

APPEAL NO. 12-17668

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BEVERLY SEVCIK, et al.

Plaintiffs-Appellants,

v.

BRIAN SANDOVAL, et al.

Defendants-Appellees.

Appeal from the United States District Court for the District of Nevada
Civil Case No. 2:12-cv-00578-RCJ-PAL (Judge Robert C. Jones)

**BRIEF OF AMICUS CURIAE CONCERNED WOMEN FOR AMERICA
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Per Fed. R. App. P. 26.1, any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation that owns 10% or more of its stock or states that there is no such corporation. Amicus states that there is no such corporation.

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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, including Nevada. 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.

SUMMARY OF ARGUMENT

The District Court’s opinion reflects this Court’s precedent regarding the role of political power in suspect class determination. Political powerlessness is *not* a dispensable or optional consideration in determining whether a classification is suspect. And as this Court already concluded in *High Tech Gays v. Defense*

¹ No party’s counsel authored the brief in whole or in part, and no one other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. This brief is filed with consent of all parties; thus no motion for leave to file is required. *See* Notice of All Parties’ Consent to Amicus Curiae Briefs, ECF No. 19; *see also* Fed. R. App. P. 29(a).

Industries Security Clearance Office, 895 F.2d 563, 574 n.10 (9th Cir. 1990), lesbians and gay men have the ability to attract lawmakers’ decision—a finding that is entirely consistent with Supreme Court treatment of race- and sex-based classifications.

This brief first shows that political powerlessness is a critical factor in a “suspect class” analysis, and also demonstrates that the Plaintiffs-Appellants’ definition of when a class is politically powerless is inconsistent with this Court’s precedent. Under the Plaintiffs-Appellants’ reasoning, virtually every minority group that fails to win every political battle may qualify as a suspect class.

This brief also illustrates that gays and lesbians are *not* politically powerless. In fact, for many years they have repeatedly demonstrated their ability to influence public policy through democratic means, and their influence is only increasing. Their causes are supported by mainstream media, popular culture, big labor, and big business. The most powerful figure in American politics, President Obama, vigorously supports same-sex marriage—and has declared so in a variety of ways, including his 2013 inaugural address. The President’s administration has actively promoted the agenda of gays and lesbians to the unprecedented point of not only abandoning its defense of the Defense of Marriage Act (DOMA), but actually switching sides and arguing against the law and for same-sex marriage. Vice President Biden also supports same-sex marriage. The Senate Majority Leader and

the House Minority Leader support same-sex marriage. The 2012 Democratic National Platform declares support for “marriage equality” for “same-sex couples.” One-third of the members of the House of Representatives recently joined an amicus brief in support of redefining marriage in the *Windsor* case. In 2012, voters in three states legalized same-sex marriage, while voters in a fourth state rejected a state constitutional amendment to define marriage as the union of a man and a woman. And in 2013, six additional states legalized same-sex marriage.

In short, gays and lesbians have clearly “attract[ed] the attention of the lawmakers,” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985), whether those lawmakers be officials, legislators, or the voters themselves. As a result, this Court should not remove important domestic policy issues “from the majoritarian political process.” *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (quotation marks omitted).

ARGUMENT

This case questions whether the institution of marriage should be redefined in Nevada to include same-sex couples. But this case is also about *what institution* should define marriage: the people in each state, through either direct democracy or their democratically elected leaders, or the judiciary?

Most courts faced with this issue have deferred to the democratic process by refusing to apply strict scrutiny to classifications based on sexual orientation. New

York’s highest court, for example, was conscious of this when it refused to redefine marriage. “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[.]” *Hernandez v. Robles*, 805 N.Y.S.2d 354, 26 A.D. 3d 98, 102 (N.Y. App. Div. 2005).

Restraint from interference in policy decisions is consistent with the Supreme Court’s prevailing view that there must be compelling reasons for the judiciary to interfere in the democratic process. Judicial intervention is the exception, and it is reserved for cases involving “prejudice against discrete and insular minorities..., which seriously 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.” *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). Since *Carolene Products*, the Supreme Court has identified only a very few “suspect” classifications that are subject to heightened scrutiny,² and no additional classifications in over three

² Classifications based on race, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), national origin, *Oyama v. California*, 332 U.S. 633 (1948), and alienage, *Graham v. Richardson*, 403 U.S. 365 (1971) are subject to strict scrutiny. Classifications based on gender, *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973), and illegitimacy, *Trimble v. Gordon*, 430 U.S. 762, 766-67 (1977), are subject to heightened scrutiny.

decades. The wisdom of legislative classifications is ordinarily left to the democratic process.

