Nos. 2011-17357, 2011-17373

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SMITHKLINE BEECHAM CORPORATION, DBA GLAXOSMITHKLINE,
PLAINTIFF-APPELLEE/CROSS-APPELLANT,

v.

ABBOTT LABORATORIES,
DEFENDANTS-APPELLANT/CROSS-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 4:07-CV-05702 (Hon. Claudia Wilken)

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL AND TWELVE OTHER LEGAL AND PUBLIC INTEREST ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLEE SMITHKLINE BEECHAM CORPORATION DBA GLAXOSMITHKLINE AND IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

None of the *amici* has a parent corporation and no corporation owns 10% or more of any of *amici*'s stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici are a coalition of twelve public interest legal organizations and advocacy groups committed to protecting the equal rights of all women and minorities in the United States, including African Americans, Latinos, Asian Americans and Pacific Islanders, women, and lesbian, gay, bisexual, and transgender individuals.[2] *Amici* submit this brief to urge the Court to ensure that the Constitution's guarantee of equal protection is fully realized in the administration of justice by applying *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny to prohibit peremptory challenges based on a prospective juror's sexual orientation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Lesbians and gay men have suffered a long history of discrimination in both the public and private spheres. As with other groups targeted with invidious discrimination, far too often discrimination against lesbians and gay men has found its way into the courtroom, denying them equal access to the courts and an equal opportunity to participate in civic life. This is apparent in cases like the instant

[1] The parties have consented to the filing of this brief. No party's counsel authored this brief; no party or party's counsel contributed money to fund this brief; and no person – other than *amici curiae* – contributed money to fund preparation and submission of this brief.

[2] A brief description of each *amicus* is included herein as Appendix A.

case where a prospective juror was excluded from the venire solely because of his sexual orientation. Such invidious discrimination is an affront to the core principles of equal protection enunciated in well-established Supreme Court precedent. *See, e.g. J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

In *Batson v. Kentucky*, the U.S. Supreme Court held that the Equal Protection Clause precludes the use of peremptory challenges to strike prospective jurors because of their race. 476 U.S. 79 (1986). The Court has explained that, although no one has an absolute right to sit on the jury, once summoned for jury service prospective jurors "have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B.*, 511 U.S. at 128, 129. Since then, *Batson* has evolved to prohibit peremptory challenges based on any classification that warrants heightened judicial scrutiny. *See J.E.B.*, 511 U.S. at 128-129 (collecting cases); *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995). Although the Ninth Circuit has twice assumed without deciding that *Batson* applies to sexual orientation-based peremptory challenges, the question remains an open one. *See United States v. Osazuwa*, Case No. 10-50109, 2011 U.S. App. LEXIS 16813 (9th Cir. 2011), *cert. denied*, 2012 U.S. LEXIS 1329 (2012); *Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996).

The present case requires that the Court at last resolve the issue. *Amici* urge the Court to hold that, under the Supreme Court's logic and reasoning in *Batson* and its progeny, peremptory challenges based on sexual orientation violate the constitutional guarantee of equal protection. As Plaintiff-Appellee GlaxoSmithKline (GSK) asserts in its initial brief, Dkt. 20-1, there are three different bases under equal protection analysis that warrant extending *Batson* to sexual orientation. While *amici* agree with all three arguments, this brief principally focuses on one: under traditional equal protection analysis, classifications based on sexual orientation should be considered suspect or quasi-suspect and be provided heightened judicial scrutiny.

The level of scrutiny required for classifications based on sexual orientation is currently an open question in the Ninth Circuit. The Court's decision in *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (finding that rational basis review applies to classifications based on sexual orientation), was premised upon then-controlling precedent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was subsequently overruled by *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).[3] As such, this Court should evaluate the level of review

[3] *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (where an intervening decision of a higher court is clearly irreconcilable with a Ninth Circuit decision, lower courts "should consider themselves bound by the intervening higher authority and reject the prior opinion of [the Ninth Circuit] as

for sexual orientation classifications under the traditional analysis for determining whether a classification is suspect. When this is done, it is clear that discrimination based on sexual orientation must be subjected to heightened judicial review. Both the Executive Branch and at least one district court within this Circuit have recently agreed.[4]

Any result other than applying *Batson* to preclude peremptory strikes based on a prospective juror's sexual orientation would be in direct contravention of core equal protection principles and serve only to perpetuate discrimination against lesbians and gay men. The discrimination at issue here is particularly harmful, because it reinforces historical invidious discrimination within the court system and undermines the integrity of the judicial system.

ARGUMENT

I. A PEREMPTORY CHALLENGE BASED ON A PROSPECTIVE JUROR'S SEXUAL ORIENTATION VIOLATES THE EQUAL PROTECTION CLAUSE.

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having been effectively overruled").

[4] Letter from Attorney General to Congress on Litigation Involving the Defense of Marriage Act, *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (hereinafter "Attorney General Letter to Congress"); *Golinski v. Office of Pers. Mgmt.*, No. 10-00257, 2012 U.S. Dist. LEXIS 22071 (N.D. Cal. Feb. 22, 2012).

