

No. 12-144

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al*,
Petitioners,

v.

KRISTEN M. PERRY, *et al*,
Respondents.

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

**AMICUS CURIAE BRIEF OF CONCERNED
WOMEN FOR AMERICA,
ADDRESSING THE MERITS AND SUPPORTING
REVERSAL**

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INTEREST OF *AMICUS CURIAE*¹

Concerned Women for America (“CWA”) is the largest public policy women’s organization in the United States, with 500,000 members from all 50 states. Through our grassroots organization, CWA encourages policies that strengthen families and advocates the traditional virtues that are central to America’s cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful or the elite. CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment. Through California’s democratic initiative process, many of our members and like-minded citizens supported Proposition 8. CWA believes that the decision of the court below poses a significant threat to those rights.

¹ No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution to the preparation or submission of the brief, and no person—other than the amicus curiae, its members, or its counsel—made such a monetary contribution. Note that although counsel for *Amicus* was previously employed by a firm representing Petitioners, counsel did not prepare any part of this brief while employed by that firm. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

SUMMARY OF ARGUMENT

This Brief examines the substantial political power and considerable political resources of the community often described as lesbian, gay, bisexual, and transgender (LGBT). LGBT political power in California and across the nation is demonstrated by significant legislative success and powerful elected officials who vigorously support LGBT causes. LGBT political power is not likely to diminish; the LGBT community has amassed impressive political assets, including powerful allies, access to lawmakers, financial resources, and deep ties to influential mainstream media.

As a result, the Respondents' claims can be fairly addressed in the political forum. There is no reason to judicially remove debate over the definition of marriage from public discourse—and certainly not in favor of a viewpoint that has demonstrated its full access to democratic channels with tremendous political success.

ARGUMENT

All laws classify. “There is hardly a law on the books that does not affect some people differently than others.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (Stewart J., concurring). But in the vast majority of cases, courts defer to the democratic process by asking only whether there is some conceivable rational basis for the classification. *See McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

Marriage laws classify by age and consanguinity, for example.² If these classifications were challenged on equal protection grounds, the court would have to determine whether these are rational democratic decisions to be determined legislatively, or whether the judiciary should intervene and override these legislative choices. This case may³ present the question of whether a classification based on sexual orientation is rational—and therefore subject to the democratic process—or whether courts should interfere in the democratic process and apply a higher level of scrutiny.⁴

This Court has explained that there must be compelling reasons for the judiciary to interfere in classifications that are the result of the democratic process. In *United States v. Carolene Products Co.*, the Court hinted that there may be cases involving “prejudice against discrete and insular minorities ..., which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” 304 U.S. 144, 152

² See Calif. Family Code §§ 301, 302 (limiting marriage by age); *id.* § 2200 (limiting marriage by relatives); *id.* § 2201 (prohibiting marriage based on existing marriage).

³ The Court of Appeals applied rational basis review. Respondents assert that if this Court finds that Proposition 8 survives rational basis review, it must then determine whether stricter scrutiny should apply. See Respondents’ Brief in Opposition to Petition for Certiorari at p.27.

⁴ See, e.g., *Hernandez v. Robles*, 26 A.D. 3d 98, 102 (N.Y. 2005) (“Deprivation of legislative authority, by judicial fiat, to make important, controversial policy decisions prolongs divisiveness and defers settlement of the issue; it is a miscarriage of the political process involved in considering such a policy change[.]”).

n.4 (1938). Subsequently, this Court has identified a very few “suspect” classifications that are subject to stricter scrutiny. Classifications based on race, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), national origin, *Oyama v. California*, 332 U.S. 633, 646 (1948), and alienage, *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) are subject to strict scrutiny. Classifications based on gender, *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973), and illegitimacy, *Trimble v. Gordon*, 430 U.S. 762, 767 (1979), are subject to heightened scrutiny. But the wisdom of legislative classifications is ordinarily left to the democratic process.

In these very limited instances where heightened scrutiny was granted, the group’s political powerlessness was a critical factor. Race was a valid basis for disenfranchisement before passage of the Fifteenth Amendment. For many years afterward, national origin was used to deny naturalization and corresponding access to our political system. *Oyama*, 332 U.S. at 652-55, 665. As this Court has noted, aliens “have no direct voice in the political processes.” *Foley v. Connelie*, 435 U.S. 291, 294 (1978). More than fifty years after winning the right to vote, women were still “vastly underrepresented in this Nation’s decisionmaking councils.” *Frontiero*, 411 U.S. at 686 n.17. And when this Court has concluded that heightened scrutiny is *not* merited, its conclusion was rightfully based on the group’s ability to accomplish its goals through the political process. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985).

The purpose of this brief is to (1) show that “political powerlessness” is a critical factor in determining whether strict scrutiny should be

applied, and (2) demonstrate that this factor strongly supports application of rational basis review in this case.

I. POLITICAL POWERLESSNESS IS A KEY COMPONENT OF EVERY SUSPECT CLASS.

This Court has reserved heightened scrutiny for groups that cannot rely on “the operation of those political processes ordinarily to be relied upon to protect minorities.” *Carolene Products Co.*, 304 U.S. at 152–53 n.4.⁵ Suspect classes are groups that have been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). See *Castaneda v. Partida*, 430 U.S. 482, 514 n.6 (1977) (“The classic situation in which a ‘minority group’ may suffer discrimination in a community is where it is relegated to a position of political powerlessness.”) (quotation marks and ellipsis omitted). Thus, only groups lacking the ability to “attract the attention of the lawmakers” merit heightened scrutiny. *Cleburne*, 473 U.S. at 445.

In *Windsor v. United States*, the Second Circuit applied “intermediate” scrutiny to the Defense of

⁵ While this Court has sometimes described the factor as being “a minority or politically powerless,” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), minority status alone does not merit heightened scrutiny. See, e.g., *Cleburne*, 473 U.S. at 446 (denying suspect class to mentally disabled).

Marriage Act. 699 F.3d 169, 185 (2d Cir. 2012).⁶ Citing *Cleburne*, the Court suggested that “lack of political power” is a dispensable consideration. *Id.* at 181. But far from dispensing with political powerlessness as a factor, the *Cleburne* majority focused on it, finding that “the legislative response ... negates any claim that the mentally retarded are politically powerless” *Cleburne*, 473 U.S. at 445. Inexplicably, the Second Circuit ignored the majority opinion and instead cited a concurring/dissenting opinion by Justice Marshall. But Justice Marshall’s reasoning was rejected by the majority. *See id.* at 465-66 (Marshall J., concurring in part and dissenting in part). Thus, contrary to the Second Circuit’s suggestion, *Cleburne* confirms the importance of political powerlessness.

