Case Nos. 13-4178, 14-5003, 14-5006

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DEREK KITCHEN, ET AL.
Plaintiffs-Appellees,
v.
GARY R. HERBERT, ET AL.
Defendants-Appellants.

Appeal from The United States District Court
for the District of Utah (No. 2:13-cv-00217)

MARY BISHOP, ET AL.
Plaintiffs-Appellees,
v.
SALLY HOWE SMITH, ET AL.
Defendants-Appellants.

Appeal from The United States District Court
for the Northern District of Oklahoma (No. 4:04-cv-00848)

AMICI CURIAE BRIEF OF THE NATIONAL WOMEN'S LAW CENTER, OTHER WOMEN'S LEGAL ORGANIZATIONS, AND PROFESSORS OF LAW ASSOCIATED WITH THE WILLIAMS INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES AND PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

[All Parties Have Consented. FRAP 29(a)]

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CORPORATE DISCLOSURE STATEMENT

None of the Amici (identified in Appendix) has a parent corporation.

No publicly held company owns more than 10% of stock in any of the Amici.

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I. INTEREST OF AMICI CURIAE[1]

Amici Curiae are the National Women's Law Center, other women's legal organizations, and professors of law associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. Amici have substantial expertise in constitutional issues related to equal protection of the laws, including discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise bears directly on the issues before the Court. Descriptions of individual Amici are set out in the Appendix.

II. SUMMARY OF ARGUMENT

Under the federal Constitution's equal protection guarantees, laws that classify on the basis of sex are subject to heightened judicial scrutiny and cannot stand absent an "exceedingly persuasive justification," and a showing that such laws substantially further important governmental interests.

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[1] Prior to his representation of the Kitchen Plaintiffs in the pending action, David Codell co-authored portions of previous versions of this brief submitted in the Supreme Court and the Ninth Circuit. He has not authored, revised, or edited any portion of this brief since commencing representation of the Plaintiffs, nor has any other party or parties' counsel authored this brief. No party or party's counsel contributed money to fund preparing or submitting this brief, and no person other than the Amici Curiae, their members, or their counsel contributed money to fund preparing or submitting this brief.

United States v. Virginia, 518 U.S. 515, 533 (1996) [hereinafter "*VMI*"]. In particular, the government may not enforce laws that make sex classifications based on gender stereotypes or gendered expectations, including stereotypes about roles that women and men perform within the family, whether as caregivers, breadwinners, heads of households, or parents. Courts have recognized that sex classifications warrant heightened scrutiny because legal imposition of archaic and overbroad gender stereotypes arbitrarily harms women and men by limiting individuals' abilities to make decisions fundamental to their lives and their identities.

Laws that discriminate based on sexual orientation share with laws that discriminate based on sex a frequent basis in overbroad gender stereotypes about the preferences and capacities of men and women.[2] Lesbian, gay, and bisexual persons long have been harmed by legal enforcement of the expectation that an individual's most intimate relationship will be and should be with a person of a different sex, not with a

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[2] Although this brief focuses on the level of constitutional scrutiny that is appropriate for laws that discriminate based on sexual orientation, Amici note that laws that discriminate based on gender identity, including transgender status, are also premised on overbroad gender stereotypes and should be subject to heightened scrutiny. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (finding discrimination against a transgender individual based on gender-nonconformity constitutes sex discrimination and collecting circuit court and district court cases in accord); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (assuming without deciding same).

person of the same sex. Such presumptions underlie many laws that discriminate based on sexual orientation, including Utah's and Oklahoma's marriage laws at issue here. Just as the Constitution requires close scrutiny of laws that on the basis of gender stereotypes enforce the roles that men and women perform within marriage, so, too, the Constitution demands close scrutiny of laws based on gender stereotypes that restrict individuals' liberty to decide with whom they enter into such intimate relationships.

Courts have played an important role in dismantling laws that sought to enforce separate gender roles within marriage based on the principle that such legally enforced roles improperly restrict opportunity and liberty for individuals who depart from gendered expectations. Nevertheless, many states, including Utah and Oklahoma, continue to enforce laws prohibiting same-sex couples from marrying, even though such laws rest on overbroad gender stereotypes about the preferences, relationship roles, and capacities of men and women that do not reflect the realities of the lives of gay, lesbian, and bisexual persons. Such state imposition of gender-based expectations about the roles that men and women should play in their most intimate relationships causes gay, lesbian, and bisexual persons to experience both serious practical harms and dignitary harms of constitutional dimension. This discrimination communicates to gay, lesbian, and bisexual

persons and to the world in which they live that there is something wrong with a core part of their identity, that they do not measure up to what a man or a woman supposedly should be, and that their most important relationships are "less worthy," *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013), than the relationships and marriages of different-sex couples.