A. As Established in *Batson v. Kentucky* and Its Progeny, Peremptory Challenges May Not Be Based on Characteristics That Give Rise to Heightened Judicial Scrutiny.

Peremptory challenges have a long history in our judicial system, dating back to English common law.[5] The purpose of a peremptory challenge is to allow attorneys to remove a prospective juror from the venire without cause.[6] The Supreme Court has recognized the utility of the peremptory challenge, but has made clear that it is a privilege, not a right, and its reach is not without limits – peremptory challenges must be exercised within the constraints of the Equal Protection Clause.

In *Batson*, the Supreme Court held that the Equal Protection Clause prohibits the use of peremptory challenges to strike potential jurors based solely on the juror's race. 476 U.S. at 89. The Court acknowledged that peremptory challenges may generally be used "for any reason at all" and without explanation, but the Court concluded that *voir dire* – like all government action – is "subject to the commands of the Equal Protection Clause." *Id*. As such, the Constitution will not tolerate racial discrimination simply because it is cloaked as a peremptory

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[5] John J. Neal, *Striking Batson Gold at the End of the Rainbow?: Revisiting Batson v. Kentucky in Light of Romer v. Evans and Lawrence v. Texas*, 91 Iowa L. Rev. 1091, 1095 (March 2006).

[6] Neal, *supra* note 5, at 1093.

challenge. As with any race-based classification by the government, the Court explained, the judiciary must closely scrutinize peremptory challenges that appear to be based solely on race to ensure against discrimination.[7] *Batson*, 476 U.S. at 93-94.

Since *Batson*, the Court has repeatedly reaffirmed its "commitment to jury selection procedures that are fair and nondiscriminatory." *J.E.B.*, 511 U.S. at 128 (collecting cases). The Court has applied *Batson* to both criminal and civil proceedings.[8] *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson*, 500 U.S. 614 (1991). And, in *J.E.B. v. Alabama ex rel T.B.*, the Court extended *Batson* beyond race-based peremptory challenges to prohibit peremptory challenges used to remove prospective jurors because of their gender. *J.E.B.*, 511 U.S. at 129, 136-37

[7] In *Batson*, the Supreme Court established a three part test for evaluating a claim that counsel made a peremptory strike in a manner that violated the Equal Protection Clause. 476 U.S. at 96-98. First, the party raising the objection to the peremptory challenge must make a *prima facie* showing that the opposing party exercised the strike for a discriminatory purpose. If the requisite showing has been made, the burden then shifts to the party exercising the peremptory challenge to articulate a neutral, nondiscriminatory reason for striking the juror. Finally, the court must then determine whether the objecting party has met her burden of proving purposeful discrimination given the totality of the circumstances. *Id.*

[8] In civil proceedings, the parties become government actors when exercising peremptory challenges – thereby invoking protections under the U.S. Constitution. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 616-617 (1991) (explaining that, where the underlying case arises in the United States District Court, the equal protection component of the Fifth Amendment's Due Process Clause applies; where it arises in state court, the equal protection provision of the Fourteenth Amendment applies).

(applying heightened scrutiny and finding that "gender-based peremptory challenges are not substantially related to an important government objective"). The circuit courts, including the Ninth Circuit, have interpreted *J.E.B.* as extending *Batson* to prohibit peremptory challenges of a prospective juror based on *any* classification entitled to heightened scrutiny under equal protection analysis. *See, e.g.*, *Bowles v. Sec'y for the Dept. of Corrections*, 608 F.3d 1313, 1316 (11th Cir. 2010), *cert. denied*, 131 U.S. S.Ct. 652 (2010) (the Supreme Court "has drawn the line of application [of *Batson*] at distinctive groups entitled to heightened scrutiny"); *Santiago-Martinez*, 58 F.3d at 423 (declining to apply Batson to peremptory challenges of obese jurors because obesity is not a classification subject to heightened scrutiny); *United States v. Watson*, 483 F.3d 828, 831 (D.C. Cir. 2007) ("A member of a class entitled to heightened scrutiny … receives protection under the rule established in *Batson*."). *See also Davis v. Minnesota*, 511 U.S. 1115, 1117 (1994) (Thomas, J. dissenting from denial of certiorari) (opining that, pursuant to *J.E.B.*, it would be reasonable to apply *Batson* "to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause.").

Of particular relevance here, the *J.E.B.* Court paid special attention to the long history of discrimination against women and looked to its equal protection

jurisprudence requiring heightened judicial scrutiny of classifications based on sex. *See*, *J.E.B.*, 511 U.S. at 131-37. The Court recognized that, as was true for African Americans, women suffered a long history of discrimination that included laws barring them from participating in all aspects of society, including civic life and the democratic process. *J.E.B.*, 511 U.S. at 136. Consistent with *Batson*, the Court concluded that the "long and unfortunate" history of discrimination against women warrants heightened judicial scrutiny of peremptory challenges based on a prospective juror's sex. *J.E.B.*, 511 U.S. at 136-37.

