

**No. 10-16696**

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

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**KRISTIN PERRY, et al.,**  
*Plaintiffs-Appellees,*

v.

**ARNOLD SCHWARZENEGGER, et al.,**  
*Defendants,*

and

**DENNIS HOLLINGSWORTH, et al.,**  
*Defendant-Intervenors-Appellants.*

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

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**BRIEF AMICUS CURIAE OF  
CONCERNED WOMEN OF AMERICA,**  
in support of Defendant-Intervenors-Appellants  
Urging Reversal

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Holly L. Carmichael  
Counsel of Record for *Amicus Curiae*  
5096 Selinda Way  
Los Gatos, California 95032  
Phone: (408) 838-1212  
Email: holly.l.carmichael@gmail.com

## **FRAP RULE 26.1 DISCLOSURE STATEMENT**

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

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## **INTEREST OF *AMICUS CURIAE***

Concerned Women for America (“CWA”) is the largest public policy women’s organization in the United States, with 500,000 members from all 50 states. Through our grassroots organization, CWA encourages policies that strengthen families and advocates the traditional virtues that are central to America’s cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—average, middle-class Americans whose views are not represented by the powerful or the elite. CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment. Through California’s democratic initiative process, many of our members and like-minded citizens supported Proposition 8. CWA believes that that decision of the court below, however, poses a significant threat to those rights.

This Brief is filed pursuant to consent of all parties.

## **SUMMARY OF ARGUMENT**

This Brief examines the substantial political power of the LGBT community, as evidenced by its current political power and considerable political resources. Current LGBT political power is demonstrated in local, Californian, and national

legislative success as well as powerful elected officials who vigorously support LGBT causes. Future political power is ensured, due to the impressive political assets amassed by the LGBT community, including powerful allies, access to lawmakers, financial resources, and deep ties to influential mainstream media.

### **ARGUMENT**

The court below erred in asserting that Plaintiffs-Appellees, as members of a larger class of gays and lesbians, could be characterized as a “suspect class” meriting heightened scrutiny and protection under the Equal Protection Clause of the Fourteenth Amendment. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995-98 (N.D. Cal. 2010). This Court should refuse to do so because, contrary to the statements of the court below, the evidence presented at trial shows that gays and lesbians are *not* the type of minority strict scrutiny was designed to protect. In *City of Cleburne, v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985), the Supreme Court made it clear that only groups lacking the ability to “attract the attention of lawmakers” are entitled to heightened scrutiny. Gays and lesbians plainly have the ability to attract the attention of lawmakers, and thus are *not* politically powerless. Accordingly, they do not merit the extraordinary exemption from the democratic process that the Plaintiffs-Appellees demand.

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

**A. *Gay and Lesbian political power in California has reached unprecedented heights in just 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>. Indeed, Equality California notes that over the last decade, California has passed more than sixty laws aimed at protecting the rights of gays and lesbians. *Id.* Plaintiffs-Appellees’ own expert, political science professor Gary Segura, agrees California’s legal protections for gays and lesbians exceed those of any other state. Trial Tr. 1665:10-12 (Segura) (unable to identify any state with more comprehensive legal protections for gays than California); Trial Tr. 1763:23-1764:2 (Segura) (“Q: And there are more civil rights protections in California for gays and lesbians than in any other state, correct? A: That would appear to be the case.”).

Equality California sponsored California’s sweeping Domestic Partner Rights and Responsibilities Act of 2003, which provides domestic partners with all of the same rights and obligations that California grants to spouses. 2003 Cal.

Adv. Legis. Serv. 421 (Deering); Trial Tr. 468:6-9 (Chauncey) (acknowledging California's sweeping domestic partnership laws). Equality California 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 1 (Sept. 19, 2003).

Since the passage of California's 2003 domestic partnership rights bill, political momentum for California's LGBT population has continued to build. Gay and lesbian lobbying efforts in California have been extremely successful. Even Plaintiffs-Appellees' own experts admit that nearly every policy supported by LGBT lobbyists has been enacted in California, other than redefining marriage to include same-sex couples. For example: punishment for crimes committed on the basis of the victim's sexual orientation, 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. 504:23-505:15 (Chauncey). Equality California assessed the 2009 California Legislative session as "one of Equality California's best yet in Sacramento. We passed a record 11 pieces of Equality California-sponsored legislation that will improve the lives of



LGBT Californians.” Equality California, *2009 Legislative Scorecard*, 2, [http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/EQCA\\_LEG\\_SCORECARD\\_2009.PDF](http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/EQCA_LEG_SCORECARD_2009.PDF).