This Court should hold that laws that discriminate based on sexual orientation warrant heightened judicial scrutiny and that the laws challenged here cannot withstand such scrutiny.

III. ARGUMENT

Over the last four decades, application of heightened scrutiny to laws that discriminate based on sex has served as an important bulwark in protecting opportunities to seek fulfillment in family life, education, and work, free from the imposition by government of gender-based roles. Gay, lesbian, and bisexual persons, however, are still subject to laws that burden their liberty to enter into relationships, including marriage, with the person to whom they may feel closest—a person of the same sex. Those laws deny gay, lesbian, and bisexual persons full citizenship in profound ways. Rather than serving an important governmental interest, such discriminatory laws typically reflect the gender-role expectation that women will form intimate relationships with men, not with other women, and that men will form such

relationships with women, not with other men, as well as the stereotype that same-sex spouses are inferior parents because they cannot fulfill particular gender roles. The decisions whether and with whom to enter into intimate relationships, including marriage, and whether and with whom to raise children, are central to individual liberty under the Constitution. The government has no authority to restrict those choices based on gender-based expectations, just as it has no authority to codify the roles that men and women fill within marriage on such bases. The Supreme Court repeatedly has held that the government may not justify sex discrimination by an asserted interest in perpetuating traditional gender roles in people's family and work lives. Neither may state actors justify sexual orientation discrimination based upon rigid and exclusionary definitions of the roles that men and women fill within relationships.

"As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). Under the Equal Protection Clause, laws that deny rights or opportunities based on sexual orientation should be subject to heightened scrutiny. In *United States v. Windsor*, the Supreme Court noted that the question whether laws that discriminate based on sexual orientation warrant heightened scrutiny is "still being debated and considered in the

courts." 133 S. Ct. at 2683. In affirming the judgment of the Second Circuit in that case, the Supreme Court let stand the Second Circuit's holding that the federal Constitution requires heightened scrutiny of laws that discriminate based on sexual orientation. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012). The Ninth Circuit has subsequently held that heightened scrutiny applies to sexual orientation discrimination. *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 481 (9th Cir. 2014). In addition, the highest courts of California, Connecticut, Iowa, and New Mexico have held that, under their state constitutions, laws that classify based on sexual orientation are subject to heightened judicial scrutiny. *See Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432-54 (Conn. 2008); *In re Marriage Cases,* 183 P.3d 384, 401 (Cal. 2008); *Griego v. Oliver*, 316 P.3d 865, 879-80 (N.M. 2013).

Were this Court to apply to laws that discriminate based on sexual orientation the same standard of review applicable to sex discrimination, laws denying rights based on sexual orientation would be invalid unless the government could show an "exceedingly persuasive justification" for them, including a showing "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives"

without "rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533 (internal quotation marks and citations omitted; first alteration in original). Utah's and Oklahoma's prohibitions of marriage between same-sex couples cannot withstand such scrutiny.[3]

A. The Supreme Court Adopted Heightened Scrutiny For Laws That Discriminate Based On Sex Because Such Laws Are Frequently Based On Gender Stereotypes.

Again and again, the Supreme Court has recognized that laws that discriminate on the basis of sex typically rely on gender-based expectations about the roles or conduct that is supposedly natural, moral, or traditional for women and men, and that legal enforcement of these stereotypes is incompatible with equal opportunity. Indeed, a repeated refrain runs through modern case law addressing measures that deny rights or

[3] While discrimination on the basis of sexual orientation should be subject to heightened scrutiny, Amici also note that these laws also lack any rational basis and cannot survive even the most deferential form of review, as the district courts found below. *Kitchen v. Herbert*, 2:13-CV-217, 2013 WL 6697874, at *21 (D. Utah Dec. 20, 2013); *Bishop v. U.S. ex rel. Holder*, 04-CV-848-TCK-TLW, 2014 WL 116013, at *25 (N.D. Okla. Jan. 14, 2014). Moreover, were this Court to adopt for laws that discriminate based on sexual orientation the strict level of scrutiny that applies to laws that discriminate on the basis of race and national origin, *e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005), the measures now challenged in the cases before the Court would fail, for they are not narrowly tailored to further a compelling state interest.

opportunities based on sex: Such laws warrant “skeptical scrutiny,” *VMI*, 518 U.S. at 531, because “of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender, or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.” *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (internal quotation marks omitted).

In *Frontiero v. Richardson*, for example, a plurality of the Supreme Court recognized “that our Nation has had a long and unfortunate history of sex discrimination” in which the Supreme Court itself had played a role. 411 U.S. 677, 684 (1973) (plurality). Justice Brennan’s plurality opinion in *Frontiero* noted now-infamous language from an 1873 opinion stating that “‘[m]an is, or should be, women’s protector and defender’”; that women’s “natural and proper timidity and delicacy” render women “unfit[]for many of the occupations of civil life”; and that “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.” *Id.* at 684-85 (quoting *Bradwell v. Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) (rejecting constitutional challenge to Illinois’s refusal on the basis of sex to admit Bradwell to the bar). The *Frontiero* plurality acknowledged that “[a]s a result of notions such as these,

our statute books gradually became laden with gross, stereotyped distinctions between the sexes." 411 U.S. at 685.