I. POLITICAL POWERLESSNESS IS A KEY FACTOR IN IDENTIFYING PROTECTED CLASSES.

Contrary to the myriad of federal courts that have affirmed that sexual orientation is not a suspect classification and is thus subject to rational-basis review—including the Ninth Circuit,³ Plaintiffs-Appellants argue that they are part of a class that should be subject to heightened scrutiny. To get there, they purport reliance on Justice Marshall’s non-precedential *Cleburne* concurrence/dissent.

³ See, e.g., *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 (10th Cir. 2008); *Rich v. Sec’y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); see also *Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (not applying strict scrutiny to classification based on sexual orientation); but see *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (concluding that sexual orientation constitutes a suspect classification for constitutional equal-protection analysis) reviewed by *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) (not creating a new suspect classification based on sexual orientation).

But far from minimizing political powerlessness as a factor, the *Cleburne* majority actually focused on it. The *Cleburne* Court noted “the distinctive legislative response, both national and state, to the plight of those who are mentally retarded.” *Cleburne*, 473 U.S. at 443. That legislative response demonstrated that “lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.” *Id.* The Supreme Court then noted the passage of several laws protecting the mentally retarded. *Id.* This “legislative response, which could hardly have occurred and survived without public support...negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.” *Id.* at 445.

Ignoring the majority opinion in *Cleburne*, Appellants instead cite a concurring/dissenting opinion by Justice Marshall without explaining that Justice Marshall’s opinion criticized the *Cleburne* majority for relying on political powerlessness. *See id.* at 465-66 (Marshall J., concurring in part and dissenting in part). Thus, contrary to Appellant’s suggestion, the *majority* opinion in *Cleburne* confirmed the importance of political powerlessness.

Cleburne’s emphasis on political power is consistent with three-quarters of a century of precedent. In its first mention of suspect classifications, the Supreme Court suggested that heightened scrutiny may be appropriate 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. That dictum has since been regularly cited in cases recognizing a suspect class. *See e.g.*, *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (holding that resident aliens are a suspect class, citing *Carolene Products*). And when the Supreme Court has rejected heightened scrutiny, it has frequently noted the ability of the class at issue to participate in the political process. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

The Supreme Court also said that suspect-class designation is reserved for groups that are “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.*, 411 U.S. at 28). This does not mean an inability to win most, or even some, political battles. Rather, strict scrutiny protects classes that have effectively been excluded from the political process as a result of a malfunctioning democracy. *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980). *See also Foley v. Connelie*, 435 U.S. 291, 294 (1978) (heightened scrutiny for alienage is “a treatment deemed necessary since aliens—pending their eligibility for citizenship—have no direct voice in the political processes”).

Plaintiffs-Appellants also make the tenuous argument that political power is an optional criterion because it has occasionally been prefaced by the word “or.” But suspect class status has never been granted to a class that possessed political power, and to do so would contradict the premise of democracy. Indeed, the High Court has stressed its “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). “[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” *Cleburne*, 473 U.S. at 440. Thus, “judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

Consistent with its respect for democracy, the Supreme Court limits heightened scrutiny to the politically powerless. Restraint is particularly appropriate here, where the democratic process is in full sway, because 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). In short, political powerlessness—and judicial modesty when the political process has *not* malfunctioned—is a key consideration used in determining whether to apply strict scrutiny.

**II. A GROUP IS POLITICALLY POWERLESS ONLY WHEN IT CANNOT
“ATTRACT THE ATTENTION OF LAWMAKERS.”**

Plaintiffs-Appellants also misapprehend what it means to be “politically powerless.” There is no serious disagreement that gays and lesbians are politically successful. But even the most politically successful fails to obtain victory in *every* instance. The Supreme Court explained in *Cleburne* that “[a]ny 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, a class must be politically powerless “in the sense that they have *no ability to attract the attention of the lawmakers.*” *Id.* (emphasis added).

Plaintiffs-Appellants suggest that political success can somehow coexist with political powerlessness. To support their theory, they cite the High Court’s extension of suspect class status to race and gender in *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and *Frontiero*, 411 U.S. at 685-87, despite civil rights laws and gender-based protections. But although the *Frontiero* plurality opinion noted that “the position of women in America has improved markedly in recent decades,” it also found that women still “face pervasive, although at times more subtle, discrimination...in the political arena.” *Frontiero*, 411 U.S. at 685-86. The *Frontiero* Court explained that because of a historical attitude of misguided paternalism, women continued to lack political power, despite some gains:

It is true, of course, that *when viewed in the abstract*, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government.

Id. at 686 n.17 (emphasis added). The fact that half the population had almost no representation in political decisionmaking bodies suggested a serious democratic malfunction, notwithstanding some important political victories.