***B. The National Political Power of Gays and Lesbians.***

Political support for homosexuals and lesbians extends well beyond the passage of laws in California. As of June 1, 2009, thirty-one states and the District of Columbia had state laws regarding “hate crimes” based on sexual orientation. Human Rights Campaign (“HRC”), *State Hate Crimes Laws*, [http://www.hrc.org/documents/hate\\_crime\\_laws.pdf](http://www.hrc.org/documents/hate_crime_laws.pdf); Trial Tr. 2478:8-14 (Miller) (testifying that thirty states have hate crime laws based on sexual orientation). 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](http://www.hrc.org/documents/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf) (collecting municipal data as of 2008); Human Rights Campaign, *Statewide Employment Laws & Policies*, [http://www.hrc.org/documents/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf) (collecting data on states as of February 17, 2010); Trial Tr. 2478:15-2479:19 (Miller) (commenting on widespread state employment discrimination legislation benefiting non-heterosexually oriented workers). Twenty-two states and the District of Columbia provide domestic

partnership benefits for state employees. Trial Tr. 2479:20-23 (Miller) (“according to a survey by the Human Rights Campaign, over 20 states have adopted state employee domestic partnership benefits, at this point”). And in addition to California’s domestic partnership laws, gays and lesbians have succeeded in enacting laws providing for civil unions or domestic partnerships in nine other states and the District of Columbia. Colorado Designated Beneficiary Agreement Act, 2009 Colo. Sess. Laws. 428; D.C. Code § 7-201 *et seq.* (2009); Reciprocal Beneficiaries Act, 1997 Haw. Sess. Laws 1211; 2008 Md. Laws 4597; Me. Rev. Stat. Ann. tit. 22 § 2710 (2009); Nevada Domestic Partnership Act, 2009 Nev. Stat. §§ 2183-2187; N.J. Rev. Stat. § 37:1-31 (2010); Or. Rev. Stat. § 106.340 (2009); Wash. Rev. Code § 26.60.030 (2009); Wis. Stat. § 770.01 *et seq.* (2009).

On the national front, the political influence of the gay and lesbian community is also impressive. *See, e.g.,* Howard Fineman, *Marching to the Mainstream*, Newsweek, May 3, 1993 (stating in 1993 that gays are a “powerful and increasingly savvy [political] bloc”); Human Rights Campaign Annual Report (2009) (describing recent legislative achievements); Trial Tr. 2482:4–2483:14 (Miller) (describing pro-gay achievements in Congress, such as the Matthew Shepard Hate Crimes Act, Employment Discrimination Act, repeal of Don’t Ask Don’t Tell, and the Domestic Partnership and Benefits and Obligations Act of 2009). Joe Solmonese, President of the Human Rights Campaign, a 750,000

member “civil rights organization working to achieve equality for lesbian, gay, bisexual and transgender Americans”, described the actions of our most recent Congress in the following way:

The lesbian, gay, bisexual and transgender community has made unprecedented progress in Congress over this two-year session. For the first time, the U.S. Senate and U.S. House of Representatives 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/documents/Congress\\_Scorecard-110th.pdf](http://www.hrc.org/documents/Congress_Scorecard-110th.pdf).

The recently-passed federal “hate crimes” legislation imposes a minimum sentence on perpetrators of violent crimes “involving actual or perceived . . . sexual orientation [or] gender identity.” 18 U.S.C. § 249(2) (2006). But Congressional support for gay and lesbian concerns extends well beyond protection from hate crimes. Trial Tr. 2482:4–2483:14 (Miller) (describing pro-gay achievements in Congress). For instance, 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 in recent months—despite opposition from the American public and the military itself—Congress has repeatedly considered a controversial repeal of the military’s “Don’t Ask, Don’t Tell” policy (DADT). Ed O’Keefe & Shailagh Murray, *Senate Fails in Attempt to Repeal Don’t Ask Don’t Tell*, Wash. Post, Sept. 22, 2010 (reporting that lifting the Don’t Ask Don’t Tell policy is against the wishes of many military leaders and public interest groups); *see also* David M. Herszenhorn, *House Passes Bill with ‘Don’t Tell’ Repeal*, N.Y. Times, May 28, 2010 at A15 (reporting on the passage of a bill in the House repealing Don’t Ask Don’t Tell and noting Senate deliberations on the same topic). In May 2010, U.S. House Speaker Nancy Pelosi, a vocal supporter of the LGBT political agenda, obtained the necessary votes to attach a repeal of DADT to the 2011 defense authorization bill. *Id.*

Gay and Lesbian political power even extends to the White House.

