

No. 12-307

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IN THE  
**Supreme Court of the United States**

UNITED STATES OF AMERICA,

*Petitioner,*

V.

EDITH SCHLAIN WINDSOR

AND

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED  
STATES HOUSE OF REPRESENTATIVES,

*Respondents.*

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

***AMICUS CURIAE*** BRIEF OF  
CONCERNED WOMEN FOR AMERICA,  
ADDRESSING THE MERITS AND SUPPORTING  
RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF  
THE UNITED STATES HOUSE OF REPRESENTATIVES  
AND REVERSAL

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

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.

**SUMMARY OF ARGUMENT**

In its suspect class determination, the Second Circuit made two significant errors. First, it suggested that political powerlessness is a dispensable consideration—“not strictly necessary”—in determining whether a classification is suspect. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012). Second, it reached the astounding conclusion that gays and lesbians are politically powerless, not

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<sup>1</sup> 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. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

because they lack political power, but because they have not triumphed in every instance of perceived discrimination. *Id.* at 184-85.

This brief first shows that political powerlessness has always been a critical factor in this Court's "suspect class" analysis. This brief also demonstrates that the Second Circuit's analysis of when a class is politically powerless is inconsistent with this Court's precedent. Under the Second Circuit's reasoning, every minority group that cannot win every political battle may qualify as a suspect class.

Finally, this brief illustrates that gays and lesbians are *not* politically powerless. In fact, they have repeatedly demonstrated their ability to influence public policy through democratic means. And their influence is only increasing. Their causes are supported by the mainstream media, popular culture, big labor, and big business. The most powerful figure in American politics, President Obama, vigorously supports same-sex marriage—and declared so in his recent 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 law at issue here—the Defense of Marriage Act—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 are part of an amicus brief in this case, in support of

Respondent Windsor. And in the most recent elections, voters in three states legalized same-sex marriage, while voters in a fourth state rejected a state constitutional amendment that would have defined marriage as the union of a man and a woman.

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). As a result, this Court should not take the extraordinary step of removing these issues “from the majoritarian political process.” *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (quotation marks omitted).

## ARGUMENT

The heart of this case is, of course, whether the institution of marriage should be redefined 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 an unelected 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 important point 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*, 26 A.D. 3d 98, 102 (N.Y. 2005).

That restraint from interference in policy decisions is consistent with this 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 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 n.4 (1938). Since *Carolene Products*, this Court has identified only a very few “suspect” classifications that are subject to heightened scrutiny.<sup>2</sup> The wisdom of legislative classifications is ordinarily left to the democratic process.

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

Going against every other federal court of appeals to rule on the issue,<sup>3</sup> the court below held that

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<sup>2</sup> 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 (1979), are subject to heightened scrutiny.

<sup>3</sup> Every federal court of appeals to address the question—including the Ninth Circuit—evaluates sexual orientation classifications under rational-basis review. *See Massachusetts*

“homosexuals compose a class that is subject to heightened scrutiny.” *Windsor*, 699 F.3d at 185. Citing *Cleburne*, the Court suggested that “lack of political power” is a dispensable consideration and “not strictly necessary to identify a suspect class.” *Windsor*, 699 F.3d. at 181.

But far from minimizing political powerlessness as a factor, the *Cleburne* majority actually focused on it. The 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 apathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.” *Id.* The 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,” the Court concluded, “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.

Inexplicably, the Second Circuit ignored the majority opinion in *Cleburne* and instead cited a concurring/dissenting opinion by Justice Marshall.

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*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).

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 the Second Circuit's suggestion, the majority opinion in *Cleburne* actually confirmed the importance of political powerlessness.

*Cleburne's* emphasis on political power is consistent with three-quarters of a century of precedent. In the case that first raised questions about suspect classifications, this 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 this 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).

In language that has been repeatedly quoted, the Court has said that suspect-class designation is reserved for 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. at n.14 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). 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”).

Along the way, the 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 process.” *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, this 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 by this Court in determining whether to apply strict scrutiny.

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

The court below also misapprehended what it means to be “politically powerless.” There is no disagreement that gays and lesbians are politically successful. Even the court below agreed: “The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination.” *Windsor*, 699 F.3d at 184. While there is some truth in this formulation, “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).

