

No. 14-50196

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

CLEOPATRA DELEON, NICOLE DIMETMAN,
VICTOR HOLMES, MARK PHARISS
Plaintiffs-Appellees

v.

RICK PERRY, in his official capacity as Governor of the State of Texas; GREG ABBOTT, in his official capacity as Texas Attorney General; DAVID LAKEY, , in his official capacity as Commissioner of the Texas Department of State Health Services,
Defendants-Appellants

Appeal from the United States District Court for the
Western District of Texas
Civil Case No. 5:13-cv-982 (Judge Orlando L. Garcia)

BRIEF OF AMICUS CONCERNED WOMEN FOR AMERICA
IN SUPPORT OF DEFENDANTS-APPELLANTS
URGING REVERSAL

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Services,

Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Amicus Curiae, Concerned Women for America has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

s/Steven W. Fitschen

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(c).....	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT.....	2
I. THIS COURT SHOULD APPLY RATIONAL BASIS SCRUTINY TO APPELLEES’ EQUAL PROTECTION CLAIM.....	2
II. HOMOSEXUALS ARE NOT POLITICALLY POWERLESS.	3
A. Political Powerlessness Is a Key Factor In Identifying Protected Classes.....	3
B. A Group Is Politically Powerless When It Cannot “Attract the Attention of Lawmakers.”	7
C. Homosexuals Have Attracted the Attention of Lawmakers Both Nationally and in Texas.. ..	11
<i>i. Public support and legal protection in Texas.</i>	<i>11</i>
<i>ii. The national political power of homosexuals.....</i>	<i>12</i>
D. Homosexuals Have Powerful Allies Both Nationally and in Texas.	15
<i>i. Allies in Texas.</i>	<i>15</i>
<i>ii. Allies across the nation.....</i>	<i>17</i>
E. The Homosexual Community is Well-Financed By a Broad Range of Contributors and Resources.	22

i. Homosexual political interests have demonstrated deep pockets.22

ii. Influential labor unions support homosexual causes.24

iii. Corporate America backs homosexual causes.25

F. Overwhelming Media Support of Homosexuals is Likely to Enhance Future Power for their Community.28

G. Many Religious Groups Support Homosexual Causes.....29

H. Public Opinion is Trending in Favor of Homosexuals.....31

CONCLUSION.....32

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Andersen v. King County</i> , 138 P.3d 963 (Wash. 2006)	10, 11
<i>Ben-Shalom v. Marsh</i> , 881 F.2d 454 (7th Cir. 1989)	9, 10
<i>Bostic v. Schaefer</i> , Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493, (4th Cir. July 28, 2014).....	5
<i>Bowen v. Gilliard</i> , 483 U.S. 587 (1987)	3
<i>Citizens for Equal Prot. v. Bruning</i> , 455 F.3d 859 (8th Cir. 2006)	4
<i>City of Cleburne v. Cleburne Living Ctr., Inc.</i> , 473 U.S. 432 (1985).....	3, 4, 5, 7, 9, 10, 19
<i>Conaway v. Deane</i> , 932 A.2d 571 (Md. 2007)	11
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	5
<i>De Leon v. Perry</i> , 975 F. Supp. 2d 632 (W.D. Tex. 2014).....	2
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	8
<i>High Tech Gays v. Defense Indus. Sec. Clearance Office</i> , 895 F.2d 563 (9th Cir. 1990)	4, 10
<i>Johnson v. Johnson</i> , 385 F.3d 503 (5th Cir. 2004).....	2, 4
<i>Kitchen v. Herbert</i> , No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014)	5
<i>Lofton v. Sec’y of Dep’t of Children & Family Servs.</i> , 358 F.3d 804 (11th Cir. 2004).....	4
<i>Mass. v. Dep’t of Health & Human Servs.</i> , 682 F.3d 1 (1st Cir.2012).....	4
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	4

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).....5

Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012).....7

SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014).....4, 6, 10

SmithKline Beecham Corp. v. Abbott Laboratories, Nos. 11–17357, 11–17373, 2014 WL 2862588 (9th Cir. June 24, 2014).....6, 7

United States v. Albert, 675 F.2d 712 (5th Cir. 1982).....2

United States v. Windsor, 133 S. Ct. 2675 (2013).....6

Vance v. Bradley, 440 U.S. 93 (1979)5

Windsor v. United States, 699 F. 3d 169 (2d Cir. 2012).....3, 4, 6, 7, 8, 9

Statutes:

18 U.S.C. § 249(2)14

Other Sources:

18 Pro Athletes Who Support Same-Sex Marriage, RollingStone Culture, <http://www.rollingstone.com/culture/lists/18-pro-athletes-who-support-same-sex-marriage-20140108/michael-irvin-dallas-cowboys-wide-reciever-19691231>.....16, 17

