

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

JAMES OBERGEFELL, et al.	:	Civil Action No. 1:13-cv-501
Plaintiffs,	:	
	:	Judge Timothy S. Black
v.	:	
	:	
THEODORE WYMYSLO, et. al.,	:	EXPERT DECLARATION OF GARY M.
	:	SEGURA IN SUPPORT OF
Defendants.	:	PLAINTIFFS' MOTION FOR
	:	DECLRATORY JUDGMENT AND
	:	PERMENANT INJUNCTION

I, Gary M. Segura, Ph.D., pursuant to 28 U.S.C. §1746, hereby declare and state under penalty of perjury that I am an adult over the age of 18 and am competent to testify to the following matters if called as a witness and that these are my true and correct opinions:

PRELIMINARY STATEMENT

I. Expert Background and Qualifications

1. I am a Professor of American Politics in the Department of Political Science at Stanford University. I have been retained by counsel for Plaintiffs as an expert in connection with the above-referenced litigation. I have actual knowledge of the matters stated in this declaration and could and would so testify if called as a witness. My background, experience and list of publications from the last 10 years are summarized in my curriculum vitae, which is attached as Exhibit A to this Declaration.

2. In the past four years, I have testified as an expert—either at trial or through declaration—or been deposed as an expert in *Darby v. Orr*, Nos. 12-CH-19718 and 12-CH-19719 (Cir. Ct. of Cook County, Ill.), *Windsor v. U.S.*, No. 10 Civ. 8435 (BSJ) (JCF) (S.D.N.Y.), *Dragovich v. U.S. Dep't of the Treasury*, CV 4:10-01564-CW (N.D. Cal.), *Golinski v. Office of Personnel Management*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *Perry v. Schwarzenegger*, 704 F.

Supp. 2d 921 (N.D. Cal. 2010), *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *Massachusetts v. United States HHS*, 698 F. Supp. 2d 234 (D. Mass. 2010), *Pedersen v. Office of Personnel Management*, No. 3:10-cv-01750-VLB (D. Conn.), *Jackson v. Abercrombie*, Civ. No. 11-00734 ACK-KSC (D. Haw.), *Cooper-Harris v. United States*, CV 12-887 CBM (AJWx), *Sevcik v. Sandoval*, No. 2:12-CV-00578-RCJ-PAL and *Satorre v. San Mateo County Board of Supervisors*, CIV504866.

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

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

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

6. To date, I have authored 49 article-length publications in professional journals

and edited volumes. Those journals include the *American Political Science Review*, the *American Journal of Political Science*, *Political Research Quarterly*, *Political Behavior*, and the *Journal of Politics*. I edited *Diversity in Democracy: Minority Representation in the United States*, published by the University of Virginia Press in 2005. I am also the co-author of *Latino Lives in America: Making It Home*, addressing new patterns of Latino life and politics in the U.S., published by Temple University Press in 2010. I have a third book that was published in 2011 with Congressional Quarterly Press, entitled "*The Future is Ours: Minority Politics, Political Behavior, and the Multiracial Era of American Politics*", a comparative exploration of political behavior across American racial and ethnic minority groups and how such behaviors will shape American party coalitions in the coming decades. I am the co-author of a fourth book, *Latinos in the New Millennium: An Almanac of Opinion, Behavior, and Policy Preferences*, which was published in 2011..

7. I am the former President of the Midwest Political Science Association (MPSA), the second-largest organization of American political scientists. In 2006, I was the General Program Chair of the MPSA Annual Meeting. In 2011, I was elected Vice-President and Program Chair of the Western Political Science Association for 2012-2013, and will serve as President in 2013-14. In addition, I am a member and former Executive Council Member of the American Political Science Association, member and former Executive Council Member of the Western Political Science Association, and member of the Southern Political Science Association. I serve or have served on the editorial boards of the *American Journal of Political Science*, *Journal of Politics*, and *Political Research Quarterly*. I am a member of the Sexuality and Politics organized section of the American Political Science Association, have served on the

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

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

9. I am being compensated for this effort at a rate of \$250.00 per hour. I will be compensated at \$350.00 per hour for work performed while traveling, and I will be reimbursed for expenses incurred while traveling in connection with my services. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

II. Summary of Conclusions

10. Gay men and lesbians do not possess a meaningful degree of political power and are politically vulnerable, relying almost exclusively on allies who are regularly shown to be insufficiently strong or reliable to achieve their goals or protect their interests. The powerlessness of gay men and lesbians is evidenced in numerous ways, and they are subject to political exclusion and suffer political disabilities greater than other groups that have received suspect classification protection from the courts.

III. Political Powerlessness in General

11. Any evaluation of the political power of a particular group in the United States, or in any particular state, takes place in the context of a general understanding of the role that groups play in American politics. From James Madison onward, American democracy frequently has been understood as a pluralist system, in which competition among groups should

ideally ensure that no one interest becomes permanently dominant, or determines outcomes over a large number of decisions over a long time. Madison believed that in an “extended” republic, coalitions commanding the day on one issue would dissolve and be replaced by a different majority coalition on the next issue.

12. Modern political scientists generally approach pluralism through the concept of group interests. In what David Truman calls “disturbance” theory, the action of one group raises challenges to the interests of another, causing the latter to react, and preventing a single interest from dominating the political process. However, scholarly work on collective action (including Mancur Olson among others) has found that not all groups have an equal opportunity to form and act successfully to stave off threats to their interests. Differences in group size, resources, and position in the class structure mean that some groups are inherently better positioned to act on their own behalf than others, and some groups suffer a permanent disadvantage that places them at the mercy of others. Reflecting this concern, eminent political scientist Elmer Eric Schattschneider famously wrote, “The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.” Those with greater resources—time, money, and numbers—exert greater influence on the political process. Minorities, by definition, are less numerous than the majority.

13. The existence of societal prejudice against a particular group makes the accumulation of resources, including finances and allies, more difficult. Moreover, that same prejudice imposes an additional systematic burden because it tends to prevent that group’s interests or policy preferences from receiving due consideration by other actors in the political process, or causes that consideration to be sacrificed for the sake of political expediency. Relative to minority groups that are otherwise similarly situated, a group that suffers such

prejudice does not receive an equivalent hearing in political contestation and debate.

Constitutions (and courts, through judicial review) play the role of the Madisonian corrective in the pluralist system by protecting disadvantaged minorities from majoritarian excesses and from effective exclusion from the political process.

14. Political power refers to a person's or group's demonstrated ability to extract favorable (or prevent unfavorable) policy outcomes from the political system. In a well-established and commonly cited definition, Robert Dahl wrote that A has power over B when A is able to compel B to do something that B otherwise would not do. Thus, simple meetings of the mind are insufficient to demonstrate the exercise of power. One does not have power over those who, for other reasons, already agree. For example, in the last national election, millions voted for the same candidate I did, but this is not evidence of my electoral influence.

