

Nos. 12-15388 & 12-15409

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

KAREN GOLINSKI,

Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; JOHN BERRY,
Director of the United States Office of Personnel Management, in his official
capacity,

Defendants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF
REPRESENTATIVES,

Intervenor-Defendant-Appellant.

KAREN GOLINSKI,

Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; JOHN BERRY,
Director of the United States Office of Personnel Management, in his official
capacity,

Defendants-Appellants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF
REPRESENTATIVES,

Intervenor-Defendant

**On Appeal from the United States District Court
For the Central District of California**

**BRIEF *AMICUS CURIAE* OF
CONCERNED WOMEN FOR AMERICA,**

in support of *Intervenor*

Urging 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 its 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 elected representatives, the people have enacted the Defense of Marriage Act (DOMA). CWA believes that any judicial decision invalidating DOMA overrides the democratic process and poses a significant threat to First Amendment rights.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party’s counsel authored this 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

counsel of record for *Amicus Curiae* Concerned Women for America, The National Legal Foundation, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF THE ARGUMENT

The court below erred when it concluded that gays and lesbians do not wield meaningful political power. The court's error has been demonstrated by events that have occurred in the few short months since its opinion issued: The President, the Vice President, and the nation's oldest and largest civil rights organization, the NAACP, have declared their support for same-sex marriage; Newsweek magazine has declared President Obama our first "gay" president; several analyses of campaign contributions have revealed the role that gay contributors play in presidential politics; and President Obama has declared June to be Lesbian, Gay, Bisexual, and Transgender Pride Month for the fourth year in a row. However, just as recent evidence exists of the court's error, so too long standing evidence exists. Specifically—both in California and across the country—gays and lesbians have achieved direct political, they have important political allies, they can raise significant funds from their own community, from labor unions and from corporate America, they have support from various religious communities, and public opinion is moving in their favor. In short, gays and lesbians do wield meaningful political power.

ARGUMENT

I. RECENT EVENTS DEMONSTRATE THAT GAYS AND LESBIANS WIELD MEANINGFUL POLITICAL POWER.

As part of its level-of-scrutiny analysis, the court below concluded that gays and lesbians “have relatively limited political power to attract the favorable attention of lawmakers.” *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989 (N.D. Cal. 2011). Ironically, in the few short months since the court made this assertion, the President, the Vice-President, and the nation’s oldest and largest civil rights organization, the NAACP, have announced their support for same-sex marriage;¹ *Newsweek* proclaimed on its cover that President Obama is America’s “First Gay President”;² a CNN analysis has shown that President Obama’s gay “bundlers” (high dollar political contributors) recently out-contributed the President’s Hollywood bundlers;³ and President Obama

¹ *President Obama Supports Same-Sex Marriage*, <http://www.whitehouse.gov/blog/2012/05/09/president-obama-supports-same-sex-marriage> (last visited Jun. 8, 2012); *Press Briefing by Press Secretary Jay Carney, 5/7/12*, <http://www.whitehouse.gov/the-press-office/2012/05/07/press-briefing-press-secretary-jay-carney-5712> (last visited Jun. 8, 2012); *NAACP Passes Resolution in Support of Marriage Equality*, <http://www.naacp.org/news/entry/naacp-passes-resolution-in-support-of-marriage-equality> (last visited Jun. 10, 2012).

² The cover can be seen at <http://www.thedailybeast.com/newsweek/2012/05/13/andrew-sullivan-on-barack-obama-s-gay-marriage-evolution.html>.

