

No. 14-5297

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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VALERIA TANCO AND SOPHIA JESTY, ET AL.,

*Plaintiffs-Appellees,*

v.

WILLIAM HASLAM, in his official capacity  
as Governor of Tennessee, ET AL.,

*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the Middle District of Tennessee  
Hon. Aleta Arthur Trauger  
Case No. 3:13-CV-1159

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**BRIEF OF *AMICI CURIAE* LEADERSHIP CONFERENCE ON CIVIL AND  
HUMAN RIGHTS, PUBLIC INTEREST ORGANIZATIONS, AND BAR  
ASSOCIATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES**

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**American Civil Liberties Union**

**American Civil Liberties Union of Kentucky**

**American Civil Liberties Union of Michigan**

**American Civil Liberties Union of Tennessee**

**API Equality-LA**

**Asian Americans Advancing Justice | AAJC**

**Asian Americans Advancing Justice | Asian Law Caucus**

**Asian Americans Advancing Justice | Chicago**

**Asian Americans Advancing Justice | Los Angeles**

**Human Rights Campaign**

**League of United Latin American Citizens**

**National Association for the Advancement of Colored People (NAACP)**

**National Black Justice Coalition**

**National Gay and Lesbian Task Force Foundation**

**National LGBT Bar Association**

## **CORPORATE DISCLOSURE STATEMENT**

None of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are a coalition of sixteen civil and human rights groups, public interest organizations, and bar associations committed to preventing, combatting, and redressing discrimination and protecting the equal rights of women and minorities in the United States, including African-Americans, Latinos, Asian Americans and Pacific Islanders, and lesbian, gay, bisexual, and transgender individuals.<sup>2</sup>

*Amici* have a vital interest in ensuring that the Constitution's guarantee of equal protection effectively protects all people from invidious discrimination and have filed this brief to address an issue of overriding importance in this case: the proper standard for reviewing governmental action that discriminates on the basis of sexual orientation. All *amici* have given their authorization to have this brief filed on their behalf.

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<sup>1</sup> All parties have consented to the filing of this brief. Substantially similar briefs were submitted by many of the same *amici curiae* and/or by the same counsel in other cases challenging the constitutionality of the federal Defense of Marriage Act and state laws excluding same-sex couples from marriage. Counsel for amici, the American Civil Liberties Union, is counsel to Plaintiffs-Appellees in *Obergefell v. Himes*, No. 14-3057, also pending before this Court. The National Center for Lesbian Rights, counsel to Plaintiffs-Appellees, participated in drafting previous versions of this brief that were filed in other cases, including in *Obergefell v. Himes*, No. 14-3057. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting this brief. No person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. See Fed. R. App. P. 29.

<sup>2</sup> A brief description of each *amicus* is included herein as Appendix A.

## INTRODUCTION

Plaintiffs-Appellees challenge the constitutionality of state laws that prohibit same-sex couples from marrying under state law, deny recognition to the legally valid marriages of same-sex couples performed in other jurisdictions, and exclude same-sex couples from any legal status that provides rights, benefits, or duties that are substantially similar to marriage. Although *amici* agree with Plaintiffs-Appellees that the marriage bans are unconstitutional under any standard of review, *amici* submit this brief to i) explain why – under the controlling framework established by the Supreme Court – laws that discriminate based on sexual orientation such as the marriage bans at issue here should be subjected to heightened scrutiny, and ii) explain that decisions from this Court and other circuits rejecting heightened scrutiny for sexual orientation classifications were abrogated by *Lawrence v. Texas* and, thus, are not binding or persuasive authority and that this Court therefore can and should conduct the analysis mandated by the Supreme Court to determine if a classification warrants heightened scrutiny.

## ARGUMENT

### I. UNDER THE TRADITIONAL FRAMEWORK FOR IDENTIFYING SUSPECT OR QUASI-SUSPECT CLASSIFICATIONS, SEXUAL ORIENTATION CLASSIFICATIONS MUST BE SUBJECTED TO HEIGHTENED SCRUTINY.

“In considering whether state legislation violates the Equal Protection Clause” courts must “apply different levels of scrutiny to different types of classifications.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988). At a minimum, non-suspect classifications are subject to rational-basis review and “must be rationally related to a legitimate governmental purpose.” *Id.* On the other end of the spectrum, “[c]lassifications based on race or national origin” are suspect classifications and “are given the most exacting scrutiny.” *Id.* “Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.” *Id.* Classifications receiving this intermediate level of scrutiny are quasi-suspect classifications that can be sustained only if they are “substantially related to an important governmental objective.” *Id.*

Heightened scrutiny—whether strict or intermediate – is warranted when a classification is likely “to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective.” *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982); *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (courts

apply heightened scrutiny in order to “smoke out” whether a classification is based on prejudice as opposed to a legitimate governmental purpose).