Frontiero struck down a military benefits scheme premised on the gender-based expectation that women were financially dependent on their husbands. It directly rejected assumptions that the Supreme Court had relied on not only in that 1873 decision but through the 1960s—assumptions that fundamental differences between women and men, rooted in women's traditional family roles, justified laws limiting opportunities for women and reinforcing gender stereotypes. *See Hoyt v. Florida,* 368 U.S. 57, 62 (1961) (upholding state law that made jury duty registration optional for women because "woman [was] still regarded as the center of home and family life"); *cf. Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (upholding legislation limiting women's work hours because "healthy mothers are essential to vigorous offspring, [and so] the physical well-being of woman becomes an object of public interest").

In *Weinberger v. Wiesenfeld*, the Supreme Court further illuminated how laws based on gender stereotypes arbitrarily harm those who do not conform to those stereotypes. 420 U.S. 636 (1975) [hereinafter "*Wiesenfeld*"]. *Wiesenfeld* held a provision of the Social Security Act that provided for payment of benefits to a deceased worker's *widow* and minor

children, but not to a deceased worker's *widower*, violated the Constitution. *Id.* at 637-38. First, the Court explained that the challenged measure's reliance on the "gender-based generalization" that "men are more likely than women to be the primary supporters of their spouses and children" devalued the employment of women, "depriv[ing] women of protection for their families which men receive as a result of their employment." *Id.* at 645. Second, the challenged provision "was intended to permit women to elect not to work and to devote themselves to the care of children." *Id.* at 648. The measure thereby failed to contemplate fathers such as Stephen Wiesenfeld, a widower who wished to care for his child at home. Rejecting the statute's imposition of gender roles, the Court declared: "It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has . . . raised . . . .'" *Id.* at 652 (citation omitted); *see also Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) [hereinafter "*Goldfarb*"] (finding unconstitutional differential treatment of widows and widowers based on "'archaic and overbroad' generalizations").

As these and other cases illustrate, laws that discriminate on the basis of sex are most typically premised on gender stereotypes—including

stereotypes of the family as necessarily constituted by a woman assuming the role of homemaker and caretaker and a man assuming the role of breadwinner and protector.[4] In their failure to recognize that many men and women either do not wish to or are unable to conform to these roles, such laws arbitrarily limit individuals' ability to make fundamental decisions about how to live their lives. When the law enforces "assumptions about the proper roles of men and women," it closes opportunity, depriving individuals of their essential liberty to depart from gender-based expectations. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) [hereinafter "*Hogan*"]. Accordingly, "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-25.

This long line of Supreme Court decisions make clear that "archaic and overbroad generalizations" cannot justify "statutes employing gender as

[4] *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (finding unconstitutional federal statute providing for support only in event of father's unemployment based on stereotype that father is principal provider "while the mother is the 'center of home and family life'"); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations only on husbands because it "carries with it the baggage of sexual stereotypes"); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (striking down statute assigning different age of majority to girls and boys and stating, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas").

an inaccurate proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). Such "loose-fitting characterizations" are "incapable of supporting . . . statutory schemes . . . premised upon their accuracy." *Craig*, 429 U.S. at 199. By requiring an "exceedingly persuasive" showing of a far closer relationship between a sex classification and a statutory scheme's objective, and by demanding that the objective be important, the Supreme Court rejected the "artificial constraints on an individual's opportunity" imposed by laws resting on imprecise gender stereotypes.[5] *VMI*, 518 U.S. at 533.

B. Laws That Discriminate Based On Sexual Orientation Should Be Subject To Heightened Scrutiny Because Of Their Frequent Basis In Gender Stereotypes.

Just as laws that classify based on sex frequently are based on gender stereotypes or expectations that do not hold true for all men and women, so are laws that discriminate based on sexual orientation. Central among those gender-based expectations are the presumptions that a woman will be attracted to and form an intimate relationship with a man, not with a woman, and that a man will be attracted to and form an intimate relationship with a woman, not with a man. Marriage laws that discriminate based on sexual

[5] Of course, the challenged measures themselves classify on the basis of sex in defining who may enter into marriage. They must be subject to heightened scrutiny for this reason as well, as the *Kitchen* district court found. 2013 WL 6697874, at *20.

orientation rest on those gender-based expectations about the preferences, relationship roles, and capacities of men and women that do not reflect the realities of the lives of gay men, lesbians, and bisexual persons. The courts have rejected such stereotypes as a proper basis for lawmaking with regard to sex. Courts similarly should view gender stereotypes and gender-based expectations with skepticism when reviewing the constitutionality of laws that discriminate based on sexual orientation.