15. Power may also be reflected in the content of the political agenda, the issues that are considered for legislative action. More powerful political actors face fewer legislative threats to their interests than less powerful actors. The very circumstance of being forced to defend interests against potential legislative action is a reflection of weakness rather than strength.

16. Groups that lack political power may, on occasion, receive pledges of support, or even desirable legislative outcomes, that they themselves lack the power to compel through the political process. An elected official may arrive at a position on a policy or proposal for their own reasons unrelated to the specific communicated preferences of the minority group's constituents.

17. In some instances, the minority preferences may be entirely beside the point. For example, an elected official may choose not to support a bill or policy proposal because he or she

may determine that the policy has implications adverse to other interests or because the costs of implementation or enforcement of the policy are too great.

18. Positive legislative outcomes may also be the result of “affinity” or sympathy from legislators in a position to bestow them. An elected official may decide not to support a bill or policy proposal that discriminates against, singles out, or mistreats a minority group because he or she independently believes that discriminating against, singling out, or mistreating the minority group is wrong. But since these pledges or outcomes are not the result of an exercise of political power by the minority group, they are not necessarily indicative of a group’s actual political power. Moreover, they are significantly more vulnerable to reversal than those achieved through the exercise of actual power. The affinity or sympathy that gave rise to the support could dissipate or flatten, and is likely to be abandoned in the face of subsequent opposition, and in the absence of sufficient power and influence of the minority group to counter opposition.

19. For example, in the 2011 legislative debate over the legalization of marriage for same-sex couples in the Maryland House of Delegates, several members of the chamber who had co-sponsored the legislation—and even some who had solicited endorsements and donations during the election cycle on this basis—ultimately voted against it in committee, publicly announced their intention to vote against it on the floor, and subsequently did so. These legislators’ apparent support in the earlier stage of the legislative process was costless, and withered in the face of mobilized opposition and as an actual roll-call vote approached.

20. Following Dahl’s understanding, power can be illustrated only in comparison to a baseline understanding of the decision-makers’ preferred actions. That is, to demonstrate that power had been at work, one would need to observe successful instances of opinion change on

the part of a legislator in the face of positive or negative sanction or, alternatively, electoral change precipitated by the ire of the dissatisfied constituency.

21. Apparent policy “agreement” is a particularly erroneous measure of power when mere “agreement” requires no action on the part of the policy-maker. Again, the example of candidates and officials endorsing a policy position, only to recant that support when an actual vote approaches, illustrates the illusory nature of this form of support.

22. My opinion does not rest on the extreme assumption that in no place, at no time, under any circumstances, have gay men and lesbians won any outcome.

23. Rather, my view is that one must weigh the relative impact of positive and negative outcomes against the numerosity of moments of contestation and the insecure nature of legislative gains. Policy “successes” should not be considered in isolation. While legislative gains have occurred in some states and localities, numerous jurisdictions have adopted statutes and constitutional amendments expressly in opposition to the interests of gay men and lesbians. Even an assessment of “trend” requires consideration of the relative frequency of positive and negative outcomes and the stakes involved in each of the policy debates.

24. Policy successes—whether at the state or federal level—are insecure so long as the rights and legal status of lesbians and gays remains a subject of legislative action. We must consider the frequency with which legislative gains have been repealed, turned back by the voters, or foregone altogether, as well as the serious risk of repeal of legislative gains after each election cycle in which political power shifts to a different political party. Recent policy modifications, such as the adoption of a mechanism that led to the end of the “Don’t Ask, Don’t Tell” policy, illustrate precisely this dynamic. Several prospective Republican presidential candidates who ran for office in the 2012 Republican primary expressed support for a repeal of

this legislation and the reinstatement of “Don’t Ask, Don’t Tell,” a view also shared by members of the House majority. Reinstating Don’t Ask, Don’t Tell was an explicit plank in the 2012 Republican platform. Similarly, after the Maine legislature passed legislation in 2009 to provide same-sex couples access to marriage, voters overturned the law a few months later by referendum. The Washington and Maryland legislatures also enacted legislation last year to allow same-sex couples to marry, but opponents of the legislation gathered sufficient signatures to subject both measures to a referendum by popular vote in November 2012. Both referenda failed, and Maine ultimately reinstated marriage for same-sex couples in another initiative, last year. Those favorable results, however, should be examined against the broader backdrop: even occasional political successes of gay men and lesbians are subject to repeated challenge at the ballot box and, recent successes notwithstanding, they lose an exceedingly high percentage of the time.

25. Even positive outcomes for gay men and lesbians that are secured through court rulings are vulnerable to popular or legislative rollback. For example, in response to the Iowa Supreme Court’s ruling that lesbians and gay men could not be excluded from the institution of civil marriage, anti-gay forces like the National Organization for Marriage organized a nationally funded campaign to defeat three of the members of that court in judicial retention elections in November 2010, and were ultimately successful in defeating all three. Though a fourth removal attempt was defeated 2012, the earlier defeat of state jurists facing retention elections has the dual effect of weakening that court’s majority—raising the possibility of their reversing the previous decision—as well as chilling similar action by jurists in other states whose judicial views might otherwise lead them to similar conclusions.

26. Furthermore, many of the policy “successes” that have benefitted gay men and

lesbians are measures that remediate or repeal express, de jure discrimination against the group. Remediation of existing discrimination and disadvantage should be distinguished from affirmative political power. For example, the adoption of hate crimes statutes inclusive of sexual orientation, in Illinois and elsewhere, while a “success” for gay men and lesbians, was necessary only because there is such prevalent bias-related violence against gay men and lesbians. While a fair assessment of the relative political “power” of gay men and lesbians would include the adoption of such legislation, it must also include a consideration of the underlying behavior and bias that gave rise to the need for the legislation, which is an indicator of political powerlessness, not strength.

27. In light of the political disadvantages still faced by a small, targeted, and disliked group, I conclude that gay men and lesbians are powerless to secure basic rights within the normal political processes.

28. Traditional markers of political powerlessness include systematic disadvantages in the political process; the existence of significant prejudice, stigmatization, or de facto or de jure second-class status; or an inability, alone or in concert with reliable coalition partners, to secure basic rights or equal treatment from and within the political process. Here, I organize traditional markers of political powerlessness into two categories: (1) manifestations of power and powerlessness, on which gays and lesbians score poorly; and (2) factors that contribute to political disadvantage, on which gays and lesbians—to their detriment—score high.