In a long line of cases, the Supreme Court has established a framework for determining whether a classification should be treated with suspicion and, thus, subjected to heightened scrutiny.

The Supreme Court uses certain factors to decide whether a new classification qualifies as a [suspect or] quasi-suspect class. They include: A) whether the class has been historically “subjected to discrimination,” B) whether the class has a defining characteristic that “frequently bears [a] relation to ability to perform or contribute to society,” C) whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group” and D) whether the class is “a minority or politically powerless.”

*Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (citations omitted) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 444 (1985)), *aff'd*, 133 S. Ct. 2675 (2013). Of these considerations, the first two are the most important. *See Windsor*, 699 F.3d at 181 (“Immutability and lack of political power are not strictly necessary factors to identify a suspect class.”); *accord Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987 (N.D. Cal. 2012).

As the Second Circuit and several federal and state courts have recently recognized, any faithful application of those factors leads to the inescapable conclusion that sexual orientation classifications must be recognized as at least quasi-suspect and subjected to heightened scrutiny. *See, e.g., Windsor*, 699 F.3d at

181-85; *Wolf v. Walker*, No. 14-cv-64, 2014 WL 2558444 (W.D. Wis., June 6, 2014); *Whitewood v. Wolf*, No. 13-cv-1861, 2014 WL 2058105, at \*11-14 (M.D. Pa., May 20, 2012); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 986-91 (S.D. Ohio 2013); *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *appeal dismissed sub nom. Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013); *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of 20 bankruptcy judges); *Griego v. Oliver*, 316 P.3d 865, 879-84 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 425-32 (Conn. 2008).

**A. Gay, Lesbian, And Bisexual People Have Suffered A Long History Of Discrimination.**

There can be no doubt that gay, lesbian and bisexual people historically have been, and continue to be, the target of purposeful and often grievously harmful discrimination because of their sexual orientation. For centuries, the prevailing attitude toward gay persons has been “one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment.” Richard A. Posner, *Sex and Reason* 291 (1992); *see also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.) (gay people “have historically been the object of pernicious and sustained

hostility”). As the Second Circuit reasoned, “[i]t is easy to conclude that homosexuals have suffered a history of discrimination. Windsor and several amici labor to establish and document this history, but we think it is not much in debate.” *Windsor*, 699 F.3d at 182; *see Pedersen*, 881 F. Supp. 2d at 318 (“[T]he long history of anti-gay discrimination which evolved from conduct-based proscriptions to status or identity-based proscriptions perpetrated by federal, state and local governments as well as private parties amply demonstrates that homosexuals have suffered a long history of invidious discrimination.”); Brief of the Organization of American Historians and the American Studies Association as *Amici Curiae* in Support of Respondent Edith Windsor, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 838150 (summarizing history of discrimination against gay, lesbian and bisexual people in America).

**B. Sexual Orientation Has No Bearing On One’s Ability To Perform In Or Contribute To Society.**

The other essential factor in the Court’s heightened scrutiny analysis is whether the group in question is distinctively different from other groups in a way that “frequently bears [a] relation to ability to perform or contribute to society.” *Cleburne*, 473 U.S. at 440-4 (citation omitted); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality) (“[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the

recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”).

Numerous courts have agreed that a person’s sexual orientation is irrelevant to one’s ability to perform or contribute to society. “There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual’s ability to contribute to society, at least in some respect. But homosexuality is not one of them.” *Windsor*, 699 F.3d at 182; *accord Golinski*, 824 F. Supp. 2d at 986 (“[T]here is no dispute in the record or the law that sexual orientation has no relevance to a person’s ability to contribute to society.”); *Pedersen*, 881 F. Supp. 2d at 320 (“Sexual orientation is not a distinguishing characteristic like mental retardation or age which undeniably impacts an individual’s capacity and ability to contribute to society. Instead like sex, race, or illegitimacy, homosexuals have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”).