³ Jen Christensen, *LGBT Donors Back President Obama*, *Big Time*, http://www.cnn.com/2012/06/05/politics/lgbt-obama-donors/index.html?hpt=hp_c1 (last visited Jun, 8, 2012). CNN only counted contributions from openly gay bundlers.

proclaimed June as Lesbian, Gay, Bisexual, and Transgender Pride Month for the fourth year in a row.⁴

Portions of the President's 2012 proclamation are particularly instructive as to why the court below was wrong when it insisted that gays and lesbians are relatively politically powerless:

The lesbian, gay, bisexual, and transgender (LGBT) community has written a proud chapter in this fundamentally American story [of fighting for equality]. From brave men and women who came out and spoke out, to union and faith leaders who rallied for equality, to activists and advocates who challenged unjust laws and marched on Washington, LGBT Americans and allies have achieved what once seemed inconceivable. This month, we reflect on their enduring legacy, celebrate the movement that has made progress possible, and recommit to securing the fullest blessings of freedom for all Americans.⁵

The President also noted recent accomplishments:

Since I took office, my Administration has worked to broaden

They were able to identify that one in sixteen bundlers are gay, but noted that other media outlets have calculated the figure to be one in six or one in five. *Id.* Thus, the real contribution figures for gay bundlers would be much greater.

⁴ <http://www.whitehouse.gov/the-press-office/2012/06/01/presidential-proclamation-lesbian-gay-bisexual-and-transgender-pride-mon> (2012 Proclamation) (last visited Jun. 8, 2012); <http://www.whitehouse.gov/the-press-office/2011/05/31/presidential-proclamation-lesbian-gay-bisexual-and-transgender-pride-mon> (2011 Proclamation) (last visited Jun. 8, 2012); <http://www.whitehouse.gov/the-press-office/presidential-proclamation-lesbian-gay-bisexual-and-transgender-pride-month> (2010 Proclamation) (last visited Jun. 8, 2012); <http://www.whitehouse.gov/the-press-office/presidential-proclamation-lgbt-pride-month> (2009 Proclamation) (last visited Jun. 8, 2012).

⁵ <http://www.whitehouse.gov/the-press-office/2012/06/01/presidential-proclamation-lesbian-gay-bisexual-and-transgender-pride-mon> (2012 Proclamation) (last visited Jun. 8, 2012).

opportunity, advance equality, and level the playing field for LGBT people and communities. We have fought to secure justice for all under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, and we have taken action to end housing discrimination based on sexual orientation and gender identity. We expanded hospital visitation rights for LGBT patients and their loved ones, and under the Affordable Care Act, we ensured that insurance companies will no longer be able to deny coverage to someone just because they are lesbian, gay, bisexual, or transgender. Because we understand that LGBT rights are human rights, we continue to engage with the international community in promoting and protecting the rights of LGBT persons around the world. Because we repealed “Don’t Ask, Don’t Tell,” gay, lesbian, and bisexual Americans can serve their country openly, honestly, and without fear of losing their jobs because of whom they love. And because we must treat others the way we want to be treated, I personally believe in marriage equality for same-sex couples.⁶

Significantly, while the President also noted that he believes that more can be done, his attitude is fundamentally different from that of the court below. His words are very much congratulatory and optimistic:

More remains to be done to ensure every single American is treated equally, regardless of sexual orientation or gender identity. Moving forward, my Administration will continue its work to advance the rights of LGBT Americans. This month, as we reflect on how far we have come and how far we have yet to go, let us recall that the progress we have made is built on the words and deeds of ordinary Americans. Let us pay tribute to those who came before us, and those who continue their work today; and let us rededicate ourselves to a task that is unending--the pursuit of a Nation where all are equal, and all have the full and unfettered opportunity to pursue happiness and live openly and freely.⁷

In contrast, the court below adopted the attitude that the arguments of

⁶ *Id.*

⁷ *Id.*

the Bipartisan Legal Advisory Group (hereinafter “BLAG”) proved too little. The problem is that the court could not see the forest for the trees. By looking at this piece of evidence or that piece of evidence, the court missed the big picture. Or to put it differently, the court failed to realize that the whole is greater than the sum of the parts.

To be clear, Concerned Women for America is opposed to the redefinition of marriage. However, that is not the point. The point is not whether our view or the President’s view ultimately prevails . The point is to determine whether gays and lesbians are politically powerless. Gays and lesbians might ultimately win *or* lose (or under our federal system, they might win some battles and lose others). However, the question is whether their victories are currently “the exception, not the rule.” *Golinski*, 824 F. Supp. 2d at 988. Nor is the question *how many* federal judges are openly homosexual. *Id.* Nor is it *how many* states have passed statutes legalizing same-sex marriage. Rather, the question is—as the court below actually articulated correctly at one point (while answering incorrectly—whether gays and lesbians have “*meaningful* political power,” *Id.* at 989 (emphasis added)).