Of course, in a case in which the President himself directed the Attorney General to cease its defense of the challenged law and to instead argue on behalf of Respondent Windsor, the court below had to acknowledge the significant political successes of gays and lesbians. Yet the court below reached the perplexing conclusion that they remain politically powerless because they do not have enough power in *every* instance to triumph. *Windsor*, 699 F.3d at 184.

This Court rejected that position in *Cleburne*, explaining 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, *Cleburne* said that a class must be politically powerless “in the sense that they have *no ability to attract the attention of the lawmakers.*” *Id.* (emphasis added). But the court below ignored this critical part of *Cleburne*.<sup>4</sup>

Instead, the court below suggested that political success can coexist with political powerlessness. The court below supported its theory by noting that “[w]hen the Supreme Court ruled that sex-based classifications were subject to heightened scrutiny in 1973, the Court acknowledged that women had already achieved major political victories.” *Windsor*, 699 F.3d at 184. Admittedly, the *Frontiero* plurality opinion did note that “the position of women in America has improved markedly in recent decades,” but the Court found that they also 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

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<sup>4</sup> The test proposed in *Windsor* “is little test at all, but rather a reason behind an absolute (or nearly absolute) rule ..., *i.e.*, that a discrete minority group challenging a discriminatory law necessarily lacks political power for the purposes of level-of-scrutiny analysis based purely upon the fact that the group has not been able democratically to avoid or alter the law it is challenging in a particular case. That result obviates the Supreme Court’s use of political powerlessness as a factor in assessing the level of scrutiny to be applied. If a plaintiff could necessarily win on the political powerless factor of the level-of-scrutiny analysis by the very fact that he was unable to challenge a particular law democratically, the factor would be meaningless.” *Sevcik*, \_\_ F. Supp. 2d \_\_, 2012 WL 5989662 at \*12.

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, not 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, homosexuals are such a small part of the population that they certainly 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. "[T]heir political voice was disproportionately small compared to their

numbers.” *Sevcik*, \_\_ F. Supp. 2d at \_\_, 2012 WL 5989662 at \*13. In contrast, while homosexuals may be a small percentage of the population, their “political voice” is disproportionately loud and vastly outweighs their numbers.<sup>5</sup> 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*.

The relevant 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 homosexual and heterosexual lawmakers. For even if homosexuals are underrepresented in decisionmaking bodies (in the sense that there are fewer open homosexuals in those bodies than there are in the general population<sup>6</sup>), “[s]upport for homosexuals is, of course, not limited to other

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<sup>5</sup> In its brief to the Second Circuit, the Department of Justice explains that “[i]t is difficult to offer a definitive estimate of the size of the gay and lesbian community in the United 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.” Case No. 12-CV-2335, Dkt. # 120 at 41 n.8, Brief for the United States, *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>.

<sup>6</sup> The court below acknowledges that it cannot in fact say whether gays and lesbians are underrepresented, but the court then goes on to hypothesize that there would be more gays and lesbians in public office if not for “hostility” toward them. *Windsor*, 699 F.3d at 184. While that may be possible, such a presumption cannot form the basis for strict scrutiny.



homosexuals.” *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989). As discussed below, gays and lesbians clearly have attracted attention and substantial support for their interests. If anything, they hold disproportionate political power in comparison to their numbers.

### III. GAYS AND LESBIANS HAVE ATTRACTED THE ATTENTION OF LAWMAKERS.

Two decades ago, the Seventh and Ninth Circuits both 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 this Court’s critical *Cleburne* language that has now been ignored by the court below. “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. The Ninth Circuit 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 by the Seventh and Ninth Circuits 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.

In 2006, the Washington Supreme Court noted that sexual orientation had been added to the Washington State Law Against Discrimination and that “several state statutes and municipal codes provide protection against discrimination based on sexual orientation and also provide economic benefit for same sex couples.” *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) (en banc). Additionally, “a number of openly gay candidates were elected to national, state, and local offices in 2004.” *Id.* That court logically concluded that “[t]he 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.” *Id.* at 974-75.

In 2007, the Supreme Court of Maryland agreed that gays and lesbians possess political power:

In spite of the unequal treatment suffered 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. 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.

