No. 10-16696

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

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KRISTIN M. PERRY, et al.,
*Plaintiffs-Appellees*,
v.
ARNOLD SCHWARZENEGGER, et al.,
*Defendants*,
and
PROPOSITION 8 OFFICIAL PROPONENTS
DENNIS HOLLINGSWORTH, et al.,
*Defendants-Intervenors-Appellants*.

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On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 VRW
The Honorable Vaughn R. Walker

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# BRIEF FOR APPELLEES

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THEODORE J. BOUTROUS, JR.
CHRISTOPHER D. DUSSEAULT
THEANE EVANGELIS KAPUR
SARAH E. PIEPMEIER
ENRIQUE A. MONAGAS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804

THEODORE B. OLSON
*Counsel of Record*
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

*Attorneys for Plaintiffs-Appellees Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo*

*[Additional Counsel Listed on Inside Cover]*

DAVID BOIES
JEREMY M. GOLDMAN
THEODORE H. UNO
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
(914) 749-8200

*Attorneys for Plaintiffs-Appellees*
*Kristin M. Perry, Sandra B. Stier,*
*Paul T. Katami, and Jeffrey J. Zarrillo*

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## INTRODUCTION

This case is about marriage, "the most important relation in life," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), and equality, the most essential principle of the American dream, from the Declaration of Independence, to the Gettysburg Address, to the Fourteenth Amendment.

Fourteen times the Supreme Court has stated that marriage is a fundamental right of all individuals. This case tests the proposition whether the gay and lesbian Americans among us should be counted as "persons" under the Fourteenth Amendment, or whether they constitute a permanent underclass ineligible for protection under that cornerstone of our Constitution.

The unmistakable, undeniable purpose and effect of Proposition 8 is to select gay men and lesbians—and them alone—and enshrine in California's Constitution that they are different, that their loving and committed relationships are ineligible for the designation "marriage," and that they are unworthy of that "most important relation in life." After an expensive, demeaning campaign in which voters were constantly warned to vote "Yes on 8" to "protect our children"—principally from the notion that gay men and lesbians were persons entitled to equal dignity and respect—Proposition 8 passed with a 52% majority, stripping away the state constitutional right to marry from gay men and lesbians. Proponents' stigmatization of gay and lesbian

relationships as distinctly second-class thus became the official constitutional position of the State of California.

Class-based balkanization and stigmatization of our citizens is flatly incompatible with our constitutional ideals. "[T]he Constitution 'neither knows nor tolerates classes among citizens.'" *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). The tragic time has long passed when our government could target our gay and lesbian citizens for discriminatory, disfavored treatment—even imprisonment—because those in power deemed gay relationships deviant, immoral, or distasteful. Proponents' own expert acknowledged that the principle of "equal human dignity must apply to gay and lesbian persons." SER 287. "In respect of civil rights, all citizens are equal before the law." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

Thus, the Constitution now fully embraces the truth that, no less than heterosexual persons, "[p]ersons in a homosexual relationship" enjoy "constitutional protection [for] personal decisions relating to marriage." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). The district court correctly recognized that Proposition 8 and its demeaning of the personal autonomy of gay men and lesbians with respect to marriage was of a piece with the anti-miscegenation statutes struck down years ago in *Loving v. Virginia*, 388 U.S. 1 (1967). And just as the Supreme Court properly vindicated those foundational principles of freedom and equality in *Loving*, so, too, does the decision

of the district court invalidating Proposition 8 make this Nation, in the words of Proponents' expert, "*more* American . . . than we were on the day before." SER 287.

From the very first sentence of their opening brief, Proponents make clear that their case hinges upon application of a version of rational basis review that a court might apply to everyday economic legislation. Under this type of rational basis review, Proponents contend, a State may "draw a line around" its gay and lesbian citizens and exclude them from the entire panoply of state benefits, services, and privileges so long as one can imagine a conceivable set of facts that would justify providing those benefits only to heterosexual persons.

Application of Proponents' version of rational basis review to Proposition 8 would be profoundly unjust and absolutely incompatible with our Nation's tradition of equality as articulated in numerous decisions of the Supreme Court. Categorical exclusions from "the most important relation in life" cannot possibly be equated with zoning or economic regulations that adjust in nice gradations the economic benefits and burdens of life in American society. And a person's sexual orientation is not a species of conduct that may readily be adjusted to conform to the government's changing priorities; the court below, based on ample expert analysis, found that a gay man or lesbian cannot simply choose to be attracted to the opposite sex and thereby avoid the sting of Proposition 8, to say nothing of the other acts of discrimination and violence frequently directed at gay and lesbian persons. Heightened scrutiny thus

properly applies to laws targeting persons based on their sexual orientation, just as it does to laws classifying persons on the basis of race, ancestry, sex, illegitimacy, alienage, and religion.

Even under Proponents' preferred standard of review, however, Proposition 8 fails. There is no legitimate interest that is even remotely furthered by Proposition 8's arbitrary exclusion of gay men and lesbians from the institution of marriage. Indeed, Proponents can offer nothing to support it but unproven assertions and tautologies.

Proponents argue that stripping gay men and lesbians of their right to marry advances governmental interests in "responsible procreation" and preventing the "deinstitutionalization" of marriage—two phrases that, tellingly, the Yes on 8 campaign never saw fit to urge upon California voters. To determine whether these rationales and others proffered from time to time by Proponents legitimately could justify Proposition 8, the district court—like courts in many other civil rights cases—held a trial at which it considered evidence and expert testimony. Plaintiffs presented 17 witnesses, including nine leading experts in history, political science, psychology, and economics, and hundreds of trial exhibits, including more than 100 exhibits related to messages transmitted to voters as part of the Proposition 8 campaign.

Proponents, on the other hand, denounced from the start the notion that their assertions might be subjected to adversarial testing, resisting the very idea of a trial, and ultimately insisted their assertions did not need to be supported by any evidence what-

soever. In the end, they presented just two witnesses, including a supposed expert on marriage who derived the substance of his opinions concerning the harms same-sex marriage might cause to "traditional" marriage from a "thought experiment" in which he essentially did little more than chronicle the responses provided by an unscientifically selected audience. ER 81. When asked by the district court to identify what harms would befall opposite-sex married couples if gay and lesbian couples could marry, Proponents' counsel candidly acknowledged, "I don't know." ER 44.

Based on that factual record—undoubtedly the most detailed ever assembled in a case challenging legislation targeting gay and lesbian persons—the district court issued a 136-page opinion that meticulously examined each of the parties' factual assertions and the evidence supporting those assertions. The district court found that "Proponents' evidentiary presentation was dwarfed by that of plaintiffs," and concluded that Proponents "failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest." ER 46. In light of Proponents' inability to identify a single legitimate interest furthered by Proposition 8, the court concluded that, under any standard, Proposition 8 violated both the Due Process and Equal Protection Clauses.

Proponents and their *amici* now attempt to fill the evidentiary void they left in the district court with an avalanche of non-record citations, distortions and misstatements regarding the proceedings below, and baseless attacks on the good faith of the

district court. The tactic is unfortunate, unbecoming, and unavailing. The governmental interests Proponents assert have been affirmatively disavowed by California, or have no basis in reality, or both. The fact is, as the testimony of 19 witnesses and 900 trial exhibits introduced into evidence amply demonstrate, there is no good reason—indeed, not even a rational basis—for California to exclude gay men and lesbians from the institution of civil marriage, the most important relation in life.

The district court's judgment is predicated squarely on the fundamental principles established by the Supreme Court in *Loving* and its other decisions explaining the constitutional meaning of marriage, as well as the Court's decisions in *Lawrence* and *Romer* concerning the constitutional rights of gay and lesbian individuals, which together make clear that Proposition 8 flatly violates the constitutional commands of due process and equal protection. That judgment—and the injunction against the enforcement of Proposition 8 that necessarily must follow—should be affirmed.

## STATEMENT OF JURISDICTION

The district court possessed jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under the Constitution and laws of the United States. This Court lacks jurisdiction over this appeal because Proponents do not have Article III standing to appeal the district court's decision. *See infra* Part I.

## STATEMENT OF FACTS

### I. THE ENACTMENT OF PROPOSITION 8

In 2000, California voters adopted Proposition 22, which amended the Family Code to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Fam. Code § 308.5. In May 2008, the California Supreme Court struck down Proposition 22, holding that it violated the due process and equal protection guarantees of the California Constitution, and ordered the State to issue marriage licenses without regard to the sex of the prospective spouses. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

After the California Supreme Court's decision in the *Marriage Cases*, Proponents financed and orchestrated a $40 million campaign to amend the California Constitution to strip gay men and lesbians of their fundamental right to marry recognized by the state supreme court. The measure—Proposition 8—was placed on the ballot for the November 2008 election, and proposed to add a new Article I, § 7.5 to the California Constitution stating that "[o]nly marriage between a man and a woman is valid or recognized in California."

The Official Voter Information Guide informed voters that Proposition 8 would "[c]hange[ ] the California Constitution to eliminate the right of same-sex couples to marry in California." ER 1030. The Voter Guide's "Argument in Favor of Proposition 8"—an official statement of the Yes on 8 campaign—urged voters to sup-

port the measure because "[w]e should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay." ER 1032. The Argument asserted that "while gays have the right to their private lives, *they do not have the right to redefine marriage* for everyone else," and told Californians that "[v]oting YES *protects our children*." ER 1032.

Proposition 8 passed by a narrow margin, and went into effect on November 5, 2008, the day after the election. *See Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009). During the period between the California Supreme Court's decision in the *Marriage Cases* on May 15, 2008, and the effective date of Proposition 8, more than 18,000 same-sex couples were married in California. ER 37. On May 26, 2009, the California Supreme Court upheld Proposition 8 against a state constitutional challenge, but held that the new amendment to the California Constitution did not invalidate the marriages of same-sex couples that had been performed before its enactment. *See Strauss*, 207 P.3d 48; *see also* ER 38.

By eliminating the right of individuals of the same sex to marry, Proposition 8 relegated same-sex couples seeking government recognition of their relationships to so-called "domestic partnerships." Under California law, domestic partners are granted nearly all the substantive rights and obligations of a married couple, but are denied the highly venerated label of "marriage." *See* Cal. Fam. Code § 297; *see also Marriage Cases*, 183 P.3d at 402, 434-35, 444-45.

## II. PLAINTIFFS' SUIT CHALLENGING PROPOSITION 8

Plaintiffs are gay and lesbian Californians who are in committed, long-term relationships and who wish to marry. ER 89-90. As a direct result of Proposition 8, Plaintiffs were denied the right to marry solely because their prospective spouses are of the same sex. ER 89-90.

On May 22, 2009, Plaintiffs filed suit to secure the right to marry. They challenged the constitutionality of Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and named as defendants California's Governor, Attorney General, Director of Public Health, and Deputy Director of Health Information and Strategic Planning; the Alameda County Clerk-Recorder; and the Los Angeles County Registrar-Recorder/County Clerk. ER 60-62, 148-49; *see also* SER 74-84. In response, the Attorney General admitted that Proposition 8 is unconstitutional, SER 44-46, 49-51, and the remaining government defendants declined to defend Proposition 8. SER 22, 26-30.

Proponents moved to intervene in the case to defend Proposition 8, SER 53, and the district court granted their motion on June 30, 2009. ER 204-06. In August 2009, the City and County of San Francisco was also granted leave to intervene in the case. SER 19.

On July 2, 2009, the district court denied Plaintiffs' motion for a preliminary injunction, finding that the case presented a number of important "factual questions"

that the court "ought to address . . . in the traditional way in which courts have dealt with factual questions," allowing "plaintiffs, the defendants, and the intervenors the opportunity to make" a "fully developed record" upon which to evaluate the "serious" constitutional questions raised by Plaintiffs' claims. ER 197, 199-200, 214.

On October 14, 2009, the district court denied Proponents' motion for summary judgment. SER 17. In so doing, the court held that the Supreme Court's nearly forty-year-old summary order in *Baker v. Nelson*, 409 U.S. 810 (1972), did not resolve the issues presented in this case because there "have been significant doctrinal developments on both Equal Protection and Due Process grounds since *Baker* was summarily dismissed in 1972." ER 183. Moreover, unlike Proposition 8, the Minnesota marriage law at issue in *Baker* did not "strip unmarried gay and lesbian individuals of an existing state constitutional right to marry." ER 183. The court therefore concluded that Plaintiffs' claims resemble those in *Romer v. Evans*, 517 U.S. 620 (1996)—which struck down a voter-enacted state constitutional amendment that stripped gay men and lesbians of antidiscrimination protections—far more than those in *Baker*. ER 184. The court also rejected Proponents' argument that *High Tech Gays v. Defense Industry Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), requires the application of rational basis review to Plaintiffs' equal protection claim because *High Tech Gays* was explicitly premised on the since-overruled decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). ER 188-89.

The district court then conducted a twelve-day bench trial, during which the parties were "given a full opportunity to present evidence in support of their positions." ER 46. At trial, the parties called 19 witnesses—17 of them by Plaintiffs—and played the video depositions of other witnesses as well. ER 46. The court admitted into evidence more than 700 exhibits and took judicial notice of more than 200 other exhibits.

The district court's decision to resolve disputed factual issues through the trial process was consistent with a long line of constitutional cases. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 523 (1996) (discussing a trial that "consumed six days and involved an array of expert witnesses on each side"); *Cleburne Living Ctr. v. City of Cleburne*, 726 F.2d 191, 193 (5th Cir. 1984) (discussing trial testimony in an equal protection challenge), *aff'd in part*, 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202, 207 (1982) (citing the district court's "extensive findings of fact" in support of a decision holding that a state law violated equal protection under rational basis review); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.10 (1954) (discussing lower court's factual findings, based on witness testimony, that "State-imposed segregation in educa-

tion itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children").[1]

## III. THE DISTRICT COURT'S DECISION STRIKING DOWN PROPOSITION 8

On August 4, 2010—after hearing more than six hours of closing arguments and considering hundreds of pages of proposed findings of fact and conclusions of law submitted by the parties (Doc #606, SER 1)—the district court found in favor of Plaintiffs. The court declared Proposition 8 unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and permanently enjoined its enforcement. ER 171.

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[1] Proponents "elected not to call the majority of their designated witnesses to testify at trial and called not a single official proponent of Proposition 8," claiming that their withdrawn witnesses were unwilling to testify because the district court planned to record the trial proceedings for dissemination on the Internet. ER 70. "[P]roponents failed to make any effort," however, "to call their witnesses after the potential for public broadcast in the case had been eliminated" by the Supreme Court's issuance of a permanent stay of the district court's broadcasting order on the third day of trial. ER 71. Proponents assert that these expert witnesses remained unwilling to testify because the district court was videotaping the proceedings for in-court use. Prop. Br. 13. But there was no trace of this supposed fear of videotaping (peculiar among persons of such public profile) during the *videotaped* depositions of those witnesses—depositions that were so favorable to *Plaintiffs*, that Plaintiffs used them affirmatively at trial. *See* SER 222-26 (Paul Nathanson); SER 678 (same); SER 188, 194-95 (Loren Marks); SER 226-28 (Katherine Young); SER 677 (same); SER 269-74 (Daniel Robinson). That fact—and not the purported fear of videotaping—is what explains the experts' absence from trial.

A. The district court concluded that Proposition 8 violates the Due Process Clause because it "unconstitutionally burdens the exercise of the fundamental right to marry" and "cannot withstand rational basis review"—let alone the strict scrutiny required when a measure infringes on a fundamental right. ER 144, 151-52. The district court found that the right to marry is fundamental for both heterosexuals and for gay men and lesbians, and that unions between individuals of the same sex "encompass the historical purpose and form of marriage." ER 149. Accordingly, Plaintiffs were "not seek[ing] recognition of a new right," but access to the fundamental right to marry constitutionally guaranteed to all persons. ER 149.

