

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 1:09-cv-10309

NANCY GILL & MARCELLE LETOURNEAU,)
MARTIN KOSKI & JAMES FITZGERALD,)
DEAN HARA,)
MARY RITCHIE & KATHLEEN BUSH,)
MELBA ABREU & BEATRICE HERNANDEZ,)
MARLIN NABORS & JONATHAN KNIGHT,)
MARY BOWE-SHULMAN &)
DORENE BOWE-SHULMAN,)
JO ANN WHITEHEAD & BETTE JO GREEN,)
RANDELL LEWIS-KENDELL, and)
HERBERT BURTIS,)

Plaintiffs,)

v.)

OFFICE OF PERSONNEL MANAGEMENT,)
UNITED STATES POSTAL SERVICE,)
JOHN E. POTTER, in his official capacity as)
the Postmaster General of the United States of)
America,)
MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
ERIC H. HOLDER JR., in his official capacity)
as the United States Attorney General, and)
THE UNITED STATES OF AMERICA,)
Defendants.)

AFFIDAVIT OF GARY M. SEGURA, Ph.D.

AFFIDAVIT OF GARY M. SEGURA, Ph.D.

I, Gary M. Segura, Ph.D., hereby depose and say as follows:

PRELIMINARY STATEMENT

1. I am a Professor of American Politics in the Department of Political Science at Stanford University. I have been retained by counsel for Plaintiffs and by the Commonwealth of Massachusetts as a consultant in connection with both the above-referenced litigation (“*Gill*”) and in *Commonwealth of Massachusetts v. United States Dept. of Health and Human Services, et. al*, Civ. A. No. 1:09-11156 JLT (D. Mass). I have actual knowledge of the matters stated in this affidavit and could and would so testify if called as a witness.

2. My background, experience and list of publications from the last 10 years are summarized in my curriculum vitae, which is attached as Exhibit A to this Affidavit.

3. I received a Ph.D. in American Politics and Political Philosophy from the Department of Political Science at the University of Illinois in Urbana-Champaign in 1992. My tertiary field of emphasis was political methodology. My MA was also from Illinois in 1990, and I earned my undergraduate degree from Loyola University of New Orleans in 1985.

4. I am also the founding Director of the Institute on the Politics of Inequality, Race and Ethnicity at Stanford, and the founding co-Director of the Stanford Center for American Democracy. In that latter role, I am one of the Principal Investigators-Designate of the American National Election Studies for 2009-2013, the premier data-gathering project for scholars of American elections.

5. My primary emphases in my scholarly research and writing are on public attitudes, opinion, and behavior with respect to politics, and minority group politics. I have taught classes on elections, public opinion, representation, Congress, Latino politics, Gay and Lesbian politics, race and racism, the Voting Rights Act, inequality and American democracy, interest group politics, philosophy of science, research design, and statistical analysis (introductory and advanced).

6. To date, I have 42 article-length publications in professional journals and edited volumes. Those journals include the *American Political Science Review*, the *American Journal of Political Science*, *Political Research Quarterly*, *Political Behavior*, and the *Journal of Politics*. I edited *Diversity in Democracy: Minority Representation in the United States*, published by the University of Virginia Press. I am also the co-author of a forthcoming book addressing new patterns of Latino life and politics in the US, being published by Temple University Press in early 2010. I am under contract with Congressional Quarterly Press for a third book, a comparative exploration of political behavior across American racial and ethnic minority groups and how that will shape American party coalitions in the coming decades. We anticipate the publication of this volume in late 2010 or early 2011.

7. I am currently the President of the Midwest Political Science Association, the second-largest organization of American political scientists. In 2006, I was the General Program Chair of the MPSA Annual Meeting. In addition, I am a member and former Executive Council Member of the American Political Science Association, member and former Executive Council Member of the Western Political Science Association, and member of the Southern Political Science Association. I serve on the editorial boards of the *American Journal of Political Science*, *Journal of Politics*, and *Political Research Quarterly*. I am a member of the Sexuality and

Politics organized section of the American Political Science Association, have served on the Southern Political Science Association's Committee on the Status of Gays and Lesbians, and was part of the Executive Committee of the Sexuality Studies Program at the University of Iowa.

8. In preparing this Affidavit, I reviewed the Amended Complaint in *Gill*, the Complaint in the *Commonwealth of Massachusetts* case, and the materials listed in the attached list of Sources (Exhibit B). I may rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this Affidavit, as additional support for my opinions. I have also relied on my years of experience in the field of political science, as set out in my curriculum vitae (Exhibit A), and on the materials listed therein.

I. Summary of Ultimate Conclusions

9. Gays and lesbians do not possess a meaningful degree of political power, and are politically vulnerable, relying almost exclusively on allies who are regularly shown to be insufficiently strong or reliable to achieve or protect their interests. Their powerlessness is evidenced in numerous ways, and they are subject to political exclusion and suffer political disabilities greater than other groups that have received suspect class protection.