IV. Political Powerlessness of Gays and Lesbians

A. Manifestations of Political Powerlessness

29. Although an exhaustive catalog is impossible, the lack of meaningful political

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

(1) Absence of Statutory Protection/Presence of De Jure Statutory Inequality

30. To date, there is no federal legislation prohibiting discrimination against gay men and lesbians in employment, education, access to public accommodations, or housing. Nor is there any protection of this nature under Ohio law. Indeed, the history of the Employment Non-Discrimination Act (ENDA) provides a good example of gay men and lesbians' inability to compel policy outcomes for which they actively advocate. ENDA, which would extend employment protections on the basis of sexual orientation (and in some versions, gender identity) has been introduced regularly since 1994 (with earlier versions existing as far back as the 1970s), but has never passed both houses of Congress. It has failed to win passage in both Republican- and Democratic-controlled Congresses. While the legislation attracts many "co-sponsors," one cannot test the reliability or strength of this support in the absence of a recent and meaningful vote, or any realistic chance of its passage. The almost complete absence of legislative progress on the issue suggests that, at the very least, it is not a legislative priority for most legislators or the leadership of either party and, at worst, that the "support" is rhetorical and without substance.

31. In 1996, Congress adopted the “Defense of Marriage Act,” or DOMA, which, among other things, prevented even legally married same-sex couples from filing joint tax returns, inheriting social security benefits, and obtaining all of the other rights afforded to married individuals by federal law. This preclusion of rights acquisition was signed into law by a Democratic president. Until recently, litigation against DOMA was actively resisted by both Democratic and Republican administrations. Indeed, until February 2011, the Obama Justice Department defended the constitutionality of DOMA despite the administration’s public support for its legislative repeal. And the decision by the Department of Justice to cease its defense of DOMA in court came only after one house of Congress passed into the control of the opposite party, thus allowing that body the opportunity to intervene in the litigation. In short, it was a change of course without immediate practical effect. The same is true for President Obama’s and Vice President Biden’s announced personal support for the freedom to marry for same-sex couples, and the addition of this position to the Democratic platform in 2012. Their personal views and the platform have no practical effect on the exclusion from marriage faced by same-sex couples across the country. More to the point, in no instance can we identify an effect of lesbian and gay political power at work, here. Gay and lesbian voters were in no position to insist on these changes, nor are they able to compel candidates across the party to abide by them. Properly understood, they reflect affinity of the current President and the platform committee, but not power.

32. Ohio adopted a state level “DOMA” statute in 2004. It was adopted by huge margins in both chambers. That same year Ohio voters passed a state constitutional DOMA amendment, also by a wide margin. .

33. Despite a long-documented record of violence against gay men and lesbians, attempts to extend existing federal hate crimes to include violent crimes based on the perceived sexual orientation of the victim reached fruition only in 2009, after more than a decade of advocacy by civil rights groups and supporters. Previously, gays and lesbians enjoyed virtually no such federal protection. The legislative process that produced even this positive outcome is illustrative of the political powerlessness of gay men and lesbians. To provide political cover, the bill extending hate crimes protections to gays and lesbians was attached to and adopted as part of a Defense Appropriations Bill. Even under these circumstances, 75% of Republican members of the Senate voted against it. In the House of Representatives, 131 of 175 Republican members voting (again, 75%) also opposed the hate crimes provision, illustrating at once the depth of opposition to even ameliorative measures that benefit gay men and lesbians, as well as the fragility of the institutional support for such outcomes. It is again worth noting that the impetus for this legislation was the pattern of violence directed at gay men and lesbians, a circumstance that provides important context for why the adoption of such a provision need not represent an exercise of “power.”

34. In 1993, Congress codified the military’s “Don’t Ask, Don’t Tell” (DADT) policy, under which lesbians and gay men were required to conceal their sexual orientation in order to serve in the military, were investigated if suspected to be gay, and were discharged if they disclosed or were found to be gay. Like the “Defense of Marriage Act,” this legislation was signed by a Democratic president. In December 2010, Congress adopted a provision with an administrative mechanism that led to the end of this policy. But the circumstances under which even this positive outcome was achieved highlight the ultimate political powerlessness of gays and lesbians. The DADT policy was in effect for over 17 years and, despite significant evidence

of abuse—including discharges initiated based on unsubstantiated allegations and third-party accusations, and aggressive investigations beyond the bounds of the policy—and its cost to the military, repeal had not seriously been considered. Both Republican and Democratic administrations defended DADT in court. The current Democratic administration discouraged legislative attempts to attach legislation repealing DADT to the Defense Authorization bill in the summer of 2010, or indeed at any point prior to the November 2010 election. There was no legislative action on the policy for most of the 111th Congress, beyond committee hearings, and despite widespread shifts in public opinion on this issue, no final action was taken prior to the general election. When the matter was finally taken up during the lame-duck session, Republican members offered fierce opposition in both legislative chambers. Of 175 votes cast in the House by Republican Party members, 160 (or 91.4%) were against the provision to repeal DADT. In the Senate, 31 of 39 Republican senators (79.5%) opposed the repeal. Like the hate crimes legislation, the DADT repeal illustrates the limited access gay men and lesbians have to the legislative process because of such stalwart opposition.

35. On the state level, there is no statutory protection against discrimination in employment or public accommodations based on sexual orientation in twenty-nine states.

36. While there is an executive order in place protecting state workers from discrimination based on sexual orientation, at least five bills aimed at outlawing private discrimination based on sexual orientation have failed in recent years in the Ohio legislature.

37. De jure inequality also exists in state constitutional law. In 1990, there was not a single state constitutional provision that targeted gay men and lesbians for unequal treatment. Today, in over three-fifths of the states there is now constitutionally-established inequality—that is, the exclusion of gay men and lesbians from the civil institution of marriage is formally written

into the framework of government. Indeed, voters in many states, like in Ohio, passed ballot initiatives to amend their state constitutions to prohibit same-sex couples from marrying even after the state legislature had already passed statutes barring same sex couples from marrying. At least 10 additional states, affirmatively exclude gay men and lesbians from civil marriage by statute but have not yet amended their constitutions.

38. The presence of domestic partnership and civil union laws adopted in various states, rather than viewed as an “accomplishment,” is best understood as an illustration of the political weakness of gay and lesbian political efforts. These laws are enacted for one of two reasons: either (1) civil marriage for same-sex couples is politically unattainable in a state, either through the array of existing political forces or the presence of a constitutional bar—which also illustrates the weakness of lesbian and gay politics—or (2) the enactment of a domestic partnership or civil union law would have the effect of complying with a court order to address gay and lesbian exclusion, as was the case when Vermont originally adopted civil unions. Notably, in Vermont, the civil union law was the legislature’s way of not granting civil equality to lesbian and gay citizens, despite a court order.

