

Case Nos. 10-2204, 10-2207 and 10-2214

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

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *et al.*,

Defendants-Appellants.

DEAN HARA,

Plaintiff-Appellee/Cross-Appellant,

NANCY GILL, *et al.*,

Plaintiffs-Appellees,

KEITH TONEY; ALBERT TONEY, III,

Plaintiffs,

v.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,

Defendants-Appellants/Cross-Appellees,

HILARY RODHAM CLINTON,

in her official capacity as United States Secretary of State,

Defendant.

Appeals from the United States District Court for the District of Massachusetts
Civil Action Nos. 1:09-cv-11156-JLT, 1:09-cv-10309-JLT
(Honorable Joseph L. Tauro)

**BRIEF OF *AMICUS CURIAE*, CONCERNED WOMEN FOR AMERICA,
IN SUPPORT OF DEFENDANTS-APPELLANTS
AND IN SUPPORT OF REVERSAL**

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FRAP RULE 26.1 DISCLOSURE STATEMENT

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.

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INTEREST OF *AMICUS CURIAE*

Concerned Women for America (“CWA”) is the largest public policy women’s organization in the United States, with 500,000 members from all 50 states. 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 Americans 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. Through our elected representatives, the people have enacted the Defense of Marriage Act (DOMA). CWA believes that the decisions of the court below override the democratic process and pose a significant threat to our First Amendment rights.

This Brief is filed pursuant to consent of all parties. No party’s counsel authored the brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This Brief examines the substantial political power and considerable political resources of the community often described as lesbian, gay, bisexual, and transgender (LGBT). Current LGBT political power is demonstrated in local, regional, and national legislative success as well as through powerful elected officials who vigorously support LGBT causes. One need look no further than the Government's opening brief in this case to see that LGBT political power extends even to the White House, as the president has repeatedly stated that he wants to repeal DOMA. LGBT political power is not likely to diminish; the LGBT community has amassed impressive political assets, including powerful allies, access to lawmakers, financial resources, and deep ties to influential mainstream media.

As a result, the Plaintiffs-Appellees' claims can be fairly addressed in the political forum. There is no reason to judicially remove debate over the definition of marriage from public discourse in favor of a viewpoint that has full access to democratic channels and has enjoyed tremendous political success.

ARGUMENT

The district court did not address whether DOMA should be subject to strict scrutiny because it found that the law failed rational basis review. *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010).

Although the district court sorely erred in finding that DOMA could not meet the highly deferential rational basis review, it was correct that rational basis review applies. This Court should also apply rational basis review because gays and lesbians are *not* the type of minority strict scrutiny was designed to protect. In *City of Cleburne, v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985), the Supreme Court made it clear that only groups lacking the ability to “attract the attention of the lawmakers” are entitled to heightened scrutiny. Gays and lesbians plainly have the ability to attract the attention of lawmakers, and thus are *not* politically powerless. Accordingly, they do not merit the extraordinary exemption from the democratic process that the Plaintiffs-Appellees demand.

I. PRO-GAY LEGISLATIVE SUCCESSES IN NEW ENGLAND AND ACROSS THE COUNTRY ILLUSTRATE THE BROAD SCOPE OF GAY AND LESBIAN POLITICAL POWER.

A. Gay and Lesbian political power in New England has reached unprecedented heights in just the last twenty years.

Over the past twenty years, New England states have seen a dramatic increase in the privileges afforded to gays and lesbians—privileges that have been gained and maintained through increased political power with voters and elected officials. For example, “[o]n May 17, 2004, Massachusetts became the first state to grant marriage licenses to same-sex couples... giv[ing] couples all the state benefits of marriage.” *Massachusetts Marriage/Relationship Recognition Law*, Human Rights Campaign (“HRC”), http://www.hrc.org/your_community/926.htm

(last visited Jan. 12, 2011) [hereinafter *MA Marriage*, HRC]. Though same-sex marriage in Massachusetts was originally established by *Goodridge v. Dep't of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Legislature soundly defeated a proposed amendment to the Massachusetts state constitution, which would have restored the traditional definition of marriage within the state, “by a vote of 151-45.” *MA Marriage*, HRC. The Massachusetts Legislature has provided additional protections to LGBT individuals: explicit protection for sexual orientation in the state’s hate crime legislation, Mass. Gen. Laws Ann. ch. 265 § 39 (West 2010), and prohibitions against “discrimination based on sexual orientation in public accommodations, housing, public and private employment, . . . credit and union practices.” *Massachusetts Non-Discrimination Law*, HRC, http://www.hrc.org/your_community/929.htm (last visited Jan. 12, 2011); *see also* Mass. Gen. Laws Ann. ch. 151B § 4 (West 2010).

Gay and lesbian causes have also achieved demonstrable political power in other states. Maine’s legislature has passed many LGBT-friendly bills, including a domestic partner registry bill, which took effect July 30, 2004, H.P. 1152, 121st Leg., 2d Spec. Sess. (Me. 2004), 2004 Me. Legis. Serv. Ch. 672; an amendment to the state’s Family Medical Leave Act to include LGBT workers, S.P. 119, 123rd Leg., 1st Reg. Sess. (Me. 2007), 2007 Me. Legis. Serv. Ch. 261; and An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation

(Non-Discrimination Law), which prohibited discrimination in employment, Me. Rev. Stat. Ann. tit. 5, § 4571 (2010), housing, *id.* § 4581, public accommodation, *id.* § 4591, credit, *id.* § 4595, and educational opportunities, *id.* § 4601, on the basis of sexual orientation. The Non-Discrimination Law also expanded the definition of sexual orientation in Maine to include gender identity or expression. S.P. 413, 122nd Leg., 1st Reg. Sess. (Me. 2005), 2005 Me. Legis. Serv. 10; *see also* Me. Rev. Stat. Ann. tit. 5, § 4552 (2010).