President Obama and his administration have taken significant actions on behalf of gays and lesbians, including the following:

- supporting the Hate Crimes Bill;
- a presidential directive to end discrimination on the basis of gender identity, Trial Tr. 1691:3-17 (Segura);

- appointing numerous openly gay and lesbian people to his administration, Trial Tr. 2483:15–2484:11 (Miller);
- proclaiming a gay pride month;
- eliminating the HIV travel ban, Human Rights Campaign Annual Report 5 (2009);
- endorsing the UN statement calling for decriminalization of homosexuality, *id.*;
- issuing a June 2009 a memorandum to all federal executive departments and agencies, ordering that same-sex partners of federal workers receive some federal benefits, Memorandum from Pres. Barack Obama to the Heads of Exec. Dep’t & Agencies (June 17, 2009); and
- further expanding domestic partner benefits in June 2010, Ed O’Keefe, *Same-Sex Partners of Federal Workers Can Start Applying for Benefits Next Month*, Wash. Post, June 2, 2010 (reporting on June 1, 2010 announcement that that the “same-sex partners of gay and lesbian federal workers” could begin applying for long-term health insurance).

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. In essence, Plaintiffs-Appellees complain that despite their ever-increasing political power and success in winning all but one political fight in California, the LGBT movement is politically powerless. But that argument is nothing more than a judicial request for a political trump card. If granted, every political loss would entitle them to a judicial win, despite their actual status as a political juggernaut.<sup>1</sup>

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<sup>1</sup> Admittedly, LGBT supporters have, at times, eroded their own political power through the use of counterproductive tactics. Barbara Giasone, *Anti-Prop. 8 Graffiti Painted in Fullerton*, Orange County Reg., Oct. 22, 2008 (“Vandals used gold spray paint to scrawl anti-Proposition 8 messages” on downtown buildings); Mark Gomez, *Vandals Hit Prop. 8 Supporters*, San Jose Mercury News, Oct. 28, 2008 (“No on 8” spray painted on garage with Yes on 8 signs); Gale Holland, *L.A. College is Sued Over Speech on Gay Marriage; Student Opposed to the Unions Says Teacher Reacted Improperly*, L.A. Times, Feb. 16, 2009, at B3 (College teacher calls student a “fascist bastard” for supporting Prop. 8 and tells him to “ask God what your grade is”); Steve Lopez, *A Life Thrown in Turmoil by \$100 Donation for Prop 8*, L.A. Times, Dec. 14, 2008 (police have “to quell an angry mob” outside a boycotted restaurant of a Prop. 8 supporter); Thomas M. Messner, Heritage Found., *The Price of Prop. 8* (2009) [www.heritage.org/Research/Family/bg2328.cfm](http://www.heritage.org/Research/Family/bg2328.cfm) (“[T]he naked animus manifested against people and groups that supported Prop 8 raises serious questions that should concern anyone interested in promoting civil society, democratic processes, and reasoned discourse on important matters of public policy, such as marriage.”); The O’Reilly Factor, *Gay Activist Attacks Female Christian Missionary in SF* (Fox News television broadcast) (interviewing a girl assaulted with her own Bible – a hate crime against Christians); ProtectMarriage.com, *Final YouTube Prop 8 Video*, YouTube.com, <http://www.youtube.com/VoteYesonProp8#p/u/1/yBrFHC1aoWI> (outlining the vandalism, harsh words, and harassment Prop. 8 supporters faced); *Scuffles Over Gay-Marriage Ballot Measure Lead to Injuries*, San Diego 6 NEWS, Nov. 4, 2009, at 1 (people stealing Yes on 8 signs and attacking a jogger who confronted them); Alison Stateman, *What Happens if You’re On Gay Rights’ ‘Enemies List’*, Time,

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

One key determinant of political power is a group's allies. Gays and lesbians have powerful political friends both in California and nationally. The leading gay rights group, The Human Rights Campaign, highlights this. "We were named—by the well-respected *National Journal*—the single most effective, non-union progressive organization working in the 2006 midterm elections. We played a decisive role in electing fair-minded majorities to the U.S. House and Senate, and to legislatures from Oregon to New Hampshire." Human Rights Campaign Annual Report 4 (2007).

