Case No. 16-16345

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RAYMOND BERTHIAUME,
Plaintiff-Appellant,

v.

DAVID T. SMITH, individually;
and CITY OF KEY WEST,
a Florida Municipal corporation,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida, Docket No. 4:15-cv-10001-JLK

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AND THE NATIONAL LGBT BAR ASSOCIATION IN SUPPORT OF APPELLANT URGING REVERSAL

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USCA Case No. 16-16345

United States District Court, Southern District of Florida
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Raymond Berthiaume v. David Smith, et al.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, and 11th Circuit Rule 26.1-1, *Amici Curiae* certify that the following persons have an interest in the outcome of this appeal, listed in alphabetical order with descriptions:

1. American Civil Liberties Union of Florida ("ACLU of Florida") (*Amicus Curiae*)
2. Akerman LLP (Attorneys for Appellant)
3. Berthiaume, Raymond (Plaintiff/Appellant)
4. Burke, Michael T. (Attorney for Appellees)
5. City of Key West, a Florida Municipal Corporation (Defendant/Appellee)
6. Florida Association of Criminal Defense Lawyers ("FACDL") (*Amicus Curiae*)
7. Giddings, Katherine E. (Appellate Counsel for Plaintiff/Appellant)

8. Gorenberg, Hayley (Attorney for *Amici Curiae*)

9. Hugh L. Koerner, P.A. (Trial Attorneys for Appellant)

10. Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A. (Attorneys for Appellees)

11. King, Hon. James Lawrence (Senior U.S. District Court Judge)

12. Koerner, High L. (Trial Attorney for Appellant)

13. Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") (*Amicus Curiae*)

14. Lesh, Eric (Attorney for *Amici Curiae*)

15. Martinez, J. Marcos (Trial Counsel for Defendants/Appellees)

16. National Association of Public Defense ("NAPD") (*Amicus Curiae*)

17. National LGBT Bar Association ("LGBT Bar/ LGBT Bar Association") (*Amicus Curiae*)

18. Noll, Robert Dale, Jr. (Attorney for Appellant)

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20. Rice, Ethan (Attorney for *Amici Curiae*)

21. Smith, David T. (Defendant/Appellee)

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None of the *amici curiae* have any parent corporation, none are publicly held corporations and no person or entity owns 10% or more of any *amici curiae's* stock.

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1973, 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 lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, education and public policy. In 2005, Lambda Legal established its Fair Courts Project to expand access to justice in the courts for LGBT and HIV-affected communities. The communities Lambda Legal represents depend upon a fair and impartial judicial system to enforce their constitutional and other rights.

The National Association for Public Defense is a national organization uniting nearly 14,000 public defense practitioners across the 50 states. As public defense experts, NAPD's mission is to ensure strong criminal justice systems, policies and practices ensuring effective indigent defense; to advocate for system reform that increases fairness for indigent clients; and to educate and support public defenders and public defender leaders. NAPD plays an important role in advocating for public defense counsel and the clients they

[1] 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.

serve, and is uniquely situated to speak to issues of fairness and justice facing indigent criminal defendants.

The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization representing over 2,000 members, all of whom are criminal defense practitioners. FACDL is a nonprofit corporation whose goal is to assist in the reasoned development of Florida's criminal justice system. Its founding purposes are: promoting study and research in criminal law and related disciplines, ensuring the fair administration of criminal justice in the Florida courts, fostering and maintaining the independence and expertise of criminal defense lawyers, and furthering the education of the criminal defense community.

The ACLU of Florida is the Florida affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with over one million members nationwide and over 31,000 members in Florida. The ACLU is dedicated to defending the Bill of Rights embodied in the United States Constitution and has litigated hundreds of cases in Florida's state and federal courts as a plaintiff, on behalf of plaintiffs, and as amicus curiae. The ACLU is frequently involved in litigation regarding constitutional protections, including those concerning the due process and equal protection rights of LGBT persons.

The National LGBT Bar Association ("LGBT Bar") is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students, and affiliated lesbian, gay, bisexual and transgender legal organizations. The LGBT Bar promotes justice in and through the legal profession for the LGBT community in all its diversity. Serving on a jury is a civic duty and to infringe upon that right is prejudicial. Equality extends to the courtroom and especially to juries.

Lambda Legal, NAPD, FACDL, ACLU of Florida, and the LGBT Bar submit this brief to urge the Court to ensure that (1) *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny are applied to prohibit peremptory challenges based on a prospective juror's sexual orientation or perceived sexual orientation, and (2) voir dire to expose juror bias based on sexual orientation is required when requested and relevant, in order to secure a fair and impartial trial.

