Nos. 12-144 & 12-307

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

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICI CURIAE BRIEF OF UTAH PRIDE CENTER, CAMPAIGN FOR SOUTHERN EQUALITY, EQUALITY FEDERATION AND TWENTY-FIVE STATE-WIDE EQUALITY ORGANIZATIONS

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QUESTION PRESENTED

Whether systems of *de jure* denigration of gay Americans are permissible under the United States Constitution.

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STATEMENT OF INTEREST

This brief is submitted by organizations representing people—gay and straight alike—who are diverse in their beliefs and backgrounds but who share the conviction that gay and lesbian Americans—wherever they might live—are entitled to legal equality under the Constitution of the United States.[1] These twenty-eight *amici curiae* are non-governmental organizations from twenty-three states whose laws, to varying degrees, deprive legal equality to gay people from cradle to grave. These states have constructed systems of *de jure* (by law) denigration of gay citizens. Millions of gay citizens live in these states, including many of the states now urging this Court to preserve laws that both offend the Constitution and do harm to the lives of gay Americans. *Amici curiae* urge this Court to affirm the constitutional rights of all gay Americans by protecting their fundamental rights and by adopting heightened scrutiny to review laws discriminating against gays and lesbians.

The Utah Pride Center is a non-profit organization based in Salt Lake City that serves Utah's lesbian, gay, bisexual, and transgender ("LGBT") community. The Utah Pride Center advocates on behalf of gay Utahns and operates programs for the benefit of individuals and families throughout the Intermountain West. The *de jure* denigration in Utah is illustrative of hostile laws that exist in states represented by this brief's other *amici curiae*.

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund this brief's preparation or submission. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

The Campaign for Southern Equality, an organization based in North Carolina, advocates across the South for the full equality of LGBT people under federal law. Equality Federation supports LGBT organizations engaged in state-level advocacy in 40 states. The other statewide organizations promoting these values and joining as *amici curiae* are Equality Alabama; Arkansas Initiative for Marriage Equality; Equality Arizona; Equality Florida; Georgia Equality; Add the Words, Idaho; Indiana Equality Action; Kansas Equality Coalition; Kentucky Equality Federation; Forum for Equality Louisiana; Equality Michigan; Mississippi Safe Schools Coalition; Montana Human Rights Network; Equality North Carolina; Oklahomans for Equality; The Equality Network (Oklahoma); Equality Ohio; South Carolina Equality; Gender Benders (South Carolina); Tennessee Equality Project; Equality Texas; Equality Virginia; People of Faith for Equality in Virginia; Fair Wisconsin; and Wyoming Youth Proud.

SUMMARY OF THE ARGUMENT

The ultimate question before this Court is whether gay Americans must continue to live as second-class citizens. Millions of Americans reside in states that have constructed systems of *de jure* denigration of their gay citizens. These discriminatory state laws have been amplified at the federal level by the Defense of Marriage Act ("DOMA"). Too many laws throughout the United States say to gay Americans: *You are not equal.*

At every stage of life—from the moment a child has an inkling of being gay, through adolescence, adulthood, and sometimes beyond the grave—gay Americans are haunted by laws that deny the existence of

gay people, demean them as lesser human beings, deprive them of fundamental rights, and denigrate their lives and familial relationships. More than two-thirds of gay Americans now live under such discriminatory state laws, and the existence of these laws harms all Americans.

The arc of history is bending towards justice for gay Americans, but paradoxically, the last two decades have also brought intensified discrimination against gay people in some places. The dignity promised to gay Americans in *Lawrence v. Texas* is now being denied in many states. Systems of *de jure* denigration were hastily erected in the years after the prospect of marriage equality first emerged into the public square. The tide of public opinion has turned in favor of fairness and equality, but these systems of legal discrimination remain firmly entrenched.

The Constitution demands that all gay people—and not merely those fortunate to live in certain states—are entitled to the blessings of liberty and the promise of equal treatment under the law. The Judiciary should embrace its responsibility as a co-equal branch of government and enforce the Constitution's guarantees of due process and equal protection of the law for all, including gay Americans.

This Court once helped the nation on its journey to become a more perfect union by using judicial review to dismantle the systems of *de jure* racial segregation that once reigned in many states. This Court has also recognized rights attendant to citizenship for women by applying heightened scrutiny to laws that discriminated on the basis of sex.

Today this Court should affirm the constitutional rights of gay Americans by again adopting the judicial tool of heightened scrutiny, which will ensure that gay Americans will not be second-class citizens or strangers to the law. The promise of America will not be realized until there is legal equality for gay Americans everywhere—not just at Stonewall and in Seneca Falls, but also in Selma, Sacramento, and Salt Lake City.

ARGUMENT

I. SYSTEMS OF *DE JURE* DENIGRATION OPPRESS GAY AMERICANS IN MANY STATES.

This nation has made remarkable progress towards recognizing and achieving legal equality for gay Americans in the last two decades. Nevertheless, there are places in this country where pockets of prejudice have deepened. The cases at bar should not be resolved without deciding whether, by coincidence of birth or residency, some gay Americans must remain subject to *de jure* denigration by their home state.

Since this Court's decision in *Romer v. Evans*, some states have constructed comprehensive systems of *de jure* denigration of gay citizens. The State of Utah is among the jurisdictions that have enacted both statutes and state constitutional provisions that target homosexuality and gay people for disfavored treatment. As explained below, this legal regime negatively impacts gay citizens at every stage of life—undermining the hopes and human potential that liberty seeks to foster.

For example, Utah's educational laws require the inculcation of a negative view towards gay people; the state has waged a campaign over two decades to deter gay teens from joining Gay-Straight Alliances, preventing them from finding safety and support in public schools; the state has adopted both a constitutional amendment and statutes that deny gay couples access to the rights, responsibilities, and benefits of legal marriage; and the state has effectively prohibited gay couples from legally adopting children. The State of Utah has also excluded its gay citizens from any legal recognition or protection from discrimination. Gay Utahns have been made strangers to the state's laws.

Unfortunately, Utah's system of *de jure* denigration is not unique. Of the estimated eight million Americans who publicly identify as lesbian, gay, or bisexual, the majority now live in states that have singled out gay people for overt discrimination and official disparagement. Numerous states, including Utah, have education laws that demean gay students. In addition, many states have abridged the rights of same-sex couples to form and legally protect their families. And more than three dozen states ban marriage equality for same-sex couples by constitutional amendment, statute, or both.

Like all citizens, gay Americans and their families are entitled to respect and legal equality. Instead, these systems of *de jure* denigration inflict unnecessary and undeserved harm on them. It is imperative that this Court confront the reality that the law is being used to denigrate the dignity and humanity of gay Americans.