The Second Circuit in *Windsor* also misapprehended what this Court has meant by “political powerlessness.” “The question is not whether homosexuals have achieved political successes over the years; they clearly have,” the Second Circuit asserts. *Windsor*, 699 F.3d at 184. “The question is whether they have the strength to politically protect themselves from wrongful

⁶ Most federal courts of appeal evaluate sexual orientation classifications under rational-basis review. *Massachusetts v. Dep’t of Health & Human Servs.*, 682 F.3d 1, 9-10 (1st Cir. 2012); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing decisions from the Fourth, Sixth, Seventh, Tenth, D.C., and Federal Circuits). Only the Second Circuit has applied heightened scrutiny.” *Windsor*, 699 F.3d at 185.

discrimination.” *Id.* There is truth in this formulation, “but the answer to the second question is powerfully influenced by the answer to the first question, because political success is the most direct, if not defining, indicator of the ability to protect oneself through political processes.” *Sevcik v. Sandoval*, __ F. Supp. 2d __, 2012 WL 5989662, *12 (D. Nev., Nov. 26, 2012).

Amazingly, *Windsor* acknowledged the legislative successes of gays and lesbians—yet still found that they are politically powerless because they do not have enough power in some instances. *Windsor*, 699 F.3d at 184. This Court rejected that very position in *Cleburne*. “Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.” *Cleburne*, 473 U.S. at 445. Rather, *Cleburne* says that a class must be politically powerless “in the sense that they have no ability to attract the attention of the lawmakers.” *Id.* In this sense, there is no plausible way that gays and lesbians can be classified as politically powerless. As Respondents’ own experts acknowledged, gays and lesbians have been incredibly successful in attracting the attention of lawmakers—especially in California.

This Court has expressed “revulsion” at interfering with the political process “to protect interests that have more than enough power to protect themselves in the legislative halls.” *Dandridge v. Williams*, 397 U.S. 471, 520 (1970). “[J]udicial intervention is generally unwarranted” when political processes are available as a remedy. *Nordlinger v. Hahn*, 505 U.S. 1, 17 (1992). *See also*

Foley, 435 U.S. at 294 (heightened scrutiny for alienage is “necessary since aliens ... have no direct voice in the political processes”).

Especially in cases like this, in which the democratic process is in full sway, this Court limits heightened scrutiny to the politically powerless. Doing otherwise “pre-empt[s] by judicial action a major political decision which is currently in process of resolution” and causes “democratic institutions [to be] weakened,” *Frontiero*, 411 U.S. at 692 (Powell, J., concurring).

While gays and lesbians may not have defeated Proposition 8, they unquestionably possess substantial political power. The legislative success of gays and lesbians “negates any claim” of political powerlessness. *Cleburne*, 437 U.S. at 445. Accordingly, they do not merit the extraordinary exemption from the democratic process that Respondents demand.

II. POLITICAL POWER IN CALIFORNIA IS THE RELEVANT CONSIDERATION.

What is the relevant jurisdiction for analyzing the political powerlessness of a minority? The very nature of the question lends itself to only one answer: the relevant jurisdiction is the one in which the law being challenged was passed. Indeed, this Court has directly pointed to that very response. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989) (noting racial makeup of the city of Richmond and the Richmond city council when assessing the constitutionality of a Richmond municipal requirement). Accordingly, gay and lesbian political power in California—the jurisdiction

where Proposition 8 was enacted—is the proper political forum to consider when evaluating Respondents’ claim that Proposition 8 should be subjected to strict scrutiny. It would be quite odd to judicially interfere in the California democratic process, where gays and lesbians possess substantial political power, based on an analysis of their political power elsewhere. Thus, this brief demonstrates first that gays and lesbians have substantial political power in California.

Alternatively, if California is not the proper jurisdiction, then an assessment of national political power is the only other logical jurisdiction. It can certainly be said that national politics influence state decisions. But again, gays and lesbians possess significant political power on a national level.

A. The Proposition 8 Election Demonstrates the Formidable Political Power of the LGBT Community.

Far from demonstrating political powerlessness, Proposition 8 reveals only that gays and lesbians lost one close battle. Proposition 8, which reserves the title of marriage for opposite-sex couples, passed by a narrow vote of 52.2% to 47.8%. *Perry v. Brown*, 671 F.3d 1052, 1081 (9th Cir. 2012). But Proposition 8 did not substantively alter the legal rights of gays and lesbians, who—undoubtedly as a result of their political power in California—already had “virtually all the benefits and responsibilities afforded by California law to married opposite-sex couples.” *Id.* at 1065 quoting *In re Marriage Cases*, 183 P.3d 384,

417-18 (Cal. 2008).⁷ Those benefits were achieved through sustained political successes.

Far less success in other states has led courts to conclude that gays and lesbians are not politically powerless. *See Andersen v. King County*, 138 P.3d 963, 974-75 (Wash. 2006) (en banc) (“The enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power.”) *Conaway v. Deane*, 932 A.2d 571, 611 (Md. 2007) (“[W]e are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to extraordinary protection from the majoritarian political process. To the contrary, it appears that, at least in Maryland, advocacy to eliminate discrimination against gay, lesbian, and bisexual persons based on their sexual orientation has met with growing successes in the legislative and executive branches of government.”) (internal quotation marks omitted).⁸

⁷ California’s Domestic Partner Rights and Responsibilities Act of 2003 provides domestic partners with the same rights and obligations of marriage. Equality California described that bill’s passage as “a tremendous civil rights victory for LGBT people.” Press Release, Equality Cal., Governor Davis Makes History with Signature on Domestic Partner Rights & Responsibilities Act of 2003 (Sept. 19, 2003), <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4025653&ct=5197843>.

⁸ More than two decades ago courts recognized the political power of gays and lesbians. *See High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (“[L]egislatures have addressed and continue to address the discrimination suffered by homosexuals Thus, homosexuals are not without political power”); *Ben-Shalom v. Marsh*, 881

Gays and lesbians are certainly not without financial resources. The “No on 8” campaign raised \$43 million and *outspent* Proposition 8 proponents by \$3 million.⁹ “No on 8” contributors included many Fortune 500 corporations and their founders: PG&E (\$250,000), Apple (\$100,000), Lucas Films (\$50,000, plus another \$50,000 from George Lucas), Levi Strauss (\$25,000), Williamson Capital (\$570,000), Google founders Sergey Brin and Larry Page (\$140,000), David Geffen and Jeffrey Katzenberg of Dreamworks Studios (\$125,000), and Bruce Bastian, co-founder of WordPerfect software (\$1,000,000).¹⁰

No on 8 also enjoyed nearly universal media support. “[O]f the 23 largest newspapers in California by circulation ... 21 ... endorsed a No On 8 position.... [T]he remaining two ... did not take a position” Transcript of Record at 2456:25-2457:17, 2442:21-24 (Miller).

There was also groundbreaking opposition to Proposition 8 from a considerable number of

F.2d 454, 466 (7th Cir. 1989) (“[H]omosexuals are proving that they are not without growing political power.... A political approach is open to them”).

⁹ Cal. Sec’y of State, *Campaign Finance: No on 8, Equality for All*, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1259396&session=2007&view=general>; Cal. Sec’y of State, *Campaign Finance: ProtectMarriage.com – Yes on 8, A Project of California Renewal*, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1302592&session=2007>.