Forty years ago, the American Psychiatric Association and the American Psychological Association recognized that homosexuality was not correlated with any “impairment in judgment, stability, reliability or general social and vocational capabilities.” Am. Psychiatric Ass’n, *Resolution*, (Dec. 15, 1973), *reprinted in* 131 *Am. J. Psychiatry* 497 (1974); *Minutes of the Annual Meeting of the Council of Representatives*, 30 *Am. Psychologist* 620, 633 (1975); *see also* Am. Psychiatric



Ass'n, Position Statement On Homosexuality and Civil Rights, 131 Am. J. Psychiatry 436, 497 (1974).

In this respect, sexual orientation is akin to race, gender, alienage, and national origin, all of which “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.” *Cleburne*, 473 U.S. at 440.

**C. Sexual Orientation Is An “Immutable” Or “Defining” Characteristic.**

The heightened scrutiny inquiry sometimes also considers whether laws discriminate on the basis of “immutable . . . or distinguishing characteristics that define [persons] as a discrete group.” *Bowen*, 483 U.S. at 602 (citation omitted). This consideration derives from the “basic concept of our system that legal burdens should bear some relationship to individual responsibility.” *Frontiero*, 411 U.S. at 686; *see also Plyler v. Doe*, 457 U.S. 202, 220 (1982) (noting that undocumented immigrant children “have little control” over that status). But there is no requirement that a characteristic be immutable in order to trigger heightened scrutiny. Heightened scrutiny applies to classifications based on alienage and legitimacy even though “[a]lienage and illegitimacy are actually subject to change.” *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable).

To the extent that “immutability” is relevant to the inquiry of whether to apply heightened scrutiny, the question is not whether a characteristic is strictly unchangeable—it is whether the characteristic is a core trait or condition that one cannot or should not be required to abandon even if that were possible. *See Hernandez-Montiel v. Immigration and Naturalization Serv.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (“Sexual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.”), *overruled on other grounds, Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005); *In re Marriage Cases*, 183 P.3d at 442 (“Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”); *Kerrigan*, 957 A.2d at 438 (“In view of the central role that sexual orientation plays in a person’s fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution.”).<sup>3</sup>

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<sup>3</sup> In the past, some courts have asserted that sexual orientation is not immutable by arguing that sexual orientation refers merely to the conduct of engaging in sexual activity. *See, e.g., High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (arguing that

Under any definition of immutability, sexual orientation clearly qualifies. There is now broad medical and scientific consensus that sexual orientation is immutable. *See Perry*, 704 F. Supp. 2d at 966 (“No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.”); *accord Golinski*, 824 F. Supp. 2d at 986; *Pedersen*, 881 F. Supp. 2d at 320-24; *see also* Gregory M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 Sex Res. Soc. Policy 176 (2010); Br. of Amicus Curiae GLMA: Health Professionals Advancing LGBT Equality (Gay and Lesbian Medical Association) Concerning the Immutability of Sexual Orientation in Support of Affirmance on the Merits, *United States v. Windsor*, 133 S. Ct. 2675 (2013) No. 12-307, 2013 WL 860299.

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homosexuality “is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes.”). But the Supreme Court has now rejected that artificial distinction between the conduct of engaging in same-sex activity and the status of being gay, explaining that “[o]ur decisions have declined to distinguish between status and conduct in this context.” *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2990 (2010); *see Pedersen*, 881 F. Supp. 2d at 325 (“Supreme Court precedent has since rejected the artificial distinction between status and conduct in the context of sexual orientation. Consequently, the precedential underpinnings of those cases declining to recognize homosexuality as an immutable characteristic have been significantly eroded.” (citations omitted)).

**D. Gay, Lesbian, And Bisexual People Lack Sufficient Political Power To Protect Themselves Against Invidious Discrimination**

Lack of political power is not essential for recognition as a suspect or quasi-suspect class. *See Windsor*, 699 F.3d at 184; *Wolf*, 2014 WL 2558444 (“With respect to political powerlessness, it seems questionable whether it is really a relevant factor.”). But the limited ability of gay, lesbian and bisexual people as a group to protect themselves in the political process also weighs in favor of heightened scrutiny of laws that discriminate based on sexual orientation. In analyzing this factor, “[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination.” *Windsor*, 699 F.3d at 184.

The political influence of gay, lesbian and bisexual people today stands in sharp contrast to the political power of women in 1973, when a plurality of the Supreme Court concluded in *Frontiero* that sex-based classifications required heightened scrutiny. *Frontiero*, 411 U.S. at 688. After all, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, both of which protect women from discrimination in the workplace. *See id.* at 687-88. In contrast, there is still no express federal ban on sexual orientation discrimination in employment or housing, and twenty-nine states have no such protections either. *See Golinski*, 824 F. Supp. 2d at 988-89; *Pedersen*, 881 F.