1. Laws That Discriminate Based on Sexual Orientation Are Rooted in Gender Stereotypes or Gender-Based Expectations.

Laws that classify based on sexual orientation typically share with laws that discriminate based on sex a foundation in gender stereotypes or gender-based expectations. Many laws discriminating based on sexual orientation are founded on assumptions that men and women form (or should form) intimate, romantic, or sexual relationships with each other, rather than with persons of the same sex. These assumptions have been at the root of laws prohibiting same-sex intimate conduct, as well as laws regarding family structure that discriminate on the basis of sexual orientation, such as the restrictive Utah and Oklahoma marriage laws that the present lawsuits challenge. Perhaps less apparent, but equally true, is that such gender-based expectations underlie other forms of discrimination

against gay, lesbian, and bisexual people, too.

The notion that stigma and discrimination against gay, lesbian, and bisexual persons are premised on gender-role assumptions is a matter of common experience in our society. "There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination,* 69 N.Y.U. L. Rev. 197, 235 (1994). "Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other." *Id.*; *see also Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women."). Individuals who depart from gender-based expectations are often targeted with antigay animus and slurs, regardless of their actual sexual orientation. Gay, lesbian, and bisexual people regularly experience social disapproval and discrimination that is targeted at their nonconformity with gender-based

expectations—because they are not acting as "real men" or "real women" supposedly do.

Although the linkage between antigay stigma and gender-based expectations is apparent in ordinary life, courts have only recently begun to recognize the legal implications of that linkage. For example, in considering whether gay, lesbian, and bisexual people could find recourse in federal statutes prohibiting discrimination based on sex, courts initially focused on the absence of express mention of sexual orientation in such laws. *E.g.*, *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979), *abrogated by Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001). More recently, however, courts have begun to understand that much of the discrimination that gay, lesbian, and bisexual people experience in the workplace or in educational environments takes the form of hostility toward nonconformance with gender stereotypes—which the Supreme Court recognized twenty-four years ago in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), constitutes discrimination based on sex. *See Prowel v. Wise Business Forms*, Inc., 579 F.3d 285, 290 (3d Cir. 2009) (holding that harassment of a gay man targeting his gender-nonconforming behavior and appearance could constitute sex harassment); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (Pregerson, J.,

concurring) (concluding that gay male employee stated a claim for sex discrimination based on evidence that he was mocked by male co-workers because of his non-conformance with "gender-based stereotypes"); *Nichols*, 256 F.3d at 874-75 (holding that harassment of male employee for failing to act "as a man should act," including being derided for not having sex with female colleague, constituted actionable sex discrimination based on nonconformity with gender stereotypes); *Koren v. Ohio Bell Tel. Co.*, 894 F.Supp.2d 1032 (N.D. Ohio Aug. 14, 2012) (finding that allegation manager harassed employee because he took his male spouse's surname stated claim based on sex stereotyping); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219 (D. Conn. 2006) (explaining that harassment in the form of antigay epithets could be actionable under Title IX's prohibition of sex discrimination because it could be based on plaintiff's failure to conform to gender stereotypes).

Courts in the Tenth Circuit, too, have confirmed that discrimination based on sexual orientation often may be linked to non-conformance with gender expectations, and, as such, can be actionable as sex discrimination. *See, e.g.*, *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (finding that claim that male student who was subjected to antigay slurs, physical abuse, and rumors about his

masturbation habits because of his "perceived lack of masculinity" and because he "did not act as a man should act" could proceed to trial on the theory of gender stereotyping under Title IX); *cf. Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (noting that a plaintiff could "satisfy [the] evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes").

Federal agencies also have recently emphasized that much discrimination experienced by gay, lesbian, and bisexual people is discrimination based on nonconformity with gender-based expectations. For example, the Civil Rights Division of the United States Department of Justice recently issued guidance explaining that federal employment, housing, education, and other statutes that prohibit discrimination based on sex "protect[] all people (including LGBTI people) from . . . discrimination based on a person's failure to conform to stereotypes associated with [a] person's real or perceived gender." U.S. Dep't of Justice, Civil Rights Div., Protecting the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Individuals, http://www.justice.gov/crt/publications/

lgbtibrochure.pdf (last visited Mar. 3, 2014).[6] The U.S. Equal Employment Opportunity Commission has explained that Title VII's "broad prohibition of discrimination 'on the basis of . . . sex' will offer coverage to gay individuals in certain circumstances," including where an employee is discriminated against "based on the perception that he does not conform to gender stereotypes of masculinity." *Couch v. Chu*, Appeal No. 0120131136, 2013 WL 4499198, at *7-8 (E.E.O.C. Aug. 13, 2013) (collecting cases from every circuit post-*Price Waterhouse* to show non-conformance with gender stereotypes constitutes sex discrimination and noting this principle applies to gay, lesbian, and bisexual people); *Veretto v. U.S. Postal Service*, Appeal No. 0120110873, 2011 WL 2663401, at *3 (E.E.O.C. July 1, 2011) (holding that discrimination based on sex stereotype that a man should not marry