¹⁰ *Proposition 8: Who gave in the gay marriage battle?*, <http://projects.latimes.com/prop8/> (enter contributor name).

religious organizations in California.¹¹ For example, “California’s six most senior Episcopal bishops [] unanimously declared their opposition to [Proposition 8].”¹² The Board of Rabbis of Southern California, described as “one of the nation’s largest rabbinic boards,” opposed Proposition 8.¹³ The California Council of Churches ran an ad opposing Proposition 8, and California’s Unitarian Universalists organized and conducted weekly “No on 8” phone banks and rallies.¹⁴

In sum, Proposition 8 passed, not because of the political powerlessness of its opponents, but *despite* a powerful, highly organized, and well-financed LGBT opposition.

¹¹ See, e.g., Rev. Rebecca Voelkel, Nat'l Gay & Lesbian Task Force, *A Time to Build Up: Analysis of the No on Proposition 8 Campaign & Its Implications for Future Pro-LGBTQQA Religious Organizing* (2009); Press Release, GLAAD, *Faith Leaders from Across State to Speak Out Against Proposition 8* (Oct. 30, 2008).

¹² Duke Helfand, *Bishops in state oppose Prop. 8*, L.A. Times, Sept. 11, 2008, <http://articles.latimes.com/2008/sep/11/local/megaymarriage11>.

¹³ Rebecca Spence, *Leading Combatant in Gay Marriage Fight To Head Southern California Rabbis*, The Jewish Daily Forward, Apr. 15, 2009, <http://forward.com/articles/104856/leading-combatant-in-gay-marriage-fight-to-head-so/>; Duke Helfand, *Board of Rabbis Opposes California Anti-Gay-Marriage Initiative*, L.A. Now (Sept. 26, 2008), <http://latimesblogs.latimes.com/lanow/2008/09/proposition-8-i.html>.

¹⁴ *UCC Church takes a Stand Against California's Proposition 8*, United Church of Christ: Called out eNews, Oct. 2008; Neighborhood Unitarian Universalist Church of Pasadena Newsletter, Oct. 2008 (Unitarian rally); Pac. Sw. Dist. of the Unitarian Universalist Ass'n and Camp de Benneville Pines Annual Meeting (May 2009).

No minority group has the power to win every political battle. “Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.” *Cleburne*, 473 U.S. at 445.

“[G]ays in America have considerable power. They are disproportionately wealthy. They are disproportionately influential to their numbers, at least their numbers as defined by those who are openly gay.”¹⁵ While gays and lesbians may not have achieved their desired outcome with Proposition 8, they unquestionably possess political power.

B. Gays and Lesbians Enjoy Established and Sustained Legislative Success in California.

In the face of California’s well-established role as the political epicenter of the gay community’s ever-growing political influence,¹⁶ the outcome of Proposition 8 was likely a surprise to many.

“California has been dramatically transformed into a state with the most sweeping and substantive rights and protections for LGBT community

¹⁵ Alan M. Dershowitz, Lecture 11, *Lawrence v. Texas*, in *The Modern Scholar: Fundamental Cases: The Twentieth-Century Courtroom Battles That Changed Our Nation* Disc 6, Track 4 at 1:45-1:57 (Recorded Books, LLC 2006).

¹⁶ *See, e.g.*, Michael J. Klarman, *From the Closet to the Altar* 10, 12-13, 18, 23-25, 29, 44, 71, 114, 119, 128-29, 131-32, 147, 195, 201 (2012) (highlighting societal deference to gay rights and political accomplishments in California and elsewhere since the early 1960s).

members in the nation.”¹⁷ Equality California, which describes itself as the largest statewide LGBT advocacy organization in California, notes that in the last decade it has “successfully passed more than 90 pieces of civil rights legislation for the LGBT community.”¹⁸

Respondents’ own expert, political science professor Gary Segura, agrees that California’s legal protections for gays and lesbians exceed those of any other state. Transcript of Record at 1665:10-12 (Segura) (unable to identify any state with more comprehensive legal protections for gays than California); Transcript of Record at 1763:23-1764:2 (Segura) (“Q: And there are more civil rights protections in California for gays and lesbians than in any other state, correct? A: That would appear to be the case.”). As the group’s former director noted upon his recent departure, “Equality California today is without question closer to achieving our goals, especially with the election of a governor and attorney general who are true champions for our community.”¹⁹

Since the passage of California’s landmark 2003 domestic partnership rights bill, political momentum for California’s LGBT population has continued to build. Gay and lesbian lobbying efforts in California have been extremely successful. Even Respondents’ experts admit that in California, nearly every policy

¹⁷ Press Release, Equality California Executive Director Geoff Kors Announces 2011 Departure, Equality California (Dec. 3, 2010),

<http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4869041&ct=8951539>.

¹⁸ *Id.*

¹⁹ *Id.*

supported by LGBT lobbyists has been enacted, including prohibitions against sexual-orientation discrimination in public and private employment, business services, education, housing, insurance, medical care, publicly funded programs and activities, public contracting, and a wide array of other contexts. Transcript of Record at 504:23-505:15 (Chauncey).

In 2011, the California Legislature passed “the greatest number of pro-equality bills ... in any legislative session in California history.”²⁰ Two of the most recent laws broke new ground for LGBTs. The first, known as the FAIR Education Act or SB 48, requires that California school curriculum—at all grade levels—teach the historic roles and contributions of LGBT people.²¹ The second law asks all judicial candidates for the California court system to reveal their sexual preferences.²²

²⁰ Press Release, Equality Cal., Equality California Releases 2011 Legislative Scorecard (Nov. 1, 2011), <http://www.eqca.org/site/apps/s/content.asp?c=kuLRJ9MRKrH&b=4096757&ct=9024453>.

²¹ Voters attempted two separate referendums to repeal this law, but failed to collect sufficient signatures in 2011 and again in 2012. *See* CLASS Act, Important Notice, <http://classact2012.com/> (reporting failure to gather sufficient signatures).

²² The 2012 information collected as a result of California’s Judicial Applicant & Appointment Demographics Inclusion Act reveals that more than two percent of California’s judges are gay and lesbian. Judicial Council of California, 2012 Demographic Data Provided by Justices and Judges As of December 31, 2011, <http://www.courts.ca.gov/documents/2012-Demographic-Report.pdf>. This percentage is very close to the population estimates of gays and lesbians. The Human Rights Campaign reports that “[t]here are roughly 9 million LGBT people in the U.S.” HRC, Top 5 Things to Know About LGBT

LGBT concerns have clearly captured the attention of California legislators. “These victories for LGBT equality would be impossible without the heroic efforts of those California lawmakers who championed those bills and who voted to advance equality for LGBT people in California.”²³

Indeed, California has an impressive array of lawmakers who are staunch political allies of gays and lesbians. “In California, supporting LGBT rights is a winning formula, as candidates who oppose equality are continually rejected by voters.”²⁴ For example, the most influential positions within California’s elected leadership are occupied by vocal proponents of the LGBT agenda. California’s current governor and named party in this case, Jerry Brown, refused to defend Proposition 8 during his tenure as state attorney general. As governor, Brown has continued to refuse to defend Proposition 8 and has advocated for same-sex marriage.