2005 Annual Report, Human Rights Campaign, *available at* <http://www.hrc.org/the-hrc-story/annual-reports>29

2013 Human Rights Campaign Annual Report, Human Rights Campaign, *available at* http://www.hrc.org/files/assets/resources/HRC_2013_ANNUAL_FINAL.pdf.....15, 22

About GLAAD, Gay & Lesbian Alliance Against Defamation, <http://www.glaad.org/about-glaad-0>.....28

Anita Hassan, *Sen. Patrick Questions Legality of Domestic Partnership Benefits*, Chron (Nov. 2, 2012), <http://www.chron.com/news/houston-texas/houston/article/Patrick-questions-legality-of-domestic-4004790.php> 12

Austin Jenkins, *Wealthy Gay Donors a New Force in Politics*, NPR, (June 26, 2007), <http://www.npr.org/templates/story/story.php?storyId=11433268>..... 23

Brian D. Ward, James M. Dahlhamer, Adena M. Galinsky & Sarah S. Joestl, *Sexual Orientation and Health Among U.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>. 9

Brief of Petitioner, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), available at 2013 WL 683048 19

CNN/ORC Poll, 2, available at <http://i2.cdn.turner.com/cnn/2012/images/06/06/rel5e.pdf> 32

Congressional Scorecard: Measuring Support for Equality in the 112th Congress, Human Rights Campaign, 2, available at http://hrc-assets.s3-website-us-east1.amazonaws.com//files/assets/resources/112thCongressionalScorecard_2012.pdf 14, 22

Corporate Equality Index 2014: Rating American Workplaces on Lesbian, Gay, Bisexual, and Transgender Equality, Human Rights Campaign, available at <http://www.hrc.org/campaigns/corporate-equality-index> 27

Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage, Nat’l Conference of State Legislatures (May 20, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx#1> 13

Don’t Ask, Don’t Tell Repeal Act of 2010, Human Rights Campaign, <http://www.hrc.org/resources/entry/dont-ask-dont-tell-repeal-act-of-2010> 14

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>.18

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

Employment Non-Discrimination Act, Human Rights Campaign, <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act>13

Focus on Tomorrow: What Matters Most in 2008 and Beyond, Voters and the Issues, Nat’l Educ. Ass’n at 9-10 (2008), *available at* <http://www.nea.org/assets/docs/HE/votingfocus08.pdf>.24

George Chauncey, *Why Marriage? The History Shaping Today’s Debate over Gay Equality* (2004).....30, 31, 32

Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, *Am. Psychologist*, Sept. 200632

Finding An Affirming Church, [gaychurch.org, http://www.gaychurch.org/find_a_church/](http://www.gaychurch.org/find_a_church/).....31

Hate Crime Laws, Movement Advancement Project (2014), http://www.lgbtmap.org/equality-maps/hate_crime_laws.....13

HRC National Dinner Silent Auction, Human Rights Campaign, *available at* <http://hrc-assets.s3-website-us-east-1.amazonaws.com/national-dinner/images/general/SilentAuction-2014.pdf>.....20

Jeffrey Weiss, *Cathedral of Hope in Dallas Rocked By Loss Of Senior Pastor, Other Key Staffers*, *Dallas News* (May 3, 2013 10:41 PM), <http://www.dallasnews.com/news/local-news/20130503-cathedral-of-hope-rocked-by-loss-of-senior-pastor-other-key-staffers.ece>31

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_c1.18

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.html20, 21

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>20

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>23

John Patterson, *Why Gus van Sant’s Milk Is an Important Film*, The Guardian, (Dec. 5, 2008), <http://www.guardian.co.uk/film/2008/dec/05/john-patterson-milk-gus-van-sant..>28

John Wright, *Texas-Based Companies Lag on LGBT Equality*, Lone Star Q (Dec. 10, 2013), <http://www.lonestarq.com/cei-scores/>.17

Judith A. Johnson, Cong. Research Serv., RL30731, *AIDS Funding for Federal Government Programs: FY1981-FY2009* (2008)14

Justin Cerra & Robert Pitman, *Openly Gay Judge Appointed to Texas District Court*, The Victory Fund (June 30, 2014), <https://www.victoryfund.org/our-story/gaypolitics/>.....16

Ken Lombardi, *Ellen DeGeneres Brings Laughs to Oscars 2014*, CBS News (March 3, 2014), <http://www.cbsnews.com/news/oscars-2014-ellen-degeneres-kicks-off-86th-academy-awards>29

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).....22

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>.....19

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..>24

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>.....20

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>.....17

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>24

Michael Rothman, *Gay and Straight Couples Married Live During 2014 Grammy Awards*, ABC News (Jan.26, 2014 11:30 PM), <http://abcnews.go.com/blogs/entertainment/2014/01/gay-and-straight-couples-married-live-during-2014-grammy-awards/>.....28, 29