While the Court acknowledged, as it had in previous cases, that no one has a right to serve on a jury, it reaffirmed that once an individual is summoned for jury service, he or she has "an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B.* at 128, 129. The Court explained,

> All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.' It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation.

J.E.B., 511 U.S. at 141-42 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). Such discrimination, the Court found, must not be tolerated. *J.E.B.* at 129.

Applying *Batson* to preclude peremptory challenges based on sexual orientation is consistent with, and warranted by, the logic and reasoning of *J.E.B.* and the cases upon which it relied. Indeed, as explained in greater detail below, lesbians and gay men have suffered a long history of discrimination at the hands of the federal, state, and local governments. Far too often, as is the case here, sexual orientation-based discrimination extends into the judicial system and precludes lesbians and gay men from participating in our democratic institutions. As with race- and sex-based peremptory challenges, allowing prospective jurors to be precluded from the venire because of their sexual orientation serves no purpose other than to perpetuate and reinforce invidious discrimination. Not only is this harmful to the juror, the litigants, and the judicial system, it directly contravenes the Equal Protection Clause and should not be permitted.

B. Pursuant to *Batson v. Kentucky* and Its Progeny, Peremptory Strikes Based on Sexual Orientation Are Impermissible Because Such Classifications Warrant Heightened Judicial Scrutiny.

Generally, government classifications – whether embodied in law or other governmental action – are presumed valid if rationally related to a legitimate

government purpose. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Certain classifications, however, carry a particularly high risk of being employed illegitimately and are therefore treated as "suspect" or "quasi-suspect." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *Cleburne*, 473 U.S. at 440 (certain legal classifications must be considered "suspect" or "quasi-suspect" 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."). *See also Romer v. Evans*, 517 U.S. 620, 629 (1996) (noting that, to date, the Supreme Court has accorded heightened scrutiny under equal protection analysis to classifications based on race, national origin, sex, religion, illegitimacy, and alienage). In such cases, courts must examine the classification under heightened judicial review. *See Cleburne*, 473 U.S. at 440.

The issue of whether sexual orientation classifications warrant heightened scrutiny remains unsettled in the Ninth Circuit and the Supreme Court. Although this issue was recently before the Ninth Circuit in *Perry v. Brown*, the Court found it unnecessary to decide whether heightened scrutiny applies to classifications based on sexual orientation, because the ballot initiative at issue in that case could

not survive even rational basis review. No. 10-16696, 11-16577, 2012 U.S. App. LEXIS 2328 at *66-67, 83 n.19 (9th Cir. Feb. 7, 2012) (finding the case analogous to *Romer v. Evans* and employing rational basis review under an analysis similar to that used in *Romer*). *See also Diaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011) ("We do not need to decide whether heightened scrutiny might be required.").

Prior Ninth Circuit cases also do not answer the question of whether heightened scrutiny applies to sexual orientation. As mentioned above, while *High Tech Gays* addressed the issue, that precedent can no longer be considered sound. Indeed, the court relied on the since overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and concluded that laws classifying lesbians and gay men for adverse treatment are not subject to heightened scrutiny "because homosexual conduct can . . . be criminalized." *High Tech Gays*, 895 F.2d at 571. *Lawrence* renounced that premise: "*Bowers* was not correct when it was decided, and it is not correct today." 539 U.S. at 578.

High Tech Gays also relied on the mistaken assumption – now authoritatively rejected by the Supreme Court – that sexual orientation is merely "behavioral," rather than the sort of deeply rooted, immutable characteristic that would warrant heightened protection from discrimination. *High Tech Gays*, 895 F.2d at 573-74 (holding that the behavior of a group is "irrelevant to their

identification"). The Supreme Court has rejected this artificial distinction, noting that its "decisions have declined to distinguish between status and conduct in th[e] context" of sexual orientation. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010). The Supreme Court's rejection of the legal foundations on which *High Tech Gays* rested renders that decision and its progeny no longer controlling and the appropriate level of scrutiny an open question. *See Miller*, 335 F.3d at 900.[9]

Accordingly, this Court should look to the Supreme Court's well-established framework for determining whether a classification should be treated with suspicion and subjected to heightened scrutiny. *See, e.g. United States v. Virginia*, 518 U.S. 515, 531-32 (1996); *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). The Supreme Court consistently has applied heightened scrutiny where the classified group has suffered a history of discrimination, and the classification has no bearing on a

[9] The Ninth Circuit also did not decide this issue in *Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008), challenging discharge under the military's "Don't Ask, Don't Tell" ("DADT") policy. *Witt* did not involve a claim to heightened scrutiny based on a sexual orientation-based equal protection claim, but rather a claim to heightened scrutiny based on the deprivation of a due process right. *Id.* at 824 n. 4 (Canby, J., concurring and dissenting). Accordingly, *Witt* did not decide whether rational basis review was proper for sexual orientation classifications under the Equal Protection Clause. Instead, the court merely noted in a single sentence in *dicta* – and in the context of the military, where judicial deference "is at its apogee" – that, *if* rational basis review were applied, DADT would survive that inquiry. *Id.* at 821.

