

Nos. 14-14061-AA & 14-14066-AA

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

JAMES BRENNER, et al.,
Plaintiffs-Appellees,

v.

JOHN H. ARMSTRONG, et al.,
Defendants-Appellants.

SLOAN GRIMSLEY, et al.,

Plaintiffs-Appellees,

v.

JOHN H. ARMSTRONG, et al.,
Defendants-Appellants.

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA,**

Civil case Nos.: 4:14-cv-00107-RH-CAS (Judge Robert L. Hinkle) &
4:14-cv-001087-RH-CAS (Judge Robert L. Hinkle)

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA,
in support of Defendants-Appellants,
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Nos. 14-14061-AA & 14-14066-AA

United States Court of Appeals For The Eleventh Circuit

JAMES BRENNER, *et al.*, Plaintiffs-Appellees,

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SLOAN GRIMSLEY, *et al.*, Plaintiffs-Appellees,

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JOHN H. ARMSTRONG, *et al.*, Defendants-Appellants.

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Amicus Curiae, Concerned Women for America, pursuant to 11th Cir. R. 26.1-1, certifies that the following persons and entities have an interest in the outcome of this case and/or appeal:

American Civil Liberties Union of Florida, Inc., The

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INTEREST OF *AMICUS CURIAE*

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 Florida. 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.

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(c)

No party’s counsel authored this Brief in whole or in part; no party or party’s counsel contributed money intended to fund preparing or submitting the Brief; and no person other than *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF THE ARGUMENT

Amicus agrees with the district court that under this Court’s decision in *Lofton v. Secretary of Department of Children & Family Services*, 358 F.3d 804

(11th Cir. 2004), homosexuals cannot be considered a suspect or quasi-suspect class. That view is also binding on this Court, since only the Court sitting *en banc* can overrule a prior panel opinion. However, should this Court disagree (believing that a narrow exception to this rule applies), it should still refuse to recognize homosexuals as a suspect or quasi-suspect class, since—among other reasons—homosexuals are not politically powerless. This Brief demonstrates this by documenting that homosexuals have achieved direct political power; acquired important political allies; raised significant funds from their own community, from labor unions and from corporate America; obtained support from religious communities; and moved public opinion in their favor.

ARGUMENT

The district court below correctly recognized that it was bound by this Court’s decision in *Lofton v. Secretary of Department of Children & Family Services*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004), that homosexuals are neither a suspect nor a quasi-suspect class. *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1291 (N.D. Fla. 2014). *Lofton* is also binding on this Court since only the Court sitting *en banc* can overrule a prior panel opinion. *Walker v. Jefferson Cnty. Bd. of Educ.*, No. 13-14182, 2014 WL 5575607, at *3 (11th Cir. Nov. 4, 2014). The only exception occurs when an opinion has been “undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.” *Id.* (internal quotation

marks and citation omitted). And that exception does not apply here. As the Sixth Circuit's recently full-blown¹ analysis of this very question demonstrates, no Supreme Court opinion has even hinted that homosexuals constitute a suspect or quasi-suspect class. *DeBoer v. Snyder*, ___ F.3d. ___, No. 14-1341, 2014 WL 5748990, at *18-21 (6th Cir. Nov. 6, 2014).

However, should this Court disagree and believe it is free to revisit the question, it would still need to conduct the analysis of whether homosexuals are a suspect or quasi-suspect class. The remainder of this Brief will explain why they are not.

I. Political Powerlessness Is a Key Factor in Identifying Protected Classes.

In deciding whether a group should be treated as a suspect or quasi-suspect class, courts must consider four factors: whether the group has historically been discriminated against, whether the group has immutable characteristics, whether the group has characteristics that relate to its ability to contribute to society, and whether the group is politically powerless. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 684-687 (1973). Until the decision of the United States Court of Appeals for the Second Circuit in *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), every federal appellate court to have considered the matter had held that

¹ See ftnt. 5, *infra*, for recent opinions that have not engaged in suspect class analysis.

homosexuals are not a suspect or quasi-suspect class.² And, as noted above, the Sixth Circuit has recently concluded the same. In its contrary holding, the Second Circuit claimed that homosexuals are politically powerless, and, in the alternative, that political powerlessness is “not strictly necessary ... to identify a suspect class,” *Id.* at 181, 185, relying on Justice Marshall’s partly concurring and partly dissenting opinion in *City of Cleburne v. Cleburne Living Ctr., Inc.* 473 U.S. 432 (1985). *See, id.* at 185 (citing Justice Marshall’s opinion). However, the *Cleburne* majority focused on political powerlessness, noting that there had been a “distinctive legislative response, both national and state, to the plight of those who are mentally retarded [the putative quasi-suspect class],” demonstrating that the judiciary did not need to interfere with lawmakers, 473 U.S. at 443, and negating any claim that the mentally retarded could not attract the attention of lawmakers. *Id.* at 445.