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

39. Evidence from the past two decades in particular has demonstrated that gay men and lesbians are especially vulnerable in the context of direct democracy. That is, positive legislative outcomes achieved at the state and local levels are often insecure. Initiatives and referenda frequently and effectively have been used to reverse or pre-empt the legislative grant at the state or local levels of policies benefiting or protecting gays and lesbians. These ballot initiatives can be broken into three groups: (1) those which overturn anti-discrimination policies, (2) anti-marriage initiatives, and (3) restrictions on adoption.

40. Overturning anti-discrimination policies—The first wave of ballot actions on gay and lesbian rights began in the early 1970s, but reached its peak in the 1990s. The most common form was citizen initiatives to overturn municipal, county, or state extensions of anti-discrimination policies to sexual orientation. These ballot actions were generally successful. Legislative enactments were overturned in cities and counties across the country, including Santa Clara County and the City of San Jose, California; Tacoma, Washington; Lewiston, Maine; Lansing, Michigan; St. Paul, Minnesota; Wichita, Kansas; Cincinnati, Ohio, and perhaps most famously, Miami-Dade County, Florida. A very small number of pro-gay votes also occurred and, not surprisingly, did not fare as well, including the defeat of a voter attempt to compel the Davis, California City Council to enact a gay rights ordinance. Haider-Markel and colleagues (2007) identified 143 votes from the 1970s through 2005, and found that gay and lesbian rights were defeated or overturned in more than 70% of the cases—with the opponents of those rights prevailing at about the same rate for local and state elections. The frequency of electoral and policy conflict over non-discrimination statutes declined once the focus of the struggle increasingly centered on preventing legal recognition of same-sex couples' relationships. It is worth noting that many anti-gay measures amended city charters or state constitutions to increase the burden on gays and lesbians and their supporters for accomplishing policy change, such as Colorado's Amendment 2, struck down by the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996). The general approach of such measures was to prohibit legislative action preemptively, and require that any change be through popular, majority vote (with all of the disadvantages for minority rights this carries). Most recently, the state of Tennessee adopted a new "anti-discrimination" law in May of 2011 that specifically forbids any jurisdiction from enacting any anti-discrimination measures that go beyond the protections in state law (which currently

excludes lesbians, gay men, bisexual and transgender people from all anti-discrimination protections). As a result, Nashville's two ordinances protecting gay men and lesbians from workplace discrimination were rendered unenforceable. Similar measures are being advocated in other state legislatures.

41. Anti-marriage initiatives—In 2004 alone, ballot initiatives prohibiting marriage for same-sex couples passed in 13 states. To date, gay and lesbian marriage prohibitions have been voted on at the state level 38 times, most recently in North Carolina, Minnesota, and Maine in 2012. In only two instances did the pro-gay position win. First, when Arizona's Proposition 107, which also would have affected unmarried heterosexual couples, failed in 2006; the constitutional amendment passed handily in 2008 when it was narrowed to affect only gay men and lesbians. (Colorado, likewise, had multiple items, two competing anti-marriage initiatives and one referendum. The harshest initiative, which would also have outlawed civil unions and domestic partnership, failed to qualify for the ballot. On election day, the referendum, which would have confined marriage to opposite-sex couples but award lesbian and gay couples domestic partner rights failed, while the remaining anti-marriage initiative passed on the same day.) In 2012, North Carolina adopted an anti-marriage amendment. Minnesota, in 2012, provided the only other example of anti-gay forces failing to write inequality into the state's constitution.

42. In Maine, the state legislature managed to adopt marriage for same-sex couples through statute. That policy success was short lived, as a popular majority was able to overturn legislative action and reinstate the ban on marriage between same-sex couples through statewide ballot on "Question 1." This outcome was secured with massive intervention from national anti-gay organizations, such as the National Organization for Marriage, as well as substantial

investment by religious organizations, including the Roman Catholic Church, whose role was documented and touted in Catholic media sources. Campaign materials used by interests opposing the freedom to marry were, in some instances, identical to those used in the campaign to repeal marriage for same-sex couples in California via Proposition 8, illustrating the vast and national reach of those interests working against the interests of gay men and lesbians. This year, that change was overturned with a new initiative. But the lesson, that gay and lesbian political equality is subject to repeated challenge and popular repeal, remains.

43. Adoption—In five states, gay men and lesbians are prohibited from adopting children. Some of these bans were adopted recently. For example, in 2008, Arkansas voters adopted Arkansas’ Act One, which prohibited adoption by unmarried cohabitating couples, an act conceived with regard to—and targeted at—same-sex couples. Act One was struck down in April 2011 as an unconstitutional infringement on the right to privacy by the Arkansas Supreme Court. That decision notwithstanding, it is possible, and I think likely, that these initiatives or legislative actions will appear elsewhere in the future. Indeed, Arizona recently enacted a statutory preference for heterosexuals in the state’s foster and adoption programs. In the 2012 American National Election Study, 35.8% of respondents nationwide felt that gay men and lesbians should be prohibited from adopting.

44. Thus, beyond the obstacles gay men and lesbians face in the traditional legislative process, ballot initiatives further disadvantage them politically and have undone many of the benefits they have obtained through legislative action. The success of anti-gay ballot initiatives, moreover, makes it less likely that legislatures will enact pro-gay policies in the first place (Lax and Phillips 2009), because elected officials will fear having their actions overturned by angry constituents. Moreover, many gay and lesbian activists fear that the reactive post-initiative

policies will be worse than the status quo, thereby forcing them to consider whether foregoing legislative policy change in the first instance is actually in the best interests of the group. For example, several successful anti-marriage ballot initiatives also prohibited civil unions and domestic partnerships, removing benefits that had existed prior to the enactment of the anti-gay ballot initiatives.

45. Ballot initiative campaigns are frequently polarizing, are built on enormous sums of money, and are waged primarily in the non-deliberative media of mass advertising. Small minorities are even less able to protect their interests in these kinds of contests than they are in the legislative process, which—as a result of legislative districts, institutional rules, coalitional politics, and other factors—tends to give smaller minorities more of an opportunity to prevent undesirable outcomes. The passage of Proposition 8 in California and Question 1 in Maine both illustrate that coalition politics are more easily broken down in popular vote situations where misleading messages can circumvent community leaders and office holders.

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

role for bargaining and coalitional politics. But the initiative process has now been used specifically against gay men and lesbians more than against any other social group.

47. While there has been an increase in state and local jurisdictions with statutory anti-discrimination protections for gay men and lesbians over the last two decades, these legislative successes have been resisted strongly at the ballot box. Again, in three-fifths of the 50 states, voters have amended their state constitutions to establish formal political and social inequality for gays and lesbians. Similar proposals to amend the federal constitution have also been considered.