[6] The United States Department of Education's Office for Civil Rights similarly has issued guidance explaining that harassment of students "on the basis of their [lesbian, gay, bisexual, or transgender] status," is prohibited by Title IX, 20 U.S.C. § 1681 *et seq.*, when such harassment is based on "sex-stereotyping." U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter: Harassment and Bullying at 7-8 (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (last visited Mar. 3, 2014). The Department of Housing and Urban Development has similarly construed the sex discrimination prohibition in the Fair Housing Act, 42 U.S.C. 3601 *et seq.* *See* Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662-01 (Feb. 3, 2012) (to be codified at 24 C.F.R. Parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982) ("[T]he Fair Housing Act's prohibition of discrimination on the basis of sex prohibits discrimination against LGBT persons in certain circumstances, such as those involving nonconformity with gender stereotypes.").

another man rather than a woman can constitute discrimination based on sex); *Castello v. U.S. Postal Service*, Appeal No. 0120111795 2011 WL 6960810, at *2-3 (E.E.O.C. Dec. 20, 2011) (concluding that discrimination based on sex stereotype that women should only have sexual relationships with men can constitute discrimination based on sex); *Culp v. Dep't of Homeland Security*, Appeal No. 0720130012, 2013 WL 2146756, at *3-4 (E.E.O.C. May 7, 2013) (finding allegation of sexual orientation discrimination was a claim of sex discrimination because supervisor was motivated by his attitudes about sex stereotypes that women should only have relationships with men).

Just as courts and agencies have recognized in the context of *statutory* antidiscrimination protections that *Price Waterhouse*'s anti-stereotyping principle can serve as a basis for protecting gay, lesbian, and bisexual people from discrimination, so must courts consider the implications of the *constitutional* protections against sex discrimination—and the anti-stereotyping principle on which these protections rest—for laws that discriminate based on sexual orientation. Laws that discriminate based on sexual orientation are, at their core, based on "'fixed notions'" about the roles, preferences, and capacities of women and men of the sort that have been repeatedly rejected in sex discrimination cases under the Equal

Protection Clause. *VMI*, 518 U.S. at 541 (quoting *Hogan*, 458 U.S. at 725). Such discrimination seeks to impose gender-based expectations on how men and women structure their personal and family lives.

2. Government Action That Discriminates Based on Sexual Orientation Warrants Heightened Scrutiny.

Gay, lesbian, and bisexual people long have had important life opportunities foreclosed by state action seeking to enforce gender-based stereotypes in connection with the most intimate of human relationships. As with measures seeking to enforce outdated gender stereotypes on the basis of sex, the courts should require at least "an exceedingly persuasive justification," *id.*, for classifications based on sexual orientation. Heightened scrutiny for such laws follows straightforwardly from precedents identifying relevant factors in considering whether a particular classification warrants close judicial scrutiny, rather than simple deference to majoritarian lawmaking. *See generally United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting several considerations that "may call for . . . more searching judicial inquiry"); *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973) (reciting "traditional indicia of suspectness"). That is so because measures discriminating on the basis of sexual orientation typically bear little or no relation to the actual abilities, capacities, or preferences of the persons that such measures constrain or burden.

Heightened scrutiny is particularly appropriate in this context because laws that impose gender-role expectations in contravention of the actual preferences of individuals offend the central liberty interest on which the Supreme Court focused in *Lawrence* and which it acknowledged in *Windsor*. In *Lawrence*, the Court recognized that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution *allows homosexual persons the right to make this choice*." 539 U.S. at 567 (emphasis added); *Windsor*, 133 S. Ct. at 2675. In *Lawrence,* the Supreme Court reaffirmed that "'matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment,'" and that "'[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.'" 539 U.S. at 573 (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992)). The Court in *Lawrence* was emphatic that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do," *id.* at 574, and in *Windsor*, the Court expressly noted that state marriage laws permitting same-sex couples to marry "reflect[] . . . evolving understanding of the

meaning of equality," 133 S. Ct. at 2692-93. The liberty principle so fundamental to the Court's analysis in *Lawrence* and the related equal opportunity principle that the Equal Protection Clause enshrines are incompatible with a presumption of constitutionality for the legally enforced expectation that men and women should enter into intimate relationships only with each other. Such laws arbitrarily deny opportunities and legal protections to individuals who are capable of fulfilling the responsibilities of marriage and who would benefit from legal protections accompanying marriage; accordingly, they must be subject to close scrutiny.