Supp. 2d at 326-27. “As political power has been defined by the Supreme Court for purposes of heightened scrutiny analysis, gay people do not have it.”

*Obergefell*, 962 F.Supp.2d at 990.

Moreover, while there have been recent successes in securing antidiscrimination legislation and marriage equality in some parts of the nation, those limited successes do not alter the conclusion that lesbians and gay men “are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public.” *Windsor*, 699 F.3d at 185. Gay people “have seen their civil rights put to a popular vote more often than any other group.” Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997); see also Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304 (2007). This history of popular referendums to roll back or prevent legal protections for lesbians and gay men “demonstrates that the members of the LGBT community do not have sufficient political strength to protect themselves from purposeful discrimination.” *Griego*, 316 P.3d at 884.

Indeed, the notion that gay people are too politically powerful to warrant applying heightened scrutiny is particularly misplaced here because, by enshrining marriage bans in their state constitutions, Kentucky, Michigan and Tennessee have effectively locked gay people out of the normal political process. Having disabled

gay people from remedying discrimination through the normal legislative process, they can hardly argue that this discrimination is likely “to be soon rectified by legislative means.” *Cleburne*, 473 U.S. at 440.

**II. DECISIONS FROM THIS COURT AND OTHER CIRCUITS REJECTING HEIGHTENED SCRUTINY WERE ABROGATED BY *LAWRENCE V. TEXAS* AND, THUS, ARE NOT BINDING OR PERSUASIVE AUTHORITY.**

As discussed above, classifications based on sexual orientation have all the indicia of a suspectness identified by the Supreme Court. From 1986 to 2003, however, traditional equal protection analysis for sexual orientation classifications was cut short by the Supreme Court’s decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which erroneously held that the Due Process Clause does not protect “a fundamental right . . . [for] homosexuals to engage in sodomy.” *Bowers*, 478 U.S. at 190. The Supreme Court overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003), and emphatically declared that “*Bowers* was not correct when it was decided, and it is not correct today.” 539 U.S. at 578. But in the meantime, *Bowers* had imposed a “stigma” that “demean[ed] the lives of homosexual persons” in other areas of the law as well. *Id.* at 575. As *Lawrence* explained, “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.” *Id.* at 575. By effectively endorsing that discrimination, *Bowers* preempted the equal

protection principles that otherwise would have required subjecting sexual orientation classifications to heightened scrutiny.

By the mid-1980s, judges and commentators had begun to recognize that under the traditional equal-protection framework, classifications based on sexual orientation should be subject to heightened scrutiny. *See, e.g., Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.) (sexual orientation classifications should be “subjected to strict, or at least heightened, scrutiny”); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 162-64 (1980); Laurence H. Tribe, *American Constitutional Law* 1616 (2d ed. 1988).

But after *Bowers*, courts interpreted that case to foreclose application of heightened scrutiny to sexual orientation classifications. For example, the year after *Bowers* was decided, the D.C. Circuit reasoned:

If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

*Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). Several other circuit courts including this Court followed suit. *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267-68 (6th Cir. 1995) (“*Equality Foundation I*”), *vacated*, 518 U.S. 1001 (1996); *see also Richenberg v. Perry*, 97 F.3d 256, 260

(8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (*en banc*); *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

In *Equality Foundation I*, this Court, citing *Bowers*, held that “homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected.” 54 F.3d at 266. Though the District Court in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F.Supp. 417, 426–27 (S.D. Ohio 1994) (“*Equality II*”), made extensive factual findings and concluded that sexual orientation should constitute a quasi-suspect class under the traditional framework, this Court reversed and found that *Bowers* controlled and therefore, sexual orientation classifications could not be suspect. The Supreme Court subsequently vacated *Equality Foundation I* and remanded the case to this Court for reconsideration in light of *Romer*. See 518 U.S. 1001. On remand, the Court revisited its application of rational basis review to the challenged charter amendment but did not alter its previous holding regarding the applicable level of scrutiny. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-93 (6<sup>th</sup> Cir. 1997) (“*Equality Foundation II*”) (“under *Bowers v.*



*Hardwick*... and its progeny, homosexuals did not constitute either a ‘suspect class’ or a ‘quasi-suspect class’ because the conduct which defined them as homosexuals was constitutionally proscribable.”).

