ORAL ARGUMENT SCHEDULED FOR DECEMBER 6, 2010
No. 10-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, ET AL.

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, ET AL.

Defendants,

and

DENNIS HOLLINGSWORTH, ET AL.

Defendant-Intervenors-Appellants,

On Appeal from the United States District Court
for the Northern District of California
Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

BRIEF OF THE NATIONAL LGBT BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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The National LGBT Bar Association respectfully submits this brief as amicus curiae supporting Plaintiffs-Appellees. Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The National LGBT Bar Association is a national association of lawyers, judges and other legal professionals, law students, activists, and affiliate lesbian, gay, bisexual, and transgender ("LGBT")[1] legal organizations. The LGBT Bar Association promotes justice in and through the legal profession for the LGBT community in all its diversity. In 1992, the LGBT Bar Association became an official affiliate of the American Bar Association and it now works closely with the ABA's Section on Individual Rights and Responsibilities and its Committee on Sexual Orientation and Gender Identity.

Given the LGBT Bar Association's commitment to equality in the administration of justice, it has a special interest not only in seeking equal access to civil institutions—like marriage—for the LGBT community, but also in assuring that as a general matter, courts apply the most searching level of scrutiny to laws of any kind that treat certain individuals differently merely because of their sexual orientation.

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[1] "LGBT" is a commonly used acronym for lesbian, gay, bisexual, and transgender. For ease of reference, we use the term "gay" throughout this brief as shorthand for "LGBT."

INTRODUCTION AND SUMMARY OF ARGUMENT

The LGBT community has suffered a long and shameful history of official, legal discrimination in this country. That discrimination has been based on blatant stereotyping or animus, or on moral disapproval of homosexuality or homosexual conduct, or both. The U.S. Supreme Court has now twice held that such grounds are not a legitimate, rational basis for imposing official legal disadvantage upon gay people. Those decisions lead ineluctably to an additional, more general conclusion: because laws discriminating on the basis of sexual orientation are historically based on the irrational, impermissible grounds of animus or moral disapproval, they should not be given a presumption of rationality by courts and upheld so long as some genuinely rational basis can be identified, but instead should be presumed irrational and subject to the most searching scrutiny when challenged in court. Otherwise said, because classifications based on sexual orientation have historically been premised on illegitimate factors, courts should presume that new laws establishing the same classification—like Proposition 8—are similarly not based on a valid state interests, and thus should uphold such laws only if they survive the most demanding level of review under the Equal Protection Clause.

The opinion in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990)—which held that sexual orientation is not a

suspect or quasi-suspect classification—does not stand in the way of concluding that laws classifying on the basis of sexual orientation are subject to heightened scrutiny. *High Tech Gays* relied principally on the Supreme Court's opinion in *Bowers v. Hardwick*, reasoning that if a state could criminalize the conduct that defines homosexuality as a class, the class itself cannot be entitled to heightened protection. But *Lawrence v. Texas* has squarely overruled *Bowers*, thus eviscerating *High Tech Gays*' central legal premise. And the *High Tech Gays* analysis of whether gay individuals are protected by heightened scrutiny is in any event squarely contrary to Supreme Court precedent.

In sum, laws (like Proposition 8) that classify on the basis of sexual orientation must be subjected to searching judicial scrutiny. And although we certainly agree with the Appellees that Proposition 8 does not even survive rational basis review, there is no question that it cannot survive the more demanding review properly required by the Equal Protection Clause.

ARGUMENT

I. CLASSIFICATIONS BASED ON SEXUAL ORIENTATION MUST BE SUBJECT TO HEIGHTENED SCRUTINY

The history of discrimination against gay people in this nation—discrimination based in large part on stereotypes and societal misconceptions about the nature of human sexuality—demonstrates that laws that classify on the basis of sexual orientation are likely to be premised on animus or a similarly illegitimate

governmental purpose. Indeed, the Supreme Court's recent gay-rights cases make clear that state laws that discriminate against gay people—including those adopted for the stated purpose of preserving tradition or protecting the purported values of the community—lack a legitimate basis and must be deemed presumptively invalid.