Similarly, the Supreme Court has repeatedly emphasized 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

² *See Massachusetts v. Dep’t of Health & Human Servs.*, 682 F.3d 1, 9-10 (1st Cir. 2012); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing decisions from the Fourth, Sixth, Seventh, Tenth, D.C., and Federal Circuits).

majoritarian political process.” *E.g., Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

Indeed, the Supreme Court’s preference for rational basis scrutiny may be a result of 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) (Marshall, J., dissenting) (describing why the Supreme Court has often used rational basis analysis). “[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).

Therefore, the Second Circuit was doubly wrong: political powerlessness *is* a required factor in determining classifications, and homosexuals are not politically powerless.

It was therefore unsurprising that when the Supreme Court affirmed the Second Circuit’s judgment in *Windsor*, it did so on other grounds. *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting). The Supreme Court did *not* hold that homosexuals constitute a suspect or quasi-suspect class, and it did not hold that they are politically powerless.

A. A Group Is Politically Powerless When It Cannot “Attract the Attention of Lawmakers.”

Homosexuals are politically successful. Even the Second Circuit acknowledged this: “[t]he 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 this is partially true, political success is one of the *defining* indicators of political power. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1009 (D. Nev. 2012). The Second Circuit’s answer to this was an *ipse dixit*: it simply declared that the clear successes were insufficient.

Yet, the Supreme Court had previously rejected that position in *Cleburne*: “Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.” 473 U.S. at 445. Rather, a class is politically powerless if it has “*no* ability to attract the attention of the lawmakers.” *Id.* (emphasis added).

But the Second Circuit supported its theory that political success can coexist with political powerlessness by noting that women had achieved some political success when the Supreme Court applied heightened scrutiny to sex-based classifications. *Windsor*, 699 F.3d at 184 (citing *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973)). Admittedly, at the time of *Frontiero*, “the position of women in

America has improved markedly in recent decades.” 411 U.S. at 686. However, women still “face[d] pervasive, although at times more subtle, discrimination . . . in the political arena.” *Id.* The *Frontiero* Court explained that because of an 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 decision-making 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 little representation in political decision-making bodies suggested a serious democratic malfunction, notwithstanding some important political victories.

Presently, homosexuals 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. While homosexuals are a minority group, their “political voice” greatly outweighs their numbers.³ Indeed, it is remarkable that such a minority has dominated so much of

³ In 2013, a National Health Interview Survey estimates that only 1.6% of adults have identified themselves as homosexual. Brian D. Ward, James M. Dahlhamer, Adena M. Galinsky & Sarah S. Joestl, *Sexual Orientation and Health Among U.S.*

the attention of America’s lawmakers.

The relevant consideration is not the number of homosexual elected officials, but the ability of homosexuals “to attract the attention of the lawmakers.” *Cleburne*, 473 U.S. at 445. That includes homosexual *and* heterosexual lawmakers. Even if they are underrepresented in decision-making bodies (in that there are fewer open homosexuals in those bodies than there are in the general population⁴), “[s]upport for homosexuals is, of course, not limited to other homosexuals.” *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989). Homosexuals have attracted attention and substantial support for their interests.

Two decades ago, the Seventh and Ninth Circuits recognized the “growing political power” of homosexuals and refused to apply strict scrutiny. *Id.* at 466; *High Tech Gays* 895 F.2d 563 at 574.⁵ Both acknowledged the Supreme Court’s

Adults: National Health Interview Survey, 2013, National Health Statistics Reports (July 15, 2014), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr077.pdf>.

⁴ The Second Circuit acknowledged that it could not say whether homosexuals are underrepresented, but went on to hypothesize that there would be more homosexuals in public office if not for “hostility” toward them. *Windsor*, 699 F.3d at 184, 185. While that is possible, such an unsupported presumption cannot form the basis for heightened scrutiny.

⁵ The Ninth Circuit changed its position on the level of scrutiny post-*Windsor* in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 474 (9th Cir. 2014). However, that case did not address the issue of political power; it merely held (incorrectly) that *Windsor* required heightened scrutiny. Therefore, its previous holding that homosexuals are not politically powerless remains undisturbed. Similarly, when the Ninth Circuit applied *SmithKline’s* level-of-scrutiny hold to Idaho’s ban on same-sex marriage, it did not analyze the question

critical *Cleburne* language so recently ignored by the Second Circuit: “[i]t cannot be said [homosexuals] ‘have no ability to attract the attention of lawmakers.’” *E.g.*, *Ben-Shalom*, 881 F.2d at 466 (quoting *Cleburne*, 473 U.S. at 445). The Ninth Circuit noted that “legislatures have addressed and continue to address the discrimination suffered by homosexuals . . . through the passage of anti-discrimination legislation. Thus, homosexuals . . . 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). Since these decisions, the political power of homosexuals has only grown.

For example, in 2006, Washington’s Supreme Court noted that sexual orientation had been added to Washington’s nondiscrimination law 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.* In light of these accomplishments,

of homosexuals’ political power. *Latta v. Otter*, ___ F.3d ___, 2014 WL 4977682 at *4 (9th cir. 2014).