A. Educational Statutes Force Public Schools to Demean and Endanger Gay Children.

The *de jure* denigration of gay people in many states begins on the first day of school. Whether they are already conscious of their sexual orientation or are not yet aware of their identity, gay children enter schools that by law cannot affirm their identities. Instead, gay children receive a different lesson: *You are not normal. You are not welcome and we cannot protect you.*

1. Public School Statutes and Curricula Demean Gay Children.

Utah and other states, by using legal mandates, have created hostile school climates for both gay teenagers and the children of gay families.[2] Although

[2] The following states have statutory sex-education requirements discriminatory to homosexual behavior: Alabama (Ala. Code § 16-40A-2(c) (2012)); Arizona (Ariz. Rev. Stat. Ann. § 15-716 (2012) (prohibiting schools from "promot[ing] a homosexual life-style," "portray[ing] homosexuality as a positive alternative life-style," and suggesting that some methods of homosexual sex are safe)); Florida (Fla. Stat. § 1003.46 (2013) (requiring public schools to "[t]each abstinence from sexual activity outside of marriage," as well as the "benefits of monogamous heterosexual marriage")); Louisiana (La. Rev. Stat. Ann. § 17:281 (2012) (prohibiting educational materials that include sexually explicit materials depicting homosexual activity)); Mississippi (Miss. Code Ann. § 37-13-171 (2012) (requiring that "abstinence-only education" teach Mississippi's law prohibiting sodomy)); Oklahoma (Okla. Stat. tit. 70, § 11-103.3 (2012) (requiring HIV/AIDS education to teach that homosexual activity is "primarily" responsible for contact with the AIDS virus)); South Carolina (S.C. Code Ann. § 59-32-30 (2011) (sex education may "not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning

"[a] positive school climate has been associated with decreased depression, suicidal feelings, substance use, and unexcused school absences among LGBT students," sympathetic educators in these states are left unequipped to protect, help or reach out to vulnerable gay youth. CDC, *Youth*, Lesbian, Gay, Bisexual and Transgender Health, http://www.cdc.gov/lgbthealth.htm (last updated May 19, 2011).

Utah has restricted instruction about homosexuality and prohibited the "advocacy of homosexuality" in its schools. Utah Code Ann. § 53A-13-101(1)(c)(iii)(A) (2012). Such statutes warp reality, chill speech and conduct, propagate false views and stereotypes, create a climate of fear about homosexuality, and expose gay children to ignorance, bullying and an "increased risk for experiences with violence." CDC, Lesbian, Gay, Bisexual and Transgender Health, *supra*. Utah's ban against the "advocacy of homosexuality" not only signals social disdain for homosexuality, but burdens gay students and children of gay families with moral disapproval from the State of Utah.[3]

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sexually transmitted diseases.")); Utah (Utah Code Ann. § 53A-13-101(1)(c)(iii)(A) (2012) ("prohibiting instruction in . . . the advocacy of homosexuality")).

[3] Although this Court has flatly rejected efforts to justify discrimination against gay persons based on efforts to differentiate between homosexual conduct and homosexual orientation, Utah and other states have not modified their educational standards to comport with this Court's decisions in *Lawrence* and *Christian Legal Society*. *See Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context.")

The result is stifling. A teacher in Utah may not be able to provide assurances to a student's question, "Is it okay to be gay?" Indeed, educators may hesitate to show—or even recommend—the video message from the President of the United States encouraging gay students that "It Gets Better." *See* White House, *It Gets Better*, http://www.whitehouse.gov/itgetsbetter (last visited Feb. 24, 2013). Utah's system of laws thus ensures that gay students may never hear a school- or state-sponsored message such as "you are not alone," "you didn't do anything wrong," and you are valued "just the way you are." *Id.* Rather, the official state message is exactly the opposite: *You are not valued. You are lesser than your straight peers.*

Similar school policies in other states, such as South Carolina, invariably expand the law so that teachers fear discipline by mentioning the word "gay" or "homosexual," and risk their livelihood by discussing, for example, Harvey Milk as a history subject. *See, e.g.*, S.C. Code Ann. § 59-32-30(5) (homosexuality may only be discussed in the context of discussing sexually transmitted diseases). Elementary schools have removed picture books that feature same-sex parents. *See, e.g.*, Melinda Rogers, *Davis District Sued Over Flap About Lesbian Mothers Book*, Salt Lake Trib., Nov. 14, 2012. And professional educators fear repercussions even for being perceived as helping gay students. Even this brief—which advocates for the rights of gay citizens under the Constitution—would likely be barred from social studies courses in Utah and other states because of its "advocacy of homosexuality."

Sex education laws are also crafted to denigrate gay students and to exclude any validation of a gay student's sexual orientation. *See, e.g.*, Ala. Code § 16-

40A-2(c) (2012) (requiring all sex education courses in public schools to teach that homosexuality is not an acceptable lifestyle and that homosexual conduct is a criminal offense). Schools cannot provide gay teenagers with life-saving information about safer sexual practices and healthy same-sex relationships. Indeed, Utah's educators are effectively barred from giving gay teens hope of living happy and fulfilling lives with satisfying, committed adult relationships.

Collectively, these statutes demean same-sex families, teach that treatment of individuals as inherently inferior is acceptable under the law, send denigrating messages to children of same-sex parents, and undermine straight parents whose belief systems accept gay people as equal members of society. When state laws require schools to distort or ignore the scientific reality that sexual orientation is an immutable characteristic—and that homosexuality is a normal variation of human sexuality—both students and society suffer. *See* Am. Psychological Assoc., *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, Aug. 5, 2009, http://www.apa.org/about/policy/sexual-orientation.aspx/. And thus *de jure* denigration taints the next generation.