person's ability to perform in society. *See Murgia*, 427 U.S. at 313 (heightened scrutiny is warranted where a classified group has "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."); *United States v. Virginia*, 518 U.S. at 531-32; *Cleburne*, 473 U.S. at 440-41. In addition, the Supreme Court has occasionally, but not always, considered whether the group is a minority or politically powerless, and whether the defining characteristic is "immutable" or beyond the group member's control. *See Bowen*, 483 U.S. at 602; *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

Although the first two considerations are central to finding that a classification is suspicious and should be afforded heightened scrutiny, the Supreme Court has extended heightened scrutiny even where the latter two considerations were absent. *See, e.g. Nyquist v. Mauclet*, 432 U.S. 1, 7-9 n.11 (1977) (treating lawful permanent aliens as a suspect class even though they may opt out of that class voluntarily); *Frontiero v. Richardson*, 411 U.S. 677, 685-86 n.17 (1973) (heightened scrutiny applies to women even though women do not constitute a small and powerless minority).

As demonstrated below, and as concluded by members of this Court, by district courts within the Circuit, by several state supreme courts, and by the

Executive Branch, sexual orientation satisfies all of these considerations, and heightened scrutiny should thus be applied to classifications based on sexual orientation. *See, e.g.*, *Watkins v. United States Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); *Golinski v. United States Office of Pers. Mgmt.*, No. 10-00257, 2012 U.S. Dist. LEXIS 22071 at *48 (N.D. Cal. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *affirmed* by 2012 U.S. App. LEXIS 2328 (9th Cir. 2012) (upholding the decision under rational basis review); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 43 Cal. 4th 757, 841-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 175-227 (Conn. 2008). *See also* Attorney General Letter to Congress, *supra* note 4 ("[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny").

1. Lesbians and Gay Men Have Experienced a History of Discrimination.

Lesbians and gay men have experienced a history of purposeful unequal treatment both in the public and private spheres. The Ninth Circuit, along with a number of other courts, has previously recognized that lesbians and gay men have suffered a lamentable history of pervasive discrimination. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (observing that defendants would be "hard pressed to deny that gays and lesbians have experienced

discrimination in the past in light of the Ninth Circuit's ruling in *High Tech Gays*"); *Watkins*, 875 F.2d at 724 (Norris, J., concurring). *See also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., and Marshall, J., dissenting from denial of certiorari) ("homosexuals have historically been the object of pernicious and sustained hostility"); *Golinski*, 2012 U.S. Dist. LEXIS 22071 at * 36 ("There is no dispute in the record that lesbians and gay men have experienced a long history of discrimination."); *Perry*, 704 F. Supp. 2d at 981-82 ("Gays and lesbians have been victims of a long history of discrimination" in California and throughout the United States); *Ben-Shalmon v. Marsh*, 881 F.2d 454, 465-66 (7th Cir. 1989) (recognizing that lesbians and gay men have suffered a long history of discrimination).

In an open letter to Congress, and briefing in subsequent court proceedings, the Executive Branch has documented at length the discrimination that lesbians and gay men have suffered at the hands of the federal, state, and local governments. *See* Attorney General Letter to Congress, *supra* note 4.[10] In fact, as far as *amici* are aware, no court to consider this issue has ever ruled otherwise.

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[10] *See* Defendant's Brief in Opposition to Motion to Dismiss filed in *Golinski v. United States Office of Pers. Mgmt.*, (Case No. 10-00257, N.D. Cal. 2012) *available at* http://www.lambdalegal.org/in-court/legal-docs/golinski_us_20110701_defendants-brief-in-opposition-to-motion-to-dismiss .

2. Sexual Orientation Is Unrelated to the Ability to Contribute to Society.

Rather than resting on "meaningful considerations," laws that discriminate based on sexual orientation, like laws that discriminate based on race, national origin, or sex, target a characteristic that "bears no relation to ability to perform or contribute to society." *Cleburne*, 473 U.S. at 441. As one California district court recently concluded, "sexual orientation has no relevance to a person's ability to contribute to society." *Golinski*, 2012 U.S. Dist. LEXIS 22071 at *37. Indeed, for over 30 years, the American Psychological Association has recognized that sexual orientation "'implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'" *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1374 (N.D. Cal. 1987) (quoting American Psychological Association Resolution (January 1975)), *rev'd in part on other grounds*, 895 F.2d 563 (9th Cir. 1990). *See also Watkins*, 875 F.2d at 725 (internal quotations omitted) ("Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society.") (Norris, J., concurring). In the words of the Attorney General, "[r]ecent evolutions in legislation…and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives." Attorney General Letter to Congress, *supra* note 4.