### A. *LGBT Allies in California.*

"In California, supporting LGBT rights is a winning formula, as candidates

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Nov. 15, 2008 (reporting racial epithets used against African Americans after Prop. 8 passed); Brad Stone, *Disclosure, Magnified On the Web*, N.Y. Times, Feb. 8, 2009 ("For the backers of Proposition 8 . . . victory has been soured by the ugly specter of intimidation. Some donors to groups supporting the measure have received death threats and envelopes containing a powdery white substance, and their businesses have been boycotted."); *SUV Denouncing Family's Support for Prop 8 is Moved*, S.J. Mercury News, Oct. 23, 2008 (reporting incident where, after family posted a "Yes on 8" banner on their garage, a SUV painted with slogans calling the family "bigots" and "haters" was parked in front of their house); Trial Tr. 1306:11-15, 20-22 (Sanders) (taking a class of first-grade students to a same-sex wedding may have hurt No on 8); *id.* at 1309:22-1310:1; *id.* at 1310:2-5; Trial Tr. 1810:25-1811:15 (Segura). The Plaintiffs-Appellees might claim that these appalling acts diminished LGBT political power. *E.g.*, Trial Tr. 1713:1-1719:9 (Segura) (gays appeal to norm of fairness and equality – but "*the moment* [a group] engages in violence, much of that appeal dissipates"). But individual choices to resort to threats and violence have not negated gays' tremendous ongoing legislative success.

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 U.S. Congress, California voters elect candidates who vocally support LGBT rights or who are gay themselves. Trial Tr. 1723:9-1724:12 (Segura) (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 2008 Platform includes a pledge that California Democrats will fight for “[s]upport [for] 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, *2008 State Platform, Equality of Opportunity*, [http://www.cadem.org/site/c.jrLZK2PyHmF/b.1193709/k.7470/Equality\\_of\\_Opportunity.htm](http://www.cadem.org/site/c.jrLZK2PyHmF/b.1193709/k.7470/Equality_of_Opportunity.htm).

But gays and lesbians in California do not solely rely on their heterosexual allies. California was the first state to create an officially-recognized caucus of openly-gay state legislators. While California’s LGBT Caucus has had as many as eight members, today’s membership includes the current and very influential chair



of the Assembly Democratic Caucus, John A. Perez, as well as Senators Mark Leno and Christine Kehoe and Assembly member Tom Ammiano. *See* Cal. Legislative Lesbian, Gay, Bisexual & Transgender (LGBT) Caucus, [http://www.assembly.ca.gov/LGBT\\_caucus/](http://www.assembly.ca.gov/LGBT_caucus/).

In addition, many influential positions within California's elected leadership are occupied by vocal proponents of Plaintiffs-Appellees' political agenda. *See, e.g.,* Letter from Debra Bowen, Cal. Sec'y of State, *2007 Pride Celebrations* (California Secretary of State supports gay rights); California Ripple Effect, *Jerry Brown Supports Federal Case Against Proposition 8*, June 12, 2009 (Equality California is "extremely appreciative of the Attorney General's continued leadership in opposition to Proposition 8"); Lockyer for Treasurer, *Leading LGBT Groups Support Lockyer in Treasurer's Race*, <http://www.lockyer2010.com> (California Treasurer receives 100 percent rating on his Equality California questionnaire); Press Release, Nat'l Gay & Lesbian Task Force, *Task Force Honors California Statewide Leaders for their Contributions to LGBT Equality* (Nov. 6, 2009) (describing California's Controller as a "steadfast ally of LGBT people"); Press Release, Office of the Lt. Gov., *Cal. Lieutenant Governor John Garamendi's Statement on the California Supreme Court's Ruling on Proposition 8* (May 26, 2009) (lamenting the validity of Prop. 8).

***B. LGBT Allies Across the Nation.***

The LGBT movement also has powerful federal allies. The national Democratic party vigorously supports gay and lesbian rights. *See Platform Standing Comm., 2008 Democratic Nat'l Convention Comm., Renewing America's Promise* 36, 51-52 (2008) (“We support the repeal of ‘Don’t Ask Don’t Tell’ and the implementation of policies to allow qualified men and women to serve openly regardless of sexual orientation...Democrats will fight to end discrimination based on ... sexual orientation ... in every corner of our country...We support the full inclusion of all families, including same-sex couples, in the life of our nation, and support equal responsibility, benefits, and protections. We will enact a comprehensive bipartisan employment non-discrimination act. We oppose the Defense of Marriage Act and all attempts to use this issue to divide us.”). The LGBT movement has powerful allies in Washington, D.C., including Senators Boxer and Feinstein and House Speaker Pelosi. Representative Barney Frank, an openly gay member of Congress, is Chairman of the House Banking Committee. Majority Leader Reid brought a repeal of the Don’t Ask, Don’t Tell legislation to the floor of the Senate. And President Obama himself has repeatedly championed the rights of gays and lesbians.