In so ruling, the district court credited the testimony of Plaintiffs' expert Dr. Nancy Cott, Professor of History at Harvard University, who testified that marriage "is a basic civil right." ER 49, 95. Cott explained that marriage is "a couple's choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life." SER 102. Similarly, Plaintiffs' expert Dr. Letitia Peplau, Professor of Psychology at the University of California, Los Angeles, testified that "[m]ost Americans view marriage as one of the most important relationships in their life," and "[m]any people view getting married as a very important life goal." SER 148-49; *see also* SER 103-

04 (Cott: newly emancipated slaves saw the right to marry as one of their most important new rights and "flocked to get married").

The district court concluded that the availability of domestic partnerships does not satisfy California's due process obligation to gay and lesbian individuals because the evidence showed that "domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage"; "exist solely to differentiate same-sex unions from marriages"; and are an "inferior" substitute for marriage. ER 150-51; *see also* ER 115-16 (citing Cott). That evidence included testimony from the four plaintiffs about their desire to marry and the meaning of marriage. ER 47. Sandra Stier testified, for example, that marriage would tell "our friends, our family, our society, our community, our parents . . . and each other that this is a lifetime commitment." ER 48. She explained that "there is certainly nothing about domestic partnership . . . that indicates the love and commitment that are inherent in marriage." ER 54. Similarly, Jeffrey Zarrillo explained that "[d]omestic partnership would relegate [him] to a level of second class citizenship," and "it doesn't give due respect to the relationship that [he has] had for almost nine years." ER 118.

B. The district court also held that Proposition 8 violates the Equal Protection Clause because it "creates an irrational classification on the basis of sexual orientation." ER 144.

As an initial matter, the district court found that "the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect." ER 156 (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam)). That evidence included the testimony of Plaintiffs' expert Dr. George Chauncey, Professor of History at Yale University, who explained that gay and lesbian individuals "have experienced widespread and acute discrimination from both public and private authorities over the course of the twentieth century," and that significant discrimination continues through the present. ER 131-32. Proponents themselves conceded this history of discrimination and the fact that it was not based on a trait that impaired the ability of gay men and lesbians to make a full and meaningful contribution to society. ER 131; SER 20; *see also* ER 111.

On the issue of the relative political power of gay men and lesbians, the district court looked to the testimony of Dr. Gary Segura, Professor of Political Science at Stanford University. Taking into account "legislative defeat[s], the presence of ballot initiatives, the absence of statutory or constitutional protection, the presence of statutory or constitutional disadvantage," as well as "small numbers, public hostility, hostility of elected officials, and a clearly well-integrated, nationally prominent, organized opposition," Dr. Segura "conclude[d] that gays and lesbians lack the sufficient power necessary to protect themselves in the political system." SER 242. Similarly, Proponents' expert on political power, Dr. Kenneth Miller, admitted that "at least

some people voted for Proposition 8 on the basis of anti-gay stereotypes and prejudice," ER 139, and that "there has been severe prejudice and discrimination against gays and lesbians." ER 133.[2]

The district court also determined that sexual orientation satisfies the "immutability" prong of the standard for heightened scrutiny. *See* ER 109-11; *see also* ER 156-57. That finding was supported by the testimony of Dr. Gregory Herek, Professor of Psychology at the University of California, Davis, who testified that same-sex attraction is a normal expression of human sexuality, and that the vast majority of gay men and lesbians have little or no choice about their sexual orientation. ER 106-07, 109-10. In addition, Dr. Peplau testified that a large and well-respected body of research shows that same-sex relationships have "great similarity" to opposite-sex relationships. SER 150-51.

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[2] The district court found that all of Plaintiffs' witnesses were credible and that their testimony was entitled to weight. ER 60, 63. In contrast, the court found that Dr. Miller's opinions were "entitled to little weight and only to the extent they are amply supported by reliable evidence." ER 89. The court emphasized that Dr. Miller had previously written—contrary to his trial testimony—that gay men and lesbians, like other minorities, are vulnerable and powerless in the initiative process, and that his experience with politics generally did not qualify him to offer an opinion on gay and lesbian political power because his research "has not focused on gay and lesbian issues" and he was unfamiliar with the literature on the subject. ER 85-86, 88.

Based on this evidence, the district court concluded that "[a]ll classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation." ER 157. The court found it unnecessary, however, to evaluate Proposition 8 under strict scrutiny because the measure failed even rational basis review. ER 157.

In reaching that conclusion, the district court carefully evaluated each of Proponents' proffered justifications for Proposition 8. The court rejected "Proponents' argument that tradition prefers opposite-sex couples to same-sex couples" because it "equates to the notion that opposite-sex relationships are simply better than same-sex relationships." ER 159-60. "[T]he state cannot have an interest in disadvantaging an unpopular minority group simply because the group is unpopular." ER 160 (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

The district court also dismissed Proponents' purported interest in "proceeding with caution when implementing social change" because "the evidence shows same-sex marriage has and will have no adverse effects on society or the institution of marriage." ER 161. In that regard, Plaintiffs' expert Dr. M.V. Lee Badgett, Professor of Economics at the University of Massachusetts, testified that there have not been any adverse effects from same-sex marriage in those States and countries where it has been permitted, and that there is no credible basis to believe that there will be any adverse effects in California. SER 206; *see also* SER 208-09, 213-14. In addition, Dr.

Cott testified that permitting same-sex couples to marry in Massachusetts has not generated any adverse effects on the institution of marriage. SER 125-26; *see also* ER 118-19 (Peplau: same). And Proponents' expert, Mr. David Blankenhorn, admitted that, to the extent marriage was becoming "deinstitutionaliz[ed]," that phenomenon was attributable to heterosexuals, not gay men and lesbians. SER 281-82.[3]

Similarly, the district court concluded that Proposition 8 does not advance the State's purported interest in promoting opposite-sex parenting over same-sex parenting. As an initial matter, the court found that this interest was not even a legitimate one for the State to pursue because "the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes." ER 162. To support that finding, the court relied on the testimony of Plaintiffs' expert Dr. Michael Lamb, Professor of Social and Developmental Psychology at Cambridge University, who explained "that children who are raised by gay and lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents." ER 130. The court also found this purported interest to be insufficient for the additional reason that "Proposition 8 has nothing to do with children, as [it] simply prevents same-sex cou-

[3] Mr. Blankenhorn was called by Proponents to testify about the definition and purpose of marriage, ER 72-73, but the district court found that his analysis lacked intellectual rigor and that his opinions accordingly were "unreliable and entitled to essentially no weight." ER 84.

ples from marrying" and does not disturb existing California law permitting same-sex couples to adopt. ER 162.

Ultimately, the district court concluded that, "despite ample opportunity and a full trial," Proponents "have failed to identify any rational basis Proposition 8 could conceivably advance." ER 166. And, "[i]n the absence of a rational basis," the court continued, "what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples." ER 167. That evidence included testimony from Dr. Chauncey, who explained that the public messages disseminated by the Yes on 8 campaign evoked fears of gay people as child molesters and recruiters of children (ER 140-42), and from Hak-Shing William Tam, an official proponent of Proposition 8 called by Plaintiffs as an adverse witness, who testified that the campaign messages were designed to convince people that "gay marriage will encourage more children to experiment with the gay lifestyle, and that that lifestyle comes with all kinds of disease." SER 255-56. According to Dr. Tam, there is a "gay agenda" that includes legalizing prostitution and sex with children, and "permitting gays and lesbians to marry" in California would mean that "one by one other states would fall into Satan's hand." SER 251-52, 254, 348-49.

The district court concluded that Plaintiffs were entitled to a permanent injunction against the enforcement of Proposition 8 because they will continue to suffer irreparable harm as long as Proposition 8 remains in force. ER 171.

## SUMMARY OF ARGUMENT

The district court correctly held that Proposition 8 is an arbitrary, irrational, and discriminatory measure that denies gay men and lesbians their fundamental right to marry in violation of the Due Process and Equal Protection Clauses. The judgment below should be affirmed.

I. As an initial matter, Proponents lack standing to pursue this appeal. Proponents do not contend that they would personally suffer an injury if gay men and lesbians were permitted to marry in California. They instead rely on their status as official sponsors of Proposition 8 to satisfy the requirements of Article III. But there is no provision of California law that authorizes the proponents of a ballot initiative to represent the State's interest in defending the constitutionality of an initiative. Indeed, the California Supreme Court has authoritatively determined that initiative proponents *lack* standing to represent the State's interests and are "in a position no different from that of any other member of the public." *In re Marriage Cases*, 183 P.3d 384, 406 (Cal. 2008). Proponents' "'value interest[ ]'" in defending Proposition 8—which is shared by every Californian who voted in favor of the measure—is insufficient to sat-

isfy the requirements of Article III. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

II. Proponents are also wrong when they contend that the district court's decision invalidating Proposition 8 is foreclosed by binding precedent. The Supreme Court's nearly forty-year-old summary order in *Baker v. Nelson*, 409 U.S. 810 (1972), has been undermined by numerous jurisprudential developments—most notably, the Supreme Court's decisions protecting gay men and lesbians from discrimination in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996). Moreover, *Baker* did not even present an equal protection challenge based on sexual orientation, and it did not consider the constitutionality of a ballot initiative that stripped gay men and lesbians of their previously recognized right to marry. This Court's decision in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), has also been undermined by *Lawrence* and *Romer*, and has no force outside the specialized immigration context.

III. Proposition 8 violates the Due Process Clause because it denies gay men and lesbians their fundamental right to marry and does not further a legitimate—let alone a compelling—state interest.

The Supreme Court has recognized on more than a dozen occasions that the right to marry is "one of the liberties protected by the Due Process Clause." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). The Court has never limited

that right to persons willing or able to procreate, *see, e.g.*, *Turner v. Safley*, 482 U.S. 78, 96 (1987), but has instead recognized that "the right to marry is of fundamental importance *for all individuals*." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added). Indeed, the Supreme Court has emphasized that the Constitution "afford[s] . . . protection to personal decisions relating to marriage" and that "[p]ersons in a homosexual relationship may seek autonomy for th[i]s purpose[ ], just as heterosexual persons do." *Lawrence*, 539 U.S. at 574.

Over time, marriage has "shed its attributes of inequality," including race-based restrictions and gender-based distinctions, SER 128 (Cott), but its essential character—"a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred" (*Griswold v. Connecticut*, 381 U.S. 479, 486 (1965))—has not changed. Eliminating the final discriminatory feature of California's marriage law—its prohibition on marriage by individuals of the same sex—thus would not require the recognition of a new right, but would instead afford gay men and lesbians access to the fundamental right to marry guaranteed to all persons.

Domestic partnerships are not a constitutionally sufficient substitute for marriage. The uncontradicted evidence at trial established that domestic partnerships lack the symbolic significance and social meaning of marriage, and that relegating gay men and lesbians (and their families) to these inferior, second-class unions has a profoundly stigmatizing effect. The Supreme Court long ago recognized that the Consti-

tution does not permit a State to afford separate-and-inherently-unequal rights to disfavored minority groups. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

IV. Proposition 8 also violates the Equal Protection Clause because it extinguishes the preexisting right of gay men and lesbians to marry for no reason other than to make them "unequal to everyone else." *Romer*, 517 U.S. at 635.

Proposition 8 is subject to heightened equal protection scrutiny because gay men and lesbians are a suspect (or at the very least) a quasi-suspect class. It is undisputed that gay and lesbian individuals have been the victims of a long and reprehensible history of discrimination based on a characteristic that has absolutely no bearing on their ability to contribute to society. That fact alone is sufficient to afford gay men and lesbians heightened equal protection scrutiny. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam). This conclusion is confirmed by the immutability of sexual orientation and the relative political powerlessness of gay and lesbian individuals in comparison with other groups that receive heightened scrutiny.

Proposition 8 cannot satisfy the requirements of strict scrutiny—or any other standard of constitutional review. While Proponents proffer several state interests that are furthered by opposite-sex marriage, they fail to identify a *single* legitimate state interest that is advanced by stripping gay men and lesbians of their preexisting right to marry. For example, Proponents contend that Proposition 8 is rationally related to the State's interest in "responsible procreation." To the extent that Proponents are argu-

ing that the "ideal" is for children to be raised by their married, biological parents, the State of California itself disagrees. The State permits individuals in same-sex relationships to adopt children, *see Marriage Cases*, 183 P.3d at 428, and its decision to do so is consistent with the overwhelming weight of the evidence at trial, which established that children raised by same-sex parents fare just as well as children raised by their biological parents. ER 130. Proponents' argument that Proposition 8 is rationally related to the State's interest in "channeling" children into these purportedly "ideal" family environments is equally flawed because denying gay and lesbian individuals the right to marry does not increase the likelihood that opposite-sex couples capable of producing children will decide to get married. Nor can Proposition 8 be justified based on voters' fears about the repercussions of allowing individuals of the same sex to marry. The evidence at trial exposed those fears as wholly unsubstantiated. In any event, permitting uncertainty about the consequences of eliminating discrimination to justify that discrimination would make inequality self-perpetuating.

The absence of any rational basis for Proposition 8—together with the evidence of anti-gay rhetoric in the Yes on 8 campaign—leads inexorably to the conclusion that Proposition 8 was enacted solely for the purpose of making gay men and lesbians unequal to everyone else. Because a "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," *Romer*, 517 U.S. at 634 (internal quotation marks omitted), Proposition 8 is unconstitutional.

## STANDARD OF REVIEW

This Court reviews "*de novo* the legal conclusions underlying a district court's grant of a permanent injunction." *Malabed v. N. Slope Borough*, 335 F.3d 864, 867 (9th Cir. 2003). "Factual findings underlying an injunction are reviewed for clear error." *Sandpiper Vill. Condo. Ass'n, Inc. v. La.-Pac. Corp.*, 428 F.3d 831, 840 (9th Cir. 2005); *see also* Fed. R. Civ. P. 52(a). The clear error standard "applies equally to 'ultimate' facts and to 'subsidiary' facts," *Anti-Monopoly, Inc. v. Gen. Mills Fun Group, Inc.*, 684 F.2d 1316, 1318 (9th Cir. 1982) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 286 (1982)), and to the "results of 'essentially factual' inquiries applying the law to the facts." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

Proponents attempt to evade this well-established standard of review by characterizing nearly every factual finding made by the district court as a "legislative fact." But many of the district court's findings plainly involve adjudicative facts, which are "simply the facts of the particular case." *Valdivia v. Schwarzenegger*, 599 F.3d 984, 994 (9th Cir. 2010) (citation omitted). Those findings include facts about the parties, ER 89-94, the themes and messages employed by the Proposition 8 campaign and their meaning, ER 108, 140, 143, and the specific effects of Proposition 8. ER 120-29.

Moreover, neither the Supreme Court nor the Ninth Circuit has established a different standard of review for legislative facts. In *Service Employees International*

*Union v. Fair Political Practice Commission*, 955 F.2d 1312 (9th Cir. 1992), for example, this Court reviewed for clear error the district court's findings on the discriminatory impact of Proposition 73, a campaign-finance law, and expressly rejected the contention that those findings should be reviewed *de novo*. *Id.* at 1317 n.7. The Court held that the findings regarding the law's discriminatory effects—which are similar to those that Proponents here characterize as legislative—were not clearly erroneous because they were "derived from the testimony of two expert witnesses" and "[e]xperts may make reasonable projections of future harm based on reliable data." *Id.* at 1317-18; *see also Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1063-64 (9th Cir. 1999) (reviewing for clear error the district court's findings that school admissions requirements satisfied strict scrutiny).

