No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR POLITICAL SCIENCE PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENT WINDSOR AND AFFIRMANCE ADDRESSING POLITICAL POWER OF GAY MEN AND LESBIANS

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INTEREST OF AMICI CURIAE

Amici curiae are 13 political science professors who have professional and scholarly interests in the issues presented in this case. *Amici* have researched, studied, and written on issues relevant to whether gay men and lesbians have political power, including the ways in which minority groups exercise sufficient power to protect their interests through the legislative process. Their expertise in these issues will assist the Court in determining whether heightened scrutiny should apply to laws disadvantaging gay men and lesbians on the ground that the group lacks political power.[1]

Amici are **John Aldrich**, Pfizer-Pratt University Professor of Political Science, Duke University; **Shaun Bowler**, Professor of Political Science, University of California, Riverside; **Bruce Cain**, Charles Louis Ducommun Professor in Humanities and Sciences, Professor of Political Science, Stanford University; **Cornell W. Clayton**, Director of the Thomas S. Foley Institute for Public Policy and Public Service and Claudius O. Johnson Distinguished Professor of Political Science, Washington State University; **Donald P. Haider-Markel**, Professor of Political Science, University of

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. The parties have consented in writing to the filing of this brief.

Kansas; **Rodney Hero**, Professor, Political Science, University of California, Berkeley; **Taeku Lee**, Professor of Political Science and Law and Chair of the Travers Department of Political Science, University of California, Berkeley; **Gregory B. Lewis**, Professor of Public Management and Policy and Department Chair in the Andrew Young School of Policy Studies, Georgia State University; **Margaret Levi**, Jere L. Bacharach Professor of International Studies in the Department of Political Science, University of Washington, and Chair in Politics in the United States Studies Centre, University of Sydney; **Michael McCann,** Gordon Hirabayashi Professor for the Advancement of Citizenship, University of Washington; **Valerie Martinez-Ebers**, Professor of Political Science, University of North Texas; **Kenneth Sherrill**, Professor Emeritus of Political Science, Hunter College, City University of New York; and **Charles Anthony Smith**, Associate Professor, University of California, Irvine.

SUMMARY OF ARGUMENT

I. The Framers envisioned a political process in which groups of citizens sharing a common interest would unite to advocate for laws favoring the group and against laws disfavoring it. Because the government was likely to consist of minority factions, laws would be passed only if their appeal was sufficiently broad to attract support of multiple factions. In the Framers' view, this process would protect the rights of minority groups because laws supported by majority coalitions were likely to

promote the public good, rather than deprive minority groups of their rights.

Political theory and this Court's decisions both recognize that the political process will not always protect the rights of minority groups. Some groups can better protect their interests through the political process because they have greater resources than opposing groups. Other groups find themselves at a permanent disadvantage and are unable to protect their interests through the political process. When a minority group's lack of power prevents it from protecting its interests, laws disadvantaging the group cannot be given a presumption of legitimacy. As a result, this Court has long required a "more searching judicial inquiry" when the "political processes ordinarily to be relied upon to protect minorities" have been "curtail[ed]." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

Determining whether a particular minority group has political power requires consideration of more than simply whether the group has ever achieved successful legislative outcomes. The political process will occasionally produce legislation favorable to a minority group lacking political power for numerous reasons. For one, politicians may take a position favorable to the minority group on a particular issue because it accords with their personal beliefs, without regard to the minority group's influence over the process. For another, politicians may disagree with the group's view, but nevertheless vote with them for reasons entirely unrelated to the group's interests. As a result, a group's political power can be measured only by

considering the group's ability to influence the political process, not by whether the process sometimes produces results that the group supports.

II. Gay men and lesbians lack political power for numerous reasons. *First*, they are underrepresented in political office. Although gay men and lesbians make up approximately 3.5 percent of the U.S. population, they have never held more than about 1 percent of the legislative seats in Congress or state legislatures. As this Court has recognized, underrepresentation in political office can deprive a group of political power. *See Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality).

Second, gay men and lesbians are viewed negatively by a majority of Americans, and rank among the least popular minority groups in the country. Because the group's unpopularity is based on moral opposition to homosexuality, politicians who are opposed to their interests are unlikely even to consider supporting the group's interests. This moral opposition also reduces the political power of gays and lesbians by making members of the group less likely to participate in the political process.

Third, the groups advocating against marriage for same-sex couples have significantly more resources than the groups supporting it. Because these opposition groups are able to generate support throughout the country, they have successfully used the ballot initiative process to achieve their goals. This strategy has allowed opposition groups to bypass legislative safeguards that protect minority interests. The ballot initiative process also forces

gay men and lesbians to defend their legislative successes from repeated attempts to repeal them.

Fourth, the political allies of gay men and lesbians often prove unreliable. Because most Republican politicians strongly oppose gay rights, gay men and lesbians can generally look for support only from Democratic politicians. But these allies, even if generally supportive of gay rights, often have no incentive to push for legislation to protect gay men and lesbians. Because voting for a Republican candidate is often not a viable alternative for gay men and lesbians, Democratic candidates need not produce legislative results to keep the group's vote.

III. Recent events do not establish that gay men and lesbians have political power. The Court should not focus on isolated instances in which gay men and lesbians have achieved successful political outcomes because such a limited focus ignores the broader context in which the successes have occurred. Even counting the gay men and lesbians who were elected to office in 2012, the group is still vastly underrepresented in political office. Moreover, although ballot measures approving of marriage for same-sex couples passed in three states in November 2012, those victories pale in comparison to the many defeats—more than 30—that gay men and lesbians have suffered in ballot initiatives in other states.