Passage of Maine’s Non-Discrimination Law vividly illustrates the recent growth of LGBT political power. Maine’s legislature approved similar laws in prior sessions, S.P. 840, 119th Leg., 2d Reg. Sess. (Me. 2005), 2000 Me. Legis. Serv. Ch. 629, S.P. 338, 118th Leg., 1st Spec. Sess., 1997 Me. Legis. Serv. Ch. 205, but each time Maine’s voters repealed them through referendum. But when the Maine legislature passed the law in 2005, “Maine voters upheld the non-discrimination law by a margin of more than 10 percent.” *Non-Discrimination*, Equality Maine, <http://equalitymaine.org/non-discrimination> (last visited Jan. 20, 2011). Maine’s legislators aggressively continued the political momentum of their LGBT-constituents when “[o]n May 6, 2009 Maine became the first state [...] to pass a [same-sex] marriage bill through its Legislature and have it signed by its Governor.” *Marriage in Maine*, Equality Maine, <http://equalitymaine.org/marriage-maine> (last visited Jan. 20, 2011). Although that

bill ultimately did not survive the people's veto referendum, and therefore did not take effect, its passage demonstrates the ability of the LGBT community to attract support for LGBT causes with lawmakers even when popular support is lacking.

New Hampshire's recent legislative history also shows the progressively increasing political power of gays and lesbians, with the 2002 enactment of prohibitions against discrimination on the basis of sexual orientation, N.H. Rev. Stat. Ann. § 21-I:42(XVI) (2010), *id.* § 354-A:2(XIV-c), *id.* § 354-A:6, 2003 adoption of hate crimes legislation, *id.* § 651:6, 2003 N.H. Laws 33, creation of same-sex civil unions in 2007, N.H. Rev. Stat. Ann. § 457-A:1-8 (2010), 2007 N.H. Laws 58, followed quickly by the replacement of civil unions with same-sex marriage. N.H. Rev. Stat. Ann. § 457:1-a (2010).

While Rhode Island has not created a statewide registry for same-sex couples, its Legislature has also extended significant rights and benefits to its LGBT constituents.¹ These legislative benefits, along with claiming four of the

¹ *Rhode Island Marriage/Relationship Recognition Law*, HRC, http://www.hrc.org/your_community/1750.htm (last visited Jan. 12, 2011) (describing LGBT political progress in Rhode Island). *See, e.g.*, 2001 R.I. Pub. Laws 110 (extends health insurance benefits to domestic partners of state employees); 2001 R.I. Pub. Laws 340 (amends Rhode Island Fair Housing Practices Act to include gender identity or expression in addition to sexual orientation); 2003 R.I. Pub. Laws 131 (adds sexual orientation and gender identity or expression to basis for harassment complaints at institutions of higher education and in workplace), 2003 R.I. Pub. Laws 173 (same); 2004 R.I. Pub. Laws 6 (adds sexual orientation, gender identity and expression to non-discrimination for state employment policies, all educational programs and activities of state agencies,

five states that recognize same-sex marriage,² make the New England region one of the most politically successful for LGBT interests in the nation.

B. The National Political Power of Gays and Lesbians.

Political support for homosexuals and lesbians extends well beyond the passage of laws in New England. As of June 1, 2009, thirty-one states and the District of Columbia had state laws regarding “hate crimes” based on sexual

state licensing and regulatory agencies); 2004 R.I. Pub. Laws 595 (Governor's veto overridden July 30, 2004) (appropriations bill adds marital status, age, sexual orientation, gender identity or expression to non-discrimination statement for admission to veterans' home); 2006 R.I. Pub. Laws 189 (amends Rhode Island Parental and Family Medical Leave Act with respect to state employees to include domestic partners as family members, and amends insurance benefits for state employees to treat domestic partners as dependents with regard to COBRA and allows amounts deemed taxable from the benefit to be deducted from federal adjusted gross income for the purposes of calculating state income tax), 2006 R.I. Pub. Laws 316 (same); 2006 R.I. Pub. Laws 157 (provides no interest loans to qualified employees who received health care benefits for domestic partners who did not otherwise qualify as dependents and therefore had incurred additional income tax owed for taxable benefit received of which they had not been previously advised), 2006 R.I. Pub. Laws 631(same); 2006 R.I. Pub. Laws 644 (provides one time death benefit for spouses or domestic partners of deceased fire fighters or police officers), 2006 R.I. Pub. Laws 645(same); 2007 R.I. Pub. Laws 476 (entitles domestic partner of decedent to make an anatomical gift); 2007 R.I. Pub. Laws 510 (Governor's veto overridden October 30, 2007) (provides allowances to surviving spouses, domestic partners or minor children of deceased justices); 2009 R.I. Pub. Laws 369 (Governor's veto overridden January 5, 2010) (establishes authority of domestic partners to make arrangements for funerals and receive disposition of deceased bodies of former partners), 2009 R.I. Pub. Laws 385 (same); R.I. Gen. Laws Ann. § 12-19-38 (2010) (addresses violence based on sexual orientation).