STATEMENT OF THE ISSUES

Pursuant to the Federal Rules of Civil Procedure and the Eleventh Circuit Rules of Civil Procedure, *amici* adopt Appellant's Statement of the Issues as set forth in Appellant's Principal Brief. *See* Fed. R. Civ. P. 28(i); 11th Cir. R. 28-1(f); *and see* Appellant's Br. at 2.

SUMMARY OF ARGUMENT

Lesbians and gay men have suffered a long history of discrimination and exclusion connected to prevailing invidious stereotypes. As has been the case for other groups targeted for their personal characteristics, lesbians and gay men have seen prejudice against them reflected in the nation's courtrooms. Where prejudice based on sexual orientation has infiltrated trials, bias in the context of jury selection and service is notably harmful, as it reinforces historical prejudice in the court system, interferes with litigants' right to a fair trial, and undermines the integrity of the judicial system. This corrosive impact appears in cases like the one at hand, where two potential jurors were struck from the venire, and the court prevented the Plaintiff/Appellant, Raymond Berthiaume ("Berthiaume") from even offering a prima facie case that Defendants/Appellees ("Defendants") struck those jurors because of their actual or perceived sexual orientation.

Supreme Court precedent shows that peremptory strikes based on sexual orientation violate the Constitution. In *Batson v. Kentucky*, the U.S. Supreme Court established that peremptory challenges cannot be used to systematically strike otherwise qualified jurors from the panel on the basis of race. 476 U.S. 79. *Batson* has since been extended to prohibit challenges of a prospective

juror based on any classification subject to heightened scrutiny under equal protection analysis. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128-129 (1994) (collecting cases). *Amici* urge the Court to hold, as the Ninth Circuit has, 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. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).

Classifications based on sexual orientation warrant heightened scrutiny. This Court's decision in *Lofton v. Secretary of Department of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004) (finding that rational basis review applies to classifications based on sexual orientation), can no longer stand in light of recent Supreme Court precedent. The Supreme Court's decisions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), have undermined to the point of abrogation[2] *Lofton*'s deferential standard of review. Moreover, striking jurors on the basis of sexual orientation constitutes sex discrimination in violation of the Supreme

[2] Under this Court's prior-panel-precedent rule, a prior panel's holding is binding on subsequent panels "until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *In re Lambrix*, 776 F.3d 789 (11th Cir. 2015) (quoting *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)).

Court's ruling in *J.E.B.*, 511 U.S. 127.

A voir dire process such as the one in this case that fails to adequately assess whether potential jurors have any prejudice that would impact their decisions fails to protect the litigants' right to an impartial jury. *See Kaplan v. Daimlerchrysler, A.G.*, 2003 WL 22023315, at *2 (11th Cir. Aug. 1, 2003). "Voir dire is the key element in the trial court's constitutionally-mandated search for juror impartiality." *Jordan v. Lippman*, 763 F.2d 1265, 1277 (11th Cir. 1985). The Constitution requires that courts allow voir dire regarding sexual orientation bias where, as here, sexual orientation is "'inextricably bound up' with the evidence to be presented at trial." *United States v. Bates*, 590 F. App'x 882, 886-887 (11th Cir. 2014) (quoting *Ristaino v. Ross*, 424 U.S. 589, 597 (1976)). In the instant case, the trial court unconstitutionally limited voir dire by refusing to allow any question to be put to the venire regarding potential bias on the basis of sexual orientation. Furthermore, even when not mandated by the Constitution, voir dire regarding sexual orientation bias must be permitted when there is a reasonable possibility that sexual orientation bias will affect the jury. *See Rosales-Lopez v. United States*, 451 U.S. 182 (1981). Additionally, such voir dire should be allowed by a trial court when requested and relevant.

Failing to apply *Batson* to peremptory strikes based on a prospective

juror's sexual orientation directly contravenes core equal protection principles and perpetuates discrimination against lesbians and gay men. Additionally, voir dire regarding sexual orientation in a case such as this one, where sexual orientation is implicated by the facts and identity of a litigant, is limiting to the point of constitutional violation and will not protect the right of all litigants to a fair trial. This Court should make clear that, even when there is limited risk of a constitutional violation, voir dire regarding sexual orientation bias should be required when requested by a party in a case where there is a reasonable possibility that such bias will affect the jury.

ARGUMENT

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

A. The Principles that Underlie *Batson v. Kentucky* and Its Progeny Preclude Peremptory Challenges Based on Sexual Orientation.