Here, unlike women, homosexuals are a small part of the population. It could be said that they lack absolute numbers for political power “when viewed in the abstract.” *Id.* But every minority group lacks political power “in the abstract” by the mere fact that they are a minority group. In *Frontiero*, the reality that half the population had almost no representation in decisionmaking bodies suggested a more serious problem in the democratic process. As the court below correctly observed, “their political voice was disproportionately small compared to their numbers.” *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1011 (D. Nev. 2012). In contrast, while homosexuals may be a small percentage of the population, their “political voice” is disproportionately loud and vastly outweighs their numbers.⁴

⁴ In a recent brief, the Department of Justice explained that “[i]t is difficult to offer a definitive estimate for the size of the gay and lesbian community in the United

Indeed, it is remarkable that such a small percentage of the population has dominated so much of the attention of America's lawmakers. This is far different from the circumstance described in *Frontiero*—or of the circumstance of chronically underrepresented racial minorities.

Of course, the relevant constitutional consideration is *not* the raw numbers of gay and lesbian elected officials, but their “ability to attract the attention of the lawmakers.” *Cleburne*, 473 U.S. at 445. That includes *all* lawmakers—both homosexual and heterosexual. For even if homosexuals are underrepresented in decision-making bodies (in the sense that there are fewer open homosexuals in those bodies than there are in the general population), “[s]upport for homosexuals is, of course, not limited to other homosexuals.” *Ben-Shalom*, 881 F.2d at 466 n.9. As discussed below, gays and lesbians clearly have attracted legislative attention and substantial support for their interests. If anything, they favorably hold disproportionate political power in comparison to their numbers.

States. According to an analysis of various data sources published in April 2011 by the Williams Institute, there appear to be 9 million adults in the United States who are lesbian, gay or bisexual, comprising 3.5 percent of the adult population.” Brief for the United States at 28 n.8, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (No. 12-2335-cv), ECF No. 120, *citing* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?* (April 2011), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

III. GAYS AND LESBIANS REGULARLY ATTRACT THE ATTENTION OF LAWMAKERS.

Two decades ago, this Court—along with the Seventh Circuit—recognized the “growing political power” of gays and lesbians and appropriately refused to apply strict scrutiny. *Ben-Shalom*, 881 F.2d at 466; accord *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990). Both quoted the Supreme Court’s critical *Cleburne* language: “It cannot be said ‘[gays and lesbians] have no ability to attract the attention of lawmakers.’” *Ben-Shalom*, 881 F.2d at 466 (quoting *Cleburne*, 473 U.S. at 445). This Court also explained that “legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do ‘attract the attention of the lawmakers,’ as evidenced by such legislation.” *High Tech Gays*, 895 F.2d at 574 (quoting *Cleburne*, 473 U.S. at 445). Although the political successes noted were modest, they were sufficient to show that gays and lesbians were not politically powerless. And in the intervening twenty-plus years, their political power has only grown.

For example, in 2006 Washington’s Supreme Court noted that many state and local laws had been passed to provide protection against discrimination based on sexual orientation and to provide economic benefits for same-sex couples, and the number of national, state, and local officials elected in 2004 who are openly

gay. *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) (en banc). That court logically concluded that “as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power.” *Id.* at 974-75. And in 2007, the Supreme Court of Maryland agreed that gays and lesbians possess political power:

In spite of the unequal treatment suffered possibly by [many gays and lesbians], we 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.

Conaway v. Deane, 932 A.2d 571, 611 (Md. 2007) (internal quotation marks omitted).

Of course, since these decisions in 2006 and 2007, the political power of gays and lesbians has increased substantially. This is perhaps best evidenced by President Obama’s own public evolution on the issue of same-sex marriage.

A. President Obama and His Administration Strongly Support Gay and Lesbian Causes.

In his second inaugural address, the President spoke of the issues that are a priority for his administration. And on that highly visible inaugural stage, in three separate references to gay and lesbian interests, the President himself pledged his support for gay and lesbian political causes.⁵

⁵ President Barack Obama, *Inaugural Address* (Jan. 21, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

The President's high-profile endorsement of gays and lesbians comes as no surprise. After all, the official White House blog now blares: "President Obama Supports Same-Sex Marriage."⁶ Newspapers across the country, lauding President Obama's highly visible support, agree that President Obama's personal shift on this issue is symbolic of a national shift in public opinion. They describe President Obama's same-sex marriage support announcement in 2012 as "an important, even historic, marker of how far public opinion has shifted."⁷ The New York Daily News noted that President Obama's announcement was part of a "national conversation that has moved with unprecedented speed."⁸ Judicial intervention, of course, would bring that national conversation to an abrupt end.