An essential component of the Constitution's equal protection guarantee is that the government cannot exclude individuals from important social statuses, institutions, relationships, or legal protections because of a characteristic that is irrelevant to participation in such statuses, institutions, relationships, or protections. *E.g.*, *Frontiero*, 411 U.S. at 686. The courts should therefore look with skepticism upon laws that restrict access to marriage based on overbroad gender stereotypes unrelated to the actual capacity of persons to engage in mutual care and protection, to share economic risks, and to raise children together—capacities that do not turn on sexual orientation. Because legal enforcement of overbroad gender stereotypes arbitrarily constrains and determines individuals' most

fundamental and personal choices about their own lives, equal protection requires vigorous interrogation of any such government action.

C. Laws Excluding Same-Sex Couples From Marriage Cannot Survive Heightened Scrutiny.

Laws related to marriage were once a leading example of sex-based rules enforcing separate gender roles for men and women and depriving persons of equal opportunities. As the harm arising from laws requiring adherence to gender stereotypes has been recognized, sex-based marriage rules have been almost completely dismantled, with one glaring exception: many states continue to exclude same-sex couples from marriage. The Equal Protection Clause promises gay, lesbian, and bisexual persons, as it promises all persons, "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society." *VMI*, 518 U.S. at 532. Subjecting laws, including marriage laws, that discriminate based on sexual orientation to heightened scrutiny is appropriate so that each person may have equal opportunity to aspire to and to experience a relationship with the person with whom he or she most wishes to build a life.

1. Heightened Scrutiny Has Been Key to Dismantling Sex-Specific Marriage Laws That Once Enforced Gender Stereotypes.

Historically, "the husband and wife [were] one person in law: . . . the very being or legal existence of the woman [was] suspended . . . or at least

[was] incorporated and consolidated into that of the husband." 1 William Blackstone, *Commentaries on the Laws of England* 442 (3d ed. 1768); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11 (2000). For example, wives could not contract or dispose of their assets without their husbands' cooperation. Even after the Married Women's Property Acts and similar laws gave married women increased control over their property in the nineteenth century, many state and federal statutes continued to rely on the notion that marriage imposed separate (and unequal) roles on men and women. *See generally* Deborah A. Widiss, *Changing the Marriage Equation*, 89 Wash. U. L. Rev. 721, 735-39 (2012). Indeed, courts routinely invalidated efforts by spouses to "alter the 'essential' elements of marriage" through contractual arrangements seeking to modify its "gender-determined aspects." Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality 9, 15 & n.24 (1991).

An extensive legal framework continued to set out gender-specific rules relating to marriage well into the second half of the twentieth century. In 1971, for example, an appendix to the appellant's brief submitted by then-attorney Ruth Bader Ginsburg in *Reed v. Reed* listed numerous areas of state law that disadvantaged married women, including: mandatory disqualification of married women from administering estates of the

intestate; special qualifications on married women's right to engage in independent business; limitations on the capacity of married women to become sureties; differential marriageable ages; and domiciles of married women following that of their husbands. Brief for Appellant at 69-88 (App.), *Reed v. Reed,* 404 U.S. 71 (1971) (No. 70-4) (collecting state laws in each area). Federal law also persisted in attaching different legal consequences to marriage for men and women. For example, across a variety of federal programs, benefits were provided to wives on the assumption that they were financially dependent on their husbands, but denied to husbands altogether or unless they could prove financial dependence on their wives. *See, e.g.*, *Goldfarb*, 430 U.S. at 201; *Wiesenfeld*, 420 U.S. at 643-44.

In the intervening years, courts applying heightened scrutiny have played a key role in dismantling the legal machinery enforcing separate gender roles within marriage, based on the principle that such legally enforced roles do not properly reflect individuals' "ability to perform or contribute to society" and thus violate "'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)); *see also, e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455,

458-60 (1981) (invalidating Louisiana statute giving the husband as "head and master" the right to sell marital property without his wife's consent); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147-48 (1980) (rejecting stereotypes regarding wives' financial dependency in the context of differential workers' compensation benefits); *Westcott*, 443 U.S. at 89 (finding unconstitutional a statute's limitation of social security benefits to unemployed fathers, rather than to both fathers and mothers); *Orr*, 440 U.S. at 281-82 (rejecting stereotypes regarding wives' financial dependency in the context of alimony); *Goldfarb*, 430 U.S. at 206-07 (rejecting "'role-typing society has long imposed'" (citation omitted)); *Duncan v. Gen. Motors Corp.*, 499 F.2d 835, 838 (10th Cir. 1974) (finding that "intangible benefits" forfeited through "loss of consortium" applied equally to husband and wife who "have equal rights in the marriage relation."). As a result, men and women entering into marriage today have the liberty under law to determine for themselves the responsibilities each will shoulder regardless of whether these roles conform to traditional arrangements.