This approach to the review of district court fact-finding gives effect to the plain language of Rule 52(a). *See* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); *Pullman-Standard*, 456 U.S. at 287 (Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obliga-

tion of a court of appeals to accept a district court's findings unless clearly erroneous."); *Serv. Emps. Int'l*, 955 F.2d at 1317 n.7 (same).[4]

Furthermore, in this case, there is an extensive and detailed factual record, to which all parties had the opportunity to contribute. ER 46. The district court engaged in a lengthy, careful, and thorough analysis of the evidence presented, which included the testimony of 19 witnesses and more than 900 exhibits. In that context, the application of *de novo* review is likely to be inefficient and without clear countervailing benefits. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985) ("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."); *Serv. Emps. Int'l*, 955 F.2d at 1317 n.7. Indeed, without discussing the level of review, the Supreme Court regularly adopts findings of fact where district courts have developed thorough records through extensive testimony and rigorous

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[4] Proponents rely on decisions from other circuits suggesting that appellate courts may have the option of reviewing legislative facts less deferentially. *See* Prop. Br. 37. That view has never been embraced by this Court or by the Supreme Court, and has occasioned strong dissents. *See Free v. Peters*, 12 F.3d 700, 708 (7th Cir. 1993) (Cudahy, J., dissenting) ("The trial courts are our window on reality, and I would be exceedingly cautious in arrogating their functions to ourselves."); *Dunagin v. City of Oxford*, 718 F.2d 738, 755 (5th Cir. 1983) (Higginbotham, J., dissenting). Proponents suggest that *Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986), expressed doubts about whether legislative fact-finding is reviewed for clear error. But the Court expressly declined to decide the "standard of review" issue in that case. *Id.*

analysis. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 849-58 (1997) (citing 22 of the district court's findings in a 10-page discussion of the record); *Plyler v. Doe*, 457 U.S. 202, 207 (1982) (relying on the district court's "extensive findings of fact" to uphold an equal protection challenge).[5]

In any event, this is not a case in which the standard of review will determine the outcome of the litigation. Plaintiffs called as experts the leading scholars from around the country (and the world) in their respective fields, who testified based on years of research. As the district court observed, the evidence put forward by Plaintiffs was overwhelming; in contrast, Proponents' arguments were completely unsupported. ER 46. Whatever standard of review is applied, the evidence admits of only one conclusion: that Proposition 8 is unconstitutional.

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[5] Proponents' suggestion that trials are not well suited to determine legislative facts is insupportable. Kenneth Culp Davis, who coined the term "legislative fact," explained that "[o]ften the best way to resolve hotly disputed issues of legislative fact is by taking evidence subject to rebuttal and cross-examination, and this is common practice." Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *in* Perspectives of Law 69, 88 (Roscoe Pound et al. eds., 1964); *see also H.B.R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990) (Posner, J.) (noting that the line between adjudicative and legislative facts is not "hard and fast" and that "[i]f facts critical to a decision on whether [a particular legal standard should apply] cannot be determined with reasonable accuracy without an evidentiary hearing, such a hearing can and should be held").

## ARGUMENT

## I. PROPONENTS LACK STANDING TO APPEAL.

Proponents are the only parties to the case below who have filed a notice of appeal from the district court's judgment. ER 1421.[6] But to invoke the jurisdiction of this Court, an appellant must meet the requirements of Article III standing. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997). Because Proponents cannot satisfy this threshold requirement for appellate jurisdiction, their appeal should be dismissed.

An "irreducible constitutional minimum" requirement of Article III standing is that the party invoking the jurisdiction of a federal court demonstrate an "actual" stake in the litigation that is "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do" to confer standing. *Arizonans*, 520 U.S. at 64. It is for precisely this reason that the Supreme Court expressed (unanimously) "grave doubts" that one's status as a sponsor of a ballot proposition could confer Article III standing. *Id.* at 66. It is not merely that the Supreme

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[6] Putative intervenor Imperial County has also filed a notice of appeal from the district court's order denying its motion to intervene. *See* Case No. 10-16751. For the reasons discussed in Plaintiffs' separately filed response to Imperial County's opening brief, Imperial County also lacks standing to appeal and the district court properly denied its motion to intervene.

Court previously has declined to "identif[y] initiative proponents as Article-III-qualified defenders of the measures they advocated," *id.* at 65; the Court has rejected the notion outright. *See Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 460 U.S. 1077 (1983) (summarily dismissing, for lack of standing, an appeal by an initiative proponent from a decision holding the initiative unconstitutional).

As the district court correctly observed—and Proponents pointedly do not dispute—Proponents have "failed to articulate even one specific harm they may suffer as a consequence of the injunction" against Proposition 8. ER 7. Proponents' status as intervenor-defendants in the district court cannot itself confer standing to appeal, *see Diamond v. Charles*, 476 U.S. 54, 68-71 (1986), and throughout this litigation Proponents have never once suggested that permitting same-sex couples to marry could harm them personally. *See W. Watersheds Project v. Kraayenbrink*, _ F.3d _, 2010 WL 3420012, at *6 (9th Cir. Sept. 1, 2010) ("An interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by the other parties.") (quoting *Didrickson v. U.S. Dep't of the Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992)).

Proponents' claim of standing thus rises or falls on the strength of their assertions that (1) California law authorizes ballot measure proponents to "directly assert the State's interest" in defending the constitutionality of the ballot measure once en-

acted, Prop. Br. 19; or (2) California law creates a particularized interest in initiative proponents, *id.* at 22. Both assertions are incorrect.

Proponents first claim that initiative proponents may speak for the State in defending initiatives they sponsored. This, Proponents contend, puts them on the same footing as the state legislators who initiated the litigation in *Karcher v. May*, 484 U.S. 72 (1987), whom the *Arizonans* Court recognized had the requisite standing because "state law authorize[d] legislators to represent the State's interests." 520 U.S. at 65 (citing *Karcher*, 484 U.S. at 82).[7]

*Arizonans* itself distinguished *Karcher* on the ground that ballot measure sponsors "are not elected representatives." 520 U.S. at 65. But, even if Proponents were elected representatives, Proponents can point to no provision of California law that even remotely resembles the provisions referenced in *Karcher*. *See supra* note 7. While California courts have permitted initiative proponents to *intervene* in state-court litigation in defense of their initiatives, *see, e.g.*, *Strauss v. Horton*, 207 P.3d 48, 69

[7] *Karcher* cited *In re Forsythe*, 450 A.2d 499 (N.J. 1982), a case brought under New Jersey statutory provisions governing challenges to a law on the ground that it was not validly enacted. Those provisions permitted "[a]ny two or more citizens of the State" to initiate the litigation and "prosecute the application," N.J. Stat. Ann. § 1:7-4 (cited in *Forsythe*, 450 A.2d at 500), and further provided that "[a]ny citizen of the State may . . . appear before the court, in defense," N.J. Stat. Ann. § 1:7-5.

(Cal. 2009), those decisions have allowed proponents to pursue their *own* interests in the ballot initiative, not to represent the interests of the *State*.[8]

Where ballot proposition proponents have sought not merely a right to intervene, but *standing* to maintain a suit in their own right, the California Supreme Court has determined that they have none. In the *Marriage Cases*, The Proposition 22 Legal Defense and Education Fund (the "Fund"), representing the proponent of Proposition 22, asked the California Supreme Court to grant review to determine "whether initiative proponents, or an organization they establish to represent their interests, have standing to defend attacks on the validity or scope of the initiative." Petition for Review of Proposition 22 Legal Defense and Education Fund at 13, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), 2006 WL 3618498. In support of its petition, the Fund argued that initiative proponents should be allowed to defend the constitutionality of their enactments because elected officials were not uniformly vigorous in defending initiatives—and particularly so in the *Marriage Cases*. *Id.* at 15-

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[8] In this respect, the California intervention decisions cited by Proponents resemble those of Arizona at the time *Arizonans* was decided. *Compare Amwest Sur. Ins. Co. v. Wilson*, 906 P.2d 1112, 1116 (Cal. 1995), *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 581 (Cal. 1994), *and Legislature of Cal. v. Eu*, 816 P.2d 1309, 1312 (Cal. 1991), *with Slayton v. Shumway*, 800 P.2d 590, 591 (Ariz. 1990), *Energy Fuels Nuclear, Inc. v. Coconino Cnty.*, 766 P.2d 83, 84 (Ariz. 1988), *and Transamerica Title Ins. Co. Trust Nos. 8295, 8297, 8298, 8299, 8300 & 8301 v. City of Tucson*, 757 P.2d 1055, 1056 (Ariz. 1988).

16. The California Supreme Court granted review and held that the Fund's strong interest in Proposition 22 "is not sufficient to afford *standing to the Fund* to maintain a lawsuit" concerning the constitutionality of Proposition 22. *In re Marriage Cases*, 183 P.3d 384, 406 (Cal. 2008) (emphasis added). The Court explained that "the Fund is in a position no different from that of any other member of the public having a strong ideological or philosophical disagreement with a legal position advanced by a public entity that, through judicial compulsion or otherwise, continues to comply with a contested measure." *Id.*

Second, Proponents contend that California's constitutional right to propose initiatives creates a "new interest[ ], the invasion of which . . . confer[s] standing" on them here. Prop. Br. 22 (quoting *Diamond*, 476 U.S. at 65 n.17). This contention is foreclosed by the *Marriage Cases*' holding that initiative sponsors lack standing to defend their initiatives. 183 P.3d at 406. Even if it were not, California law confers no express cause of action to defend the constitutionality of initiatives enacted into law, *see* Cal. Const. art. II, § 8(a), as it must to create a particularized injury. *See Diamond*, 476 U.S. at 65 n.17; *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 n.22 (1976). Thus, the status of ballot initiative sponsor is insufficient to elevate the sponsor's interest in defending the constitutionality of the initiative above the "'value interest[ ]'" shared by every Californian who voted in favor of the measure. *Arizonans*, 520 U.S. at 65 (quoting *Diamond*, 476 U.S. at 62). And, because Proponents themselves will

suffer no judicially cognizable injury if gay men and lesbians are permitted to marry, Proponents, though intervenors below, have no standing to carry an appeal. *See Diamond*, 476 U.S. at 68-69.[9]

## II. THE DISTRICT COURT'S RULING IS NOT FORECLOSED BY PRECEDENT.

Proponents contend that the district court's decision is foreclosed by the Supreme Court's summary order in *Baker v. Nelson*, 409 U.S. 810 (1972), and by this Court's decision in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982). Proponents fundamentally misconstrue the limited precedential force of the Supreme Court's nearly forty-year-old summary order in *Baker* and this Court's immigration-law decision in *Adams*.

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[9] Proponents also argue that the district court "likely lacked jurisdiction altogether" because the Attorney General agreed that Proposition 8 was unconstitutional. Prop. Br. 30 n.10. It is not the law, however, that the government's confession of error deprives a federal court of jurisdiction to redress constitutional injuries. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In any event, it is simply not the case that all the parties before the district court agreed that Proposition 8 was unconstitutional or sought "precisely the same result" from that court. *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 383 (1980). Proponents themselves were parties to the proceedings below and vigorously argued in defense of Proposition 8's constitutionality. Moreover, the Governor of California, who is charged with executing state law (Cal. Const. art. V, § 1), filed an answer stating that he intends to enforce Proposition 8 until he is enjoined by a court from doing so. SER 37. And, in fact, he has continued to enforce Proposition 8 throughout this litigation.

In *Baker*, the Supreme Court dismissed "for want of a substantial federal question" an appeal from a Minnesota Supreme Court decision rejecting federal due process and equal protection challenges to the State's refusal to issue a marriage license to a same-sex couple. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The Supreme Court's summary dismissals are binding on lower courts only "on the *precise* issues presented and necessarily decided" by the Court, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added), and only to the extent that they have not been undermined by subsequent "doctrinal developments" in the Supreme Court's jurisprudence. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (internal quotation marks omitted); *see also Turner v. Safley*, 482 U.S. 78, 96 (1987). Contrary to Proponents' suggestion that the district court somehow ignored *Baker* (Prop. Br. 40), the court explicitly recognized when it denied Proponents' summary judgment motion that neither requirement is met here. ER 182-85.

The Supreme Court's summary disposition of the due process question in *Baker* is not controlling in this case because it cannot be reconciled with the Court's subsequent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which invalidated a state criminal prohibition on same-sex intimate conduct under the Due Process Clause. *See also Turner*, 482 U.S. at 95 (holding that the fundamental right to marry extends to incarcerated inmates because "inmate marriages, like others, are expressions of emotional support and public commitment"); *Zablocki v. Redhail*, 434 U.S. 374, 384

(1978) ("the right to marry is of fundamental importance for all individuals"). *Lawrence* explicitly recognized that the Constitution "afford[s] . . . protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, [and] child rearing" and that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." 539 U.S. at 574 (emphasis added). Nor is the jurisprudential force of *Lawrence* limited to laws that target the conduct of gay and lesbian individuals, rather than those, like Proposition 8, that single them out as a class for disfavored and discriminatory treatment. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in [the context of sexual orientation].").

*Baker*'s equal protection ruling has equally little precedential force in this case. As an initial matter, *Baker* presented an equal protection challenge based *solely* on sex discrimination and therefore cannot conceivably foreclose Plaintiffs' claim that Proposition 8 discriminates against gay and lesbian individuals on the basis of their sexual orientation. *See* Jurisdictional Statement at 16, *Baker* (No. 71-1027) ("The discrimination in this case is one of gender."); ER 1613.

Moreover, *Baker*'s equal protection ruling has been undermined by subsequent doctrinal developments. In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court struck down on equal protection grounds a Colorado constitutional amendment prohibiting governmental action to protect gay and lesbian individuals against discrimina-

tion because the measure "withdr[ew] from homosexuals, but no others, specific legal protection" and "impose[d] a special disability upon those persons alone." *Id.* at 627, 631. Proposition 8 shares all the salient—and constitutionally unacceptable—features of Colorado's Amendment 2 because, in the absence of any conceivably legitimate government interest, it imposes a "special disability" on gay and lesbian individuals, who, alone among California's citizens, have been deprived of their preexisting state constitutional right to marry. *Id.* at 631.

Nor can *Baker*'s summary treatment of the sex-based equal protection challenge to Minnesota's marriage law survive later doctrinal developments. *Baker* was decided before the Supreme Court recognized that sex is a quasi-suspect classification. *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality).

Finally, the Supreme Court's summary dismissal in *Baker* addressed equal protection and due process challenges to a marriage framework that is far different from the one that Plaintiffs are challenging here, and therefore cannot be controlling on *any* component of Plaintiffs' claims. *See* ER 182-83. Whereas *Baker* concerned the constitutionality of an outright refusal by a State to afford *any* recognition to same-sex relationships, Plaintiffs' suit challenges California voters' use of the ballot initiative process to strip unmarried gay and lesbian individuals of their preexisting state constitutional right to marry and relegate them to the inherently unequal institution of do-

mestic partnership. Whatever the constitutional flaws in Minnesota's blanket denial of recognition to same-sex relationships, Proposition 8 is uniquely irrational and discriminatory: California voters used the initiative process to single out unmarried gay and lesbian individuals for a "special disability" (*Romer*, 517 U.S. at 631) by extinguishing their state constitutional right to marry, while at the same time preserving the 18,000 existing marriages of gay and lesbian couples (but not allowing those individuals to remarry if divorced or widowed) and affording unmarried gay and lesbian individuals the right to enter into domestic partnerships that carry virtually all the same rights and obligations—but not the highly venerated label—associated with opposite-sex marriages (and existing same-sex marriages).

