No. 12-144

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,

v.

KRISTIN M. PERRY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, WILLIAMS INSTITUTE SCHOLARS OF SEXUAL ORIENTATION AND GENDER LAW, AND WOMEN'S LEGAL GROUPS IN SUPPORT OF RESPONDENTS ON THE MERITS

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are the National Women's Law Center and other women's legal organizations, and professors of law associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. These organizations and individuals have substantial expertise in constitutional issues related to equal protection of the laws, including with respect to discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise thus bears directly on the issues before the Court in both *United States v. Windsor,* No. 12-307, and *Hollingsworth v. Perry,* No. 12-144. Descriptions of the individual *Amici* are set out in the Appendix.[2]

SUMMARY OF ARGUMENT

Over the past forty years, this Court repeatedly has emphasized that laws that classify based on gender stereotypes violate the federal Constitution's equal protection principle. In

[1] No counsel for a party authored this brief in whole or in part, and no person other than *Amici Curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] *Amici* are simultaneously filing identically worded briefs on the merits in both *Windsor* and *Hollingsworth*.

particular, the government may not assume and enforce gender-specific rules based on stereotypes about roles that women and men perform within the family, whether as caregivers, breadwinners, heads of households, or parents. Under this Court's precedents, the Constitution demands that such laws be examined with heightened scrutiny, because legal imposition of archaic and overbroad gender stereotypes arbitrarily harms women and men by limiting or burdening individuals' abilities to make decisions fundamental to their lives and their identities.

Laws that discriminate based on sexual orientation share with laws that discriminate based on sex a similar basis in overbroad gender stereotypes about the preferences and capacities of men and women. Lesbians, gay men, and bisexual persons long have been harmed by legal enforcement of the expectation that an individual's most intimate relationship will be with a person of a different sex, not with a person of the same sex. Such presumptions underlie many laws that discriminate based on sexual orientation, including laws such as the measures at issue in the cases before this Court, Section 3 of the federal Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, and California's Proposition 8, Cal. Const., art. I, § 8.5. Just as the Constitution has required close scrutiny of laws that restrict the roles that men and women perform within marriage on the basis of gender stereotypes, so, too, the Constitution requires close scrutiny of laws based on gender stereotypes that restrict individuals' liberty to decide with whom they will enter such intimate relationships.

Heightened scrutiny of laws that discriminate on the basis of sexual orientation is especially warranted because legal enforcement of overbroad gender stereotypes improperly burdens individuals' most personal choices about how and with whom they will build and live their lives.

This Court should hold that laws that discriminate based on sexual orientation warrant heightened judicial scrutiny and that the provisions challenged in these lawsuits—the federal DOMA and California's Proposition 8—cannot withstand such scrutiny.

ARGUMENT

This Court recognized in *Lawrence v. Texas,* 539 U.S. 558 (2003), that, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 579. Over the last four decades, application of heightened scrutiny to laws that discriminate based on sex has served as an important bulwark in protecting opportunities to seek fulfillment in family life, education, and work, free from the imposition by government of gender-based roles.

Gay men, lesbians, and bisexual persons, however, are still subject to laws that burden their liberty to enter into relationships, including marriage, with the person to whom they may feel closest—a person of the same sex. Those laws deny gay, lesbian, and bisexual persons full citizenship in profound ways. Rather than serving an important government interest, such discriminatory laws typically reflect the gender-role stereotypes that

women should form intimate relationships with men, not with other women, and that men should form such relationships with women, not with other men. The decisions whether and with whom to enter into intimate relationships, including marriage, are central to individual liberty under the Constitution, and the government has no authority to restrict those choices based on gender stereotypes, just as it has no authority to codify the roles that men and women fill within marriage on such bases. This Court repeatedly has held that the government may not justify sex discrimination by an asserted interest in perpetuating traditional gender roles in people's family and work lives. Neither may state actors restrict rights and opportunities in ways that rely upon rigid and exclusionary definitions of the roles that men and women fill within relationships.

Under the federal Constitution's equal protection guarantees, laws that deny rights or opportunities based on sexual orientation should be subject to heightened scrutiny. Heightened scrutiny for such laws follows straightforwardly from this Court's precedents identifying factors to which this Court historically has looked when considering whether certain classifications warrant careful judicial scrutiny, rather than simple deference to majoritarian lawmaking. *See generally United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting several considerations that "may call for . . . more searching judicial inquiry"); *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973) (reciting "traditional indicia of suspectness"). Central among the reasons why close scrutiny is appropriate for laws that discriminate on the basis of sexual orientation is such laws' frequent reliance on inaccurate and sometimes

invidious stereotypes. In particular, laws that discriminate based on sexual orientation share a key feature with laws that discriminate on the basis of sex: Both forms of discrimination are frequently rooted in stereotypes about supposedly "natural," "moral," or "traditional" roles or conduct for women and men. Were this Court to apply to laws that discriminate based on sexual orientation the same standard of review that the Court has applied to sex discrimination, a law denying rights based on sexual orientation would be invalid unless the government could show an "exceedingly persuasive justification" for the law, including a showing "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," without "rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia* (*VMI)*, 518 U.S. 515, 533 (1996) (internal quotation marks and citations omitted; first alteration in original).

Twice in recent history, this Court has invalidated laws that discriminated against gay, lesbian, or bisexual persons because this Court determined that those laws lacked any rational basis or failed to further any legitimate government purpose. *See Lawrence v. Texas,* 539 U.S. 558 (2003) (invalidating under Fourteenth Amendment's Due Process Clause a Texas law that criminalized consensual sexual conduct between persons of the same sex); *Romer v. Evans*, 517 U.S. 620, 624 (1996) (invalidating under Fourteenth Amendment's Equal Protection Clause a Colorado constitutional amendment entitled "No Protected Status Based on

Homosexual, Lesbian, or Bisexual Orientation"). In both instances, because this Court found the challenged measures to be completely lacking in rational basis or legitimate governmental purpose, there was no need for the Court to consider whether laws that classify based on sexual orientation should be subject to a heightened level of scrutiny under the Fourteenth Amendment's Equal Protection Clause.