2. Like Other Marriage Laws Enforcing Gender-Based Expectations, Laws Excluding Same-Sex Couples From Marriage Cannot Survive Constitutional Scrutiny.

Although the law no longer expressly imposes separate roles on married men and women, marriage laws that discriminate based on sexual

orientation continue to rest on gender stereotypes about the preferences, relationship roles, and capacities of men and women that do not reflect the realities of the lives of many individuals. For example, proponents of Utah's Amendment 3 have argued that preventing "genderless marriage" is necessary to "maintain[] public morality." Plaintiff's Motion for Summary Judgment at XVI, *Kitchen*, No. 2:13-CV-00217-RJS (D. Utah Oct. 11, 2013) (quoting Utah Voter Information Pamphlet General Election November 2, 2004). Such justifications reflect gender stereotyping on which the courts must focus a skeptical eye just as the belief that it is "moral" or "natural" for women to and men to play separate (and unequal) roles within marriage.

Both Utah and Oklahoma also argue that "genderless marriage" will move-away from a "child-centric" to an "adult-centric" focus. Yet, as the Supreme Court has recognized, marriage has many core purposes other than procreation, such as emotional support, public commitment, and personal dedication as well as tangible benefits such as social security and property rights. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (holding that prison inmates must be allowed to marry, even if their marriages are never consummated). And, of course, the state is without power to compel procreation within marriage. *See, e.g.*, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 849 (1994) ("[T]he Constitution

places a limit on a State's right to interfere with a person's most basic decisions about family and parenthood. . . as well as bodily integrity") (collecting cases). Cases holding that married couples have a right to use contraception, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and that women cannot be required to notify their spouses to obtain an abortion, *Casey*, 505 U.S. at 898, further illustrate that marriage and procreation are not coextensive. Indeed, a description of marriage as based primarily on procreation is a description of an institution that most married couples would fail to recognize.

Similarly, the contention that permitting same-sex couples to marry could have harmful effects on child welfare because children need to be raised by both a mother and a father also rests on pervasive gender stereotypes. Courts repeatedly have struck down laws that discriminate based on the assumption that mothers and fathers predictably play different roles as parents, rejecting "any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 389 (1979); *see also Wiesenfeld*, 420 U.S. at 652 ("It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female."); *Stanley v. Illinois*, 405 U.S. 645, 646-47 (1972) (finding unconstitutional a state's presumption that

single fathers were unfit to raise their children where single mothers were presumed fit to raise their children). Same-sex couples, of course, may become parents through adoption, assisted reproduction, or surrogacy, or may be raising children from prior relationships.[7] Generalizations about how mothers and how fathers typically parent are an insufficient basis for discriminatory laws even when these generalizations are "not entirely without empirical support." *Wiesenfeld*, 420 U.S. at 645. Here, evidence does not support the notion that different-sex couples are more effective in parenting than same-sex couples. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) (finding that research supporting the conclusion that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted . . . is accepted beyond serious debate in the field of developmental psychology").

Indeed, preventing same-sex couples from marrying in Utah and Oklahoma inflicts serious harms on same-sex couples and their children.

[7] Indeed, in Salt Lake City, same-sex couples are already raising the highest percentage of children out of all metro areas in the United States with populations above 1 million, despite Utah's ban on in-state adoptions by cohabiting but non-married couples. *See* The Williams Institute, INFOGRAPHIC: % of Same-sex Couples Raising Children in Top Metro Areas (MSAs), http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/infographic-msas-may-2013 (last updated Jul. 26, 2013); Utah Code § 78B-6-117 (2008).

Those harms include not only denial of marital benefits and responsibilities under law, but also serious dignitary harms, which, as the Supreme Court emphasized in *Windsor*, are of constitutional dimension. 133 S. Ct. at 2694-95 (explaining how the refusal of the federal government to recognize the marriages of same-sex couples "demeans" the members of such couples and "humiliates" their children). *Windsor* instructs that, in evaluating for constitutional purposes the harms that discriminatory marriage laws inflict, dignitary harms are of great moment.

One of the most serious ways in which laws that exclude same-sex couples from marriage demean gay, lesbian, and bisexual persons is by the enforcement of gender-based expectations in the roles that men and women play in the most intimate of relationships. State enforcement of such gender stereotypes and gender-based expectations—through exclusionary marriage laws and other discriminatory government action—communicates to gay, lesbian, and bisexual persons, their children, and to the community in which they live that there is something wrong with a core part of their identity and being. Such government action communicates that gay, lesbian, and bisexual persons do not measure up to what a man or a woman should be and that their most important relationships are "less worthy," *Windsor*, 133

U.S. at 2696, than the relationships and marriages of different-sex couples. Such discrimination cannot survive heightened scrutiny.