Mike Morris, *Houston to Offer Same-Sex Spousal Benefits*, Chron (Nov. 20, 2014), <http://www.chron.com/news/houston-texas/Houston/article/Houston-to-offer-same-sex-spousal-benefits-4996173.php>.....12

Municipality Equality Index 2013, Human Rights Campaign, available at http://issuu.com/humanrightscampaign/docs/mei_2013_report/53?e=1357809/5671399..12

Moving America Forward: 2012 Democratic National Platform, Democratic Nat’l Convention Comm, available at http://www.presidency.ucsb.edu/papers_pdf/101962.pdf.....21

NAACP Passes Resolution in Support of Marriage Equality, NAACP, <http://www.naacp.org/news/entry/naacp-passes-resolution-in-support-of-marriage-equality>17

National Corporate Partners, Human Rights Campaign, <http://www.hrc.org/the-hrc-story/corporate-partners>25, 26

National Sponsors, Lambda Legal, <http://www.lambdalegal.org/about-us/sponsors>26

Omar Araiza, *San Antonio Spurs, SBOE Member Marisa Perez Back LGBT Non-Discrimination Ordinance*, Burnt Orange Report (Sep. 5, 2013 9:00 AM CDT), <http://www.burntorangereport.com/diary/14030/spurs-back-lgbt-nondiscrimination-ordinance>.....17

Obama Issues Proclamation Declaring June LGBT Pride Month, ELIXHER, (June 25, 2014), <http://elixher.com/obama-issues-proclamation-declaring-june-lgbt-pride-month/#sthash.dZHPGovC.dpuf>.....18

Obama Meets With Russian Gay Rights Advocates, CNN Politics (Sept. 6, 2013), <http://www.cnn.com/2013/09/06/politics/russia-obama/>.....21

Partners, GLSEN, <http://www.glsen.org/support/partners>.26

Past Dinners, Human Rights Campaign, <http://www.hrcnationaldinner.org/pages/past-dinners#.U6mRiRZCfw4>.20

Paige Lavender, *Wendy Davis Backs Gay Marriage*, The Huffington Post (Feb. 13, 2014), http://www.huffingtonpost.com/2014/02/13/wendy-davis-gay-marriage_n_4783604.html.16

Press Release, Office of the Press Sec’y, Press Briefing by Press Secretary Jay Carney, 5/7/12 (May 7, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/05/07/press-briefing-press-secretary-jay-carney-5712>.17

Proclamation No.8989, 78 Fed.Reg.at 33,957 (May 31, 2013).....18, 19

Proposition 8: Who Gave in the Gay Marriage Battle?, L.A. Times,
<http://projects.latimes.com/prop8/>25

Rebecca Voelkel, *A Time to Build Up: Analysis of the No on Proposition 8 Campaign & Its Implications for Future Pro-LGBTQQA Religious Organizing*, Nat’l Gay & Lesbian Task Force (2009) available at http://www.thetaskforce.org/downloads/reports/reports/time_to_build_up_rev.pdf.....30

Religion and Attitudes Toward Same-Sex Marriage, Pew Research Religion & Pub. Life Project (Feb. 7, 2012), available at <http://www.pewforum.org/2012/02/07/religion-and-attitudes-toward-same-sex-marriage/>31

Religious Groups’ Official Positions on Same-Sex Marriage, Pew Research Religion & Pub. Life Project (Dec. 7, 2012), <http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/>.....30

Roger Jones, *Thanks to Friends of Fairness*, The Unigram (Nov. 2008), available at <http://uuss.org/Unigram/Unigram2008-11.pdf>.....30

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>.20

Sponsors, Equality California, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKRH&b=4026491>.27

State Hate Crime Laws, Human Rights Campaign, http://hrc-assets.s3-website-us-east1.amazonaws.com//files/assets/resources/hate_crimes_laws_022014.pdf.....12

Texas Democratic Party Releases 2014 Party Platform, Embraces Gay Marriage, The Venture, <http://www.theventureonline.com/2014/06/texas-democratic-party-releases-2014-party-platform-embraces-gay-marriage/>15

Texas Tech Survey: Abbott to Win Texas Governor, Voter ID Law

Didn't Cause Problems and Texans Split on Gay Marriage,
Newswise (April 17, 2014), [http://www.newswise.com/articles/
texas-tech-survey-abbott-to-win-texas-governor-voter-id-law-
didn-t-cause-problems-and-texans-split-on-gay-marriage](http://www.newswise.com/articles/texas-tech-survey-abbott-to-win-texas-governor-voter-id-law-didn-t-cause-problems-and-texans-split-on-gay-marriage)11

The Equality Poll 2013, EQTX Foundation [http://equalityfederation.
salsalabs.com/o/35034/p/salsa/web/common/public/content?
content_item_KEY=9072](http://equalityfederation.salsalabs.com/o/35034/p/salsa/web/common/public/content?content_item_KEY=9072).....12

The State of the Workplace, Human Rights Campaign (2009) available
at [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).....13

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).....13

Trial Tr. at 2456:25-2457:17, 2442:21-24 (testimony of Miller), *Perry v.
Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-
CV-2292)29

Trial Tr. at 504:23-505:15 (testimony of Segura), *Perry v. Schwarzenegger*,
704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292).....22

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)25

Your Elected Officials, Human Rights Campaign, [http://www.hrc.org/elected-
officials/state/TX](http://www.hrc.org/elected-officials/state/TX)16

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. 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.