Again, despite Concerned Women for America’s hope that traditional, one-man-one-woman marriage ultimately attracts the support of a majority

of Americans, the President's view is clearly correct and that of the court below is clearly incorrect: Gays and lesbians do wield meaningful political power. When the Executive branch moves beyond advocating for gay rights in our own country and begins to advocate for these rights internationally—as President Obama highlighted in this year's Gay Rights Proclamation, *supra*—it should be beyond cavil that the political power of gays and lesbians is firmly established.

But despite all of this, the court found additional reasons to reject BLAG's arguments. Specifically, the court rejected BLAG's arguments based on the campaign spending on California's Proposition 8 (*i.e.*, it rejected arguments addressing the political power of gays and lesbians in California); rejected BLAG's argument about the political power of gays and lesbians at the national level (based in part on BLAG's citation of a letter from the Human Rights Campaign); and accepted Golinski's argument based upon the Attorney General's letter which states that gays and lesbians “have [only] limited political power.” *Id.* at 989 (citation omitted).

As for the latter point, in light of the content of the President's four Lesbian, Gay, Bisexual, and Transgender Pride Month Proclamations, this letter must be seen as a mere litigation position. (Portions of the 2012 Proclamation have already been quoted above and the content of each

Proclamation can be found at the sources cited in footnote 4, *supra*.) The President has unequivocally spoken for himself officially on at least these four occasions. He does not believe the gays and lesbians have limited political power.

The remainder of this Brief will demonstrate why the court below erred on the first two points, that is, when it refused to acknowledge the political power of gays and lesbians both in California and at the national level. Specifically, the court below concluded that because Proposition 8 passed, the relevant data about the political muscle wielded by gays and lesbians in California did “not create a question of fact.” *Golinski*, 824 F. Supp. 2d at 988. Similarly, for reasons already noted, the court concluded that gays and lesbians do not wield meaningful political power at the national level. *Id.* at 988-990. Because DOMA is a federal statute, the question of meaningful political power *vel non* at the national level may be more important than the same question at the state level. However, since the court addressed both questions, the Brief will also address both questions.

II. GAYS AND LESBIANS DIRECTLY WIELD MEANINGFUL POLITICAL POWER IN CALIFORNIA AND NATIONALLY.

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

According to Equality California, a leading gay rights organization,

California has quickly moved “from a state with extremely limited legal protections for lesbian, gay, bisexual and transgender (LGBT) individuals [in 1998] to a state with some of the most comprehensive civil rights protections in the nation.” Equality California, *About Equality California*, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4025493> (last visited Jun. 10, 2012). Indeed, Equality California notes that over the last decade, California has passed more than eighty-five laws aimed at protecting the rights of gays and lesbians. *Id.*

Equality California, which helped sponsor California’s sweeping Domestic Partner Rights and Responsibilities Act of 2003, described the bill’s passage as “a tremendous civil rights victory for LGBT people” and “an incredible personal victory for those of us who will now have the kind of legal recognition that we have spent a lifetime dreaming about.” Press Release, Equality Cal., *Governor Davis Makes History with Signature on Domestic Partner Rights & Responsibilities Act of 2003* (Sept. 19, 2003), available at <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4025653&ct=5197843> (last visited Jun 10, 2012).

Even prior to *judicial* involvement with Proposition 8, the *political* process showed *meaningful* political power by gays and lesbians on the marriage issue. (Again, we mention one last time that the measure of political power is *not* which side wins one particular election.) For example, during the district trial in the

Proposition 8 litigation, an anti-Proposition 8 expert admitted that nearly every policy supported by LGBT lobbyists has been enacted in California (other than redefining marriage), including punishment for crimes committed on the basis of the victim's sexual orientation; and prohibitions on sexual-orientation discrimination in public and private employment, business services, education, housing, insurance, medical care, publicly funded programs and activities, public contracting, and a wide array of other contexts. Trial Tr. at 504:23-505:15 (testimony of Chauncey), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292).