A. The Supreme Court Has Applied Heightened Scrutiny When The Group Or Class At Issue Historically Has Been Subjected To Invidious Or Otherwise Illegitimate Discrimination

The Equal Protection Clause "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008) (quoting *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887)) (internal quotation marks omitted). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). That is because, normally, "individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has authority to implement." *Id.* at 441. In those circumstances, the presumption is that a statute that creates a classification among people does so for a reason legitimately related to the classification, such that "all persons subject to

legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'" *Engquist*, 553 U.S. at 602.

Certain legal classifications have been deemed inherently "suspect"—classifications such as race, alienage, or national origin—because they "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne*, 473 U.S. at 441. With suspect classifications, courts presume that the law is *not* treating persons "alike, under like circumstances and conditions," but instead is treating them differently for no legitimate reason. Such classifications "will be sustained only if they are suitably tailored to serve a compelling state interest." *Id.*

Similarly, statutes employing a "quasi-suspect" classification like sex "also call for a heightened standard of review," because "[t]hat factor generally provides no sensible ground for differential treatment." *Id.* at 440. As the Supreme Court in *Cleburne* explained:

> "[What] differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.

Id. at 440-41 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)) (alterations in original; citation omitted). This type of heightened scrutiny, where a quasi-suspect classification is used, requires that the state's "proffered justification [for the law] is 'exceedingly persuasive.'" *United States v. Virginia*, 518 U.S. 515, 553 (1996).

In short, heightened scrutiny rather than standard rational basis review is required when historical circumstances give courts sufficient reason to presume that a given classification is not based on any legitimate governmental purpose, but rather reflects a "special likelihood of bias on the part of the ruling majority." *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 (1979). The state defending the challenged law must provide particularly strong proof that, despite the fact that such classifications are usually irrational or illegitimate, the particular classification at issue was in fact employed for a proper, non-invidious reason.

To determine whether a given classification warrants heightened scrutiny, the Supreme Court has identified "traditional indicia of suspectness" courts should look for, including when a class of persons is "[1] saddled with such disabilities, or [2] subjected to such a history of purposeful unequal treatment, or [3] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *see also Bowen v. Gilliard*, 483 U.S. 587, 602

(1987); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). Although any of these factors can suffice to establish the need for heightened scrutiny,[2] the most important factor in determining whether a classification is presumptively valid or presumptively illegitimate is whether the relevant class or group has "experienced a 'history of purposeful unequal treatment' . . . on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313.[3]

The dispositive strength of this consideration—a long history of discrimination grounded not in any legitimate basis for differentiation but rather in stereotype—is best demonstrated by the line of Supreme Court precedent establishing heightened scrutiny for sex-based classifications. Such heightened review, the Court has emphasized, "responds to volumes of history." *United States v. Virginia*, 518 U.S. 515, 531 (1996); *see Pers. Adm'r of Mass. v. Feeney*, 442

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[2]*See, e.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971) (classifications based on alienage are "inherently suspect" because "[a]liens as a class are a prime example of a 'discrete and insular minority' for whom such heightened judicial solicitude is appropriate" (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)) (citation omitted).

[3]As *Murgia* demonstrates, a history of discrimination by itself has not been enough to establish suspect or quasi-suspect status. If the Court finds that usually there are good reasons for a legislature to classify on the basis of some particular characteristic, it may find that heightened scrutiny is inappropriate even in the face of historical discrimination. *See, e.g., Murgia*, 427 U.S. at 313-14 (age); *City of Cleburne*, 473 U.S. at 442-47 (mental disability).

U.S. 256, 273 (1979) ("Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination"). As the plurality opinion in *Frontiero v. Richardson*—later adopted by the full Court[4]—explained, this country has a "long and unfortunate history of sex discrimination," traditionally "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." 411 U.S. 677, 684 (1973). "As a result of notions such as these," the Court explained, "our statute books gradually became laden with gross, stereotyped distinctions between the sexes." *Id.* at 685. And while "the position of women in America has improved markedly in recent decades, . . . it can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." *Id.* at 685-86.[5] Finally, the Court explained:

> And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result,

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[4]*See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531 (1996); *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994).