Proponents' reliance on this Court's decision in *Adams* is equally misplaced. That decision upheld a federal immigration law that granted an admissions preference to opposite-sex—but not same-sex—spouses of American citizens. The court explained that "Congress has almost plenary power to admit or exclude aliens" and "the decisions of Congress" in the area of immigration are therefore "subject only to limited judicial review." *Adams*, 673 F.2d at 1041. No such "plenary power" is implicated in this case, and the "limited judicial review" undertaken in *Adams* is therefore inapplicable to Plaintiffs' constitutional challenge to Proposition 8. In any event, the district court was free to depart from *Adams*'s reasoning in light of the subsequent

jurisprudential developments in *Romer* and *Lawrence*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

## III. PROPOSITION 8 VIOLATES DUE PROCESS.

The "freedom of personal choice in matters of marriage" is a well-established fundamental right. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). In more than a dozen cases over the last century, the Supreme Court has reaffirmed that the right to marry is "one of the liberties protected by the Due Process Clause," *id.*; "essential to the orderly pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967); and "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).[10] Because Proposition 8 burdens that fundamental right, it is unconstitutional unless Proponents can demonstrate that it is "narrowly drawn" to further a "compelling state interest[ ]." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977).

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[10] *See also Lawrence*, 539 U.S. at 574; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Turner*, 482 U.S. at 95-96; *Zablocki*, 434 U.S. at 384; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality); *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

Proponents claim that marriage—and thus the fundamental right to marry—excludes same-sex couples as a definitional matter. They contend that "marriage" categorically excludes same-sex couples because "the existential purpose of marriage in every society is, and has always been, to regulate sexual relationships between men and women" and to "increase the likelihood that children will be born and raised in stable and enduring family units by the mothers and fathers who brought them into this world." Prop. Br. 54. According to Proponents, *only* those couples who can "produce children" have a due process *right* to marry (*id.*); everyone else enjoys access to marriage only for as long as the government (or a voting majority) permits. Similarly, under Proponents' "responsible procreation" theory of marriage, if the State determined that children raised outside of marriage fared as well as children raised inside marriage, the State could eliminate civil marriage altogether.

Citing a slew of dictionaries and articles never presented to the district court, written by authors who never testified at trial, Proponents claim that this alleged interest in "responsible procreation" is the defining purpose of marriage. Proponents' narrow understanding of marriage conflicts with controlling precedent and the overwhelming record evidence.

### A. The Supreme Court Has Recognized That The Right To Marry Is A Fundamental Right For All People.

The Supreme Court has characterized the right to marry as one of the most fundamental rights—if not *the* most fundamental right—of an individual. *Loving*, 388 U.S. at 12. The Court has defined marriage as a right of liberty (*Zablocki*, 434 U.S. at 384), privacy (*Griswold*, 381 U.S. at 486), intimate choice (*Lawrence*, 539 U.S. at 574), and association (*M.L.B.*, 519 U.S. at 116). "Marriage is a coming together for better or for worse, hopefully enduring, and intimate *to the degree of being sacred*." *Griswold*, 381 U.S. at 486 (emphasis added). The right "is of fundamental importance *for all individuals*." *Zablocki*, 434 U.S. at 384 (emphasis added).

The right to marry has always been based on, and defined by, the constitutional liberty to select the partner of one's choice—not on the partner chosen. As the district court observed, "The Supreme Court cases discussing the right to marry do not define the right at stake . . . as a subset of the right to marry depending on the factual context in which the issue presented itself." ER 185-86; *see generally Loving*, 388 U.S. 1; *Turner*, 482 U.S. 78. Thus, just as striking down Virginia's prohibition on marriage between persons of different races did not require the Supreme Court to recognize a new constitutional right to interracial marriage in *Loving*, invalidating Proposition 8 would not require recognition of a new right to same-sex marriage. Instead, it would vindicate the longstanding right of *all* persons to exercise "freedom of personal

choice" in deciding whether and whom to marry. *See Lawrence*, 539 U.S. at 566, 574 (invalidating Texas's criminal prohibition on same-sex intimate conduct because it violated the right to personal sexual autonomy guaranteed by the Due Process Clause, not because it violated a "fundamental right" of "homosexuals to engage in sodomy") (internal quotation marks omitted).

Contrary to Proponents' suggestion, the Supreme Court has never conditioned the right to marry on the ability to procreate. *See Lawrence*, 539 U.S. at 567 ("it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse"). The Supreme Court has never suggested that the "constitutional right to marry is possessed only by individuals who are at risk of producing children accidentally," or implied "that this constitutional right is not equally important for and guaranteed to responsible individuals who can be counted upon to take appropriate precautions in planning for parenthood." *Marriage Cases*, 183 P.3d at 432. Rather, the Supreme Court has expressly recognized that the right to marry extends to individuals *unable* to procreate with their spouse, *see Turner*, 482 U.S. at 95, and that married couples have a fundamental right *not* to procreate. *See Griswold*, 381 U.S. at 485.

In *Griswold*, the Supreme Court rejected a State's attempt to link marriage and procreation by striking down a state law forbidding the use of contraceptives by married couples. 381 U.S. at 485-86. And the Court has held that the liberty interest in an

individual's choice of marriage is so fundamental that it prohibits filing fee barriers to divorce—barriers that would seem unobjectionable if the right to marry were tied to the State's interest in marital procreation. *Boddie*, 401 U.S. at 380; *see also Moore*, 431 U.S. at 502 (liberty in matters of marriage and family life cannot be circumscribed by the "arbitrary boundary . . . of the nuclear family").

Indeed, the Supreme Court has clearly distinguished between the right to marry and the right to procreate. In *Zablocki*, the Court struck down a Wisconsin statute that barred residents with child support obligations from marrying. 434 U.S. at 376-77. The Court distinguished between the right to marry and the separate rights of "procreation, childbirth, child rearing, and family relationships." *Id.* at 386; *see also Carey*, 431 U.S. at 685 (distinguishing between separate rights of "marriage" and "procreation"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, *married or single*, to . . . [decide] whether to bear or beget a child.") (emphasis altered). Although Proponents suggest that *Zablocki* treated marriage only as a means to prevent illegitimate children, Prop. Br. 69-70, *Zablocki* in fact held that a parent's financial responsibility to his child was irrelevant to marriage. 434 U.S. at 389-90.

Similarly, in *Turner*, the Supreme Court held that incarcerated prisoners—even those with no right to conjugal visits—have a fundamental right to marry because "[m]any important attributes of marriage remain . . . after taking into account the limi-

tations imposed by prison life . . . [including the] expressions of emotional support and public commitment," the "exercise of religious faith," and the "expression of personal dedication," which "are an important and significant aspect of the marital relationship." 482 U.S. at 95-96. These attributes of the right to marry extend far beyond the limited procreational purpose Proponents advocate. Indeed, *Turner* acknowledged procreation as only *one* among *many* goals of marriage. *Id.* at 96. And it recognized that, while many "inmate marriages are formed in the expectation that they ultimately will be fully consummated," some are not. *Id*.[11]

Proponents nonetheless contend that their procreative "understanding of marriage" is "universal." Prop. Br. 57, 59. But "[n]o State marriage statute mentions procreation or even the desire to procreate among its conditions for legal marriage," and "[n]o State requires that heterosexual couples who wish to marry be capable or even desirous of procreation." Amy Doherty, *Constitutional Methodology and Same-Sex*

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[11] Proponents thus mischaracterize *Turner* when they suggest that it "would have come out differently but for inmates' expectation that their marriages would be fully consummated, for the Court distinguished an earlier case that upheld a marriage ban for inmates sentenced to life imprisonment." Prop. Br. 70 n.33 (internal quotation marks omitted). As the Supreme Court observed, in that "earlier case"—*Butler v. Wilson*, 415 U.S. 953 (1974), summarily affirming *Johnson v. Rockefeller*, 365 F. Supp. 377 (S.D.N.Y. 1973)—it was not simply that the prisoner was under a life sentence (marriage while on parole was a possibility, *see Johnson*, 365 F. Supp. at 378 n.1), but also, "importantly," that "denial of the right [to marry] was part of the punishment for crime" and the "governmental interest of punishing crime [was] sufficiently important to justify deprivation of [the] right [to marry]." *Turner*, 482 U.S. at 96.

*Marriage*, 11 J. Contemp. Legal Issues 110, 113 (2000); *cf. Lawrence*, 539 U.S. at 604-05 (Scalia, J., dissenting) ("If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.").

Proponents claim that California shares their procreative "understanding of marriage." Prop. Br. 57. But, in California, "the constitutional right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children." *Marriage Cases*, 183 P.3d at 431. Indeed, the California Supreme Court has held that an equally important purpose of marriage is "the promotion of the happiness of the parties by the society of each other," *Baker v. Baker*, 13 Cal. 87, 103 (1859), and "that the right to marry is the right to enter into a relationship that is 'the center of the personal affections that ennoble and enrich human life.'" *Marriage Cases*, 183 P.3d at 432 (quoting *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952)).

Proponents attempt to explain away the absence of laws conditioning marriage on procreative ability by arguing that "[a]ny policy mandating that all married couples bear and raise children would presumably require enforcement measures . . . that would surely violate constitutionally protected privacy rights." Prop. Br. 61-62 (em-

phasis omitted). But if this "were an accurate and adequate explanation for the absence of such a limitation it would follow that in instances in which the state is able to make a determination of an individual's fertility without such an inquiry, it would be constitutionally permissible for the state to preclude an individual who is incapable of bearing children from entering into marriage." *Marriage Cases*, 183 P.3d at 431. And there is "no authority whatsoever to support the proposition that an individual who is physically incapable of bearing children does not possess a fundamental constitutional right to marry." *Id*. Indeed, many persons become parents through adoption or assisted reproduction and exercise their constitutional rights to marry and raise those children in a recognized family unit. *Id*.[12]

### B. The Trial Record Demonstrates That Plaintiffs Do Not Seek Recognition Of A New Right.

The trial record amply supports the district court's finding that "[t]he right to marry has been historically and remains the right to choose a spouse and, with mutual

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[12] In an attempt to demonstrate that infertile opposite-sex couples also serve the alleged procreative purpose of marriage, Proponents claim that, "even where infertility is clear, usually only one spouse is infertile," and in those cases, "marriage still furthers society's interest in responsible procreation by decreasing the likelihood that the fertile spouse will engage in sexual activity with a third party." Prop. Br. 62. But marriage by same-sex couples serves this societal interest just as well because it decreases the likelihood that either spouse will "engage in sexual activity with a third party" of the opposite sex—which, on Proponents' view that sexual orientation is an "amorphous" and mutable "phenomenon," must be regarded as a substantial risk. *Id.* at 71.

consent, join together and form a household." ER 148 (citing FF 19-20, 34-35). Although "[r]ace and gender restrictions shaped marriage during eras of race and gender inequality, . . . such restrictions were never part of the historical core of the institution of marriage." ER 148 (citing FF 33). And spouses have never been required to "have an ability or willingness to procreate in order to marry." ER 148 (citing FF 21). Thus, the evidence clearly establishes that liberty and mutual consent—not simply "responsible procreation"—are defining purposes of marriage.

As Professor Cott explained, marriage is "a couple's choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life." SER 102. Marriage "creates stable households, which in turn form the basis of a stable, governable populace." ER 146 (citing FF 35-37); *see also* ER 48 (citing SER 108 (Cott)).

The trial evidence also demonstrates that, over time, marriage has "shed its attributes of inequality"—including race-based restrictions and gender-based distinctions such as coverture—and "has been altered to adjust to changing circumstances so that it remains a very alive and vigorous institution today." SER 128 (Cott). In "[a]s many as 41 states and territories," including California, laws placed restrictions on "marriage between a white person and a person of color." SER 114-15 (Cott). Racially restrictive marriage laws "prevented individuals from having complete choice

on whom they married, in a way that designated some groups as less worthy than other groups." SER 123 (Cott). Like defenders of bans on marriage by individuals of the same sex, defenders of race-based restrictions on the right to marry argued that these laws were "naturally-based and God's plan"; "people who supported [racially restrictive marriage laws] saw these as very important definitional features of who could and should marry, and who could not and should not." SER 122-24 (Cott).

"When the Supreme Court invalidated race restrictions in *Loving*, the definition of the right to marry did not change." ER 147 (citing *Loving*, 388 U.S. at 12). Rather, "the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry." ER 147 (citation omitted).

The district court also found that "California, like every other state, has never required that individuals entering a marriage be willing or able to procreate." ER 95. Indeed, as Professor Cott testified, "[t]here has never been a requirement that a couple produce children in order to have a valid marriage," "people beyond procreative age have always been allowed to marry," and "procreative ability has never been a qualification for marriage." SER 109.

The only trial testimony presented by Proponents on the history and purpose of marriage was that of think-tank founder David Blankenhorn, who conceded that the

willingness or ability to procreate or consummate a relationship is not a precondition to marriage. *See* SER 296-97.

The evidence therefore provides overwhelming support for the district court's finding that the purposes of marriage are not limited to procreation, but also include "the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents." ER 102 (citing SER 98-100, 102 (Cott)). This is precisely the venerated, officially sanctioned relationship that Plaintiffs seek to enter. For Plaintiffs—as for the rest of society—marriage is the "most important relation in life." *Zablocki*, 434 U.S. at 384 (internal quotation marks omitted); *see, e.g.*, ER 47 (Plaintiff "Zarrillo wishes to marry Katami because marriage has a 'special meaning' that would alter their relationships with family and others.") (citing SER 91-92); SER 97 (Plaintiff

Stier: marriage would be a way to tell "our friends, our family, our society, our community, our parents . . . and each other that this is a lifetime commitment").[13]

### C. Allowing Same-Sex Couples To Marry Would Promote "Responsible Procreation."

Even if "responsible procreation" were the defining purpose of marriage—which it is not—marriage by individuals of the same sex would nonetheless further that purpose.

Proponents' own definition of so-called "responsible procreation" centers on the welfare of children and the need for them to be "raised in stable family units." Prop. Br. 58. Indeed, Proponents attempt to distinguish Proposition 8 from anti-miscegenation laws on the ground that, "by prohibiting interracial marriages, [those

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[13] Proponents' *amici* argue that recognizing Plaintiffs' right to marry will lead to a parade of horribles, including polygamy and incest. Br. of State of Indiana et al. at 30-31. But States "have a strong and adequate justification for refusing to officially sanction polygamous or incestuous relationships because of their potentially detrimental effect on a sound family environment." *Marriage Cases*, 183 P.3d at 434 n.52; *see also Utah v. Green*, 99 P.3d 820, 830 (Utah 2004) (upholding ban on polygamy based on the State's interest in protecting vulnerable individuals, especially underage women and children, from exploitation and abuse, and preventing the perpetration of marriage fraud and the misuse of government benefits associated with marital status); *see also Reynolds v. United States*, 98 U.S. 145, 166 (1878) (rejecting challenge to polygamy prohibition). Ironically, if, as Proponents contend, access to marriage were determined principally by reference to a couple's ability to procreate, then both polygamous and incestuous relationships would qualify. It is thus Proponents' vision of marriage—not Plaintiffs'—that opens the door to the bogeymen conjured by Proponents' *amici*.

laws] substantially *decreased* the likelihood that children of mixed-race couples would be born to and raised by their parents in stable and enduring family units." *Id.* at 66. Therefore, Proponents contend, such laws were "affirmatively *at war* with" marriage's "central procreative purposes." *Id*. But by prohibiting same-sex couples from marrying and creating "stable and enduring family units," Proposition 8 is equally "at war" with these purposes and affirmatively harmful to the children of same-sex couples. *See Zablocki*, 434 U.S. at 390 ("the net result of preventing . . . marriage is simply more illegitimate children").