Equality California’s 2011 Legislative Scorecard gave pro-LGBT rankings of 80% or more to Governor Brown, 25 of California’s 40 Senators, and 53 of its

Issues, <http://www.hrc.org/press-releases/>. Nine million equates to 2.8% of the U.S. population (using the 2012 Census number of 311,591,917 total population, United States Census Bureau, USA People QuickFacts, <http://quickfacts.census.gov/qfd/states/00000.html>).

²³ Press Release, Equality Cal., Nov. 1, 2011, *supra*.

²⁴ Press Release, Equality California, Pro-Equality Candidates Sweep Seats in the Legislature, Gain Ground in State (Nov. 8, 2006), <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4025925&ct=5196849>.

79 Assemblymembers.²⁵ In fact, a majority of California's legislators receive a 100% ranking from LGBT watch groups. Transcript of Record at 1723:9-1724:12 (Segura) (agreeing that a majority of California legislators are rated 100% by LGBT groups and admitting he is unable to identify any evidence that these 100% rated legislators in CA are not LGBT allies).

The 2012 Platform of the California Democratic Party, which controls the Senate and Assembly, expresses “[s]upport [for] nondiscrimination and equality for Lesbian, Gay, Bisexual, and Transgender people in all aspects of their lives; and [w]e support the LGBT Community in its quest for the right to legal marriage.”²⁶ This powerful statement from California's strongest political party is—like other components of gay and lesbian political power—not a new or unusual development.²⁷ Gay and lesbian political power has been firmly established in California for many years.

²⁵ Equality Cal., 2011 Legislative Scorecard 7-11, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=7832947>. California's 80th Assembly member was rated “N/A.”

²⁶ Cal. Democratic Party, *2012 State Platform, Equality of Opportunity*, <http://www.cadem.org/resources?id=00691>.

²⁷ See, e.g., Letter from Debra Bowen, Cal. Sec'y of State, *2007 Pride Celebrations* (California Secretary of State supports gay rights); Lockyer for Treasurer, *Leading LGBT Groups Support Lockyer in Treasurer's Race*, <http://www.lockyer2010.com> (California Treasurer receives 100 percent rating from Equality California); Press Release, Nat'l Gay & Lesbian Task Force, *Task Force Honors California Statewide Leaders for their Contributions to LGBT Equality* (Nov. 6, 2009) (describing California's Controller as a “steadfast ally of LGBT people”); Press Release, Office of the Lt. Gov., *Cal. Lieutenant Governor John Garamendi's Statement on the California Supreme*

C. Gays and Lesbians are Overrepresented in the California Legislature.

In *Frontiero*, 411 U.S. at 686, n.17 (1973), this Court noted that one indicator of political powerlessness is significant underrepresentation. In 1973, women comprised more than half of America's population, but held no Senate seats and only fourteen seats in the House of Representatives.²⁸ In contrast, gays and lesbians are *over*represented in the California legislature:

	California Senate		California Assembly		Total in Calif. Legislature		Calif. Pop. %
	#	%	#	%	#	%	
LGBT	3	7.5%	5	6.3%	8	6.7%	3.2%
Women	11	27.5%	21	26.3%	32	26.7%	50.3%
Hisp.	15	37.5%	8	10.0%	23	19.2%	38.1%
Black	2	5.0%	6	7.5%	8	6.7%	6.6%

²⁹

Court's Ruling on Proposition 8 (May 26, 2009) (lamenting the validity of Prop. 8).

²⁸ *Frontiero v. Richardson*, 411 U.S. at 686 n.17; *see also* K. Amundsen, *The Silenced Majority: Women and American Democracy* (1971) (detailing disparity between female population and representation); Jt. Reply Br. of Appellants and ACLU *Amicus Curiae* at 9, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694).

²⁹ California Legislative Black Caucus website (2013), <http://blackcaucus.legislature.ca.gov/> (listing Black members of the California Legislature); California Legislative Latino Caucus website (2013), <http://www2.legislature.ca.gov/latinocaucus/> (listing Latino members of the California Legislature); California Legislative LGBT Caucus website (2013), <http://lgbtcaucus.legislature.ca.gov/> (listing LGBT members of

California's LGBT representation is not only disproportionately strong, it holds highly influential positions within the Legislature. The California Legislative LGBT Caucus includes current Assembly Speaker Perez and Senator Leno, Chairman of the Budget and Fiscal Review Committee. Until reaching her term limit in 2012, the Caucus also included former Speaker pro Tempore (later Senator) Kehoe.³⁰ In the California November 2012 elections, eight of the eleven known gay or lesbian candidates for state-wide office won their elections.³¹

the California Legislature); California Legislative Women's Caucus website, Summary of the 2012 Election (2013) <http://senweb03.senate.ca.gov/focus/outreach/clwc/lwc-201212-ewsletter.asp>; California: State & County Quickfacts, U.S. Census Bureau (2012), <http://quickfacts.census.gov/qfd/states/06000.html> (estimating the 2011 population of California is 50.3% female, 38.1% Hispanic, and 6.6% Black); Gary J. Gates & Christopher Ramos, *2008 Census Snapshot*, Williams Institute (Oct. 2008), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Ramos-CA-Snapshot-Oct-2008.pdf> (estimating the 2008 LGBT population of California at 861,000, composing 3.2% of the adult population). Determining the percentage of the population that is gay or lesbian is difficult. The numbers used in the chart are from the Williams Institute for Sexual Orientation Law and Public Policy at UCLA. A recent Gallup poll put the percentage of adults who identify as lesbian, gay, bisexual, or transgender at 3.4%. Gary J. Gates & Frank Newport, *Gallup Special Report: The U.S. Adult LGBT Population* (Oct. 2012), <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/gallup-special-report-18oct-2012/>.

³⁰ *California Legislative LGBT Caucus, supra*.

³¹ Denis Dison, *Victory Fund celebrates huge night for gay candidates*, Gay Politics (Nov. 7, 2012), <http://www.gaypolitics.com/2012/11/07/victory-fund-celebrates-huge-night-for-gay-candidates/>.

In fact, LGBT control of California's Legislature is so firm that Senate leader Steinberg has even speculated that the Legislature might place a referendum of Proposition 8 on a future statewide ballot.³² Surely a group that has such significant control of California's legislature cannot be viewed as politically powerless.

D. California LGBT Allies Outside of Government.

The LGBT community also has influential allies outside of government who influence California politics, including the all-important labor vote. The California Teachers Association supports gays and lesbians and contributed \$1.3 million to oppose Proposition 8.³³ The 700,000 member California State Council of the Service Employees International Union (SEIU) contributed more than \$500,000 to the "No on 8" campaign and publicly expressed its support for LGBT rights. SEIU assembled a coalition of more than fifty California labor groups representing more than two million California workers to join an *amicus* brief opposing Proposition 8.³⁴

³² AM Alert: Is Proposition 8 referendum in the cards?, Sacramento Bee (Nov. 15, 2012), <http://blogs.sacbee.com/capitolalertlatest/2012/11/am-alert-is-proposition-8-referendum-in-the-cards-for-california.html>.