[5]The Court noted that while "women do not constitute a small and powerless minority," at the time "[t]here ha[d] never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives." *Frontiero*, 411 U.S. at 686 n.17.

> statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Id. at 686-87 (footnote omitted).

Precedent thus establishes that laws that classify on the basis of some group or class characteristic are subject to heightened scrutiny when that group or class has suffered a history of discrimination based on illegitimate factors such as animus or stereotyping. That is particularly so when the characteristic upon which the classification is based "frequently bears no relation to ability to perform or contribute to society." *Id.* at 686.[6] Laws that classify on the basis of sexual orientation—like California's Proposition 8—fall squarely within this category.

B. Laws That Classify On The Basis Of Sexual Orientation Should Be Subject To Heightened Scrutiny Because Of The Long History Of Invidious Discrimination Against Gay People, And Because Sexual Orientation Bears No Relation To An Individual's Ability To Contribute To Society

1. *Gay People Have Suffered A Long History Of Discrimination Based On Societal Animus And Stereotypes*

There is no serious dispute that gay people have suffered a long history of discrimination. ER 131-32. That noxious history demonstrates beyond any doubt

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[6]Classifications based on illegitimacy are also subject to heightened scrutiny because "illegitimacy is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society.'" *City of Cleburne*, 473 U.S. at 441 (quoting *Mathews v. Lucas*, 427 U.S. 495, 505 (1976)).

that classifications on the basis of sexual orientation should be presumed illegitimate and sustained only in light of an "exceedingly persuasive" justification. *Virginia*, 518 U.S. at 553 (internal quotation omitted).

In the late 19th century, American scientific literature began describing homosexuality as a pathological "condition, something that was inherent in a person, a part of his or her 'nature.'" D'Emilio, *Capitalism and Gay Identity*, *in* The Lesbian and Gay Studies Reader 467, 471 (Abelove ed. 1993).[7] With the turn of the 20th century came public discrimination and attacks on gay people. Police targeted for arrest people perceived to be gay and raided institutions that served a predominantly gay clientele. *See* Chauncey, Gay New York 138-39 (1994); Eskridge, *Law and Construction of the Closet: American Regulation of Same Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1080-83 (1997) (hereinafter "*Law and Construction of the Closet*"); *see also* ER 131-32 (detailing trial testimony by Chauncey). States routinely targeted gay people through laws against

[7]The concept of homosexuality (or heterosexuality) as a defining characteristic of one's social identity is relatively recent. ER 106. Indeed, American "colonial society lacked even the category of homosexual or lesbian to describe a person," though colonial court records refer to incidents of sexual acts between two women or two men. D'Emilio, *Capitalism and Gay Identity*, *in* The Lesbian and Gay Studies Reader 467, 470 (Abelove ed. 1993).

"prostitution" and "degeneracy." *Law and Construction of the Closet*, *supra*, at 1033-38. Gay-themed plays were censored, and books were banned.[8]

After World War II, discrimination against gay individuals took its most virulent forms in the United States.[9] Senator McCarthy grouped homosexuality with communism as a "grave evil to be rooted out of the federal government," *Developments in the Law—Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1556 (1989), and the U.S. Senate conducted a special investigation into government employment of gay people and "other sex perverts," S. Rep. No. 241 (1950). That investigation concluded that gay people were unfit for public employment because they "lack the emotional stability of normal persons" and threaten to "pollute" government offices. *Id.* at 3-5. In 1953, President Eisenhower terminated all gay people from federal employment, and the FBI sought to enforce the order by gathering data on local arrests for gay-related

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[8]*See* Curtin, We Can Always Call Them Bulgarians: The Emergence of Lesbians and Gay Men on the American Stage (1987); Russo, The Celluloid Closet: Homosexuality in the Movies (1991); Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1557 (1993).