The privilege to serve as a juror is an opportunity to participate in the democratic process and contribute to civic life. *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Discrimination in jury selection offends the dignity of individuals and threatens the integrity of the courts. *Id.* at 402. The Supreme Court has explained that the injury inflicted by discrimination within the judicial system is most pernicious because the courthouse is "where the law itself unfolds."

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 628 (1991); *see Batson*, 476 U.S. at 87.

Peremptory challenges allow attorneys to remove jurors perceived to be biased, even if that perception may not sustain a challenge for cause. The Supreme Court has acknowledged that the peremptory challenge has made an important contribution to the administration of justice. *Batson*, 476 U.S. at 98-99. Importantly, while recognizing the utility of the peremptory challenge, the Court has also made clear that the privilege is subject to the "commands of the Equal Protection Clause." *Id.* at 89.

In *Batson*, the Court held that peremptory challenges cannot be used to systematically strike otherwise qualified jurors from the panel on the basis of race. 476 U.S. 79. Since *Batson,* the Court has reaffirmed that "potential jurors, as well as litigants, 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 (collecting cases). The Court has applied *Batson* to both criminal and civil cases. *Powers*, 499 U.S. 400; *Edmonson,* 500 U.S. 614. And in *J.E.B.*, the Court extended *Batson* to prohibit the use of peremptory challenges on account of a juror's sex. 511 U.S. at 129, 136-37. In extending the principles in *Batson* to classifications based on sex, the *J.E.B.* Court acknowledged the long history of discrimination

that women suffered at the hands of state actors, including exclusion from jury service, as well as the prevalence of "invidious group stereotypes" that "reinvokes a history of exclusion from political participation." *Id.* at 131-34, 140. The Court concluded that, as with race-based exclusions, when individual jurors are denied access to democratic processes simply on the basis of their sex, the "promise of equality dims, and the integrity of our judicial system is jeopardized." *Id.* at 146.

The Eleventh Circuit, like other circuit courts, has interpreted *J.E.B.* as forbidding peremptory challenges of a prospective juror based on any classification subject to heightened scrutiny under equal protection analysis. *See Bowles v. Sec'y for the Dep't of Corr.*, 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"). While the Supreme Court has not expressly ruled on whether the Equal Protection Clause precludes the use of peremptory challenges to strike prospective jurors based on sexual orientation, applying *Batson* to prohibit peremptory challenges based on sexual orientation is required by *J.E.B.*'s logic and reasoning. Indeed, in *SmithKline*, the Ninth Circuit undertook just such an analysis and concluded that heightened scrutiny applied to sexual orientation, and that *Batson* precluded peremptory challenges on that basis. *SmithKline*,

740 F.3d at 488.

In *SmithKline*, the Ninth Circuit found that "the principles that lie behind *Batson* and *J.E.B.* require that we apply the same principles to the unique experiences of gays and lesbians" as were applied in the context of race and gender. *Id*. at 485. The Ninth Circuit, inspecting the long history of discrimination against lesbians and gay men, concluded that they had a record of being "systematically excluded from the most important institutions of self-governance." *Id*. at 484. The Court found that peremptory challenges based on preconceived notions about sexual orientation reinforced and perpetuated invidious stereotypes. *Id*. at 486.

The Ninth Circuit cited empirical research showing that discriminatory attitudes towards lesbians and gay men continue to play a "significant role in courtroom dynamics." *Id*. As jurors, lawyers, litigants, and defendants, people who are lesbian, gay, bisexual, or transgender (LGBT) may face both overt and subtle discrimination. In a recent national survey of LGBT people, respondents reported experiencing a range of negative courthouse encounters, ranging from overhearing negative comments about sexual orientation to having their own sexual orientation disclosed in court against their will.[3] Empirical studies by

[3] Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014), *available at*

judicial commissions and bar associations have also found that bias related to sexual orientation significantly and negatively impacted court users' court system experiences in California and New Jersey.[4] Lesbian, gay, and bisexual individuals' most common court contact is through jury service,[5] and data indicate a substantial number of non-heterosexual prospective jurors encounter bias in some form.[6] For example, in the California study, respondents indicated that when sexual orientation became an issue in a lesbian or gay court users' contact, 30% believed those who knew their sexual orientation did not treat them with respect, and 39% believed their sexual orientation was used to lessen their credibility.[7]

Batson must protect potential jurors, litigants, and the community from

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http://www.lambdalegal.org/protected-and-served.

[4] *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 empirical studies in California and New Jersey that evaluated the experiences of lesbians and gay men with the court system).

[5] Brower, *Supra* note 3 at 670.