² Currently, five states allow same-sex marriages: Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont.

orientation.³ In addition, recent data indicates that twenty-one states and the District of Columbia and at least 181 cities and counties prohibit employment discrimination on the basis of sexual orientation.⁴ Twenty-two states and the District of Columbia provide domestic partnership benefits for state employees.⁵ Gays and lesbians have also succeeded in enacting laws providing for various forms of relationship recognition, such as civil unions and domestic partnerships in many states and the District of Columbia. *See, e.g.*, Colo. Rev. Stat. Ann §§ 15-22-101 *et seq.* (West 2010) (creating designated beneficiary agreement); D.C. Code §§ 7-201 *et seq.* (West 2010); Haw. Rev. Stat. Ann. §§ 572C-1 *et seq.* (instituting reciprocal beneficiary relationship); Nev. Rev. Stat. Ann. §§ 122A.010 *et seq.* (West 2010) (establishing domestic partnerships, rights and duties of domestic partners, and procedures for registration of domestic partnerships); N.J. Stat. Ann. § 37:1-31 (West 2010) (detailing rights and responsibilities of civil union couples); Or. Rev. Stat. § 106.340 (West 2010) (giving spousal-equivalent rights to domestic partnerships); Wash. Rev. Code Ann. § 26.60.010 *et seq.* (2011)

³ *State Hate Crimes Laws*, HRC, 1 (June 1, 2009)
http://www.hrc.org/documents/hate_crime_laws.pdf.

⁴ *The State of the Workplace* (2009), HRC,
http://www.hrc.org/documents/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf (collecting municipal data as of 2008); *Statewide Employment Laws & Policies*, HRC, 1 (July 26, 2010)
http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf (collecting data on states as of July 26, 2010).

⁵ *Id.*

(creating state registered domestic partnerships with “the intent . . . that for all purposes . . . domestic partners shall be treated the same as married spouses.”) *Id.* § 26.60.015; Wis. Stat. Ann. § 770.001 *et seq.* (West 2010) (establishing a legal status of domestic partnership).

On the national front, the political influence of the gay and lesbian community is also impressive. *See, e.g.*, Howard Fineman, *Marching to the Mainstream*, Newsweek, May 3, 1993 (stating in 1993 that gays are a “powerful and increasingly savvy [political] bloc”); HRC 2009 Annual Report, 2-3 (Oct. 14, 2009), http://www.hrc.org/documents/HRC_AR09.pdf (describing recent legislative achievements). Joe Solmonese, President of the Human Rights Campaign, a 750,000 member “civil rights organization working to achieve lesbian, gay, bisexual and transgender (LGBT) equality”⁶, described the actions of the 110th Congress in the following way:

The lesbian, gay, bisexual and transgender community has made unprecedented progress in Congress over this two-year session. For the first time, the U.S. Senate and U.S. House of Representatives both passed hate crimes legislation that provides protection on the basis of sexual orientation and gender identity (the Matthew Shepard Act). The first-ever House vote on the Employment Non-Discrimination Act (ENDA) was held. Since the “Don’t Ask, Don’t Tell” law (DADT) was passed in 1993, no hearings examining the negative impact of that policy had been held until this year. And the discriminatory Federal Marriage Amendment was dead on arrival. . . . [T]hese accomplishments would not have been possible without the

⁶ *About HRC*, HRC, http://www.hrc.org/about_us/index1.html (last visited Jan. 21, 2011).

support of congressional leadership and allies in both the House and Senate.

Congressional Scorecard: Measuring Support for Equality in the 110th Congress, HRC, 2 (Oct. 15, 2008) http://www.hrc.org/documents/Congress_Scorecard-110th.pdf . HRC’s view of the most recent Congress was similarly complimentary. *Measuring Support for Equality: HRC’s Scorecard for the 111th Congress*, HRC, <http://www.hrc.org/scorecard/> (last visited Jan. 21, 2011) (praising, “fair-minded leadership and a new president who would support...measures to protect the LGBT community” that enabled “the LGBT community...to build majorities for important legislation in this Congress.”).

The recently-passed 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) (2010). But Congressional support for gay and lesbian concerns extends well beyond protection from hate crimes. For instance, over the last two decades, Congress has spent tens of billions of dollars on AIDS treatment, research, and prevention, which is, at least in part, a direct result of successful lobbying by LGBT constituents and allies. 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). And in recent months—despite opposition from the American public and the

military itself—Congress repealed the military’s “Don’t Ask, Don’t Tell” policy (DADT). See Peter Grier, “‘Don’t ask, don’t tell’ repeal: Will there be political fallout?” *Christian Science Monitor*, Dec. 22, 2010 (reporting the president’s signing of the repeal of the Don’t Ask Don’t Tell policy, despite opposition from many military leaders and public interest groups).

Washington support of LGBT causes even extends to the White House, where President Obama and his administration have taken significant actions on behalf of gays and lesbians, including the following:

- supporting the Hate Crimes Bill;
- pushing Congress to repeal 10 U.S.C. § 654 (2010), the law termed “Don’t Ask, Don’t Tell;”⁷
- a presidential directive to end discrimination on the basis of gender identity;⁸
- appointing numerous openly gay and lesbian people to his administration;⁹

⁷ Christine Simmons, *Obama HRC Speech: “I Will End Don’t Ask, Don’t Tell,” Says President Obama*, *Huffington Post*, Oct. 10, 2009, available at http://www.huffingtonpost.com/2009/10/10/obama-says-he-will-end-do_n_316524.html.

⁸ President Obama, *Presidential Memorandum – Hospital Visitation*, (April 15, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation>.