The other circuit courts that rejected heightened scrutiny based on *Bowers* likewise saw no need to analyze the four suspect-classification factors or, at most, discussed them in a cursory fashion and with the assumption that the only characteristic uniting gay people as a class was their propensity to engage in intimate activity that, at the time, was allowed to be criminalized. *See, e.g., Woodward*, 871 F.2d at 1076; *Ben-Shalom*, 881 F.2d at 464; *High Tech Gays*, 895 F.2d at 571.

In 2003, however, the Supreme Court overruled *Bowers* and declared that it “was not correct when it was decided and is not correct today.” *Lawrence*, 539 U.S. at 578. By overruling *Bowers*, the Supreme Court in *Lawrence* necessarily abrogated decisions that relied on *Bowers* to foreclose the possibility of heightened scrutiny for sexual orientation classifications. *See Pedersen*, 881 F. Supp. 2d at 312 (“The Supreme Court’s holding in *Lawrence* ‘remov[ed] the precedential underpinnings of the federal case law supporting the defendants’ claim that gay persons are not a [suspect or] quasi-suspect class.’”) (citations omitted); *Golinski*, 824 F. Supp. 2d at 984 (“[T]he reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened

scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*.”). *Lawrence* removed the barrier that *Bowers* had erected and cleared the path for traditional heightened scrutiny analysis to resume its well-established role in equal protection cases.

Unfortunately, even after *Bowers* was overruled, some circuit courts continued to erroneously adhere to their pre-*Lawrence* precedent or adopt pre-*Lawrence* precedent from other circuits without conducting any independent analysis of the factors the Supreme Court has identified as relevant to heightened scrutiny. See *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008); *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008); *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004); see generally Arthur S. Leonard, *Exorcising the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84 Chi.-Kent L. Rev. 519 (2009).<sup>4</sup> None of these decisions considered the traditional factors relevant for identifying suspect or quasi-suspect classifications.<sup>5</sup>

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<sup>4</sup> The Ninth Circuit in *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 817 (9th Cir. 2008), initially held that *Lawrence* did not overrule prior circuit precedent applying rational-basis review to sexual orientation classifications, but concluded after *Windsor* that *Witt* was wrongly decided and that heightened scrutiny must be applied. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).

<sup>5</sup> The Eighth Circuit in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), did not rely on *Bowers* or its progeny in determining that rational basis

In two post-*Lawrence* cases, this Court, in *dicta*, similarly relied on *Bowers*-era precedent for the proposition that sexual orientation classifications are evaluated under rational basis review. *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012). In neither case did the Court evaluate the level of scrutiny in light of *Lawrence*'s overruling of *Bowers* nor has this Court considered the suspect classification factors identified by the Supreme Court. Rather, in both cases this Court merely noted that rational basis review was the standard for sexual orientation classifications based on *Bowers*-era precedent. *Scarborough*, 470 F.3d at 261 (“homosexuality is not a suspect class in this circuit” (citing *Equality Foundation II*)); *Davis*, 679 F.3d at 438 (“this court has not recognized sexual orientation as a suspect classification” (citing *Scarborough*)).

In both *Scarborough* and *Davis*, the Court's discussion of the level of scrutiny was not necessary to the outcome of the case because the Court concluded that the plaintiffs stated an equal protection claim because they asserted discriminatory treatment based on anti-gay animus, which is not a legitimate government interest

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review applies to sexual orientation classifications. But rather than apply the Supreme Court's heightened scrutiny factors, the court tautologically concluded that heightened scrutiny doesn't apply because a rational basis allegedly existed for such classifications in some circumstances. *Id.*, at 867-68. But if the existence of a rational basis in a particular case precluded heightened scrutiny, then heightened scrutiny would be meaningless. The whole point of heightened scrutiny is that a stronger justification than a rational basis is required for certain classifications that have historically been prone to abuse.

even under rational basis review. *See Stemler v. City of Florence*, 126 F.3d 856, 873-74 (6th Cir. 1997). It is therefore *dicta* that is not binding on the Court. *See United States v. McMurray*, 653 F.3d 367, 375-76 (6th Cir. 2011) (because statement in prior case “‘was not necessary to the outcome’ in that case...it is *dicta* that is not binding.”)(internal citations omitted).

Now that *Lawrence* has overruled *Bowers* and, thus, abrogated this Court’s only otherwise binding precedent regarding the level of scrutiny applicable to sexual orientation classifications—*Equality Foundation II*—, this Court must apply the criteria mandated by the Supreme Court to determine whether sexual orientation classifications should receive heightened scrutiny. If it does this, for the reasons discussed above, the inevitable conclusion that has now been recognized by numerous courts is that heightened scrutiny is warranted.