[9]Europe's most horrific anti-gay discrimination, of course, took place during the war, when thousands were exterminated in Nazi camps. *See, e.g.*, Haeberle, *Swastica, Pink Triangle, and Yellow Star: The Destruction of Sexology and the Persecution of Homsexuals in Nazi Germany*, *in* Hidden from History: Reclaiming the Gay and Lesbian Past (Duberman et al. eds., 1989).

charges and membership in gay and lesbian civil rights organizations.[10] Indeed, the federal government zealously enforced its anti-gay laws throughout the 1950s and early 1960s, and was abetted by the press and by politicians. *See* Eskridge, *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 Fl. St. U. L. Rev. 703, 742-46 (1997) (hereinafter "*Privacy Jurisprudence*"). This zeal for enforcement extended all the way to Congress, where a congressional subcommittee "criticized the Civil Service Commission for not knowing that 457 of the 'perverts' arrested in D.C. between 1947 and 1950 were federal employees, who should have been fired." *Id.* at 754 (quoting Subcomm. on Investigations of the Sen. Comm. on Expenditures in the Exec. Departments, *Interim Report: Employment of Homosexuals and Other Sex Perverts in Government* 12-13 (1950)). And these federal policies went beyond employment to the immigration realm: "The McCarran-Walter Act of 1952 [enacted] exclusions of people 'afflicted with psychopathic personality'—a code word for homosexuals and bisexuals."[11]

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[10]*See* D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970 (1983); Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, Washington History (Fall/Winter 1994/95), at 44.

[11]Eskridge, *Channeling: Identity-Based Social Movements And Public Law*, 150 U. Pa. L. Rev. 419, 430 (2001) (quoting Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (1952)); *see Boutilier v. INS*,

In 1966, John W. Macy, Jr., the Chairman of the U.S. Civil Service Commission, wrote a letter to the Mattachine Society—an early gay-rights organization—explaining why the federal government's ban on hiring gay people would not be rescinded. The letter speaks for itself:

> Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of the common toilet, shower and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

ER 131 (quoting the letter, Plaintiffs' Exhibit 2566).

Anti-gay discrimination was not limited to the federal government. Like the federal government, "most state governments would not employ homosexuals."[12] And like the federal government, numerous state governments engaged in "witch hunts" to aggressively ferret out gay people from their midst. *See Privacy Jurisprudence*, *supra* at 746-53. States enacted laws authorizing forced psychiatric

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387 U.S. 118, 124 (1967) ("Congress commanded that homosexuals not be allowed to enter. The petitioner was found to have that characteristic and was ordered deported"; construing Immigration and Nationality Act).

[12]Eskridge, *supra* note 11, at 430.

examinations of persons convicted of sodomy or suspected of being "sexual deviants," and confinement of those deemed in need of a "cure" for their homosexuality.[13] Indeed, "[b]y 1961, twenty-nine states and the District of Columbia required the hospitalization of 'psychopathic persons,'" which was as explained "often a code for homosexuals."[14] "An Alabama law 'reform' commission announced that gay people are 'persons of abnormal tendencies' who 'have forfeited certain of their standings,' and warned that Alabama would make itself 'known as a place where it is tough for [such] persons.'" Center for Cognitive Liberty & Ethics, *Threats to Cognitive Liberty: Pharmacotherapy and the Future of the Drug War* 36 n.17 (2004) (quoting Commission to Study Sex Offenses: Interim Report to the Alabama Legislature, June 12, 1967, at 5 (hereinafter, Alabama Commission)). Other state and local governments took steps to expose and exile gay people, including through commitment to the gruesome asylums of the day.[15]

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[13]*See* Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 Law & Sex. 1, 75-76 & nn. 355-65 (2001). California had just such a law, which was not repealed until September 2010. *See* 2010 Cal. Legis. Serv. Ch. 379 (A.B. 2199).

[14]Eskridge, *supra* note 11, at 428.