In the years since this Court's decision in *Lawrence*, the high courts of California, Connecticut, and Iowa have held that, under their state constitutions, laws that classify based on sexual orientation are subject to heightened judicial scrutiny. *See Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) ("[L]egislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution."); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008) ("[A]s a minority group that continues to suffer the enduring effects of centuries of legally sanctioned discrimination, laws singling [gay persons] out for disparate treatment are subject to heightened judicial scrutiny to ensure that those laws are not the product of such historical prejudice and stereotyping."); *In re Marriage Cases,* 183 P.3d 384, 401 (Cal. 2008) (holding that, like laws that discriminate based on race or sex, laws that discriminate based on sexual orientation are subject to strict scrutiny under the California Constitution). In the *Windsor* case under review, the Second Circuit held that the federal Constitution too requires heightened scrutiny of laws that discriminate based on sexual orientation. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (No. 12-307) (U.S. Dec. 7, 2012).

As further explained below, this Court similarly should hold that laws that deny rights and opportunities based on sexual orientation warrant heightened judicial scrutiny. The particular measures challenged in these lawsuits—the federal DOMA and California's Proposition 8—cannot withstand such scrutiny.[3]

A. *The Constitution's Equal Protection Principle Requires that Courts Subject to Heightened Scrutiny Laws by Which the Government Seeks to Require Adherence to Gender Stereotypes.*

This Court applies "close judicial scrutiny" to classifications based on gender, race, and ethnicity, because these classifications historically have been used to deny opportunities to individuals and typically bear no relation to an individual's ability to contribute to society; reliance on these classifications thus violates the concepts of individual liberty and responsibility. *Frontiero v. Richardson*, 411 U.S. 677, 685, 686 (1973); *see also J.E.B. v. Alabama ex rel.*

[3] While discrimination on the basis of sexual orientation should be subjected to heightened scrutiny, *Amici* also note that, as set out by the parties challenging DOMA and Proposition 8 in these cases, those laws also lack any rational basis and cannot survive even the most deferential form of review. Moreover, were this Court to adopt for laws that discriminate based on sexual orientation the strict level of scrutiny that this Court already applies to laws that discriminate on the basis of race and national origin, *e.g., Johnson v. California*, 543 U.S. 499, 505 (2005), the measures now challenged in the cases before the Court would fail, for they are not narrowly tailored to further a compelling state interest.

T.B., 511 U.S. 127, 152-53 (1994). Central to this Court's embrace of heightened scrutiny is the recognition that overbroad stereotypes are a constitutionally insufficient basis for state action that discriminates in this manner. *Frontiero,* 411 U.S. at 685; *see also e.g., Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (Marshall, J., concurring) (equal protection prohibits state action based on "crude, inaccurate racial stereotypes"); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (same). Even when laws employ suspect classifications based not on animus or hostility toward the targeted class, but rather on unthinking habits of mind, they must be subject to this close analysis.

In particular, a repeated refrain runs through this Court's modern case law addressing measures that deny rights or opportunities based on sex: Such laws warrant "skeptical scrutiny," *VMI,* 518 U.S. at 531, because of "the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender, or based on 'outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas." *J.E.B.*, 511 U.S. at 135 (internal quotations omitted). In carefully scrutinizing laws that draw distinctions based on sex, this Court has emphasized that central to equal protection is the principle that both women and men are entitled to "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *VMI,* 518 U.S. at 532.

In the first case in which Justices of this Court expressly subjected a sex-based classification to heightened scrutiny, *Frontiero v. Richardson*, 411 U.S. 677 (1973),[4] a plurality of the Court noted not only "that our Nation has had a long and unfortunate history of sex discrimination," but also that the Court itself had played a role in that history. *Id.* at 684 (plurality). Justice Brennan's plurality opinion in *Frontiero* quoted now-infamous language by Justice Bradley, who had explained in a concurring opinion in 1873 that "'[m]an is, or should be, women's protector and defender'"; that women's "natural and proper timidity and delicacy" rendered women "unfit[]for many of the occupations of civil life"; and that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother." *Id.* at 684-85 (quoting *Bradwell v. Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring)). The plurality in *Frontiero* recognized that "[a]s a result of notions such as these, *our statute books gradually became laden with gross, stereotyped distinctions between the sexes*." 411 U.S. at 685 (emphasis added).

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[4] In *Frontiero*, four Justices applied strict scrutiny to the challenged sex classification, one Justice concurred and concluded that the provision constituted "invidious discrimination," and three Justices concurred but found it unnecessary to determine whether strict scrutiny applied. Two years before *Frontiero*, in *Reed v. Reed*, 404 U.S. 71 (1971), this Court, "for the first time in our Nation's history . . . ruled in favor of a woman who complained that her State had denied her the equal protection of its laws," *VMI*, 518 U.S. at 532 (citing *Reed*, 404 U.S. at 73), but did not expressly apply heightened scrutiny. *See Reed*, 404 U.S. at 74.

At issue in *Frontiero* was a law requiring a female Air Force officer to prove that her husband was dependent on her for over half of his support in order to obtain increased allowances for housing and medical and dental benefits, without imposing any such proof requirement on male married servicemembers. *Id.* at 678-79. The Government defended the statute by arguing that Congress could reasonably presume that wives of male servicemembers were financially dependent on their husbands. *Id.* at 689. Subjecting the statute to heightened scrutiny, however, the Court noted that "there [was] substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits," and held the Government's rationale of administrative convenience to be insufficient. *Id.* at 689-90. In its application of heightened scrutiny to smoke out gender stereotypes, the *Frontiero* plurality opinion was a direct rejection of assumptions underlying Court decisions stretching from the 1870s (*Bradwell*) through the 1950s and 1960s—assumptions that fundamental differences between women and men, rooted in women's family roles, justified laws limiting opportunities for women. *See Hoyt v. Florida,* 368 U.S. 57, 62 (1961) (upholding state law that made jury duty registration optional for women because "woman [was] still regarded as the center of home and family life"); *Goesaert v. Cleary,* 335 U.S. 464, 466 (1948) (upholding statute prohibiting women from bartending unless they were a wife or a daughter of the bar owner because states were not precluded "from drawing a sharp line between the sexes" and "oversight . . . by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting

oversight"); *cf. Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (upholding legislation limiting women's work hours because "healthy mothers are essential to vigorous offspring, [and so] the physical well-being of woman becomes an object of public interest").