As the district court found, "The tangible and intangible benefits of marriage flow to a married couple's children." ER 106; *see also* SER 180-81 (Lamb: explaining that when a cohabiting couple marries, that marriage can improve the adjustment outcomes of the couple's child because of "the advantages that accrue to marriage"); SER 440-42 (American Psychiatric Association: marriage benefits the couple's children). Even Proponents' expert David Blankenhorn agreed that "children raised by same-sex couples would benefit if their parents were permitted to marry." ER 83 (citing SER 285); *see also* SER 291 (same).

Moreover, California law treats gay men and lesbians equally to heterosexuals with respect to the rights and obligations of parenthood, including the right to produce and raise children, the right to adopt children, the right to become foster parents, and the obligation to provide for children after separation. *See Elisa B. v. Superior Court*,

117 P.3d 660, 666 (Cal. 2005); Cal. Fam. Code § 297.5. More than 37,000 children in California are currently being raised by same-sex couples. SER 558-63. Allowing these couples to marry would plainly serve the purpose of "increasing the likelihood that children will be born to and raised in stable family units." Prop. Br. 58; *see also Marriage Cases*, 183 P.3d at 433 ("a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents)").

### D. Domestic Partnerships Do Not Satisfy California's Due Process Obligations.

As the district court found, the "evidence shows that domestic partnerships do not fulfill California's due process obligation to plaintiffs." ER 150. "[D]omestic partnerships are distinct from marriage and do not provide the same social meaning as marriage." ER 150. The "evidence at trial shows that domestic partnerships exist solely to differentiate same-sex unions from marriages," "marriage is a culturally superior status compared to a domestic partnership," and "the withholding of the designation 'marriage' significantly disadvantages plaintiffs." ER 151. Indeed, Proponents did not dispute the "significant symbolic disparity between domestic partnership and marriage." ER 150.

Plaintiffs and their witnesses testified that denying gay men and lesbians, and their families, access to marriage is stigmatizing and harmful because it denies their family relationships the same dignity and respect afforded to opposite-sex couples and their families. ER 117-18; *see also* SER 157, 159 (Meyer: domestic partnerships reduce the value of and stigmatize same-sex relationships); ER 1050-51 (Attorney General admitting that establishing a separate legal institution for state recognition and support of gay and lesbian relationships, even if well-intentioned, marginalizes and stigmatizes their families). Even Proponents' expert David Blankenhorn agreed that "[s]ame-sex marriage would signify greater social acceptance of homosexual love and the worth and validity of same-sex intimate relationships." SER 294; *see also* ER 780.

Indeed, ensuring that gay and lesbian relationships were *not* officially accorded the same dignity, respect, and status as heterosexual marriages was one of the core underlying purposes of Proposition 8. *See* SER 156 (Meyer: "Proposition 8, in its social meaning, sends a message that gay relationships are not to be respected; that they are of secondary value, if of any value at all; that they are certainly not equal to those of heterosexuals."); *see also Strauss*, 207 P.3d at 77.

As the Supreme Court has recognized, a State cannot meet its constitutional obligations by conferring separate-and-inherently-unequal rights on a socially disfavored group because doing so impermissibly brands the disfavored group with a mark of in-

feriority. *See United States v. Virginia*, 518 U.S. 515, 554 (1996); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). The district court therefore properly concluded that California "does not meet its due process obligation to allow plaintiffs to marry by offering them a substitute and inferior institution that denies marriage to same-sex couples." ER 151.

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The Supreme Court has held that the Constitution "afford[s] . . . protection to personal decisions relating to marriage" and that "[p]ersons in a homosexual relationship may seek autonomy for th[i]s purpose[ ], just as heterosexual persons do." *Lawrence*, 539 U.S. at 574. By prohibiting same-sex couples from marrying, Proposition 8 materially and substantially burdens gay and lesbian individuals' fundamental right to marry. Accordingly, it can withstand constitutional scrutiny only if it is "narrowly drawn" to serve a "compelling state interest[ ]." *Carey*, 431 U.S. at 686; *see also* ER 152. Proponents did not—and do not—make a serious attempt to establish that Proposition 8 satisfies this onerous standard. *See* Prop. Br. 47-70. Indeed, as discussed below and as the district court concluded, Proposition 8 cannot satisfy even *rational basis* review. ER 158; *see infra* Part IV.B.[14]

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[14] In a one-sentence footnote, Proponents assert that, in light of the "compelling interests served by marriage" and the supposed connection between "those interests"

Because Proposition 8 denies Plaintiffs a fundamental right without a compelling—or even legitimate—reason, it is unconstitutional under the Due Process Clause of the Fourteenth Amendment. ER 151-52.

## IV. PROPOSITION 8 VIOLATES EQUAL PROTECTION.

"From its founding the Nation's basic commitment has been to foster the dignity and well-being of *all* persons within its borders." *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970) (emphasis added). Indeed, "[f]ormal equality before the law is the bedrock of our legal system." *Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1009 (9th Cir. 2001). The Equal Protection Clause safeguards that equality by "secur[ing] every person within the State's jurisdiction against intentional and arbitrary discrimination." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (internal quotation marks omitted).

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[Footnote continued from previous page]
and "the biological differences between same-sex couples and opposite-sex couples," "Proposition 8 readily satisfies heightened scrutiny." Prop. Br. 83 n.43. This lone footnote is likely insufficient even to preserve an argument that Proposition 8 could survive heightened scrutiny. *See Int'l Olympic Comm. v. San Francisco Arts & Athletics*, 781 F.2d 733, 738 n.2 (9th Cir. 1986). But even if considered, Proponents' footnote does not come close to the showing required to defend a discriminatory law under strict or intermediate scrutiny. Indeed, nowhere in their brief do Proponents even identify the State's *actual* justification for excluding gay men and lesbians from marriage, as opposed to *post hoc*, hypothetical justifications that bear solely on the State's decisions to recognize opposite-sex marriages but that provide absolutely no basis for stripping gay men and lesbians of their preexisting right to marry. *See Virginia*, 518 U.S. at 533 (under heightened scrutiny, the proffered justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation").

Proposition 8 is antithetical to the "principles of equality" on which this "Nation . . . prides itself." *Plyler*, 457 U.S. at 219. It creates a permanent "underclass" of hundreds of thousands of gay and lesbian Californians (*id.*)—who are denied the fundamental right to marry available to all other Californians simply because a majority of voters deems gay and lesbian relationships inferior, morally reprehensible, or religiously unacceptable. With the full authority of the State behind it, Proposition 8 sends a clear and powerful message to gay men and lesbians: You are not good enough to marry. Proponents themselves do not dispute that this discriminatory message does profound and enduring stigmatic harm to gay men and lesbians—and their families. "[I]f Prop. 8 were undone," and gay and lesbian "kids . . . could never know what this felt like, then," as Plaintiff Kris Perry explained, "their entire lives would be on a higher arc. They would live with a higher sense of themselves that would improve the quality of their entire life." SER 95; *see also* ER 120 (Meyer: Proposition 8 "sends a message that gay relationships are not to be respected" and places the State's imprimatur on private discrimination); SER 294 (Blankenhorn).

Despite the indisputably invidious effects of Proposition 8, Proponents contend that the measure is consistent with the Fourteenth Amendment's commitment to dignity and equality because laws targeting gay men and lesbians are not subject to heightened equal protection scrutiny and because Proposition 8 is rationally related to legitimate state interests. They are wrong on both counts.

As Professor Segura explained, "There is simply no other person in society who endures the [same] likelihood of being harmed as a consequence of their identity [as] a gay man or lesbian." ER 132. Gay and lesbian individuals are precisely the type of physically and politically vulnerable minority group for whom heightened scrutiny is warranted. In any event, Proposition 8 cannot survive even rational basis review because there is simply no legitimate reason for stripping gay men and lesbians of their fundamental right to marry and singling them out for the separate-and-inherently unequal status of domestic partnership. Such targeted nullification of a disfavored group's rights has long been constitutionally proscribed. *See Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (invalidating a voter-enacted California constitutional provision that extinguished state-law protections that minorities had previously possessed against housing discrimination). *Romer* leaves no doubt that placing gay men and lesbians in a "solitary class" in the eyes of the law "not to further a proper legislative end but to make them unequal to everyone else" is flatly unconstitutional. 517 U.S. at 627, 635.

And, while "traditional opposite-sex marriage" itself serves legitimate state interests (Prop. Br. 3), the constitutionally relevant question in this case is whether *Proposition 8*—which "eliminate[d] the ability of same-sex couples to enter into an official relationship designated 'marriage'" (*Strauss*, 207 P.3d at 77)—furthers any legitimate objective. *See Romer*, 517 U.S. at 635 (inquiring whether Colorado had a

rational basis for stripping gay men and lesbians of antidiscrimination protections, not whether Colorado's antidiscrimination laws protecting other minority groups had a rational basis). The answer to that question is plainly "no." In fact, Proposition 8 is not only blatantly discriminatory, but also wholly irrational. It creates at least five categories of couples in California: (1) Unmarried opposite-sex couples, who retain their right to marry; (2) married opposite-sex couples, whose marriages remain lawful and who can remarry upon being divorced or widowed; (3) unmarried same-sex couples, who are denied the right to marry, but who can enter into a domestic partnership that grants them all the rights and obligations of marriage; (4) the 18,000 same-sex couples married in California before the enactment of Proposition 8, whose marriages remain valid, but who cannot remarry if divorced or widowed; and (5) out-of-state same-sex couples who were lawfully married outside the State before the enactment of Proposition 8, whose marriages are recognized by the State if they later move to California. Such an arbitrary and contradictory patchwork of marriage regulations cannot conceivably "advance a legitimate government interest." *Id.* at 632.

### A. Heightened Scrutiny Applies And Proposition 8 Cannot Survive It.

The district court found that "the evidence presented at trial shows that gay men and lesbians are the type of minority strict scrutiny was designed to protect." ER 156. That finding follows inexorably from the Supreme Court's equal protection jurispru-

dence, the extensive trial record, and Proponents' concession that gay men and lesbians have faced a history of discrimination based on a trait that has no bearing on their ability to contribute to society. *See* SER 384, 386; SER 20. And, as Proponents effectively further concede, Proposition 8 cannot survive the exacting requirements of heightened scrutiny.

### 1. Proposition 8 Is Subject To Heightened Scrutiny Because It Discriminates On The Basis Of Sexual Orientation.

Strict and intermediate equal protection scrutiny apply to classifications based on factors "so seldom relevant to achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). The Supreme Court has consistently applied heightened scrutiny where a group has experienced a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (internal quotation marks omitted); *see also Virginia*, 518 U.S. at 531-32 (noting "long and unfortunate history of sex discrimination") (internal quotation marks omitted).

In addition to a history of discrimination based on a "characteristic" that "frequently bears no relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 440-41 (internal quotation marks omitted), the Supreme Court has also identi-

fied two additional factors that may be relevant to whether a classification triggers heightened scrutiny: (1) whether the distinguishing characteristic is "immutable" or beyond the group member's control, *see Lyng v. Castillo*, 477 U.S. 635, 638 (1986), and (2) whether the group is "a minority or politically powerless," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (internal quotation marks omitted). The Supreme Court has not considered these additional factors in every case (*see, e.g.*, *Murgia*, 427 U.S. at 313), and both the Supreme Court and this Court have applied heightened scrutiny in cases where those factors were not present. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (holding that all racial classifications are inherently suspect, even though many racial groups exercise substantial political power).[15]

The *undisputed* fact that gay men and lesbians have been subjected to a history of discrimination based on a trait that bears no relationship to their ability to contribute to society is sufficient, in and of itself, to render classifications based on sexual orientation "suspect" (or, at the very least, quasi-suspect) and to give rise to heightened scrutiny. As explained below, however, all four of the factors relevant to the ap-

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[15] *See also Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (treating resident aliens as a suspect class despite their ability to opt out of that class voluntarily); *Frontiero*, 411 U.S. at 686 n.17 (applying intermediate scrutiny to women even though they "do not constitute a small and powerless minority"); *Christian Sci. Reading Room Jointly Maintained v. City & Cnty. of San Francisco*, 784 F.2d 1010, 1012 (9th Cir. 1986) (holding that "an individual religion meets the requirements for treatment as a suspect class," even though religion is not immutable).

propriate level of equal protection scrutiny weigh in favor of heightened scrutiny for classifications based on sexual orientation.

***History of Discrimination.*** Proponents do not—and cannot—dispute that gay men and lesbians have been subjected to a history of pervasive and intolerable discrimination. *See* SER 302 (Proponents lead counsel: "We have never disputed and have offered to stipulate that gays and lesbians have been the victims of a long and shameful history of discrimination.").

This undisputed history of public and private discrimination has been recognized by numerous courts. *See, e.g.*, *Lawrence*, 539 U.S. at 571 ("for centuries there have been powerful voices to condemn homosexual conduct as immoral"); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 434 (Conn. 2008) ("gay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation"). And the evidence at trial confirms, beyond question, that gay men and lesbians have faced and continue to face severe discrimination based on naked prejudice and unfounded stereotypes. *See* ER 131-40.[16]

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[16] *See also* SER 130 (Chauncey: Gay men and lesbians "have experienced widespread and acute discrimination from both public and private authorities over the course of the twentieth century. And that has continuing legacies and effects."); SER 639-46 (gay men and lesbians have been banned from federal employment); SER 650-51 (letter from IRS denying tax exempt status to Pride Foundation because organization's goal of advancing the welfare of the gay community was "perverted and deviate

***Ability to Contribute to Society.*** It is equally clear and uncontroverted that an individual's sexual orientation bears no relation to his or her ability to perform or contribute to society. Once again, Proponents admit as much. *See* SER 386 (Proponents admit that "same-sex sexual orientation does not result in any impairment in judgment or general social and vocational capabilities"). And their admission is consistent with extensive, unrefuted evidence that gay men and lesbians make meaningful contributions to all aspects of society without the slightest impairment attributable to their sexual orientation. *See, e.g.*, SER 264 (Herek: There is no inherent relationship between a person's sexual orientation and his or her ability to be a productive and contributing member of society).

***Immutability.*** Proponents argue that the classification of citizens based on their sexual orientation cannot be deemed suspect for equal protection purposes because sexual orientation is not "immutable" and constitutes "a complex and amorphous phenomenon that defies consistent and uniform definition." Prop. Br. 71-74. Proponents' argument is both factually and legally flawed.

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behavior" and "contrary to public policy"); SER 368, 370, 372, 374, 376 (from 2004-2008, between 246 and 283 hate crimes motivated by sexual orientation bias each year).

Ten years ago, this Court recognized that "[s]exual orientation and sexual identity are immutable," and that "[h]omosexuality is as deeply ingrained as heterosexuality." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (internal quotation marks omitted). Sexual orientation is "fundamental to one's identity," and gay and lesbian individuals "should not be required to abandon" it to gain access to fundamental rights guaranteed to all people. *Id*. Proponents do not even mention *Hernandez-Montiel* in their brief.[17]

Consistent with *Hernandez-Montiel*, the district court here found that "[i]ndividuals do not generally choose their sexual orientation" and that "[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation." ER 109; *see also* ER 51 ("Herek explained that . . . the vast majority of gays and lesbians have little or no choice in their sexual orientation; and therapeutic efforts to change an individual's sexual orientation have not been shown to be effective and instead pose a risk of harm to the individual."); SER 268 (Herek: Research shows that the vast ma-

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[17] Proponents instead rely on this Court's conclusion in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), that sexual orientation is "behavioral" and a conduct-based classification. *Id.* at 573. But that reasoning has been authoritatively rejected by the Supreme Court. *See Christian Legal Soc'y*, 130 S. Ct. at 2990 ("Our decisions have declined to distinguish between status and conduct in [the context of sexual orientation].").

jority of gay men and lesbians report having "no choice" or "very little choice" about their sexual orientation.).