II. Political Powerlessness in General

10. Any evaluation of the political power of a particular group in the United States takes place in the context of a general understanding of the role that groups play in American politics. From Madison forward, American democracy has been predominantly understood as a pluralist system, in which competition among groups ideally should ensure that no one interest becomes permanently dominant or holds sway over a large number of decisions over a long time.

Madison believed that in an “extended” republic, coalitions commanding the day or one issue would dissolve and be replaced by a different majority coalition on the next issue.

11. Modern political scientists generally approach pluralism through the concept of group interests. The action of one group raises challenges to the interests of another, causing it to react, and preventing a single interest from dominating the political process. However, not all groups have an equal opportunity to form and act successfully to stave off threats to their interests. Differences in group size, resources, and position in the class structure mean that some groups are inherently better positioned to act on their behalf than others, and some groups suffer a permanent disadvantage that places them at the mercy of others. The existence of societal prejudice against a particular group imposes an additional systematic burden, because it tends to prevent that group’s interests or policy preferences from receiving due consideration by other actors in the political process, or causes that consideration to be sacrificed to political expediency. Relative to minority groups that are otherwise similarly situated, a group that suffers such prejudice does not receive an equivalent hearing in political contestation and debate. Constitutions (and courts, through judicial review) play a role in the pluralist system in protecting disadvantaged minorities from majoritarian excesses and from effective exclusion from the political process.

12. Political power refers to a demonstrated ability to extract favorable (or prevent unfavorable) policy outcomes from the political system. In a well-established and commonly cited definition, Robert Dahl wrote that A has power over B when A is able to compel B to do something that B otherwise would not do. Thus, simple meetings of the mind are insufficient to demonstrate the exercise of power. One does not have power over those who, for other reasons,

already agree. For example, in the last national election, millions voted for the same candidate I did, but this is not evidence of my electoral influence.

13. Groups that lack political power may on occasion receive rights or benefits that they cannot compel through the political process as a result of “affinity” or sympathy from legislators in a position to bestow them. These outcomes are not the result of an exercise of political power by the minority group, and, hence, are significantly more vulnerable to reversal than those achieved through political victories. The affinity or sympathy that gave rise to them could dissipate or flatten, and is likely to be abandoned in the face of subsequent opposition.

14. Following Dahl’s understanding, power can be illustrated only in comparison to a baseline understanding of the subject’s preferred action. That is, to demonstrate that power had been at work, one would need to observe successful instances of opinion change on the part of the legislator in the face of positive or negative sanction or, alternatively, electoral change precipitated by the ire of the dissatisfied constituency.

15. My opinion does not rest on the extreme assumption that in no place, at no time, under any circumstances, have gays and lesbians won any outcome. Rather, my view is that we must weigh the relative impact of positive and negative outcomes against the numerosity of moments of contestation and the insecure nature of legislative gains. We must consider the frequency with which legislative gains have been repealed, turned back by the voters, or foregone altogether. In light of the political disadvantages faced by a small, targeted, and disliked group, I conclude that gays and lesbians are powerless to *secure* basic rights within the normal political processes.

16. Traditional markers of political powerlessness include systematic disadvantages in the political process; the existence of significant prejudice, stigmatization, or a de facto or de

jure second-class status; or an inability, alone or in concert with reliable coalition partners, to secure basic rights or equal treatment from and within the political process. Here, they are organized into two groups: manifestations of power and powerlessness, on which gays and lesbians score poorly, and factors that contribute to political disadvantage, on which gays and lesbians—to their detriment—score high.

III. Political Powerlessness of Gays and Lesbians

A. Manifestations of Political Powerlessness

17. Although an exhaustive catalog is impossible, the lack of meaningful political power possessed by gays and lesbians is reflected in numerous features of the nation's laws, institutions, and political history that are adverse to policy outcomes favored by and important to gays and lesbians. Some examples are discussed below. The political powerlessness of gays and lesbians is evidenced by their inability to bring an end to pervasive prejudice and discrimination, and to secure desired policy outcomes and prevent undesirable outcomes on fundamental matters that closely and directly impact their lives. Furthermore, the demonstrated vulnerability of occasional and geographically confined policy gains to reversal or repeal is indicative of a role played by "affinity" or sympathy, rather than the exercise of meaningful political power by gays and lesbians.

Absence of Statutory Protection/Presence of de jure Statutory Inequality

18. To date, there is no national-level legislation prohibiting discrimination in employment, education, access to public accommodations, or housing. The Employment Non-Discrimination Act, which would extend employment protections on the basis of sexual orientation (and in some versions, gender identity) has been introduced regularly since 1994 (and

earlier versions as far back as the 1970s) and has never passed both houses of Congress. It has failed to win passage in both Republican and Democratic controlled Congresses.