Again similarly, the Seventh Circuit in its recent same-sex marriage opinion mentioned political power in response to an argument made by Indiana, *Baskin v. Bogan*, 766 F.3d 671 (7th Cir. 2014). But it did not ask or answer the question of whether homosexuals are politically powerless as part of a suspect or quasi-suspect analysis, since that court did not conduct such an analysis.

that court concluded that homosexuals were exercising “increasing political power.” *Id.* at 974-75.

In 2007, Maryland’s highest court agreed that homosexuals possess political power:

In spite of the unequal treatment suffered . . . by [some], 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 [homosexuals] . . . 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) (citations omitted).

Both Maryland and Washington have now extended, by popular vote, marriage rights to same-sex couples.⁶ In light of such examples, it would make little sense to now find that homosexuals are politically powerless.

B. Homosexuals Have Attracted the Attention of Lawmakers Both Nationally and in Florida.

i. Homosexual political power in Florida is strong and growing stronger.

The direct political power of homosexuals in Florida was seen in the recent nail-bitingly close Florida gubernatorial election. The 2014 elections will be remembered as a Republican triumph, and incumbent Republican Governor Rick Scott should have easily won reelection. Instead, Scott eked out a slim 1.1%

⁶ Edith Honan, *Maryland, Maine, Washington Approve Gay Marriage*, Reuters (Nov. 7, 2012), available at <http://www.reuters.com/article/2012/11/07/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107>.

victory⁷ that has been attributed—in part—to his politically unpopular support of traditional marriage. Equality Florida describes Scott’s support for traditional marriage as a “political liability” and summarized the election with the observation that “[t]he electorate in Florida has become decidedly pro-[same-sex marriage].”⁸

Political support for same-sex marriage cannot be drawn along political lines, of course. Earlier this year Florida Representative David Jolly, a Republican, “announced his support for gay marriage.”⁹ Jolly is reportedly the second Republican representative from Florida and the eighth current Republican member of Congress to express such support.¹⁰

Supporters of same-sex marriage have good reason to believe their political power will grow in Florida. The Miami Herald reports that despite passing a constitution amendment defining marriage as between a man and a woman only six years ago, “[p]olling now shows a majority of Floridians now support same-sex marriage.”¹¹

⁷ Florida Division of Elections, <http://enight.elections.myflorida.com/StateOffices/> (reporting Scott with 48.15% and Crist with 47.07% of the vote).

⁸ Equality Florida, *Pro-Equality Voters Kept Election Close*, Nov. 5, 2014, <http://www.eqfl.org/2014midterm>.

⁹ Sean Sullivan, *Republican Rep. David Jolly (Fla.) Announces Support for Gay marriage*, The Washington Post (July 21, 2014), available at <http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/21/republican-rep-david-jolly-fla-supports-gay-marriage/>.

¹⁰ *Id.*

¹¹ Steve Rothaus, *Rick Scott Supports, Charlie Crist Opposes Florida’s Same-sex Marriage Ban*, Miami Herald (Oct. 17, 2014), available at <http://www.miami>

That growing political power has been demonstrated through the enactment of local ordinances protecting more than 55% of the state's population from discrimination based on sexual orientation and gender identity.¹² LGBT political allies have also proposed a state bill to add sexual orientation and gender identity to Chapter 760 of the Florida state statutes.¹³ And despite the failure of the Democratic party to prevail overall in the November 2014 elections, in Florida “[m]ore than 69% of [Equality Florida’s] endorsed candidate[s] won.”¹⁴ As Equality Florida stated in its post-election press release, “Public support in Florida continues to move swiftly in favor of same-sex marriage, and it is unlikely that a candidate opposed to [same-sex marriage] will ever again win a Florida governor’s race.”¹⁵

ii. National political power of homosexuals.

The national political power of the homosexuals has also increased. For example, 71% of homosexuals live in states with hate crime laws covering sexual orientation.¹⁶ Twenty-one states, the District of Columbia,¹⁷ and at least 181 cities

herald.com/news/local/community/gay-south-florida/article2946940.html.

¹² Equality Florida, *Discrimination*, <http://www.eqfl.org/Discrimination>.

¹³ *Id.*

¹⁴ Equality Florida, *We’re Still Marching Forward After Disappointing Elections*, Nov. 5, 2014, <http://www.eqfl.org/2014results>.

¹⁵ Equality Florida, *Pro-Equality Voters Kept Election Close*, *supra*.

¹⁶ Movement Advancement Project, *Hate Crime Laws*, (2014), <http://www.lgbt>

and counties prohibit employment discrimination based on sexual orientation. Human Rights Campaign, *The State of the Workplace*, 3-4 (2009) available at http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf (collecting state and municipal data as of 2008). As of the so-called Proposition 8 trial, twenty-two states and the District of Columbia were providing domestic partnership benefits for state employees. Trial Tr. at 2479:20-23 (testimony of Miller), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292). And at least thirty-two states and the District of Columbia now offer same-sex marriage.¹⁸

The Human Rights Campaign, with its million-plus members, remarked concerning the 112th Congress:

With allies in the U.S. Senate, the Judiciary Committee held a hearing on the Respect for Marriage Act (RMA)—which would repeal the outrageously named Defense of Marriage Act, or DOMA. The legislation was passed out of committee for the first time ever, thanks to the leadership of Chairman Patrick Leahy (D-Vt.) and the bill’s lead sponsor, Sen. Dianne Feinstein (D-Calif.). There was also a successful hearing and markup of the Domestic Partnership Benefits and Obligations Act (DPBO)—led by Sens. Joe Lieberman (I-Conn.) and Susan Collins (R-Maine)—the bill to bring the federal government in line with a majority of major U.S. employers in offering health benefits to the domestic partners of federal workers.