[15]*See, e.g.*, Garland, *supra* note 13; D'Emilio, *supra* note 10; Katz, Gay American History: Lesbians and Gay Men in the U.S.A. (1976); Chauncey, *The Postwar Sex Crime Panic*, *in* True Stories from the American Past (1993);

Even as more gay people have been open about their orientations over the past forty years, invidious discrimination has persisted. ER 132-33. For example, Lambda Legal Defense and Education Fund, the first gay legal organization, was able to incorporate only by obtaining an injunction, *see In re Thom*, 301 N.E.2d 542 (N.Y. 1973), and some organizations were not even that lucky, *see State ex rel. Grant v. Brown*, 313 N.E.2d 847 (Ohio 1974).[16] Gay individuals routinely lost jobs, housing, and custody of their children based solely on sexual orientation.[17] The law in many places continued to treat gay people as if they were unstable or mentally ill, even after the major American psychological and psychiatric societies rejected that notion.[18] While social conditions have improved substantially in recent years, even the Appellants have admitted that "gays and lesbians continue to experience instances of discrimination." ER 132. To give just one example, over

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Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920-1960*, *in* Passion and Power: Sexuality in History (1989).

[16]*See also* ER 131-32 (quoting a letter denying the Pride Foundation tax-exempt status because "advancing the welfare of the homosexual community" was "perverted or deviate behavior"); Cain, Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement 59-61 (2000) (difficulties of gay charitable organizations in obtaining tax-exempt status).

[17]*See, e.g.*, ER 133; Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different*, 14 Harv. J. L. Pub. Pol'y 21, 30-33 (1991) (collecting examples).

[18]*See* Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law & Sex. 133, 142-43 (1991).

1000 hate crimes based on sexual orientation bias occurred in California between 2004 and 2008. ER 132. The long history of vicious public and private discrimination against gay people in America, unfortunately, remains an open record.

2. *This History Of Invidious Discrimination Against Gay People Mandates Heightened Scrutiny For Classifications Based On Sexual Orientation*

The above discussion demonstrates not only that gay people have suffered long and pervasive discrimination, but also that this discrimination was based on perceived distinctions—like distinctions based on race or sex—that "bear[] no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686. "As a result, statutory distinctions [based on sexual orientation] often have the effect of invidiously relegating the entire class of [gay people] to inferior legal status without regard to the actual capabilities of its individual members." *Id.* at 686-87.

As with the history of sex-based discrimination, discrimination against gay individuals has been based on stereotypes that have no legitimate basis in fact. As explained, the United States Senate in 1950 concluded that gay people "lack the emotional stability of normal persons" and threaten to "pollute" government offices. S. Rep. No. 241, at 3-5. A congressional subcommittee wondered why the U.S. Civil Service Commission failed to detect and expel such a large number of

"perverts." Subcomm. on Investigations of the Sen. Comm. on Expenditures in the Exec. Departments, *Interim Report: Employment of Homosexuals and Other Sex Perverts in Government* 12-13 (1950). That Commission defended the ban on gay federal employees in 1966 by highlighting, among other things, "the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of the common toilet, shower and living facilities, [and] the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business." ER 131. A panel commissioned by the State of Alabama determined that gay people were "persons of abnormal tendencies" who "have forfeited certain of their standings." Alabama Commission, at 5. And such views continue to be widespread even among government officials. *See* The Williams Institute, Chapter 14: Other Indicia of Animus Against LGBT People by State and Local Officials, 1980-Present at 14-8 (2009). For example, a California legislator stated in 1999 that being gay "is a sickness," "an uncontrolled passion similar to that which would cause someone to rape." ER 133.

Indeed, even if the history of sexual-orientation discrimination were not based predominantly on the types of malicious stereotypes described above, but instead on adherence to tradition or on religious-based disapproval of homosexuality, heightened scrutiny would still be required. The Supreme Court

has now twice made clear that moral disapproval of homosexuality is not a sufficient basis to sustain a classification based on sexual orientation. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down a Colorado constitutional amendment outlawing state or local laws protecting gay individuals from discrimination. "The primary rationale" provided for the Colorado law was "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality." *Id.* at 635. The Court rejected that rationale, stating that the law was a "classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* "[A]nimosity toward the class of persons affected" is not a legitimate basis for a classification. *Id.* at 634. Similarly, in striking down Texas's anti-sodomy law in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court determined that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Accordingly, the Court held, "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578.