These allies deliver political punch for their gay and lesbian constituents. Senator Barbara Boxer, House Speaker Nancy Pelosi, and twenty-four other

California Congressional members received top scores from the Human Rights Campaign. Human Rights Campaign, *Congressional Scorecard: Measuring Support for Equality in the 110th Congress*, 6, 15-16, [http://www.hrc.org/documents/Congress\\_Scorecard-110th.pdf](http://www.hrc.org/documents/Congress_Scorecard-110th.pdf) (scoring 41 Senators at 80% or above and 161 House members 80% or higher). Senator Feinstein is also a strong advocate for her LGBT constituents—in fact, she starred in television ads for the “No on 8” campaign. *Senator Feinstein: No on 8* (No on 8 Campaign Commercial 2008), <http://www.youtube.com/watch?v=U7LdC1RxvZg>. *See also* Trial Tr. 1747:6-8 (Segura) (Feinstein opposed Proposition 8). This impressive array of allies verifies that gays possess significant political power on a local and national level.

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

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

#### ***A. Gay and lesbian political interests have demonstrated deep pockets.***

“Few questions are as important to an understanding of American democracy as the relationship between economic power and political influence.” Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 *Am. Pol. Sci. Rev.* 1026 (1977). In reality, money is the lifeblood of modern-day politics. Trial Tr. 1676:2-

6 (Segura) (stating that money is a source of political power); Trial Tr. 2437:19–2438:15 (Miller) (“money is a critical asset for achieving political power” and “allows a group to be heard”). That lifeblood flows richly for the gay and lesbian community, which has mobilized tremendous financial support from many sources. Prentice Report to Evangelical Christian Credit Union (in campaigns outside of California to include the traditional definition of marriage in other state constitutions, opponents of traditional marriage outspent supporters by three or four to one, on average); *see also* Human Rights Campaign Annual Report 14 (2009) (HRC raised \$46.9 million in 2009); Human Rights Campaign Annual Report (2008) (HRC raised \$45.9 million in 2008); Human Rights Campaign Annual Report 28 (2007) (HRC raised \$41 million in 2007); Human Rights Campaign Annual Report (2000) (HRC raised \$16 million in 2000).

Financial support for gay and lesbian interests was highly visible in the costly Proposition 8 campaign. The No on 8 campaign raised \$43 million and outspent supporters of traditional marriage by \$3 million. Trial Tr. 1677:11-20 (Segura) (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://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1259396&session=2007&view=general> (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> (Yes on 8 campaign reporting \$40 million in funding).

Although the No on 8 campaign's excess 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>. In that report, NPR described an organized effort to finance candidates who support gay and lesbian causes. *Id.*

Likewise, a 2008 Time Magazine article revealed the scope and organization of the homosexual political movement, describing “the Cabinet” of wealthy homosexual men. “Among gay activists, the Cabinet is revered as a kind of secret gay Super Friends, a homosexual justice league that can quietly swoop in wherever anti-gay candidates are threatening and finance victories for the good guys.” *Id.* See also John Cloud, *The Gay Mafia That's Redefining Liberal Politics*, Time, Oct. 31, 2008, <http://www.time.com/time/politics/article/0,8599,1854884-1,00.html> (describing the “intriguing development [across America in the 2008 elections]:

anti-gay conservatives had suffered considerably. . . .”).

In the political realm, money not only wins elections, it also obtains preferential access to lawmakers at every level of government. Trial Tr. 1683:4-10 (Segura) (access to legislators is the most valuable favor a party can confer on a large donor). Gay and lesbian political organizations have this type of access. *See, e.g., id.* at 1684:10-14 (gays and lesbians are able to meet with Speaker Pelosi). The ability of gays and lesbians to raise significant sums of money to support their political agenda is a leading indicator of their political power.

***B. Influential labor unions support homosexual causes.***

LGBT political power is not simply a matter of dollars and cents. Political influence can exponentially further LGBT power in a way that money cannot buy. For example, many of the most influential unions actively support the gay and lesbian community. Trial Tr. 2442:2–2468:23 (Miller) (listing key allies of LGBTs: Democrats, elected officials, unions, corporations, newspapers, celebrities, progressive religions, professional associations).