2. Gay Teenagers Are Targeted by Regulations Banning Gay-Straight Alliances in Public High Schools.

States and communities reinforce the denigration of gay Americans with laws deterring gay teenage students from receiving vital affirmation and support at public high schools. School clubs that provide sanctuary for gay teens, called Gay-Straight Alli-

ances, have been targeted for excessive regulation and prohibition by disapproving communities.[4]

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[4] Lawmakers and school boards in the following states have forbidden, significantly curtailed, or discouraged participation in Gay-Straight Alliances in public schools: California (*Colin v. Orange Unified Sch. Dist*., 83 F. Supp. 2d 1135, 1138-39 (C.D. Cal. 2000) (school board voted to deny plaintiffs' application to form a Gay-Straight Alliance)); Florida (Letitia Stein, *Teachers Lash Out at Board Meeting*, St. Petersburg Times, Feb. 14, 2007, at 1B (reporting local school board's adoption of parental veto of student membership in school clubs after the formation of a Gay-Straight Alliance at a local high school)); Georgia (Ga. Code Ann. § 20-2-705 (2012) (requiring each local school board to distribute a list of student organizations and their missions, and to provide an opportunity for a parent or legal guardian to decline permission for his or her student to participate in a club or organization designated by him or her)); Idaho (Editorial, *House Ignores Big Issues to Meddle in School Clubs*, Idaho Statesman, Apr. 4, 2006, at 6 (reporting on proposed legislation that required school boards to obtain parental permission for student to join school clubs)); Indiana (*Franklin Cent. Gay/ Straight Alliance v. Franklin Twp. Cmty. Sch. Corp.*, No. IP01-1518, 2002 U.S. Dist. LEXIS 24981, at *1-*2 (Dec. 26, 2002 S.D. Ind. 2002) (school board refused to recognize the Gay-Straight Alliance as a legitimate student club)); Kentucky (*Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 676-77 (E.D. Ky. 2003) (board of education denied Gay-Straight Alliance the same access to school facilities given to other student groups)); Minnesota (*Straights & Gays for Equality v. Osseo Area Schs*., 471 F.3d 908 (8th Cir. 2006) (school board designated student group formed to promote tolerance and respect for the LGBT community as a non-curricular group, thus granting them only limited access to school avenues of communication)); Texas (*Caudillo v. Lubbock Indep. Sch. Dist*., 311 F. Supp. 2d 550, 556 (N.D. Tex. 2004) (school district and school officials denied requests made from Gay-Straight Alliance to distribute fliers, use the public address system, and be recognized as a student group)); Utah (*East High Sch. Prism Club v. Seidel*, 95 F. Supp. 2d 1239, 1242-43 (D. Utah 2000) (school district denied a club formed to address issues of civil

The State of Utah, for example, has made it more difficult for a gay teenager to start a school club than for a person to form a corporation.[5] Utah has enacted a statutory scheme that designates Gay-Straight Alliances as "noncurricular" and vests school administrators with the power to ban any club "involving human sexuality." Utah Code Ann. § 53A-11-1206(1)(b)(iii) (2012). This statute also restricts any club from "advocating or engaging in sexual activity outside of legally recognized marriage or forbidden by state law." *Id.* § 53A-11-1202. The impact of these provisions is unmistakable: only gay citizens are denied access to "legally recognized marriage" and the phrase "or forbidden by state law" breathes new life into Utah's criminal sodomy statute, *id.* § 76-5-403, which remains on the books even after *Lawrence v. Texas*.

Utah's school clubs statute further requires students to obtain parental consent to join any noncurricular club. *Id.* § 53A-11-1210. This requirement was not inspired by rogue chess clubs; it was aimed at keeping scared, gay teenagers in the closet. *See, e.g.*, Dan Harrie, *Bills Aim to Keep Gay Students in*

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rights, equality, discrimination and diversity access to the limited forum created for curriculum-related student clubs at a high school)); Virginia (*See* Tommy Denton, *Lawmakers Chose Politics Over Substance*, Roanoke Times, Feb. 27, 2007, at B8) (reporting on proposed legislation regarding parental permission for participation in Gay-Straight Alliances)).

[5] *Compare* Utah Code Ann. § 53A-11-1205 (2012) (annual formation of noncurricular school clubs) *with* Utah Code Ann. § 16-10a-120 (2012) (formation of business corporations); *see also* Floor Debate, H.B. 236, 57th Leg. Gen. Sess. (Utah Feb. 21, 2007) ("Look at the effort it takes to organize a noncurricular club. It's more severe than organizing a limited liability company or a corporation.") (statement of Rep. Scott Wyatt).

Closet, Salt Lake Trib., Feb. 13, 1996, at A4. This provision does particular harm to teenagers who are coming to terms with their identity and who fear rejection from their parents, families, and friends. It deprives vulnerable teens of a safe place of affirmation—a safety net that may be their only lifeline—at school.

Utah's crusade against Gay-Straight Alliances illustrates how states committed to *de jure* denigration have reacted sharply and swiftly to dash the hopes of gay teens. In 1996, a few brave students at Salt Lake City's East High School tried to start a Gay-Straight Alliance. Alarmed by this prospect, the Utah State Senate (Republicans and Democrats alike) rushed into a secret—and illegal—meeting to watch an anti-gay video and to plot to ban the fledgling club. *See* Louis Sahagun, *Utah Board Bans All Schools Clubs in Anti-Gay Move*, L.A. Times, Feb. 22, 1996. When asked about the violation of Utah's Open Meetings Act, the state senate president rationalized that the ends justified the means: "There are many of us who disagree with [the gay and lesbian] lifestyle. . . . That doesn't mean we look down at them. But I don't want their lifestyle taught to my children in our schools, and neither do my neighbors." Tony Semerad and Dan Harrie, *Anti-Gay Meet: Secret's Out, Anger Sets In--Unlike the Senate's Anti-Gay Meeting, the Anger of Critics is No Secret*, Salt Lake Trib., Feb. 1, 1996, at A1. Thereafter, in an episode that echoed an era when municipalities closed swimming pools rather than integrate them, the Salt Lake City School District shuttered *all* noncurricular school clubs rather than allow a Gay-Straight Alliance to meet under the federal Equal Access Act (which requires all comers or no clubs at all). *See id*.

The state's message to gay students: *You don't belong in our schools. You are alone.*

3. Educational Statutes that Demean Gay People Harm Students.

Legislative bullying against gay people has seeded the bullying of gay children in classrooms and on playgrounds. The connection between school policies and teen suicide hit home in Taylorsville, Utah on November 29, 2012. After being teased and ridiculed by peers for months—and after being suspended by school officials who had searched him and confronted him about having a condom in his backpack—an embarrassed and bullied gay teenager could take no more. He returned to school with a pistol and a single bullet. He shot himself as classmates watched in horror. Ray Parker, *Family Reveals Details About Utah Teen Who Committed Suicide*, Salt Lake Trib., Dec. 15, 2012 (discussing circumstances of suicide and suicide note).