The Brief is filed with the consent of all parties.

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

In assessing the level correct level of scrutiny to be applied in this matter, the court below correctly held that it was unnecessary to apply heightened scrutiny in this case. Heightened scrutiny is inappropriate, in part, because homosexuals do not constitute either a suspect class or a quasi-suspect class. This is so because they have achieved direct political power, acquired important allies, and raised significant funds. Furthermore, they are supported by labor unions, corporate America, media and religious communities, and have public opinion moving in their favor.

ARGUMENT

I. THIS COURT SHOULD APPLY RATIONAL BASIS SCRUTINY TO APPELLEES' EQUAL PROTECTION CLAIM.

This Court has held that classifications based on sexual orientation are subject to rational basis review. *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (“a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims”).

The lower court held that it was unnecessary to decide the level of scrutiny in this case, as Texas’s same-sex marriage ban fails even under a rational basis of review. *De Leon v. Perry*, 975 F. Supp. 2d 632, 652 (W.D. Tex. 2014). Despite this, the Appellees will likely argue that heightened scrutiny applies to their equal

protection claim. However, only a Court sitting *en banc* may alter the law of this Circuit. *United States v. Albert*, 675 F.2d 712, 713 (5th Cir. 1982). Thus, in the absence of any intervening Supreme Court precedent, this Court need not—indeed, cannot—consider whether the appellees’ equal protection claim is subject to heightened scrutiny.

However, should this Court disagree, it would need to consider whether homosexuals are politically powerless. Therefore, the next Section of this Brief will demonstrate that they are not.

II. HOMOSEXUALS ARE NOT POLITICALLY POWERLESS.

A. Political Powerlessness Is a Key Factor In Identifying Protected Classes.

When identifying 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., Windsor v. United States*, 699 F. 3d 169, 181 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602, (1987) and *City of Cleburne v. Cleburne Living Ctr., Inc.* 473 U.S. 432, 440–41 (1985)). Until *Windsor*, every federal appellate court to have considered applying heightened scrutiny

classifications based on sexual orientation refused to do so.¹

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,” *Windsor*, 699 F.3d at 181, 185, relying on Justice Marshall’s partly concurring and partly dissenting opinion in *Cleburne*. *See, id.* at 185. 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 majoritarian political process.” *E.g., Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982)

¹ *See Mass. v. Dep’t of Health & Human Servs.*, 682 F.3d 1, 9-10 (1st Cir.2012); *Johnson v. Johnson*, 385 F.3d at 532; *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) *overruled by SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014); *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, Ninth, Tenth, D.C., Federal Circuits and this Court).

(quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

Indeed, the 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 Court has often used rational bases for state regulations). "[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.

Since *Windsor*, the Fourth, Ninth, and Tenth Circuits have applied strict scrutiny in several cases involving homosexuals. The Fourth and Tenth Circuits both applied strict scrutiny in striking down same-sex marriage bans, however both courts did so because they concluded that the fundamental right to marry included the fundamental right to marry someone of the opposite sex. *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493, at *9 (4th Cir. July 28, 2014); *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *1 (10th Cir. June

25, 2014). Thus, neither court applied heightened scrutiny in consequence of finding homosexuals to be a suspect or quasi-suspect class.

However, the Ninth Circuit's case, *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 474 (9th Cir. 2014) involved a peremptory strike of a homosexual juror, and thus, it did not include a fundamental right analysis. Turning to whether heightened scrutiny might be required due to homosexuals constituting a suspect or quasi-suspect class, the Ninth Circuit acknowledged that, because of its precedents, it was precluded from applying heightened scrutiny without a change in Supreme Court precedent. the Ninth Circuit concluded that *United States v. Windsor*, 133 S. Ct. 2675 (2013), constituted a change in precedent even though that opinion made no mention of the level of scrutiny it applied. *SmithKline*, 740 F.3d at 480. The Ninth Circuit nonetheless interpreted *Windsor* as requiring heightened scrutiny. *Id.* at 484.² In doing so, that court “plainly misread *Windsor*, abandoned [its] own precedent, and disregarded [its] own procedures for departing from settled constitutional doctrine.” *SmithKline Beecham Corp. v. Abbott Laboratories*, Nos. 11–17357, 11–17373, 2014 WL 2862588 (9th Cir. June 24, 2014) (O’Scannlain, J, dissenting from denial of

² In interpreting *Windsor*, the Ninth Circuit used a three part test: whether *Windsor* considered the possible post-hoc rationalizations for the law, which are required under rational basis review; whether *Windsor* required a “legitimate state interest” to “justify” the harm that the law would inflict; and whether the cases relied on by *Windsor* had applied heightened scrutiny. *Id.* at 480.

rehearing *en banc*).