[6] *See* Vanessa H. Eisemann, *Striking A Balance of Fairness: Sexual Orientation and Voir Dire*, 13 Yale J.L. & Feminism 1, 7 (2001) (citing an empirical study in California courts, which noted that twenty-two percent of gay and lesbian court users felt threatened because of their sexual orientation in general, and thirty-eight percent felt threatened when sexual orientation became an issue).

[7] Judicial Council of the State of Cal., *Sexual Orientation Fairness in the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee* (2001) at 13, available at http://www.courts.ca.gov/documents/sexualorient_report.pdf.

the serious dignitary harm of strikes based on sexual orientation. *SmithKline*, 740 F.3d at 486. The Supreme Court recognizes the "honor and privilege of jury duty" as one of the most significant individual responsibilities and "opportunities to participate in the democratic process." *Powers*, 499 U.S. at 407. Securing LGBT people's equal dignity and full participation in our fundamental institutions lies at the heart of the Supreme Court's command in *Windsor* and *Obergefell*. *Windsor*, 133 S. Ct. at 2694 ("Responsibilities, as well as rights, enhance the dignity and integrity of the person."); *Obergefell*, 135 S. Ct. at 2608 (noting that the Constitution guarantees equal dignity by ensuring people are not excluded from one of civilization's oldest institutions based on sexual orientation). As with race- and sex-based peremptory challenges, denying prospective jurors the privilege to serve on juries because of their sexual orientation reinforces and perpetuates invidious discrimination in a manner that violates the Equal Protection Clause, harming both jurors and litigants. Threats to fairness and impartiality injure the entire judicial system.

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

One of the fundamental purposes of the Equal Protection Clause is to ensure that all similarly situated persons are treated alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Some classifications "are

so seldom relevant to the achievement of any legitimate state interest" that they are treated as "suspect" or "quasi-suspect." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *City of Cleburne*, 473 U.S. at 440. Classifications based on sexual orientation are among them. In identifying such classifications, the Supreme Court has examined whether the class has been historically subjected to discrimination and whether the defining characteristic of the class bears any relation to ability to contribute to society. The Court has also sometimes considered whether the class is defined by an "immutable" characteristic and whether the group has political power sufficient to protect itself from the political majority. The first two factors are necessary and the most important. *See Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Cleburne*, 473 U.S. at 440-41.

In light of recent decisions, this Court's prior application of rational basis review to sexual orientation classifications can no longer be considered sound. In *Lofton*, this Court did not apply heightened scrutiny to sexual orientation classifications under equal protection analysis, holding that a purported government preference for childrearing by married heterosexual parents was a rational and legitimate basis for a one-time Florida adoption restriction. *Lofton*, 358 F.3d at 818-20. Notably, *Lofton* did not provide any analysis or address the multi-part test for whether government discrimination warrants heightened

equal protection review, but rather rested exclusively on the observation that "all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class." *Id*. at 818.

In the thirteen years since *Lofton*, the basis for that one-sentence assertion quoted above has vanished. The Supreme Court's subsequent decisions in *Obergefell* and *Windsor*, have undermined to the point of abrogation *Lofton*'s deferential standard of review. While *Obergefell* and *Windsor* did not explicitly expound on the standard of scrutiny for sexual orientation classifications, *Windsor* repudiated the notion that classifications based on sexual orientation were presumptively legitimate and called for "careful consideration" of laws singling out lesbians and gay men for special disadvantage. *Windsor*, 133 S. Ct. at 2692-96 (requiring the government to establish that a "legitimate purpose overcomes" the injury that its discrimination inflicts on lesbians and gay men); *id*. at 2706 (Scalia, J., dissenting) (noting that the *Windsor* Court "certainly does not apply anything that resembles [rational basis] framework").

Obergefell acknowledged that sexual orientation classifications satisfy the four factors the Court has considered in evaluating whether classifications are "suspect" or "quasi-suspect" and therefore are appropriately evaluated under heightened scrutiny. First, the Court detailed that lesbians and gay men have historically been criminalized and subjected to discrimination by the

government in the form of prohibition from certain employment, including military service, being excluded under immigration laws, and in many other arenas. *See Obergefell*, 135 S. Ct. at 2596-97. Second, the Court found that sexual orientation does not bear a relation to an individual's ability to contribute to society. *Id.* at 2596. Third, the Court found that sexual orientation is a defining and immutable characteristic. *Id.* at 2594, 2596. And fourth, the Court recognized that lesbians and gay men remain a politically vulnerable minority. *Id*. at 2606. Recent gains in the recognition of the rights of lesbians and gay men do not change this analysis, which examines relative political powerlessness, and does not require absolute political powerlessness. *See Cleburne*, 473 U.S. at 440. Furthermore, political hostility abounds. In 2016 alone, more than 200 anti-LGBT bills were introduced in 34 state legislatures across the country.[8] In six states, bills were introduced to preempt local nondiscrimination protections for LGBT people.[9] *Obergefell*'s analysis confirms that heightened scrutiny applies.