Sadly, this tragedy is not an isolated incident but exemplar of the joint epidemic of anti-gay bullying and gay teen suicide. At least eight of ten gay middle and high school students have reported verbal harassment; four of ten have been physically harassed; six of ten have felt unsafe at school; and one in five has been the victim of physical assault. CDC, Lesbian, Gay, Bisexual and Transgender Health, *supra*. Longitudinal studies have also shown that the effects of bullying, for kids who survive it *and* for those who perpetrate it, extend into adulthood. William E. Copeland, et al., *Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence*, J. Am. Medicine Assoc. Psychiatry, Feb. 20, 2013. Nationally, adolescents in grades 7 through 12 who identify as lesbian, gay, or

bisexual are more than twice as likely as their straight counterparts to have attempted suicide. CDC, Lesbian, Gay, Bisexual and Transgender Health, *supra*. It is no coincidence that suicide is the second leading cause of death for Utah youth ages 10-17. For Utah young adults ages 18-24, the suicide rate has been consistently higher than the national rate for more than a decade.[6]

Gay Americans are left wanting the "security of justice." Martin Luther King, Jr., *I Have a Dream*, Address at the March on Washington (Aug. 28, 1963). Any delay in vindicating their constitutional rights will be counted in the lives of gay teenagers. *De jure* discrimination creates a class of disfavored sons and daughters that offends the conscience of our Constitution. The pervasive denigration of gay teens in public schools demeans gay students, denies their dignity, and deprives them of hope for a bright future.

The despair of beaten-down students found voice in the Taylorsville teen's final note: "*I had a great life but I must leave.*"

B. Bans on Adoption Harm Same-Sex Couples and Their Children.

Systems of *de jure* denigration of gay Americans extend from school to family life. Many states withhold legal recognition and protection for the families

[6] *See* Suicide in Utah, 2006-2010: Youth (10-17 years), Utah Dep't of Health, Violence & Injury Prevention Program, http://www.health.utah.gov/vipp/pdf/FactSheets/Youth.pdfl (last updated September 2012); Suicide in Utah, 2006-2010: Young Adults (18-24 years), Utah Dep't of Health, Violence & Injury Prevention Program, http://www.health.utah.gov/vipp/pdf/FactSheets/YoungAdultSuicide.pdf (last updated September 2012).

of gay people. These measures seek to exclude gay Americans from helping raise the next generation, while denying them one of the most socially valuable and life-enriching endeavors—raising children. The message to gay couples is brutal: *You can't be trusted to raise children together.*

Several states, Utah included, effectively ban adoption by same-sex couples. In Utah, "[a] child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state." *See* Utah Code Ann. § 78B-6-117(3) (2012). Although this statute appears on its face to apply to all "cohabitating" couples, the effect of the law is to preclude gay couples from adopting children. Cohabitating heterosexual couples are able to get married if they wish to adopt, but gay couples are denied this option. The law even allows single persons to adopt. As a result, the only people who are specifically excluded from adopting are those "cohabitating in a relationship that is not a legally valid and binding marriage." *Id.* § 78B-6-117(2)(b), (3). The statute thus impairs same-sex couples by making them ineligible to have legally recognized and protected families.

The legislative history demonstrates that Utah's law was intended to specifically prevent gay couples from adopting children or otherwise having families. During the senate floor debate, Senator Terry Spencer was asked if a blood relative, such as a grandmother, would be allowed to adopt her grandchild under the bill. Senator Spencer replied that a "grandmother would not be prohibited from adopting a grandchild of hers, unless [the] grandmother is gay. That's where the prohibition comes." Floor Debate, S.B. 63,

53rd Leg., Gen. Sess. (Utah Feb. 18, 2000) (statement of Sen. Terry Spencer).

The resulting legislative mandate precludes gay couples in Utah from legally adopting children together. These legal impediments cannot, however, prevent same-sex couples from becoming parents. The human reality is that same-sex couples have children regardless of adoption prohibitions. *See, e.g.*, Rosemary Winters & Lee Davidson, *Census: Gay Couple Households Boom in Utah*, Salt Lake Trib., July 28, 2011 (citing U.S. Census data showing over 1,800 same-sex households in Utah have children under 18 living with them). Gay men and women can and do have their own biological children, and gay individuals can still adopt in Utah and other states. It is a fact that gay couples are raising children in Utah as well as in every other state with an adoption ban. *See, e.g.*, Daphne Lofquist, Same-Sex Couple Households, U.S. Census Bureau, Sept. 2011, http://www.census.gov/prod/2011pubs/acsbr10-03.pdf (reporting that the 2010 nationwide American Community Survey found that "out of the 594,000 same-sex couple households, 115,000 reported having children").

Utah's adoption ban is not an isolated attack on gay American families. Several states around the country have implemented or maintain bans on adoption by gay couples.[7] Adoption bans denigrate

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[7] States with functional bans on adoption by same-sex couples include: Alabama (Ala. Code § 26-10A-27 (2012) (permitting only husband and wife to "jointly" adopt a minor and limiting step-parent adoption to married spouse)); Georgia (*Bates v. Bates*, 730 S.E.2d 482 (Ga. Ct. App. 2012) (explaining step-parent adoption provided for under Georgia law excludes adoption by same-sex partner)); Michigan (Mich. Comp. Laws § 710.24

the relationship between same-sex partners, both in the eyes of their children and society at large. These bans are also meant to de-legitimize the couple's relationship by forbidding them as a couple from raising children together. Utah's law permits gay people to raise children alone, but the State of Utah will not recognize that gay couples actually raise children together. Their families have been made invisible to the law.

Bans on adoption by same-sex couples also penalize children because their parents are gay. By design, these laws make these children partially illegitimate—a disfavored outcome under any circumstance. American jurisprudence traditionally features a presumption in favor of legitimacy. After all, this Court has explained that "[t]he presumption of legitimacy was a fundamental principle of the common law," primarily due to the "aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession," among other reasons. *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (omitting internal citation).

(2012) (permitting adoption by single person or "married" couple and thereby excluding adoption by same-sex couple); *see also* Op. Atty Gen. No. 7160 (Mich. 2004)); Mississippi (Miss. Code Ann. § 93-17-3 (2012) ("Adoption by couples of the same gender is prohibited.")); Nebraska (*In re Adoption of Luke*, 640 N.W.2d 374, 381-82 (Neb. 2002) (holding a same-sex partner cannot adopt the partner's child without terminating the other partner's parental rights)); Ohio (*In re Adoption of Doe*, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998) (prohibiting a woman from adopting her same-sex partner's biological child); Ohio Rev. Code Ann. § 3107.03 (LexisNexis 2013) (step-parent adoption not available to same sex couples)); Utah (Utah Code Ann. § 78B-6-102(4) (2012)).

Children being raised by same-sex couples are thus deprived of the stability and benefits of having two legally recognized parents. This legal deprivation can affect every aspect of a child's life. These children must live with the specter of misfortune looming over their lives, as the death or disability of the legally recognized parent could cause a child to lose not just one but both parents.