This Court should not follow the flawed analysis of the Fourth, Ninth, and Tenth Circuits. (This brief will not further address why your *Amicus* believes that the fundamental right to marriage does not encompass same-sex marriage but refers this Court to the Appellants' discussion of this issue.)

B. 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.” *Cleburne*, 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, in *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.* at 686. The *Frontiero* Court explained that because of a historical attitude of misguided paternalism, women continued to lack political power, despite some gains:

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

Id. at 686 n.17 (emphasis added). The fact that half the population had 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 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;

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. 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 in fact 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.

High Tech Gays 895 F.2d 563 at 574.⁵ Both acknowledged the Supreme Court’s 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, that court concluded that homosexuals were exercising “increasing political

⁵ As previously mentioned, the Ninth Circuit has changed its position on this matter. However, *SmithKline* did not address the issue of political power; it merely held that *Windsor* required heightened scrutiny. Therefore its previous holding that homosexuals are not politically powerless merits consideration.

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.

C. Homosexuals Have Attracted the Attention of Lawmakers Both Nationally and in Texas.

i. Public support and legal protection in Texas.

Homosexuals are not without political power in Texas. Recent polls show that 48% of Texans support gay marriage, while 47% do not.⁷ Furthermore, 65.7%

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

⁷ *Texas Tech Survey: Abbott to Win Texas Governor, Voter ID Law Didn’t Cause Problems and Texans Split on Gay Marriage*, Newswise (April 17, 2014), <http://www.newswise.com/articles/texas-tech-survey-abbott-to-win-texas-governor-voter-id-law-didn-t-cause-problems-and-texans-split-on-gay-marriage>.

of voters in Texas support extending domestic partner benefits to employees of the government and public universities, and 52% of voters support recognizing same-sex marriages from other jurisdictions.⁸

Public support has translated into legal protection. In 2002, for example, Texas criminalized hate or bias crimes based on sexual orientation.⁹ In addition, in 2013, Houston began offering health and life insurance benefits to same-sex couples married in other jurisdictions.¹⁰ Furthermore, major cities like San Antonio, Fort Worth, Dallas, and Austin offer benefits to domestic partners¹¹ and have non-discrimination laws in place.¹²

Clearly, homosexuals in Texas have caught the attention of lawmakers.

ii. The national political power of homosexuals.

The national political power of the homosexuals has also increased. For

⁸ *The Equality Poll 2013*, EQTX Foundation, http://equalityfederation.salsalabs.com/o/35034/p/salsa/web/common/public/content?content_item_KEY=9072 (last visited July 31, 2014).

⁹ *State Hate Crime Laws*, Human Rights Campaign, http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/hate_crimes_laws_022014.pdf (last visited July 31, 2014).

¹⁰ Mike Morris, *Houston to Offer Same-Sex Spousal Benefits*, Chron (Nov. 20, 2014), <http://www.chron.com/news/houston-texas/houston/article/Houston-to-offer-same-sex-spousal-benefits-4996173.php>.

¹¹ Anita Hassan, *Sen. Patrick Questions Legality of Domestic Partnership Benefits*, Chron (Nov. 2, 2012), <http://www.chron.com/news/houston-texas/houston/article/Patrick-questions-legality-of-domestic-4004790.php>.

¹² *Municipality Equality Index 2013*, Human Rights Campaign, 51, available at http://issuu.com/humanrightscampaign/docs/mei_2013_report/53?e=1357809/5671399 (last visited July 31, 2014).

example, 71% of homosexuals live in states with hate crime laws covering sexual orientation.¹³ Twenty-one states, the District of Columbia,¹⁴ and at least 181 cities and counties prohibit employment discrimination based on sexual orientation. *The State of the Workplace*, Human Rights Campaign, 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 twenty states and the District of Columbia now offer same-sex marriage, domestic partnerships or civil unions.¹⁵

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

¹³ *Hate Crime Laws*, Movement Advancement Project (2014), http://www.lgbtmap.org/equality-maps/hate_crime_laws.

¹⁴ *Employment Non-Discrimination Act*, Human Rights Campaign, <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act> (last updated June 2, 2014).

¹⁵ *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, Nat'l Conference of State Legislatures (May 20, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx#1>.