³³ *California Teachers Association, Ballot measure activism, 2008*, http://ballotpedia.org/wiki/index.php/California_Teachers_Association#cite_ref-13.

³⁴ Paul Hogarth, *Organized Labor Joins Prop. 8 Lawsuit*, BeyondChron, Jan. 14, 2009, <http://www.beyondchron.org/news/index.php?itemid=6490>; *cf.* Brief for Cal. Fed. of Labor, AFL-CIO, *et al.* as *Amici Curiae*

In sum, gays and lesbians have, through the democratic process in California, gained all the rights of marriage and enacted the most robust nondiscrimination laws anywhere in the country. They have 100% support from a majority of California's legislators. California's governor has refused to defend Proposition 8. And California's business community strongly backs gay rights. A group with such support cannot plausibly claim to be politically powerless, particularly within California.

III. THE NATIONAL POLITICAL POWER OF GAYS AND LESBIANS.

A. The Obama Administration's Strong Support for LGBT Concerns.

Gays and lesbians have an ally at the very top. In 2012, President Obama explained, “[s]ince I took office, my Administration has worked to broaden opportunity, advance equality, and level the playing field for LGBT people and communities . . . I personally believe in marriage equality for same-sex couples.”³⁵ President Obama's support for LGBT interests includes:

- Directing the Department of Justice to not defend DOMA;³⁶
- Successfully pushing Congress to repeal 10

Supporting Petitioners, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

³⁵ President Obama, *Lesbian, Gay, Bisexual, and Transgender Pride Month, 2012*, A Proclamation By the President of the United States of America (June 1, 2012).

³⁶ Letter from Eric Holder, Attorney General, to Congress, *On Litigation Involving the Defense of Marriage Act*, Feb. 23, 2011.

U.S.C. § 654, aka “Don’t Ask, Don’t Tell;”³⁷

- Supporting the Hate Crimes Bill;³⁸
- A presidential directive to end discrimination on the basis of gender identity;³⁹
- Appointing the highest-ever number of openly gay and lesbian people to his administration;⁴⁰
- Proclaiming a gay pride month each year;⁴¹
- Issuing a June 2009 memorandum to all federal executive departments and agencies, ordering that same-sex partners of federal workers receive some federal benefits;⁴² and
- Expanding domestic partner benefits in June 2010.⁴³

³⁷ Christine Simmons, *Obama HRC Speech: “I Will End Don’t Ask, Don’t Tell,” Says President Obama*, Huffington Post, Oct. 10, 2009, http://www.huffingtonpost.com/2009/10/10/obama-says-he-will-end-do_n_316524.html.

³⁸ Obama, *Pride Month 2012* Proclamation, *supra*.

³⁹ President Obama, *Presidential Memorandum – Hospital Visitation*, (April 15, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation>.

⁴⁰ *See, e.g., Presidential Appointments Project*, Gay & Lesbian Leadership Institute, <http://www.glli.org/programs/presidential> (announcing more than 250 gay and lesbian appointees).

⁴¹ Obama, *Pride Month 2012* Proclamation, *supra* (mirroring similar proclamations in 2009, 2010, and 2011).

⁴² President Obama, *Memorandum for the Heads of Executive Departments and Agencies on Federal Benefits and Non-Discrimination*, (June 17, 2009), <http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discri>.

⁴³ Ed O’Keefe, *Same-Sex Partners of Federal Workers Can Start Applying for Benefits Next Month*, Wash. Post, June 2, 2010 (reporting June 1, 2010 announcement that that the “same-sex partners of gay and lesbian federal workers [could begin] applying . . . for long-term health-care insurance”).

B. LGBT Success in Congress and Nationally.

Recent headlines have been filled with news of LGBT political victories in Washington: the repeal of “Don’t Ask, Don’t Tell” despite military leaders’ concerns, the introduction and hearings for a DOMA repeal bill, Senate confirmation of openly gay and lesbian judges, and Congressional dispute over whether the House should defend the constitutionality of its law (DOMA) after President Obama directed the Department of Justice not to.

These victories are not surprising, considering the political voice that gays and lesbians have in Washington. At least six U.S. House Representatives and one Senator—the recently elected Senator Baldwin of Wisconsin—are openly gay. According to the president and CEO of the Gay & Lesbian Victory Institute, “Baldwin’s victory . . . is a testament to the enormous [political] power of . . . LGBT candidates and their allies [who] showed we are willing to engage fully in the political process to win.”⁴⁴

LGBT political headlines are attributable not only to the growing number of elected gays and lesbians, but also due to their impressive array of allies. Many Congressional members receive top scores from the Human Rights Campaign, a 1.5 million member LGBT civil rights organization, for their work on LGBT issues.⁴⁵ Fifty-two Senators

⁴⁴ Dison, *supra*.

⁴⁵ HRC, *HRC Scorecard of 112th Congress* at 6-11, 15-31 (Oct. 18, 2012), http://www.hrc.org/files/assets/resources/HRC-112th_CongressionalScorecard_Updated.pdf.

and 174 House members received scores of 70% or higher. And both California Senators⁴⁶ and thirty-three other California Congressional members received top scores from the HRC.⁴⁷

LGBT political power extends to the political parties themselves. The Democratic Party declared in its 2012 platform, “We support the Employment Non-Discrimination Act . . . We support marriage equality and support the movement to secure equal treatment under law for same-sex couples . . . We oppose . . . constitutional amendments and other attempts to [define marriage as the union of a man and a woman]. . . . We support the full repeal of the so-called Defense of Marriage Act and the passage of the Respect for Marriage Act.”⁴⁸ A growing number of Republicans also support LGBT causes.⁴⁹

That commitment has translated into substantial taxpayer dollars directed towards LGBT causes. Over the last two decades, Congress has spent tens

⁴⁶ Senator Feinstein starred in television ads for the “No on 8” campaign. *Senator Feinstein: No on 8* (No on 8 Campaign Commercial 2008), <http://www.youtube.com/watch?v=U7LdC1RxvZg>. See also Transcript of Record at 1747:6-8 (Segura) (Feinstein opposed Proposition 8); *Senator Boxer: Celebrating LGBT Pride Month*, June 1, 2012, <http://boxer.senate.gov/en/press/updates/060112a.cfm>.

⁴⁷ *HRC Scorecard of 112th Congress*, supra at 6, 15-17.

⁴⁸ Platform Standing Comm., 2012 Democratic Nat’l Convention Comm., *Moving America Forward* 17, 18 (2012).

⁴⁹ See, e.g., *Republicans support same-sex marriage, too*, Baltimore Sun, Nov. 1, 2012, http://articles.baltimoresun.com/2012-11-01/news/bs-ed-gop-marriage-letter-20121101_1_marriage-equality-republicans-civil-marriage-protection-act (listing notable Republican supporters of same-sex marriage).

of billions of dollars on AIDS treatment, research, and prevention. Judith A. Johnson, Cong. Research Serv., RL30731, *AIDS Funding for Federal Government Programs: FY1981-FY2009* (2008) (reporting a dramatic increase in AIDS funding, with \$6 billion in discretionary funds in 2008).