In adopting heightened scrutiny for sex classifications, this Court recognized that statutes relying on these stereotypes "employ[ed] gender as an inaccurate proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). These "loose-fitting characterizations" were determined to be "incapable of supporting . . . statutory schemes . . . premised upon their accuracy." *Id.* at 199. By requiring a far closer relationship between a sex classification and a statutory scheme's objective, and by demanding that the objective at least be important, heightened scrutiny rejected the "artificial constraints on an individual's opportunity" imposed by laws resting on imprecise gender stereotypes. *VMI*, 518 U.S. at 533. Because of the harm that these laws impose on individuals who depart from the stereotype, heightened scrutiny requires courts to "take a 'hard look'" at sex-based classifications, *id.* at 541 (quoting Sandra D. O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546, 1551 (1991)), so that "[s]tate actors controlling gates to opportunity . . . [do] not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" *Id* (quoting *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 725 (1982)). In this way, heightened scrutiny recognizes that "'[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual … class.'"

J.E.B., 511 U.S. at 152-53 (Kennedy, J., concurring) (citation omitted; alterations in original).

In *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), this Court illuminated how laws based on gender stereotypes arbitrarily harmed those who did not conform to those stereotypes. There, this Court found a provision of the Social Security Act that provided for payment of benefits to a deceased worker's *widow* and minor children, but not to a deceased worker's *widower*, to violate the Constitution. *Id.* at 637-38. First, the Court explained that the challenged measure's reliance on the "gender-based generalization" that "men are more likely than women to be the primary supporters of their spouses and children" devalued the employment of women, "depriv[ing] women of protection for their families which men receive as a result of their employment," while nevertheless requiring that women workers contribute through the Social Security system to the support of others' families. *Id.* at 645. Second, this Court explained, the challenged provision "was intended to permit women to elect not to work and to devote themselves to the care of children." *Id.* at 648. The measure thereby failed to contemplate fathers such as Stephen Wiesenfeld, who wished to care for his child at home. Rejecting the statute's imposition of gender roles, this Court declared, "It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised . . . .'" *Id.* at 652 (citation omitted); *see also Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (finding unconstitutional a

Social Security provision differentially treating nondependent widows and widowers "based simply on 'archaic and overbroad' generalizations").

As these and other decisions of this Court illustrate, laws premised on gender stereotypes—and including particularly stereotypes of the family as necessarily constituted by a woman assuming the role of homemaker and caretaker and a man assuming the role of breadwinner and protector—deeply offend the Constitution.[5] Such laws cause offense because, in their failure to recognize that many men and women either do not wish to or are unable to conform to these roles, such laws arbitrarily limit individuals' ability to make fundamental decisions about how to live their lives. When the law enforces "assumptions about the proper roles of men and women," *Hogan,* 458 U.S. at 726, it closes opportunity, depriving individuals of their essential liberty to depart from gendered expectations. Accordingly, "the test for determining the validity of a gender-based classification . . . must be applied free

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[5] *See Califano v. Westcott*, 443 U.S. 76, 89 (1979) (finding unconstitutional federal statute providing for support in event of father's unemployment, but not mother's unemployment; describing measure as based on stereotypes that father is principal provider "while the mother is the 'center of home and family life'"); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations on husbands, but not on wives, because it "carries with it the baggage of sexual stereotypes"); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (finding unconstitutional state support statute assigning different age of majority to girls than to boys and stating, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.")

of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-25.

B. *Marriage Laws Once Enforced Gender Stereotypes in Ways That Came To Be Understood to Violate Equal Protection Guarantees.*

Laws related to marriage were once a leading example of these sex-based rules. Both state and federal laws setting out the legal consequences of marriage expressly reflected and enforced separate gender roles for men and women. But these sex-specific rules that once characterized and defined the law of marriage have been almost completely dismantled, as courts and lawmakers have recognized the harms that arise from laws that require adherence to gender stereotypes.

1. Laws related to marriage once reflected and enforced gender stereotypes defining married men's and women's distinctly separate roles in the family.

For centuries, under the doctrine of coverture, established in England and carried to the early United States, "the husband and wife [were] one person in law: . . . the very being or legal existence of the woman [was] suspended . . . or at least . . . incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she perform[ed] everything." 1 William Blackstone, *Commentaries on the Laws of England* 442-445 (1765); *see* Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11 (2000). For example,

coverture prohibited wives from independently contracting or disposing of their own assets without their husbands' cooperation. Blackstone, *supra*, at 442-445; Cott, *supra*, at 11. Coverture also allowed a husband to abuse his wife sexually because the wife had "given up herself in this kind." Sir Matthew Hale, *The History of the Pleas of the Crown* 629 (1736).

Even after the Married Women's Property Acts and nineteenth century laws "dismantled the legal fiction that women lost individual identity upon marriage," Deborah A. Widiss, *Changing the Marriage Equation*, 89 Wash. U. L. Rev. 721, 735-45 (2012), many laws continued to discriminate on the basis of sex, relying on the notion that the very nature of marriage imposed separate (and unequal) roles on men and women. For example, in 1915, this Court upheld a federal law stripping a woman who married a foreign man of her U.S. citizenship, while imposing no such consequences on men marrying foreign women. The Court reasoned: "The identity of husband and wife is an ancient principle of our jurisprudence. . . . determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband." *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915). Courts also routinely invalidated as contrary to public policy efforts by married spouses to "alter the 'essential' elements of marriage" through voluntary contracts modifying various aspects of marriage "gender-determined" by law. Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality 9, 15 (1991) (citing cases declaring void contractual arrangements between

spouses to allow the wife to choose the marital domicile, to provide wages to a wife for caring for her husband, to pay a wife for work performed as a business partner, and to terminate a husband's support obligations to his wife).