Romer and *Lawrence* make clear that sexual-orientation-based discrimination is not only unrelated to any legitimate state interest when premised

on vicious stereotypes, but also when it is based on simple disapproval of homosexuality. If simple disapproval cannot sustain laws that classify on the basis of sexual orientation, especially in light of the full set of biases and historical discrimination against gay people, then all of these classifications are premised on a presumptively invalid ground. As with race and sex, sexual orientation is a "factor [that] generally provides no sensible ground for differential treatment." *City of Cleburne*, 473 U.S. at 441. "Rather than resting on meaningful considerations," these statutes "reflect outmoded notions of the relative capabilities of" gay and straight men and women. *Id.* Accordingly, laws that classify on the basis of sexual orientation must be subjected to heightened scrutiny.

II. THIS COURT'S OPINION IN *HIGH TECH GAYS* IS NO LONGER GOOD LAW, AND DOES NOT PRECLUDE A FINDING THAT CLASSIFICATIONS BASED ON SEXUAL ORIENTATION ARE SUBJECT TO HEIGHTENED SCRUTINY

Twenty years ago a three-judge panel held in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), that sexual-orientation-based classifications are not subject to heightened scrutiny. That case is no longer good law. Not only does it principally rely on the Supreme Court's now-repudiated decision of *Bowers v. Hardwick*, 478 U.S. 186 (1986), but it also incorrectly applies the factors for determining whether heightened scrutiny is required. *High Tech Gays* therefore does not preclude this Court from applying

heightened scrutiny to laws (like Proposition 8) that classify individuals on the basis of their sexual orientation.

A. *High Tech Gays* Has Been Overruled By Intervening Supreme Court Precedent

In 1980, this Court held that "[c]lassifications which are based solely on sexual preference" are subject to heightened scrutiny because they "implicate the right to be free, except in very limited circumstances, from unwarranted government intrusions into one's privacy." *Hatheway v. Sec'y of the Army*, 641 F.2d 1376, 1382 (9th Cir. 1980) (quotation omitted). Ten years later, the panel in *High Tech Gays* reversed *Hatheway*, relying almost exclusively on the intervening precedent of *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held that the Due Process Clause does not prevent the states from criminalizing homosexual conduct. *Id.* at 194. The panel in *High Tech Gays* reasoned that "because homosexual *conduct* can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes." 895 F.2d at 571 (emphasis added).

The central premise underlying *High Tech Gays*—that sexual orientation cannot constitute a suspect or quasi-suspect classification because homosexual conduct may be criminalized without any constitutional impediment—was squarely rejected in *Lawrence v. Texas*, which explicitly overruled *Bowers*. 539 U.S. at 578. The *Lawrence* Court determined that the "State cannot demean [gay

people's] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention from the government." *Id.*

Because the foundation upon which *High Tech Gays* rested has been rejected by intervening Supreme Court precedent, the case is no longer controlling and must be overruled. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that three-judge panels are not bound by precedent where an intervening higher authority effectively overrules the decision). Just as *High Tech Gays* overruled *Hatheway* in light of *Bowers*, this Court should overrule *High Tech Gays* in light of *Lawrence* and apply heightened scrutiny to classifications based on sexual orientation.

B. *High Tech Gays* Incorrectly Applies The Factors For Suspect Classification

High Tech Gays based its holding primarily on *Bowers*, but also determined that sexual orientation does not meet the requirements of a suspect or quasi-suspect classification. The Court believed that in order to demonstrate entitlement to heightened scrutiny, "homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless." *High Tech Gays*, 895 F.2d at 573 (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987)). The Court found that the first criterion is met, but that

the other two are not, thus finding heightened scrutiny inappropriate. *Id.* That analysis is directly contrary to Supreme Court precedent.