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

in Washington, where the NEA has consistently ranked in the top fifteen of the *Fortune* Washington Power 25 list. The California Teachers Association likewise supports gays and lesbians; it contributed \$1,312,998 to oppose Proposition 8. *Proposition 8 Contributions*, <http://www.sfgate.com/webdb/prop8/> (enter “contributor name”).

With more than twice as many members as the California Teachers Association, the 700,000 member California State Council of the Service Employees International Union (SEIU) is yet another solid ally of the gay and lesbian community. SEIU contributed more than \$500,000 to the “No on 8” campaign and has very publicly expressed its support for LGBT rights. In fact, SEIU was credited for its “strong leadership” in assembling a coalition of more than fifty California labor groups who joined in an *amicus* brief filed with the California Supreme Court opposing Proposition 8. *Pride at Work, California Labor Comes Together to Oppose Prop. 8*, <http://www.prideatwork.org/page.php?id=617>; *cf.* Brief for Cal. Fed. of Labor, AFL-CIO, *et al.* as *Amici Curiae* Supporting Petitioners, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (listing labor groups expressing opposition to Proposition 8).

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

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

**C. *Corporate America backs LGBT issues.***

It is well established that “[t]he business community . . . is one of the most important sources of interest group activity.” Wendy L. Hansen & Neil J. Mitchell, *Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics*, 94 *Am. Pol. Sci. Rev.* 891 (2000). The gay and lesbian community also enjoys broad support from this important source of interest group activity—Corporate America.

“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, which champions LGBT rights, lists numerous corporate sponsors: American Airlines, Bank of America, Citibank, Deloitte LLP, Ernst & Young LLP, Mitchell Gold & Bob Williams, Prudential, Beaulieu Vineyard, British Petroleum, Chevron, Harrah's, Lexus, MGM Mirage, Nike, Shell, Chase, Cox Enterprises, Dell, Google, IBM, KPMG, Orbitz, Paul Hastings, PricewaterhouseCoopers, Replacements, Ltd., Showtime, Starwood Hotels & Resorts, Sweet, and Tylenol PM. Human Rights Campaign, *National Corporate Sponsors*, [http://www.hrc.org/about\\_us/partners.asp](http://www.hrc.org/about_us/partners.asp). These corporations provide a significant amount of HRC's more than thirty million dollar annual budget.

Other LGBT groups also benefit from Corporate America's largess. The Gay Men's Health Clinic (GMHC), an organization dedicated to fighting AIDS, has a similar list of corporate sponsors contributing to its thirty million dollar annual budget.<sup>2</sup> Similarly, The Gay, Lesbian, and Straight Education Network

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<sup>2</sup> Altria, Bristol-Meyers Squibb, Delta, Ford Foundation, Jeffrey Fashion Cares, MAC AIDS Fund, Duane Read, Empire Blue Cross Blue Shield, Gap, Inc., Merck, NBC4/Telemundo47, Wachovia, CBS, GlaxoSmithKline, IBM, JPMorgan

(GLSEN) is supported by America's most recognized corporate names.<sup>3</sup> 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.<sup>4</sup>

But while corporate funding for LGBT causes is generous, it is not the full extent of corporate support. "There are various dimensions to corporate political

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Chase & Co., Macys, Newman's Own, Pfizer, PricewaterhouseCoopers, Target, Viacom, Abbott Laboratories, American Express, Anheuser-Busch Companies, Inc, Barclays, Bloomberg, Davis Polk & Wardwell, Deutsche Bank, Herrick, Feinstein LLP, Kenneth Cole Productions, Polo Ralph Lauren, Prudential Financial, Roche, and Washington Mutual, among others. Gay Men's Health Crisis, 2008 Annual Report 17-18 (2009).

<sup>3</sup> Cisco Systems, IBM, Morgan Stanley, Time-Warner, Disney-ABC Television, Goldman, Sachs & Co., Merck & Co, UBS, Wachovia, Citigroup Global Markets, Credit Suisse First Boston, Deutsche Bank, Dow Jones & Co., Eastman/Kodak Co., Holland & Knight LLP, MTV Networks, Nixon Peabody LLP, PricewaterhouseCoopers, Weil, Gotshal & Manges LLP, Wells Fargo, and many others. Gay, Lesbian, & Straight Educ. Network, 2008 Annual Report 11 (2008).