19. Moreover, Congress adopted the “Defense of Marriage Act” that, among other things, prevented even legally married same-sex couples from filing joint tax returns, inheriting social security benefits, and obtaining all of the other rights afforded to married individuals by federal law. This preclusion of rights acquisition was signed into law by a Democratic president.

20. Other federal legislation contrary to the policy preferences of the lesbian and gay community includes the statutory enactment of “Don’t Ask, Don’t Tell,” under which lesbians and gay men must conceal their sexual orientation in order to serve in the military, and are investigated if suspected to be gay and discharged if they admit or are found to be gay.

21. Despite a documented record of violence against gays and lesbians in contemporary society, attempts to extend existing federal hate crimes to include violent crimes based on the perceived sexual orientation of the victim only reached fruition this year, after more than a decade of trying. Previously, gays and lesbians enjoyed no such federal protection, apart from the sentencing guidelines factor in the extremely narrow case of victims engaged in “federally protected” actions, established in 1994. Even in this instance of an eventual positive outcome, the legislative process involved is informative in the consideration of whether the group is powerful or powerless. Hate crimes protections were adopted as part of the Defense Appropriations Bill to provide political cover, and even under these circumstances, 75% of Republican members of the Senate felt it necessary to vote against it.

Repeal or Pre-Emption of Legislative or Judicial Protections Through Ballot Initiatives

22. Evidence from the past two decades in particular has demonstrated that gays and lesbians are especially vulnerable in the context of direct democracy. That is, positive legislative

outcomes achieved at the state and local level are often insecure. Rather, initiatives and referenda have frequently and effectively been used to reverse or pre-empt the legislative grant at the state or local level of policies benefitting or protecting gays and lesbians. These ballot initiatives can be broken into three groups: (1) Overturning anti-discrimination policies, (2) Anti-marriage initiatives, and (3) Adoption.

23. *Overturning anti-discrimination policies*—The first wave of ballot actions on gay and lesbian rights began in the early seventies but only reached its peak in the 1990s. The most common form was citizen initiatives to overturn municipal, county, or state extensions of anti-discrimination policies to sexual orientation. They were generally successful. Legislative enactments were overturned in cities and counties across the country, including Santa Clara County and the City of San Jose, CA, Tacoma, WA, Lewiston, ME, Lansing, MI, St. Paul, MN, Wichita, KS, and perhaps most famously, Miami-Dade County, FL. A very small number of pro-gay votes also occurred and, not surprisingly, did not fare as well, including the defeat of a voter attempt to compel the Davis, CA, City Council to enact a gay rights ordinance. Haider-Markel and colleagues (2007) identify 143 votes from the 1970s until 2005, and found that gay and lesbian rights were defeated or overturned in more than 70% of the cases—with the opponents of those rights prevailing at about the same rate for local and state elections. The frequency of electoral and policy conflict over non-discrimination statutes declined once the focus of the struggle increasingly centered on preventing legal recognition of same-sex couples. It is worth noting that many anti-gay measures amended city charters or state constitutions to raise the burden on gays and lesbians and their supporters for accomplishing policy change. The general form was to prohibit legislative action preemptively, and require that any change be through popular vote (with all of the disadvantages this implies).

24. *Anti-marriage initiatives*—To date, gay and lesbian marriage rights have been voted on at the state level 34 times, most recently in Maine in November 2009. In only one instance did the pro-gay position win, when Arizona’s proposition 107 failed in 2006, only to be passed in slightly modified form in 2008. (A second proposition failed in Colorado, but that state had two provisions on the same ballot, with the more expansive of the two failing, while the more restrictive passed.) In Washington State in 2009, the pro-gay position also prevailed, but the vote was on domestic partner rights specifically defined to exclude the legal concept of marriage. The Maine example specifically illustrates a case where a favorable legislative outcome remains insecure and, in this instance, was short-lived.

25. *Adoption*—A recent development is the passage of Arkansas’ Act One, prohibiting adoption by unmarried cohabitating couples, an act conceived with regard to—and targeted at—same-sex couples. It is possible, I think likely, that these initiatives will appear elsewhere on the ballot. In the 2008 American National Election Study, 47.6% of respondents nationwide felt that gays and lesbians should be prohibited from adopting. Since that percentage varies widely across states, I and others expect anti-adoption initiatives to start appearing in states where the level of opposition exceeds 50%.

26. Beyond the obstacles gays and lesbians face in the traditional legislative process, ballot initiatives further disadvantage them politically and have undone many of the legislative benefits they have received. These initiatives also make it less likely that legislatures will enact pro-gay policies in the first place (Lax and Phillips 2009), because elected officials will fear having actions overturned by angry constituents. Moreover, gay and lesbian activists’ fear that the post-initiative policy reality will be worse than the status quo forces them to consider whether not seeking legislative policy change is in the best interests of the group.