Proponents nevertheless argue that sexual orientation cannot be deemed "immutable" because it "can shift over time" for a minority of individuals and because, according to one study, many people have had both a same-sex and opposite-sex partner since reaching the age of 18. Prop. Br. 74. Neither point overcomes the immutability of sexual orientation. First, the fact that a minority of gay men and lesbians may report that their orientation changed over their lifetime does not establish that they *chose* to make such a change or that they could change their sexual orientation today, either voluntarily or through therapy, in order to avoid discrimination. Nor do Proponents even try to explain why evidence of change in the sexual orientation of a *minority* of gay men and lesbians justifies denying the protection of heightened scrutiny to the *majority* of gay men and lesbians who report having little or no choice concerning their sexual orientation. Second, the fact that some gay men and lesbians may have experimented with heterosexual intimacy is hardly surprising given the undisputed discrimination and stigma that attach to being gay or lesbian, nor does an isolated instance of sexual conduct show that one's sexual orientation, as properly defined, is a choice or can be changed. *See* SER 261 (Herek: "Sexual orientation is a term that we use to describe an *enduring* sexual, romantic, or intensely affectional attraction.") (emphasis added).

Proponents' argument that sexual orientation is too "complex" and "amorphous" to warrant heightened scrutiny fares no better. Prop. Br. 71. The district court properly rejected this argument as refuted by the evidence. *See* ER 107-08; SER 262 (Herek: When people are asked in research studies whether they are heterosexual, straight, gay, lesbian or bisexual, they are generally able to answer.). As Professor Herek testified, if two women wish to marry each other, it is reasonable to assume that they are lesbian, and if two men wish to marry each other, it is reasonable to assume that they are gay. SER 278. The district court also emphasized that the Proposition 8 campaign itself, and its many references to "homosexuals," "assumed voters understood the existence of homosexuals as individuals distinct from heterosexuals." ER 108-09. Moreover, because Proponents concede that gay men and lesbians have faced a history of discrimination, *see* SER 302, they find themselves in the untenable position of arguing that sexual orientation is sufficiently "definable" to serve as a basis for discrimination, but insufficiently definable to protect gay men and lesbians from that same discrimination.

***Relative Political Powerlessness.*** Proponents devote three sentences of their opening brief to arguing that gay men and lesbians are so politically powerful that they cannot possibly qualify for heightened scrutiny. Once again, Proponents are wrong.

Plaintiffs presented extensive evidence at trial that gay and lesbian individuals possess less political power than other groups that are afforded the protection of suspect or quasi-suspect status under the Equal Protection Clause, including African-Americans and women. *See* SER 2-16. Indeed, of the more than half million people who hold political office at the local, state, and national levels in this country, less than 300 are openly gay. *Kerrigan*, 957 A.2d at 446; *see also* SER 240-41 (Segura). No openly gay person has ever served in the United States Cabinet, on any federal court of appeals, or in the United States Senate, and there are only three openly gay members of the House of Representatives. SER 388; *see also Kerrigan*, 957 A.2d at 447. In contrast, African-Americans have served as President of the United States, Attorney General, and Secretary of State, as well as in the United States Senate and on the U.S. Supreme Court, and there are currently 41 African-American members of the House of Representatives. SER 247-48 (Segura); *see also* Congressional Research Serv., *Membership of the 111th Congress: A Profile* 5 (2010). Similarly, women currently head the Departments of State, Homeland Security, and Labor, and the 111th Congress includes seventeen female Senators and 76 female representatives, including the current Speaker of the House. *See* SER 243 (Segura); *see also* Congressional Research Serv., *supra*, at 5.

Moreover, gay and lesbian individuals have been unable to secure federal legislation to protect themselves from discrimination in housing, employment, or public

accommodations; they lack similar protections in 29 States, including seven of the ten largest; and they are banned from serving openly in the military. SER 230-31 (Segura). *But see Log Cabin Republicans v. United States*, _ F. Supp. 2d _, 2010 WL 3960791 (C.D. Cal. Oct. 12, 2010) (declaring "Don't Ask, Don't Tell" unconstitutional). And, "there is no group in American society who has been targeted by ballot initiatives more than gays and lesbians." SER 236 (Segura). Nationwide, voters have used initiatives or referenda to repeal or prohibit marriage rights for gay and lesbian individuals *33 times*; in contrast, such measures have been defeated just once—and even that victory for gay men and lesbians was undone by voters in the next election cycle. SER 238.

This evidence leaves no doubt that gay and lesbian individuals have been unable to make the political strides necessary to protect themselves against the invidious discrimination that Proponents admit exists against them. *See* ER 88 (noting Miller's concession that "gays and lesbians currently face discrimination and that current discrimination is relevant to a group's political power"). As much as (if not more than) any other minority group, gay men and lesbians require the protections of heightened scrutiny to shield them from the often-discriminatory whims of the political process.[18]

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[18] Proponents' argument to the contrary relies on the assertion that, in California, the gay and lesbian community has achieved its major policy goals other than marriage

Despite the overwhelming evidence that gay men and lesbians meet the criteria for heightened equal protection scrutiny, Proponents argue that a "long line of binding precedent" precludes this Court from deeming sexual orientation a suspect classification. Prop. Br. 70. They are wrong.

Proponents rely principally on *High Tech Gays v. Defense Industry Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), which held that sexual orientation is not a suspect or quasi-suspect classification. Prop. Br. 73. But, as the district court recognized when it denied Proponents' summary judgment motion, *High Tech Gays* does not foreclose heightened scrutiny because it explicitly premised its equal protection analysis on *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See High Tech Gays*, 895 F.2d at 571 ("by the [*Bowers*] majority holding that the Constitution con-

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[Footnote continued from previous page]

equality. Prop. Br. 73 n.37. As an initial matter, Proponents are wrong to limit their focus to California because the relative political power of a group must be determined on a nationwide basis. The Fourteenth Amendment applies with equal force in all States, and restricting the political power inquiry to those States in which gay men and lesbians have achieved a modicum of political success ignores those individuals who live in jurisdictions where they may be discriminated against without consequence. In any event, Proponents' argument overlooks the fact that the California Legislature prohibited discrimination on the basis of sexual orientation only *after* the state courts found such discrimination impermissible under the state constitution. SER 133-34 (Segura); *see, e.g.*, Cal. Gov. Code §§ 12920, 12921, 12940, 12955 (noting the Legislature's intent to codify court decisions prohibiting discrimination based on sexual orientation). These enactments thus provide no indication that gay and lesbian individuals in California are able to protect themselves through the political process without judicial intervention.

fers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class"); ER 188-89. Because *Lawrence* overruled *Bowers*, this Court is free to revisit whether sexual orientation is a suspect or quasi-suspect classification. *See Miller*, 335 F.3d at 900.[19]

Moreover, *High Tech Gays*' finding that gay men and lesbians are not politically powerless was a factual determination decided on a vastly different record from the one before this Court. 895 F.2d at 574. In finding at the summary-judgment stage that gay men and lesbians are not politically powerless, *High Tech Gays* cited nothing more than the existence of various antidiscrimination measures in certain States. *Id.*

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[19] Nor do *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997), or *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), prevent this Court from applying heightened equal protection scrutiny. *Philips*—a challenge to the "Don't Ask, Don't Tell" policy—expressly relied on *High Tech Gays* to hold that sexual orientation is not a suspect or quasi-suspect classification. 106 F.3d at 1425. Like the case on which it relied, however, *Philips* was decided before *Lawrence*. And in *Witt*—another challenge to "Don't Ask, Don't Tell"—the plaintiff did not dispute that *Philips* was controlling as to the standard of equal protection scrutiny and simply preserved the issue for potential consideration by the en banc court. *See Witt*, 527 F.3d at 823-24 & n.4 (Canby, J., concurring in part and dissenting in part); *see also* Br. of Appellant at 52, *Witt* (No. 06-35644). Moreover, *Witt* was decided before the Supreme Court's recent decision in *Christian Legal Society*, 130 S. Ct. at 2990, which held that the Constitution's protections for gay men and lesbians do not rest on a distinction between status and conduct and thus rejected this Court's earlier rulings that "regulations . . . directed to homosexual acts rather than merely to status or orientation[ ] are constitutional." *Philips*, 106 F.3d at 1427.

Here, the extensive evidence regarding the comparative political power of gay men and lesbians and other minority groups, the absence of antidiscrimination protections for gay men and lesbians in the majority of jurisdictions, and the pervasive targeting of gay men and lesbians through the initiative process—which has become significantly more prevalent since *High Tech Gays* was decided in 1990—conclusively establishes that gay men and lesbians in fact lack sufficient political power to protect themselves from discrimination.

Lastly, Proponents point to ten out-of-circuit decisions decided over the last three decades that have declined to apply heightened scrutiny to gay men and lesbians. Prop. Br. 70-71 n.35. Proponents forgo any discussion of the reasoning of these decisions or the state of the law at the time each case was decided. And for good reason. Seven of the ten cases were decided *before* the Supreme Court overturned *Bowers* in 2003. Moreover, all ten cases were decided before the Supreme Court's recent decision in *Christian Legal Society*, 130 S. Ct. at 2990, which rejected the distinction between status and behavior in the context of sexual orientation. In any event, most engage in little or no discussion of the four factors the Supreme Court has deemed rele-

vant to the applicability of heightened scrutiny, and all are of limited persuasive force today.[20]

### 2. Proposition 8 Is Subject To Heightened Scrutiny Because It Discriminates On The Basis Of Sex.

Heightened scrutiny is also warranted for the additional reason that Proposition 8 discriminates on the basis of sex. Proposition 8 prohibits a man from marrying a person whom a woman would be free to marry, and vice-versa. As the district court explained: "Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus,

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[20] *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006) (applying rational basis review with no discussion of the four relevant factors); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997) (restating previous holding that gay men and lesbians were not a suspect class because "the conduct which defined them as homosexuals was constitutionally proscribable"); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) ("[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'"); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (finding that homosexuality is "primarily behavioral in nature" and that, in light of *Bowers*, "it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm"); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc) (basing its holding on the premise that "engaging in homosexual conduct is not a constitutionally protected liberty interest," and asserting that "implementing morality" is a permissible state goal). Proponents also cite the fact that *Romer* invalidated Colorado's Amendment 2 under rational basis review. Prop. Br. 71 n.35. But *Romer* did not even discuss, let alone reject, the contention that gay men and lesbians meet the requirements for heightened scrutiny. Nor did the Court need to do so in light of its conclusion that Amendment 2 lacked even a rational basis.

Proposition 8 operates to restrict Perry's choice of marital partner because of her sex." ER 154.

The fact that Proposition 8's discriminatory restrictions apply with equal force to both sexes does not cure its constitutional deficiencies. As the Supreme Court held in *Loving*, the mere "fact" that Virginia's anti-miscegenation law had "equal application [to both the white and African-American member of the couple] d[id] not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." 388 U.S. at 9. "[E]qual application" is thus a plainly insufficient basis for defending discriminatory restrictions on the right to marry.

The district court also found that the sex-based restriction embodied in Proposition 8 is based on, and inextricably intertwined with, outdated and unfounded stereotypes about the roles that men and women should play in society and in the family. As the district court explained, "[T]he evidence shows that the tradition of gender restrictions arose when spouses were legally required to adhere to specific gender roles." ER 159. Today, "California has eliminated all legally mandated gender roles except the requirement that a marriage consist of one man and one woman." ER 159.

Classifications based on sex are unconstitutional unless the State proves that they are "substantially related" to an "important governmental objective[ ]." *Virginia*, 518 U.S. at 533 (internal quotation marks omitted). As discussed above, Proponents

make no serious attempt to satisfy such heightened scrutiny. Proposition 8 is therefore unconstitutional for the additional, independent reason that it impermissibly discriminates on the basis of sex.

### B. Proposition 8 Fails Rational Basis Review.

Even though sexual orientation is a fundamental aspect of every person's identity and Proposition 8 targets gay men and lesbians for disfavored treatment because of their sexual orientation, Proponents nevertheless insist that rational basis review must apply to any challenge to Proposition 8's enshrinement of inequality. They contend that Proposition 8—indeed, any law that targets gay men and lesbians for disfavored treatment—must be examined as a court would scrutinize a law that provides educational benefits to combat veterans, but not conscientious objectors, *Johnson v. Robison*, 415 U.S. 361, 362-64 (1974); or establishes a mandatory retirement age for employees in the Foreign Service, but not the Civil Service, *Vance v. Bradley*, 440 U.S. 93, 95-96 (1979); or exempts from regulation certain satellite systems serving multiple buildings under common ownership, but not systems serving multiple buildings when owned or managed by multiple parties, *FCC v. Beach Commc'ns*, 508 U.S. 307, 310 (1993).

This argument trivializes both the nature of sexual orientation and the horrifying acts of discrimination that gay men and lesbians have endured and continue to en-

dure today. But Proposition 8 fails even this most relaxed level of constitutional scrutiny.

Rational basis review does not mean no review at all. Government action that discriminates against a discrete class of citizens must "bear[ ] a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. While a plaintiff, to prevail under rational basis review, generally must "negative every conceivable basis" for the enactment, *Heller v. Doe*, 509 U.S. 312, 320 (1993) (internal quotation marks omitted), the State's supposed rationales "must find some footing in the realities of the subject addressed by the legislation," *id.* at 321, and must be ones that could "reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 111. And, of course, "'a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer*, 517 U.S. at 634 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973)).

Where one can identify a legitimate purpose that the government conceivably might have adopted, the Equal Protection Clause further requires that the State's disparate treatment bear at least a rational relationship to the governmental objective. *Cleburne*, 473 U.S. at 446. While rational basis review does not require a particularly precise fit between the government's means and ends, a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Lazy Y Ranch*, 546 F.3d at 589 (quoting *Cleburne*,

473 U.S. at 447). By "insist[ing] on knowing the relation between the classification adopted and the object to be attained," courts "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S at 632, 633.

Proponents complain that the district court compiled a factual record as part of this analysis, charging that it "simply could not have violated the[ ] well-established principles [of rational basis review] more pervasively." Prop. Br. 34; *see also id.* (complaining of the "district court's *144* references to the 'evidence' and 'testimony' in the record"). But this Court has rejected similar complaints and "allowed plaintiffs to rebut *the facts* underlying defendants' asserted rationale for a classification to show that the challenged classification could not reasonably be viewed to further the asserted purpose." *Lazy Y Ranch*, 546 F.3d at 590-91 (emphasis added); *see also Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) (reversing grant of summary judgment to defendants in equal protection challenge to water moratorium, which State justified as "rationally related to a legitimate state interest in controlling a water shortage," where the plaintiffs raised a triable issue of fact regarding the "very existence of a water shortage"). Thus, far from a "pervasive[ ]" violation of the law, the district court's decision to permit Plaintiffs to build a factual record of Proposition 8's

irrationality was not only *authorized* by this Court's decisions, it was *compelled* by them.[21]

Measured against that factual record, Proponents' two hypothesized rationales for Proposition 8 disintegrate. And, in the absence of any *rational* justifications for its decision to strip gay men and lesbians of their right to marry and thereby mark their relationships as inferior to those of heterosexual couples, the district court was right to conclude that the only available inference is that Proposition 8's principal purpose was to advance the majority's moral disapproval of gay relationships. Just as moral disapproval could not justify Amendment 2 in *Romer*, it cannot justify Proposition 8.