## CONCLUSION

The Court can and should hold that sexual orientation discrimination must be subjected to heightened scrutiny, and that the state marriage bans challenged in these appeals cannot survive this demanding standard.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,899 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type style.

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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on June 16, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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## **APPENDIX**

The **Leadership Conference on Civil and Human Rights** (“The Leadership Conference”) is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States.\* It is the nation’s oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, and sexual orientations. The Leadership Conference works to build an America that is inclusive and as good as its ideals, and toward this end, urges the Court to hold that sexual orientation classifications should be subject to heightened scrutiny. The Leadership Conference believes that every person in the United States deserves to be free from discrimination based on race, ethnicity, gender, or sexual orientation.

The **American Civil Liberties Union (“ACLU”)** is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation’s civil rights laws. The ACLU of Kentucky, ACLU of Michigan and ACLU of Tennessee are three of its statewide affiliates. The ACLU, ACLU of Kentucky, ACLU of Michigan, and



ACLU of Tennessee advocate for equal rights of lesbian, gay, bisexual and transgender (“LGBT”) people and the freedom to marry for same-sex couples in Kentucky, Michigan, Tennessee, and across the country.

**API Equality-LA** is a coalition of organizations and individuals who are committed to working in the Asian/Pacific Islander (“API”) community in the greater Los Angeles area for equal marriage rights and the recognition and fair treatment of LGBT families through community education and advocacy. API Equality-LA recognizes that the long history of discrimination against the API community, especially California's history of anti-miscegenation laws and exclusionary efforts targeted at Asian immigrants, parallels the contemporary exclusion of gays and lesbians from marriage.

**Asian Americans Advancing Justice | AAJC** (“Advancing Justice-AAJC”) is a national non-profit, non-partisan organization in Washington, D.C. whose mission is to advance the civil and human rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991, Advancing Justice-AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of issues, including anti-discrimination. Advancing Justice-AAJC is committed to challenging barriers to equality for all sectors of our society and has supported same-sex marriage rights in numerous amicus briefs.

**Asian Americans Advancing Justice - Asian Law Caucus** (“Advancing Justice-ALC”) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. Recognizing that social, economic, political, and racial inequalities continue to exist in the United States, Advancing Justice-ALC is committed to the pursuit of equality and justice for all sectors of our society.

**Asian Americans Advancing Justice - Chicago** (“Advancing Justice-Chicago”) is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, coalition-building, education, and research. Advancing Justice—Chicago’s programs include community organizing, leadership development, and legal advocacy. Founded in 1992, Advancing Justice—Chicago is deeply concerned about the discrimination and exclusion faced by Asian Americans, including lesbian, gay, bisexual, transgender and queer members of the Asian American community. Accordingly, Advancing Justice—Chicago is committed to challenging barriers to equality for all members of society and has supported same-sex marriage rights in other amicus briefs.

**Asian Americans Advancing Justice - Los Angeles** (“Advancing Justice-LA”) is the nation’s largest legal and civil rights organization for Asian Americans,

Native Hawaiians, and Pacific Islanders (NHPI). As part of its mission to advance civil rights, Advancing Justice-LA is committed to challenging discrimination and has championed equal rights for the LGBT community, including supporting marriage equality for same-sex couples and opposing California's Proposition 8.

**Human Rights Campaign** (“HRC”), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Among those basic rights is equal access for same-sex couples to marriage and the related protections, rights, benefits and responsibilities.

The **League of United Latin American Citizens** (“LULAC”) is the nation’s largest and oldest civil rights volunteer-based organization that empowers Hispanic Americans and builds strong Latino communities. Headquartered in Washington, DC, with 900 councils around the United States and Puerto Rico, LULAC’s programs, services and advocacy address the most important issues for Latinos, meeting critical needs of today and the future. The mission of the League of United Latin American Citizens is to advance the economic condition, educational attainment, political influence, housing, health and civil rights of the Hispanic population of the United States. LULAC has a longstanding history of advancing equal justice under law for all Latinos—including our lesbian, gay,

bisexual and transgender (“LGBT”) sisters and brothers. Through direct action and national resolutions, LULAC and its membership have stood firm on the right for LGBT Americans to be protected from hate crimes, the right to work free from discrimination, the right to serve openly and honestly in the U.S. Armed Services, the right to allow bi-national couples to stay together by updating antiquated immigration laws, and officially oppose federal marriage laws that discriminate against couples who have entered legal unions in their state.