President Obama's open support for same-sex marriage, however, predates his announcement. The President proudly announces that "[s]ince I took office, my Administration has worked to broaden opportunity, advance equality, and level the playing field for LGBT people and communities."⁹ Support from President Obama's administration has included:

⁶ Josh Earnest, *President Obama Supports Same-Sex Marriage*, The White House Blog (May 10, 2012, 7:31 PM), <http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>.

⁷ *Id.* (quoting USA Today, May 10, 2012).

⁸ *Id.* (quoting New York Daily News, May 10, 2012).

⁹ President Barack Obama, *Lesbian, Gay, Bisexual, and Transgender Pride Month, 2012*, A Proclamation by the President of the United States of America (June 1,

- Not only refusing to defend DOMA,¹⁰ but filing briefs in the case arguing that DOMA is unconstitutional;
- Successfully pushing Congress to repeal 10 U.S.C. § 654 (“Don’t Ask, Don’t Tell”);¹¹
- Supporting the Hate Crimes Bill;¹²
- A presidential directive to end discrimination on the basis of gender identity;¹³
- Appointing the highest-ever number of openly gay and lesbian people to his administration;¹⁴
- Ensuring hospital visitation rights for LGBT patients and their loved ones;¹⁵
- Proclaiming an annual gay pride month;¹⁶

2012) <http://www.whitehouse.gov/the-press-office/2012/06/01/presidential-proclamation-lesbian-gay-bisexual-and-transgender-pride-mon>.

¹⁰ Letter from Att’y Gen. Eric H. Holder, Jr., to the Hon. John A. Boehner, Speaker of the House (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

¹¹ 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.

¹² President Obama, *Pride Month 2012*, Proclamation, *supra*.

¹³ President Barack Obama, *Presidential Memorandum – Hospital Visitation* (April 15, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation>.

¹⁴ See, e.g., *Presidential Appointments Project*, Gay & Lesbian Victory Institute (Sept. 30, 2013), <http://www.glli.org/programs/presidential> (“The Presidential Appointments Project, led by the Gay & Lesbian Victory Institute, serves as a talent bank for openly LGBT professionals seeking opportunities to improve our federal government’s policies and processes” and lists names of more than 250 openly LGBT Appointees of the Obama-Biden Administration and nominated but not Senate-confirmed appointees—“more than all known LGBT appointments of other presidential administrations combined”).

¹⁵ President Barack Obama, *Obama Administration Record for the LGBT Community*, The Obama Administration Record in Focus (Oct. 11, 2011), http://www.whitehouse.gov/sites/default/files/docs/lgbt_record.pdf.

¹⁶ President Barack Obama, *Lesbian, Gay, Bisexual, and Transgender Pride Month, 2013*, A Proclamation by the President of the United States of America (May 31, 2013) <http://www.whitehouse.gov/the-press->

- Issuing a June 2009 a memorandum to all federal executive departments and agencies ordering that same-sex partners of federal workers receive some federal benefits;¹⁷ and
- Expanding domestic partner benefits.¹⁸

Indeed, the President's "Administration is a proud partner" of LGBT causes.¹⁹

President Obama has also appeared—three times—as the keynote or featured speaker at the National Dinner for The Human Rights Campaign (HRC), a 1.5 million member LGBT civil rights organization.²⁰ Former President Bill Clinton, former Vice President Al Gore, and then-Speaker Nancy Pelosi have also appeared at that event.²¹ And then-Senator Hillary Clinton has appeared on behalf

office/2013/06/03/presidential-proclamation-lgbt-pride-month (mirroring similar proclamations in 2009, 2010, 2011, and 2012).

¹⁷ President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, 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-discrimi>.

¹⁸ Ed O'Keefe, *Same-Sex Partners of Federal Workers Can Start Applying for Benefits Next Month*, Wash. Post, June 2, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/01/AR2010060103686.html> (reporting on 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").

¹⁹ President Obama, *Pride Month 2013*, Proclamation, *supra*.

²⁰ See, e.g., Human Rights Campaign, *Past Dinners*, <http://www.hrcnationaldinner.org/pages/past-dinners>; David Basash, *President Obama and J Lo Headline HRC National Dinner*, October 6, 2013, <http://thenewcivilrightsmovement.com/president-obama-and-j-lo-headline-hrc-national-dinner-photos/politics/2013/10/06/76367>.

²¹ See, e.g., Human Rights Campaign, *Past Dinners*, *supra*; *Nancy Pelosi to Speak at HRC Dinner: Human Rights Campaign to Honor House Speaker Nancy Pelosi with 2007 National Equality Award*, Human Rights Campaign, July 22, 2007, <http://www.hrc.org/press-releases/entry/nancy-pelosi-to-speak-at-hrc-dinner>.

of then-Senator Joe Biden, who has also become a vocal supporter of same-sex marriage.