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[8] Human Rights Campaign, *Listen: HRC Legal Director Answers Members Questions On Anti-LGBT State Bills* (2016), available at http://www.hrc.org/blog/listen-hrc-legal-director-answers-members-questions-on-anti-lgbt-state-bill.

[9] American Civil Liberties Union, *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country* (2017), available at https://www.aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country?redirect=lgbt-nondiscrimination-and-anti-lgbt-bills-across-country.

Additionally, since *Lofton*, three circuit courts have concluded that heightened scrutiny applies to sexual orientation classifications on equal protection grounds. *See Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (holding that sexual orientation classifications are constitutionally suspect as a matter of equal protection and noting that "*Windsor*'s balancing is not the work of rational basis review." (quoting *SmithKline*, 740 F.3d 483); *SmithKline*, 740 F.3d at 481 (noting "*Windsor* requires that we reexamine our prior precedents" and concluding that "we are required by *Windso*r to apply heightened scrutiny to classifications based on sexual orientation."); *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012) (holding that classifications based on sexual orientation warrant equal protection heightened scrutiny). Similarly, post-*Lofton*, numerous federal district and state courts have recognized that government classifications based on sexual orientation trigger heightened scrutiny.[10]

This Court has never addressed these four factors to determine whether

[10] *See Whitewood v. Wolf*, 992 F. Supp. 2d 410, 425-30 (M.D. Pa. 2014); *Whitewood v. Sec'y Pa. Dep't of Health*, 621 F. App'x 141 (3d Cir. 2015); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1011-14 (W.D. Wis. 2014), *aff'd sub nom. Baskin*, 766 F.3d 648; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012); *Griego v. Oliver*, 316 P.3d 865, 879-84 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-54 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008).

heightened scrutiny should apply to sexual orientation classifications. Because *Lofton* predates developments in *Windsor* and *Obergefell*, as well as the circuits, this Court must consider them now and should hold that classifications based on sexual orientation are subject to heightened scrutiny. The Eleventh Circuit has expressly held "a panel of this Court may decline to follow a decision of a prior panel if such action is necessary in order to give full effect to an intervening decision of the Supreme Court of the United States." *Lufkin v. McCallum*, 956 F.2d 1104, 1107 (11th Cir. 1992). The decisions in *Obergefell* and *Windsor* satisfy the Eleventh Circuit's standard for when to depart from prior precedent. Accordingly, this Court can and should rule that sexual orientation satisfies all of the necessary factors, and heightened scrutiny must be applied to classifications based on sexual orientation.

C. *Batson v. Kentucky* and Its Progeny Prohibit Peremptory Strikes Against Lesbians and Gay Men Because Such Classifications Discriminate on the Basis of Sex.

It is well settled that the Equal Protection Clause prohibits discrimination on the basis of sex in jury selection. *See J.E.B.*, 511 U.S. at 129, 146. First, discrimination against jurors who are perceived to be gay is sex discrimination because they are being targeted by virtue of their sex relative to the sex of the person with whom they have or would like to have an intimate relationship. If a male prospective juror in a relationship with a man is struck, but a female

prospective juror in a relationship with a man would not be, the action discriminates on the basis of the juror's sex. *See, e.g., Baldwin v. Foxx*, App. No. 0120133080, 2015 WL 4397641, at *5 (EEOC, July 15, 2015) ("Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."); *Videckis v. Pepperdine Univ.*, 2015 WL 8916764, at *16-17 (C.D. Cal. Dec. 15, 2015) ("[T]he line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct.").

Second, discrimination against a juror perceived to be gay is sex stereotyping, a form of impermissible sex discrimination. "In *Price Waterhouse v. Hopkins*, 490 U.S. 288 [] (1989), the Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). In applying this principle, this Court found that "[e]ver since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes." *Id.* at 1319.

The District Court for the Northern District of Florida recently found, in applying the principles in *Glenn* to alleged discrimination on the basis of gender and sexual orientation or perceived sexual orientation, that whether based on

actual or perceived sexual orientation, "discrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination." *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 2016 WL 3440601, at *8 (N.D. Fla. June 20, 2016). The Court found that sexual orientation discrimination is a form of prohibited gender-based stereotyping because it seeks to enforce conformity with the "ultimate gender stereotype—heterosexual attraction." *Id.* (quoting Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 Wm. & Mary J. Women & L. 67, 84 (2000)).