An extensive legal framework continued to set out sex-specific rules relating to marriage well into the second half of the twentieth century. In 1971, an appendix to the appellant's brief in *Reed* listed numerous areas of state law that disadvantaged married women, including, *inter alia*: mandatory disqualification of married women to administer estates of the intestate; special qualifications on married women's right to engage in independent business; limitations on the capacity of married women to become sureties or guarantors; differential marriageable ages (to allow time to men for education and preparation for labor or business); and domiciles of married women following their husbands' domiciles. App. to Appellant's Br., *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (collecting state laws in each area).

Federal law also persisted in attaching different legal consequences to marriage for men and women well into the latter half of the twentieth century. For example, across a variety of programs, the law provided benefits to wives on the assumption that they were financially dependent on their husbands, but denied benefits to husbands altogether or unless they could prove financial dependence on their wives. *See*, *e.g.*, *Goldfarb*, 430 U.S. at 199; *Wiesenfeld,* 420 U.S. at 643; *Frontiero*, 411 U.S. at 677; *Kalina v. R.R. Ret. Bd.*, 541 F.2d 1204, 1209 (6th Cir. 1976), *aff'd*, 431 U.S. 909 (1977) (Railroad Retirement Act spousal

benefits). The Social Security Act presumed income from a trade or business in a community property state to be the husband's income. *See Carrasco v. Sec'y of Health, Educ. & Welfare*, 628 F.2d 624, 627, 629 (1st Cir. 1980). Federal bankruptcy law provided that alimony and support debts owed to a wife were nondischargeable, while the same debts owed to a husband lacked such protection. *See Matter of Crist*, 632 F.2d 1226 (5th Cir. 1980) (citing 11 U.S.C. § 523 (a)(5) (1978)). These laws assumed husbands bore primary financial responsibility in a marriage, while wives bore primary domestic responsibilities. The laws burdened those who departed from these roles.

2. Laws prescribing separate roles for women and men in marriage have failed heightened scrutiny because of their reliance on gender stereotypes.

In the intervening years, courts applying heightened scrutiny have played a key role in dismantling the legal machinery enforcing separate gender roles within marriage, based on the principle that such legally enforced roles do not properly reflect individuals' "ability to perform or contribute to society" and thus violate "'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)); *see also, e.g.*, *Goldfarb*, 430 U.S. at 206-07 (rejecting "role-typing society has long imposed") (internal quotation marks omitted); *Kirchberg v. Feenstra*, 450 U.S. 455, 459-60 (1981) (overturning Louisiana provision giving the husband as "head and master" the right to sell marital property without his wife's consent); *Orr*, 440 U.S. at

281-82 (rejecting stereotypes regarding wives' financial dependency in the context of alimony); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147-48 (1980) (same for differential workers' compensation benefits to widows versus widowers); *Duncan v. Gen. Motors Corp.*, 499 F.2d 835, 838 (10th Cir. 1974) (loss of consortium for men but not women unconstitutional because the "intangible segments of the elements comprising the cause of action . . . are equally precious to both husband and wife"); *Kalina*, 541 F.2d at 1209 (differential rules for spousal Railroad Retirement benefits "denigrat[ed] the efforts" of women) (internal quotation marks omitted); *Carrasco*, 628 F.2d at 627, 629 (striking down provision that treated income in a community property jurisdiction from a trade or business as the husband's).

As a result of these decisions and attendant legislative reforms, laws relating to marriage have become almost wholly gender-neutral, apart from their frequent exclusion of same-sex couples. *See generally* Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 Stan. L. & Pol'y Rev. 97, 113-14 (2005). Men and women entering into marriage today have the liberty to determine for themselves the responsibilities each will shoulder as parents or wage earners or family decision-makers, regardless of whether these responsibilities conform to or depart from traditional arrangements.

C. *Like Laws that Discriminate Based on Sex, Laws that Discriminate Based on Sexual Orientation Frequently Are Based on Gender Stereotypes.*

Although the laws of the states and the Nation no longer expressly impose separate roles on married men and women, gender stereotypes remain embedded in the Nation's laws and the laws of many states through measures that discriminate based on sexual orientation. In particular, laws regarding marriage that discriminate based on sexual orientation rest on—and now are expressly defended based on—presumptions about the preferences, relationship roles, and capacities of men and women that do not reflect the realities of the lives of most gay men and lesbians. This Court has rejected these stereotypes as a proper basis for lawmaking with regard to sex; it should accord these stereotypes no deference here.

1. Discrimination against gay and lesbian persons typically reflects assumptions that heterosexual relationships are preferred.

The term "sexual orientation" refers to "the sex of those to whom one is sexually and romantically attracted."[6] "Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members

[6] The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients, adopted by the American Psychological Association Council of Representatives, (Feb. 18-20, 2011) (available at http://www.apa.org/pi/lgbt/resources/guidelines.aspx).

of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals)."[7]

Laws can classify based on sexual orientation in several ways. Because sexual orientation is defined in terms of relationships, many laws that classify based on sexual orientation do so by regulating the relationships formed by two persons—such as relationships between two men, between two women, or between a man and a woman. [8] Such is the case with numerous laws restricting marriage or marriage recognition to unions of a man and woman, including California's Proposition 8 and Section 3 of the Federal DOMA.[9]

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[7] *Id.*

[8] Other laws that classify based on sexual orientation do so by directly regulating with respect to particular sexual orientations, *see, e.g., Romer,* 517 U.S. at 624-26 (invalidating Colorado state constitutional measure labeled "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation"), or by singling out persons having or identifying as having a particular sexual orientation, *see e.g.,* 10 U.S.C. § 654(b) (1993) ("Don't Ask, Don't Tell" statute formerly providing for discharge of a member of the United States armed forces for "stat[ing] that he or she is a homosexual or bisexual"), *repealed by* Pub. L. No. 111–321, 124 Stat. 3515 (2010). Finally, some laws classify based on sexual orientation by targeting particular intimate conduct between two persons, such as the sodomy statute that this Court invalidated in *Lawrence. See* 539 U.S. at 563; *id.* at 583 (O'Connor, J., concurring in the judgment) ("While it is true that the law applies only to conduct, ... [i]t is . . . directed toward gay persons as a class."); *Christian Legal Soc. Chapter v. Martinez,* __ U.S. __, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context.").