Focusing on recent events also ignores the burdens imposed by the many existing laws that disadvantage gay men and lesbians. It is one thing for a group to have enough power that it can occasionally block passage of unfavorable laws, but it

is quite another for the group to have the power to repeal existing laws. This problem is compounded by the fact that many state constitutions have been amended to disfavor gay men and lesbians. As a result, the group must first amend the state constitutions before they can even attempt to achieve their goals through the normal legislative process.

ARGUMENT

I. A MINORITY GROUP IS POLITICALLY POWERLESS IF IT CANNOT FORM THE MAJORITY COALITIONS NECESSARY TO PROTECT ITS INTERESTS.

1. In *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938), this Court held that, as a general matter, an Act of Congress is constitutional so long as Congress had a rational basis for enacting it. The Court noted, however, that a "more searching judicial inquiry" may be necessary in some circumstances, including when a law disfavors certain minority groups. *Id.* at 153 n.4. Heightened scrutiny may be warranted because "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.*

This Court's subsequent decisions have adopted the framework of *Carolene Products*, and have held that heightened scrutiny applies when a law disadvantages a "suspect class." *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). To determine whether heightened scrutiny applies, the Court considers several "traditional

indicia of suspectness," including whether the minority group has been "relegated to . . . a position of political powerlessness." *Id.*; *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985).

As these decisions demonstrate, a minority group is politically powerless if the "political processes ordinarily to be relied upon to protect minorities" have been "curtail[ed]." *Carolene Products*, 304 U.S. at 153 n.4. Making that determination requires consideration of how the "political processes" were designed to protect minorities.

The Framers recognized that the democratic principle of majority rule posed a serious threat to the rights of the minority. *See The Federalist No. 10* at 80 (J. Madison) (Rossiter ed. 1961). James Madison envisioned a pluralistic system of competing "factions," which he defined as a group of citizens that shared a common interest adverse to the rest of the population. *Id.* So long as a particular faction included only a minority of the population, it posed no threat to the rights of others because "the majority [could] defeat its sinister views by regular vote." *Id.* But "[i]f a majority be united by a common interest, the rights of the minority will be insecure." *The Federalist No. 51* at 323 (J. Madison).

Although the Framers understood that a majority faction was unlikely to protect the minority's rights, they nevertheless expected the political process to protect those rights because, in their view, permanent majority factions were unlikely to form. *Id.* at 323-34. Rather than a government controlled

by a majority faction, the Framers envisioned a government of competing minority factions. Because a minority faction cannot enact laws on its own, laws would be passed only when a group of minority factions united to form a majority coalition. *Id.* Unlike a majority faction, a majority coalition would enact laws reflecting "justice and the general good," not depriving the minority of rights. *Id.* at 325.

Drawing on Madison's insights, political scientists have studied the way in which minority factions compete to form majority coalitions. These scholars typically address the issue by focusing on "interest groups." In an influential work, David Truman concluded that an interest group cannot gain permanent control of the political process in a pluralist system because, as that group gains power, opposing interests will mobilize to prevent the group from dominating the political process. *See* David Truman, THE GOVERNMENTAL PROCESS 26-44 (Alfred A. Knopf 1951). While this "disturbance theory" is widely accepted, other scholars have shown that not all groups are equally capable of protecting their interests. *See, e.g.*, Mancur Olson, THE LOGIC OF COLLECTIVE ACTION 117-31 (Harvard Univ. Press 1965). Based on differences in size and resources, some groups are necessarily in a better position than others to protect their interests. J.A. 398. In short, "[t]hose with greater resources—time, money, and numbers—exert greater influence on the political process. Minorities, by definition, are less numerous than the majority." *Id.*

In this pluralist framework, the term "power" is generally used to refer a group's ability to influence

others to support its interests. Professor Robert Dahl has provided a widely accepted definition, which describes "power" as "A's capacity for acting in such a manner as to control B's responses." Robert Dahl, A PREFACE TO DEMOCRATIC THEORY 13 (Univ. of Chicago Press 1956); J.A. 399. Based on this understanding of power, a minority group is "politically powerless" when it cannot achieve positive legislative outcomes through the "political processes ordinarily to be relied upon to protect minorities." *Carolene Products*, 304 U.S. at 153 n.4.

2. A group's political power cannot be measured based solely on legislative outcomes. Legislatures can—and sometimes do—pass laws that benefit powerless minorities. Likewise, even powerful groups will sometimes fail to achieve the legislative outcomes they seek. Rather than looking only to legislative outcomes, a group's political power must be analyzed by looking at the group's ability to influence the legislative process.

This Court's decision in *Frontiero v. Richardson,* 411 U.S. 677 (1973), illustrates this point. In *Frontiero*, the Court noted that Congress had enacted legislation prohibiting employers from discriminating on the basis of sex, and had recently passed a constitutional amendment to prohibit such discrimination. *Id.* at 687. Notwithstanding these legislative outcomes, the Court concluded that women lacked sufficient political power to protect their interests in the legislative process. *Id.* at 688. As a result, the Court held that gender-based classifications are "inherently suspect," and therefore subject to heightened judicial scrutiny. *Id.* at 688.

A handful of positive legislative outcomes do not establish that a group has political power for numerous reasons. *First*, legislators may support a minority group on a particular issue because they agree with the group's view, not because the group exerted any influence over them. J.A. 399 ("One does not have power over those who, for other reasons, already agree."). As an example, Professor Segura explained that "in the last national election, millions voted for the same candidate I did, but this is not evidence of my electoral influence." *Id.*

Second, legislators may support a minority group for reasons unrelated to the group's interests. Indeed, a congressman may support the policies underlying a bill, but nevertheless vote against it because he thinks the bill is too costly or that the issue should be left to the states. Such opposition based on fiscal or federalism grounds does not establish that the interest groups opposing the bill have exercised political power.