*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.***

Only recently, the entire nation paused to watch America re-inaugurate President Obama into office. In his 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.<sup>7</sup>

The President's high-profile endorsement of gays and lesbians should come as no surprise. The official White House web page now blares: "President Obama Supports Same-Sex Marriage."<sup>8</sup> Newspapers across the country, lauding President Obama's 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 as "an important,

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<sup>7</sup> President Obama, Inaugural Address (Jan. 21, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

<sup>8</sup> The White House Blog, *President Obama Supports Same-Sex Marriage*, <http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>.

even historic, marker of how far public opinion has shifted.”<sup>9</sup> The New York Daily News noted that President Obama’s announcement was part of a “national conversation that has moved with unprecedented speed.”<sup>10</sup> Judicial intervention, of course, would bring that national conversation to an abrupt end.

Even before his declaration of open support for same-sex marriage, President Obama bragged 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.”<sup>11</sup> Support from President Obama’s administration has included:

- Not only refusing to defend DOMA,<sup>12</sup> but filing briefs in this case arguing that DOMA is unconstitutional;
- Successfully pushing Congress to repeal 10 U.S.C. § 654 (“Don’t Ask, Don’t Tell”);<sup>13</sup>
- Supporting the Hate Crimes Bill;<sup>14</sup>
- A presidential directive to end discrimination

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<sup>9</sup> *Id.* (quoting USA Today, May 10, 2012).

<sup>10</sup> *Id.* (quoting New York Daily News, May 10, 2012).

<sup>11</sup> President Obama, *Lesbian, Gay, Bisexual, and Transgender Pride Month, 2012*, A Proclamation By the President of the United States of America (June 1, 2012).

<sup>12</sup> Letter from Eric Holder, Att’y Gen’l, to the Hon. John A. Boehner, Speaker of the House, *On Litigation Involving the Defense of Marriage Act*, Feb. 23, 2011, <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>13</sup> 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](http://www.huffingtonpost.com/2009/10/10/obama-says-he-will-end-do_n_316524.html).

<sup>14</sup> President Obama, *Pride Month 2012 Proclamation*, *supra*.

on the basis of gender identity;<sup>15</sup>

- Appointing the highest-ever number of openly gay and lesbian people to his administration;<sup>16</sup>
- Proclaiming an annual gay pride month;<sup>17</sup>
- 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;<sup>18</sup> and
- Expanding domestic partner benefits in June 2010.<sup>19</sup>

President Obama has also appeared—twice—as the keynote speaker at the National Dinner for The

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

<sup>16</sup> See, e.g., *Presidential Appointments Project*, Gay & Lesbian Leadership Institute, <http://www.glli.org/programs/presidential> (“The Presidential Appointments Project, led by the Gay & Lesbian Leadership 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”).

<sup>17</sup> Obama, *Pride Month 2012 Proclamation* (mirroring similar proclamations in 2009, 2010, and 2011).

<sup>18</sup> 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>.

<sup>19</sup> Ed O’Keefe, *Same-Sex Partners of Federal Workers Can Start Applying for Benefits Next Month*, Wash. Post, June 2, 2010 (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”).

Human Rights Campaign, a 1.5 million member LGBT civil rights organization.<sup>20</sup> Former President Bill Clinton, former Vice President Al Gore, and then-Speaker Nancy Pelosi have also appeared at that event.<sup>21</sup> Then-Senator Hillary Clinton also appeared on behalf of then-Senator Joe Biden. Although Vice President Biden voted for DOMA as a senator, he is also now a vocal supporter of same-sex marriage.

***B. Congressional Support for Gay and Lesbian Causes.***

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

At least some of that support comes from representatives who are themselves gay or lesbian. Six members of the U.S. House Representatives and one Senator—the recently elected Senator Tammy Baldwin of Wisconsin—are openly gay. 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 . . .

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<sup>20</sup> 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>.

<sup>21</sup> *Id.*

LGBT candidates and their allies [who] showed we are willing to engage fully in the political process to win.”<sup>22</sup>

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 Human Rights Campaign. Fifty-two Senators and 174 House members received scores of 70% or higher.<sup>23</sup>

Many of those legislators may owe their political seat to the work of the HRC. That organization has bragged about its success in 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.”<sup>24</sup>

LGBT political success is no secret. Mainstream 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

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<sup>22</sup> 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/>.