[9] Respondent Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") in *Windsor* argues in a

Historically, most laws classifying based on sexual orientation in this Nation have been based on an assumption that men and women form intimate, romantic, or sexual relationships with each other, rather than with persons of the same sex. Such laws have embodied assumptions such as the following:

- that a woman will be attracted romantically and sexually to a man, and that a man will be attracted romantically and sexually to a woman;
- that a woman's usual (or preferred) role is to form a household and a family with a man, and that a man's usual (or preferred)

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footnote in its brief on the merits that "DOMA does not classify based on a married couple's sexual orientation" because a gay person could enter into a different-sex union that would fall within DOMA's definition of marriage. *See* Br. on the Merits of Resp't BLAG at 25 n.7, *Windsor*, No. 12-307. That argument ignores that, *by definition*, a person with a gay sexual orientation seeks to enter into a relationship with a person of the same sex. By expressly limiting its definition to the relationships of different-sex couples, DOMA on its face classifies based on sexual orientation.

Within the same footnote of its brief, BLAG states that "DOMA classifies based on whether a marriage is . . . between two persons . . . *of the opposite sex*." *Id.* (emphasis added). That statement essentially acknowledges that DOMA's definition is a sex-based classification. *Amici* agree that DOMA classifies sex by basing recognition of a person's marriage on the sex of the person's spouse, and *Amici* contend that Proposition 8 similarly expressly classifies on the basis of sex. Regardless of whether these laws also classify based on sex, however, laws that discriminate based on sexual orientation (including DOMA and Proposition 8) are entitled to heightened judicial scrutiny for the reasons set out herein.

role is to form a household and a family with a woman; and

- that women will not enter intimate relationships with each other, and that men will not enter intimate relationships with each other.

Such assumptions have been at the root of laws regulating personal conduct, intimate relationships, family structure and roles, and have motivated denials of opportunities in employment, housing, and other realms of social life, too. The result of such assumptions has been a profound degree of discrimination limiting or burdening the personal autonomy of gay and lesbian persons.

The notion that laws that discriminate against gay and lesbian persons are premised on gender-role assumptions is a matter of common experience in our society. "There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination,* 69 N.Y.U. L. Rev. 197, 235 (1994); *id.* ("Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other.").

Court decisions applying federal statutes reaching private sex discrimination have recognized this important link between assumptions about gender-

"appropriateness" and discrimination based on sexual orientation. Although such statutes do not expressly prohibit discrimination based on sexual orientation, courts have recognized that gay and lesbian persons frequently experience discrimination that is actionable as sex discrimination under those statutes because such plaintiffs allege conduct that constitutes impermissible imposition of gender stereotypes.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court recognized that an employer violates the sex discrimination prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, *et seq.,* when the employer takes an adverse action against an individual based on her failure to conform to gender stereotypes.[10] *Id.* at 251 (plurality); *id.* at 272 (O'Connor, J., concurring in the judgment). Court of Appeals cases following *Price Waterhouse* consistently have held that employers discriminate "because of sex" under Title VII when they require employees to conform to conventional gender-based expectations.[11] This protection against employer

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[10] In *Price Waterhouse*, the defendant accounting firm denied partnership to Ann Hopkins, the only woman in her class, after partners suggested that she take a "course at charm school" and "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 235.

[11] *See, e.g., Lewis v. Heartland Inns of Am.*, 591 F.3d 1033, 1038-39 (8th Cir. 2010) (finding proof of sex-stereotyping where female hotel employee who dressed in a masculine fashion was terminated and her employer commented she was not pretty enough and lacked a "Midwestern girl look"); *cf. Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (explaining "a man can ground a [sex discrimination] claim on evidence that other men discriminated

imposition of gender stereotypes extends to gay and lesbian employees just as it does to all other employees, and, indeed, federal courts in numerous cases alleging such discrimination have noted the difficulty of line drawing "between sexual orientation discrimination and discrimination 'because of sex.'" *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (reversing summary judgment grant for employer where gay male employee presented evidence that fellow employees harassed him because his appearance, behavior, and demeanor did not accord with what was regarded as typical male behavior); *see also Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that harassment for failing to act "as a man should act," including being derided for not having sex with female colleague, constituted actionable sex discrimination because plaintiff was discriminated against for violating gender stereotypes).

Moreover, following this Court's holding in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), that a male employee stated a Title VII claim for sex discrimination when he alleged harassment by his male coworkers including derogatory name-calling suggesting homosexuality, federal sex discrimination decisions have observed that cases involving same-sex harassment often involve anti-gay hostility rooted in gender stereotypes. For example, in *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002), the plaintiff brought a Title VII claim alleging that his co-workers tormented him for over seven

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against him because he did not meet stereotyped expectations of masculinity.").

years by mocking him as effeminate and implying that he was gay, even though the plaintiff did not disclose his sexual orientation at work. *Id.* at 406, 410. The district court observed "[s]ex stereotyping"—"making assumptions about an individual because of that person's gender . . . that may or may not be true"—"is central" both to discrimination based on sex and to discrimination based on sexual orientation. *Id.* at 408-09. The court stated:

> Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real men don't date men." The gender stereotype at work here is that "real" men should date women, and not other men.

Id. at 410.