⁹ See, e.g., *Presidential Appointments Project*, Gay & Lesbian Leadership Institute, <http://www.glli.org/programs/presidential> (last visited Jan. 21, 2011) (“The Presidential Appointments Project, led by the Gay & Lesbian Leadership Institute, serves as a talent bank for openly LGBT professionals seeking opportunities to improve our federal government’s policies and processes” and lists names of more

- proclaiming a gay pride month;¹⁰
- issuing a June 2009 a memorandum to all federal executive departments and agencies, ordering that same-sex partners of federal workers receive some federal benefits;¹¹ and
- further expanding domestic partner benefits in June 2010.¹²

These political accomplishments are the work of a powerful and effective political organization, and surely not of a politically powerless group.

In essence, Plaintiffs-Appellees complain that despite their ever-increasing political power and success, the LGBT movement is politically powerless. But that argument is nothing more than a judicial request for a political trump card. If

than 150 openly LGBT Appointees of the Obama-Biden Administration and nominated but not Senate-confirmed appointees).

¹⁰ President Obama, *Lesbian, Gay, Bisexual, and Transgender Pride Month, 2009*, A Proclamation By the President of the United States of America (June 1, 2009), http://www.whitehouse.gov/the_press_office/Presidential-Proclamation-LGBT-Pride-Month/.

¹¹ President Obama, *Memorandum for the Heads of Executive Departments and Agencies on Federal Benefits and Non-Discrimination*, (June 17, 2009), <http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discrimi>.

¹² Ed O’Keefe, *Same-Sex Partners of Federal Workers Can Start Applying for Benefits Next Month*, Wash. Post, June 2, 2010 (reporting on June 1, 2010 announcement that that the “same-sex partners of gay and lesbian federal workers [could begin] applying . . . for long-term health-care insurance”).

granted, every political loss would entitle them to a judicial win, despite their actual status as a political juggernaut.¹³

II. GAYS AND LESBIANS HAVE POWERFUL POLITICAL ALLIES, BOTH LOCALLY AND NATIONALLY.

In addition to having their own political power, gays and lesbians also have powerful political friends both in New England and nationally. The leading gay rights group, HRC, highlights this. “We were named—by the well-respected *National Journal*—the single most effective, non-union progressive organization working in the 2006 midterm elections. We played a decisive role in electing fair-minded majorities to the U.S. House and Senate, and to legislatures from Oregon to New Hampshire.” HRC 2007 Annual Report, 4 (2007),

<http://www.hrc.org/documents/HRCAnnual07.pdf> .

¹³ Admittedly, LGBT supporters have, at times, eroded their own political power through the use of counterproductive tactics. *See, e.g.*, George F. Will, *Thuggish Liberalism at Work in Washington State Vote*, Wash. Post, Oct. 31, 2009, available at <http://www.chron.com/disp/story.mpl/editorial/outlook/6696754.html> (describing efforts by same-sex marriage supporters in many states, including Maine and Massachusetts, demanding disclosure of those supporting traditional marriage for “no other purpose than to make it possible to harass those signers.”); KnowThyNeighbor.Org: Protect Marriage for ALL Families, www.KnowThyNeighbor.org (last visited Jan. 24, 2011) (website publishing names and addresses of those signing marriage petitions in Massachusetts and other states to enable LGBT supporters to harass and intimidate traditional marriage supporters); Danvers Police Department, Incident Report #5018704, Oct. 1, 2005 (documenting provocation and physical assault of a 62-year-old woman gathering signatures supporting traditional marriage by a homosexual activist). But individual choices to resort to threats and violence have not negated gays’ tremendous ongoing legislative success.

A. *LGBT Allies in New England.*

Gay and Lesbians are well-represented in New England and throughout the nation. CNN reported that “123 openly gay people r[an] for public office” in the November 2010 election. Soledad O’Brien, *Record number of openly gay candidates*, CNN (Nov. 2, 2010), <http://politicalticker.blogs.cnn.com/2010/11/02/record-number-of-openly-gay-candidates/>. Gay & Lesbian Leadership Institute (“GLLI”), an organization that works to “increase the number of lesbian, gay, bisexual, and transgender (LGBT) people in public office,” *Mission*, Gay & Lesbian Leadership Institute, <http://www.glli.org/mission/mission> (last visited Jan. 21, 2011), identifies more than four openly LGBT members currently serving Rhode Island, including the Deputy Majority Leader and Speaker of the State House, as well as David Cicilline, former Mayor of Providence, Rhode Island, who currently serves as U.S. Representative for Rhode Island’s First Congressional District. *Find a Leader*, GLLI, http://www.glli.org/out_officials/view_all (last visited Jan. 12, 2011). New Hampshire has at least one current openly LGBT State Representative, David Pierce, as identified by GLLI, but it should be noted that in the previous sessions four representatives were openly LGBT. *Id.* Massachusetts’ openly LGBT leaders include representatives at all levels including at least two current city mayors, five State Representatives, one State Senator, and Barney Frank, U.S. Representative

for Massachusetts' District Four. *Id.* Maine has at least one openly LGBT state Senator and one openly LGBT state Representative. *Id.* These allies are effective; Victory Fund¹⁴ recently praised the significant 2009 success of Maine State Senator Lawrence Bliss, Maine House Representatives Terry Morrison, and Representative James Martin in passing a bill authorizing same-sex couples to marry, which was also signed by the Governor, albeit overturned by a statewide ballot question.¹⁵

In addition to openly LGBT members directly representing their shared interests with LGBT constituents, New England states have many other LGBT allies. "Governor Lincoln Chafee used his inauguration speech to voice support for the [same-sex marriage] bills" that have been introduced in the Rhode Island House and Senate. *Marriage efforts heat up in key states*, WGLB (Jan. 12, 2011), <http://wglb-tv.blogspot.com/2011/01/marriage-efforts-heat-up-in-key-states.html>. Similarly, Governor John Lynch has vowed to veto any measure to repeal New Hampshire's marriage law that the newly-elected conservative state congress may pass. *Id.* Perhaps even more significant, the Democratic Parties of Maine,

¹⁴ Gay & Lesbian Victory Fund ("Victory Fund") is a political action committee whose mission is to "increase[e] the number of openly LGBT officials at all levels of government," *Mission*, Gay & Lesbian Victory Fund, http://www.victoryfund.org/our_story/mission (last visited Jan. 21, 2011); GLLI is a non-profit affiliated organization of Victory Fund, *id.*

¹⁵ *Community Impact*, Gay & Lesbian Victory Fund, http://www.victoryfund.org/our_results/community_impact (last visited Jan. 21, 2011).