<sup>23</sup> HRC, *Congressional Scorecard: Measuring Support for Equality in the 112th Congress* 6-11, 15-31 (Oct. 18, 2012), <http://www.hrc.org/files/assets/resources/HRC-112th-CongressionalScorecard-Updated.pdf>.

<sup>24</sup> HRC 2007 Annual Report 4 (2007), [http://www.hrc.org/files/assets/resources/AnnualReport\\_2007.pdf](http://www.hrc.org/files/assets/resources/AnnualReport_2007.pdf).

DOMA repeal bill, Senate confirmation of openly gay and lesbian judges, and Congressional dispute over whether the House should defend the constitutionality of DOMA after President Obama directed the Department of Justice not to.

In addition, over the last two decades, Congress has spent tens of billions of taxpayer dollars on AIDS treatment, research, and prevention. This Congressional spending is—at least in part—a direct result of successful lobbying by LGBT constituents and their powerful allies.<sup>25</sup>

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

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<sup>25</sup> 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).



passage of the Respect for Marriage Act.<sup>26</sup>

A growing number of Republicans also support same-sex marriage and other gay-rights causes.<sup>27</sup>

Joe Solmonese, President of the Human Rights Campaign, said in 2008 that “[t]he 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.”<sup>28</sup> HRC’s view of subsequent Congressional terms was also complimentary.<sup>29</sup> Its

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<sup>26</sup> Platform Standing Comm., 2012 Democratic Nat’l Convention Comm., *Moving America Forward* 17, 18 (2012). 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., 2008 Democratic Nat’l Convention Comm., *Renewing America’s Promise* (2008).

<sup>27</sup> 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](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); GoProud, *Advisory Council*, <http://goproud.org/page.aspx?pid=354>, (including Grover Norquist, “one of the most important conservative leaders in the country”).

<sup>28</sup> 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](http://www.hrc.org/files/documents/Congress_Scorecard-110th.pdf).

<sup>29</sup> HRC, *Measuring Support for Equality: HRC’s Scorecard for the 111th Congress*, [http://www.hrc.org/files/assets/resources/111thCongressional\\_Scorecard.pdf](http://www.hrc.org/files/assets/resources/111thCongressional_Scorecard.pdf) (praising, “fair-minded leadership and a new

assessment of the most recent 112th Congress again “shows the LGBT community is making gains on Capitol Hill.”<sup>30</sup>

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.

### *C. Political Victories in the States.*

LGBT political power is also reflected in state-level politics. 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.<sup>31</sup> California’s legislature has granted all of the legal rights of marriage to domestic partnerships. *Perry v. Brown*, 671 F.3d 1052, 1065 (9th Cir. 2012). And gays and lesbians have succeeded in enacting similar laws in many states and the District of Columbia that provide civil unions, domestic partnerships, and

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president who would support...measures to protect the LGBT community” that enabled “the LGBT community...to build majorities for important legislation in this Congress.”).

<sup>30</sup> *HRC Scorecard of 112<sup>th</sup> Congress, supra*.

<sup>31</sup> 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.

related benefits for same-sex couples.<sup>32</sup>

As of 2011, thirty-one states and the District of Columbia had laws regarding “hate crimes” based on sexual orientation.<sup>33</sup> In addition, the Human Rights Campaign reports that twenty-one states, the District of Columbia, and at least 181 cities and

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<sup>32</sup> *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. 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).

<sup>33</sup> Anti-Defamation League State Hate Crime Statutory Provisions, [http://www.adl.org/99hatecrime/state\\_hate\\_crime\\_laws.pdf](http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf).

counties prohibit employment discrimination on the basis of sexual orientation.<sup>34</sup> “Almost half” of the states and the District of Columbia provide domestic partnership benefits for state employees.<sup>35</sup>

Gay and lesbian candidates have also enjoyed political success countrywide. In the 2012 election, “[h]undreds of openly lesbian, gay, and bisexual candidates won election to public offices across America.”<sup>36</sup> 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.<sup>37</sup>

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 clearly headed in the same direction.