The links between discrimination based on sexual orientation and the types of gender stereotyping that underlie sex discrimination are also illustrated by cases allowing sex discrimination claims under Title IX, 20 U.S.C. § 1681, *et seq.*, where hostility to an

individual based on his or her perceived failure to conform to gender stereotypes has taken the form of anti-gay attitudes and slurs, regardless of whether the targeted individual is gay or heterosexual. In *Montgomery v. Independent School District*, 109 F. Supp. 2d 1081, 1084 (D. Minn. 2000), a male high school student brought a Title IX claim alleging that fellow students harassed him almost daily from elementary school until the end of tenth grade by calling him "gay" and derogatory names suggesting that he was gay (including "homo," "fairy," "queen," "pansy," and other names), and also by calling him names suggesting that he was feminine. The district court concluded that the plaintiff had stated a sex discrimination claim under Title IX by alleging that the students targeted him "not only because they believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity," and noted that the harassment had started as early as kindergarten, when the court found it unlikely the plaintiff had "developed any solidified sexual preference, or for that matter, that he even understood what it meant to be 'homosexual' or 'heterosexual.'" *Id.* at 1090. Similarly, in *Riccio v. New Haven Board of Education*, 467 F. Supp. 2d 219 (D. Conn. 2006), in which a student's classmates called her "dyke," "freak," and "lesbian," the district court denied defendants' motion for summary judgment on the plaintiff's Title IX harassment claim, *id.* at 222, rejecting the school board's argument that such harassment was based simply on the student's sexual orientation, not the student's gender or failure to conform to gender stereotypes. *See id.* at 225; *cf. EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991 (9th Cir. 2010) (reversing summary judgment for

employer in Title VII case; widower was taunted as homosexual when he repeatedly refused female co-worker's advances); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) (denying employer's motion for summary judgment on Title VII sexual discrimination claims in case where supervisor repeatedly used anti-gay slurs).

Such analyses of what constitutes sex discrimination under federal statutes help to illustrate the common basis that much sexual orientation discrimination shares with sex discrimination in stereotyping about gender preferences, roles, and abilities. Laws that discriminate against gay and lesbian persons based on sexual orientation are, at their core, based on just such "'fixed notions'" about the roles, preferences, and capacities of women and men that this Court has rejected in sex discrimination cases under the Equal Protection Clause. *VMI,* 518 U.S. at 541 (quoting *Hogan,* 458 U.S. at 725).

2. Marriage laws that discriminate based on sexual orientation are based on stereotypes about the relationship roles and preferences of men and women.

As discussed above, this Court repeatedly has recognized that stereotypical notions about how men and women should conduct their lives have included presumptions about supposedly appropriate roles for women and men within the family and within intimate relationships. The gender stereotypes that this Court has rejected as a permissible basis for sex classifications in law are closely tied to presumptions that men and women should form heterosexual relationships; both seek to prescribe the roles that

women and men will play in their most personal interactions. Just as state actors' reliance on stereotypes regarding women's financial dependency or domestic role or nurturing nature constitutes discrimination subject to heightened scrutiny under the Constitution, so, too, should state actors' reliance on the gender stereotype that men do not enter into intimate relationships with men and women do not enter into intimate relationships with women.

Proposition 8 and DOMA's specifications that women can be wives only to men and that men can be husbands only to women—and that marriage requires one of each—are vestiges of an obsolete legal regime that imposed separate and unequal roles on men and women within marriage. *See, e.g.,* Pet. App. 219a, No. 12-144 (*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 960 (N.D. Cal. 2010) ("California has eliminated marital obligations based on the gender of the spouse. Regardless of their sex or gender, marital partners share the same obligations to one another and to their depend[e]nts. As a result of Proposition 8, California nevertheless requires that a marriage consist of one man and one woman."), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (No. 12-144) (U.S. Dec. 7, 2012)).

This Court has rejected the legal presumption that "'[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things'" demands that "'[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother'" and that "'man is, or should be, women's protector and defender.'" *Frontiero*, 411 U.S. at 684-85 (quoting

Bradwell, 16 Wall. at 141 (Bradley, J., concurring)). Yet many of the justifications that have been advanced in support of limiting marriage to different-sex couples are no more than modern iterations of the same stereotypes, assuming that men and women must fill separate and complementary roles within marriage. This assumption underlies the argument pressed by those defending the exclusion of same-sex couples from marriage that, for example, "redefining marriage as a genderless institution will have deeply harmful consequences for society" and that children need both mothers and fathers to be properly raised. *See* Br. of Pet'rs at 51, 55, *Hollingsworth*, No. 12-144; *see also* Br. on the Merits of Resp't BLAG at 48, *Windsor*, No. 12-307. Indeed, arguments asserting a universal, qualitative difference between marriages of same-sex couples and different-sex couples will almost inevitably reflect the kind of gender stereotyping to which the Constitution turns a close eye. Attempts to enforce separate gender roles through law are precisely what this Court has previously subjected to heightened constitutional scrutiny. Marriage laws that discriminate against gay men and lesbians are based on the "baggage of sexual stereotypes" that bears "no relation to ability to perform or contribute to society" and should be subject to heightened scrutiny, as well. *See Westcott*, 443 U.S. at 89; *Frontiero*, 411 U.S. at 686.

3. Attempts to justify discriminatory marriage laws by reference to the supposed desirability of children being raised by both a mother and a father are based on stereotypes about the capacities of women and men.

In *Windsor* and *Perry,* the parties defending Proposition 8 and DOMA, as well as various of their *amici,* have asserted that the marriage restrictions in these cases serve a governmental interest in preferring the rearing of children by one mother and one father. The government defendants in these cases disavow such a purported governmental interest, but even were such interest genuine, it would not be legitimate because it would be based on stereotypes about mothers' and fathers' separate roles that have been rejected repeatedly. The assertion that denying legal recognition of same-sex relationships is appropriate in order to "offer special encouragement and support for relationships that can result in mothers and fathers jointly raising their biological children," Br. on the Merits of Resp't BLAG at 48, *Windsor*, No. 12-307, relies on notions that mothers inherently play the role of nurturer, while fathers inherently play the role of provider and disciplinarian—in other words, on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533.