27. Ballot initiative campaigns are frequently polarizing, are built on enormous sums of money, and are waged primarily in the non-deliberative media of mass advertising. Small minorities are even less able to protect their interests in these kinds of contests than they are in the legislative process, which—as a result of legislative districts, institutional rules, coalitional politics, and other factors—tends to give smaller minorities greater opportunity to prevent undesirable outcomes.

28. Although the use of the initiative process against gay and lesbian policy goals is a comparatively recent phenomenon, in the past, ballot initiatives were used to undo legislative gains by immigrants, non-English speakers, African Americans, and minorities generally, including overturning fair housing statutes, affirmative action programs, bilingual education, and establishing English as an official language. Historians of the turn-of-the-century progressive movement, when these processes were established and written into the laws of the western states, note the association of progressive reforms with anti-immigrant sentiment (among other factors). Indeed, the progressive movement created the initiative process in order to allow the majority to overturn decisions made by legislatures, which allow a greater role for bargaining and coalitional politics.

29. The initiative process has now been used specifically against gays and lesbians more than against any other social group.

30. While there has been an increase in state and local jurisdictions with statutory protections of gays and lesbians from discrimination over the last two decades, these legislative successes have been resisted strongly at the ballot box, and have been accompanied by the amending of state constitutions in over 2/3 of the states to establish formal political and social

inequality for gays and lesbians. A similar proposal to amend the federal constitution has also been considered.

Underrepresentation in Political Office

31. Gay elected officials have risen to various offices around the country. Those representatives may strive to advocate for gay and lesbian rights, but their numbers and legislative impact of those successes continue to demonstrate significant under-representation and reliance on friendly representatives, over whom they hold no direct power. For example, 79 state legislators nationwide are openly gay, but the total number of state legislators nationwide is 7382, so those 79 legislators represent only 1% of the total. Under even the most conservative estimates of gay and lesbian population share, this number indicates that gays and lesbians are substantially under-represented. All of these state legislators were elected in the last two decades.

32. There have been only six openly gay members of Congress in history, and only three—considerably less than one percent of all members—serve today (.7% of the House, .56% of the entire Congress). Four of those six were initially elected to the House with their sexual orientation not public. Only two members were first elected to the House without the benefits of incumbency and with widespread public familiarity with their sexual orientation, Jared Polis (D-CO) and Tammy Baldwin (D-WI). Both represent districts that are home to the flagship campus of their state universities—districts that are typically more tolerant than others in the state. Gay and lesbian politicians are largely confined to a single political party. Homosexual Republicans face an extremely difficult time, and the few GOP gay elected officials who have emerged seldom last, either through primary challenges or retirement in the face of pressure. There has

never been an openly gay US Senator, Cabinet level appointee, or Justice of the United States Supreme Court.

33. The percentages at the local level are lower still. The Gay and Lesbian Leadership Institute identifies 288 local elected gay or lesbian political officials serving on city councils, county commissions, school boards, and other local offices (http://www.glli.org/out_officials), which is an insignificant fraction of the total. Over a decade ago, the Census Bureau reported that the number of elected officials nationwide was slightly over 511,000. Subtracting members of Congress and state legislatures, about whom I just reported, that leaves somewhat over 500,000 city, county, school, and local board officials, and only 288 (or .05%) are identified as openly gay. These are concentrated in coastal states at both ends of the country, and in Illinois. Some states have no openly-gay elected officials at all, and many more have just a very small handful.

B. Factors Contributing to Political Powerlessness

34. Numerous factors, often working in combination or in mutually reinforcing ways, contribute to the political powerlessness of gays and lesbians. Furthermore, many of these factors—including public and political hostility, prejudice, censorship, and religious and moral condemnation—impose a political disability on gays and lesbians not suffered by groups of comparable size and geographic dispersion. I begin in this section with demographic considerations and then discuss other, relational factors pointing to a degree of powerlessness that today is unique to gays and lesbians.

Small Population Size and Geographic Dispersion

35. The simplest way to secure political representation and exercise some degree of influence over the political process is through numerical strength. The population strength of

gays and lesbians is not close to being sufficient to obtain electoral control of a single jurisdiction, let alone change the composition of the legislature or Congress. There are no congressional districts with a majority population of gay and lesbian Americans. There are no municipalities of any size with a majority gay and lesbian population. Even in broadly identified gay-friendly communities, often places where chain migration has significantly increased the gay population above the national average, gays and lesbians fail to reach majority status. A fair estimation of population suggests that gays have sufficient numbers to determine (or substantially influence) the outcome of only a few city council or county board seats, or state legislative districts, nation-wide. At any level of aggregation above the precinct or neighborhood, there is no place with a gay majority.