Third, positive legislative outcomes may also result from legislators' affinity for a minority group. For example, a politician may oppose a law that discriminates against a particular minority group because the politician believes that discriminating against any minority group is wrong. This sort of general opposition to discrimination does not suggest that a minority group has exercised political power. J.A. 400.

When a particular legislative outcome is attributable to one or more of these factors, the outcome does not establish that a minority group has

political power. As a result, the legislature may occasionally enact bills that respect a minority group's interests even when prejudice against the group has "curtail[ed] the operation of those political processes ordinarily to be relied upon to protect minorities." *Carolene Products Co.*, 304 U.S. at 153 n.4.

II. GAY MEN AND LESBIANS LACK POLITICAL POWER.

Gay men and lesbians lack political power because they are unable to form the majority coalitions necessary to protect their interests. This is true for at least four reasons. *First*, gay men and lesbians are underrepresented in political office. *Second*, moral opposition to homosexuality deprives gay men and lesbians of political power. *Third*, the interest groups opposing gay rights are significantly more powerful than the groups supporting them. *Fourth*, the political allies of gay men and lesbians often prove to be unreliable.

A. Gay Men and Lesbians Are Underrepresented in Political Office.

1. Gay men and lesbians were underrepresented in political office when the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996), was enacted, and they continue to be underrepresented today. Studies have concluded that gay men and lesbians make up roughly 3.5 percent of the U.S. population. J.A. 415; *see also* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender* at 1 (Williams Institute 2011). Their representation in political office has

never come close to their percentage of the population.

Prior to 1983, there were no openly gay members of Congress. *See* Donald P. Haider-Markel, OUT AND RUNNING 19 (Georgetown Univ. Press 2010). Although a few sitting congressmen announced that they were gay during the 1980s and 1990s, it was not until 1998—two years after DOMA was enacted—that a non-incumbent gay or lesbian candidate was elected to Congress. *See* Arthur Leonard, Editorial, *A Congressional First*, N.Y. TIMES, Nov. 6, 1998, at A32.

When DOMA was enacted in 1996, there were only four openly gay members of Congress, all serving in the House of Representatives. *See* David W. Dunlap, *A Republican Congressman Discloses He Is a Homosexual*, N.Y. TIMES, Aug. 3, 1996, at A6. The number of openly gay or lesbian members of Congress has increased since then, but the group remains vastly underrepresented. There are currently six openly gay, lesbian, or bisexual Representatives and one openly lesbian Senator. Jeremy W. Peters, *Openly Gay, and Openly Welcomed in Congress*, N.Y. TIMES , Jan. 26, 2013, at A1. These seven legislators account for just over 1 percent of the current Congress.

Gays and lesbians have also been consistently underrepresented in state legislatures. The first openly gay or lesbian state legislators were not elected until the 1970s. Haider-Markel, OUT AND RUNNING at 86. Overall, there have been approximately 200 openly gay or lesbian state

legislators since 1974. *Id.* Although the number of gay and lesbian legislators has increased in recent years, they still hold only about 1 percent of the state legislative seats. *Id.* at 86-87.[2]

2. This Court has recognized that under-representation in political office can undermine a group's political power. *See Frontiero*, 411 U.S. at 686 n.17. Because women make up slightly more than half of the U.S. population, the Court acknowledged that, "when viewed in the abstract, women do not constitute a small and powerless minority." *Id.* But the Court nevertheless held that women were sufficiently powerless that laws disadvantaging them must be subject to heightened scrutiny. *Id.* at 688. In reaching this result, the Court relied on the fact that women are underrepresented in political office:

> [I]n part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. . . . [T]his under-representation is present throughout all

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[2] *See also* Nat'l Conf. of State Legislatures, *History Holds True in 2012 Legislative Elections*, *available at* http://www.ncsl.org/press-room/history-holds-true-in-2012-legislative-races.aspx.

> levels of our State and Federal Government.

Id. at 686 n.17.

Underrepresentation deprives a group of political power in numerous ways. *First*, as a matter of simple arithmetic, underrepresentation makes forming a majority coalition more difficult. Consider a minority group that comprises 10 percent of the population. If that group also holds 10 percent of the seats in the legislature, it can create a majority coalition so long as it can gain support from another 40 percent (plus one) of the legislators. In contrast, if the same group is underrepresented and holds only 1 percent of the seats, creating a majority coalition requires substantially more political power because the group must gain support from another 49 percent (plus one) of the legislators.

Second, underrepresentation hinders a group's ability to influence the political agenda. Studies have shown that female representatives are more likely to introduce bills on issues important to women. *See* Haider-Markel, OUT AND RUNNING at 11-12. Similarly, African-American legislators are more likely to introduce bills of interest to African Americans. *See* Kathleen Bratton, *Legislative Collaboration and Descriptive Representation*, in REPRESENTATION OF MINORITY GROUPS IN THE U.S. 289, 305 (Charles E. Menifield, ed. 2001). Minority representatives also influence the political agenda by serving on committees that address issues relevant to their minority groups. *See* Haider-Markel, OUT AND RUNNING at 10 ("African American legislators

are more likely to serve on committees that deal with social welfare and education issues, as well as defined black issues.").