This Court has struck down laws that discriminate between men and women based on the assumption that mothers and fathers reliably and predictably play different roles as parents, rejecting "any universal difference between maternal and

paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 388, 389 (1979); *see also Wiesenfeld*, 420 U.S. at 652 ("It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female."); *Stanley v. Illinois*, 405 U.S. 645 (1972) (finding state law presumption that unmarried fathers were unfit violated Due Process and Equal Protection Clauses). The Court also has recognized that stereotypes about distinct parenting roles for men and women foster discrimination in the workplace and elsewhere. *Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 736 (2003) ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.").

Following this precedent, the federal Courts of Appeals have recognized that "generalizations about typical gender roles in the raising and nurturing of children" are constitutionally insufficient bases for sex discrimination. *Knussman v. Maryland*, 272 F.3d 625, 636 (4th Cir. 2001) (refusal of state police department to grant father paid leave as primary caregiver for newborn violated Equal Protection Clause); *see also Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 130 (2d Cir. 2004) (finding it "eminently clear that it is unconstitutional to treat men and women differently simply because of

presumptions about the respective roles they play in family life.").

Generalizations about how mothers typically parent and how fathers typically parent are an insufficient basis for discriminatory laws even when these generalizations are "not entirely without empirical support." *Wiesenfeld*, 420 U.S. at 645. But the laws at issue here lack any empirical support for their purported underlying assumptions regarding the superiority of different-sex parents in raising children. The purportedly "common sense" notion that children fare better when raised by a mother and a father than when raised by same-sex parents in committed, stable relationships is, in fact, not supported by evidence. *See* Pet. App. 263a, No. 12-144 (*Perry*, 704 F. Supp. 2d 921, 980-81 (2010) (finding that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted," setting out the extensive record evidence supporting this finding, and noting that "[t]he research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology")); Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment,* 16 Applied Developmental Sci. 98, 104 (2012); ("[N]umerous studies of children and adolescents raised by same-sex parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals conclude that they are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents."). Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage*

Both Miss the Mark, 8 N.Y. City L. Rev. 573, 581-83 (2005) (collecting studies finding same); Judith Stacey, *Legal Impact of Same-Sex Couples: The Impact on Children and Families*, 23 Quinnipiac L. Rev. 529, 533 (2004) ("[T]here is no empirical support in the social science research literature for the claim that there is an optimal gender mix of parents or that children with two female or two male parents suffer any developmental disadvantages compared with children with two different-gender parents."). Laws based on stereotypes about differences in how mothers and fathers parent thus do no more than "ratify and reinforce prejudicial views of the relative abilities of men and women," and demand close constitutional scrutiny. *J.E.B.*, 511 U.S. at 140.

D. *Laws that Discriminate Based on Sexual Orientation Are Rooted in Impermissible Gender Stereotypes and Should Be Subject to Heightened Scrutiny.*

Gay men and lesbians long have had important life opportunities foreclosed by measures that constitute improper efforts by the government to enforce invalid gender-based stereotypes in connection with the most intimate of human relationships. Just as classifications based on sex "have traditionally been the touchstone for pervasive and often subtle discrimination," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979), so, too, have classifications based on sexual orientation. As with measures seeking to enforce outdated gender stereotypes on the basis of sex, this Court should require at least "an exceedingly persuasive justification," *id.*, in order for classifications based on sexual orientation to withstand equal protection

review. That is so because such measures frequently bear little or no relation to the actual abilities, capacities, or preferences of the persons that such measures constrain or burden.

Heightened scrutiny is particularly appropriate in this context because laws that impose gender-role expectations in contravention of the actual preferences of individuals offend the central liberty interest on which this Court focused in *Lawrence*. There, this Court recognized that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution *allows homosexual persons the right to make this choice*." 539 U.S. at 567 (emphasis added). This Court reaffirmed that "'matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment,'" and that "'[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.'" *Id.* at 573 (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992)). This Court was emphatic that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574.

That liberty principle so fundamental to this Court's analysis in *Lawrence* and the related equal opportunity principle that equal protection embodies are incompatible with a system of laws that would presume as constitutional, rather than viewing with close scrutiny, the legally enforced expectation that

men and women should enter into intimate relationships only with each other. Such laws arbitrarily deny opportunities and legal protections to individuals who are capable of fulfilling the responsibilities of marriage and who would benefit from legal protections accompanying marriage.

The courts should look with skepticism upon laws that rely on overbroad stereotypes instead of making room for the actual abilities of persons, without regard to sexual orientation, to engage in mutual care and protection, to share economic risks, and, if they choose, to raise children together. An essential component of the Constitution's equal protection guarantee is that the government cannot exclude individuals from important social statuses, institutions, relationships, or legal protections because of a characteristic that is irrelevant to participation in such statuses, institutions, relationships, or protections. Because legal enforcement of overbroad gender stereotypes arbitrarily constrains and determines individuals' most fundamental and personal choices about their own lives, equal protection requires vigorous interrogation of any such enforcement.

The Constitution's guarantee of equal protection promises gay and lesbian persons, as it promises all persons, "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society." *VMI,* 518 U.S. at 532. Subjecting laws that discriminate based on sexual orientation to heightened scrutiny is appropriate so that each person may have equal opportunity to aspire to and to experience a relationship with the person with whom he or she most wishes to build a life.

CONCLUSION

For the foregoing reasons, *Amici Curiae* urge this Court to hold that laws that classify based on sexual orientation are subject to heightened scrutiny under the Constitution's equal protection guarantee and to affirm the judgment of the Court of Appeals that the challenged provision does not survive constitutional scrutiny.

Respectfully submitted,

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APPENDIX

APPENDIX

Williams Institute Scholars of Sexual Orientation and Gender Law

The *Amici* professors of law are associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. These *Amici* have substantial expertise in constitutional law and equal protection jurisprudence, including with respect to discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise thus bears directly on the constitutional issues before the Court in these cases. These *Amici* are listed below. Institutional affiliations are listed for identification purposes only.