(3) Underrepresentation in Political Office

48. Gay elected officials have risen to various offices around the country. These representatives may strive to advocate for gay and lesbian rights, but their numbers and limited legislative impact on issues concerning those rights continue to demonstrate significant underrepresentation and reliance on friendly, heterosexual representatives, over whom gay men and lesbians hold no direct political power. For example, 85 state legislators nationwide are openly gay, but the total number of state legislators nationwide is 7,382, so those 85 legislators represent only 1.2% of the total. A recent study by the Williams Institute estimated the gay, lesbian and bisexual population of the U.S. to be approximately 3.5%. Under even the most conservative estimates of gay and lesbian population share, this number indicates that gays and lesbians are substantially under-represented. Prior to 1990, only four openly gay men or lesbians were members of state legislatures.

49. There have been only 11 openly gay or bisexual members of Congress in history, and only eight total, seven in the House and one in the Senate, serve today (1.6% of the House, 1% of the Senate). Four of those eleven were initially elected to the House with their sexual

orientation not publicly known. Only seven members were first elected to the House without the benefits of incumbency and with widespread public familiarity with their sexual orientation, Jared Polis (D-CO), Tammy Baldwin (D-WI), David Cicilline (D-RI), Mark Pocan (D-WI), Sean Patrick Maloney (D-NY), Mark Takano (D-CA) and Kyrsten Sinema (D-AZ). Polis, Baldwin, and Pocan were elected in districts that are home to the flagship campus of their state universities—districts that are typically more tolerant than others in the state. Baldwin and Pocan were elected from the same district. Tammy Baldwin (D-WI) was elected to the Senate in 2012, the first openly-gay member of that body in the history of the republic. Gay and lesbian politicians are largely confined to a single political party. Gay Republicans face an extremely difficult time, and the few gay GOP elected officials who have emerged seldom last, most leaving power either through primary challenges or retirement in the face of pressure. There has never been an openly gay President, Cabinet level appointee, or Justice of the United States Supreme Court.

50. The percentages of gay and lesbian representation at the local level are lower still. In 2010, the Gay and Lesbian Leadership Institute identified 288 local elected gay or lesbian political officials serving on city councils, county commissions, school boards, and other local offices (http://www.glli.org/out_officials), which is an insignificant fraction of the total number of elected local officials. Over a decade ago, the Census Bureau reported that the number of elected officials nationwide was slightly over 511,000. Subtracting members of Congress and state legislatures, about whom I just reported, that leaves somewhat over 500,000 city, county, school, and local board officials, and only 288 (or .05%) were identified as openly gay. These officials are also concentrated in the coastal states and in Illinois. Some states have no openly-gay elected officials at all, and many more have just a very small handful.

51. In Ohio specifically, only two members of the state's legislature, which consists of a total of 132 members divided across two chambers (99 House of Representatives; 33 Senate), identify as gay or lesbian, constituting just 1.5% of the total. Both serve in the lower chamber, as there are no openly gay or lesbian members of the Ohio Senate.

B. Factors Contributing to Political Powerlessness

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

(1) Small Population Size and Geographic Dispersion

53. The simplest way to secure political representation and exercise some degree of influence over the political process is through numerical strength. The population strength of gay men and lesbians is not close to being sufficient to obtain electoral predominance in a single jurisdiction, let alone change the composition of a legislature or Congress. There are no congressional districts with a majority population of gay and lesbian Americans. There are no municipalities of any size with a majority gay and lesbian population. Even in broadly identified gay-friendly communities, often places where migration to established lesbian and gay communities has significantly increased the gay population above the national average, gays and lesbians fail to reach majority status. A fair estimation of population suggests that gay men and lesbians have sufficient numbers to determine (or substantially influence) the outcome of only a

few city council or county board seats, or state legislative districts, nationwide. At any level of aggregation above the precinct or neighborhood, there is no place with a gay majority.

(2) Effect of HIV/AIDS Epidemic

54. The AIDS epidemic has set back the gay community's potential for political action, in ways that are both obvious and not obvious. Through 2005, the Centers for Disease Control reported that just over 300,000 MSMs (a CDC term for men who have sex with men) had died of HIV/AIDS. Another 217,000 were living with AIDS. The loss of 300,000 potential voters, organizers, and leaders is a profound setback to a community whose population starts as a fairly small share of the society. Harder to calculate are the lost financial contributions to the political efforts of gay men and lesbians as a consequence of this epidemic. Gay men and lesbians have both raised substantial amounts of money for HIV-related research and social services, diverting resources that could otherwise be used to fight discrimination. Further, gay net wealth is negatively impacted by the loss of income on the part of those who have died, and the partial loss of income and expenditures on healthcare from those still living with the disease. Some political observers suggest that a decade or more of gay activism was lost to the cause of gay equality as gay men and lesbians turned their attention to the more immediate threat of the epidemic. While gay men and lesbians do not have the resources—reliable allies, elected officials, votes, dollars, and organizational capacity—to be politically powerful, they have been further disadvantaged by the fact that HIV destroyed such a large segment of the community and consumed such a large portion of its resources. In addition to the direct resource and political costs, AIDS offered heterosexuals a new reason to stigmatize gay people and same-sex relations, and to resist political change that would have advanced gay equality.

(3) Violence

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

56. Though broad federal hate crimes protections for gays and lesbians came into existence only recently, the FBI has collected data on hate crimes committed on the basis of perceived sexual orientation for a number of years, at least from jurisdictions that have chosen to report them, and the numbers are substantial. In the last year for which statistics have been published, 2009, the total number of hate crime incidents was 6,604, and 1,482 (17.8%) of those were on the basis of sexual orientation. In terms of single groups, only African Americans endured more incidents, and since they are roughly three times the population share as gays and lesbians, the likelihood that any given gay or lesbian citizen experiences an attack (that is, the per capita number of attacks) is considerably higher.

57. Reported hate crime incidents range from simple assault to murder. According to the FBI's statistics, in 2008, 73 percent of all hate crimes committed against gays and lesbians included an act of violence; 71 percent of all hate-motivated murders in the United States were of gay men and lesbians; and 55 percent of all hate-motivated rapes were against gays and lesbians.

58. FBI Hate Crimes reports for 2009 show that gay men, along with Jewish Americans, are the most likely to be victimized by a bias crime. The Southern Poverty Law Center (“SPLC”) also suggests that steps forward in the cause of gay and lesbian equality seem to be associated with a subsequent surge in antigay violence, pointing to data immediately in the wake of the Supreme Court’s ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Court struck down Texas’ sodomy law. The intimidation effect of hate crimes serves to undermine the mobilization of gays and lesbians and their allies and to limit their free exercise of simple economic and social liberties.