This should not be surprising given that in 2002 California became the first state to have an officially-recognized caucus of openly-gay state legislators. *See Cal. Legislative Lesbian, Gay, Bisexual & Transgender (LGBT) Caucus*, http://www.assembly.ca.gov/LGBT_caucus/ (last visited Jun. 10, 2012).

B. The National Political Power of Gays and Lesbians.

Political support for gays and lesbians extends well beyond the passage of laws in California. Currently, at least thirty-one states and the District of Columbia have state laws regarding "hate crimes" based on sexual orientation.

http://www.hrc.org/files/assets/resources/Hate_Crimes_Guide_FINAL.pdf (last visited Jun. 10, 2012). 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. Human Rights Campaign, *The State of the Workplace* (2009), http://www.hrc.org/documents/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf (last visited Jun. 10, 2012) (collecting municipal data as of 2008); Human Rights Campaign, *Statewide Employment Laws & Policies*, http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf last visited Jun. 10, 2012) (collecting data on states as of Jan. 6, 2012). As of the time of the Proposition 8 trial, twenty-two states and the District of Columbia were providing domestic partnership benefits for state employees. Trial Tr. at 2479:20-23 (testimony of Miller), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292) (“according to a survey by the Human Rights Campaign, over 20 states have adopted state employee domestic partnership benefits, at this point”).

Statistics on same-sex marriage, domestic partnerships, and civil unions (like the above statistics) are constantly in a state of flux. However, as of the date of the filing of this Brief, nineteen states offer (or will offer when statutes become effective) same-sex marriage, domestic partnerships or civil unions. National conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (current through June 2012) (last visited Jun. 10, 2012).

This Brief has already documented the President's view on the political power of gays and lesbians. However, much more than that can be said about the national political power of gays and lesbians, stretching back several decades. *See, e.g.,* Howard Fineman, *Marching to the Mainstream*, Newsweek, May 3, 1993 (stating in 1993 that gays were a “powerful and increasingly savvy [political] bloc”); *2010 Human Rights Campaign Annual Report*, available at http://www.hrc.org/files/assets/resources/HRC_Annual_Report_2010.pdf (2010) (last visited Jun. 10, 2010) (describing pro-gay achievements in Congress, including many of the same achievements noted by the President in his Proclamations). Furthermore, the Human Right Campaign, with its million-plus members, is often explicit about its clout on Capitol Hill, as in this example concerning the 110th Congress:

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

Human Rights Campaign, *Congressional Scorecard: Measuring Support for*

Equality in the 110th Congress, http://www.hrc.org/files/documents/Congress_Scorecard-110th.pdf (last visited Jun. 10, 2012).

The 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). But Congressional support for gay and lesbian concerns extends well beyond protection from hate crimes. For example, over the last two decades, Congress has spent tens of billions of dollars on AIDS treatment, research, and prevention. Cong. Res. Serv., *AIDS Funding for Federal Government Programs: FY1981-FY2006* (reporting a dramatic increase in AIDS funding, with \$6 billion in discretionary funds in 2008). And, as mentioned previously, the possible repeal of “Don’t Ask, Don’t Tell” has become a reality—and has been trumpeted by the President.

Two decades ago, this Court held that gays and lesbians were not politically powerless because, even then, they had the ability to attract lawmakers’ attention. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990). Yet most of the legislative achievements described above—and all of the recent California political accomplishments—were enacted after *High Tech Gays*. This vividly illustrates the growing political power of gays and lesbians. The court below was simply incorrect to refuse to acknowledge what is obvious to President Obama and to the Human Right Campaign.

In fact, the last quotation from the Human Right Campaign, above, shows that not only do gays and lesbians themselves wield meaningful political power, but they also have been able to attract significant political allies. They are in no way politically ostracized. And this Brief will turn to that point in the next section.