- Nancy Polikoff;

  Professor of Law, American University Washington College of Law;

  2012 Visiting McDonald/Wright Chair of Law, UCLA School of Law;

  Faculty Chair, The Williams Institute;

- Vicki Schultz;

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  Vice Provost for Diversity and Faculty Development, UCLA;

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- Devon Carbado;

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- Seana Shiffrin;

  Pete Kameron Professor of Law and Social Justice, UCLA School of Law;

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  Faculty Advisory Committee Member, The Williams Institute;

- Brad Sears;

  Assistant Dean of Academic Programs and Centers, UCLA School of Law;

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Executive Director, The Williams Institute.

California Women's Law Center

California Women's Law Center ("CWLC"), founded in 1989, is dedicated to addressing the comprehensive and unique legal needs of women and girls. CWLC represents California women who are committed to ensuring that life opportunities for women and girls are free from unjust social, economic, legal and political constraints. CWLC's issue priorities on behalf of its members are gender discrimination, women's health, reproductive justice, and violence against women. CWLC and its members are firmly committed to eradicating invidious discrimination in all forms. CWLC recognizes that women have historically been the target of invidious discrimination and unequal treatment under the law.

Equal Rights Advocates

Equal Rights Advocates ("ERA") is a national non-profit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and education and advance equal opportunity for all by litigating historically significant gender discrimination cases in both state

and federal courts, and by engaging in other advocacy. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment, which often have been justified by or based on stereotypes and biased assumptions about the roles that women (and men) can or should play in the public and private sphere, including within the institution of marriage. ERA is concerned that if laws such as California's Proposition 8 and others like it are allowed to stand, millions of gay, lesbian, and bisexual persons in the United States will be deprived of the fundamental liberty to choose whether and whom they will marry—a deprivation that offends the core principle of equal treatment under the law.

Legal Momentum

Legal Momentum, formerly NOW Legal Defense and Education Fund, is the nation's oldest women's legal rights organization. Legal Momentum has appeared before the Court in many cases concerning the right to be free from sex discrimination and gender stereotypes, including appearing as counsel in *Nguyen v. INS*, 533 U.S. 53 (2001), and *Miller v. Albright,* 523 U.S. 420 (1998), and as *Amicus Curiae* in *United States v. Virginia (VMI),* 518 U.S. 515 (1996), and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Legal Momentum views discrimination on the basis of sexual orientation as a form of sex discrimination,

and strongly supports the rights of lesbians and gay men to be free from discrimination based on, among other things, gender stereotyping.

Legal Voice

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a regional nonprofit public interest organization based in Seattle that works to advance the legal rights of women in the five Northwest states (Washington, Oregon, Idaho, Montana, and Alaska) through litigation, legislation, education, and the provision of legal information and referral services. Since its founding, Legal Voice has worked to eliminate all forms of sex discrimination, including gender stereotyping. To that end, Legal Voice has a long history of advocacy on behalf of lesbians, gay men, bisexuals, and transgender individuals. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country. Legal Voice also served on the governing board of Washington United for Marriage, the coalition that successfully advocated in 2012 to extend civil marriage to same-sex couples in Washington State.

National Association of Women Lawyers

The National Association of Women Lawyers ("NAWL") is the oldest women's bar association in the United States. Founded in 1899, the association promotes not only the interests of women in the profession but also women and families everywhere.

That has included taking a stand opposing gender stereotypes in a wide range of areas, including Title IX and Title VII. NAWL is proud to have been a signatory to the civil rights *amicus* brief in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), in which the Massachusetts Supreme Judicial Court found that denial of marriage licenses to same-sex couples violated state constitutional guarantees of liberty and equality. Now, a decade later, NAWL is proud to join in this *amicus* brief and stand, once again, for marriage equality.

National Partnership for Women & Families

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of women and their families. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious discrimination and has filed numerous briefs *amicus curiae* in the United States Supreme Court and in the federal Courts of Appeals to protect constitutional and legal rights.

National Women's Law Center

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or *amicus curiae* in a range of cases before this Court to secure the equal treatment of women under the law, including numerous cases addressing the scope of the Constitution's guarantee of equal protection of the laws. The Center has long sought to ensure that rights and opportunities are not restricted for women or men on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by the Constitution.

Southwest Women's Law Center

The Southwest Women's Law Center is a non-profit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential, including by eliminating gender bias, discrimination and harassment. *United States v. Windsor* and *Hollingsworth v. Perry* could help prevent discrimination in matters involving the most intimate and personal choices that people make during their

lifetime. Personal intimate choices that individuals make for themselves are central to the liberty protected by the Fourteenth Amendment.

Women's Law Project

Founded in 1974, the Women's Law Project ("WLP") is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. For nearly forty years, WLP has engaged in high-impact litigation, advocacy, and education challenging discrimination rooted in gender stereotypes. WLP represented the plaintiffs in *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992), striking down the Pennsylvania Abortion Control Act's husband notification provision as "repugnant to this Court's present understanding of marriage and the nature of the rights secured by the Constitution." WLP served as counsel to *Amici Curiae* in *T.B. v. L.R.M.,* 786 A.2d 913 (Pa. 2001), which conferred third-party standing on parents in same-sex relationships to sue for partial custody or visitation of the children they have raised; and *In re Adoption of R.B.F.,* 803 A.2d 1195 (Pa. 2002), which recognized that the Pennsylvania Adoption Act permits second-parent adoption in families headed by same-sex couples. Together with Legal Momentum, WLP represented women in non-traditional

employment as *Amici Curiae* in *Prowel v. Wise Business Forms, Inc.,* 579 F.3d 285 (3d Cir. 2009), in which the Court of Appeals reinstated a Title VII sex discrimination claim involving concurrent evidence of sexual orientation discrimination. Because harmful gender stereotypes often underlie bigotry against lesbian and gay persons, it is appropriate to subject classifications based on sexual orientation to heightened judicial scrutiny.