[map.org/equality-maps/hate_crime_laws](http://www.hrc.org/equality-maps/hate_crime_laws).

¹⁷ Human Rights Campaign, *Employment Non-Discrimination Act*, <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act> (last updated June 2, 2014).

¹⁸ Nat’l Conference of State Legislatures, *Same-Sex Marriage Laws*, (Nov. 7, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx#1>.

Historically, the Senate confirmed three openly gay federal judges—breaking down a barrier that was only pierced once before in our nation’s history. And the inclusive Employment Non-Discrimination Act (ENDA) got a Senate Committee hearing where, for the first time, a transgender witness testified in its favor, thanks to Chairman Tom Harkin (D-Iowa).¹⁹

Additionally, federal “hate crimes” legislation imposes a minimum sentence on perpetrators of violent crimes “involving actual or perceived . . . sexual orientation [or] gender identity.” 18 U.S.C. § 249(2). Furthermore, over the last two decades, Congress has spent billions on AIDS treatment, research, and prevention, in part because of successful lobbying by homosexual constituents and their allies.²⁰ Finally, in 2010, both houses of Congress supported the successful repeal of “Don’t Ask, Don’t Tell.” Human Rights Campaign, *Don’t Ask, Don’t Tell Repeal Act of 2010*, <http://www.hrc.org/resources/entry/dont-ask-dont-tell-repeal-act-of-2010> (last updated Sept. 20, 2011).

All these achievements have occurred since the Seventh and Ninth Circuit’s conclusions that homosexuals are not politically powerless.

C. Homosexuals Have Powerful Political Allies Both Nationally and in Florida.

Although implied in the prior Section, it is worth noting the significance of

¹⁹ Human Rights Campaign, *Congressional Scorecard: Measuring Support for Equality in the 112th Congress, 2*, available at http://issuu.com/humanrights/campaign/docs/112thcongressionscorecard_2012/1.

²⁰ 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).

ally-building by homosexuals. According to the Human Rights Campaign, 2012 was an especially significant election cycle for homosexuals, notably with the re-election of Barack Obama, “the most pro-equality president ever,” as “Ally-in-Chief”; the election the first openly gay politician to the Senate, Tammy Baldwin; and the election of a record number of openly homosexual members and allies to Congress.²¹

i. Homosexual allies in Florida.

Homosexuals in Florida have political power that greatly exceeds their own numbers. Equality Florida says that it “has identified nearly 350,000 same-sex and pro-LGBT voter households in Florida,” with the result that “[m]ore and more candidates are recognizing that the LGBT community is an engaged and united electorate”²² That electorate is also funded and supported by leaders in Florida’s business community through the Equality Means Business organization, which is led by an Advisory Board pulled from Florida’s leading businesses.²³ (For more on Equality Means Business, see *infra*, 25-26.)

²¹ Human Rights Campaign, *2013 Human Rights Campaign Annual Report*, 4, available at http://www.hrc.org/files/assets/resources/HRC_2013_ANNUAL_FINAL.pdf.

²² Equality Florida, *Voter Mobilization, 350,000 Voices for Equality*, http://eqfl.org/Voter_Mobilization.

²³ Equality Means Business, *Advisory Board*, http://equalitymeansbusiness.com/advisory_board.

ii. Homosexual allies across the nation.

Homosexuals also have powerful federal allies. The President, the Vice President, and the nation's oldest and largest civil rights organization, the NAACP, openly support same-sex marriage;²⁴ *Newsweek* proclaimed that President Obama is America's "First Gay President";²⁵ a CNN analysis has shown that President Obama's homosexual "bundlers" (high dollar political contributors) out-contributed the President's Hollywood bundlers;²⁶ and President Obama recently proclaimed June as Lesbian, Gay, Bisexual, and Transgender Pride Month for the sixth year in a row.²⁷

²⁴ Matt Compton, *President Obama Supports Same-Sex Marriage*, The White House Blog (May 9, 2012, 6:12 PM EDT), <http://www.whitehouse.gov/blog/2012/05/09/president-obama-supports-same-sex-marriage>; Press Release, Office of the Press Sec'y, Press Briefing by Press Sec'y Jay Carney, (May 7, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/05/07/press-briefing-press-secretary-jay-carney-5712>; NAACP, *NAACP Passes Resolution in Support of Marriage Equality*, <http://www.naACP.org/news/entry/naACP-passes-resolution-in-support-of-marriage-equality>.