59. Recent years show no discernible decline in bias crimes against gays and lesbians. FBI statistics reporting the number of hate crimes against specific groups shows that anti-gay acts were as frequent in 2009 as they were in 2003.

60. In Ohio, specifically, the numbers from the 2009 report are very similar. Of the 297 total hate crime incidents reported, 47, or 15.8% of the total, were identified as motivated from sexual orientation. The 2011 report indicates that 58 out of 228, or 25% of the total, were identified as motivated from sexual orientation. While the total number of hate incidents reported declined, the number of hate incidents motivated by sexual orientation increased, and by extension raising their share of the total.

(4) Invisibility

61. A unique aspect of gay and lesbian identity that distinguishes gays and lesbians from other minority groups—to their political disadvantage—is their relative invisibility. The scholarship on passing and self-identification suggests that members of repressed or targeted groups who have the ability to pass unobserved in the majority population may choose to do so if the costs of self-identification, in the form of family disapproval, physical threat, discrimination,

and their consequences, can be avoided. While this strategy avoids some risks of identification, passing itself has a personal and a political cost.

62. The unwillingness to identify has several important implications for the question of whether gay men and lesbians can meaningfully or effectively act on their own behalf politically. While not a panacea, social contact with gay men and lesbians is generally associated with more sympathetic policy preferences. Invisibility undermines community support.

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

64. Since not all gay men and lesbians come out, the percentage of the gay and lesbian population that is mobilized seems higher than it really is. Likewise, since those gay and lesbian citizens who choose to self-identify are those whose economic and social position in society is more secure—thereby lessening the risks of coming out—the resulting self-selection bias results in a misperception of gays and lesbians as better educated, of higher income, and otherwise “privileged.” This leads the public to believe—mistakenly—that gay men and lesbians do not need of certain protections.

65. The public perception that gay men and lesbians are better educated or have higher incomes is not accurate. Statistically, gays and lesbians do not have higher levels of income and, when all gay men and lesbians are considered rather than only the self-identified, are no better educated than the public at-large. My analysis of the 2004 National Exit Polls demonstrates no difference between heterosexual voters and gay and lesbian voters on income and education.

66. Opponents characterize the efforts of gay men and lesbians to gain statutory protection as both unjustified and transgressive. Moreover, the public incorrectly perceives that gay men and lesbians are more privileged than they actually are. This misperception both mobilizes opponents and encourages complacency by potential allies.

67. In addition, the fact that sexual orientation is not directly visible may reduce the group's ability to attract allies. Potential heterosexual allies may reasonably fear being misidentified as gay or lesbian, reducing the chance that they will mobilize on behalf of gays and lesbians. The National Coalition of Anti-Violence Programs reported in 2008 that 9% of hate-crimes reported to their participating agencies on the basis of perceived sexual orientation victimize heterosexuals misidentified as gay or lesbian.

68. Finally, invisibility exacerbates the problem of geographic and social dispersion, making it more difficult for gay men and lesbians to find each other and mobilize politically.

(5) Censorship

69. In a variety of ways, gay men and lesbians are pressured to remain invisible, and in several contexts, discussion of gay people and their relationships is prohibited or regulated. Examples include the military's long-standing and only recently repealed "Don't Ask, Don't Tell" policy; legislation that prevented the National Endowment of the Arts from funding any art depicting homoeroticism; rules that have prohibited federally funded AIDS education materials from "promoting" homosexuality and requiring educators to advocate for abstinence from extramarital sex, including same-sex couples' intimacy; and efforts in several states to forbid the mention of homosexuality in school health classes, or mandate the association of the term with descriptors suggesting that it is not acceptable. In 2011, Tennessee considered legislation banning the mention or discussion of homosexuality in primary grades, and Missouri has

considered a similar bill. And, Arizona, for example, prohibits any mention that same-sex intimacy could be made “safe.”

(6) Public Hostility and Prejudice

70. Gay men and lesbians face severe hostility from non-gay citizens in many parts of the country, and opinion data suggest that they are held in considerably lower regard than many groups currently receiving the protection of heightened scrutiny from the courts. Such low public regard makes it difficult for gay people to achieve significant political progress, implicitly justifies legislative and electoral actions against gay men and lesbians, and severely hampers their ability to attract donors, allies, coalition partners, or even public sympathy.

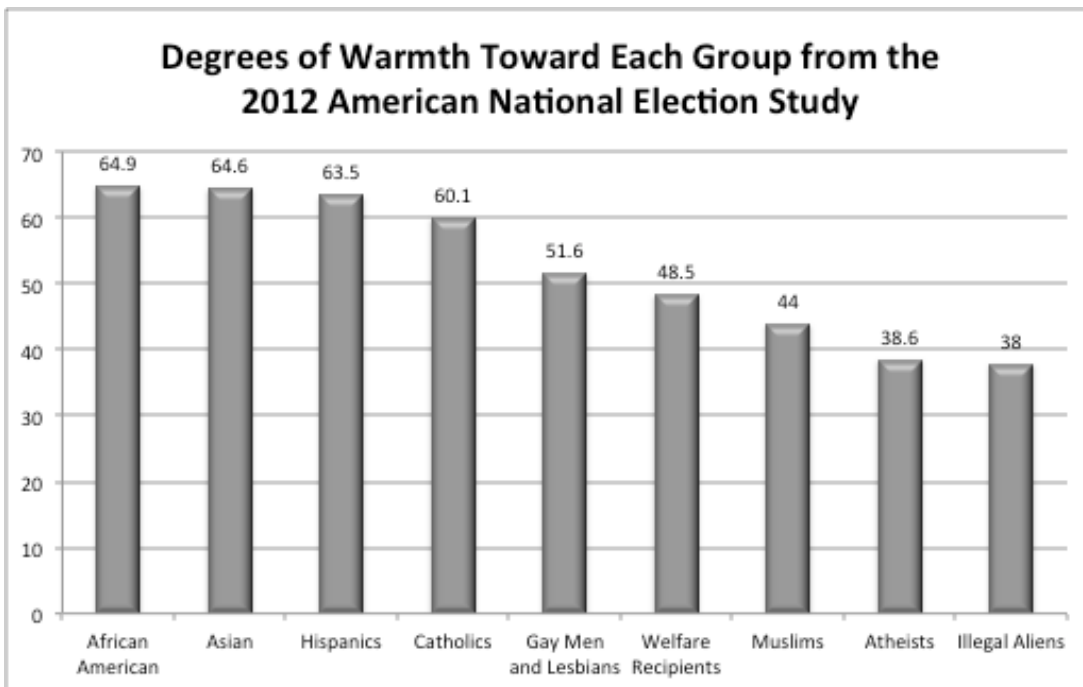
71. In each national election year, the American National Election Study (available at electionstudies.org or the Inter-university Consortium for Political and Social Research website) asks a representative sample of American citizens to gauge their “warmness” toward a particular group. Political scientists call this instrument a “feeling thermometer” and the scale of each ranges from 0 to 100, with 100 indicating strong warmth/fondness/positive views.