As demonstrated above, there is no question that gay people have been and continue to be subject to pervasive discrimination, that such discrimination comes from baseless stereotypes, and that distinctions based on sexual orientation have no bearing on a person's ability to perform in or contribute to society. That is enough, under Supreme Court precedent, to warrant heightened scrutiny—the *High Tech Gays* court erred in requiring satisfaction of additional conditions. *See supra* Part I.A. But even to the extent immutability and political powerlessness are relevant to the question whether a given classification warrants heightened judicial scrutiny, both conditions apply to the class of gay people disfavored by the government's typical use of sexual-orientation-based classifications.

The court in *High Tech Gays* determined that homosexuality is a behavioral characteristic and thus is not immutable. *High Tech Gays*, 895 F.2d at 573. As the Supreme Court recently reaffirmed, however, the Court's cases "have declined to distinguish between status and conduct in this context." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010); *see also Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination"). This Court itself recognized subsequent to *High Tech Gays* that

"[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzalez*, 409 F.3d 1177, 1187 (9th Cir. 2005) (en banc). That conclusion is consistent with the district court's findings below. ER 106-11.[19]

To the extent the final factor—political powerlessness or minority status—is pertinent to heightened scrutiny,[20] it is also satisfied for sexual-orientation-based classifications. The court in *High Tech Gays* found that because several states had enacted legislation protecting gay people from employment discrimination, homosexuals were not completely politically powerless because they could "attract the attention" of lawmakers to their concerns. *High Tech Gays*, 895 F.2d at 574 (quotation omitted). That analysis cannot be correct.

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[19]Immutability in any event is not required for a finding of suspect or quasi-suspect status. Aliens can (and often do) become citizens, but alienage is still a suspect class.

[20]Political powerlessness as a consideration appears to derive from *Rodriguez*, which stated that the requirements of suspectness are met when a class is "saddled with such disabilities, *or* subjected to such history of purposeful or unequal treatment, *or* relegated to such a position of a political powerlessness as to command extraordinary protection from the majoritarian process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (emphasis added). As the italicized words show, these criteria are stated in the disjunctive—any *one* of the identified factors, including a "history of purposeful or unequal treatment"—can suffice to "command extraordinary protection" from the courts. *Id.* Indeed, as explained at length above, a history of discrimination based on illegitimate factors has long been considered an especially compelling basis for heightened scrutiny.

First, as *High Tech Gays* itself appears to acknowledge, the relevant question is whether gay people "are a minority *or* politically powerless." *Id.* at 573 (emphasis added). These two requirements are stated in the disjunctive for a reason—a showing of political powerlessness is necessary only if the relevant group is *not* a minority. Numerical minorities that have been subject to a history of invidious discrimination are protected by heightened equal protection scrutiny because they by definition cannot protect themselves through the normal political process. Political powerlessness only becomes relevant for groups that are *not* numerical minorities. For example, African-Americans made up a majority of some southern states and many counties in the early 20th century but were nevertheless unable to protect themselves through ordinary legislation. And women make up half the population, but have historically been unable to prevent invidiously discriminatory laws. *See Frontiero*, 411 U.S. at 686 n.17. Gay people are, of course, a numerical minority. *High Tech Gays* thus erred in finding that this factor counts against heightened scrutiny for sexual-orientation-based classifications.

Second, the existence of legislation protecting a group from discrimination cannot by itself be an indicator of political power sufficient to preclude strict scrutiny of classifications otherwise recognizable as suspect. The existence of, for example, the Civil Rights Act of 1870, Civil Rights Act of 1964, and Voting

Rights Act of 1965—not to mention the Fourteenth Amendment itself—obviously does not negate the suspicious nature of race-based classifications. More to the point, the Supreme Court in *Frontiero* noted the existence of antidiscrimination legislation enacted by Congress for the benefit of women—including the then-pending Equal Rights Amendment—as a factor cutting *in favor* of applying heightened scrutiny to sex-based classifications, because it showed that "Congress itself has concluded that classifications based upon sex are inherently invidious." 411 U.S. at 687.