Society also suffers when the law fails to recognize child-parent relationships. When only one of a child's parents is acknowledged by state law, doctors, teachers, and even soccer coaches can find their hands tied if an issue arises with the child. For this reason, same-sex parents live constantly in fear of the moment when the unavailability of the legally recognized parent and the legal impotence of the other parent might leave the child's welfare—or even life—in peril.

No child should be made to suffer because of the sexual orientation of the child's parents. And no couple should be denied the blessings and responsibilities of being legal parents simply because of their sexual orientation. Certain states may still wish to deter or prevent gay people from forming legally recognized families, but the reality is that gay Americans have families, spouses, and children. Gary J. Gates, Williams Institute, *LGBT Parenting in the United States*, Feb. 2013, http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf (stating that there are approximately 125,000 same-sex couples raising nearly 220,000 children in the United States).

The question is whether these family relationships are entitled to the same equal protection under the law as other families, or whether certain states may

continue, in the name of "protecting children," to legislatively deprive gay couples and their children of the same rights as heterosexual families.

C. Marriage Bans and DOMA Deny Gay Citizens Access to Marriage.

The keystone of existing systems of *de jure* denigration of gay Americans is the denial of the right to marry. It is both the crux of the matter and the root of other forms of legal discrimination against gay citizens. The heartbreaking message to committed, gay couples: *Your love is unworthy of marriage.*[8]

The deprivation of the right to marry harms gay citizens and, as explained above, marks them with a stigma that has been used to justify other deprivations. Thirty-eight states currently prohibit same-sex marriage: at least twenty-nine by constitutional ban,[9] nine solely by statute, and many by

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[8] The injustice suffered by gay couples at the moment of denial of a marriage license has been profiled by the Campaign for Southern Equality, *We Do Campaign: Hattiesburg, Mississippi* (January 2, 2013), http://www.youtube.com/watch?v=NHKDZjuUjPU; *We Do Campaign - Across the South* (Jan. 13, 2013), http://www.youtube.com/watch?v=5cEhjUr-Jm0.

[9] Many states constitutionally ban same-sex marriage, including: Alabama (Ala. Const. art. I, §36.03); Alaska (Alaska Const. art. I, § 25); Arizona (Ariz. Const. art. XXX, § 1); Arkansas (Ark. Const. amend. 83, § 1); Colorado (Colo. Const. art. II, § 31); Florida (Fla. Const. art. I, § 27); Georgia (Ga. Const. art. I, §IV, para. I); Idaho (Idaho Const. art. III, § 28); Kansas (Kan. Const. art. XV, § 16); Kentucky (Ky. Const. § 233a); Louisiana (La. Const. art. XII, § 15); Michigan (Mich. Const. art. I, § 25); Mississippi (Miss. Const. art. XIV, § 263A); Missouri (Mo. Const. art. I, § 33); Montana (Mont. Const. art. XIII, § 7); Nebraska (Neb. Const. art. I, § 29); Nevada (Nev. Const. art. I, § 21); North Carolina (N.C. Const. art. XIV, § 6); North Dakota (N.D. Const. art. XI, § 28); Ohio (Ohio Const. art. XV, § 11); Oklahoma

both.[10] Nat'l Conference of State Legislatures, *State Laws Limiting Marriage to Opposite-Sex Couples*, http://www.ncsl.org/issues-research/human-services/ state-doma-laws.aspx (last updated May 19, 2012). In addition, the Federal Defense of Marriage Act both

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(Okla. Const. art. II, § 35); Oregon (Or. Const. art. XV, § 5a); South Carolina (S.C. Const. art. XVII, § 15); South Dakota (S.D. Const. art. XXI, § 9); Tennessee (Tenn. Const. art. XI, § 18); Texas (Tex. Const. art. I, § 32); Utah (Utah Const. art. I, § 29); Virginia (Va. Const. art. I, § 15-A); Wisconsin (Wis. Const. art. XIII, § 13).

[10] Alabama (Ala. Code § 30-1-19 (2012)); Alaska (Alaska Stat. §§ 25.05.011 and 25.05.013 (2013)); Arizona (Ariz. Rev. Stat. Ann. § 25-101 (2012)); Arkansas (Ark. Code Ann. § 9-11-109 (2012)); Colorado (Colo. Rev. Stat. Ann. § 14-2-104 (2012)); Delaware (Del. Code Ann. tit. 13, § 101 (2013)); Florida (Fla. Stat. § 741.212 (2013)); Georgia (Ga. Code Ann. § 19-3-3.1 (2012)); Idaho (Idaho Code Ann. §§ 32-202, 32-209 (2012)); Illinois (750 Ill. Comp. Stat. 5/212 (2012) (the pending Religious Freedom and Marriage Fairness Act has passed the state senate and may repeal the statutory ban on same-sex marriage)); Indiana (Ind. Code § 31-11-1-1 (2012)); Kansas (Kan. Stat. Ann. §§ 23-2501, 23-2508 (2011)); Kentucky (Ky. Rev. Stat. Ann. §§ 402.005, 402.020, 402.040, 402.045 (2012)); Michigan (Mich. Comp. Laws §§ 551.1, 551.271 (2012)); Minnesota (Minn. Stat. § 517.03 (2012)); Mississippi (Miss. Code Ann. § 93-1-1 (2012)); Missouri (Mo. Rev. Stat. § 451.022 (2013)); Montana (Mont. Code Ann. §§ 40-1-103, 40-1-401 (2012)); North Carolina (N.C. Gen. Stat. § 51-1.2 (2013)); Ohio (Ohio Rev. Code Ann. § 3101.01 (LexisNexis 2013)); Oklahoma (Okla. Stat. tit. 43, § 3.1 (2012)); Pennsylvania (23 Pa. Cons. Stat. § 1704 (2012)); South Carolina (S.C. Code Ann. § 20-1-15 (2011)); South Dakota (S.D. Codified Laws §§ 25-1-1, 25-1-38 (2012)); Tennessee (Tenn. Code Ann. § 36-3-113 (2012)); Texas (Tex. Fam. Code Ann. §§ 2.001, 6.204 (2012)); Utah (Utah Code Ann. § 30-1-2 (2012)); Virginia (Va. Code Ann. § 20-45.2 (2013)); West Virginia (W. Va. Code § 48-2-603 (2012)); Wisconsin (Wis. Stat. Ann. §§ 765.001(2), 765.01, 765.04, 765.30 (2012)); Wyoming (Wyo. Stat. Ann. § 20-1-101 (2012)).

forbids federal recognition of same-sex marriages and, in violation of the Constitution's Full Faith and Credit Clause, authorizes states like Utah to disregard lawfully performed marriages from other states between same-sex couples.