Third, even apart from a legislator's deliberate efforts to influence the political agenda, "simply having representatives of a group in a policymaking body may influence other decision makers' attitudes about the group and subsequent support for policy proposals related to the group." Haider-Markel, OUT AND RUNNING at 85; *see also* Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 50 (Larry J. Sabato et al., eds., 2001) ("mere presence of minorities in a legislature may deter the worst forms of legislative prejudice"). In addition, "the elected representatives of a group may likewise influence public perceptions of the group, and the public and legislator preferences concerning policies related to the group." Haider-Markel, OUT AND RUNNING at 85-86. This phenomenon—sometimes referred to as the "role model" effect (*id.* at 85)—is important because legislators are more supportive of gay rights when their constituents also support them. *See* Donald P. Haider-Markel, *Redistributing Values in Congress: Interest Group Influence Under Sub-Optimal Conditions*, 52 POLITICAL RESEARCH QUARTERLY 113, 131 (1999).

The empirical data confirm that under-representation deprives a group of political power. Studies of state legislatures have shown that an increase in the number of female representatives

results in more proposed legislation relating to issues important to women. *See, e.g.*, Haider-Markel, OUT AND RUNNING at 85-86. Other studies have similarly shown that "the presence of elected black and Hispanic officials increases the likelihood that black and Hispanic interests are represented in policy processes." Donald P. Haider-Markel, et al., *Minority Group Interests and Political Representation: Gay Elected Officials in the Policy Process*, 62 J. OF POLITICS 568, 568 (2000).

A similar study recently determined that an increase in the number of gay men and lesbians in a state legislature leads to an increase in the number of pro-gay rights bills introduced and adopted. *See* Haider-Markel, OUT AND RUNNING at 127. The study also showed that increased representation creates a greater likelihood that a state will adopt antidiscrimination laws that protect gay men and lesbians. *Id.*; *see also* Haider-Markel, et al., *Minority Group Interests and Political Representation: Gay Elected Officials in the Policy Process*, 62 J. OF POLITICS at 573.

In sum, gay men and lesbians are under-represented in political office at both the federal and state level. This underrepresentation deprives the group of political power.

B. Gay Men and Lesbians Are Viewed Negatively by a Majority of Americans Based on the Widespread Moral Opposition to Homosexuality.

Given their relatively small numbers and significant underrepresentation in political office,

gay men and lesbians can protect their interests in the political process only by gaining support from other groups. Several factors prevent this from happening. The groups opposing gay rights strongly oppose homosexuality on moral grounds, and a majority of Americans hold negative views of gay men and lesbians. This moral opposition hinders the ability of gay men and lesbians to form majority coalitions to enact favorable laws and to block unfavorable ones.

1. When DOMA was enacted, a large majority of Americans viewed sex between two adults of the same sex as morally wrong. A 1996 survey conducted by the National Opinion Research Center ("NORC") showed that 60 percent of Americans thought that it was "always wrong," 5 percent thought it was "almost always wrong," and 6 percent thought it was "sometimes wrong." *See* Karlyn Bowman, *Attitudes About Homosexuality & Gay Marriage*, AEI STUDIES IN PUBLIC OPINION 2 (2008). Although public opinion has shifted to some degree since 1996, a majority of Americans still are morally opposed to homosexuality. The most recent NORC study—conducted in 2010—showed that 54.4 percent of Americans thought that sex between two adults of the same sex was "always," "almost always" or "sometimes" wrong.[3]

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[3] Tom W. Smith, *Public Attitudes toward Homosexuality* at 2 (Sept. 2011), *available at* http://www.norc.org/PDFs/2011%20GSS%20Reports/GSS_Public%20Attitudes%20Toward%20Homosexuality_Sept2011.pdf.

A recent study showed that gay men and lesbians are one of the most negatively viewed groups in America. J.A. 424-27. This study asked Americans to rate their "warmness" towards certain groups on a scale of 0 to 100, with 100 indicating strong positive feelings for the group. *Id.* at 424-25. More than 65 percent of the respondents rated gay men and lesbians negatively (*i.e.*, below the mid-point rating of 50), and more than 13 percent gave gay men and lesbians a rating of zero. *Id.* at 426-27. Other groups—including "suspect classes" under the Court's equal protection jurisprudence—have significantly higher "warmness" scores. J.A. 426. Gay men and lesbians' rating of 49.4 is considerably lower than the ratings of African-Americans (68.8), Catholics (67.3), Latinos (65.2), and Jews (65.0), and slightly lower than the rating for Muslims (50.3). *Id.* Gay men and lesbians were ranked higher than only two groups: atheists (41.0) and undocumented aliens (39.3). *Id.*

2. Moral opposition to homosexuality prevents gay men and lesbians from exercising political power. A minority group generally is unable to influence politicians who are morally opposed to its interests because these politicians are unlikely to think that the group's interests deserve consideration or respect. *See* Donald P. Haider-Markel, et al., *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. OF POLITICS 332, 334 (1996).

Gay men and lesbians face this issue in advocating for the freedom to marry. As the floor debates over DOMA demonstrate, many politicians

oppose marriage for same-sex couples on moral and religious grounds. *See, e.g.,* 142 Cong. Rec. 22,447 (1996) ("One has only to turn to the Old Testament and read the word of God to understand how eternal is the true definition of marriage."); *id*. at 17,074 ("God laid down that one man and one woman is a legal union. That God-given principle is under attack."). As a result, gay men and lesbians have little chance of forming a majority coalition by convincing their opponents to change their views on this issue. *See* Haider-Markel, et al., *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. OF POLITICS at 334.

The moral opposition to homosexuality also reduces the political power of gays and lesbians by making members of the group less likely to participate in the political process. Unlike members of other minority groups, gay men and lesbians can choose not to reveal their sexual orientation publicly, which results in others not identifying them as part of the minority group. The scholarship on this issue suggests that individuals will choose not to self-identify with a group when doing so imposes substantial costs, such as family disapproval, physical threats, and discrimination. J.A. 421-23; *see also* Scott S. Gartner & Gary M. Segura, *Appearances Can Be Deceiving: Self Selection, Social Group Identification, and Political Mobilization*, 9 RATIONALITY & SOC. 1043 (1997). The unwillingness of many gay men and lesbians to self-identify limits the group's political power because it causes the group to appear smaller than it actually is.