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. 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).¹⁶

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.¹⁷ Finally, in 2010, both houses of Congress supported the successful repeal of “Don't Ask, Don't Tell.” *Don't Ask, Don't Tell Repeal Act of 2010*, Human Rights Campaign, <http://www.hrc.org/resources/entry/dont-ask-dont-tell-repeal-act-of-2010> (Last Updated Sept. 20, 2011).

¹⁶ *Congressional Scorecard: Measuring Support for Equality in the 112th Congress*, Human Rights Campaign, 2, available at http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/112thCongressionalScorecard_2012.pdf (last visited July 31, 2014).

¹⁷ 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).

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

D. Homosexuals Have Powerful Allies Both Nationally and in Texas.

Although implied in the prior Section, it is worth noting the significance of 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.¹⁸

i. Allies in Texas.

Homosexuals in Texas have numerous allies. For example, the Texas Democratic party has embraced same-sex marriage in its platform and condemned Governor Rick Perry and Texas Republicans for endorsing reparative therapy for gays.¹⁹

This past June, Robert Lee Pitman, the first openly homosexual U.S.

¹⁸ *2013 Human Rights Campaign Annual Report*, Human Rights Campaign, 4, available at http://www.hrc.org/files/assets/resources/HRC_2013_ANNUAL_FINAL.pdf (last visited July 31, 2014).

¹⁹ *Texas Democratic Party Releases 2014 Party Platform, Embraces Gay Marriage*, The Venture, <http://www.theventureonline.com/2014/06/texas-democratic-party-releases-2014-party-platform-embraces-gay-marriage/> (last visited July 31, 2014).

Attorney in Texas, was nominated as a federal judge for the United States District Court for the Western District of Texas. Justin Cerra & Robert Pitman, *Openly Gay Judge Appointed to Texas District Court*, The Victory Fund (June 30, 2014), <https://www.victoryfund.org/our-story/gaypolitics/>. If confirmed, he will become the first openly homosexual federal judge in the state. *Id.*

Texas state senator Wendy Davis, who is currently running for governor, supports equality for homosexuals in the workplace and has advocated for same-sex marriage,²⁰ stating, “[i]t’s my strong belief that when people love each other and are desirous of creating a committed relationship with each other that they should be allowed to marry, regardless of their sexual orientation”²¹

A number of allies can be found among Texas Congressional Representatives, including Al Green, Ruben Hinojosa, Sheila Jackson Lee, Eddie Bernice Johnson, and Lloyd Doggett. *Your Elected Officials*, Human Rights Campaign, <http://www.hrc.org/elected-officials/state/TX> (last visited July 31, 2014).

Support for homosexuals in Texas has gone beyond politics. Michael Irvin of the Dallas Cowboys has spoken in support of homosexual rights,²² and the San

²⁰ Paige Lavender, *Wendy Davis Backs Gay Marriage*, The Huffington Post (Feb. 13, 2014), http://www.huffingtonpost.com/2014/02/13/wendy-davis-gay-marriage_n_4783604.html.

²¹ *Id.*

²² *18 Pro Athletes Who Support Same-Sex Marriage*, RollingStone Culture, <http://>

Antonio Spurs have supported nondiscrimination policies based on sexual orientation, citing their own policies and the NBA's.²³ Furthermore, major Texas companies such as American Airlines, AT&T Inc., Dell Inc., GameStop Corp. and Nokia Inc., received perfect scores in the Human Rights Campaign 2014 Corporate Equality Index. John Wright, *Texas-Based Companies Lag on LGBT Equality*, Lone Star Q (Dec. 10, 2013), <http://www.lonestarq.com/cei-scores/>.

With such allies in Texas, homosexuals clearly are not politically powerless.

ii. 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

www.rollingstone.com/culture/lists/18-pro-athletes-who-support-same-sex-marriage-20140108/michael-irvin-dallas-cowboys-wide-receiver-19691231 (last visited July 31, 2014).

²³ Omar Araiza, *San Antonio Spurs, SBOE Member Marisa Perez Back LGBT Non-Discrimination Ordinance*, Burnt Orange Report (Sep. 5, 2013) <http://www.burntorangereport.com/diary/14030/spurs-back-lgbt-nondiscrimination-ordinance>.

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, 5/7/12 (May 7, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/05/07/press-briefing-press-secretary-jay-carney-5712>; *NAACP Passes Resolution in Support of Marriage Equality*, NAACP, <http://www.naACP.org/news/entry/naACP-passes-resolution-in-support-of-marriage-equality> (last visited July 31, 2014).

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

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:

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 *Obama Issues Proclamation Declaring June LGBT Pride Month*, ELIXHER, (June 25, 2014), <http://elixher.com/obama-issues-proclamation-declaring-june-lgbt-pride-month/#sthash.dZHPGovC.dpuf>.

²⁸ Proclamation No.8989, 78 Fed.Reg.at 33,957 (May 31, 2013).

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

For example, the President’s 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,

²⁹ *Id.*

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>.