The combination of Utah's marriage ban and DOMA constitutes a particular threat to members of the U.S. Armed Forces. The State of Utah is home to several large military installations and hosts American service members from around the country. Just as the nation once ordered African-American soldiers to serve in segregated states, today the U.S. military commands gay service members to move into states that will not recognize their lawfully issued marriage licenses from a sister state.

On a daily basis, members of our military—including those who are gay and may have married legally in other states—put their lives on the line for our country. Yet if a married gay service member were to die off-base, the surviving spouse could be treated as a stranger by state law. The surviving spouse could even be denied control over the remains and funeral rites. *See, e.g.*, Utah Code Ann. § 58-9-602 (2012) (excluding same-sex partners from controlling the "disposition of a deceased person" in the absence of a legal designation). These circumstances would cause a gay member of our nation's Armed Forces to suffer from discrimination even beyond death.

The men and women of the United States military deserve to be honored for protecting our nation; they should not be denigrated either by DOMA or states like Utah that would decline to honor their marital vows. It is wrong that Americans can be torn asunder between the love of their lives and their

service to our country. This Court should end the *de jure* denigration of gay Americans, and it should affirm that all Americans—whether gay or straight—have the right to marry the person whom they love.

II. HEIGHTENED SCRUTINY IS WARRANTED TO PROTECT GAY CITIZENS FROM DISCRIMINATION.

This Court should apply heightened scrutiny to review laws impacting gay citizens. Although prejudice against gay people is inherently irrational—and thus laws burdening them should not be able to survive even rational basis review—heightened judicial scrutiny is warranted. Gay Americans have long faced discrimination despite their contributions to our nation's public life, and yet they have always lacked the political power to prevent disfavored treatment from both the states and the federal government because of a distinguishing or immutable characteristic—namely, sexual orientation.

The political vulnerability of gay Americans is self-evident from the existence of systems of *de jure* denigration in Utah and other states. Gay Americans were not able to prevent the enactment of laws that demoted them to second-class citizenship, and they now lack both the political power and the realistic prospect of attaining full equality through democratic processes. That is because, after the passage of so many discriminatory state constitutional amendments, gay Americans—already underdogs in the political process—face daunting prospects for rolling back these provisions.

Heightened scrutiny is used as a judicial tool to safeguard the fairness of democratic processes and the constitutional rights of minorities. As explained

below, the application of heightened judicial scrutiny is warranted here because gay citizens in Utah and other states have been—and will remain, perhaps indefinitely—unable to vindicate their right to legal equality through democratic processes.

A. Gay Citizens Were Powerless to Prevent the Establishment of Systems of *De Jure* Denigration In Utah and Other States.

Systems of *de jure* denigration are vivid examples of how gay citizens lack sufficient political power to thwart legislative assaults on their rights. For decades, gay communities across the nation have been subjected almost annually to legislation that attacks the dignity of gay citizens and diminishes their access to marriage and parenthood.

Utah's gay community, which comprises less than three percent of the state's population and which is mainly sprinkled around the state's capital city, was subjected to the combined forces of the largest and most powerful political, economic, social, and religious institutions in the Intermountain West. Gary J. Gates and Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, Gallup, (Feb. 15, 2013) http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx. At the behest of these determined and motivated forces, the State of Utah constructed a comprehensive system of *de jure* denigration that not only deprives gay Americans of fundamental rights but has left them virtually as strangers to the law.

Gay citizens in Utah are particularly vulnerable to legislative bullying. The state's dominant political party, whose platform has been unremittingly hostile

to gay rights, has controlled Utah's legislative and executive branches without interruption for the last quarter century. This political party has controlled both houses of the state's legislature with veto-proof majorities over the same period. *See, e.g.*, Karl N. Snow & David R. Irvine, Op-Ed., *The Fruits of Single-Party Government in Utah*, Salt Lake Trib., Oct. 9, 2010 (noting "25 years of veto-proof legislative majorities"). Meanwhile, more than sixty percent of the state's residents—and nearly ninety percent of the state's lawmakers—belong to a religious denomination that has encouraged its members to support only marriage between a man and a woman. *See, e.g.*, Editorial, *A Helping Hand: LDS Should Support Equal Rights*, Salt Lake Trib., Feb. 17, 2013; Matt Canham, *Census: Share of Utah's Mormon Residents Holds Steady*, Salt Lake Trib., Apr. 17, 2012.

With few allies and virtually no political influence at the statewide level, Utah's small gay community was utterly powerless to prevent its *de jure* denigration by the State of Utah. Each element of Utah's system of *de jure* denigration was adopted with overwhelming and often bipartisan support. For example, in 2000, the Utah legislature, which was then comprised of 72 Republicans and 32 Democrats, passed the state's ban on adoption by non-married, cohabitating couples. Utah State Legislature, Legislators by Session, (1986-current), http://le.utah.gov/asp/roster/roster.asp?year=2000 (last visited Feb. 23, 2013); Amendments to Child Welfare, 2000, Ch. 208, 2000 Utah Laws 208, codified at Utah Code Ann. § 78B-6-117 (2012). The bill cleared the house by a margin of 53 to 17; the senate's vote was even more overpowering: 27 to 1. Utah State Legislature, Bill Status, H.B. 103 Third Substitute Amendments to

Child Welfare, http://le.utah.gov/~2000/status/hbillsta/HB0103S3.txt (last updated Mar. 15, 2012).

The following year, the Utah legislature adopted legislation prohibiting any school instruction in "the advocacy of homosexuality." Public Education Curriculum Amendments, 2001 Ch. 105, § 1, 2001 Utah Laws 105, codified at Utah Code Ann. § 53A-13-101 (2012). This bill passed 49-19 in the house and with nary a dissenting vote in the state senate. Utah State Legislature, Bill Status, S.B. 75 Public Education Curriculum Amendments, http://le.utah.gov/~2001/status/sbillsta/SB0075.txt (last updated Mar. 19, 2012). In 2007, the Utah legislature targeted school clubs that "involve human sexuality." Student Club Act, 2007 Ch. 113, § 2, 2007 Utah Laws 114, codified at Utah Code Ann. §§ 53A-11-1201 to -1214 (2012). The purpose of the legislation was to give school administrators the ability to block school clubs supporting gay students. *See* Matt Canham, *Legislature Passes Anti-Gay Clubs Law*, Salt Lake Trib., Feb. 21, 2007. The bill also passed decisively with votes of 48 to 23 in the house and 16 to 8 in the senate. Utah State Legislature, Bill Status, H.B. 236 Seventh Substitute Student Clubs Amendments, http://le.utah.gov/~2007/status/hbillsta/hb0236s07.htm (last visited Feb. 14, 2013).