72. Examining the 2012 study, for Hispanics, approximately 35.8% of respondents rated their warmth at 50 (midpoint) or less, and the average temperature was 63.5 (std.dev.22.5). For African Americans, only 34.4% of respondents were at or below 50, and the mean temperature was 64.9 (std.dev. 22.1). For Catholics, 42.9% were at or below the mid-point and the mean temperature was 60.1(std.dev 23.9). What is revealing about these summary numbers is their similarity. They do vary, of course, but the percentage below the mid-point all group between 34 and 43%, the means of each group is between 60 and 65 degrees on the “thermometer,” and the standard deviations (a statistical score that calculates how spread apart

the responses are around the mean) are between 22 and 24, indicating majority positive perception of each of these groups..

73. By contrast, gay men and lesbians fare far worse. Fully 60.6% of respondents rated gays at or below the mid-point of 50 and the mean temperature response was 51.6 (std.dev 27.8), indicating that a majority of respondents do not perceive gay men and lesbians positively. Three-fifths of the respondents rate gays and lesbians at or below the mid-point, which is almost twice that for African Americans and substantially higher than for the other groups. The mean sentiment towards gay men and lesbians is 12 points lower than for Hispanics, and 13 points lower than for African Americans. The standard deviation is also instructive, since its size (larger than for the other groups) illustrates the level of polarization in sentiment about gay men and lesbians.

74. The following chart is illustrative of this point:



75. The trend in “warmness” toward gay men and lesbians has been positive over the last several decades (as it has, in fact, for many groups in society). Notwithstanding that trend, the relative placement of gay men and lesbians vis-à-vis other “out-groups” in society suggest that public esteem remains a significant obstacle to political progress. By any estimation, the public is less fond of gay and lesbian Americans than racial and ethnic minorities and religious groups. In fact, the other groups with comparable levels of coolness include Muslims (mean=50.3), atheists (mean=41), and undocumented aliens (mean=39.3). It is revealing that 13.4% of respondents gave gay men and lesbians a score of zero, a percentage exceeded only by scores for undocumented immigrants (15.4%) and atheists (18.6%).

(7) Political and Social Hostility

76. Gay men and lesbians face outspoken denunciation by elected officials in a manner that would be unthinkable if directed toward almost any other social group. Hostility by public officials is often directly mirrored in the population. Furthermore, its public nature, even when articulated by only a small segment of office-holders and officials, serves as a signal to the broader population that these discriminatory attitudes are “acceptable” or reasonable within the bounds of mainstream political discourse.

77. Gay men and lesbians have been described by a sitting U.S. Senator as “the greatest threat to our freedom that we face today.” Another sitting senator, during his successful campaign, openly called for gay men and lesbians to be banned from the classroom, a claim he repeated at a public rally. A third senator compared same-sex marriage to marrying “a box turtle.” He was subsequently reelected with a large margin. Same-sex intimacy has been described by a sitting senator as morally equivalent to incest and bestiality. In 2010, the GOP nominee for governor of New York responded to a question about marriage for same-sex couples

by saying that “we should stop pandering to pornographers and perverts....” The social and political disadvantage that flows from these very public and derisive comments is palpable.

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

(8) Unreliable Allies

80. The structure of the American party system is such that the path to pro-LGBT equality policy change lies almost exclusively through the actions of one party. The increasing power of evangelical Christians and self-styled “Tea Party” advocates in the GOP has shifted this party’s social policy further to the right and all but eliminated its once sizable tradition of libertarianism. Many within the Republican Party in office (and the national Republican platform) are openly hostile to gay and lesbian rights. The nearly complete disinterest of one party severely disadvantages gay men and lesbians, since gay men and lesbians can thus be understood as “captured” by the Democratic Party, that is, unlikely to bolt from the party or

abstain from voting for it in large numbers. Under these circumstances, the capturing party can take the political support of the group for granted.

81. Although the Democratic Party is more supportive in its rhetoric, and the Democratic platform speaks favorably regarding equality for lesbians and gay men, Democrats have repeatedly shrunk from any extension of rights to gay men and lesbians at the federal level. Democrats controlled the White House from 1993 to 2001, and the Congress until 1994 and from 2006 to 2010. Nevertheless, nondiscrimination statutes and federal recognition of state-sanctioned marriages between same-sex couples remain undelivered. Again, “Don’t Ask, Don’t Tell” was passed in a Democratically controlled Congress, and both it and the federal “Defense of Marriage Act” were signed into law by a Democratic president.

82. This is not to say that gay men and lesbians have no allies at all. Recently, the governors of New York, Maryland, Minnesota and Washington signed marriage bills into law. In the case of Washington State, the governor was not seeking reelection, but both other governors have future political aspirations. Their assistance weighs positively on my assessment of political resources of gays and lesbians. Their support, however, must be weighed against the vast majority of state governors, however, who offer no such support—costly or cost-free—or offer direct opposition to the political and social aspirations of gays and lesbians.

83. Gay men and lesbians are disadvantaged by the circumstance of party capture. The almost complete indifference or hostility of Republican elected officials to the political interest of gay men and lesbians largely confines their political opportunities for support and public office to a single party, the Democrats. Democratic leaders, mindful of this complete exclusion, are thus free to neglect and even occasionally set back gay and lesbian interests, secure in the knowledge that the other party does not represent a credible threat for peeling away

voters. Gay men and lesbians may be disenchanted with the quality and intensity of representation they appear to receive from Democratic office-holders but, in a practical sense, have no alternative. Taken together, Republican hostility and Democratic capture significantly weaken the political voice of lesbians and gay men.

(9) Moral and Political Condemnation

84. While the pluralist framework envisions shifting majorities and rotation in office, perceived Old Testament prohibitions of homosexuality serve to create, in many of America's religious communities, a permanent majority that believes same-sex intimacy is sinful and immoral, and that it should be condemned and discouraged. The General Social Survey (<http://www.norc.org/GSS+Website/>) regularly asks a representative sample of Americans to evaluate whether homosexual relations are "wrong." In 2008, those data show that 51.5% of Americans still report that sex between two persons of the same sex is "always wrong," while another 10.3% agree that it is "sometimes" or "almost always" wrong. Moreover, the shift in the direction of tolerance is neither large nor rapid. A decade ago, a module from the same survey showed comparable numbers, at 56% and 11.8% respectively.