²⁵ Dylan Byers, *Newsweek Cover: 'The First Gay President,'* (May 13, 2012), <http://www.politico.com/blogs/media/2012/05/newsweek-cover-the-first-gay-president-123283.html>.

²⁶ Jen Christensen, *LGBT Donors Back President Obama, Big Time*, CNN Politics (June 6, 2012), http://www.cnn.com/2012/06/05/politics/lgbt-obama-donors/index.html?hpt=hp_c1. CNN only counted contributions from openly homosexual bundlers. They were able to identify that one in sixteen bundlers are homosexual, but noted that other media outlets have calculated the figure to be one in six or one in five. *Id.* Thus, the real contribution figures for homosexual bundlers would be much greater.

²⁷ *Presidential Proclamation—Lesbian, Gay, Bisexual, and Transgender Pride Month, 2014*, <http://www.whitehouse.gov/the-press-office/2014/05/30/presidential-proclamation-lesbian-gay-bisexual-and-transgender-pride-mon>.

Portions of the June 2013 proclamation are instructive:

This year, we celebrate LGBT Pride Month at a moment of great hope and progress, recognizing that more needs to be done. Support for LGBT equality is growing, led by a generation which understands that, in the words of Dr. Martin Luther King, Jr., “injustice anywhere is a threat to justice everywhere.” In the past year, for the first time, voters in multiple States affirmed marriage equality for same-sex couples. State and local governments have taken important steps to provide much-needed protections for transgender Americans.²⁸

The President also noted his administration’s accomplishments:

My Administration is a proud partner in the journey toward LGBT equality. We extended hate crimes protections to include attacks based on sexual orientation or gender identity and repealed “Don’t Ask, Don’t Tell.” We lifted the HIV entry ban and ensured hospital visitation rights for LGBT patients. Together, we have investigated and addressed pervasive bullying faced by LGBT students, prohibited discrimination based on sexual orientation and gender identity in Federal housing, and extended benefits for same-sex domestic partners. Earlier this year, I signed a reauthorization of the Violence Against Women Act (VAWA) that prohibits discrimination on the basis of sexual orientation or gender identity in the implementation of any VAWA-funded program. And because LGBT rights are human rights, my Administration is implementing the first-ever Federal strategy to advance equality for LGBT people around the world.²⁹

While the President stated that more can be done, his attitude does not implicate the test for political powerlessness promulgated by the Supreme Court, which speaks of classes that “have *no* ability to attract the attention of the lawmakers,” *Cleburne* 473 U.S. at 445 (emphasis added). His words are congratulatory and

²⁸ *Presidential Proclamation—Lesbian, Gay, Bisexual, and Transgender Pride Month, 2013* <http://www.whitehouse.gov/the-press-office/2013/06/03/presidential-proclamation-lgbt-pride-month>.

²⁹ *Id.*

optimistic—as they must be in light of his accomplishments.

For example, the Administration stopped defending the Defense of Marriage Act (DOMA),³⁰ and also filed briefs in *Windsor* arguing that DOMA is unconstitutional. Brief of Petitioner, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), *available at* 2013 WL 683048. During his first term, President Obama appointed more homosexuals than any previous president.³¹ He has also spoken three times at the National Dinner for The Human Rights Campaign,³² which has been attended by Former President Bill Clinton, former Vice President Al Gore,³³ and former Speaker Nancy Pelosi.³⁴ Furthermore, on July 21, the President signed an executive order barring federal contractors from discriminating on the basis of sexual orientation.³⁵

³⁰ 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*, Dep’t of Justice (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

³¹ Sam Hananel, *Obama Has Appointed Most U.S. Gay Officials*, The Washington Post, October 26, 2010, *available at* <http://www.washingtontimes.com/news/2010/oct/26/obama-has-appointed-most-us-gay-officials/?page=all>.

³² See, e. g., Human Rights Campaign, *Past Dinners*, <http://www.hrcnationaldinner.org/pages/past-dinners#.VA>

³³ Human Rights Campaign, *HRC National Dinner Silent Auction*, *available at* <http://hrc-assets.s3-website-us-east-1.amazonaws.com/national-dinner/images/general/SilentAuction-2014.pdf>.

³⁴ John Arvosis, *A Word About Nancy Pelosi’s Speech at the Gay Rights Dinner Last Night*, AmericaBlog (Oct. 7, 2007 7:19 PM), <http://americablog.com/2007/10/a-word-about-nancy-pelosis-speech-at-the-gay-rights-dinner-last-night.html>.

³⁵ Marianne Levine, *Obama Signs Order Banning LGBT Discrimination By Federal Contractors*, L.A. Times (July 21, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-obama-gay-workers-order-20140721-post.html>.

President Obama has also advocated for homosexuals internationally, naming three homosexual athletes to the U.S. Winter Olympics delegation in 2013 after Russian President Vladimir Putin signed laws banning adoption by homosexual couples and homosexual “propaganda.”³⁶ Furthermore, in September 2013, President Obama met with leaders of social activist groups in Russia, including those from the homosexual community, and expressed his support for their efforts and his offense at the new laws. *Obama Meets With Russian Gay Rights Advocates*, CNN Politics (Sept. 6, 2013), <http://www.cnn.com/2013/09/06/politics/russia-obama/>.