Massachusetts and New Hampshire have all articulated strong support for LGBT constituents. Their 2010 Party Platforms all included statements specifically affirming marriage for same-sex couples and vowing to oppose any effort in opposition to same-sex marriage. *Party Platform*, Maine Democratic Party 2010 <http://www.mainedems.org/assets/files/MDPPlatform2010.pdf> (last visited Jan. 21, 2011); *The Platform of the Massachusetts Democratic Party*, The Massachusetts Democratic Party, <http://www.massdems.org/about/platform.htm> (last visited Jan. 21, 2011); New Hampshire Democratic Party Platform 2010 http://nhdp.org/free_details.asp?id=59 (last visited Jan. 21, 2011).

B. LGBT Allies Across the Nation.

The LGBT movement also has powerful federal allies. The national Democratic party vigorously supports gay and lesbian rights. *See* Platform Standing Comm., 2008 Democratic Nat'l Convention Comm., *Renewing America's Promise* 36, 51-52 (2008) ("We support the repeal of 'Don't Ask Don't Tell' and the implementation of policies to allow qualified men and women to serve openly regardless of sexual orientation...Democrats will fight to end discrimination based on ... sexual orientation ... in every corner of our country...We support the full inclusion of all families, including same-sex couples, in the life of our nation, and support equal responsibility, benefits, and protections. We will enact a comprehensive bipartisan employment non-discrimination act. We

oppose the Defense of Marriage Act and all attempts to use this issue to divide us.”). The LGBT movement has powerful allies in Washington, D.C., including Senators Boxer and Feinstein and House Speaker Pelosi. Representative Barney Frank, an openly gay member of Congress, served until recently as Chairman of the House Financial Services Committee. *About Congressman Barney Frank*, U.S. House of Representatives, <http://www.house.gov/frank/about/index.html> (last visited Jan. 21, 2011). Majority Leader Reid brought a repeal of the Don’t Ask, Don’t Tell legislation to the floor of the Senate. Jonathan Capehart, *DADT repeal: 18 days in December*, Wash. Post (Dec. 31, 2010 11:45 a.m. ET), http://voices.washingtonpost.com/postpartisan/2010/12/_rare_is_the_occasion.htm. And President Obama himself has repeatedly championed the rights of gays and lesbians.

These allies deliver political punch for their gay and lesbian constituents. Large numbers of Congressional members receive top scores for their work on LGBT issues from the Human Rights Campaign. *Congressional Scorecard: Measuring Support for Equality in the 110th Congress, supra*, at 6, 15-16 (scoring 41 Senators at 80% or above and 161 House members 80% or higher).

This impressive array of allies verifies that gays possess significant political power on a local and national level.

III. THE LGBT COMMUNITY IS WELL-FINANCED BY A BROAD RANGE OF CONTRIBUTORS AND RESOURCES.

A look at the LGBT financial and organizational base explains how they maintain their remarkable level of political connections.

A. Gay and lesbian 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). In reality, money is the lifeblood of modern-day politics. That lifeblood flows richly for the gay and lesbian community, which has mobilized tremendous financial support from many sources. *See, e.g.*, HRC 2009 Annual Report, *supra*, at 14 (HRC raised \$45.79 million in 2009); HRC 2008 Annual Report, 14 (2008), http://www.hrc.org/documents/HRC_AR_2008.pdf (HRC raised \$43.95 million in 2008); HRC 2007 Annual Report, *supra*, at 28 (HRC raised \$41 million in 2007); HRC 2000 Annual Report, 21 (2000), http://www.hrc.org/documents/AR_2000.pdf (HRC raised \$16 million in 2000).

It cannot be said that LGBT political interests have insufficient 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>. In that report, NPR described an organized effort to finance candidates who support gay and lesbian causes. *Id.*

Likewise, a 2008 Time Magazine article revealed the scope and organization of the homosexual political movement, describing “the Cabinet” of wealthy homosexual men. “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://www.time.com/time/politics/article/0,8599,1854884-1,00.html> (describing the “intriguing development [across America in the 2008 elections]: anti-gay conservatives had suffered considerably. . .”).

In the political realm, money not only has a major influence on elections, it also obtains preferential access to lawmakers at every level of government. Gay and lesbian political organizations have this type of access. *See, e.g., 2007 – Our Year In Review*, Out 4 Immigration (2007),

http://www.out4immigration.org/assets/pdf/immeqla/2007_Year_in_review.pdf

(describing meetings with various members of Congress), *Human Rights*

Campaign to Honor House Speaker Nancy Pelosi with 2007 National Equality Award, HRC, July 23, 2007, http://www.hrc.org/issues/coming_out/5529.htm

(announcing then-Speaker Nancy Pelosi as the keynote speaker for HRC's National Dinner and listing former keynote speakers including former President Bill Clinton and former Vice President Al Gore). The ability of gays and lesbians to raise significant sums of money to support their political agenda is a leading indicator of their political power.