3. The inability to form majority coalitions through legislative compromise has prevented enactment of laws to protect gay men and lesbians from many forms of discrimination. For example, the Employment Non-Discrimination Act—which would extend the federal employment antidiscrimination laws to prohibit discrimination on the basis of sexual orientation—has been regularly introduced in Congress since 1994 but has never passed. J.A. 405-06. As a result of Congressional inaction, "there is no federal legislation prohibiting discrimination against gay men and lesbians in employment, education, access to public accommodations, or housing." *Id.* at 405. Similarly, the antidiscrimination laws in 29 states do not list sexual orientation as a protected characteristic.[4]

The moral opposition to homosexuality has also led to enactment of laws that disadvantage gay men and lesbians in other areas of the law. For example, numerous states limit the ability of gay men and lesbians to adopt children or become foster parents. J.A. 412; Sean Cahill, *The Anti-Gay Marriage Movement*, in THE POLITICS OF SAME-SEX MARRIAGE 167 (Rimmerman and Wilcox, eds., Univ. of Chicago Press 2007). Moreover, "[a] number of states have also passed laws preventing teachers from mentioning the word *homosexual* in the classroom or mandating that homosexuality be presented in an exclusively negative way." *Id.* at 166-67.

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[4] *State Nondiscrimination Laws in the U.S.*, National Gay and Lesbian Task Force, *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12.pdf.

Hate crime legislation provides a particularly striking example of how the moral opposition to homosexuality makes forming a majority coalition so difficult. Gay men and lesbians are frequent victims of hate crimes. J.A. 419-20. Indeed, they are the most frequently victimized group on a per-capita basis, and the second most targeted group based on total crimes. *Id.*[5] Despite the frequency of such crimes, legislative efforts to expand the hate crime statutes to include crimes against gay men and lesbians have faced strong opposition. Efforts to amend state hate crime laws often have failed, as evidenced by the 14 states that have hate crime laws but do not protect gay men and lesbians.[6] Although Congress recently extended hate crime protection to gay men and lesbians, it took more than a decade of efforts before the federal law was amended, and the amendment was adopted only after it was attached to a defense appropriations bill. J.A. 406-07. Even then, the provision faced strong opposition. *Id.* at 407.

In short, gay men and lesbians are one of the most unpopular minority groups in America. Because of this unpopularity and the moral opposition to homosexuality, gay men and lesbians cannot form the majority coalitions necessary to enact the most

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[5] *See also* Federal Bureau of Investigation, Hate Crime Statistics 2011, *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/victims.

[6] *See State Laws & Policies*, Human Rights Campaign Foundation (Mar. 27, 2007), *available at* http://www.hrc.org/resources/entry/state-laws-policies.

basic types of antidiscrimination laws that have long protected other minority groups.

C. Gay Men and Lesbians Face Strong Opposition from Powerful, Well-Funded Groups that Rely Heavily on the Ballot Initiative Process.

1. Gay men and lesbians also lack political power because the interest groups opposing marriage for same-sex couples "have substantial strategic, structural, and political advantages over groups that advocate full marriage rights." Mark Carl Rom, *Introduction*, in THE POLITICS OF SAME-SEX MARRIAGE at 16; *see also* J.A. 432 ("Gay men and lesbians lack the political resources . . . to counter th[e] kind of committed, organized opposition to their interests.").

By drawing on the moral opposition to homosexuality, interest groups opposing gay rights are able to generate support throughout the country. *See* Cahill, *The Anti-Gay Marriage Movement*, in THE POLITICS OF SAME-SEX MARRIAGE at 156-57. National religious organizations offer a network for coordinating activities—including fundraising and pressuring elected officials—across states and jurisdictions. J.A. 431; *see also* Rom, *Introduction*, in THE POLITICS OF SAME-SEX MARRIAGE at 16 (opposition "groups are often religion-based and so have ready access to a broad institutional network of individuals and resources that can be mobilized in opposition.").

The interest groups opposing marriage for same-sex couples are better funded than those groups

supporting it. Studies have shown that "groups leading the charge against gay marriage today dramatically outspend groups promoting equal rights for lesbian, gay, bisexual, and transgender people." Cahill, *The Anti-Gay Marriage Movement*, in THE POLITICS OF SAME-SEX MARRIAGE at 175. For example, in 2003, 13 organizations organized a rally in Washington D.C. to oppose same-sex marriage. *Id.* at 157. Those organizations—which were not the 13 largest groups opposing same-sex marriage—reported income of $211 million in 2002. *Id.* In contrast, the 13 *largest* gay political organizations reported income totaling $53 million in 2002. *Id.*

2. The interest groups opposing marriage for same-sex couples frequently use their enormous political power to achieve their objectives through ballot initiatives. Indeed, "[t]he initiative process has been used specifically against gay men and lesbians more than against any other social group." J.A. 414. States have voted on marriage rights through ballot initiatives more than 30 times; the position favoring marriage for same-sex couples has lost nearly every time. J.A. 411. Because many of these initiatives resulted in amendments to state constitutions, the issue is no longer subject to the normal legislative process. *See infra* Part III.B.[7]

The use of ballot initiatives has deprived gay men and lesbians of political power in multiple ways.

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[7] These interest groups have also used ballot initiatives to repeal antidiscrimination laws and to prevent gay men and lesbians from adopting children. J.A. 412-14.