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

In addition to the previous quotation from the Human Rights Campaign, a second quotation sets the stage for some examples of the type of ally-building politics gay and lesbian advocacy groups are capable of: “We were named—by the well-respected *National Journal*—the single most effective, nonunion 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.” *2007 Human Rights Campaign Annual Report 4*, available at http://www.hrc.org/files/assets/resources/AnnualReport_2007.pdf (last visited Jun. 10, 2012).

A. LGBT Allies in California.

“In California, supporting LGBT rights is a winning formula, as candidates who oppose equality are continually rejected by voters.” Press Release, Equality California, *Pro-Equality Candidates Sweep Seats in the Legislature, Gain Ground in State* (Nov. 8, 2006), <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4025925&ct=5196849>. From city councils, mayors, and

state legislators, to members of the United States Congress, California voters elect candidates who vocally support LGBT rights or who are gay themselves. Trial Tr. at 1723:9-1724:12 (testimony of Segura), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292) (agreeing that a majority of California legislators are rated 100% by LGBT groups and admitting he is unable to identify any evidence that these 100% rated legislators in CA are not LGBT allies).

The California Democratic Party is a staunch ally of gays and lesbians. Its 2012 Platform retains language from earlier platforms, which states that the party “[s]upport[s] nondiscrimination and equality for Lesbian, Gay, Bisexual, and Transgender people in all aspects of their lives. We support the LGBT Community in its quest for the right to legal marriage” Cal. Democratic Party, *2012 State Platform, Equality of Opportunity*, available at <http://www.cadem.org/resources?id=0069> (last visited Jun. 10, 2012). And in 2009 the Assembly Democratic Caucus voted *unanimously* to support John A. Pérez, an openly homosexual member, in his bid for Speaker of the Assembly, a position he still holds today. See, *Cal. Legislative Lesbian, Gay, Bisexual & Transgender (LGBT) Caucus*, http://www.assembly.ca.gov/LGBT_caucus/.

B. LGBT Allies Across the Nation.

The LGBT movement also has powerful federal allies. The national Democratic Party vigorously supports gay and lesbian rights. Although its current

platform (*i.e.*, the 2008 Platform) will soon be replaced, it is informative both for what it supported and for what has been accomplished. *See* Platform Standing Comm., 2008 Democratic Nat'l Convention Comm., *Renewing America's Promise* 36, 51-52 (2008), *available at* http://www.democrats.org/about/party_platform) (last visited Jun. 10, 2012) (“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.”).

One these national allies deliver political punch for their gay and lesbian constituents. As just one example, every Democratic United States Senator serving in the 111th Congress received a score of between 75% and 100% on the Human Rights Campaign’s *Congressional Scorecard*. *See*, Human Rights Campaign, *Congressional Scorecard: Measuring Support for Equality in the 110th Congress*, http://www.hrc.org/files/assets/resources/111thCongressional_Scorecard.pdf (last visited Jun. 10, 2012). In all, 266 Democratic and Republican Senators and Representatives voted in the 75% to 100% range on the Human Rights Campaign’s

issues.

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

Another important aspect of meaningful political power is the financial picture. This Brief has already President Obama's gay bundlers. But there is much more to the picture than that.

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). This truism is easily demonstrated by looking at the money the Human Rights Campaign has spent to marshal the political clout discussed in previous sections of this Brief—money that they were able to attract from donors all across the country. For example the Campaign and its Foundation raised \$45.7 million in 2009 and \$43.9 in 2008. *2009 Human Rights Campaign Annual Report* 14, available at http://www.hrc.org/files/assets/resources/AnnualReport_2009.pdf (last visited Jun. 10, 2010) (showing figures for both years).