Founded in 1909, the **National Association for the Advancement of Colored People (NAACP)** is the country’s largest and oldest civil rights organization, incorporated by the State of New York. The mission of the NAACP is to ensure the political, social, and economic equality of rights of all persons, and to eliminate racial hatred and racial discrimination. In fulfilling its mission, the NAACP has filed and joined numerous amicus curiae briefs supporting marriage equality in federal and state courts across the country.

The **National Black Justice Coalition (“NBJC”)** is a civil rights organization dedicated to empowering Black lesbian, gay, bisexual and transgender (“LGBT”) people. NBJC’s mission is to end racism and homophobia. As America’s leading national Black LGBT civil rights organization focused on federal public policy, NBJC has accepted the charge to lead Black families in

strengthening the bonds and bridging the gaps between the movements for racial justice and LGBT equality.

The **National Center for Lesbian Rights** (“NCLR”) is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has an interest in ensuring that laws that treat people differently based on their sexual orientation are subject to heightened scrutiny, as equal protection requires.

The **National Gay and Lesbian Task Force Foundation** (the “Task Force”), founded in 1973, is the oldest national LGBT civil rights and advocacy organization. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including the full and equal participation of same-sex couples in the institution of civil marriage.

The **National LGBT Bar Association** (“LGBT Bar”) is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students and affiliated lesbian, gay, bisexual and transgender legal organizations. The LGBT Bar promotes justice in and through the legal profession

for the LGBT community in all its diversity. This case stands to impact our membership both professionally and personally. A ruling in favor of marriage equality would greatly increase our attorneys' ability to safeguard the families and relationships they have formed in their own lives. We believe that marriage equality is a profound step in the right direction towards equitable treatment under the law for all citizens.

\*The participating members of the Leadership Conference on Civil and Human Rights include:

A. Philip Randolph Institute

AARP

Advancement Project

African Methodist Episcopal Church

Alaska Federation of Natives

Alliance for Retired Americans

Alpha Kappa Alpha Sorority, Inc.

Alpha Phi Alpha Fraternity, Inc.

American-Arab Anti-Discrimination Committee

American Association for Affirmative Action

American Association of College for Teacher Education

American Association of People with Disabilities

AAUW

American Baptist Churches, U.S.A.-National Ministries

American Civil Liberties Union

American Council of the Blind

American Ethical Union

American Federation of Government Employees

American Federation of Labor-Congress of Industrial Organizations

American Federation of State, County & Municipal Employees, AFL-CIO

American Federation of Teachers, AFL-CIO

American Friends Service Committee

American Islamic Congress (AIC)

American Jewish Committee

American Nurses Association

American Postal Workers Union, AFL-CIO

American Society for Public Administration

American Speech-Language-Hearing Association

Americans for Democratic Action

Americans United for Separation of Church and State

Amnesty International USA

Anti-Defamation League

Appleseed

Asian Americans Advancing Justice | AAJC

Asian Pacific American Labor Alliance

Association for Education and Rehabilitation of the Blind and Visually Impaired

B'nai B'rith International

Bend the Arc

Brennan Center for Justice at New York University School of Law

Building & Construction Trades Department, AFL-CIO

Center for Community Change

Center for Responsible Lending

Center for Social Inclusion

Center for Women Policy Studies

Children's Defense Fund

Church of the Brethren-World Ministries Commission

Church Women United

Coalition of Black Trade Unionists

Coalition on Human Needs

Common Cause

Communications Workers of America



Community Action Partnership

Community Transportation Association of America

Compassion & Choices

DC Vote

Delta Sigma Theta Sorority

DEMOS: A Network for Ideas & Action

Disability Rights Education and Defense Fund

Disability Rights Legal Center

Division of Homeland Ministries-Christian Church (Disciples of Christ)

Epilepsy Foundation of America

Episcopal Church-Public Affairs Office

Equal Justice Society

Evangelical Lutheran Church in America

FairVote: The Center for Voting and Democracy

Families USA

Federally Employed Women

Feminist Majority

Friends Committee on National Legislation

Gay, Lesbian and Straight Education Network (GLSEN)

General Board of Church & Society of the United Methodist Church

Global Rights: Partners for Justice

GMP International Union

Hip Hop Caucus

Human Rights Campaign

Human Rights First

Immigration Equality

Improved Benevolent & Protective Order of Elks of the World

International Association of Machinists and Aerospace Workers

International Association of Official Human Rights Agencies

International Brotherhood of Teamsters

International Union, United Automobile, Aerospace and Agricultural Implement

Workers of America (UAW)

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Council for Public Affairs

Jewish Labor Committee

Jewish Women International

Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity

Labor Council for Latin American Advancement

Laborers' International Union of North America

Lambda Legal

LatinoJustice PRLDEF

Lawyers' Committee for Civil Rights Under Law

League of United Latin American Citizens

League of Women Voters of the United States

Legal Aid Society – Employment Law Center

Legal Momentum

Mashantucket Pequot Tribal Nation

Matthew Shepard Foundation

Mexican American Legal Defense and Educational Fund

Muslim Advocates

Na' Amat USA

NAACP

NAACP Legal Defense and Educational Fund, Inc.