#### ***D. Public Support for Gays and Lesbians.***

George Chauncey, who testified as an expert in

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<sup>34</sup> HRC, *The State of the Workplace* (2007-2008), [http://www.hrc.org/files/assets/resources/HRC\\_Foundation\\_State\\_of\\_the\\_Workplace\\_2007-2008.pdf](http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf).

<sup>35</sup> Julie Appleby, *Many Businesses Offer Health Benefits To Same-Sex Couples Ahead Of Laws*, PBS NewsHour, May 14, 2012, <http://www.pbs.org/newshour/rundown/2012/05/many-businesses-offer-health-benefits-to-same-sex-couples-ahead-of-laws.html> (citing an HRC report).

<sup>36</sup> Dison, *supra*.

<sup>37</sup> *Mission*, Gay & Lesbian Leadership Institute, <http://www.victoryinstitute.org/mission/mission>.

the Proposition 8 case, 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. Above all, there has been a sea change in the attitudes of the young, who have grown up in a world where they know gay people and see them treated with the respect any human deserves.

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

In the last 16 years, public support for same-sex marriage has increased from 27% to 53%.<sup>38</sup> “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 . . . .”<sup>39</sup>

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<sup>38</sup> 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>.

<sup>39</sup> David Schraub, *The Perils and Promise of the Holder Memo*, 2012 Cardozo L. Rev. de novo 187, 199 (2012).

***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.”<sup>40</sup> And gays and lesbians represent nearly 20% of President Obama’s top fundraisers.<sup>41</sup>

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

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<sup>40</sup> 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>

<sup>41</sup> Michelle Garcia & Andres 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](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.”); HRC 2011 Annual Report, *supra* at 15 (showing sustained annual fundraising of approximately \$40 million).

million.<sup>42</sup> Reports indicate that the 2012 same-sex marriage ballot initiatives heavily outspent supporters of traditional marriage by even greater margins.<sup>43</sup>

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,

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<sup>42</sup> 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>

(reporting \$43 million in funding and expenditures); 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> (reporting \$40 million in funding and \$39.6 million in expenditures).

<sup>43</sup> 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"); 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](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://minnesota.publicradio.org/collections/special/columns/poli\\_naut/archive/2012/11/last\\_minute\\_mon.shtml](http://minnesota.publicradio.org/collections/special/columns/poli_naut/archive/2012/11/last_minute_mon.shtml) (estimating \$10.6 million in funding for same-sex marriage but only \$5 million supporting a traditional definition of marriage in Minnesota).

including billionaire financial executive Paul Singer, provided financial support to the lobbying campaign [for gay marriage].”<sup>44</sup>

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.”<sup>45</sup> Gays and lesbians clearly understand that relationship and are using it to their political advantage.

#### ***F. Corporate and Union Support for Gays and Lesbian Causes.***

Many of the largest and most influential unions also actively support the gay and lesbian community. 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.”<sup>46</sup>

Unions lend both their influence and their money to gay and lesbian political causes. The California Teachers Association contributed \$1.3

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<sup>44</sup> Michael J. Klarman, *From the Closet to the Altar* at 163 (2012).

<sup>45</sup> 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).

<sup>46</sup> Nat’l Educ. Ass’n, *NEA: A Voice for GLBT Educators* 1, <http://www.nea.org/assets/docs/voiceforGLBTeducatorstimeline.pdf> (listing timeline of LGBT advocacy actions taken by the NEA for the past forty years).



million to oppose Proposition 8.<sup>47</sup> 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 assembled a coalition of more than fifty California labor groups representing more than two million California workers to join in an *amicus* brief filed with the California Supreme Court opposing Proposition 8.<sup>48</sup> The 1.6 million member American Federation of State, County and Municipal Employees (AFSCME) has resolved 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 . . . [to] strongly oppose any law or constitutional amendment that will abridge the rights of gays and lesbians including ones that perpetuate unequal marriage treatment.”<sup>49</sup>

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<sup>47</sup> *California Teachers Association, Ballot measure activism, 2008*

[http://ballotpedia.org/wiki/index.php/California Teachers Association#cite\\_ref-13](http://ballotpedia.org/wiki/index.php/California_Teachers_Association#cite_ref-13).

<sup>48</sup> 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* Supporting Petitioners, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (listing labor groups expressing opposition to Proposition 8).

<sup>49</sup> *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>.