3. Lesbians and Gay Men Remain a Politically Vulnerable Minority.

"[A]s a class, gay men and lesbians are a minority and have relatively limited political power to attract the favorable attention of lawmakers." *Golinski*, 2012 U.S. Dist. LEXIS 22071 at *43 ("the evidence and the law support the conclusion that gay men and lesbians remain a politically vulnerable minority"). Indeed, the very existence of laws that were at issue in *Romer v. Evans* and *Lawrence v. Texas*, as well as "the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and 'ability to attract the [favorable] attention of the lawmakers.'" Attorney General Letter to Congress, *supra* note 4 (quoting *Cleburne*, 473 U.S. at 445)). Put another way, "the basic inability to bring about an end to discrimination and pervasive prejudice, to secure desired policy outcomes and to prevent undesirable outcomes on fundamental matters that directly impact their lives, is evidence of the relative political powerlessness of gay and lesbian individuals." *Golinski* , 2012 U.S. Dist. LEXIS 22071 at *46.

That lesbians and gay men have made some political progress does not alter the analysis. This prong of the analysis examines *relative* political powerlessness – whether the "discrimination is unlikely to be soon rectified by legislative means" –

not absolute political powerlessness. *Cleburne*, 473 U.S. at 440. Had the Supreme Court applied a standard of absolute political powerlessness to race and sex at the time it was considering whether to subject those classifications to heightened scrutiny, neither would have won more than rational basis review. For example, when *Korematsu v. United States*, was decided, race discrimination was prohibited by three federal constitutional amendments and federal civil rights enactments dating back to 1866. 323 U.S. 214 (1944). And, when the Supreme Court applied heightened review to sex-based discrimination in *Frontiero v. Richardson*, Congress had "manifested an increasing sensitivity to sex-based classifications" by enacting protections under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, and by approving the federal Equal Rights Amendment for ratification by the states. 411 U.S. at 685, 686 n. 17, 687. Furthermore, the relevant inquiry is not just about the degree of current political powerlessness; as women, racial and religious minorities have achieved greater measures of equality, the constitutional scrutiny of such classifications has become no less searching. *See In re Marriage Cases*, 183 P.3d at 443.

As was true for women when the Supreme Court applied heightened review to sex-based discrimination in *Frontiero v. Richardson*, lesbians and gay men remain "vastly under-represented in this Nation's decisionmaking councils."

Frontiero, 411 U.S. at 686 n. 17 (noting that there never has been a female President, member of the U.S. Supreme Court or U.S. Senate; only 14 women held seats in the U.S. House of Representatives; and underrepresentation is present throughout all levels of state and federal government). Congress has only four openly gay members.[11] And, no openly gay person has ever served as President, on the U.S. Supreme Court, in the U.S. Senate, or on any federal Court of Appeals.[12] Several systemic barriers contribute to this marked disparity, including gay peoples' invisibility, their targeting for hostility, powerful and well-funded opposition, and relatively small minority numbers.[13]

Rather than affording lesbians and gay men effective means to protect themselves from discrimination, the legislative process has in some ways uniquely

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[11] *See* Kerry Eleveld, *Cicilline Becomes Fourth Gay Rep*, Advocate.com (Nov. 2, 2010), *available at* http://www.advocate.com/News/Daily_News/ 2010/11/02/ Gay_Mayor_Cicilline_Elected_to_Congress.

[12] *See* Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 Duke J. Gender L. & Pol'y 385, 395 (2010); Lisa Keen, *Gay Federal Appeals Nominee: 11 Months and Still Waiting for Hearing*, Keen News Service (Mar. 7, 2011), *available at* http://www.keennews service.com/2011/03/07/gay-federal-appeals-nominee-11-months-and-still-waiting-for-hearing.

[13] *See, e.g.*, Gary J. Gates, The Williams Institute, *How many people are lesbian, gay, bisexual, and transgender?*, Executive Summary, at 1 (April 2011), *available at* http://www3.law.ucla.edu/ williamsinstitute/pdf/How-many-people-are-LGBT-Final.pdf; *see also* Segura Decl. ¶ 49.

disadvantaged them. Lesbians and gay men persistently have been stripped of basic antidiscrimination and family protections through the legislative and initiative process. Ballot initiatives in no fewer than three-fifths of the states have sought to eliminate their right to marry, and eleven additional states expressly deny that right through statute.[14] Further, in the Defense of Marriage Act, for the first time in history, the federal government has singled out a minority group and denied its members all recognition of their valid state marriages for any and all federal purposes. Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, §3, 110 Stat. 2419 (1996). And, until just six month ago, the "Don't Ask, Don't Tell" policy prohibited lesbians and gay men from serving openly in the military.[15]

To this day, lesbians and gay men remain unprotected in a majority of states against discrimination in the most basic transactions of ordinary life, including in private employment, housing, and public accommodations. Likewise, almost four decades after the first federal sexual orientation anti-discrimination legislation was introduced, no such federal legislation has succeeded in passing. *See also* Attorney General Letter to Congress, *supra* note 4 (while the enactment of legislation related

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[14] *See* Human Rights Campaign, *Statewide Marriage Prohibitions* (2009), *available at* http://www.hrc.org/documents/marriage_prohibitions_2009.pdf.