Where a peremptory challenge is based on a juror's sexual orientation or perceived sexual orientation, it is necessarily based on sex, in violation of the equal protection right of potential jurors and the rights of litigants to jury selection procedures that are free from prejudice as described in *J.E.B.* This Court should hold that discrimination on the basis of sexual orientation, whether actual or perceived, is sex discrimination, and that peremptory strikes against lesbians and gay men, or those perceived to be, are impermissible under *J.E.B.*

D. As *Batson* Precludes Peremptory Strikes Based on Sexual Orientation, the Objector Must Be Permitted to Present Relevant Facts for the Court to Infer Discriminatory Purpose.

It follows that a decision from this Court that *Batson* and its progeny preclude peremptory strikes based on sexual orientation means the objector must be allowed to present some evidence to satisfy the low evidentiary bar under the first step of *Batson*. Under *Batson*, there is a three-step process for determining whether a violation occurred. *Madison v. Comm'r, Ala. Dep't of Corr.*, 761 F.3d 1240, 1242-1243 (11th Cir. 2014) (citing *Johnson v. California,* 545 U.S. 162, 168 (2005)). First, the objector must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Madison,* 761 F.3d at 1242. Second, if the prima facie case is made, the burden shifts to the striking party to explain adequately the exclusion by offering permissible nondiscriminatory justifications for the strikes. *Id*. Third, if a nondiscriminatory explanation is given, the trial court must then decide whether the objector has proved purposeful discrimination. *Id.* at 1242-1243.

In order to satisfy step one of *Batson,* purposeful discrimination does not need to be the most likely explanation, or even more likely than not; rather, it must be supported by sufficient evidence to allow a judge to draw an inference that discrimination may have occurred. *Johnson*, 545 U.S. at 172-173. In

Johnson, the Supreme Court struck down a California requirement that "the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." *Id.* at 168. The objector must only "proffer enough evidence to support an inference of discrimination." *Id.* at 166 (internal quotations omitted). All relevant evidence can be considered by the court at the prima facie stage of the *Batson* challenge. *Id*. at 169 n.5. In the instant case, Berthiaume attempted to challenge the Defendants' use of peremptory strikes against two male jurors based on their actual or perceived sexual orientation. However, the District Court hindered Berthiaume's ability to satisfy even the first step of *Batson*. As Berthiaume was attempting to lay out the prima facie case that the peremptory strikes were discriminatory, the court interrupted and ultimately stopped him from completing his argument. [DE 39 at 51-54.] This Court should reverse and remand for a new trial because the trial court failed to appropriately entertain Berthiaume's *Batson* challenge.

II. LIMITING VOIR DIRE REGARDING SEXUAL ORIENTATION BIAS INHIBITS THE RIGHT TO A FAIR TRIAL

A. The U.S. Constitution Requires Permitting Voir Dire on Sexual Orientation Bias When Sexual Orientation Is "Inextricably Bound Up" with the Issues at Trial.

While federal district court judges are given broad discretion to

determine the scope and method of voir dire, it is well settled that its inquiry "must be conducted in thorough, competent, and complete fashion... with sufficient thoroughness that the duty to learn a prospective juror's past history and personal prejudices is fulfilled." *Vezina v. Theriot Marine Serv.*, 610 F.2d 251, 252 (5th Cir. 1980). A voir dire process that fails to provide "reasonable assurance that prejudice would be discovered" fails to protect the party's right to an impartial jury. *Kaplan*, 2003 WL 22023315, at *2 (quoting *Dellinger v. United States*, 472 F.2d 340, 367 (7th Cir. 1972)). The Constitution requires that courts allow voir dire regarding sexual orientation bias where, as here, sexual orientation is "'inextricably bound up' with the evidence to be presented at trial." *United States v. Bates*, 590 F. App'x 882, 886-887 (11th Cir. 2014) (quoting *Ristaino v. Ross*, 424 U.S. 589, 597 (1976)).