And despite the view of the court below, 824 F. Supp. 2d at 988, the money raised in the Proposition 8 campaign *is* an indication of *meaningful* political power. The No on 8 campaign raised \$43 million and outspent supporters of traditional

marriage by \$3 million. Trial Tr. at 504:23-505:15 (testimony of Segura), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292) (stating that the No on 8 campaign raised \$43 million and the Yes on 8 campaign raised only \$40 million); see California Sec’y of State webpage, *Campaign Finance: No on 8, Equality for All*, <http://calaccess.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1259396&session=2007&view=general> (last visited Jun. 10, 2012) (No on 8 campaign reporting \$43 million in funding); Cal. Sec’y of State webpage, *Campaign Finance: ProtectMarriage.com—Yes on 8, A Project of California Renewal*, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1302592&session=2007> (last visited Jun. 10, 2012) (Yes on 8 campaign reporting \$40 million in funding).

Although the No on 8 campaign’s heavier spending was not rewarded with sufficient votes to prevail, it cannot be said that opponents of Proposition 8 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> (last visited Jun. 10, 2012). In that report, NPR described an organized effort to finance candidates who support gay and lesbian causes. *Id.*

Similarly, a 2008 Time Magazine article discussed a group of gay donors

known as “the Cabinet.” “Among gay activists, the Cabinet is revered as a kind of secret gay Super Friends, a homosexual justice league that can quietly swoop in wherever anti-gay candidates are threatening and finance victories for the good guys.” John Cloud, *The Gay Mafia That’s Redefining Liberal Politics*, Time, Oct. 31, 2008, <http://www.time.com/time/politics/article/0,8599,1854884-1,00.html> (last visited Jun. 10, 2012) (describing the “intriguing development [in the 2008 elections]: anti-gay conservatives had suffered considerably . . .”).

And, as has been noted, this influence extends to presidential politics.

B. Influential labor unions support homosexual causes.

But political power is not *simply* a matter of dollars and cents. It is also a matter of leveraging influence. In this regard, many of the most influential unions actively support the gay and lesbian community.

For example, 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/HE/votingfocus08.pdf> (last visited Jun. 10, 2012). NEA support of LGBT causes influences its own 3.2 million members, as well lending its political muscle in Washington. The California Teachers Association likewise supports gays and lesbians; it contributed over \$1.3 million to oppose Proposition 8. *Proposition 8 Contributions*,

<http://www.sfgate.com/webdb/prop8/> (enter “contributor name” and add the results) (last visited Jun. 10, 2010).

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/members/conventions/resolutions-and-amendments/2004/resolutions/equal-rights-for-gay-and-lesbian-citizens> (last visited Jun. 10, 2010). With this help, gays and lesbians are not outsiders to politics. Rather, gays and lesbians have some of the most powerful grassroots and lobbying organizations in the country working as their allies.

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.

“No on 8” campaign contributors included many Fortune 500 corporations and their founders: PG&E (\$250,000), Apple (\$100,000), Lucas Films (\$50,000, plus another \$50,000 from George Lucas), Levi Strauss (\$25,000), Williamson Capital (\$570,000), Google founders Sergey Brin and Larry Page (\$140,000), David Geffen and Jeffrey Katzenberg of Dreamworks Studios (\$125,000), and Bruce Bastian, co-founder of WordPerfect software (\$1,000,000). *Proposition 8 Contributions, supra*.

Corporate America also funds broader gay and lesbian causes. The Human Rights Campaign, is supported by numerous corporate benefactors: American Airlines, Bank of America, Citibank, Deloitte LLP, Ernst & Young LLP, Lexus, Diago, Coca Cola, Microsoft, Mitchell Gold & Bob Williams, Morgan Stanley, MetLife, Nationwide Insurance, Prudential, Beaulieu Vineyard, British Petroleum, Caesars Entertainment, Chevron, Harrah’s, MGM Resorts International, Nike, Shell, Chase, Cox Enterprises, Cunard, PWC, Dell, Goldman Sachs, Google, IBM, Macy’s, Orbitz, Replacements, Ltd., Starbucks, TD Bank, and Tylenol PM. *National Corporate Partners*, <http://www.hrc.org/the-hrc-story/corporate-partners> (click on levels of partnerships) (last visited Jun. 10, 2012).