[15] *See* Servicemembers Legal Defense Network, "About Don't Ask, Don't Tell", http://www.sldn.org/pages/about-dadt1 (summarizing the history of Don't Ask, Don't Tell).

to hate crimes and DADT "indicate[s] that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged 'political powerlessness.'" (emphasis in original)).

4. Sexual Orientation Is a Defining and Immutable Characteristic.

Although the federal equal protection doctrine has never treated immutability of a personal trait as a prerequisite for determining whether a classification warrants strict scrutiny,[16] the Ninth Circuit already has recognized and reaffirmed that sexual orientation is immutable – an understanding that conforms with the settled consensus of the major professional psychological and mental health organizations. *See, e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."), *overruled on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005); *Golinski*, 2012 U.S. Dist. LEXIS 22071 at *41 (same).

Courts have considered a trait "immutable" when altering it would "involve great difficulty, such as requiring a major physical change or a traumatic change of

[16] Laws that classify based on religion, alienage and legitimacy all are subject to some form of heightened scrutiny, despite the fact that religious people may convert, undocumented people may naturalize, and illegitimate children may be adopted. *See also Watkins*, 875 F.2d at 725 (Norris, J., concurring) (the "Supreme Court has never held that only classes with immutable traits can be deemed suspect").

identity," or when the trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]." *Watkins*, 875 F.2d at 726 (Norris, J., concurring); *Perry*, 704 F. Supp. 2d at 964 ("No credible evidence supports a finding that an individual may . . . change his or her sexual orientation"). Sexual orientation classifications thus violate the fundamental principle that burdens should not be distributed – by a majority that would not inflict them upon itself – "upon groups disfavored by virtue of circumstances beyond their control." *Plyler v. Doe*, 457 U.S. 202, 218 n. 14 (1982).[17]

In sum, as demonstrated above, classifications based on sexual orientation require heightened judicial scrutiny. While satisfaction of the first two considerations alone would warrant heightened scrutiny, classifications based on sexual orientation satisfy all the indicia the Supreme Court has examined in evaluating whether heightened scrutiny is appropriate. Because, like race and sex, classifications based on sexual orientation generally are based on "prejudice and antipathy" rather than any "legitimate state interest," the courts must be suspicious of governmental classifications based on sexual orientation to guard against

[17] *See* American Psychological Association, *Just the Facts About Sexual Orientation & Youth: A Primer for Principals, Educators and School Personnel* (2008) (the notion that lesbians' and gay men's sexual orientation can be changed or cured "has been rejected by all the major health and mental health professions"), *available at http://*www.apa.org/pi/lgbt/resources/just-the-facts.pdf.

continued discrimination against lesbians and gay men at the hands of the government. *Cleburne*, 473 U.S. at 440.

C. *Batson v. Kentucky* Also Bars Peremptory Strikes Against Lesbians and Gay Men Because Such Strikes Discriminate Based on Sex and on the Manner in Which Individuals Exercise Their Constitutionally Protected Liberty Interest.

As GSK asserts in its brief, Dkt. 20-1, there are two additional bases upon which the Court could apply *Batson* and its progeny to preclude peremptory strikes based on sexual orientation.

First, it is settled law that *Batson* applies when a peremptory challenge is used to strike a juror based upon gender. *See United States v. Alanis*, 335 F.3d 965, 968 (9th Cir. 2008) (finding gender discrimination where prosecutor used all of her peremptory strikes to remove male jurors from the venire in a trial for abusive sexual conduct). It also is settled that *Batson* is violated when a subset of a particular gender is the subject of a peremptory strike. *See United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993) (finding that prosecutor's use of peremptory challenges to strike single *female* jurors was impermissible even though prosecutor did not exclude all women as evinced by the fact that there were married women on the jury). As here, when a peremptory strike is used to remove a gay man from the venire, a subset of *men* is being impermissibly singled out, resulting in an impermissible gender-based peremptory challenge.

In addition, discrimination against a gay male juror is sex discrimination, because he is being targeted by virtue of his sex relative to the sex of the person with whom he has formed or would like to form an intimate relationship. *See Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993); *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. EDR Op. 2009); *In re Marriage Cases*, 43 Cal. 4th 757, 853-54 (2008). Sex and sexual orientation "are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation." *Perry*, 704 F. Supp. 2d at 996. Here, in answering questions during *voir dire* the juror referred to his life partner as "he" and made clear that the juror was in a relationship with a man. Dkt. 20-1 at 7. Had the juror been a woman who formed romantic relationships with men rather than a man who does so, the juror would not have been disqualified. This is both formally a type of sex discrimination, and also a form of prohibited "sex stereotyping" based on the notion that a "man" should form intimate relationships with women. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a woman who was denied partnership because she did not meet sex stereotypes had an actionable claim for sex discrimination); *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (finding impermissible sex discrimination where sexual harassment of a gay man was the result of sex

stereotyping – a gay man was harassed by his male co-workers because he "did not act as a man should act."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir. 1999) ("Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.").