NALEO Educational Fund

National Alliance of Postal & Federal Employees

National Association for Equal Opportunity in Higher Education

National Association of Colored Women's Clubs, Inc.

National Association of Community Health Centers

National Association of Consumer Advocates (NACA)

National Association of Human Rights Workers

National Association of Negro Business & Professional Women's Clubs, Inc.

National Association of Neighborhoods

National Association of Social Workers

9 to 5 National Association of Working Women

National Bar Association

National Black Caucus of State Legislators

National Black Justice Coalition

National CAPACD – National Coalition For Asian Pacific American Community  
Development

National Center for Lesbian Rights

National Center for Transgender Equality

National Center on Time & Learning

National Coalition for the Homeless

National Coalition on Black Civic Participation

National Coalition to Abolish the Death Penalty

National Committee on Pay Equity

National Committee to Preserve Social Security & Medicare

National Community Reinvestment Coalition

National Conference of Black Mayors, Inc.

National Congress for Puerto Rican Rights

National Congress of American Indians

National Consumer Law Center

National Council of Churches of Christ in the U.S.

National Council of Jewish Women

National Council of La Raza

National Council of Negro Women

National Council on Independent Living

National Disability Rights Network

National Education Association

National Employment Lawyers Association

National Fair Housing Alliance

National Farmers Union

National Federation of Filipino American Associations

National Gay & Lesbian Task Force

National Health Law Program

National Hispanic Media Coalition

National Immigration Forum

National Immigration Law Center

National Korean American Service and Education Consortium, Inc. (NAKASEC)

National Latina Institute for Reproductive Health

National Lawyers Guild

National Legal Aid & Defender Association

National Low Income Housing Coalition

National Organization for Women

National Partnership for Women & Families

National Senior Citizens Law Center

National Sorority of Phi Delta Kappa, Inc.

National Urban League

National Women's Law Center

National Women's Political Caucus

Native American Rights Fund

Newspaper Guild

OCA

Office of Communications of the United Church of Christ, Inc.

Omega Psi Phi Fraternity, Inc.

Open Society Policy Center

ORT America

Outserve-SLDN

Paralyzed Veterans of America

Parents, Families, Friends of Lesbians and Gays

People for the American Way

Phi Beta Sigma Fraternity, Inc.

Planned Parenthood Federation of America, Inc.

PolicyLink

Poverty & Race Research Action Council (PRRAC)

Presbyterian Church (USA)

Pride at Work

Prison Policy Initiative

Progressive National Baptist Convention

Project Vote

Public Advocates

Religious Action Center of Reform Judaism

Retail Wholesale & Department Store Union, AFL-CIO

SAALT (South Asian Americans Leading Together)

Secular Coalition for America

Service Employees International Union

Outserve-SLDN

Sierra Club

Sigma Gamma Rho Sorority, Inc.

Sikh American Legal Defense and Education Fund

Sikh Coalition

Southeast Asia Resource Action Center (SEARAC)

Southern Christian Leadership Conference

Southern Poverty Law Center

TASH

Teach For America

The Andrew Goodman Foundation

The Arc

The Association of Junior Leagues International, Inc.

The Association of University Centers on Disabilities

The National Conference for Community and Justice

The National PTA

The Voter Participation Center

TransAfrica Forum

Transportation Learning Center

Union for Reform Judaism

Unitarian Universalist Association

UNITE HERE!



United Brotherhood of Carpenters and Joiners of America

United Church of Christ-Justice and Witness Ministries

United Farm Workers of America (UFW)

United Food and Commercial Workers International Union

United Mine Workers of America

United States International Council on Disabilities

United States Students Association

United Steelworkers of America

United Synagogue of Conservative Judaism

Wider Opportunities for Women

Workers Defense League

Workmen's Circle

YMCA of the USA, National Board

YWCA USA

Zeta Phi Beta Sorority, Inc.