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.”<sup>50</sup> 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 American Airlines, Chevron, Citibank, Coca-Cola, Dell, IBM, Lexus, Macy’s, Marriott, Nike, and Starbucks.<sup>51</sup> 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 recognized corporate names.<sup>52</sup> 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.<sup>53</sup>

At times, businesses also take very public positions on political issues. Illinois corporations and

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<sup>50</sup> 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).

<sup>51</sup> HRC, *National Corporate Sponsors*, <http://www.hrc.org/the-hrc-story/corporate-partners>.

<sup>52</sup> Gay, Lesbian, & Straight Educ. Network, *2010 Annual Report* 2 (2010), [http://www.glsen.org/binary-data/GLSEN\\_Annual\\_Report\\_FY10.pdf](http://www.glsen.org/binary-data/GLSEN_Annual_Report_FY10.pdf).

<sup>53</sup> *Our Work*, Lambda Legal, <http://www.lambdalegal.org/our-work/>.

business owners have just recently written to State lawmakers, encouraging them to redefine marriage to include gay and lesbian couples.<sup>54</sup> In California's Proposition 8 battle, many Silicon Valley corporate leaders used their influence to rally voters to oppose that measure.<sup>55</sup>

Corporations also influence public policy through their own internal policies. And there, too, gays and lesbians have valuable and effective allies. 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.<sup>56</sup>

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<sup>54</sup> 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>.

<sup>55</sup> 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&notoc=1](http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4061163&content_id=%7BF3AB95F6-93FA-40B1-82B7-CAA2C038EDAF%7D&notoc=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).

<sup>56</sup> HRC, *Corporate Equality Index 2013: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality in Corporate America*, 1 (2012) (also noting that "96% CEI-Rated Employee groups are sponsored by an Executive Champion" and "35% of those Executive Champions report being openly gay.").

### *G. Media Support for Gay and Lesbian Causes.*

Shaping public opinion is the key to political power.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> HRC brags that it is quoted every day in prominent newspapers and that editorial boards view HRC's positions as "common sense."<sup>60</sup>

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."<sup>61</sup> As GLAAD's Board

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<sup>57</sup> See John R. Zaller, *The Nature & Origins of Mass Opinions* (1992) (showing how opinions of media elites set public opinion).

<sup>58</sup> 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 that "elite support has greatest influence" on adoption of domestic partner benefits)

<sup>59</sup> 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).

<sup>60</sup> HRC 2005 Annual Report, 20 (2005), [http://www.hrc.org/files/assets/resources/AnnualReport\\_2005.pdf](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](http://www.hrc.org/files/assets/resources/AnnualReport_2000.pdf).

<sup>61</sup> 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/>.

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. . . . It’s those images they bring with them to the ballot box come voting time.”<sup>62</sup>

### ***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.”<sup>63</sup> Many religious organizations have officially embraced same-sex partnerships.<sup>64</sup> A recent compilation of religious groups’ official positions regarding same-sex marriage shows many

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<sup>62</sup> GLAAD, *Images of Equality: 2011-2102 Performance Report, From the Board* 1 (2012), <http://www.glaad.org/publications/performance-report-2012>.

<sup>63</sup> *Id.* at 13.

<sup>64</sup> *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>. *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.”).

religious organizations officially embracing homosexuality and same-sex partnership.<sup>65</sup>

Many individual adherents of religious faiths support same-sex marriages regardless of the official stance of their faith group. Equality California, a gay advocacy organization, acknowledges this valuable support, 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.”<sup>66</sup>

## 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.”<sup>67</sup> That is really the crux of this case: whether differing viewpoints on an issue that is as critically important as the definition of marriage should be respected and debated as part of the democratic process, or whether the judiciary should cut off that debate and declare the traditional view of marriage constitutionally unacceptable.

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<sup>65</sup> *Religious Groups’ Official Positions on Same-Sex Marriage*, *supra*.

<sup>66</sup> 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](http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/EQCA-WINNING_BACK_MARRIAGE_EQUALITY.pdf).

<sup>67</sup> President Obama Supports Same-Sex Marriage, *supra*.

The political success of gays and lesbians “negates any claim” of political powerlessness. *Cleburne*, 437 U.S. at 445. Faithful application of this Court’s precedents requires deference to the political process.

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