### 1. Proposition 8 Cannot Be Justified By Proponents' Concern With "Responsible Procreation."

To understand Proponents' argument that stripping gay men and lesbians of their right to marry "furthers California's vital interest in responsible procreation and childrearing," Prop. Br. 77, one first must understand what Proponents mean when

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[21] The statement in *Beach Communications*, frequently invoked by Proponents, that "a legislative choice is not subject to courtroom factfinding" is not to the contrary. 508 U.S. at 315. *Beach* itself explains that its statement was just "other words" for the uncontroversial proposition that, to sustain its classification under rational basis review, the government is not required to adduce "legislative facts explaining the distinction on the record." *Id.* (internal quotation marks and alteration omitted). And as this Court observed in *Lazy Y*, the Supreme Court's subsequent decision in *Heller v. Doe* (which itself quotes *Beach*'s statement on "courtroom factfinding," 509 U.S. at 320) makes clear that a State's classification "'must find some footing in the realties of the subject.'" 546 F.3d at 590 (quoting *Heller*, 509 U.S. at 321).

they speak of the State's interest in "responsible procreation and childrearing." It encompasses two distinct, but related, concepts: First, it addresses the State's desire to channel those heterosexual couples who might beget children "by accident" (*id.* at 86) into marital family units. But it also entails a purported interest in raising children in what Proponents have deemed to be the "optimal social structure" for child development—a man and a woman, bound together in marriage, raising children *genetically related to both parents*. *Id.* at 78; *see also id.* at 84 n.44 (being "born to and raised by both of their natural parents in stable, enduring family units" is the "optimal environment" for children and "the ideal"). Indeed, this latter notion that "the best situation for a child is to be raised by a married mother and father" was a central theme of the Yes on 8 campaign. *See* ER 1032 (official ballot argument), 1039-40; SER 317-28, 653-55.

Proponents argue that, "by providing special recognition and encouragement to committed opposite-sex relationships," civil marriage "channel[s] potentially procreative conduct" of heterosexual couples into marital family structures that, at least when the parents each are genetically related to the child, are the "optimal" childrearing environment. Prop. Br. 78. The "special recognition and encouragement" of marriage may be withheld from same-sex couples, Proponents argue, because they present no risk of *accidental* procreation and cannot, in any circumstance, create an "optimal" childrearing environment. *Id.* at 86.

Even applying a standard of mere rationality, this argument cannot sustain Proposition 8. To the extent Proponents rely on their conception of what constitutes the "ideal" childrearing environment—and their specific contention that it is superior to any environment that could be provided by a same-sex couple—that is not a rationale that the State of California could believe to be true. California has emphatically rejected the notion that gay men and lesbians are inferior parents. And, particularly after Proponents' own experts demolished the factual underpinnings of Proponents' theory, there is simply no room to debate the district court's sound and factually-supported conclusion that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted." ER 130.

Moreover, to the extent Proponents rely on the State's interest in directing sexually active heterosexual couples who could unintentionally procreate into stable marriages, Proposition 8 is a completely irrational means of achieving that end. Prohibiting gay men and lesbians from marrying simply does nothing to "increase the likelihood" that heterosexual couples with the capacity to procreate "by accident" will marry. Ironically, although Proponents argue that Proposition 8 is justified by "an interest in children," Proposition 8's most direct impact on children is to deny to the tens of thousands of children being raised by same-sex couples the stability and protective benefits that marriage indisputably would provide them.

### a. California Could Not Rationally Adopt Proponents' View That Same-Sex Couples Provide Childrearing Environments Inferior To Those Provided By Opposite-Sex Couples When They Raise Their Genetic Offspring.

To sustain a law against an equal protection challenge, the proffered rationale must be one that could "reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 111. A suggested rationale that is objectively false will not suffice, *see Lockary*, 917 F.2d at 1155, nor will a rationale that the State has disavowed. *See, e.g.*, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010) ("This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA.").

Proponents' "optimal childrearing environment" interest fails these tests.

i. Proponents stake their claim to appellate jurisdiction on the theory that they are agents of the State and that they may "directly assert the State's interest" in this appeal. Prop. Br. 19. If that is so, then Proponents cannot seek to justify Proposition 8 on grounds inimical to the State's own interests. But they do just that, in ascribing to the State of California an interest in preferring Proponents' "optimal" family structure to households headed by same-sex couples. California years ago disavowed

the view that gay and lesbian couples cannot provide as suitable an environment for children as heterosexual couples.

As the California Supreme Court has explained, the State's "current policies and conduct . . . recognize that gay individuals are fully capable of . . . responsibly caring for and raising children." *Marriage Cases*, 183 P.3d at 428. California law not only permits gay men and lesbians to raise children, but the California Supreme Court has also recognized that, under the state constitution, it is their "basic civil right of personal autonomy and liberty" to do so—a right that they enjoy on the same terms and to the same extent as heterosexual persons. *See id.* at 429.

In accordance with that constitutional command, the California Legislature has, in Proponents' words (at 105), "enacted some of the Nation's most progressive and sweeping gay-rights protections," broadly prohibiting any discrimination in any business's provision of services on the basis of sexual orientation, *see* Cal. Civ. Code § 51, and specifically prohibiting discrimination against foster parents or adoptive parents on the basis of sexual orientation, *see* Cal. Welf. & Inst. Code § 16013(a). Proposition 8 diminished none of these protections. *See Strauss*, 207 P.3d at 61 (authoritatively construing Proposition 8 as "leaving undisturbed . . . a same sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws"). Against this background, the Attorney General had no choice but to admit that California law recognizes both that "an

individual's capacity to raise children does not depend on the individual's sexual orientation," and that "lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for children." ER 1056-57.

In suggesting that Proposition 8 could be predicated on a belief that heterosexual couples can create an "ideal" environment for childrearing that gay and lesbian couples cannot, Proponents ask this Court to foist upon the State a rationale that its robust antidiscrimination laws and, indeed, its Constitution, reject. For this reason alone, Proponents' "responsible procreation" rationale is not one the State possibly could "conceive[ ] to be true," *Vance*, 440 U.S. at 111, and thus cannot support Proposition 8.[22]

ii. Moreover, Proponents' view has no "footing in the realities" of parenting, as the evidence before the district court overwhelmingly demonstrated. *Heller*, 509 U.S. at 321.

The district court had before it the unrebutted testimony of Dr. Michael Lamb, who has studied developmental psychology of children for "nearly 40 years," publish-

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[22] That California so emphatically rejects discrimination on the basis of sexual orientation distinguishes this case from *Lofton v. Department of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004). There, Florida—quite unlike California—had a "policy" of "creat[ing] adoptive homes that resemble the nuclear family as closely as possible" "with married mothers and fathers." *Id.* at 818. Florida, like Proponents, considered this to be the "optimal family structure," *id.* at 819, but California law and policy plainly do not incorporate that view.

ing in that time "maybe 500 articles." SER 161, 164. Dr. Lamb explained that there is a "large[ ] body of research"—"maybe over 100 separate peer-reviewed professional articles"—using a "wide variety of methodologies" that "document[s] very conclusively that children who are raised by gay and lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents." SER 162, 165, 168, 176; *see also* ER 130.

But that is not just the informed opinion of Dr. Lamb. It is a view shared by the American Psychological Association and numerous other national professional organizations concerned with child development. *See* SER 414 ("results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children"); SER 440 (American Psychiatric Association); ER 1060 (American Academy of Pediatrics); SER 443 (American Academy of Child and Adolescent Psychiatry); SER 399 (American Psychoanalytic Association). Indeed, even *Proponents'* expert Paul Nathanson testified in his deposition that peer-reviewed studies of the effect of permitting gay men and lesbians to marry on the rearing of children "don't detect problems and they don't predict problems." SER 630.

Proponents accuse the district court of "uncritically accepting Dr. Lamb's testimony" instead of their "instinctive, commonsense belief" of what constitutes the "ideal" family unit. Prop. Br. 89. But Proponents suggested no sound reason for the

district court to reject Dr. Lamb's testimony, which was based not merely on "commonsense belief" but 40 years of experience and study of more than 100 peer-reviewed reports investigating the effect of same-sex parenting on child development. They offered no witness to testify to the soundness of their "commonsense belief," and identified no basis in social science for believing that children raised by same-sex couples achieve worse outcomes than those raised in Proponents' "ideal" family unit, or, indeed, any family unit.[23]

To fill the void left by their presentation at trial, Proponents reference a handful of studies concluding that children raised from infancy by married parents (an "intact family") do better on average than those raised by a parent and a step-parent, and infer that the benefits of the intact family "appear to flow in substantial part from the biological connection shared by a child with both mother and father." Prop. Br. 80. Parents "act in the best interests of their children," Proponents suggest, because of these "natural bonds of affection." *Id.* at 88 (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)). But as Dr. Lamb explained, there is no reason to believe these "natural bonds of affection" are the exclusive reserve of genetic parents. A tide of scholarship con-

[23] Proponents did manage to unearth a study of Australian children in the early 1990's to support their view. SER 308. But as Dr. Lamb explained, that single study has obtained some notoriety because it is a "complete outlier," the findings of which have never been corroborated or duplicated. SER 184, 199.

firms that children adopted in infancy or conceived with a donated egg or sperm do just as well as children raised by their genetic parents. *See* SER 179; *see also* SER 432, 489, 507. Even Proponents' expert David Blankenhorn testified that adoptive parents "actually on some outcomes outstrip the biological parents in terms of providing protective care for their children." SER 284. And, indeed, in *Parham*, the parents whose "natural bonds of affection" the Supreme Court validated were seven-year-old J.R.'s *seventh* set of *foster parents*. *See* 442 U.S. at 590.

Moreover, as Dr. Lamb explained, in the social science literature, the term "biological parent" often refers not just to *genetic* parents, but also to any parent who has raised a child from infancy, including adoptive parents. SER 191-92; *see also* ER 1229 n.3 ("Most studies do not distinguish biological parents from adoptive parents"). When Proponents' expert Dr. Loren Marks was confronted with the fact that the studies on which he relied used the term "biological" in precisely this encompassing manner, he offered to revise his opinion that married biological parents were the ideal family structure for the rearing of children by *deleting the word "biological."* SER 638 (Dep. of Dr. Loren Marks); *see also* SER 194. Proponents thus ask this Court to accept as fact an assertion that Proponents' own expert explicitly withdrew.

To explain why their preferred family structure is, in fact, "ideal," Proponents eventually fall back on gender stereotypes, asserting that "there is little doubt that children benefit from having a parent of each gender." Prop. Br. 81; *see also* SER 676

at 16:58-17:20 (campaign video decrying "the confusion with two moms or two dads. I mean who do you go to when you need to learn how to change the oil if you're a guy?"). But here again, Proponents ask this Court to accept as fact a rationale that their own expert Dr. Marks, when under oath at his deposition, refused to endorse. And, as Dr. Lamb (who himself subscribed to the theory of gender-differentiated parenting when it had its most currency in the 1970s) explained to the district court, since the 1970's there have been "hundreds, thousands of articles that have explored the implications of that belief and found it to be wanting." SER 186; *see also* SER 177 (Lamb).

The sources cited by Proponents suggest no reason to question the district court's findings that "[t]he gender of a child's parent is not a factor in a child's adjustment," and that "having both a male and a female parent does not increase the likelihood that a child will be well adjusted." ER 130. The thought piece of Norval Glenn invoked by Proponents (at 81) cites no sources whatsoever. *See* ER 446-49. And even David Popenoe—long a proponent of the importance of gender-differentiated parenting—did not believe it supplied an effective argument against same-sex parenting because, in his observations, "in childrearing by homosexual couples, either gay or lesbian, one partner commonly fills the male-instrumental role while the other fills the female-expressive role." David Popenoe, *Life Without Father* 147 (1996).

With nothing but their rendition of "commonsense" to support their view that only heterosexual parents can create an ideal family structure, Proponents attempt to portray the contrary social science evidence as methodologically flawed. For instance, Proponents note that Dr. Lamb identified no study comparing children raised by same-sex couples to "children raised by their married, biological parents." Prop. Br. 89. But this is just sound social science: If one is studying the impact of parenting by same-sex couples, one should use a comparison group that is similar in all respects except the factor to be studied. Since the vast majority of gay and lesbian couples cannot marry, the appropriate comparison group is unmarried heterosexual parents. *See* SER 190 (Lamb). Even Norval Glenn, whose views Proponents apparently believe warrant deference, acknowledges that this explanation is "quite valid." ER 448.

The fact is, as Glenn again acknowledges, "[t]here have been dozens of studies of same-sex parenting." ER 447. And while this body of research—like all bodies of research—leaves some questions still to be answered, those questions are today far fewer than in 2001 when Professor Nock signed the litigation affidavit on which Proponents and their academic authorities place so much reliance. *See* Prop. Br. 90 n.47; Witherspoon Inst., *Marriage and the Public Good: Ten Principl*es 18 & n.94 (2008) (citing Nock affidavit). As a more recent analysis of research on same-sex parenting explained, "Since 2001, the quality of the samples and data has advanced notably. New waves from longitudinal studies on children approaching early adolescence have

appeared and several studies attained larger, more representative samples." Timothy J. Bilbarz & Judith Stacey, *How Does the Gender of Parents Matter?*, J. of Marriage & Fam., Feb. 2010, at 3, 9-10 (citations omitted). Whereas earlier opponents of same-sex parenting perhaps could point to the absence of research with representative samples, now there is a study based upon the most representative sample imaginable—the United States Census. *See* SER 169-70, 182, 564. And whereas earlier opponents of same-sex parenting complained of the absence of "long-term, longitudinal studies," Prop. Br. 90 (quoting Witherspoon Institute, *supra*), now there are studies that have followed children from infancy into early adulthood. SER 460.

Against that background of more than 100 peer-reviewed studies, the State of California could not reasonably accept as a true—or even debatable—statement of fact Proponents' view that only heterosexual couples can create an "ideal" childrearing environment. It is not an end that the State rationally could adopt as its own and therefore cannot sustain Proposition 8.

**b. Proposition 8 Is Not Rationally Related To Any Effort To Channel Unintentional Procreation Into Marriage.**

To the extent Proponents seek to rest Proposition 8 on a more limited interest in channeling unintentional procreative conduct into marriage, Proposition 8 still fails rational basis review because it does not even indirectly "increas[e] the likelihood"

that heterosexual couples with the capacity to procreate accidentally will marry. Prop. Br. 77.

As authoritatively construed by the California Supreme Court, Proposition 8 does one thing and one thing only: It "eliminates the ability of same-sex couples to enter into an official relationship designated 'marriage.'" *Strauss*, 207 P.3d at 77. Proponents suggest no reason to believe—indeed, they make no argument at all—that prohibiting same-sex couples from entering relationships designated "marriage" will make it more likely that heterosexual couples in California will marry. Proponents instead argue that, under rational basis review, they need not show that Proposition 8 possibly could *further* their proffered interest in seeing heterosexual couples of child-bearing capacity marry. Rational basis review, Proponents contend, permits a State to "'draw a line around those groups'" not "'pertinent to its objective'" and exclude them from a state-conferred benefit program—here, "the special recognition and encouragement" of a state-recognized marriage. Prop. Br. 78, 91 (quoting *Vance*, 440 U.S. at 109).

As an initial matter, the Supreme Court's cases upholding "line-drawing" exercises under rational basis review all have been premised on the fundamental truth that where resources of the State are scarce, "some line is essential, [and] any line must produce some harsh and apparently arbitrary consequences." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (Medicare benefits); *see also U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S.

166, 179 (1980) (railroad retirement benefits); *Vance*, 440 U.S. at 109 (mandatory retirement from government employment); *Johnson*, 415 U.S. at 383 (veterans' educational benefits). Marriage licenses, however, are not remotely a scarce commodity. Because limitations on marriage licenses are not essential or inevitable, they must advance some legitimate objective.