<sup>4</sup> Lambda Legal, *Our Work*, <http://www.lambdalegal.org/our-work/>. Donors include Jeffrey Fashion Cares 2009, American Airlines, Merrill Lynch, Levi Strauss, Deloitte, Baker & McKenzie, Bingham McCutcheon, Cadwalader, Covington & Burling LLP, Cravath, Swaine & Moore LLP, Credit Suisse, Davis Polk & Wardwell, Hogan & Hartson, Jenner & Block, Jones Day, Kirkland & Ellis LLP, Kramer Levin, Latham & Watkins, LexisNexis, Mayer Brown & Platt, McDermott Will & Emery, McGuireWoods, Mercedes-Benz, Microsoft, Morrison Foerster, Navigant Consulting, O'Melveny & Myers LLP, PaulHastings, Perkins Cole, Pillsbury, Sheppard Mullin, Sidley Austin, Sonnenschein, Wachtell, Lipton, Rosen & Katz, and Wells Fargo. Lambda Legal, *Sponsors*, <http://www.lambdalegal.org/about-us/sponsors/>.

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 non-discrimination legislation. *See, e.g.*, Equality California Website, *Sponsors*, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4026491>( listing many major corporations supporting Equality California, including AT&T and Comcast); Press Release, No on Prop. 8, *Silicon Valley Leaders to Denounce Prop 8 in Newspaper Ad*; The Official Google Blog, *Our Position on California’s No on 8 Campaign*, Sept. 26, 2008 (opposing Prop 8).

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

support for marriage equality in California”).

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

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

Contributors to the “No on 8” campaign include 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,<sup>5</sup>

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<sup>5</sup> 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, available at <http://www.guardian.co.uk/film/2008/dec/05/john-patterson-milk-gus-van-sant>.

America's news media renders even more direct and concrete support for the gay and lesbian community. Donald P. Haider-Markel, *Minority Group Interests & Political Representation* (2000) (cited by Segura and showing that "elite support has greatest influence on adoption of domestic partner benefits"); Human Rights Campaign Annual Report (2005) (stating that there is a quote from HRC in at least one newspaper each and every day); Human Rights Campaign Annual report (2000) (noting that editorial boards view the HRC position as "common sense"); Trial Tr. 1702:15-23 (Segura) (acknowledging that frequency of media coverage of gay issues has increased in recent years); *id.* at 1705:4-13 (admitting the New York Times is favorable to gay issues); *id.* at 1706:3-7 (testifying the "majority of editorial boards" "probably tend to favor some protections for gays and lesbians").

For example, in the November 2008 election, every major newspaper in California that took a position on Proposition 8, along with the influential New York Times, expressed a "vote No on 8" editorial opinion. Trial Tr. 2456:25-2457:17, 2442:21-24 (Miller) ("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."). That coverage is invaluable in shaping public opinion, which is the

key to political power. See John Zahler, *The Nature & Origins of Mass Opinions* (1992) (showing how opinions of media elites set public opinion).

## **V. MANY RELIGIOUS GROUPS SUPPORT GAY AND LESBIAN CAUSES.**

For some voters, the religious community carries more influence than the media. Gays and lesbians are not without support in this arena as well. A recent compilation of religious groups' official positions regarding same-sex marriage shows dispute, with many religious organizations officially embracing the concept of homosexuality and same-sex partnership. Pew Forum on Religion & Pub. Life, *Religious Groups' Official Positions on Same-Sex Marriage*, July 9, 2009, <http://pewforum.org/docs/?DocID=426>.

A sizable numbers of religious organizations supported No on 8. Rev. Rebecca Voelkel, Nat'l Gay & Lesbian Task Force, *A Time to Build Up: Analysis of the No on Proposition 8 Campaign & Its Implications for Future Pro-LGBTQQIA Religious Organizing* (2009) (admitting groundbreaking support for same sex "marriage" by people of faith and identifying plans for outreach). 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, Family Minister, *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.”).<sup>6</sup>

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, <http://articles.latimes.com/2008/jul/17/local/me-methodist17>; Press Release,

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<sup>6</sup> *See also* *UCC Church takes a Stand Against California's Proposition 8*, United Church of Christ: Called out eNews, Oct. 2008 (describing weekly No on 8 phone banks conducted by the United Church of Christ in Berkeley); *Council of Churches Urges NO on Proposition 8* (ad from California Council of Churches in the San Jose Mercury News); Neighborhood Unitarian Universalist Church of Pasedena Newsletter, Oct. 2008 (Unitarian rally); Pac. Sw. Dist. of the Unitarian Universalist Ass'n and Camp de Benneville Pines Annual Meeting (May 2009) (“The Unitarian Universalist Legislative Ministry Action Network PAC stepped forward to manage the statewide interfaith organizing (sic) to defeat Proposition 8.”); *Clergy Rally Against Prop. 8*, St. Francis Times, Oct. 26, 2008 (leaders of religious and ethnic groups attacking Yes on 8).