B. Influential labor unions support homosexual causes.

LGBT political power is not simply a matter of dollars and cents. Political influence can exponentially further LGBT power in a way that money cannot buy. For example, many of the most influential unions actively support the gay and lesbian community.

The National Education Association (NEA) regularly advocates for LGBT rights, including same-sex "marriage" recognition. Nat'l Educ. Ass'n, *Focus on Tomorrow: What Matters Most in 2008 and Beyond, Voters and the Issues* 9-10 (2008), <http://www.nea.org/assets/docs/votingfocus08.pdf>. NEA support of LGBT causes influences its own 3.2 million members, as well lending its political muscle in Washington, where the NEA has consistently ranked in the top fifteen of the *Fortune* Washington Power 25 list.

Many unions have adopted positions similar to that of the 1.6 million member American Federation of State, County and Municipal Employees (AFSCME). AFSCME has resolved to "continue to support the adoption of

federal, state, and local civil rights laws that prohibit discrimination based on sexual orientation in employment and other areas[;] . . . encourage negotiation of anti-discrimination, pay equity and domestic partner benefits provisions in all contracts; and . . . [to] strongly oppose any law or constitutional amendment that will abridge the rights of gays and lesbians including ones that perpetuate unequal marriage treatment.” *Equal Rights for Gay and Lesbian Citizens*, AFSCME Res. 49, 36th Int’l Convention (2004), <http://www.afscme.org/resolutions/2004/r36-049.htm>. With this help, gays and lesbians are not outsiders to politics. Rather, gays and lesbians have the most powerful grassroots and lobbying organizations in the country working for them.

C. Corporate America backs LGBT issues.

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). The gay and lesbian community also enjoys broad support from this important source of interest group activity—Corporate America.

Corporate America funds a broad range of gay and lesbian causes, including political ones. The Human Rights Campaign, which champions LGBT rights, lists numerous corporate sponsors: American Airlines, Bank of America, Citibank,

Deloitte LLP, Ernst & Young LLP, Microsoft, Morgan Stanley, MetLife, Mitchell Gold & Bob Williams, Nationwide Insurance, Prudential, Beaulieu Vineyard, British Petroleum, Chevron, Harrah's, Lexus, MGM Mirage, Nike, Shell, Chase, Cox Enterprises, Dell, Goldman Sachs, Google, , Olivia, Orbitz, Paul Hastings, PricewaterhouseCoopers, Replacements, Ltd., Showtime, Starbucks Coffee Company, TD Ameritrade, TD Bank, , , Tylenol PM, Waste Management and Wells Fargo. *National Corporate Sponsors*, HRC,

http://www.hrc.org/about_us/partners.asp (last visited Jan. 21, 2011). These corporations provide a significant amount of HRC's more than thirty million dollar annual budget.

Other LGBT groups also benefit from Corporate America's largess. The Gay Men's Health Clinic (GMHC), an organization dedicated to fighting AIDS, has a similar list of corporate sponsors contributing to its thirty million dollar annual budget.¹⁶ Similarly, The Gay, Lesbian, and Straight Education Network

¹⁶ Altria, Bristol-Meyers Squibb, Delta, Ford Foundation, Jeffrey Fashion Cares, MAC AIDS Fund, Duane Read, Empire Blue Cross Blue Shield, Gap, Inc., Merck, NBC4/Telemundo47, Wachovia, CBS, GlaxoSmithKline, IBM, JPMorgan Chase & Co., Macys, Newman's Own, Pfizer, PricewaterhouseCoopers, Target, Viacom, Abbott Laboratories, American Express, Anheuser-Busch Companies, Inc, Barclays, Bloomberg, Davis Polk & Wardwell, Deutsche Bank, Herrick, Feinstein LLP, Kenneth Cole Productions, Polo Ralph Lauren, Prudential Financial, Roche, and Washington Mutual, among others. Gay Men's Health Clinic, 2008 Annual Report 17-18 (2009).

(GLSEN) is supported by America's most recognized corporate names.¹⁷ 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.¹⁸

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

¹⁷ Cisco Systems, IBM, Morgan Stanley, Time-Warner, Disney-ABC Television, Goldman, Sachs & Co., Merck & Co, UBS, Wachovia, Citigroup Global Markets, Credit Suisse First Boston, Deutsche Bank, Dow Jones & Co., Eastman/Kodak Co., Holland & Knight LLP, MTV Networks, Nixon Peabody LLP, PricewaterhouseCoopers, Weil, Gotshal & Manges LLP, Wells Fargo, and many others. Gay, Lesbian, & Straight Educ. Network, 2008 Annual Report 11 (2008).

¹⁸ *Our Work*, Lambda Legal, <http://www.lambdalegal.org/our-work/> (last visited Jan. 21, 2011). Donors include Jeffrey Fashion Cares 2009, American Airlines, Merrill Lynch, Levi Strauss, Baker & McKenzie, Bingham McCutcheon, Cadwalader, Covington & Burling LLP, Cravath, Swaine & Moore LLP, Credit Suisse, Davis Polk & Wardwell, Hogan & Hartson, Jenner & Block, Jones Day, Kirkland & Ellis LLP, Kramer Levin, Latham & Watkins, LexisNexis, Mayer Brown & Platt, McDermott Will & Emery, McGuireWoods, Mercedes-Benz, Microsoft, Navigant Consulting, Northern Trust, O'Melveny & Myers LLP, PaulHastings, Perkins Coie, Pillsbury, ReedSmith, Sheppard Mullin, Sidley Austin, Sonnenschein, Wachtell, Lipton, Rosen & Katz, and Wells Fargo. *Sponsors*, Lambda Legal, <http://www.lambdalegal.org/about-us/sponsors/> (last visited Jan. 21, 2011).

e.g., *Sponsors*, Equality California Website,

<http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4026491> (listing many major corporations supporting Equality California, including AT&T and Comcast); *Silicon Valley Leaders to Denounce Prop 8 in Newspaper Ad*, Equality California Press Release (Oct. 30 2008),

http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4061163&content_id=%7BF3AB95F6-93FA-40B1-82B7-CAA2C038EDAF%7D¬oc=1; Sergey Brin, *Our Position on California's No*

on 8 Campaign, The Official Google Blog (Sept. 26, 2008),

<http://googleblog.blogspot.com/2008/09/our-position-on-californias-no-on-8.html>,

(opposing Prop 8).