Second, *Batson* applies to peremptory challenges based on sexual orientation, because the classification is based upon the way in which the juror excises his fundamental liberty interest in intimate personal relationships. *See Watkins*, 875 F.2d at 721 n.23 (Under equal protection analysis, heightened scrutiny applies "to classifications that burden the exercise of a fundamental or important substantive right."). Lesbians and gay men have a core liberty interest in their intimate personal relationships, *Lawrence v. Texas*, 539 U.S. 558 (2003), which this Court has held warrants heightened scrutiny. *Witt v. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008) (defining the heightened scrutiny test applicable to government intrusions on the private family relationships of gay people). The Supreme Court has made clear that conduct – exercising one's right to have an intimate relationship with a person of the same-sex – is inextricably intertwined

with one's identity. *See Christian Legal Soc'y*, 130 S.Ct. at 2990. In other words, discrimination against a person because he chooses to have a relationship with someone of the same sex amounts to discrimination against the individual because he is gay. *Id.* In this vein, exercising a peremptory challenge to exclude a gay man from the venire because he has a life partner of the same sex is tantamount to discrimination against the prospective juror because he is gay. The Equal Protection Clause subjects discrimination based on the way in which an individual exercises his or her fundamental or important right to heightened scrutiny. *See Murgia*, 427 U.S. at 312.

For these reasons, as further elaborated by GSK, *Batson* precludes striking a gay man from the jury because of his sexual orientation.

II. PEREMPTORY CHALLENGES BASED ON SEXUAL ORIENTATION HARM THE EXCLUDED JUROR AND THE JUDICIAL SYSTEM.

The Supreme Court has long recognized the significant harm of excluding prospective jurors, or entire groups, from jury service for discriminatory reasons. *See, e.g. Batson*, 476 U.S. at 87. Exclusion based on invidious discrimination that historically has plagued the judicial system offends the rights and dignity of the excluded juror, interferes with litigants' right to a fair trial by an impartial jury, and "undermines public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87; *Edmonson*, 500 U.S. at 628.

That lesbians and gay men have suffered a long history of discrimination by federal, state, and local governments is clear. *See supra* Section I(B)(1). Lesbians and gay men have long been barred from other hallmarks of civic participation, such as service in the military and being able to legally marry. And, the experience of lesbians and gay men in the court system has been one of widespread de facto discrimination. Empirical studies from California and New Jersey confirm that sexual orientation significantly and adversely affects court users' experiences be it as jurors, litigants, or other court users.[18] Indeed, lesbians and gay men report that, whether they were jurors or court users, when their sexual orientation became visible, their experience with the court became increasingly negative.[19]

All discrimination is harmful; however, the impact is exacerbated when it occurs within the courthouse. *Edmonson*, 500 U.S. at 628 ("Few places are a more real expression of the constitutional authority of the government than the courtroom, where the law itself unfolds."). Allowing discriminatory court procedures such as striking a juror based solely on a group characteristic such as sexual orientation "denigrates the dignity of the excluded juror" and invokes a

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[18] *See* Todd Brower, *Twelve Angry – And Sometimes Alienated – Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 Drake L. Rev. 669, 674 (Spring 2011) (examining two empirical studies that assessed the experiences of lesbians and gay men with the judicial system).

[19] Brower, *Supra* note 18 at 676, 695-96.

history of exclusion and discrimination. *J.E.B.*, 511 U.S. at 142. It sends a clear message to "all those in the courtroom, and all those who may later learn of the discriminatory act, [] that" gay men and lesbians "are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *Id.*[20] Not only does this perpetuate historical discrimination, it undermines trust in the court system and reinforces the perception that "juries and courts are ill-suited to provide gay people and their issues with a fair and respectful hearing."[21]

In addition, excluding prospective jurors from the venire because of their sexual orientation deprives the juror of the opportunity to participate in democracy and contribute to civic life. "[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. For many, the experience is an important educational opportunity that fosters democratic values and a sense of

[20] Sending a message that lesbians and gay men are unfit to serve as jurors by allowing peremptory challenges based on sexual orientation reinforces the damaging message that historically has oppressed gay people in many areas – as unfit to serve in the military, unfit to be parents, unfit to be teachers or police officers, and unfit to marry.

[21] Brower, *supra* note 18 at 676, 695-96.

civic responsibility. *People v. Garcia*, 77 Cal. App. 4th 1269, 1279 (Cal. Ct. App. 2000). As the Supreme Court explained,

> Equal opportunity to participate in the fair administration of justice is fundamental to our democratic society. It not only furthers the goals of the jury system, it reaffirms the promise of equality under the law….When persons are excluded from participation in our democratic processes [for discriminatory reasons], this promise of equality dims, and the integrity of our judicial system is jeopardized.

J.E.B., 511 U.S. at 145-46.