First, by using the ballot initiative process, opposition groups are able to bypass the legislative safeguards that protect minority interests. *See supra* Part I.A. As Professor Segura explained, "[s]mall minorities are even less able to protect their interests in [ballot initiatives] than they are in the legislative process, which—as a result of legislative districts, institutional rules, coalitional politics, and other factors—tends to give small minorities more of an opportunity to prevent undesirable outcomes." J.A. 413; *see also* Katie Lofton and Donald P. Haider-Markel, *The Politics of Same-Sex Marriage Versus The Politics of Gay Civil Rights*, in THE POLITICS OF SAME-SEX MARRIAGE at 316 ("Interest groups can indeed play a stronger role on the campaign trail than legislative office lobbying.").

Second, gay men and lesbians are repeatedly forced to defend their legislative successes from attempts to repeal them through the ballot initiatives process. For example, when anti-discrimination laws have been extended to prohibit discrimination on the basis of sexual orientation, opposition groups have repeatedly repealed those laws through ballot initiatives. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); J.A. 410-11. By using the ballot initiative process in this manner, opposition groups deprive gay men and lesbians of political power because they turn legislative victories into electoral defeats.

Third, the mere threat of repeal by ballot initiative makes it less likely that a law supporting gay rights will be enacted in the first place. As discussed below, *see infra* Part II.D, politicians often

pay a substantial price for supporting gay rights. They are less willing to pay that price if the legislation is likely to be overturned. J.A. 412-13 (Past success of ballot initiatives "makes it less likely that legislatures will enact pro-gay policies in the first place.").

D. Gay Men and Lesbians Have Limited Influence over Their Political Allies.

The political parties are largely polarized on issues involving the rights of gay men and lesbians. Most Republican politicians strongly oppose marriage for same-sex couples and other issues of concern to gay people. *See* Cahill, *The Anti-Gay Marriage Movement*, in THE POLITICS OF SAME-SEX MARRIAGE at 168. In contrast, Democratic politicians generally are more supportive on these issues, *id.*, but that support does not necessarily translate into action.

Democratic politicians often prove to be unreliable allies based on a phenomenon known as "electoral capture." *See, e.g.*, Paul Frymer, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA 8 (Princeton Univ. Press 1999). Electoral capture occurs when a group "votes overwhelmingly for one of the major political parties and subsequently finds the primary opposition party making little or no effort to appeal to its interests or attract its votes." *Id.* When electoral capture occurs, the group cannot exert political power over the sympathetic party because it cannot threaten defection:

> The opposing party does not want the group's vote, so the group cannot

> threaten its own party's leaders with defection. The party leadership, then, can take the group for granted because it recognizes that . . . [a captured] group has nowhere else to go. Placed in this position by the party system, a captured group will often find its interests neglected by their own party leaders.

Id.

This concept of electoral capture applies to gay men and lesbians because "the Republican party does not make any effort to compete for the group." Charles Anthony Smith, *The Electoral Capture Of Gay And Lesbian Americans: Evidence and Implications from The 2004 Election*, 40 STUDIES IN LAW, POLITICS, AND SOC'Y 103, 105 (2007). The 2004 presidential election provides a good example. Facing no threat of losing the votes of gay men and lesbians, Democratic presidential candidate John Kerry announced his opposition to marriage for same-sex couples, even though he had voted against DOMA nearly a decade earlier. *Id.* at 110. Yet, despite his opposition on this issue, "an overwhelming number of [gay men and lesbians] supported Kerry." *Id.* at 105.

DOMA's enactment provides another example of the difficulty that gay men and lesbians face in attracting reliable allies. During the 1996 elections, the Republican party adopted a strategy of making same-sex marriage an issue. *See* Michael J. Klarman, FROM THE CLOSET TO THE ALTAR 60 (Oxford Univ. Press 2013). In the spring of 1996,

Republicans introduced "defense of marriage bills" in 34 state legislatures, and the Republican presidential candidate, Senator Bob Dole, co-sponsored DOMA in the U.S. Senate. *Id.* at 59-61.

The floor debate over DOMA "quickly devolved into a general attack on homosexuality." *Id.* at 61. "Many Republican lawmakers declared that homosexuality was morally wrong and that the state should not endorse it." *Id.* One of the bill's co-sponsors in the House defended its necessity by arguing that "[t]he flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit." 142 Cong. Rec. 17,070 (1996). Other members defended the bill on similar grounds: "Homosexuality has been discouraged in all cultures because it is inherently wrong and harmful to individuals, families, and societies. *Id.* at 17,075; *see also id.* at 16,802 ("[W]e can look at history and show that no culture that has ever embraced homosexuality has ever survived.").

In the face of the Republican opposition, gay men and lesbians found little support from the Democratic party. Democratic Senator Byrd joined the Republicans in opposing marriage for same-sex couples on moral grounds and warning that the future of the country depended on enacting DOMA. *Id.* at 22,448–49 (traditional marriage must be defended against homosexual attack, and "America is being weighed in the balance"). Even among the Democrats who opposed DOMA, few expressed support for gay rights. *See* Klarman, FROM THE CLOSET TO THE ALTAR at 61. Instead, most "criticized

the bill on federalism grounds, observing that in the past Congress had always left the definition of marriage up to the states." *Id.*

DOMA passed both houses easily. The House passed the bill by a vote of 342 to 67. *Id.* at 63. Nearly two-thirds of House Democrats voted in favor of the bill, and only one Republican, an openly gay congressman, voted against it. *Id.* The Senate passed the bill by a vote of 85 to 14. *Id.* Senator John Kerry was the only Senator up for reelection in 1996 who voted against the bill. *Id.* Moreover, "[d]ozens of lawmakers who usually supported gay rights voted for the measure." *Id.* President Clinton, who had run in 1992 as a candidate sympathetic to concerns of gay men and lesbians, signed DOMA on September 21, 1996. *Id.* at 62-63.