Corporations also influence public policy by implementing their own internal policies. According to the Human Rights Campaign: Corporate Equality Index 2008, ninety-eight percent of America's top grossing companies—including companies in the Fortune 1000, Forbes 200 top private firms, and/or American Lawyer's top 200 law firms—had policies prohibiting discrimination on the basis of sexual orientation. The 2010 Corporate Equality Index reported that the number has since risen to ninety-nine percent. *Corporate Equality Index: A Report Card on Lesbian, Gay, Bisexual and Transgender Equality in Corporate America 2010*, HRC, 1,10 (2010),

http://www.hrc.org/documents/HRC_Corporate_Equality_Index_2010.pdf (also noting that “major employers stepped forward in unprecedented ways, including steadfast support for marriage equality . . .”).

Corporate leaders have a uniquely powerful platform when they express their support for LGBT rights, which they often do. *E.g.*, Value All Families Coalition, *Business Support for LGBT Non-Discrimination Legislation House Bill 300, 2*, <http://www.aclupa.org/downloads/TPsBusinessHB300.pdf> (quoting numerous corporate executives’ endorsements of LGBT issues). The multi-faceted success of the gay and lesbian community in raising campaign funds and obtaining financial and other intangible support from both sides of the political balance—unions and corporate—is enviable. Determined, organized, and prestigious, LGBT union and corporate supporters ensure that gay and lesbian causes are at the forefront of politics.

IV. OVERWHELMING MEDIA SUPPORT FOR GAYS AND LESBIANS IS LIKELY TO ENHANCE FUTURE POLITICAL POWER FOR THE LGBT COMMUNITY.

Although Hollywood influences America’s thinking and actively supports gay and lesbians with numerous positive portrayals of LGBT characters,¹⁹

¹⁹ “*Entertainment Weekly* has named GLAAD as one of Hollywood’s most powerful entities, and the *Los Angeles Times* described GLAAD as ‘possibly the most successful organizations lobbying the media for inclusion.’” *Our History*, Gay & Lesbian Alliance Against Defamation (“GLAAD”), <http://www.glaad.org/history> (last visited Jan. 21, 2011). Numerous people have

America's news media renders even more direct and concrete support for the gay and lesbian community. Donald P. Haider-Markel et al., *Minority Group Interests & Political Representation: Gay Elected Officials in the Policy Process*, 62 J. Pol. 568, 575 (2000) (showing that "elite support has greatest influence" on adoption of domestic partner benefits); HRC 2005 Annual Report, at 20 (2005) http://www.hrc.org/documents/AR_2005.pdf (stating that there is a quote from HRC in at least one newspaper each and every day); HRC 2000 Annual Report, at 3 (2000) (noting that editorial boards view the HRC position as "common sense").

For example, in the November 2008 election, every major newspaper in California that took a position on Proposition 8, along with the influential New York Times, expressed a "vote No on 8" editorial opinion. That coverage is invaluable in shaping public opinion, which is the key to political power. See John R. Zaller, *The Nature & Origins of Mass Opinions* (1992) (showing how opinions of media elites set public opinion).

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 invaluable publicity for the homosexual and lesbian community that could not be purchased with campaign funds. 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>.

V. MANY RELIGIOUS GROUPS SUPPORT GAY AND LESBIAN CAUSES.

For some voters, the religious community carries more influence than the media. Gays and lesbians are not without support in this arena as well. A recent compilation of religious groups' official positions regarding same-sex marriage shows dispute, with many religious organizations officially embracing the concept of homosexuality and same-sex partnership. *Religious Groups' Official Positions on Same-Sex Marriage*, Pew Forum on Religion & Pub. Life (July 27, 2010), <http://pewforum.org/docs/?DocID=426>.

A sizable number of religious organizations support same-sex marriage. Rev. Rebecca Voelkel, Nat'l Gay & Lesbian Task Force, *A Time to Build Up: Analysis of the No on Proposition 8 Campaign & Its Implications for Future Pro-LGBTQQIA Religious Organizing* (2009) (admitting groundbreaking support for same sex "marriage" by people of faith and identifying plans for outreach); *see also* George Chauncey, *Why Marriage? The History Shaping Today's Debate Over Gay Equality* 77-78 (2004) ("On the day same-sex marriage became legal in Massachusetts, the Unitarian Universalist Association, Reform Judaism, Reconstructionist Judaism, and the Metropolitan Community Church encouraged

their clergy to officiate at such weddings, and clergy in the American Baptist Churches and United Church of Christ could choose to do so.”²⁰