B. National Support for Gay and Lesbian Causes.

Gays and lesbians also have substantial support in Congress. One-third of the Members of the U.S. House of Representatives filed a brief in the *Windsor* case attacking the constitutionality of DOMA, and the Senate Majority Leader and the House Minority Leader both support same-sex marriage.

At least some of that support comes from representatives who declare themselves gay or lesbian. Six members of the U.S. House Representatives and one Senator—the recently elected Senator Tammy Baldwin of Wisconsin—identify themselves openly as gay or lesbian. Notably, the president and CEO of the Gay & Lesbian Victory Institute observed that “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.”²²

Most gay and lesbian support, of course, comes from their impressive array of heterosexual allies. A significant number of Congressional members receive top scores for their work on LGBT issues from the HRC. Fifty-two Senators and 174

²² 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/>.

House members received scores of 70% or higher.²³ And gay and lesbian candidates have also enjoyed political success nationwide. In the 2012 election, “[h]undreds of openly lesbian, gay, and bisexual candidates won election to public offices across America.”²⁴ 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,” identified more than 100 openly LGBT members currently serving in state legislatures across the country.²⁵

In short, LGBT national political success is no secret. Headlines have been filled with news of recent LGBT political victories in Washington: the repeal of “Don’t Ask, Don’t Tell,” the introduction and hearings for a DOMA repeal bill, Senate confirmation of openly gay and lesbian judges, Congressional dispute over whether the House should defend the constitutionality of DOMA after President Obama directed the Department of Justice not to, and the recent passage of the Employment Non-Discrimination Act (ENDA) in the U.S. Senate.

In addition, over the last two decades, Congress has spent tens of billions of taxpayer dollars on AIDS treatment, research, and prevention. This Congressional

²³ Human Rights Campaign, *Congressional Scorecard: Measuring Support for Equality in the 112th Congress*, Oct. 18, 2012, http://www.hrc.org/files/assets/resources/HRC-112th_CongressionalScorecard_Updated.pdf.

²⁴ Dison, *supra*.

²⁵ *Mission*, Gay & Lesbian Victory Institute, <http://www.victoryinstitute.org/mission/mission>.

spending is—at least in part—a direct result of successful lobbying by LGBT constituents and their powerful allies.²⁶

Political success should only grow now that the larger of this country's two major political parties has repeatedly declared its support for same-sex marriage and other gay-rights issues. The 2012 Democratic National Platform proclaims:

We support the Employment Non-Discrimination Act...The Administration has said that the word 'family' in immigration includes LGBT relationships...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.²⁷

A growing number of Republicans also support same-sex marriage and other gay-rights causes.²⁸ Joe Solmonese, former President of the HRC, said in 2008

²⁶ Judith A. Johnson, *AIDS Funding for Federal Government Programs: FY1981-FY2009*, Cong. Research Serv. Report for Congress (Apr. 23, 2008), assets.opencrs.com/rpts/RL30731_20080423.pdf (reporting a dramatic increase in AIDS funding, with \$6 billion in discretionary funds in 2008).

²⁷ Platform Standing Comm., *Moving America Forward*, 2012 Democratic National Platform 17, 18 (2012), *available at* assets.dstatic.org/dnc-platform/2012-National-Platform.pdf. The 2008 Democratic Platform also supported gay and lesbian causes, and vowed to “fight...in every corner of our country” to further that goal. Platform Standing Comm., *Renewing America's Promise*, 2008 Democratic National Platform 51 (2008), *available at* s3.amazonaws.com/apache.3cdn.net/8a738445026d1d5f0f_bcm6b5l7a.pdf.

²⁸ *See, e.g.*, David Karl Schoenbrodt Myers, *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

that “[t]he lesbian, gay, bisexual and transgender community has made unprecedented progress in Congress over this two-year session...These accomplishments would not have been possible without the support of congressional leadership and allies in both the House and Senate.”²⁹ HRC’s view of subsequent Congressional terms was also complimentary.³⁰ Its assessment of the most recent 112th Congress “shows continuous progress being made for lesbian, gay, bisexual and transgender Americans.”³¹

These political accomplishments are the work of a powerful and effective political organization. With the support of the President, Congress, and ongoing support from a major political party, gays and lesbians are surely not a politically powerless group.

notable Republican supporters of same-sex marriage); Doug Mataconis, *Grover Norquist Joins Gay Conservative Group GOProud*, Outside the Beltway, June 16, 2010, <http://www.outsidethebeltway.com/grover-norquist-joins-gay-conservative-group-goproud/>; Andy Towle, *Ann Coulter joins Board of Gay Conservative Group GOProud*, Towleroad, August 9, 2011, <http://www.towleroad.com/2011/08/coultergoproud.html>.