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 twenty-nine million dollar annual budget.⁸ Similarly, The Gay, Lesbian, and Straight Education Network (GLSEN) is supported by America's most recognized corporate names.⁹ 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.¹⁰

But while corporate funding for LGBT causes is generous, it is not the full

⁸ These include The Keith Haring Foundation, Arcus Foundation, Bristol-Myers Squibb, Delta, Jeffrey Fashion Cares, Aids Fund, Merck, Bloomberg, TD Bank, Bank of America Wells Fargo, and Aetna among many others. Gay Men's Health Clinic, *2011 Annual Report*, available at [http://gmhc.org/files/editor/file/a_ar2011\(1\).pdf](http://gmhc.org/files/editor/file/a_ar2011(1).pdf) (last visited Jun. 10, 2012).

⁹ In addition to many of those mentioned for the Human Rights Campaign and GMHC, GLSEN sponsors include ABC Television, Goldman Sachs, UBS Investment Bank, Deutsche Bank, Eastman Kodak Co., MTV Networks, Pepsi, Sony Pictures Entertainment, Inc., Verizon Communications, and Warner Bros. Entertainment among very many others. See <http://www.glsen.org/cgi-bin/iowa/all/library/record/2582.html> (last visited Jun. 10, 2012).

¹⁰ Lambda Legal, *About Us*, <http://www.lambdalegal.org/about-us> (last visited Jun. 10, 2012). Law firms include Baker & McKenzie, Covington & Burling LLP, Gibson Dunn, Jenner & Block, Jones Day, Kirkland & Ellis LLP, Kramer Levin, Latham & Watkins, Mayer Brown, McDermott Will & Emery, O'Melveny & Myers LLP, Perkins Coie LLP, ReedSmith, Sheppard Mullin, Sidley Austin LLP, Skadden, Arps, Slate, Meagher & Flom LLP, and Wachtell, Lipton, Rosen & Katz. Lambda Legal, *National Sponsors*, <http://www.lambdalegal.org/about-us/sponsors> (last visited Jun. 10, 2012).

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 nondiscrimination legislation. *See, e.g.*, Equality California, *Sponsors*, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4026491> (last visited Jun. 10, 2012) (listing many major corporations supporting Equality California, including AT&T, Southwest Airlines, and State Farm).

Corporations also influence public policy by implementing their own internal nondiscrimination policies, thereby building consensus on what “ought” to be. According to the Human Rights Campaign’s *Corporate Equality Index 2011*, ninety-ninety percent of employers surveyed had policies prohibiting discrimination on the basis of sexual orientation. The employers are drawn from the ranks of the Fortune 1000 and the American Layer’s top 200 law firms. *Corporate Equality Index: A Report Card on Lesbian, Gay, Bisexual and Transgender Equality in Corporate America 2011* at 23, available at http://www.hrc.org/files/assets/resources/CorporateEqualityIndex_2011.pdf (last visited Jun. 10, 2012).

In sum, gays and lesbians wield considerable political power with the

support of both employers and employee unions.

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

Contributors to the “No on 8” campaign included a virtual Who’s Who of the Hollywood elite. Although Hollywood influences America’s thinking and actively supports gay and lesbians with numerous positive portrayals of LGBT characters,¹¹ America’s news media renders even more direct and concrete support for the gay and lesbian community. Two examples follow: First, the *2005 Human Rights Campaign Annual Report* stated that its organization alone has at least one quote in a newspaper each and every day. http://www.hrc.org/files/assets/resources/AnnualReport_2005.pdf (last visited Jun. 10, 2012). Second, 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. Trial Tr. at 2456:25-2457:17, 2442:21-24 (testimony of

¹¹ “For 25 years, GLAAD has worked with news, entertainment and social media to . . . keep equality at the forefront of America’s cultural conversation.” *About GLAAD*, Gay & Lesbian Alliance Against Defamation (“GLAAD”), <http://www.glaad.org/about-glaad-0> (last visited Jun. 10, 2012). Numerous people have speculated that it was no coincidence that the Academy Award-winning film “Milk” was released in the critical week before the November 2008 election, providing 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> (last visited Dec. 7, 2011).