(10) Powerful, Numerous, and Well-Funded Opposition

85. The moral condemnation of homosexual acts fuels and supports political opposition to protections and benefits for gays and lesbians. Campbell and Robinson (2007) found that opposition to marriages between same-sex couples united leadership and core believers across religious traditions. Similarly, the San Francisco Chronicle reported that the campaign in favor of Proposition 8 was conceived and funded by a cooperative effort of the Roman Catholic Archbishop of San Francisco and the senior leadership of the Mormon Church. These reports were supported by documentary evidence and testimony introduced in the *Perry v.*

Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), trial in the Northern District of California, in particular evidence of interstate coordination and fundraising within and between global religious organizations. The biennial campaigns to pass Nevada’s constitutional amendment prohibiting marriage for same-sex couples also received significant support from a number of churches, including the Mormon Church, which used its infrastructure to organize voters and solicit campaign donations from church members. Churches provide a well-funded, widely spread, untaxed medium in which individuals opposed to gay and lesbian policy goals can disseminate political messages and campaign materials, as well as engage in fundraising. Moreover, national religious organizations like Focus on the Family, the Traditional Values Coalition, the Family Research Council, the National Organization for Marriage and other groups provide a national network for pressuring elected officials, fundraising, message testing, media dissemination and publication, mobilization, and coordination across states and jurisdictions. This nationwide coordination, for example, explains how 13 statewide initiatives (including Ohio) concerning marriage for people in same-sex relationships appeared in a single year, 2004. Similarly, the coordination of campaigns from California to Maine illustrates the national nature of these efforts. Cahill (2007) documents the vast economic resources of these organizations and their willingness to provide them to political efforts to prevent or reverse rights, benefits, or protections for gay men and lesbians. Gay men and lesbians lack the political resources—including voting numbers, cash, elected officials from the group, reliable allies, reach, or a favorable political opportunity structure—to counter this kind of committed, organized opposition to their interests.

86. When scientific and learned societies have concluded that there is no evidentiary or scientific bases to justify anti-gay biases or policies—whether with respect to same-sex

relationships or in evaluating gay men and lesbians as parents, as healthy, productive members of society, and so forth—forces opposed to their political and social incorporation have formed splinter or shadow organizations designed to give the appearance of scientific approval to positions without broad scientific and professional support. For example, the American Psychological Association long ago removed homosexuality from their diagnostic manual as a psychologically disordered behavior, as the consensus in psychological research is that there is little or no psycho-pathology associated with homosexual identity. Nevertheless, anti-gay forces have founded the National Association of Research and Therapy for Homosexuality (NARTH), which promotes efforts to change sexual orientation even though virtually all major mental health professional organizations have adopted policy statements warning professionals and the public about these treatments. Likewise, the American Academy of Pediatrics has been publicly supportive of gay and lesbian parenting, and states on their website that “A growing body of scientific literature reveals that children who grow up with one or two gay and/or lesbian parents will develop emotionally, cognitively, socially, and sexually as well as children whose parents are heterosexual.” In response, anti-gay activists have established the “American College of Pediatricians” which, despite their name, is actually an anti-gay organization with a fraction of the Academy’s membership and no scientific or professional standing. These non-mainstream organizations, with names designed to evoke a false sense of scientific authority, exist principally to discredit the scientific consensus regarding gay people, unquestionably weakening their political power.

V. Comparative Political Powerlessness

87. Gays and lesbians suffer an extreme degree of political vulnerability and

powerlessness compared to most other groups in society. Even groups that have obtained the protection of heightened scrutiny from the Supreme Court possessed greater political power at the time those decisions were handed down than gays and lesbians do today. It is important to note that, at the time other groups were granted heightened scrutiny, they enjoyed a variety of constitutional and statutory protections that were not deemed adequate to the job of securing their basic liberties and did not, alone, demonstrate sufficient political power to make suspect class status unnecessary. Such is the case with lesbians and gay men. While they enjoy some statutory protections in some jurisdictions, they enjoy explicit constitutional protections in none, and face statutory and constitutional disadvantages in many.

A. Gender

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

89. Women have a number of other characteristics that enhanced their ability to organize and act politically when compared with gays and lesbians. While sexism certainly existed (and still exists), and political activism could be costly, identity as a woman was not

socially controversial, did not attract familial scorn, and did not bar one from such a large range of social institutions, though some institutions were exclusively male. Women could freely identify one another, gather, coordinate, and act largely free of fear of repressive tactics. Both political parties sought the support of women.

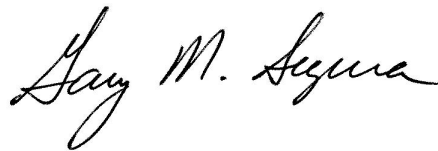
B. Race

90. Immediately in the wake of the Civil War, three amendments to the federal constitution established de jure legal equality for African-Americans and officially barred states from violating equal protection. Though this guarantee of equality had seldom been meaningfully enforced, it was nonetheless a de jure status superior to that now held by lesbians and gay men. In addition, as early as 1941, President Roosevelt issued Executive Order 8802 prohibiting race discrimination in contracting and employment in companies doing business with the U.S. In April of 2012, President Obama declined to sign an executive order barring sexual orientation discrimination among federal contractors. Through court action and the social movement of the 1950s and 1960s, African Americans (and later Latinos) achieved a rollback of Jim Crow segregation laws and established a statutory regime of equality in employment, education, and housing. Again, this was more promise than practice, but it was a statutory circumstance superior to that of lesbians and gay men today.

91. In the 1940s and 1950s, African Americans and other racial and ethnic minorities had similar disadvantages to gays in terms of resources and social sanction, but with far greater numbers (and in some instances majorities), they have been able to claim a more meaningful share of political representation and policy responsiveness. Even before the passage of the Civil Rights Act of 1964 and Voting Rights Act of 1965, there were 5 black members of Congress and over 100 elected officials nationwide. Today, 73 people of color serve in the House of

Representatives. African Americans, Latinos, and Asian Americans have been elected governors and big city mayors. They form outright majorities in dozens of jurisdictions and approximately 60 House districts through the last census. Rather than serve as an impediment, most (though admittedly not all) religious institutions express support for the principle of racial equality and the church in minority communities, rather than serving as an impediment to political progress, is a locus for identification and mobilization. In terms of social support for the general principle of equal treatment under the law, racial and ethnic minorities enjoy at least the public commitment of most institutions, elected officials and citizens, in sharp contrast to that of lesbians and gay men.

Signed under penalty of perjury this 9th day of October, 2013.

A handwritten signature in cursive script that reads "Gary M. Segura".

Gary M. Segura, Ph.D.