Joe Solmonese, President of the HRC, said in 2008 that “The lesbian, gay, bisexual and transgender community has made unprecedented progress in Congress over this two-year session . . . [T]hese accomplishments would not have been possible without the support of congressional leadership and allies in both the House and Senate.”⁵⁰ HRC is well-suited to speak about the political outlook. It validly claims credit for getting LGBT allies elected to office: “We were named—by the well-respected *National Journal*—the single most effective, non-union progressive organization working in the 2006 midterm elections. We played a decisive role in electing fair-minded majorities to the U.S. House and Senate, and to legislatures from Oregon to New Hampshire.”⁵¹ And HRC’s assessment of the most recent 112th Congress “shows the LGBT community is making gains on Capitol Hill.”⁵²

⁵⁰ HRC, *Congressional Scorecard: Measuring Support for Equality in the 110th Congress* 2 (Oct. 15, 2008) http://www.hrc.org/files/documents/Congress_Scorecard-110th.pdf.

⁵¹ HRC 2007 Annual Report 4 (2007), http://www.hrc.org/files/assets/resources/AnnualReport_2007.pdf.

⁵² *HRC Scorecard of 112th Congress*, supra. See also Transcript of Record at 2482:4-2483:14 (Miller) (describing pro-gay achievements in Congress).

C. Gay and Lesbian Political Power in Other States.

Political support for homosexuals and lesbians extends well beyond California and includes sufficient political power to enact same-sex marriage by a popular vote in several states. Whether by legislative action or direct vote of the people, “legislative response . . . negates any claim that [a group is] politically powerless in the sense that they have no ability to attract the attention of the lawmakers.” *Cleburne*, 473 U.S. at 445.

In the 2012 election, voters in three states redefined marriage to include same-sex couples—Washington, Maryland, and Maine. Minnesota voters rejected a ballot measure similar to Proposition 8. In 2011, New York’s legislature enacted same-sex marriage, continuing the political march begun in the legislatures of Massachusetts, New Hampshire, and Vermont.⁵³

LGBT political success extends beyond relationship recognition. As of 2011, thirty-one states and the District of Columbia had “hate crimes” laws based on sexual orientation.⁵⁴ HRC reports that twenty-one states and the District of Columbia and at least 181 cities and counties prohibit employment discrimination based on sexual

⁵³ Despite vigorous grass-roots efforts, the Massachusetts Legislature did not overturn the Massachusetts Supreme Judicial Court’s recognition of same-sex marriage in 2003; New Hampshire’s legislature adopted it in 2010; and Vermont’s legislature in 2009.

⁵⁴ Anti-Defamation League State Hate Crime Statutory Provisions, http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf.

orientation.⁵⁵ Twenty-two states and the District of Columbia provide domestic partnership benefits for state employees.⁵⁶ And, in addition to the generous domestic partnership laws in California, gays and lesbians have succeeded in enacting laws in many states and the District of Columbia that provide civil unions, domestic partnerships, and related benefits for same-sex couples.⁵⁷

⁵⁵ HRC, *The State of the Workplace* (2007-2008).

⁵⁶ Transcript of Record at 2479:20-23 (Miller) (“according to a survey by the Human Rights Campaign, over 20 states have adopted state employee domestic partnership benefits, at this point”).

⁵⁷ *See, e.g.*, Colo. Rev. Stat. §§ 15-22-101-112 (creating designated beneficiary agreements for same-sex couples); Conn. Gen. Stat. §§ 46b-38aa et seq. (establishing civil unions in 2005, but replaced with same-sex marriage in 2010); D.C. Code §§ 1-307.68, 1-612.31-38, 3-413, 5-113.31, 16-1001, 21-2210, 32-701-710, 42-1102, 42-3404.02, 42-3651.05, 46-401, 46-401.01, 47-858.03, 47-902, 50-1501.02, 7-201-228 (providing for and recognizing same-sex marriages and earlier provisions for same-sex partners); Haw. Rev. Stat. §§ 572C-1-7 (recognizing reciprocal benefits 1997 and adding civil unions in 2012); Ill. Comp. Stat. 750 § 75/1-90 (establishing civil unions); 2011 IL H.B. 5170 (NS) (proposing recognition of same-sex marriage); Me. Rev. Stat. tit. 18-A, § 1-201, 19-A, § 4002, 22, § 2710, 22, §§ 2843, 2846 (establishing various benefits for domestic partners); Md. Code Ann., Fam. Law §§ 2-201, 2-202 (authorizing same-sex marriages); Md. Code Ann., Health-Gen. § 6-101 (adding domestic partnerships); Nev. Rev. Stat. Ann. §§ 122A.010-122A.510 (establishing domestic partnerships); N.H. Rev. Stat. Ann. §§ 457:1-46 (replacing prior civil union statute with same-sex marriage); N.J. Stat. Ann. §§ 26:8A-1-13, 37:1-28-36 (establishing civil unions and domestic partnerships); N.Y. Dom. Rel. Law § 10-a (enacting same-sex marriage); Or. Rev. Stat. Ann. §§ 106.300-.340 (creating domestic partnerships); R.I. Gen. Laws Ann. §§ 15-3.1-11 (establishing civil unions); Vt. Stat. Ann. tit. 15, § 8 (enacting same-sex marriage with override of governor's veto); Vt. Stat. Ann. tit.

Gays and lesbians have also been successful candidates across the country. In the 2012 election, “[h]undreds of openly lesbian, gay, and bisexual candidates won election to public offices across America.”⁵⁸ In fact, the Gay & Lesbian Victory Institute, an organization that works to “increase the number of lesbian, gay, bisexual, and transgender (LGBT) people in public office,” identifies more than 100 openly LGBT members currently serving in state legislatures across the country.⁵⁹

While the 2012 election was significant for gays and lesbians, their political power is not a recent development. *See, e.g.*, Howard Fineman, *Marching to the Mainstream*, Newsweek, May 3, 1993 (stating in 1993 that gays are a “powerful and increasingly savvy [political] bloc”). And it is not likely to diminish. Gays and lesbians proclaim that they will inevitably win popular votes for their political agenda because “[t]he pulse of the public beats with their LGBT friends and neighbors.”⁶⁰

15, § 1204 (enacting civil unions); Wash. Rev. Code Ann. §§ 26.60.010-901 (establishing domestic partnerships; amended to establish same-sex marriages); Wis. Stat. Ann. §§ 770.001-.18 (establishing domestic partnerships).

⁵⁸ Dison, *supra*.

⁵⁹ *Mission*, Gay & Lesbian Leadership Institute, <http://www.victoryinstitute.org/mission/mission>.

⁶⁰ HRC 2011 Annual Report 10 (2011), http://www.hrc.org/files/assets/resources/AnnualReport_2011.pdf.