As one commentator explained, "Those who might be sympathetic to [marriage for same-sex couples] have no incentive to promote it—in the near term, at least, favorable legislation has no chance of being enacted, and the vast majority of politicians potentially face retribution at the ballot box if they speak on behalf of same-sex marriage." Rom, *Introduction*, in THE POLITICS OF SAME-SEX MARRIAGE at 18.

III. RECENT EVENTS AND STATISTICS DO NOT DEMONSTRATE THAT GAY MEN AND LESBIANS HAVE POLITICAL POWER.

Focusing on some, but not all, of the relevant events and statistics from the past few years, the Bipartisan Legal Advisory Group ("BLAG") asserts that gay men and lesbians are politically powerful.

BLAG Br. 51-54. BLAG overstates the importance of recent events to the political power inquiry. Moreover, such a limited focus is misplaced because it ignores the many existing laws that distort the political process and deprive the group of power.

A. The Importance of Recent Events to the Political Power Inquiry Is Overstated.

Gay men and lesbians lack political power. That was true when DOMA was passed and remains true today. *See supra* Part II. Gay men and lesbians are underrepresented in political office; they are viewed negatively by a majority of Americans; their interests are opposed by powerful, well-funded interest groups that use ballot initiatives to try to undo the limited political successes that gay men and lesbians have achieved; and they have limited influence over their political allies. *Id.* Despite this evidence, BLAG asserts that recent events demonstrate that gay men and lesbians have political power. That is incorrect.

1. BLAG argues that the political power of gay men and lesbians is apparent from the fact that many senior government officials, including the President, support marriage for same-sex couples. BLAG Br. 51. Indeed, BLAG goes so far as to argue that "the decision of the President and Attorney General to stop defending and start attacking DOMA itself demonstrates the remarkable political clout of the same-sex marriage movement." *Id.* at 53.

This argument fails because a group's political power cannot be determined based solely on whether it has some allies who are willing to support its

position on discrete issues. *See supra* Part I. That support may have nothing to do with political power, but rather simply be a result of policy agreement. Moreover, the government's decision not to defend DOMA was based in part on a determination that the group lacks political power. *See* Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011).

By focusing only on the actions of the President and Attorney General, BLAG ignores the actions of the many politicians who openly support discrimination against gay men and lesbians. Indeed, politicians often find it beneficial to speak negatively about gay men and lesbians in ways that would not be tolerated if the comments were made about other minority groups. For example, in recent years, elected officials have called gay men and lesbians "the greatest threat to our freedom that we face today,"[8] have referred to the group's lifestyle as "part of Satan,"[9] and have warned that the legal

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[8] *See, e.g.*, Robert Schlesinger, *Medicine Man*, Salon (Sept. 13, 2004), *available at* http://www.salon.com/2004/09/13/coburn_2/ (quoting Senator Tom Coburn: "The gay community has infiltrated the very centers of power in every area across this country, and they wield extreme power. . . . That agenda is the greatest threat to our freedom that we face today. Why do you think we see the rationalization for abortion and multiple sexual partners? That's a gay agenda.").

[9] *See* Elspeth Reeve, *The Depth of Michelle Bachmann's Fear of Gays*, (July 13, 2011), *available at* http://www.nationaljournal.com/dailyfray/the-depth-of-michele-bachmann-39-s-fear-of-gays-20110713.

recognition of marriage for same-sex couples will result in the end of civilization.[10]

2. BLAG notes that "[t]he November 2012 elections witnessed a record number of openly gay candidates for Congress, and the election of the first openly gay U.S. Senator." BLAG Br. 51. But the most recent election did not change the fact that gay men and lesbians remain vastly underrepresented in political office. *See supra* Part II.A. Even counting the six openly gay men or lesbians currently in office, only about 0.1 percent of the more than 12,000 Senators and Representatives elected to Congress in U.S. history have been openly gay or lesbian.[11] Indeed, BLAG's evidence of political power—that, after more than two centuries of having no representation, openly gay men and lesbians account for 1 percent of the U.S. Congress—highlights the group's lack of power.

3. BLAG also notes that, in 2012, "voters in Maine, Maryland, and Washington state passed measures allowing same-sex marriage, and Minnesota voters defeated a proposed traditional marriage amendment to the state constitution." BLAG Br. 52 (internal quotation marks and citation omitted). These victories are not enough to show that gay men and lesbians have political power

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[10] *See* 152 Cong. Rec. 14,799 (2006).

[11] *See* Jennifer E. Manning, Congressional Research Service, Membership of the 112th Congress: A Profile, at 1; Jeremy W. Peters, *Openly Gay, and Openly Welcomed in Congress*, N.Y. TIMES , Jan. 26, 2013, at A1.

because a determination that the group lacks political power "does not rest on the extreme assumption that in no place, at no time, under any circumstances, have gay men and lesbians won any outcome." J.A. 401; *see also supra* Part I. Indeed, even accounting for the occasional victory, gay men and lesbians have less political power than women and racial minorities had when this Court held that laws classifying based on gender or race are subject to heightened scrutiny. J.A. 433.

BLAG's focus on these recent votes is particularly misplaced because it fails to place the votes in the broader context of all ballot initiatives regarding marriage for same-sex couples. Overall, opponents of same-sex marriage have been successful in the vast majority of ballot initiatives, including as recently as last year. J.A. 410-11; s*ee* Campbell Robertson, *Ban on Gay Marriage Passes in North Carolina*, N.Y. TIMES, May 9, 2012, at A15.