²⁹ Human Rights Campaign, *Congressional Scorecard: Measuring Support for Equality in the 110th Congress*, Oct. 15, 2008, http://www.hrc.org/files/documents/Congress_Scorecard-110th.pdf.

³⁰ Human Rights Campaign, *Congressional Scorecard: Measuring Support for Equality in the 111th Congress*, http://www.hrc.org/files/assets/resources/111thCongressional_Scorecard.pdf (praising, “fair-minded leadership and a president [who would] support[]...measures to protect the [LGBT] community” that enabled “the LGBT community...to build majorities for important legislation in this Congress.”).

³¹ Human Rights Campaign, *Congressional Scorecard: Measuring Support for Equality in the 112th Congress*, *supra*, at 2.

C. Political Victories in the States.

LGBT political power is also reflected in state-level politics. In 2013, six states legalized same-sex marriage. In the 2012 election, voters in three states—Washington, Maryland, and Maine—redefined marriage to include same-sex couples. In Minnesota, voters rejected a ballot measure similar to California’s Proposition 8. In 2011, New York’s legislature enacted same-sex marriage, continuing the political march begun in the legislatures of Massachusetts, Vermont, and New Hampshire.³² Gays and lesbians have succeeded in enacting similar laws in many municipalities and states, as well as the District of Columbia, that provide civil unions, domestic partnerships, and related benefits for same-sex couples.³³

³² Despite vigorous grass-roots efforts, the Massachusetts Legislature did not overturn the Massachusetts Supreme Judicial Court’s recognition of same-sex marriage in 2003; Vermont’s legislature adopted it in 2009; and New Hampshire’s in 2010.

³³ *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 in 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.

There is no current reason to believe this trend—which clearly reflects increasing political support for gays and lesbians—will not continue. Public opinion is reportedly headed in the same direction.³⁴

D. Public Support for Gays and Lesbians.

George Chauncey, a historian who has provided expert witness testimony for same-sex marriage proponents, has written:

[I]t is hard to think of another group whose circumstances and public reputation have changed so decisively in so little time. 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.³⁵

In the last 16 years, public support for same-sex marriage has increased from

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. 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).

³⁴ Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, Gallup Politics, May 13, 2013, <http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx> (reporting that “[s]upport has been 50% or above in three separate readings” over the prior year).

³⁵ George Chauncey, *Why Marriage? The History Shaping Today's Debate Over Gay Equality* 166 (2004).

27% to 53%.³⁶ “Gay marriage has transitioned from a right-wing wedge issue to a position enjoying an emergent majority consensus. Marriage equality opponents are now on the defensive....”³⁷

E. Financial Support for Gay and Lesbian Causes.

Of course, political success requires funding. But gay and lesbian causes also enjoy generous financial support. NPR reports that “[a] new force is emerging in American politics: wealthy, gay political donors who target state-level races.”³⁸ And on the national front, gays and lesbians represented nearly 20% of President Obama’s top fundraisers in 2012.³⁹

³⁶ Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, Gallup.com (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx>.

³⁷ David Schraub, *The Perils and Promise of the Holder Memo*, 2012 Cardozo L. Rev. de novo 187, 199 (2012).

³⁸ 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>.

³⁹ Michelle Garcia & Andrew Harmon, *Obama’s Power Gays*, Advocate.com (Oct. 24, 2011), <http://www.advocate.com/news/daily-news/2011/10/24/obamas-power-gays>; Dan Eggen, *The Influence Industry: Same-Sex Marriage Issue Shows Importance of Gay Fundraisers*, Wash. Post (May 9, 2012), http://www.washingtonpost.com/politics/same-sex-marriage-debate-many-of-obamas-top-fundraisers-are-gay/2012.05/09/gIQASJYSDU_story.html; see also 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.”); Human Rights Campaign, *The Road to Equality*, HRC 2011 Annual Report 15 (2011), http://www.hrc.org/files/assets/resources/AnnualReport_2011.pdf (showing sustained annual fundraising of approximately \$40 million).

Financial support for gay and lesbian interests was highly visible in the costly Proposition 8 campaign. The “No on 8” campaign raised \$43 million and outspent Prop. 8 supporters by \$3 million.⁴⁰ Reports indicate that the 2012 same-sex marriage ballot initiatives heavily outspent supporters of traditional marriage by even greater margins.⁴¹

Expensive advertising and promises of campaign funding unquestionably affected New York’s 2011 legislative enactment of gay marriage. “The Human

⁴⁰ *Campaign Finance: No on 8, Equality for All*, California Secretary of State Debra Bowen, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1259396&session=2007&view=general> (reporting \$43 million in funding and expenditures); *Campaign Finance: ProtectMarriage.com – Yes on 8, A Project of California Renewal*, California Secretary of State Debra Bowen, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1302592&session=2007> (reporting \$40 million in funding and \$39.6 million in expenditures).