Effect of HIV/AIDS Epidemic

36. The AIDS epidemic has set back the gay community's potential for political action, in ways that are both obvious and not obvious. Through 2005, the Centers for Disease Control report that just over 300,000 MSMs (CDC term for men who have sex with men) had died of HIV/AIDS. Another 217,000 were living with AIDS. The loss of 300,000 voters, organizers, and potential leaders is a profound setback to a community whose population starts as a fairly small share of the society. Harder to calculate are the monetary costs. Gay men raise substantial amounts of money for HIV related research and social services, diverting resources that could be used to fight discrimination. Further, gay net wealth is negatively impacted by the loss of income on the part of those who have died, and the partial loss of income and expenditures on healthcare from those still living with the disease. Some political observers suggest that a decade or more of gay activism was lost to the cause of gay equality as gay men and lesbians turned their attention to the more immediate threat of the epidemic. While gay men

and lesbians do not have the resources—reliable allies, elected officials, votes, dollars, and organizational capacity—to be politically powerful, they have been further disadvantaged by the fact that HIV destroyed such a large segment of the community and consumed such a large portion of its resources. In addition to the direct resource and political costs, AIDS offered heterosexuals a new reason to stigmatize homosexuals and homosexual relations, and to resist political change that respected gay equality.

Violence

37. A crime can be classified as a hate crime when the victim is targeted because of his or her identity, generally race, ethnicity, religious identity, gender, sexual orientation or disability status. Hate crimes are unique in that the effects of the crime are understood—indeed intended—to reach beyond the person of the actual victim. The crime is best understood as an expression of animus toward an entire group and, moreover, is an attempt to intimidate that group or otherwise constrain their future behavior. For example, racially motivated hate crimes against individual target-group-members can simultaneously express racial prejudice toward an entire group as well as intimidate other group members from patronizing businesses, moving to neighborhoods, enrolling in schools, or otherwise exercising their personal liberties.

38. Though federal hate crimes protections for gays and lesbians came into existence just in the last month, the FBI has collected data on hate crimes committed on the basis of perceived sexual orientation, at least from jurisdictions that have chosen to report them, and the numbers are substantial. In the last year for which statistics have been published, 2007, the total number of incidents was 7624, and 1265 (16.6%) of those were on the basis of sexual orientation. Incidents range from simple assault to murder. In terms of single groups, only African Americans endured more incidents, and since they are as much as twice the population

share as gays and lesbians, the likelihood that any given gay or lesbian citizen experiences an attack (that is, the per capita number of attacks) is considerably higher.

39. The Southern Poverty Law Center (“SPLC”) reports that gays and lesbians are the Americans most likely to be targeted in a hate crime. The SPLC also suggests that steps forward in the cause of gay and lesbian equality seem to be associated with a subsequent surge in anti-gay violence, pointing to data immediately in the wake of the *Lawrence* decision. The intimidation effect of hate crimes serves to undermine the mobilization of gays and lesbians and their allies and to limit their free exercise of simple economic and social liberties.

40. Things do not appear to be getting better. Recent years show no discernible decline in bias crimes against gays and lesbians. FBI statistics reporting the number of hate crimes against specific groups shows that anti-gay acts were as frequent in 2007 as they were in 2003.

Invisibility

41. A unique aspect of gay and lesbian identity that distinguishes them from other minority groups—to their political disadvantage—is their relative invisibility. The scholarship on passing and self-identification suggests that members of repressed or targeted groups who have the ability to pass unobserved in the majority population may choose to do so if the costs of self-identification, in the form of family disapproval, physical threat, discrimination and its consequences, can be avoided. While this strategy avoids some risks of identification, passing itself has a personal and a political cost.

42. The unwillingness to identify has several important implications for the question of whether gays and lesbians can meaningfully or effectively act on their own behalf politically.

While not a panacea, social contact with gays and lesbians is generally associated with more sympathetic policy preferences. Invisibility undermines community support.

43. With regard to the size of the gay population, the number of gays and lesbians perceived by the general public, including those holding views hostile to gay and lesbian equality, is artificially low.

44. Mobilization levels among gays and lesbians will be lower than other groups but erroneously perceived to be higher. Mobilization can reasonably be understood to be an act of self-identification, so those choosing to pass have foreclosed visible political action.

45. Since not all gays and lesbians come out, the percentage of the gay and lesbian population that is mobilized seems higher than it really is. Likewise, since those gay and lesbian citizens who choose to self identify are those whose economic and social position in society is more secure—making the act of coming out less risk inducing—the resulting self-selection bias results in a misperception of gays and lesbians as better educated, of higher income, and otherwise “privileged.”

46. Statistically, gays and lesbians do not have higher levels of income and, when all gays and lesbians are considered rather than only the self-identified, are no better educated. My analysis of the 2004 National Exit Polls demonstrates no difference between heterosexual voters and gay and lesbian voters on income and education.

47. Efforts on the part of gays and lesbians—incorrectly perceived as less numerous and more privileged than they actually are—to gain statutory protection is characterized as both unjustified and transgressive. This misperception works both to mobilize opponents and to encourage complacency by potential allies.