Third, the treatment of political powerlessness with respect to sex-based discrimination demonstrates why the factor also justifies heightened scrutiny for sexual-orientation-based classifications. While gay people form a small minority of the population, women form roughly half of it, and yet the *Frontiero* Court recognized that women, "in part because of past discrimination," are "vastly underrepresented in this Nation's decisionmaking councils." 411 U.S. at 686 n.17. "There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives." *Id.* What was true for women in 1973 remains true of gay people today. There has never been an openly gay President, an openly gay Cabinet member, an openly gay Supreme Court Justice, or an openly gay federal court of appeals judge. There has never been an openly gay Senator,

and there are only a handful of openly gay Representatives. Homosexuality remains a political taboo in far too many respects to justify the conclusion that laws intentionally imposing disabilities on gay people can still be tolerated by courts as presumptively legitimate and rational classifications.

Finally, even though gay people have had some qualified success in supporting the enactment of antidiscrimination legislation in some states, anti-gay legislation continues to be enacted on the federal, state, and municipal levels. Since the decision in *High Tech Gays*, no fewer than thirty-three states have actively excluded same-sex couples from marriage. ER 138. Indeed, "there is no group in American society who has been targeted by ballot initiatives more than gays and lesbians." SER 236. Further, since *High Tech Gays*, the federal government has reaffirmed the ban on open service in the United States Armed Forces, *see* Nat'l Defense Authorization Act, Pub. L. No. 103-160, § 571, 107 Stat. 1547 (1994), passed the so-called Defense of Marriage Act, *see* Pub. L. No. 104-199, §3, 110 Stat. 2419 (1996), and saw the House of Representatives support by a sizeable majority an amendment to the Constitution restricting marriage nationwide only to different-sex couples, *see* H.J. Res. 88, 109th Cong. (2006). Indeed, Congress has been unsuccessful even in extending the protections of the federal antidiscrimination statutes to gay people, despite attempts to do so. *See*

Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (introduced 6/24/2009).

In light of these repeated legislative and ballot-box defeats, it is difficult to see how gay people can be seen as "politically powerful" in any way that could possibly make a difference to the equal protection analysis. On the contrary, women and African-Americans have long demonstrated an ability both to obtain substantial protective legislation, and also to elect and appoint representatives to higher office, and yet legal classifications based on sex and race (rightly) remain suspicious and subject to heightened equal protection scrutiny. It is, in short, as indisputable as it is unacceptable that gay people continue to be treated differently by the law, and by voters, from straight men and women. Such differential treatment is a product of historical animus and unjustified stereotype, and thus warrants the most searching scrutiny when subject to judicial challenge in any context.

* * * * *

There is no question that gay people have been the subject of a long history of severe discrimination. Nor is there any question that this discrimination has been based on bias, stereotypes, and other factors that the Supreme Court has determined to be illegitimate bases for state classifications. And it is difficult to dispute that a person's sexual orientation—like her race or sex—has nothing

whatever to do with her ability to perform in and contribute to society. In these circumstances, legal classifications based on that characteristic must be subjected to heightened scrutiny. And while the Appellees and the district court are correct that Proposition 8 cannot survive even minimal rational basis review, stripping same-sex couples of their right to marry certainly is not supported by any "exceedingly persuasive" justification, as Supreme Court precedent dictates it must be. In sum, this Court should find that laws like Proposition 8, which classify on the basis of sexual orientation, are subject to heightened scrutiny, and affirm the district court's holding that Proposition 8 is unconstitutional.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that the judgment of the district court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the attached brief complies with the type-volume limitations in Fed. R. App. P. 29(d) because this brief contains 6,603 words, less than half the amount allowed for a party's principal brief under Fed. R. App. P. 32(a)(7)(B)(i), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Undersigned counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as required by Fed. R. App. P. 29(c), because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2010, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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