BLAG also ignores the remedial nature of these successes. A successful outcome for gay men and lesbians typically is limited to amelioration of prior discrimination. Put another way, these successes often result in nothing more than removing existing discriminatory laws. That gay men and lesbians need positive legislative outcomes to put themselves in the same position as other minority groups is powerful evidence that they lack political power.

4. BLAG also points to the repeal of the military's "Don't Ask, Don't Tell" policy as evidence that gay men and lesbians are politically powerful. BLAG Br. 52. But this success is hardly evidence of political

power, given that it did nothing more than repeal a discriminatory law that forced gay men and lesbians to conceal their sexual orientation. That is especially true given the fierce opposition to the repeal of the policy. Of the votes cast, more than 90 percent of House Republicans and nearly 80 percent of Senate Republicans voted against repealing the law. J.A. 407-08.

Although BLAG discusses the repeal of "Don't Ask, Don't Tell," it ignores the fact that this repeal did not remove the issue from the political agenda. To the contrary, reinstating the policy was part of the Republican Party platform during the 2012 elections.[12] As a result, gay men and lesbians must continue to devote their time, energy, and other resources to protect this political success.

5. BLAG contends that "the Human Rights Campaign, one of the nation's leading gay-rights organizations, has been ranked the second most successful political organization in the entire country by National Journal." BLAG Br. 52 (internal quotation marks and citations omitted). But regardless of whether a particular political organization is considered successful, the relevant issue is whether gay men and lesbians have political power—an issue that requires considering the relative strength of organizations supporting same-sex marriage as compared to those that oppose it.

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[12] *See* Republican Platform 2012, at 42, *available at* http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf (opposing ""social experimentation" in the military).

The evidence shows that, "[c]ompared to the groups that oppose same-sex marriage, [groups advocating for same-sex marriage] are much smaller, poorer, and more politically divided." Rom, *Introduction*, in THE POLITICS OF SAME SEX MARRIAGE at 15; *see also supra* Part II.C.

In sum, BLAG's account of the recent successes of gay men and lesbians overstates that degree to which the group's political power has increased since DOMA was enacted. Both when DOMA was enacted and still today, gay men and lesbians lack the political power to protect their interests in the political process.

B. Existing Laws Have Distorted the Political Process, Making Political Change Harder for Gay Men and Lesbians.

BLAG is incorrect to focus on recent events because this limited focus ignores the burdens imposed by the many existing laws that disadvantage gay men and lesbians. Existing laws that disfavor gay men and lesbians impose a significant obstacle to the group's ability to participate in the political process. Rather than operating on a level playing field, gay men and lesbians must first undo the harmful effects of existing laws before they can even attempt to pass laws benefiting the group.

When existing laws disadvantage gay men and lesbians, the group cannot protect their interests simply by blocking future unfavorable legislation. Instead, they must repeal the existing laws, which is

substantially more difficult than blocking a law from being enacted in the first place. For example, a group needs to gain support from only the president or a majority of one house of Congress to block a federal law from being enacted, whereas repealing a law requires agreement of the president and a majority of both the House and Senate. *See* U.S. Const. Art. I, §7.

Gay men and lesbians face an even greater hurdle in a majority of states. Thirty-one states have removed the issue of marriage for same-sex couples from the normal political process by amending their state constitutions to define marriage as limited to opposite-sex couples.[13] In these states, gay men and lesbians must amend the state constitution—which typically requires a super-majority vote or a ballot initiative—before they could attempt to achieve their goals through the normal legislative process.

This Court has long recognized that the Equal Protection Clause prohibits laws that "distort[] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982). For example, this Court struck down a city ordinance that created a different—and more demanding—process for adopting housing antidiscrimination

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[13] *See* Nat'l Conf. of State Legislatures, *Same-Sex Marriage and Domestic Partnerships on the Ballot*, *available at* http://www.ncsl.org/legislatures-elections/elections/same-sex-marriage-on-the-ballot.aspx.

ordinances. *See Hunter v. Erickson*, 393 U.S. 385, 392-93 (1969). The Court explained that a state "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* (citation omitted).

In *Washington*, the Court considered a state law that permitted school districts to bus students to schools outside of their neighborhoods for almost any reason other than to promote school desegregation. 458 U.S. at 462-63. The Court held that the law violated the Equal Protection Clause because it "worked a major reordering of the State's educational decisionmaking process." *Id.* at 479. The Court explained that, "when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.'" *Id.* at 486 (quoting *Carolene Products*, 304 U.S. at 153 n.4). As a result, the law at issue "implicate[d] the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" 458 U.S. at 486 (quoting *Rodriguez*, 411 U.S. at 28).

In *Romer*, this Court considered a challenge to an amendment to the Colorado Constitution prohibiting any government action to protect persons based on their sexual orientation. 517 U.S. at 631-33. The

Court noted that, because gay men and lesbians can "obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution," they were "forbidden the safeguards that others enjoy or may seek without constraint." *Id.* at 631. In holding that the law violated the Equal Protection Clause, the Court explained that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.[14]

As these cases demonstrate, the Court should consider the way in which existing laws have distorted the political process. In 31 states, gay men and lesbians must first seek to amend the state constitution before they can resort to the normal legislative process to seek the ability to obtain a government marriage licenses. In light of these constitutional limitations, the Court should not ignore existing law by addressing the political power of gay men and lesbians based solely on recent events.

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[14] Because Colorado's attempt to "deem a class of persons a stranger to its laws" could not satisfy even rational basis review, the Court did not decide whether classifications based on sexual orientation are subject to heightened scrutiny. 517 U.S. at 635.

CONCLUSION

The Court should apply heightened scrutiny to DOMA because gay men and lesbians lack political power.

Respectfully submitted,

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