The national Democratic Party vigorously supports homosexual rights; its 2012 platform stated that “no one should face discrimination on the basis of . . . sexual orientation, [or] gender identity.”³⁷ The Democratic Party also announced support for “marriage equality . . . for same-sex couples” and opposed state and constitutional amendments limiting marriage to opposite-sex couples.³⁸

These allies deliver a significant political punch for their homosexual constituents. Forty-nine of fifty-one Democratic United States Senators serving in

³⁶ Jennifer Bendery, *Obama Jabs Putin, Picks Openly Gay Delegates For Winter Olympics In Russia*, Huffington Post (Dec. 17, 2013), available at http://www.huffingtonpost.com/2013/12/17/obama-putin-olympics-gay-delegates_n_4462283.html.

³⁷ Democratic Nat’l Convention Comm., *Moving America Forward: 2012 Democratic National Platform*, available at http://www.presidency.ucsb.edu/papers_pdf/101962.pdf.

³⁸ *Id.*

the 112th Congress, and 227 Democratic and Republican Senators and Representatives total, received a score of between 70% and 100% for support of Human Rights Campaign issues on the Human Rights Campaign's *Congressional Scorecard*.³⁹

D. The Homosexual Community is Well-Financed by a Broad Range of Contributors and Resources.

Another measure of political power is financial support. Homosexuals have garnered significant support to achieve their victories.

i. Homosexual political interests have demonstrated deep pockets.

“Few questions are as important to an understanding of American democracy as the relationship between economic power and political influence.” 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). This truism is easily demonstrated by considering the money the Human Rights Campaign raised to marshal the political clout discussed above: nearly \$53.8 million (a record high) in 2013 and \$45.6 million in 2012.⁴⁰

During the well-documented battle over California's Proposition 8, the “No on 8” campaign raised \$43 million, outspending supporters of traditional marriage by \$3 million. Trial Tr. at 504:23-505:15 (testimony of Segura), *Perry v.*

³⁹ See throughout, *Congressional Scorecard: Measuring Support for Equality in the 112th Congress*, *supra*, n.11.

⁴⁰ 2013 *Human Rights Campaign Annual Report*, *supra*, n.13 at 21, 22.

Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292). Although the “No on 8” campaign did not prevail, its supporters clearly possessed significant resources.

In 2007, National Public Radio reported that “[a] new force is emerging in American politics: wealthy, gay political donors who target state level races.” Austin Jenkins, *Wealthy Gay Donors a New Force in Politics*, NPR, (June 26, 2007), <http://www.npr.org/templates/story/story.php?storyId=11433268>. NPR described an organized effort to finance candidates who support homosexual causes. *Id.*

Similarly, a 2008 Time Magazine article discussed a group of homosexual donors known as “the Cabinet.” “Among gay activists, the Cabinet is revered as a kind of secret gay Super Friends, a homosexual justice league that can quietly swoop in wherever anti-gay candidates are threatening and finance victories for the good guys.” John Cloud, *The Gay Mafia That’s Redefining Liberal Politics*, Time, (Oct. 31, 2008) <http://content.time.com/time/magazine/article/0,9171,1855344,00.html> (describing the “intriguing development [in the 2008 elections]: anti-gay conservatives had suffered considerably . . .”).

This influence extends to presidential politics. In the 2012 Presidential campaign, twenty-one prominent homosexual individuals and couples raised at

least \$7.4 million for the President's reelection.⁴¹

ii. Influential labor unions support homosexual causes.

Political power is not *simply* a matter of money; but also of leveraging influence. In this regard, many of the most influential unions actively support homosexuals.

The National Education Association (NEA) regularly advocates on behalf of homosexuals, including for same-sex marriage recognition. Nat'l Educ. Ass'n, *Focus on Tomorrow: What Matters Most in 2008 and Beyond, Voters and the Issues*, at 9-10 (2008), available at <http://www.nea.org/assets/docs/HE/votingfocus08.pdf>. NEA support of homosexual causes influences its 3.2 million members, and lends political muscle to Washington.

The American Federation of State, County and Municipal Employees (AFSCME), with 1.6 million members, has resolved to dedicate its resources and time to advancing legislation at both the state and federal level to ensure that same-sex couples receive the same treatment as traditional couples.⁴² In sum, homosexuals are allied with some of the most powerful grassroots and lobbying organizations in the country.

⁴¹ See Melanie Mason, Matea Gold & Joseph Tanfani *Gay Political Donors Move From Margins to Mainstream*, LA Times, May 13, 2012, available at <http://articles.latimes.com/2012/may/13/nation/la-na-gay-donors-20120513>.

⁴² *Marriage Equality*, AFSCME Res. 13, 40th Int'l Convention (2012), available at <http://www.afscme.org/members/conventions/resolutions-and-amendments/2012/resolutions/marriage-equality>.

iii. Corporate America backs homosexual causes.

It is well established that “[t]he business community . . . is one of the most important sources of interest group activity.” 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). Homosexuals enjoy broad support from Corporate America.