⁴¹ Statement of Joseph Backholm, Chairman of Preserve Marriage Washington, Nov. 8, 2012 (“our [LGBT] opponents had a giant financial advantage, outspending us by \$10 million”), *see* <http://capitolrecord.tvw.org/2012/11/opponents-of-same-sex-marriage-concede-defeat/>; Susan M. Cover, *Pro-gay Group Outraises Opponents*, Portland Press Herald, Oct. 7, 2012, http://www.pressherald.com/politics/pro-gay-group-outraises-opponents_2012-10-07.html (reporting \$3.35 million raised by supporters of the Maine same-sex marriage ballot measure and only \$429,794 raised by its traditional marriage supporters); Anne Linskey, *Maryland Same-Sex Marriage Donors Part of Diverse Coalition Pushing Question 6*, The Baltimore Sun, Nov. 29, 2012, http://www.huffingtonpost.com/2012/11/29/maryland-gay-donors_n_2209724.html (reporting a 2:1 funding advantage for supporters of same-sex marriage in Maryland); Catharine Richert, *Last Minute Money Pours into Ballot Question Funds*, MPRnews, Nov. 6, 2012, http://blogs.mprnews.org/capitol-view/2012/11/last_minute_mon/ (estimating \$10.6 million in funding for same-sex marriage but only \$5 million supporting a traditional definition of marriage in Minnesota).

Rights Campaign financed an advertising barrage.... Several prominent Republican fund-raisers, including billionaire financial executive Paul Singer, provided financial support to the lobbying campaign [for gay marriage].”⁴²

It is said that “[f]ew questions are as important to an understanding of American democracy as the relationship between economic power and political influence.”⁴³ Gays and lesbians clearly understand that relationship and are using it to their political advantage.

F. Union and Corporate Support for Gay and Lesbian Causes.

Many of the largest and most influential unions also actively support the gay and lesbian community. For example, the National Education Association (NEA), which has consistently ranked in the top fifteen of the *Fortune* Washington Power 25 list, regularly advocates for LGBT rights and same-sex marriage recognition. “[For four decades,] NEA has led the fight for the rights of the nation’s GLBT students and educators.”⁴⁴ And the 1.6 million member American Federation of State, County and Municipal Employees (AFSCME) resolved ten years ago to

⁴² Michael J. Klarman, *From the Closet to the Altar* 163 (2012).

⁴³ 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).

⁴⁴ Nat’l Educ. Ass’n, *NEA: A Voice for GLBT Educators, A Force for Full Equality* 1 (Nov. 16, 2011), <http://www.nea.org/assets/docs/voiceforGLBTeducatorstimeline.pdf> (listing timeline of LGBT advocacy actions taken by the NEA for the past forty years).

“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...[to] strongly oppose any law or constitutional amendment that will abridge the rights of gays and lesbians including ones that perpetuate unequal marriage treatment.”⁴⁵

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.”⁴⁶ 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 well-known corporate sponsors.⁴⁷ These corporations provide a significant amount of HRC’s sustained forty million dollar annual budget. The Gay, Lesbian, and Straight Education Network (GLSEN) is also supported by America’s most

⁴⁵ *Equal Rights for Gay and Lesbian Citizens*, AFSCME Res. No. 49, 36th Int’l Convention (2004), <http://www.afscme.org/members/conventions/resolutions-and-amendments/2004/resolutions/equal-rights-for-gay-and-lesbian-citizens>.

⁴⁶ 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).

⁴⁷ *National Corporate Partners*, Human Rights Campaign, <http://www.hrc.org/the-hrc-story/corporate-partners>.

recognized corporate names.⁴⁸ Even Lambda Legal, counsel herein and “the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV,” boasts donations from the nation’s top law firms and corporations.⁴⁹

Businesses do not only provide financial support. Illinois corporations and business owners recently wrote to State lawmakers, encouraging them to redefine marriage to include gay and lesbian couples.⁵⁰ And in California’s Proposition 8 battle, many Silicon Valley corporate leaders used their influence to rally voters to oppose that measure.⁵¹

Corporations also influence public policy through their own internal policies. There, too, gays and lesbians have valuable and effective allies. The 2014 HRC’s Corporate Equality Index reported that 304 of America’s top companies—including companies in the Fortune 1000, Forbes 200 top private

⁴⁸ *Financial Sponsors*, Gay, Lesbian, & Straight Educ. Network, <http://glsen.org/financial-sponsors>.

⁴⁹ *About Us*, Our Sponsors, Lambda Legal, <http://www.lambdalegal.org/about-us>.