Similar margins prevailed in 2004 when the Utah legislature voted to authorize a ballot question limiting marriage to a man and a woman. This amendment, effectively prohibiting gay couples from marrying, passed 58 to 14 in the house and 20 to 7 in the senate. Utah State Legislature, Bill Status, H.J.R. 25 Joint Resolution on Marriage, http://le.utah.gov/~2004/status/hbillsta/hjr025.htm (last visited Feb. 14, 2013). The Utah electorate then passed the amend-

ment overwhelmingly in the next general election by a margin of nearly two to one. *Utah [Election Results]*, Wash. Post, Nov. 24, 2004, http://www.washingtonpost.com/wp-srv/elections/2004/ut/ (last updated Nov. 24, 2004).

B. Gay Communities in Utah and Other States Remain Politically Powerless.

In Utah and other states, gay citizens remain politically powerless to undo what has been done to them by the law. The powerful force of inertia now weighs heavily against equality in many jurisdictions.

Gay citizens in too many states face virtually insurmountable obstacles to achieving legal equality through legislative means. In Utah, for example, the state's legislative and executive branches remain firmly under the control of a political party whose platform offers little if any support to gay rights. *See generally*, Utah Republican Party State Party Platform, "*Family Values*" (as ratified at the 2009 State Convention). The current legislature is one of the most lopsided in a generation. Lee Davidson, *Legislature: Really Republican, Mildly Moderate?* Salt Lake Trib., Jan. 27, 2013. The political environment remains wholly inhospitable to the interests of Utah's gay community, despite a climate of growing public support.

The stalled Common Ground Initiative stands as unfortunate evidence of the limitations of the democratic process for Utah's gay community. First announced in 2008 and since championed by Equality Utah, the Common Ground Initiative has sought to achieve legislative progress for Utah's gay community by focusing on subjects for which polling found majority public support. Equality Utah, Common

Ground Initiative, http://www.equalityutah.org/eu/common-ground-initiative/common-ground-initiative (last visited Feb. 24, 2013). For example, nearly three-fourths of Utahns have indicated in polls that they would support legislation protecting gay individuals from housing and employment discrimination. *See* Rosemary Winters, *Lawmakers Scrap Effort to Ban Anti-Gay Discrimination*, Salt Lake Trib., Feb. 4, 2012; Equality Utah Public Opinion Study, Dan Jones and Assoc., Oct. 11-22, 2011, http://www.equalityutah.org/images/stories/PDFs/Read_the_full_Survey_with_highlights_HERE.pdf (hereinafter "2011 Dan Jones Study"). Likewise, a majority of Utahns are in favor of gay persons having hospital visitation rights, medical decision-making rights, health insurance benefits, tax responsibilities and benefits, inheritance benefits, second-parent adoption, and domestic partnerships. *See* 2011 Dan Jones Study, *supra*.

In hopes of building bridges in these areas, the Common Ground Initiative has eschewed more divisive subjects and instead focused on seeking to translate existing public support into legislation in four seemingly less-controversial areas: (1) fair housing and employment non-discrimination, (2) expanded health care for LGBT families, (3) inheritance and insurance benefits, and (4) relationship recognition. Equality Utah, Common Ground Initiative, *supra*. Although legislation to ban housing and employment discrimination against LGBT persons has been proposed every legislative session for each of the past five years, it has never even been allowed out of a legislative committee. *See* Winters, *Lawmakers Scrap Effort to Ban Anti-Gay Discrimination*, *supra* (stating that the 2012 anti-discrimination bill represented the fifth time such a bill had been brought by Democrats and that it was tabled after a hearing).

Indeed, despite popular support, efforts to pass legislation in any of these areas have been entirely unsuccessful. *See, e.g.*, Rosemary Winters, *All Gay-Rights Bills Fall Short, But Neither Side Is Giving Up*, Salt Lake Trib., Feb. 18, 2009 (explaining Common Ground Initiative bills failed to pass during the legislative session).

Utah's gay community remains politically stymied state-wide. The state offers no recognition or protections for its gay citizens. Utah law provides no recognition for gay relationships, no protection from housing or employment discrimination, and no hospital visitation or probate rights for same-sex couples. In addition, neither Utah's hate-crimes law nor its hazing and bullying statutes recognize sexual orientation as a protected category. Here again, Utah is illustrative. Where there are pockets of prejudice, gay citizens cannot obtain protection from the law.

This Court should bring an end to *de jure* denigration and ensure that gay Americans will not be treated as second-class citizens or foreigners to the law. The adoption of heightened scrutiny will advance the cause of justice by providing courts with both the judicial tools and the clear direction to dismantle the systems of *de jure* denigration burdening gay Americans across the country.

III. COURT INTERVENTION IS NECESSARY TO END *DE JURE* DENIGRATION OF GAY CITIZENS IN THE UNITED STATES.

This Court should embrace its constitutional responsibility as a co-equal branch of government to enforce the rights of gay citizens in every state. This

Court should declare an end to the *de jure* denigration of gay Americans.

Despite growing acceptance of gay people nationwide, the laws of certain states remain hostile to the equality of gay people. Marjorie Connelly, *Support for Gay Americans Growing, but U.S. Remains Divided*, N.Y. Times, Dec. 7, 2012. In a nation as large and diverse as the United States, there will always be pockets of prejudice, places where the rights of minority groups can be vulnerable to the legislative whims of localized majorities. *See* Pew Research Center for the People and the Press, Behind Gay Marriage Momentum, Regional Gap Persist (Nov. 9, 2012), http://www.people-press.org/2012/11/09/behind-gay-marriage-momentum-regional-gaps-persist/ (reporting that comparison of poll data from "different regions of the country [shows] wide disparities in attitudes about same-sex marriage").

Millions of gay Americans now live in states with systems of *de jure* denigration. These systems of discrimination are proving resistant to repeal, even in places where public opinion has shifted decisively in favor of gay rights. Barriers to reversing state constitutional provisions are considerable, and the legislative process defaults to inertia and rewards the avoidance of potentially controversial topics. As a result, systems of *de jure* denigration have proven impervious to dismantlement through legislative means. Judicial action is thus the only available remedy to ensure that gay Americans in every state will have equal access to the privileges and immunities of citizenship and equal treatment under the law.