This Court has already ruled that a trial court abuses its discretion by refusing to allow questioning of potential jurors as to prejudice on the basis of sexual orientation in a case where the defendant's same-sex sexual activity and gender-nonconforming conduct are central issues during trial. *Bates*, 590 F. App'x 882. In *Bates*, the prosecution introduced photographs into evidence of the male defendant engaging in sex acts with other adult men and questioned many witnesses about details of the defendant's same-sex sexual relationships, as well as about whether the defendant dressed in traditionally feminine

clothing. *Id.* at 884-885. In evaluating the adequacy of the voir dire in *Bates* regarding sexual orientation bias, this Court used the framework in *Ristaino*, which requires (1) that the evidence being presented would be a potential source of prejudice and (2) that the source of prejudice was "inextricably bound up with the evidence to be presented at trial." *Id. at 886.* This Court found that bias based on sexual orientation and gender-nonconforming conduct has the potential to unfairly prejudice jurors against the defendant and that these issues were inextricably bound up with the evidence presented at trial. *Bates*, 590 F. App'x at 886-887 (citing *United States v. Ochoa–Vasquez*, 428 F.3d 1015, 1037 (11th Cir. 2005), quoting *Ristaino*, 424 U.S. at 597). This Court vacated the jury's verdict and remanded the case for a new trial due to the lower court's failure to allow questioning of the jurors about sexual orientation bias, concluding that limiting the voir dire process in this fashion, given the issues at trial, did not meet minimum constitutional requirements. *Bates*, 590 F. App'x at 886.

In the context of jury selection, this Court recognized that sexual orientation bias against lesbians and gay men remains overwhelmingly pervasive. *Id.* Even in relatively tolerant jurisdictions, reported decisions and voir dire transcripts reveal that some prospective jurors continue to express

moral disapproval of lesbians and gay men, sometimes citing religious beliefs.[11] Bias based on sexual orientation can influence jurors' decisions and this prejudice can manifest in any matter.[12]

Effective voir dire is therefore essential across the board to identifying jurors who should be challenged for cause based on prejudice.[13] Courts have concluded that jurors who harbor sexual orientation bias can be challenged for cause if they cannot be impartial due to their beliefs. *See e.g.*, *State v. Salmons*, 509 S.E.2d 842, 862 (W. Va. 1998) ("The jurors were struck because they admitted they held prejudices against homosexuals. The trial court was not convinced by statements from both jurors that they would be able to put aside their biases toward homosexuals."); *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 493, 496 (Ga. Ct. App. 1994) (holding that the trial court did not abuse its discretion in removing for cause three jurors "who expressed bias

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[11] *See* Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 Harv. J. L. & Gender 407 (2014) ("These statements range from assertions of moral or religious beliefs that homosexuality is wrong ("I think that they are morally wrong"; "[M]y religious convictions tell me that homosexuality is a sin";) to outright animus ("I just don't like queers"); to ambivalent feelings ("I hope I would be able to see past that, but I can't guarantee you that, no.")).

[12] Lambda Legal, *Jury Selection and Anti-LGBT Bias: Best Practices Guide to Voir Dire on LGBT Issues* (2015), available at http://www.lambdalegal.org/sites/default/files/jury-selection-dec2015_final.pdf.

[13] Nancy L. Alvarez, Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS L.J. 959, 964 (1982).

against homosexuals"). Voir dire to assess both explicit and implicit bias relevant to sexual orientation may also facilitate the informed exercise of peremptory challenges. Additionally, relevant voir dire can remind jurors of their obligation to decide the case without letting bias or unfair prejudice influence their decision-making.[14]

In the present case, from opening statements throughout the testimony of nearly every witness, Berthiaume's sexual orientation was repeatedly brought to the jury's attention during trial by reference to his intimate relationships with men, the bars he and his friends visited, and his attire. Knowing such references would occur at trial, Berthiaume requested that the court question potential jurors about sexual orientation bias by submitting a question that read: "Do you harbor any biases or prejudices against persons who are gay or homosexual—or believe that homosexuality is a sin?" [DE 17.] The trial court refused to allow this question and failed to question the jurors at all regarding sexual orientation bias. This refusal unconstitutionally impeded Berthiaume's right to a fair trial.

Here, the fact that Berthiaume is a gay man and the perception that he is gay were inextricably bound up with the evidence presented at the trial.

[14] *See* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. Davis L. Rev. 471, 559 (2008).

Besides police witnesses and the deposition testimony of a medical doctor, Berthiaume, his husband, Jhon Villa, his former partner, Nelson Jimenez, and friend Corey Smith, all gay men, were the only witnesses at trial. Their sexual orientation and personal relationships to each other were made known to the jury. During the three-day trial, there were over twenty references to Berthiaume's intimate relationships with Mr. Villa and Mr. Jimenez. [DE 39 at 79, 80, 82, 89, 102, 138; DE 40 at 9, 72, 155, 176, 198 203, 208; DE 41 at 14, 38.] Mr. Jimenez testified that he was dancing and drinking a cocktail at a "gay bar" when the alleged incident between himself and Berthiaume began. [DE 40 at 56.] Multiple witnesses testified about the relationships between Berthiaume and Villa, Berthiaume and Jimenez, and about Berthiaume's attire. The hypersexualization of gay people has been used to propagate the stereotype that their identities are purely sexual and therefore undeserving of legal protection.[15] The fact that the police believed Berthiaume was wearing only a loincloth during the alleged incident was testified to or stated to the jury thirty times in