48. Potential heterosexual allies may fear being misidentified as gay or lesbian, reducing the chance that they will mobilize on behalf of gays and lesbians. The FBI estimates that 2% of hate-crimes committed on the basis of sexual orientation victimize misidentified heterosexuals.

49. Invisibility exacerbates the problem of geographic and social dispersion, making it more difficult for gays and lesbians to find each other and mobilize politically.

Censorship

50. In a variety of ways, gays and lesbians are pressured to remain invisible, and in several contexts discussion of gay people and their relationships is prohibited or regulated. Examples include the military's "Don't Ask Don't Tell" policy; legislation that prevented the National Endowment of the Arts from funding any art depicting homoeroticism; rules that have prohibited federally funded AIDS education materials from promoting homosexuality and requiring them to advocate for abstinence from extramarital sex, including homosexual sex; and efforts in several states to forbid the mention of homosexuality in school health classes, or mandate the association of the term with descriptors suggesting that it is not acceptable. Even in the face of the HIV epidemic, Arizona, for example, prohibits any mention that homosexual acts could be made "safe."

Public Hostility and Prejudice

51. Gay men and lesbians face severe hostility from non-gay citizens in many parts of the country, and opinion data suggests that they are held in considerably lower regard than many groups currently receiving the protection of heightened scrutiny.

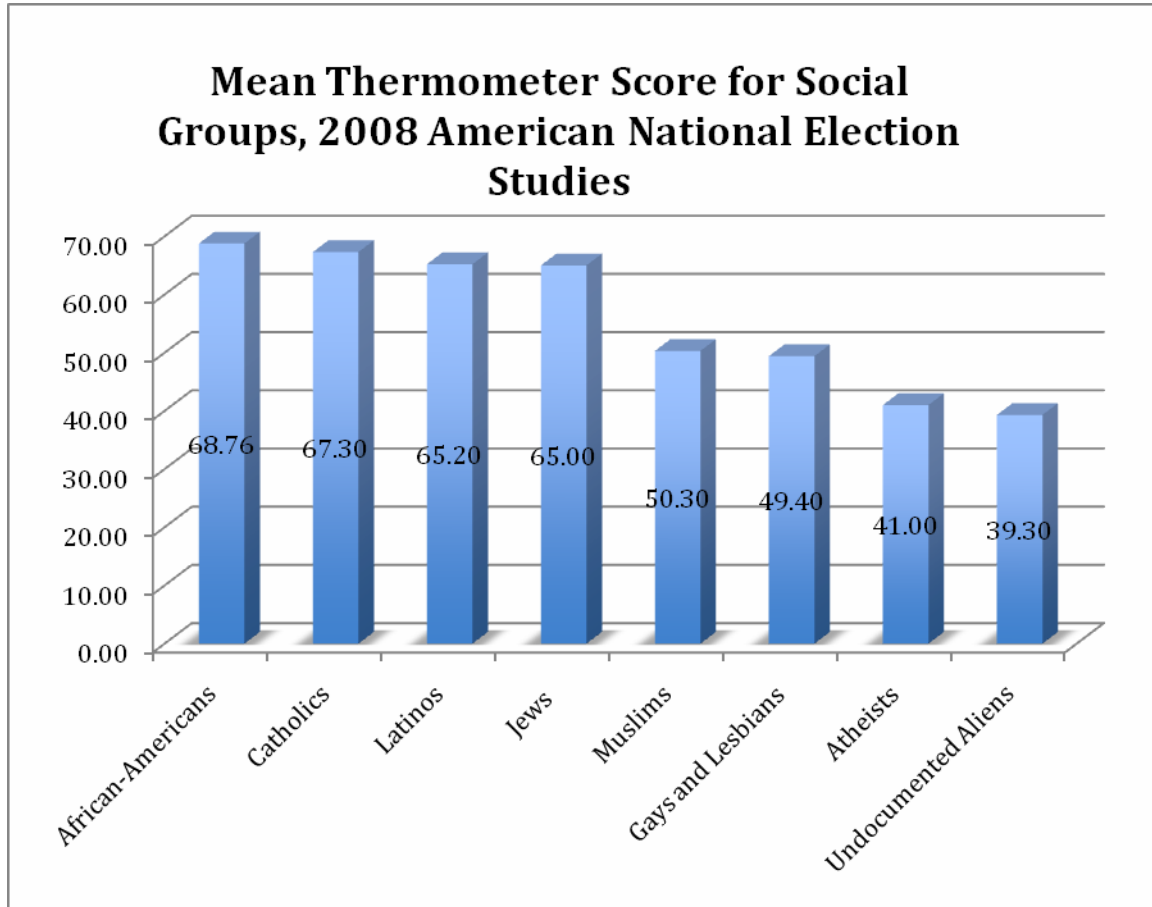
52. In each national election year, the American National Election Study (available at electionstudies.org or the ICPSR website) asks a representative sample of American citizens to

gauge their “warmness” toward a particular group. Political scientists call the instrument a “feeling thermometer” and the scale of each ranges from 0 to 100, with 100 indicating strong warmness/fondness/positive views.