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

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 Additionally, for the first time since the Summer 2000 Olympics neither the President, Vice President, First

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., *Past Dinners*, Human Rights Campaign, <http://www.hrcnationaldinner.org/pages/past-dinners#.U6mRiRZCfw4> (last visited July 31, 2014).

³³ *HRC National Dinner Silent Auction*, Human Rights Campaign, available at <http://hrc-assets.s3-website-us-east-1.amazonaws.com//national-dinner/images/general/SilentAuction-2014.pdf> (last visited July 31, 2014).

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>.

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.

Lady nor a former President attended the opening ceremony.³⁷ 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.”³⁸ 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.³⁹

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

³⁷ *Id.*

³⁸ *Moving America Forward: 2012 Democratic National Platform*, Democratic Nat’l Convention Comm, available at http://www.presidency.ucsb.edu/papers_pdf/101962.pdf (last visited July 31, 2014).

³⁹ *Id.*

Scorecard.⁴⁰

E. The Homosexual Community is Well-Financed By a Broad Range of Contributors and Resources.

Another measure of political power is the financial picture. Homosexuals have garnered significant financial 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 2012.⁴¹

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. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292).

⁴⁰ See throughout, *Congressional Scorecard: Measuring Support for Equality in the 112th Congress*, Human Rights Campaign, available at http://www.hrc.org/files/assets/resources/112thCongressionalScorecard_2012.pdf (last visited July 31, 2014).

⁴¹ *2013 Human Rights Campaign Annual Report*, Human Rights Campaign, 21, 22 (last visited July 31, 2014).

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.⁴²

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. *Focus on Tomorrow: What Matters Most in 2008 and Beyond, Voters and the Issues*, Nat'l Educ. Ass'n 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.⁴³ In sum, homosexuals are allied with some of the most powerful grassroots and lobbying organizations in the country.

⁴² See Melanie Mason, Matea Gold and 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>.

⁴³ *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/> (last visited July 31, 2014) (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. *National*

Corporate Partners, Human Rights Campaign, <http://www.hrc.org/the-hrc-story/corporate-partners> (last visited July 31, 2014) (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.⁴⁴ 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.⁴⁵

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

⁴⁴ 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 Partners*, GLSEN, <http://www.glsen.org/support/partners> (last visited July 31, 2014).

⁴⁵ 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. *National Sponsors*, Lambda Legal, <http://www.lambdalegal.org/about-us/sponsors> (last visited July 31, 2014).

quantitative indicator of a range of other corporate political activity.’” Hansen & Mitchell, *supra*, at 891 (citation omitted). Prominent corporations have actively supported nondiscrimination legislation.⁴⁶ 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 Layer’s top 200 law firms. *Corporate Equality Index 2014: Rating American Workplaces on Lesbian, Gay, Bisexual, and Transgender Equality*, Human Rights Campaign 20, available at <http://www.hrc.org/campaigns/corporate-equality-index> (last visited July 31, 2014) (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.

In sum, homosexuals wield considerable political power with the support of

⁴⁶ See, e. g. *Sponsors*, Equality California, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4026491> (last visited July 31, 2014) (listing many major corporations supporting Equality California, including AT&T, Southwest Airlines, and State Farm).

both employers and employee unions.

F. Overwhelming Media Support of Homosexuals is Likely to Enhance Future Power for their Community.

Homosexuals have found overwhelming support in the media. For example, GLAAD declares: “Leading the conversation. Shaping the media narrative. Changing the culture. That’s GLAAD at work.” *About GLAAD*, Gay & Lesbian Alliance Against Defamation, <http://www.glaad.org/about-glaad-0> (last visited July 31, 2014). And GLAAD touts its “expertise [in] News Media ... Entertainment Media ... Spanish-language and Latino media ... [and] Communications & Digital strategy.” *Id.*

Numerous people have speculated that it was no coincidence that the Academy Award-winning film “Milk” was released in the critical week before the November 2008 election, providing publicity for homosexuals. *See, e.g.*, John Patterson, *Why Gus van Sant’s Milk Is an Important Film*, *The Guardian*, (Dec. 5, 2008), <http://www.guardian.co.uk/film/2008/dec/05/john-patterson-milk-gus-van-sant>.