The official stance of a national religious organization, however, does not accurately portray the level of religious support for same-sex marriage. For example, although the General Conference of the United Methodist Church officially supports laws defining marriage as the union of one man and one woman, the California regional assemblies opposed Proposition 8, which defined marriage as the union of a man and a woman. Duke Helfand, *Pastors Risk Careers Over Gay Marriage*, L.A. Times, July 17, 2008, <http://articles.latimes.com/2008/jul/17/local/me-methodist17>; *Faith Leaders from Across State to Speak Out Against Proposition 8*, GLAAD Press Release, (Oct. 30, 2008), (“United Methodist bishops in California went on record in support of civil

²⁰ The 2008 California ballot measure known as Proposition 8, which defines marriage as the union of a man and a woman, mobilized the faith community on both sides of the issue. See, e.g., *UCC Church takes a Stand Against California's Proposition 8*, United Church of Christ: Called out eNews, Oct. 2008 (describing weekly No on 8 phone banks conducted by the United Church of Christ in Berkeley); *Council of Churches Urges NO on Proposition 8*, available at <http://www.councilofchurches-scc.org/article.php/aspeopleoffaith> (last visited Jan. 24, 2011) (ad from California Council of Churches in the San Jose Mercury News); Neighborhood Unitarian Universalist Church of Pasadena Newsletter, Oct. 2008 (Unitarian rally); Pac. Sw. Dist. of the Unitarian Universalist Ass'n and Camp de Benneville Pines Annual Meeting (May 2009) (“The Unitarian Universalist Legislative Ministry Action Network PAC stepped forward to manage the statewide interfaith organizing (sic) to defeat Proposition 8.”); *Clergy Rally Against Prop. 8*, St. Francis Times, Oct. 26, 2008 (leaders of religious and ethnic groups attacking Yes on 8).

rights for same-sex couples.”). Similar localized religious support for LGBT “marriages” exists within other religious groups, regardless of the group’s national stance. Duke Helfand, *Board of Rabbis Opposes California Anti-Gay-Marriage Initiative*, L.A. Now (Sept. 26, 2008, 12:27 p.m.), <http://latimesblogs.latimes.com/lanow/2008/09/proposition-8-i.html>.

Even among the religious organizations that officially support traditional marriage, many individual members support same-sex marriages. Recent data showed that 45% of Catholics and 27% of Protestants support same-sex “marriage,” despite opposition by their respective organized religions. *Majority Continues to Support Civil Unions*, The Pew Forum on Religion and Public Life, Oct. 9, 2009, <http://pewforum.org/Gay-Marriage-and-Homosexuality/Majority-Continues-To-Support-Civil-Unions.aspx>. Equality California, a proponent of same-sex marriage, acknowledged this valuable support, saying “[w]hile our opponents certainly invoke scripture and theology to justify their beliefs, there are many clergy and denominations that feel equally passionate that their faiths call them to stand up for marriage equality.” *Winning Back Marriage Equality in California: Analysis and Plan*, Equality California 22 (2009), http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/EQCA-WINNING_BACK_MARRIAGE_EQUALITY.pdf.

VI. PUBLIC OPINION IS TRENDING IN FAVOR OF PLAINTIFFS-APPELLEES' INTERESTS.

The success of the gay and lesbian community in obtaining funding, union support, corporate sponsorship, media endorsement, and religious backing is paying dividends beyond today's ballot box. Public opinion about homosexuality is trending in a positive direction. For example, in 1977, "only 56 percent of Americans supported gay rights legislation." Chauncey, *Why Marriage?*, *supra*, at 54-55. By 1989, that figure rose to 71 percent and by 1996, 84 percent of Americans supported gay rights legislation. *Id.* at 55. By 2002 a Gallup-Poll found that "even though 44 percent of the people said homosexuality was an unacceptable 'alternative lifestyle,' 86 percent thought homosexuals should have 'equal rights in terms of job opportunities.'"); *Id. See also id.* at 150 ("In 1977, only 14 percent of Americans thought gay people should be allowed to adopt children. That number doubled to 29 percent by 1992, and it jumped to almost 50 percent just eight years later, in one more sign of the dramatic change in attitudes in the 1990s.").

"[I]t is hard to think of another group whose circumstances and public reputation have changed so decisively in so little time. For several decades now, and especially since the 1990s, Americans have become more familiar with their lesbian and gay neighbors and more supportive of them. Above all, there has been a sea change in the attitudes of the young, who have grown up in a world where

they know gay people and see them treated with the respect any human deserves.” Chauncey, *Why Marriage?*, *supra* 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 (“Heterosexuals’ attitudes toward sexual minorities are changing rapidly. In the last two decades, public sentiment has dramatically shifted toward greater tolerance and less condemnation of sexual minorities, with opposition to discrimination on the basis of sexual orientation now widespread.”).

CONCLUSION

To date, gays and lesbians have benefited greatly from the democratic process. New England legislatures lead the nation in extending benefits based on sexual orientation. On a national level, New England’s voters have sent LGBT allies to Washington, where their voices are clearly heard. The LGBT message is carried through paid efforts, funded by numerous wealthy individuals, unions, and corporations across America. Gay and lesbian rights have also been embraced by influential labor, corporate, and religious organizations that have pledged to fight for “marriage equality.”

Homosexual and lesbian political muscle is a model of the power of American democracy. There is not a case of political powerlessness meriting extraordinary protection from the majoritarian political process. *United States v.*

Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). In the face of overwhelming evidence demonstrating political power, it would be inappropriate for this Court to grant suspect status to Plaintiffs-Appellees.

Respectfully submitted,
this 27th day of January 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,919 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I have electronically filed the foregoing Brief *Amicus Curiae* of Concerned Women for America in the case of *Massachusetts v. United States*, and *Hara, Gill, et al. v. Office of Personnel Management*, Nos. 10-2204, 10-2207, and 10-2214, with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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