Finally, excluding lesbians and gay men from the venire solely because of their sexual orientation is a disservice to litigants, because it "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.'" *Taylor v. Louisiana*, 419 U.S. 522, 699 n.12 (1975) (quoting *Peters v. Kiff*, 407 U.S. 493, 502-504 (1972)). "This is not to say that all [lesbians and gay men] see the world alike" or hold identical opinions or beliefs about any given issue. *Garcia*, 77 Cal. App. 4th at 1277 ("Commonality of perspective does not result in identity of opinion. That is the whole reason exclusion based upon group bias is an anathema. It stereotypes."). Rather, lesbians and gay men have a common perspective that is "based upon membership" in the lesbian and gay community and is informed by a shared history of persecution and discrimination. *Id.* Courts have found that maintaining the "diverse and representative character of the jury" is essential to impartiality of the jury that is

representative of the community rather than one dominant segment. *See, e.g. J.E.B.*, 511 U.S. at 134 (internal quotation marks omitted). "'When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience.'" *Taylor*, 419 U.S. at 699 n.12 (quoting *Peters v. Kiff*, 407 U.S. at 502-04)).

In sum, permitting peremptory challenges to exclude lesbians and gay men from the venire inflicts harm that the Supreme Court has long recognized warrants constitutional protection.

CONCLUSION

For the reasons stated herein, *amici* respectfully request that this Court hold that the protections afforded in *Batson* and its progeny prohibit peremptory challenges based on sexual orientation.

Respectfully submitted,

/s Shelbi D. Day_____

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Dated: March 28, 2012

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d), because it contains 6971 words, 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), because it has been prepared in a proportionally spaced typeface using Microsoft 2007 in 14-point Times New Roman type style.

/s Shelbi D. Day
SHELBI D. DAY

APPENDIX A

American Civil Liberties Foundation of Northern California (ACLU-NC), is the largest affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonpartisan organization with more than 550,000 members dedicated to the defense and promotion of the guarantees of individual liberty secured by state and federal Constitutions and civil rights statutes. ACLU-NC works on behalf of lesbian, gay, bisexual and transgender people to win even-handed treatment by government; protection from discrimination in jobs, schools, housing, and public accommodations; and equal rights for same-sex couples and LGBT families.

Asian American Justice Center ("AAJC"), member of the Asian American Center for Advancing Justice, is a national non-profit, non-partisan organization in Washington, D.C., whose mission is to advance the civil and human rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of issues, including anti-discrimination, and is committed to challenging barriers to equality based on sexual orientation.

Asian Pacific American Legal Center ("APALC"), a member of the Asian American Center for Advancing Justice, is the nation's largest public interest law firm devoted to the Asian American and Pacific Islander communities. As part of

its mission to advance civil rights, APALC has championed equal rights of the LGBT community, including equal protection under the law.

Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community.

Human Rights Campaign Foundation ("HRC Foundation") is an affiliated organization of the Human Rights Campaign. HRC Foundation's cutting-edge programs develop innovative educational resources on the many issues facing lesbian, gay, bisexual and transgender individuals, with the goal of achieving full equality regardless of sexual orientation or gender identity.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, and transgender people, and those with HIV through impact litigation, education, and public policy work. Lambda Legal was counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), and has an interest in ensuring that laws and other government acts that discriminate on the basis of sexual orientation receive the heightened scrutiny that equal protection demands.

Legal Momentum is the oldest legal defense and education fund dedicated to advancing the rights of all women and girls. For more than 40 years, Legal Momentum has made historic contributions through litigation and public policy advocacy to advance economic and personal security for women.

Mexican American Legal Defense and Education Fund ("MALDEF"). Founded in 1968, MALDEF is the nation's leading Latino legal civil rights organization. Its principal objective is to promote the civil rights of all Latinos living in the United States through litigation, advocacy and education.

National Black Justice Coalition ("NBJC") is a civil rights organization dedicated to empowering Black LGBT people, and its mission is to eradicate racism and homophobia. As American's leading national Black LGBT civil rights organization focused on federal public policy, NBJC envisions a world where all people are fully-empowered to participate safely, openly and honestly in family, faith and community, regardless of race, sexual orientation or gender identity.

National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and

their families across the country involving constitutional and civil rights. NCLR has an interest in ensuring that laws and other government action that treat people differently based on their sexual orientation are subject to heightened scrutiny, as equal protection requires.

National Gay and Lesbian Task Force Action Fund works to build the grassroots political power of the LGBT community to win complete equality. They do this through direct and grassroots lobbying to defeat anti-LGBT ballot initiatives and legislation and pass pro-LGBT legislation and other measures.

National Gay and Lesbian Task Force Foundation ("Task Force"), Founded in 1973, the Task Force is the oldest national LGBT civil rights and advocacy organization. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society.

Southern Poverty Law Center ("SPLC"), is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. SPLC's work on behalf of the lesbian, gay, bisexual, and transgender community spans decades – from an early case challenging the military's anti-gay policy, *Hoffburg v. Alexander*, to the monitoring of anti-gay hate and extremist groups today.

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2012, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth 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.

/s Shelbi D. Day
SHELBI D. DAY

Dated: March 28, 2012