For example, the “No on 8” campaign contributors included many Fortune 500 corporations and their founders, such as PG&E, Apple, Lucas Films (and George Lucas), Levi Strauss, Williamson Capital, Google founders Sergey Brin and Larry Page, David Geffen and Jeffrey Katzenberg of Dreamworks Studios, and Bruce Bastian, co-founder of WordPerfect software. *Proposition 8: Who Gave in the Gay Marriage Battle?*, L.A. Times, <http://projects.latimes.com/prop8/> (enter donor names, choose “oppose,” and add the results).

Corporate America also funds broader homosexual causes. The Human Rights Campaign is supported by numerous corporate benefactors: American Airlines, Bank of America, Citibank, Lexus, Diago, Coca Cola, Microsoft, Mitchell Gold & Bob Williams, Morgan Stanley, MetLife, Nationwide Insurance, Prudential, British Petroleum, Caesars Entertainment, Chevron, Harrah’s, MGM Resorts International, Nike, Shell, Chase, Cox Enterprises, PWC, Dell, Goldman Sachs, Google, IBM, Macy’s, Orbitz, Starbucks, and Tylenol PM. Human Rights

Campaign, *National Corporate Partners*, <http://www.hrc.org/the-hrc-story/corporate-partners> (click on levels of partnerships).

Other homosexual groups also benefit from Corporate America's largess. The Gay, Lesbian, and Straight Education Network (GLSEN) is supported by America's most recognized corporate names.⁴³ Lambda Legal, "the oldest national organization pursuing high-impact litigation, public education and advocacy on behalf of equality and civil rights for lesbians, gay men, bisexuals, transgender people and people with HIV," boasts donations from the nation's top law firms and corporations.⁴⁴

But funding is not the full extent of support. "There are various dimensions to corporate political activity [Although] 'corporate PAC donations are important in themselves, [] they also should be understood as [just] one quantitative indicator of a range of other corporate political activity.'" Hansen & Mitchell, *supra*, at 891 (citation omitted). Prominent corporations have actively

⁴³ In addition to many of those mentioned for the Human Rights Campaign and GMHC, GLSEN sponsors include ABC Television, UBS Investment Bank, Deutsche Bank, Eastman Kodak Co., MTV Networks, Pepsi, Sony Pictures Entertainment, Inc., Verizon Communications, and Warner Bros. Entertainment among very many others. See GLSEN, *Partners*, <http://www.glsen.org/support/partners>.

⁴⁴ Law firms include Baker & McKenzie, Covington & Burling LLP, Gibson Dunn, Jenner & Block, Jones Day, Kirkland & Ellis LLP, Kramer Levin, Latham & Watkins, Mayer Brown, McDermott Will & Emery, O'Melveny & Myers LLP, Perkins Coie LLP, ReedSmith, Sheppard Mullin, Sidley Austin LLP, Skadden, Arps, Slate, Meagher & Flom LLP, and Wachtell, Lipton, Rosen & Katz. Lambda Legal, *National Sponsors*, <http://www.lambdalegal.org/about-us/sponsors>.

supported nondiscrimination legislation.⁴⁵ Furthermore, corporations also influence public policy through internal nondiscrimination policies. According to the Human Rights Campaign's *Corporate Equality Index 2014*, 99% of employers surveyed had nondiscrimination policies based on sexual orientation. The employers are drawn from the ranks of the Fortune 1000 and the American Lawyer's top 200 law firms. Human Rights Campaign, *Corporate Equality Index 2014: Rating American Workplaces on Lesbian, Gay, Bisexual, and Transgender Equality 20*, available at <http://www.hrc.org/campaigns/corporate-equality-index> (click on "Read the Report"). The President of the Human Rights Campaign remarked how these businesses influence politics:

More than ever, fair-minded companies are guaranteeing fair treatment and compensation to millions of LGBT employees in all 50 states. But beyond these sound business practices of internal diversity and inclusion, these same companies are fighting for full legal equality in state legislatures, in the halls of Congress and before the U.S. Supreme Court.

Id. at 3.

And in Florida, Equality Means Business "was formed to spotlight major employers in Florida that have adopted comprehensive non-discrimination policies and have demonstrated their commitment to valuing and pro-actively including all employees." Equality Means Business, *Diversity is Good for Business*,

⁴⁵ See, e.g. Equality California, *Sponsors*, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4026491> (listing many major corporations supporting Equality California, including AT&T, Southwest Airlines, and State Farm).

<http://equalitymeansbusiness.com/home>. Its Advisory Board consists of executives and key employees from companies such as C1 Bank, Tech Data Corp., Morgan Stanley, CSX, PNC Bank, Florida Blue (BlueCross/Blue Shield of Florida), Symantec, Wells Fargo, Tropicana, Comcast/NBC Universal, University of North Florida, and University of Miami. Means Business, *Advisory Board*, http://equalitymeansbusiness.com/advisory_board. These two universities are lending their careers services departments to the recruitment efforts of homosexual-friendly companies (as, of course, do other colleges in Florida and around the nation). *See, e.g.*, University of North Florida, *List of LGBT-friendly Companies*, http://www.unf.edu/careerservices/LGBT_List_of_LGBT-Friendly_Companies.aspx; University of Miami, *LGBTQ Students*, <http://www.sa.miami.edu/toppel/mainsite/Students/ShowcasingYourDiversity/LGBTQStudents.aspx>.