D. LGBT Campaigns Are Well-Financed by a Broad Range of Contributors.

“Few questions are as important to an understanding of American democracy as the relationship between economic power and political influence.”⁶¹ Indeed, money is often said to be the lifeblood of modern-day politics. Transcript of Record at 1676:2-6 (Segura) (stating that money is a source of political power); Transcript of Record at 2437:19-2438:15 (Miller) (“money is a critical asset for achieving political power” and “allows a group to be heard”). That lifeblood flows freely for the LGBT community, which has mobilized tremendous financial support from many sources.⁶²

Expensive advertising and promises of campaign funding unquestionably affected New York’s 2011 legislative enactment of gay marriage. “The Human Rights Campaign financed an advertising barrage . . . Several prominent Republican fund-raisers, including billionaire financial executive Paul Singer,

⁶¹ Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 Am. Pol. Sci. Rev. 1026 (1977).

⁶² See, e.g., Austin Jenkins, *Wealthy Gay Donors a New Force in Politics*, NPR, June 26, 2007, <http://www.npr.org/templates/story/story.php?storyId=11433268> (“A new force is emerging in American politics: wealthy, gay political donors who target state-level races.”); John Cloud, *The Gay Mafia That’s Redefining Liberal Politics*, Time, Oct. 31, 2008, <http://www.time.com/time/magazine/article/0,9171,1855344,00.html> (describing “the Cabinet” of wealthy homosexual men “that can quietly swoop in wherever anti-gay candidates are threatening and finance victories for the good guys.”); HRC 2011 Annual Report, *supra* at 15 (showing sustained annual fundraising of approximately \$40 million).

provided financial support to the lobbying campaign [for gay marriage].”⁶³

In the political realm, money not only has a major influence on elections, it also obtains preferential access to lawmakers at every level of government. Transcript of Record at 1683:4-10 (Segura) (access to legislators is the most valuable favor a party can confer on a large donor). Gay and lesbian political organizations have had this access for several years. In the past few years, the keynote speakers at HRC’s National Dinners have included President Obama, then-Senator Hillary Clinton, President Bill Clinton, Vice President Al Gore, and Nancy Pelosi.⁶⁴ This ability to directly access the chambers of political power in support of their political agenda is a leading indicator of LGBT political power.

E. Powerful Unions and Corporate America Supports LGBT Causes.

Union and corporate support is a prized source of political support. Transcript of Record at 2442:2–2468:23 (Miller) (listing as key allies of LGBTs: Democrats, elected officials, unions, corporations, newspapers, celebrities, progressive religions, professional associations). Gays and lesbians have this support as well. The National Education Association (NEA) regularly advocates for LGBT rights, including same-sex marriage recognition.

⁶³ Klarman, *supra*, at 163.

⁶⁴ See, e.g., HRC, *Past Dinners*, <http://www.hrcnationaldinner.org/pages/past-dinners>; *Human Rights Campaign to Honor House Speaker Nancy Pelosi with 2007 National Equality Award*, July 23, 2007, <http://www.hrc.org/press-releases/entry/nancy-pelosi-to-speak-at-hrc-dinner>.

“[For four decades,] NEA has led the fight for the rights of the nation’s GLBT students and educators.”⁶⁵

The 1.6 million member American Federation of State, County and Municipal Employees (AFSCME) has vowed to “continue to support the adoption of federal, state, and local civil rights laws that prohibit discrimination based on sexual orientation in employment and other areas[;] . . . encourage negotiation of anti-discrimination, pay equity and domestic partner benefits provisions in all contracts; and . . . strongly oppose any law or constitutional amendment that will abridge the rights of gays and lesbians including ones that perpetuate unequal marriage treatment.”⁶⁶

In addition to the unquestionable political influence of the unions, “[t]he business community . . . is one of the most important sources of interest group activity.”⁶⁷ The gay and lesbian community also enjoys broad support from this important and lucrative source of interest group activity—Corporate America funds a broad range of gay and lesbian political causes. The HRC lists numerous corporate sponsors including Coca-Cola, Dell, IBM,

⁶⁵ Nat’l Educ. Ass’n, *NEA: A Voice for GLBT Educators* 1, <http://www.nea.org/assets/docs/voiceforGLBTEducatorstimeline.pdf>.

⁶⁶ *Equal Rights for Gay and Lesbian Citizens*, AFSCME Res. 49, 36th Int’l Convention (2004), <http://www.afscme.org/members/conventions/resolutions-and-amendments/2004/resolutions/equal-rights-for-gay-and-lesbian-citizens>.

⁶⁷ Wendy L. Hansen & Neil J. Mitchell, *Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics*, 94 *Am. Pol. Sci. Rev.* 891 (2000).

Chevron, Citibank, Nike, Starbucks, Marriott, Macy's, Lexus, and American Airlines.⁶⁸ These corporations provide a significant amount of HRC's sustained forty million dollar annual budget.

Other LGBT groups also benefit from Corporate America's largess. The Gay Men's Health Clinic (GMHC), an organization dedicated to fighting AIDS, has a similar list of corporate sponsors contributing to its thirty million dollar annual budget.⁶⁹ Similarly, the Gay, Lesbian, and Straight Education Network (GLSEN) is also supported by America's most recognized corporate names.⁷⁰ And Lambda Legal, "the oldest national organization whose mission is to safeguard and advance the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation," boasts donations from the nation's top law firms and corporations.⁷¹ Prominent corporations have also directly supported LGBT legislation.⁷²

⁶⁸ HRC, *National Corporate Sponsors*, <http://www.hrc.org/the-hrc-story/corporate-partners>.

⁶⁹ Gay Men's Health Clinic, *2011 Annual Report* 12-21, 24 (2011), [http://www.gmhc.org/files/editor/file/a_ar2011\(1\).pdf](http://www.gmhc.org/files/editor/file/a_ar2011(1).pdf).

⁷⁰ Gay, Lesbian, & Straight Educ. Network, *2010 Annual Report* 2 (2010), http://www.glsen.org/binary-data/GLSEN_Annual_Report_FY10.pdf.

⁷¹ *Our Work*, Lambda Legal, <http://www.lambdalegal.org/our-work/>.

⁷² See, e.g., Equality Cal., *Sponsors*, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4026491>; Press Release, Equality Cal., *Silicon Valley Leaders to Denounce Proposition 8 in Newspaper Ad* (Oct. 30, 2008), http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4061163&content_id=%7BF3AB95F6-93FA-40B1-82B7-CAA2C038EDAF%7D¬oc=1; Sergey Brin, *Our*

“There are various dimensions to corporate political activity . . . [although] ‘corporate PAC donations are important in themselves, [] they also should be understood as [just] one quantitative indicator of a range of other corporate political activity.’”⁷³ Corporations also influence public policy through their own internal policies. The 2013 Human Rights Campaign’s Corporate Equality Index reported that ninety-nine percent of America’s top grossing companies—including companies in the Fortune 1000, Forbes 200 top private firms, and/or American Lawyer’s top 200 law firms—had policies prohibiting discrimination on the basis of sexual orientation.⁷⁴

Determined, organized, well-connected, and prestigious, LGBT union and corporate supporters ensure that gay and lesbian causes are at the forefront of politics.