Miller), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292) (“I looked at the editorial endorsements of the 23 largest newspapers in California by circulation. And of those 23, 21 of the 23 endorsed a No On 8 position. Two of the—the remaining two out of the 23 did not take a position one way or the other [N]ational newspapers like the New York Times have been important allies of gays and lesbians in the LGBT rights movement.”).

VI. 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. Pew Forum on Religion & Pub. Life, *Religious Groups’ Official Positions on Same-Sex Marriage*, July 27, 2010, available at <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx> (last visited on Jun. 10, 2010).

A sizable numbers of religious organizations supported No on 8. 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), available at <http://www.thetaskforce>

.org/reports_and_research/time_to_build_up) (last visited on Jun. 10, 2010) (admitting groundbreaking support for same sex “marriage” by people of faith and identifying plans for outreach). In its November 2008 newsletter, the Unitarian Universalist Association urged congregants to give “time, attention, and money to protect marriage equality by joining the No on Prop. 8 campaign! . . . There is still time to spend a few hours on a phone bank, put up a yard sign, or talk to friends and coworkers.” Roger Jones, *Thanks to Friends of Fairness*, The Unigram, Nov. 2008, at 4, <http://uuss.org/Unigram/Unigram2008-11.pdf>; *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.”).

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. Duke Helfand, *Pastors Risk Careers Over Gay Marriage*, L.A. Times, July 17, 2008, *available at*

<http://articles.latimes.com/2008/jul/17/local/me-methodist17> (last visited Jun. 10, 2012); Press Release, United Methodist Church, *Faith Leaders from Across State to Speak Out Against Proposition 8* (Oct. 8, 2008) (“United Methodist bishops in California went on record in support of civil rights for same-sex couples.”).

Similar California-centered religious support for LGBT “marriages” exists within other religious groups lacking national support. Duke Helfand, *Board of Rabbis Opposes California Anti-Gay-Marriage Initiative*, L.A. Now, Sept. 26, 2008.

Even among the religious organizations that *officially* support traditionally marriage, many individual *members* support same-sex marriage. Recent data showed that 52% of Catholics and 34% of Protestants support same-sex “marriage,” despite opposition by their respective organized religions. *Religion and Attitudes Toward Same-Sex Marriage* (Feb. 7, 2012), <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religion-and-Attitudes-Toward-Same-Sex-Marriage.aspx> (last visited Jun 10, 2012). Equality California, a proponent of same-sex marriage, acknowledged the valuable support of such people, 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.” Equality California, *Winning Back Marriage Equality in California: Analysis and Plan 22* (2009), <http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb->

08c4b0246a88%7D/EQCA-WINNING_BACK_MARRIAGE_EQUALITY.PDF.

VII. PUBLIC OPINION IS TRENDING IN FAVOR OF GAYS AND LESBIANS, INCLUDING ON THE MARRIAGE ISSUE.

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 79 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 150-51 ("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").

This dramatic change is especially prevalent in the younger generations: "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 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.”).

This shift was confirmed just last month. According to a CNN/ORC International survey, 54% of Americans think same-sex marriages should be permitted and 60% of Americans know of a close friend or family member who is gay. Both numbers have increased by approximately 10 percentage points in two years. *CNN/ORC Poll*, <http://i2.cdn.turner.com/cnn/2012/images/06/06/rel5e.pdf> at 2 (last visited Jun. 10, 2012). There is no reason to believe that the political power of gays and lesbians will be transient.

CONCLUSION

In light of all of the above, the court below clearly erred when it concluded that gays and lesbians do not enjoy meaningful political power. For this reason

and for other reasons state by BLAG, the judgment of the court below should be reversed.

Respectfully submitted,
this 11th day of June, 2012.

s/ Steven W. Fitschen

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 6,420 words as calculated by Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2012, I have electronically filed the foregoing Brief *Amicus Curiae* of Concerned Women for America in the case of *Golinski v. United States Office of Personnel Management, et al.*, Nos. 12-15388 & 12-15409, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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