53. For Hispanics, approximately 40% of respondents rated their warmness at 50 (midpoint) or less, and the average temperature was 65.2 (std.dev.21.0). For African Americans, only 33% of respondents were at or below 50, and the mean temperature was 68.76 (std.dev. 20.2). For Catholics, 37% were at or below the mid-point and the mean was 67.3 (std.dev 19.9), and for Jews, 43.9% of respondents were at or below the mid-point and the mean warmth was 65.0 (std.dev.19.3). What is revealing about these summary numbers is their similarity. They do vary, of course, but the percentage below the mid-point all group between 33 and 43.9%, the means all group between 65 and 69 degrees and the standard deviations are between 19 and 20. Standard deviation is a statistical score that calculates how spread apart the responses are around the mean.

54. By contrast, gays and lesbians fare far worse. Fully 65.4% of respondents rated gays at or below the mid-point of 50 and the mean response was 49.4 (std.dev 27.7). Almost two thirds of the respondents rate gays and lesbians at or below the mid-point, which is almost twice that for African Americans and substantially higher than for the other groups. The mean sentiment towards gays and lesbians is 16 points lower than for Jews and Hispanics and 19 points lower than African Americans. The standard deviation is also instructive, since its size (almost half again larger than for the other groups) illustrates the level of polarization in sentiment about homosexuals.

55. This chart is illustrative:



56. By any estimation, the public is less fond of gay and lesbian Americans than racial and ethnic minorities and religious groups. In fact, the other groups with comparable levels of coolness include Muslims after 9/11 (mean=50.3), atheists (mean=41), and illegal aliens (mean=39.3). It is revealing that 13.4% of respondents gave gays and lesbians a score of zero, a percentage exceeded only by scores for illegal immigrants (15.4%) and atheists (18.6%).

Political and Social Hostility

57. Gays and lesbians face outspoken denunciation by elected officials in a manner that would be unthinkable if directed toward most other social groups. Hostility by public officials is often directly mirrored in the population. Furthermore, its public nature, even when articulated by only a small segment of office-holders and officials, serves as a signal to the

broader population that these discriminatory attitudes are “acceptable” or reasonable within the bounds of mainstream political discourse.

58. Gays and lesbians have been described by a sitting US Senator as “the greatest threat to our freedom that we face today.” Another sitting senator, during his successful campaign, openly called for gays and lesbians to be banned from the classroom, while a third has compared same-sex marriage to marrying “a box turtle.” He was subsequently reelected with a large margin. The social and political disadvantage that flows from these very public and derisive comments is palpable.

59. While there may be pockets of tolerance here or there at the state and local levels, nationwide, political condemnations of gays and lesbians are not electorally costly, and may even be used to gain electoral support. It would be difficult to identify many cases where an elected official was so damaged by holding anti-gay positions that he or she lost public office on this basis, but there are countless cases across the country where candidates felt advantaged by taking a particularly harsh viewpoint. In part, this is a consequence of the partisan and geographic distribution of views and the nature of our legislative representation regime, but in part this is also a reflection of the fact that pro-gay policies are a very low priority even among “allies” in the population who hold generally positive views. Public contempt extends beyond elected officials to prominent national religious leaders, who command the attention of political leaders as well as significant numbers of the electorate.

Unreliable Allies

60. The structure of the American party system is such that the path to pro-homosexual policy change lies exclusively through the good offices of one party. The increasing power of evangelical Christians in the GOP has shifted this party’s social policy further to the

right and all but eliminated its once sizable tradition of libertarianism. The Republican Party in office (and platform) is openly hostile to gay and lesbian rights. The complete disinterest of one party severely disadvantages gays and lesbians, since they can be understood as “captured” by the other party, that is, unlikely to bolt or abstain in large numbers. Under these circumstances, the capturing party can take the political support of the group for granted. Although the Democratic Party is more supportive in its rhetoric, Democrats have repeatedly shrunk from any extension of rights to gays and lesbians at the federal level. Democrats controlled the White House from 1993 to 2001, and the Congress until 1994 and since 2006. Nevertheless, non-discrimination statutes, equality in military service, and federal recognition of state-sanctioned same-sex marriages remain undelivered. In fact, Don’t Ask/Don’t Tell was passed in a Democratically controlled Congress, and both it and the federal Defense of Marriage Act were signed into law by a Democratic president.