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 supported Proposition 8, many members opposed Proposition 8. Plaintiffs’ political science expert, Professor Segura, provided data showing that 42.45% of Catholics, 10.47% of Mormons, 24.28% of Protestants support same-sex “marriage,” despite opposition by their respective organized religions. Segura Rebuttal Report Tables at 13. Equality California, a proponent of same-sex marriage, acknowledged their valuable support, saying “[w]hile our opponents certainly invoke scripture and theology to justify their beliefs, there are many clergy and denominations that feel equally passionate that their faiths call them to stand up for marriage equality.” 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](http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/EQCA-WINNING_BACK_MARRIAGE_EQUALITY.PDF).



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

The success of the gay and lesbian community in obtaining funding, union support, corporate sponsorship, media endorsement, and religious backing is paying dividends beyond today's ballot box. Public opinion about homosexuality is trending in a positive direction. For example, in 1977, "only 56 percent of Americans supported gay rights legislation." Chauncey, *Why Marriage?*, *supra*, at 54-55. By 1989, that figure rose to 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").

As Plaintiffs' own expert, George Chauncey, has written: "it is hard to think of another group whose circumstances and public reputation have changed to decisively in so little time. For several decades now, and especially since the 1990s, Americans have become more familiar with their lesbian and gay neighbors and more supportive of them. Above all, there has been a sea change in the

attitudes of the young, who have grown up in a world where they know gay people and see them treated with respect any human deserves.” Chauncey, *Why Marriage?*, *supra* at 166 ; *see also* Trial Tr. 469:22-470:2, 477: 22-478:2 (Chauncey) (“Q. Above all, there's been a sea change in the attitudes of the young who have grown up in a world where they know gay people and see them treated with the respect any human deserves, correct? A. I think that there has been a change on the part of young people, yes.”); Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, *Am. Psychologist*, Sept. 2006 at 618 (“Heterosexuals’ attitudes toward sexual minorities are changing rapidly. In the last two decades, public sentiment has dramatically shifted toward greater tolerance and less condemnation of sexual minorities, with opposition to discrimination on the basis of sexual orientation now widespread.”).

## CONCLUSION

To date, gays and lesbians have benefited greatly from the democratic process. California’s legislature has broken ground in extending benefits based on sexual orientation. On a national level, California’s voters have sent LGBT allies—including House Speaker Nancy Pelosi—to Washington, where their voice is clearly heard. The LGBT message is carried through paid efforts, funded by numerous wealthy individuals, unions, and corporations across America. Gay and

lesbian rights have also been embraced by influential labor, corporate, and religious organizations that have pledged to fight for “marriage equality.”

Homosexual and lesbian political muscle is a model of the power of American democracy. There is not a case of political powerlessness meriting extraordinary protection from the majoritarian political process. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). In the face of overwhelming evidence demonstrating political power, it would be inappropriate for this Court to grant suspect status to Plaintiffs-Appellees.

Respectfully submitted,  
this 24th day of September 2010

s/ Holly L. Carmichael  
Holly L. Carmichael  
Counsel of Record for *Amicus Curiae*  
5096 Selinda Way  
Los Gatos, California 95032  
Phone: (408) 838-1212  
Email: holly.l.carmichael@gmail.com

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,712 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

s/ Holly L. Carmichael  
Holly L. Carmichael  
Counsel of Record for *Amicus Curiae*  
5096 Selinda Way  
Los Gatos, California 95032  
Phone: (408) 838-1212  
Email: holly.l.carmichael@gmail.com

## CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I have electronically filed the foregoing Brief *Amicus Curiae* of Concerned Women of America in the case of *Perry v. Schwarzenegger*, No. 10-16696, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/ Holly L. Carmichael  
Holly L. Carmichael  
Counsel of Record for *Amicus Curiae*  
5096 Selinda Way  
Los Gatos, California 95032  
Phone: (408) 838-1212  
Email: holly.l.carmichael@gmail.com