[15] *See* Scott D. Wiener, *Book Review: Created Equal: Why Gay Rights Matter to America*, 30 Harv. C.R.-C.L. L. Rev. 267, 273 (1995) (noting that results of the sexualization of gay people in that portion of the majority opinion in *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), in which the argument that gay rights are fundamental was dismissed as "facetious," and that the plaintiff's privacy right was framed, not as a right to privacy in the most intimate areas of life, but rather as a right to "engage in homosexual sodomy.").

three days. [DE 39 at 101, 110 -114, 117-119, 130, 149; DE 40 at 98, 115, 118, 162,168; DE 41 at 43.] Berthiaume was referred to as the "shirtless man" twenty times. [DE 40 at 115-120; DE 41 at 43.]

Refusing to allow questioning of potential jurors regarding sexual orientation bias in cases such as Berthiaume's, where orientation is inextricably bound up with the evidence presented at trial, violates the constitutional guarantee to a fair trial. This Court should reverse and remand for a new trial in which potential jurors can be questioned to discern whether they harbor biases based on sexual orientation.

B. Even When Not Constitutionally Mandated, Courts Must Allow Voir Dire to Discover Sexual Orientation Bias When Such Questioning Is Requested and Relevant.

Voir dire to discover sexual orientation bias must be allowed in certain circumstances, even where it is not mandated by the Constitution. In *Rosales-Lopez v. United States*, the U.S. Supreme Court elucidated a standard for reviewing limitations on voir dire in cases where the insufficiency of the voir dire does not rise to a constitutional violation. 451 U.S. 182 (1981). ("[W]e have indicated that under our supervisory authority over the federal courts, we would require that questions directed to the discovery of racial prejudice be asked in certain circumstances in which such an inquiry is not constitutionally mandated." (citing *Ristaino*, 424 U.S. at 597 n.9)). The Court deemed honoring

the request of the party to inquire about potential bias to be a best practice, and found that failure to voir dire regarding bias would constitute reversible error where the circumstances of the case indicate a "reasonable possibility" that bias influenced the jury. *Id*. at 190-91 (hereinafter, "Nonconstitutional Standard"). *See also U.S. v. Groce*, 682 F.2d 1359, 1361-1362 (11th Cir. 1982) ("[a]fter Rosales-Lopez [sic], the better practice is to defer to the judgment of defense counsel when a voir dire question concerning racial or ethnic prejudice is requested unless, of course, there is 'no rational possibility of racial prejudice"). In deciding *Bates* in the constitutional context, this Court has already applied the *Ristaino* framework, which *Rosales-Lopez* adopted, to sexual orientation bias of potential jurors. *See* Section II (A), *supra*. This Court should now make clear through use of its supervisory power over the district courts that voir dire regarding sexual orientation bias is required under the Supreme Court's Nonconstitutional Standard from *Rosales-Lopez,* when requested by a party in a case where there is a reasonable possibility that sexual orientation bias will affect the jury. The Court should also reiterate that unless the court finds there is no rational possibility of this prejudice infecting the jury, it is best practice to allow questioning when requested.

In sum, limiting voir dire designed to uncover jurors' sexual orientation bias interferes with the right to a fair trial by preventing the informed exercise

of for-cause challenges and peremptory strikes. To ensure a fair and impartial trial, such voir dire must be allowed when requested and relevant.

CONCLUSION

For the reasons stated herein, *amici* respectfully request that this Court hold that *Batson* and its progeny prohibit peremptory challenges based on actual or perceived sexual orientation, and that to ensure a fair trial, voir dire relevant to uncovering bias regarding sexual orientation be permitted when required by the Constitution, when appropriate under the Nonconstitutional Standard, or when requested and relevant.

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Respectfully submitted,

/s/ Ethan Rice

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that:

1. This brief complies with the type-volume limitation, as provided in Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B), because, exclusive of the exempted portions of the brief, the brief contains 6,487 words.
2. This brief complies with the type-face requirements, as provided in Fed. R. App. P. 32(a)(5), and the type-style requirements, as provided in Fed. R. App. P. 32(a)(6), because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.
3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ *Ethan Rice*
February 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2017, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of Court for the U.S. Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will send a notice of electronic filing to all parties in this case whom are registered through the CM/ECF.

/s/ Ethan Rice
February 15, 2017