IV. CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court hold that the challenged Utah and Oklahoma marriage laws must be subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment, that the challenged marriage laws cannot survive such scrutiny, and that the judgments of the District Court in this case must be affirmed.

Dated: March 4, 2014

Respectfully submitted,

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APPENDIX

National Women's Law Center

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

Other Women's Legal Organizations

Colorado Women's Bar Association

The Colorado Women's Bar Association ("CWBA") is a Colorado nonprofit corporation that was formed in 1978 for the purpose of promoting women in the legal profession and advancing the interests of women generally. To that end, the CWBA takes an active role in monitoring national, state, and local legislation and case law; reviewing constitutional developments; and advocating before legislative and judicial bodies with regard to issues that significantly impact the interests of women.

The CWBA's interest in this case arises because, as discussed in the brief, sexual orientation discrimination is often based on the perpetuation of gender stereotypes, including traditional gender roles and views of marriage, that are harmful to women.

Equal Rights Advocates

Equal Rights Advocates ("ERA") is a national nonprofit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and education and advance equal opportunity

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

Legal Momentum

Legal Momentum, formerly NOW Legal Defense and Education Fund, is the nation's oldest women's legal rights organization. Legal Momentum has appeared before courts in many cases concerning the right to be free from sex discrimination and gender stereotypes, including appearing as counsel in *Nguyen v. INS*, 533 U.S. 53 (2001), and *Miller v. Albright*, 523 U.S. 420 (1998), and as Amicus Curiae in *United States v. Virginia* (*VMI*),

518 U.S. 515 (1996), and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Legal Momentum views discrimination on the basis of sexual orientation as a form of sex discrimination, and strongly supports the rights of lesbians and gay men to be free from discrimination based on, among other things, gender stereotyping.

Legal Voice

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

National Association of Women Lawyers

The National Association of Women Lawyers ("NAWL") is the oldest women's bar association in the United States. Founded in 1899, the association promotes not only the interests of women in the profession but also women and families everywhere. That has included taking a stand opposing gender stereotypes in a wide range of areas, including Title IX and Title VII. NAWL is proud to have been a signatory to the civil rights amicus brief in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), in which the Massachusetts Supreme Judicial Court found that denial of marriage licenses to same-sex couples violated state constitutional guarantees of liberty and equality. Now, a decade later, NAWL is proud to join in this amicus brief and stand, once again, for marriage equality.

National Partnership for Women & Families

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has

been instrumental in many of the major legal changes that have improved the lives of women and their families. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious discrimination and has filed numerous briefs as Amicus Curiae in the U.S. Supreme Court and in the Federal Courts of Appeals to protect constitutional and legal rights.

Southwest Women's Law Center

The Southwest Women's Law Center is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential, including by eliminating gender bias, discrimination, and harassment. These cases could help prevent discrimination in matters involving the most intimate and personal choices that people make during their lifetime. Personal intimate choices that individuals make for themselves are central to the liberty protected by the Fourteenth Amendment.

Women's Law Project

Founded in 1974, the Women's Law Project (WLP) is a nonprofit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. For forty years, WLP has engaged in high-impact litigation, advocacy, and education challenging discrimination rooted in gender stereotypes. WLP represented the plaintiffs in *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992), striking down the Pennsylvania Abortion Control Act's husband notification provision as "repugnant to this Court's present understanding of marriage and the nature of the rights secured by the Constitution." WLP served as counsel to Amici Curiae in *T.B. v. L.R.M.,* 786 A.2d 913 (Pa. 2001), which conferred third-party standing on parents in same-sex relationships to sue for partial custody or visitation of the children they have raised; and *In re Adoption of R.B.F.,* 803 A.2d 1195 (Pa. 2002), which recognized that the Pennsylvania Adoption Act permits second-parent adoption in families headed by same-sex couples. Together with Legal Momentum, WLP represented women in non-traditional employment as Amici Curiae in *Prowel v. Wise Business Forms, Inc.,* 579 F.3d 285 (3d Cir. 2009), in which the Court of Appeals reinstated a Title VII sex

discrimination claim involving concurrent evidence of sexual orientation discrimination. WLP also joined as Amici Curiae in *United States v. Windsor*, 133 S.Ct. 2675 (2013), in which the U.S. Supreme Court struck down the Defense of Marriage Act's definition of marriage for being in violation of the Fifth Amendment of the U.S. Constitution. Because harmful gender stereotypes often underlie bigotry against lesbian and gay people, it is appropriate to subject classifications based on sexual orientation to heightened judicial scrutiny.

Williams Institute Scholars of Sexual Orientation and Gender Law

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

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6,786 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: March 4, 2014

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) the hard copies submitted to the Clerk of the Court are exact copies of the ECF submission;

(3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection, and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2014, I electronically filed the foregoing amicus curiae brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are represented by registered CM/ECF user and that service will be accomplished by the CM/ECF system.

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