F. Overwhelming Media Support for Gays and Lesbians Incalculably, But Certainly, Influences Voters.

Shaping public opinion is the key to political power.⁷⁵ America’s news media renders direct and

Position on California’s No on 8 Campaign, The Official Google Blog (Sept. 26, 2008), <http://googleblog.blogspot.com/2008/09/our-position-on-californias-no-on-8.html> (opposing Prop 8).

⁷³ Hansen & Mitchell, *supra*, at 891 (citation omitted).

⁷⁴ HRC, *Corporate Equality Index 2013: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality in Corporate America*, 1 (2012).

⁷⁵ See John R. Zaller, *The Nature & Origins of Mass Opinions* (1992) (showing how opinions of media elites set public opinion).

concrete support for gay and lesbian political efforts, and such “elite support” has “great[] influence” on public policy.⁷⁶ In the last decade, the New York Times has run over 8,500 stories about gay rights – two stories every single day for the last ten years.⁷⁷ HRC brags that it is quoted every day in prominent newspapers and that editorial boards view HRC’s positions as “common sense.”⁷⁸

Gay and lesbian influence is apparent simply from the news media’s phrasing of the question of same-sex marriage. Commentators nearly always refer to ballot measures like Proposition 8 in the LGBT-preferred terms of a “ban on gay marriage” and almost never use marriage supporters’ terminology of “redefining marriage.” And as this Court is well aware, the ability to “[c]ontrol the semantic playing field” is a powerfully persuasive tool.⁷⁹

Since the 2008 election, gays’ and lesbians’ considerable influence on news and entertainment

⁷⁶ Donald P. Haider-Markel et al., *Minority Group Interests & Political Representation: Gay Elected Officials in the Policy Process*, 62 J. Pol. 568, 575 (2000) (cited by Segura and showing that “elite support has greatest influence” on adoption of domestic partner benefits)

⁷⁷ This number was derived from the following search on Westlaw: "gay rights" & DA (aft 12-31-2002 & bef 01-02-2013) & SO(New York Times).

⁷⁸ HRC 2005 Annual Report, 20 (2005), http://www.hrc.org/files/assets/resources/AnnualReport_2005.pdf; HRC 2000 Annual Report, 3 (2000), http://www.hrc.org/files/assets/resources/AnnualReport_2000.pdf.

⁷⁹ Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 35-37 (2010) (explaining the persuasive power of terminology).

media has only increased. For example, “[t]here are more gay and lesbian characters on network television this season [2012-2013] than ever before, and “31 regularly-appearing characters . . . identify as gay, lesbian, bisexual or transgender.”⁸⁰ As GLAAD’s Board recently noted, some voters do not know any gay or transgender people. Those voters bring the images of gays and lesbians they have met “on their favorite TV shows, while at the movies, or when sitting down to read the Sunday paper. . . . [I]t’s those images they bring with them to the ballot box come voting time.”⁸¹

G. Many Religious Groups Support the Gay and Lesbian Political Agenda.

Gays and lesbians also have valuable allies in a growing number of religious organizations. “The myth that people of faith do not accept their LGBT brothers, sisters, neighbors and friends is simply untrue.”⁸² A recent compilation of religious groups’ official positions regarding same-sex marriage shows many religious organizations officially embracing homosexuality and same-sex partnership.⁸³

⁸⁰ Brian Stelter, *Group Finds More Gay and Lesbian Characters on Television*, New York Times, Oct. 5, 2012, <http://mediadecoder.blogs.nytimes.com/2012/10/05/group-finds-more-gay-and-lesbian-characters-on-television/>.

⁸¹ GLAAD, *Images of Equality: 2011-2102 Performance Report, From the Board* 1 (2012), <http://www.glaad.org/publications/performance-report-2012>.

⁸² *Id.* at 13.

⁸³ *Religious Groups’ Official Positions on Same-Sex Marriage*, Pew Forum on Religion & Pub. Life (Dec. 7, 2012), <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx>.

Many individual members of religious faiths support same-sex marriage regardless of the official stance of their faith group. For example, Respondents' expert, Professor Segura, provided data showing that 42.45% of Catholics, 10.47% of Mormons, and 24.28% of Protestants—all organizations officially opposing same-sex marriage—actually support same-sex marriage.⁸⁴ Equality California acknowledges these allies, saying “[w]hile our opponents certainly invoke scripture and theology to justify their beliefs, there are many clergy and denominations that feel equally passionate that their faiths call them to stand up for marriage equality.”⁸⁵

H. Public Opinion Is Trending In Favor of Respondents' Interests.

Whether due to changing religious views, media influence, union, or corporate backing, public opinion is trending in favor of gay and lesbian causes. In 1977, “only 56 percent of Americans supported gay rights legislation,” but by 1996 that figure had risen to 84 percent.⁸⁶ In 2002 a Gallup Poll found that “86 percent thought homosexuals should have ‘equal rights in terms of job opportunities.’”⁸⁷ And in 2010, Gallup reported that a majority of Americans—52 percent—believe that sex between same-sex partners

⁸⁴ Segura Rebuttal Report Tables at 13.

⁸⁵ Equality Cal., *Winning Back Marriage Equality in California: Analysis and Plan*, 22 (2009), http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/EQCA-WINNING_BACK_MARRIAGE_EQUALITY.pdf.

⁸⁶ Chauncey, *Why Marriage?*, *supra*, at 54-55.

⁸⁷ *Id.*

is morally acceptable.⁸⁸ “Heterosexuals’ attitudes toward sexual minorities are changing rapidly. In the last two decades, public sentiment has dramatically shifted toward greater tolerance and less condemnation of sexual minorities, with opposition to discrimination on the basis of sexual orientation now widespread.”⁸⁹

As Respondents’ own expert, George Chauncey, has written, “For several decades now, and especially since the 1990s, Americans have become more familiar with their lesbian and gay neighbors and more supportive of them.”⁹⁰ In fact, “*it is hard to think of another group whose circumstances and public reputation have changed so decisively in so little time.*” *Id.* (emphasis added).

CONCLUSION

Only groups lacking the ability to “attract the attention of the lawmakers” merit heightened scrutiny. *Cleburne*, 473 U.S. at 445. It is hard to think of a group that has gained more legislative attention in recent years than gays and lesbians. They are powerfully engaged in the democratic process. California has extended essentially all of the rights and privileges of marriage to gay couples. California law broadly prohibits sexual-orientation discrimination. Respondent’s allies boast that they have passed every pro-LGBT bill that has gone

⁸⁸ Klarman, *supra* at 156, 178-80 (describing steady pro-LGBT turn in public opinion).

⁸⁹ Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, *Am. Psychologist*, Sept. 2006 at 618).

⁹⁰ Chauncey, *Why Marriage?*, *supra* at 166.

before the California legislature. In fact, a majority of California legislators receive a 100% rating from LGBT watch groups.

Additionally, LGBT causes are well-funded. Opponents of Proposition 8 outspent supporters. LGBT causes are supported by the media, popular culture, big labor, and big business; and they are receiving increasing support from religious organizations. President Obama supports same-sex marriage and his administration proclaims all it has done to support LGBT causes.

In the face of this overwhelming evidence demonstrating gay and lesbian political power, suspect status is simply not merited.

Respectfully submitted,

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