More recently, homosexuals found support at the 2014 Grammy Awards, and at the 2014 Oscars. The Grammys prominently featured Queen Latifah’s officiating at a mass wedding of thirty-three opposite-sex and same-sex couples to the applause of the audience.⁴⁷ Additionally, well-known lesbian actress Ellen

⁴⁷ Michael Rothman, *Gay and Straight Couples Married Live During 2014 Grammy Awards*, ABC News (Jan.26, 2014 11:30 PM), <http://abcnews.go.com/>

DeGenerous hosted the Oscars.⁴⁸

America's news media also supports homosexuals. The 2005 Human Rights Campaign Annual Report stated that its organization alone has at least one quote in a newspaper every day. *2005 Annual Report*, Human Rights Campaign 19, available at <http://www.hrc.org/the-hrc-story/annual-reports> (last visited July 31, 2014) (click on 2005 Annual Report). In addition, during the November 2008 election, every major newspaper in California that took a position on Proposition 8, along with the New York Times, expressed a “vote No on 8” editorial opinion. Trial Tr. at 2456:25-2457:17, 2442:21-24 (testimony of Miller), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292) (“I looked at the editorial endorsements of the 23 largest newspapers in California by circulation. And of those 23, 21 of the 23 endorsed a No On 8 position. Two of the—the remaining two out of the 23 did not take a position one way or the other [N]ational newspapers like the New York Times have been important allies of gays in the LGBT rights movement.”).

G. Many Religious Groups Support Homosexual Causes.

Homosexuals are not without support in the religious arena. A recent

[blogs/entertainment/2014/01/gay-and-straight-couples-married-live-during-2014-grammy-awards/](http://blogs.fox.com/entertainment/2014/01/gay-and-straight-couples-married-live-during-2014-grammy-awards/).

⁴⁸ Ken Lombardi, *Ellen DeGeneres Brings Laughs to Oscars 2014*, CBS News (March 3, 2014), <http://www.cbsnews.com/news/oscars-2014-ellen-degeneres-kicks-off-86th-academy-awards/>.

compilation of religious groups' official positions regarding same-sex marriage shows great diversity, with many religious organizations officially embracing homosexuality and same-sex partnership.⁴⁹

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).

Most importantly, religious support for homosexuals exists in Texas. One of

⁴⁹ *Religious Groups' Official Positions on Same-Sex Marriage*, Pew Research Religion & Pub. Life Project (Dec. 7, 2012), <http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/>.

Dallas's best known churches is the Cathedral of Hope, which has been "long considered the nation's largest predominantly [homosexual] congregation"⁵⁰ Houston, San Antonio, and Dallas each contain more than twenty churches that preach an LGBT-affirming message. *Finding An Affirming Church*, gaychurch.org, http://www.gaychurch.org/find_a_church/ (type the name of the city in the address bar) (last visited July 31, 2014).

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." *Religion and Attitudes Toward Same-Sex Marriage*, Pew Research Religion & Pub. Life Project (Feb. 7, 2012), *available at* <http://www.pewforum.org/2012/02/07/religion-and-attitudes-toward-same-sex-marriage/>.

H. Public Opinion is Trending in Favor of Homosexuals

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

⁵⁰ Jeffrey Weiss, *Cathedral of Hope in Dallas Rocked By Loss Of Senior Pastor, Other Key Staffers*, Dallas News (May 3, 2013), <http://www.dallasnews.com/news/local-news/20130503-cathedral-of-hope-rocked-by-loss-of-senior-pastor-other-key-staffers.ece>.

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 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 think same-sex marriages should be permitted 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.⁵¹

As noted, a large number of Texans currently support homosexual rights. Thus, there can be no real question of political powerlessness.

CONCLUSION

For these reasons, among others, this Court should analyze the Equal Protection claim under rational basis review. Under rational basis review and for

⁵¹ *CNN/ORC Poll, 2*, available at <http://i2.cdn.turner.com/cnn/2012/images/06/06/re15e.pdf> (last visited July 31, 2014).

reasons explained by Appellants, this Court should reverse the judgment of the district court.

Respectfully submitted this 31st day of July, 2014,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 6,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word counting function of Microsoft Word 2007.

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Dated: July 31, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2014, I electronically filed the attached Brief *Amicus Curiae* of Concerned Women for America in the case of *De Leon, et al., v. Perry, et al*, No. 14-50196, with the clerk of the court by using the CM/ECF system. I further certify that all counsel of record are registered CM/ECF users and have been served via that system.

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NO. 14-50196

DeLeon, et. al. (Plaintiff) vs. Perry, et al. (Defendant)

The Clerk will enter my appearance as Counsel for:

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who IN THIS COURT is (use mouse to select one)
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Intervenor

I certify that I am a member of the Bar of the Fifth Circuit Court of Appeals, or am applying by completing an admission form..

s/Steven W. Fitschen (Signature)

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NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a lead counsel to whom the court will give notification, with the understanding that the lead counsel will notify all other related counsel. If lead counsel has not signed above, lead counsel must complete his or her own form for appearance of counsel. The person to be notified in this case is:

Name of Lead Counsel (Type or Print) Steven W. Fitschen

A. Name of any Circuit Judge of the Fifth Circuit who participated in this case in the district or bankruptcy court. None

B. Inquiry of Counsel

To your knowledge:

- (1) Is there any case now pending in this court, which involves the same, substantially the same, similar or related issue(s)? Yes No
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