Moral and Political Condemnation

61. While the pluralist framework envisions shifting majorities and rotation in office, perceived Old Testament prohibitions of homosexuality serve to create, in many of America’s religious communities, a permanent majority that believes homosexual conduct is sinful and immoral and that it should be condemned and discouraged. The General Social Survey (downloadable from the National Opinion Research Center) regularly asks a representative sample of Americans to evaluate whether homosexual relations are “wrong.” In 2008, those data show that 51.5% of Americans still report that sex between two persons of the same sex is “always wrong” while another 10.3% agree that it is “sometimes” or “almost always” wrong. Moreover, the shift in the direction of tolerance is neither large nor rapid. A

decade ago, a module from the same survey shows the comparable numbers as 56% and 11.8% respectively.

Powerful, Numerous, and Well-Funded Opposition

62. The moral condemnation of homosexual acts fuels and supports political opposition to protections and benefits for gays and lesbians. Campbell and Robinson (2007) found that opposition to same-sex marriages united leadership and core believers across religious traditions. Similarly, the San Francisco Chronicle reported that campaign in favor of Proposition 8 was conceived and funded by a cooperative effort of the Roman Catholic Archbishop of San Francisco and the senior leadership of the Mormon Church. Churches provide a well-funded, widely spread, untaxed medium in which individuals opposed to gay and lesbian policy goals can disseminate political messages and campaign materials, as well as engage in fundraising. Moreover, national religious movements like Focus on the Family, the Traditional Values Coalition, the Family Research Council, and other groups provide a national network for pressuring elected officials, fundraising, message testing, media dissemination and publication, mobilization and coordination across states and jurisdictions. This nationwide co-ordination, for example, explains how 14 statewide initiatives appeared in a single year, 2004. Cahill (2007) documents the vast economic resources of these organizations and their willingness to provide them to political efforts to prevent or reverse rights, benefits, or protections for gays and lesbians. Gays and lesbians lack the political resources—including voting numbers, cash, elected officials from the group, reliable allies, reach, or a favorable political opportunity structure—to counter this kind of committed, organized opposition to their interests.

IV. Comparative Political Powerlessness

63. Gays and lesbians suffer an extreme degree of political vulnerability and powerlessness compared to most other groups in society. Even groups that have obtained the protection of heightened scrutiny from the Supreme Court possessed greater political power at the time those decisions were handed down than gays and lesbians do today.

Gender

64. When the U.S. Supreme Court held that women were a quasi-suspect class in 1970s, they were in a far superior political position compared to that held by lesbians and gays today. Women are and were a majority of the population and, if they so choose, could theoretically determine most political outcomes. While women do not have the same level of political cohesion as many other groups, so that in many cases their majority status has not proved decisive, the magnitude of their numbers is a source of potential power that politicians cannot ignore. And in fact, women had achieved important victories in the political process, including the 1963 Equal Pay Act, coverage in the 1964 Civil Rights Act and its subsequent amendments, and specific statutory and constitutional protection in several states.

65. Women have a number of other characteristics that enhanced their ability to organize and act politically when compared with gays and lesbians. While sexism certainly existed (and still exists), and political activism could be costly, identity as a woman was not socially controversial, did not attract familial scorn, and did not bar one from such a large range of social institutions, though some institutions were exclusively male. Women could freely identify one another, gather, coordinate, and act largely free of fear of repressive tactics. Both political parties sought the support of women.

Race

66. Immediately in the wake of the Civil War, three amendments to the federal constitution established de jure legal equality for African-Americans and officially barred states from violating equal protection. Though this guarantee of equality had seldom been meaningfully endorsed, it was nonetheless a de jure status superior to that now held by lesbians and gays. As early as 1941, President Roosevelt issued Executive Order 8803 prohibiting race discrimination in contracting and employment in companies doing business with the US. Through court action and the social movement of the 1950s and 1960s, African Americans (and later Latinos) achieved a rollback of Jim Crow segregation laws and established a statutory regime of equality in employment, education and housing. Again, this was more promise than practice, but it was a statutory circumstance superior to that of lesbians and gays today.

67. In the 1940s and 1950s, African Americans and other racial and ethnic minorities had similar disadvantages to gays in terms of resources and social sanction, but with far greater numbers (and in some instances majorities), they have been able to claim a meaningful share of political representation and policy responsiveness. Even before the passage of the Civil Rights Act of 1964 and Voting Rights Act of 1965, there were 5 black members of Congress and over 100 elected officials nationwide. Today, 69 people of color serve in the House of Representatives, and two in the United States Senate (four at the start of this Congress). African Americans, Latinos, and Asian Americans have been elected governors and big city mayors. They form outright majorities in dozens of jurisdictions and approximately 65 House districts. Rather than serve as an impediment, most (though admittedly not all) religious institutions express support for the principle of racial equality and the church in minority communities,

rather than serving as an impediment to political progress, is a locus for identification and mobilization.

Signed under the pains and penalties of perjury under the laws of the United States this 13th day of November 2009.

/s/ Gary M. Segura

Gary M. Segura, Ph. D

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 17, 2009.

/s/ Gary D. Buseck
Gary D. Buseck