⁵⁰ Manya Brachear, *Business Leaders Come Out in Support of Gay Marriage in Illinois*, Chicago Trib., Jan. 14, 2013; <http://www.chicagotribune.com/news/local/breaking/chi-illinois-gay-marriage-business-endorsement,0,5903141.story>.

⁵¹ *Silicon Valley Leaders to Denounce Proposition 8 in Newspaper Ad*, Equality California, 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 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).

firms, and/or American Lawyer's top 200 law firms—"earned a top score...and the distinction of 'Best Places to Work for LGBT Equality.'"⁵²

G. Media Support for Gay and Lesbian Causes.

Shaping public opinion is the key to political power.⁵³ America's news media renders direct and concrete support for gay and lesbian political efforts, and such "elite support" has "great[] influence" on public policy.⁵⁴ In the last decade, the New York Times has published nearly twice as many stories about gay rights as it has printed about women's rights, Hispanic or Latino rights, or even about affirmative action.⁵⁵ HRC has long bragged that it is quoted every day in

⁵² *Corporate Equality Index 2014: Major Businesses Champion LGBT Equality in Record Numbers*, Human Rights Campaign (2014), <http://www.hrc.org/campaigns/corporate-equality-index> (also noting on page 34 that "96% CEI-Rated Employee groups are sponsored by an Executive Champion" and "37 percent [of Executive Champions] reported being openly LGBT.").

⁵³ See John R. Zaller, *The Nature & Origins of Mass Opinions* (1992) (showing how opinions of media elites set public opinion).

⁵⁴ Donald P. Haider-Markel *et al.*, *Minority Group Interests & Political Representation: Gay Elected Officials in the Policy Process*, 62 J. Pol. 568, 575 (2000) (showing "elite support has greatest influence" on adoption of domestic partner benefits).

⁵⁵ The Westlaw search—"gay rights" & DA(aft 1-25-2004 & bef 01-26-2014)—generated 2,640 results. A search of "women! rights" & DA(aft 1-25-2004 & bef 01-26-2014) generated 1,463 results; ((hispanic or latino) and "civil rights") & DA(aft 1-25-2004 & bef 01-26-2014) generated 1,252 results; and "affirmative action" & DA(aft 1-25-2004 & bef 01-26-2014) generated 1,037 results.

prominent newspapers and that editorial boards view HRC's positions as "common sense."⁵⁶

Additionally, "[t]here are more gay and lesbian characters on network television this season [2012-2013] than ever before"—in fact, "31 regularly-appearing characters ... identify as gay, lesbian, bisexual or transgender."⁵⁷ 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."⁵⁸

H. Religious Support for Gay and Lesbian Causes.

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."⁵⁹ Many religious organizations

⁵⁶ *Annual Report*, Human Rights Campaign 3 (2000), http://www.hrc.org/files/assets/resources/AnnualReport_2000.pdf; *2005 Annual Report*, Human Rights Campaign 20 (2005), http://www.hrc.org/files/assets/resources/AnnualReport_2005.pdf.

⁵⁷ 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/>.

⁵⁸ *Images of Equality: 2011-2012 Performance Report*, GLAAD 1 (2012) <http://issuu.com/glaad/docs/performance-report-2012-1?e=6038659/2817991>.

⁵⁹ *Id.* at 13.

have officially embraced same-sex partnerships.⁶⁰ A recent compilation of religious groups' official positions regarding same-sex marriage shows many religious organizations officially embracing homosexuality and same-sex partnership.⁶¹

CONCLUSION

When President Obama announced his support for same-sex marriage during a nationally-televised interview, he added that “people are going to have differing views on marriage and those views, even if we disagree strongly, should be respected.”⁶² Here, this Court is presented with the question of whether differing viewpoints on an issue as critically important as the definition of marriage should be respected and debated through the democratic process, or whether the judiciary should summarily end that debate. Ultimately, the political success of gays and lesbians “negates any claim” of political powerlessness, *Cleburne*, 437 U.S. at 445, and the governing precedents require deference to the political process.

⁶⁰ *Religious Groups' Official Positions on Same-Sex Marriage*, Pew Research Center, Religion & Pub. Life Project (Dec. 7, 2012), <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx>. *See also* Chauncey, *supra* at 77-78 (“On the day same-sex marriage became legal in Massachusetts, the Unitarian Universalist Association, Reform Judaism, Reconstructionist Judaism, and the Metropolitan Community Church encouraged their clergy to officiate at such weddings, and clergy in the American Baptist Churches and United Church of Christ could choose to do so.”).

⁶¹ *Religious Groups' Official Positions on Same-Sex Marriage*, *supra*.

⁶² Earnest, *supra*.

Dated: January 28, 2014

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**CERTIFICATE OF COMPLIANCE WITH RULES 29-2(D) AND
32(A)(7)(B)**

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,997 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: January 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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