In sum, homosexuals wield considerable political power with the support of both employers and employee unions.

E. Many Religious Groups Support Homosexual Causes.

Homosexuals are not without support in the religious arena. A recent compilation of religious groups' official positions regarding same-sex marriage shows great diversity, with many religious organizations officially embracing

homosexuality and same-sex partnership.⁴⁶

For example, many religious organizations supported the “No on 8” campaign in California. Rebecca Voelkel, *A Time to Build Up: Analysis of the No on Proposition 8 Campaign & Its Implications for Future Pro-LGBTQQIA Religious Organizing*, Nat’l Gay & Lesbian Task Force (2009) available at http://www.thetaskforce.org/downloads/reports/reports/time_to_build_up_rev.pdf (admitting groundbreaking support for same sex “marriage” by people of faith and identifying plans for outreach). In its November 2008 newsletter, the Unitarian Universalist Association urged congregants to support the campaign. Roger Jones, *Thanks to Friends of Fairness*, The Unigram 4 (Nov. 2008), available at <http://uuss.org/Unigram/Unigram2008-11.pdf>.

When same-sex marriage became legal in Massachusetts, several religious organizations encouraged their clergy to perform such weddings, and some churches chose to do so. George Chauncey, *Why Marriage? The History Shaping Today’s Debate over Gay Equality* 77-78 (2004).

Within organizations that *officially* support only traditional marriage, many individual *members* support same-sex marriage. For example, 52% of Catholics and 34% of Protestants support same-sex “marriage.” Pew Research Religion &

⁴⁶ Pew Research Religion & Public Life Project, *Religious Groups’ Official Positions on Same-Sex Marriage*, (Dec.7, 2012), <http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/>.

Public Life Project, *Religion and Attitudes Toward Same-Sex Marriage*, (Feb. 7, 2012), available at <http://www.pewforum.org/2012/02/07/religion-and-attitudes-toward-same-sex-marriage/>. Consistent with this finding, a number of Florida churches of many denominations are listed under “Spiritual Organizations” on PrideNet.com, a business listing “Serving the Gay, Lesbian, Transgender and Bisexual Communities.”⁴⁷

F. Public Opinion Is Trending In Favor Of Homosexuals, Including on the Marriage Issue.

In 1977, “only 56 percent of Americans supported gay rights legislation.” Chauncey, *Why Marriage?*, *supra*, at 54-55. By 1996, 84% of Americans supported gay rights legislation. *Id.* at 55. By 2002, a Gallup-Poll found that “even though forty-four percent of the people said homosexuality was an unacceptable ‘alternative lifestyle,’ eighty-six percent thought homosexuals should have ‘equal rights in terms of job opportunities.’” *Id. See also, id.* at 150-51 (describing the growing number of Americans who believe that homosexuals should be allowed to adopt).

This change is especially prevalent among the younger generations, where many have grown up knowing homosexuals and seeing them treated with respect. *Id.* at 166; see also, Gregory M. Herek, *Legal Recognition of Same-Sex*

⁴⁷ PrideNet.com, *Spiritual Organizations, Florida*, http://www.pridenet.com/fla_clergy.html.

Relationships in the United States: A Social Science Perspective, Am. Psychologist, Sept. 2006 at 618 (describing changing attitudes among heterosexuals toward sexual minorities over the last two decades).

This shift was confirmed in May of 2012. According to a CNN/ORC International survey, 54% of Americans favor same-sex marriages and 60% of Americans know of a close friend or family member who is gay. Both numbers have increased by approximately 10 percentage points in two years.⁴⁸

As noted, the situation in Florida is similar. A poll conducted by the Miami Herald found that a majority of Floridians now support same-sex marriage. Rothaus, *Rick Scott supports, Charlie Crist Opposes Florida's Same-sex Marriage Ban*, *supra*. "Public opinion on same-sex marriage is changing at breathtaking speed. Voters across the nation are dropping their opposition . . . On no issue in American life have opinions changes as fast as they have on [same-sex marriage]. Sean Cockerham, *'Stunning' shift on gay marriage is changing political landscape*, Miami Herald (Feb. 3, 2014). There is no reason to believe that the political power and political momentum of homosexuals will be transient.

CONCLUSION

For the foregoing reasons and for other reasons stated in the Appellants' Brief, this Court should reverse the judgment of the district court.

⁴⁸ *CNN/ORC Poll, 2*, available at <http://i2.cdn.turner.com/cnn/2012/images/06/06/re15e.pdf>.

Respectfully submitted,
this 21st day of November, 2014,

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 6,467 words in 14 point Times New Roman font. This total was calculated with the Word Count function of Microsoft Office Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2014, I electronically filed the attached Brief *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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