Fundamental rights and constitutional guarantees should not depend on residency in certain states. This Court has a proud tradition, acquitted by history, of deploying heightened judicial review to protect targeted minority groups from majoritarian abuse. All gay Americans—and not just those fortunate enough to live in certain communities or states—are entitled to equal protection and due process of law.

This Court can also bring healing to the nation by demonstrating that the humanity of gay citizens can be reconciled with respect for religious freedom. The Constitution guarantees both the right of gay people to be treated as equals under civil law and the right of individuals and organizations to hold beliefs about homosexuality in accordance with their own consciences. By treating homosexuality in the secular context with neutrality, and by affirming that all people—whether gay or straight—are entitled to equal treatment under the Constitution, this Court can unify the country around our shared values of liberty and justice for all.

Recognition of legal equality for gay Americans will bring the nation closure, not *Kulturkampf*. Apocalyptic predictions—none realized—have preceded every major milestone in the gay rights movement. To the contrary, the integration of gay Americans into the United States military has "had no overall negative impact on military readiness or its component dimensions, including cohesion, recruitment, retention, assaults, harassment or morale." Aaron Belkin, et al., *One Year Out: An Assessment of DADT Repeal's Impact on Military Readiness*, Palm Center (Sept. 20, 2012), *available at* http://www.palmcenter.org/files/One%20Year%20Out_0.pdf. The availability of mar-

riage equality has supported couples and families around the country without doing any harm to marriages between heterosexual couples. *See, e.g.*, Brief for Respondent at 35 n.6, *Hollingsworth v. Perry*, No. 12-144 (Aug. 24, 2012). Indeed, this Court's previous decisions protecting gay citizens have been accepted and integrated into the fabric of American society.

The nation is now ready to support a decision recognizing the legal equality of its gay citizens. Sixty-three percent of Americans describe discrimination against gays and lesbians as a serious problem in the United States. Jeffrey M. Jones, *Most in U.S. Say Gay/Lesbian Is a Serious Problem*, Gallup, Dec. 6, 2012, http://www.gallup.com/poll/159113/most-say-gay-lesbian-bias-serious-problem.aspx. A majority of Americans believe the country will reach a consensus on gay rights; in fact, a consensus has already emerged among Americans between the ages of 18 and 29, who overwhelmingly support legal equality for gay citizens. *Id.*; Connelly, *Support for Gay Americans Growing, but U.S. Remains Divided*, *supra* ("A strong majority of younger Americans now support same-sex marriage. In a Gallup Poll conducted [in November 2012], 73 percent of people between 18 and 29 years old said they favored it, while only 39 percent of people older than 65 did."). Such acceptance is growing and is not limited to young people in more liberal states. *Id.* Notably, across the country and even in Utah, a higher percentage of people now support marriage equality

than supported interracial marriage before the *Loving v. Virginia* decision.[11]

Recent elections have also evidenced the shifting tide of public opinion. In the 2012 elections, for the first time, voters in three states approved marriage equality laws and, in Minnesota, defeated a proposed constitutional amendment to bar same-sex marriage. Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN, Nov. 7, 2012, http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage. America's first lesbian senator was elected to represent Wisconsin. *Id.* President Obama, the first president to endorse same-sex marriage, was re-elected. *Id.* Even in spheres once thought to be hostile to homosexuality, such as professional team sports and rap music, gay citizens are finding more acceptance. Grant Wahl, SI.com, *Robbie Rogers Coming Out, Soccer's Reaction, Mark Steps Forward*, Feb. 15, 2013, http://sportsillustrated.cnn.com/soccer/news/20130215/robbie-rogers-coming-out-gay-retire/ (noting positive reception received by U.S. Soccer stars Megan Rapinoe, David Testo, and Robbie

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[11] One year after this Court decided *Loving v. Virginia*, 388 U.S. 1 (1967), only twenty percent of Americans approved of marriage between black and whites. Jeffrey M. Jones and Lydia Saad, *Record-High 86% Approve of Black-White Marriages*, Gallup, Sept. 12, 2011, http://www.gallup.com/poll/149390/Record-High-Approve-Black-White-Marriages.aspx. Conversely, in May 2012, "[f]ifty percent of Americans believe[d] same-sex marriages should be recognized by law as valid, ..." Frank Newport, *Half of Americans Support Legal Gay Marriage*, Gallup, May 8, 2012, http://www.gallup.com/poll/154529/Half-Americans-Support-Legal-Gay-Marriage.aspx. And, in Utah "28 percent of those surveyed [in a 2012 poll] support[ed] gay marriage. . . ." Robert Gehrke, *Huntsman Says Equality for Gays and Lesbians a Continuing Journey*, Salt Lake Trib., Sept. 29, 2012.

Rogers); Zack Goldman, *Robbie Rogers and the Personification of E Pluribus Unum*: *the Reaction to Robbie Rogers Coming Out Shows Much of What Is Best About the US: Tolerance, Dignity and Human Rights*, Guardian, Feb. 18, 2013, http://www.guardian.co.uk/sport/the-shin-guardian-blog/2013/feb/18/robbie-rodgers-coming-out-gay-america (reporting that U.S. soccer fans responded to Robbie Rogers' "coming out" with "overwhelming and unwavering" support); Gerrick D. Kennedy, *Grammy 2013: Frank Ocean Wins for Urban Contemporary Album*, L.A. Times, Feb. 10, 2013 (noting that Ocean's letter revealing he had been in love with a man was "undoubtedly the glass ceiling moment for music. Especially black music, which had long been missing a voice like Ocean's to break the layers of homophobia often found in contemporary hip-hop and R&B.").

It is getting better for gay Americans. But this progress should inspire this Court to action, not silence. Against the certainty of continued harm to gay Americans this Court must not defer to mere hopes of legislative change. "Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds." Letter from Martin Luther King, Jr. to His Fellow Clergymen (Apr. 16, 1963), *available at* http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

This Court should not be silent as gay Americans suffer from *de jure* denigration. To loving gay couples in Sacramento, and to adoptive gay parents in South Bend, as well as to gay teenagers in Taylorsville, Utah, the law of the United States must say: *You are equal.*

CONCLUSION

Because the Constitution neither knows nor tolerates classes among its citizens, gay Americans must be treated equally under the law—everywhere. This Court should affirm the fundamental rights of gay Americans and adopt heightened scrutiny to review laws targeting gay people.

The best way to stop discrimination on the basis of sexual orientation is for this Court to stop *de jure* discrimination against gay Americans.

The judgments from the courts of appeal in *Windsor v. United States* and *Hollingsworth v. Perry* should be affirmed.

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