But Proponents' argument fails even on its own terms because "the line" Proposition 8 "draws" bears no relationship whatsoever to Proponents' stated objective. There are many classes of heterosexual persons who cannot procreate unintentionally, including the old, the infertile, and the incarcerated. And there are still other classes of heterosexual persons who might have the capacity to procreate, but who have no desire to do so. *All* of these classes of heterosexual persons are as unlikely to procreate "by accident" as a same-sex couple, yet Proposition 8 is concerned with *none* of them. Proposition 8 targets gay men and lesbians for exclusion and them alone.

Sometimes, a "means of pursuing [an] objective" can be "so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Romer*, 517 U.S. at 633 (holding that Amendment 2 "confounds" the "normal process of judicial review" under rational basis scrutiny because it is "at once too narrow and too broad"). This is not a question of an enactment having merely an "imperfect fit between means and ends" or drawing a line that lacks "mathematical nicety." *Heller*, 509 U.S. at 321 (in-

ternal quotation marks omitted). If Proposition 8 is intended to reserve "special recognition" of marriage for couples that can procreate "by accident," it "ma[k]e[s] no sense in light of how [it] treat[s] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (discussing *Cleburne*, 473 U.S. at 447-50). It is true that same-sex couples are different from infertile or incarcerated heterosexual couples, but this difference is "irrelevant unless [same-sex couples] would threaten [Proponents' interest] in a way that other [infertile heterosexual couples] would not." *Cleburne*, 473 U.S. at 448. Same-sex couples pose no such *unique* threat to Proponents' effort to channel instances of accidental procreation into marriage, and thus the same-sex nature of the union is not a "rational[ ] justif[ication]" for singling them out for disfavored treatment. *Id.* at 450.

Ironically, the surest and most direct impact of Proposition 8 on children is not to increase the likelihood that they will be raised in "stable and enduring family units," Prop. Br. 77, but, instead, as the district court observed, to make it "*less* likely that California children will be raised in stable households." ER 164 (emphasis added). In the name of promoting the likelihood that children would be raised in stable marital households, Proposition 8 reduced the number of families who could be married and thus the number of children who will be raised in such households. Proponents argue that there is no "empirical evidence that children would obtain any incremental benefits through marriage," Prop. Br. 85 n.45, but again Proponents reject the views of

their own expert, who testified that "adopting same-sex marriage would be likely to improve the well-being of gay and lesbian households and their children." SER 285 (Blankenhorn). Indeed, nearly 40,000 children in California are being raised by gay and lesbian couples. SER 560. Proposition 8 categorically denies to all those children and their parents the protective benefits of marriage, including, critically, social acceptance. The fact that Proponents' chosen means—justified as improving the welfare of children—"in practical operation" only harm children marks it as not merely "imprecise," but "wholly without any rational basis." *Moreno*, 413 U.S. at 538.

### 2. Proposition 8 Cannot Be Justified By An Abstract Fear Of Change.

Proponents' second proffered justification for stripping gay men and lesbians of their right to marry is to forestall "the possibility of long-term adverse societal consequences" from allowing gay men and lesbians equal access to marriage. Prop. Br. 102. More specifically, Proponents worry that marriage equality would "sever[ ]" civil marriage from its "traditional procreative purposes," resulting in a corrosion of "marital norms," including that fathers "should take responsibility for the children they beget" and "sexual fidelity" (because, supposedly, "gay couples tend to downplay the importance of sexual fidelity in their definition of marriage") and ultimately "social devaluation of marriage" as an institution. *Id.* at 96-97, 100.

It bears noting at the outset that Proponents are not proffering as a justification a *factually supported* belief that permitting gay men and lesbians to marry is likely to cause the parade of horribles their brief conjures. While that was their argument during the campaign and perhaps even at the outset of this case, that changed dramatically as this litigation progressed. Indeed, when the district court asked their counsel point blank what harm would come to opposite-sex married couples if gay and lesbian couples could marry, Proponents' counsel mustered only "I don't know. I don't know." ER 44; *see also* Tr. 3093. And Proponents presented no witness who discussed data or studies tending to show that permitting gay men and lesbians to marry harms the institution of marriage. Proponents' "deinstitutionalization" expert, David Blankenhorn, had not seen a seminal 2009 study that empirically tested his theory of deinstitutionalization and that concluded that "laws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women." SER 670-71. Mr. Blankenhorn dismissed that study, SER 300, but offered "absolutely no explanation why manifestations of the deinstitutionalization of marriage would be exacerbated (and not, for example, ameliorated) by the presence of marriage for same-sex couples." ER 83.[24]

[24] As they do elsewhere, Proponents try to fill the void with citations to stray trial

In the absence of any factually supported belief that marriage equality would have negative effects on society, the question is whether the existence of a *theory*—unsupported by empirical evidence or other facts—that marriage equality *might* have negative effects constitutes a basis for perpetuating that inequality. For at least two reasons, it does not.

First, Proponents' unsubstantiated fear that negative externalities might flow from marriage equality fails to come to grips with the fact that, before Proposition 8 was enacted, some 18,000 same-sex couples were married in California, and those marriages remain valid and recognized today. *Strauss*, 207 P.3d at 121-22. And each day, California recognizes as valid marriages of same-sex couples who were married outside California before Proposition 8's enactment under that State's Marriage Recognition and Family Protection Act. Cal. Fam. Code § 308. Even beyond that, California has among the most robust legal protections for same-sex couples in the Nation,

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[Footnote continued from previous page]
exhibits used in cross-examination of Plaintiffs' experts. *See* Prop. Br. 101-02. But the evidence they cite hardly helps their cause. First, Proponents assert that the divorce rates in Massachusetts "changed for the worse" after 2004, when same-sex couples were permitted to marry. *Id.* at 101. But the data show that the Massachusetts divorce rate was actually *lower* for every measured year starting in 2004 than it was from 1999-2003. *See* ER 118-19; ER 1362. Second, Proponents cite various marriage statistics in the Netherlands and assert that certain adverse trends were "exacerbated" after same-sex couples were permitted to marry. Prop. Br. 102. As Dr. Badgett testified, however, the data reflect preexisting trends that remained unchanged after same-sex couples were permitted to marry. SER 217.

providing them with all the rights, incidents, and benefits of marriage under state law, save the designation of their relationships as "marriages." *Marriage Cases*, 183 P.3d at 434-35. Yet despite the thousands of instances in which California has severed marriage (and its incidents) "from its traditional procreative purposes," Proponents do not even suggest that the purported "deinstitutionalization" of marriage is occurring more rapidly in California than in other States. They submitted not one affidavit—not even an unverified allegation—that a single resident of California either was less likely to get married or viewed his or her marriage as less valuable or less stable because California had extended some measure of marriage equality to same-sex couples.

That complete failure of proof by Proponents is accurately reflected in the district court's factual finding that "[p]ermitting same-sex couples to marry will not affect the number of opposite sex-couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages." ER 118-19. And against the background of California's short, but entirely uneventful, experience with providing marriage rights to same-sex couples, the district court's finding is unassailable.

Second, and perhaps more importantly, if Proponents are correct that an unsubstantiated fear of negative externalities of *equality* is sufficient to justify *inequality*, then discrimination can become self-justifying. *See Cleburne*, 473 U.S. at 448 ("mere

negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases for" differential treatment). And the more valued the institution from which a class is excluded—which is to say, the more injurious the inequality—then the stronger the self-justification for the inequality becomes. On this view, in *Moreno*, the mere articulation of a *fear* that unrelated persons living in a single household might be fraudsters would have been sufficient to dispose of the equal protection attack on the statute excluding them from Food Stamps benefits. *But see* 413 U.S. at 535-37. In *Zobel v. Williams*, 457 U.S. 55 (1982), a fear that well-incented benefit-seekers might pour into Alaska would have been sufficient to sustain Alaska's durational residency scheme for distributing oil royalties. *But see id.* at 61-63. And in *Romer*, the actually-stated fear that gay men and lesbians might flood legislatures and city councils with demands for antidiscrimination laws would have been sufficient to sustain Colorado's Amendment 2. *But see* 517 U.S. at 635.

It cannot be the law that public resistance to equal treatment itself can justify a denial of equal treatment. *See Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) ("it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them"). If it were, then in Little Rock in 1958, the "drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds and placed the school 'off limits' to colored students" itself could have been

enough to justify the continuation of segregation. *Cooper v. Aaron*, 358 U.S. 1, 9 (1958). Of course, it was not. *See id.* at 16 ("The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature."). Nor could it be, given the promise of the Equal Protection Clause "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); *see also Buchanan v. Warley*, 245 U.S. 60, 81 (1917) ("It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.").[25]

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[25] Proponents' *amici* are equally unsuccessful in their efforts to identify a rational basis for Proposition 8's arbitrary and discriminatory restrictions on the right to marry. *Amicus* Becket Fund for Religious Liberty, for example, contends that Proposition 8 is rationally related to the State's interest in protecting the religious liberties of persons who are opposed to marriage by individuals of the same sex. According to the Becket Fund, religious groups will face liability under California antidiscrimination laws if they distinguish between married couples of the opposite sex and married couples of the same sex. Becket Br. 5-9. Those fears are unfounded. The California Supreme Court has already authoritatively determined as a matter of state law that, if gay men and lesbians are permitted to marry, "no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs." *Marriage Cases*, 183 P.3d at 451-52.

### 3. Overwhelming Evidence Supports The District Court's Finding That Proposition 8 Was Motivated By A Bare Desire To Make Gay Men And Lesbians Unequal To Everyone Else.

The district court found that, "[i]n the absence of a rational basis, what remains of proponents' case is an inference . . . that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples." ER 167. The district court's finding is supported both by Proponents' failure to identify any legitimate state interest furthered by Proposition 8 and by extensive record evidence that Proposition 8 was enacted "not to further a proper legislative end" but for the illicit purpose of "mak[ing] [gay men and lesbians] unequal to everyone else." *Romer*, 517 U.S. at 635.

#### a. The Equal Protection Clause Prohibits Voters From Using The Initiative Process To Single Out A Disfavored Group For Unequal Treatment.

"[A] bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer*, 517 U.S. at 634 (internal quotation marks omitted). In determining whether such improper motives animate a law targeting a disfavored group, courts not only scrutinize the *post hoc* justifications offered in defense of the law but also examine the explanations offered by legislators at the time of the law's enactment. *See id.* at 626-31. To discern the purposes underlying an enactment, courts pursue an objective inquiry that "takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or

comparable official act." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (internal quotation marks omitted); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (plurality). Even on rational basis review, courts routinely examine legislative history and other available evidence to shed light on the purpose of an enactment. *See Cleburne*, 473 U.S. at 448; *Moreno*, 413 U.S. at 534.

A voter-approved initiative is equally susceptible to such an examination. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982); *Reitman*, 387 U.S. at 373. Indeed, this Court has already held that evidence concerning the campaign messages disseminated in support of Proposition 8 is relevant to Plaintiffs' claims and "might reasonably lead to the discovery of evidence undermining or impeaching Proponents' claims that Proposition 8 serves legitimate state interests" or showing that "Proponents' campaign messages were designed to appeal to the biases of the voters." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2010) (internal quotation marks and alterations omitted).

Proponents nevertheless insist that this Court should simply ignore the extensive record evidence regarding the factors that motivated the enactment of Proposition 8. Prop. Br. 104-05. According to Proponents, *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970), establishes that voter motivation is not a proper subject of judicial inquiry. Prop. Br. 107. But Plaintiffs did

not offer—and the district court did not rely on—evidence of the subjective state of mind of individual voters. Plaintiffs instead introduced publicly disseminated campaign messages from Proponents themselves—which are part of the "historical context" for the initiative's enactment and an appropriate subject of judicial inquiry. *S. Alameda*, 424 F.2d at 295 (citing *Reitman*, 387 U.S. 369).

While Proponents attempt to minimize this evidence on the ground that it represents merely "a handful of the cacophony of messages" before the electorate during the campaign, Proponents in fact produced in discovery more than 20,000 pages of documents from the Yes on 8 campaign. *See* SER 203. Plaintiffs introduced many of those documents during trial, including the voter pamphlet distributed to all voters; television advertisements broadcast across the State; campaign signs; presentations at events sponsored by Proponents and simulcast at locations across the State; and articles and website materials disseminated by Proponents.

As discussed below, that array of campaign materials leaves no doubt that Proposition 8 was motivated by a desire to single out gay men and lesbians for disfavored treatment.

**b. The Purpose Of Proposition 8 Was To Brand Gay Men And Lesbians And Their Relationships As Different And Inferior.**

Proposition 8 has a single purpose and single effect: It "reserv[es] the official designation of the term 'marriage' for the union of opposite-sex couples as a matter of

state constitutional law." *Strauss*, 207 P.3d at 62. The Yes on 8 campaign materials introduced at trial make clear that this amendment was motivated by a desire to relegate gay men and lesbians to second-class status by denying them a fundamental right available to all other Californians.

The Yes on 8 campaign repeatedly made this motivation explicit. For example, the campaign publicly argued that, "if we have same-sex marriage legalized, it's really giving implicitly our political blessing to this thing. . . . It's an affirmation that it's just as good. And then we're going to have this society that eventually is going to come to believe it." SER 552-53; *see also* SER 258-59 (Proponent Tam: it is important that parents be able to tell their children that domestic partnership "is not 'marriage'").

Other campaign messaging focused on the theme that Proposition 8 was necessary to protect children from learning about gay relationships. For example, the official ballot argument in support of Proposition 8 stated that "[w]e should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay." ER 1032; *see also id*. ("If the gay marriage ruling is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is *no difference* between gay marriage and traditional marriage"); *id.* (Proposition 8 "protects our children from being taught that 'same-sex marriage' is the same as traditional marriage"). The Yes on 8 campaign translated this argument into a series of advertisements and

simulcast presentations that warned, in the words of the campaign's architect, that "this new 'fundamental right' would be inculcated in young children through the public schools." SER 352; *see also* SER 548 (campaign poster with text "Restoring Marriage and Protecting California Children"); SER 550 (campaign poster stating "Yes on 8 . . . You Have The Power To Protect Your Children").[26]

Even more ominously, other campaign materials suggested that Proposition 8 was necessary to protect children from gay men and lesbians themselves, and even to prevent children from becoming gay. Official proponent William Tam, for example, posted a letter on his website warning voters that, after gay men and lesbians secured the right to marry, they would continue to pursue their agenda, including "legaliz[ing] having sex with children," and that, without Proposition 8, "[m]ore children would be-

[26] This education-based argument was highly misleading. California Education Code § 51890 requires marriage to be discussed in schools only where age-appropriate health education is taught, but does not mandate any specific curriculum. *Id.* § 51890(a). Moreover, another provision of the Education Code already makes clear that California public schools are affirmatively obligated to combat bias. *Id.* § 201(b). Proposition 8 did not amend either of these provisions. In any event, contrary to the argument of *amicus* Hausvater Project, Proposition 8 is not rationally related to parents' fundamental right to direct their children's education because that right does not encompass the authority to control a public school's curriculum about marriage (or any other topic). As this Court has held, "The constitution does not vest parents with the authority to interfere with a public school's decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005).

come homosexuals." SER 349; *see also Perry*, 591 F.3d at 1166 (reproducing letter); SER 674.

Other Yes on 8 advertisements disseminated the Protect Our Children message by highlighting the purported developmental dangers posed by same-sex parents. In a simulcast to Yes on 8 supporters, for example, a Focus on the Family official claimed that it would be "radically anti-human" to "say" that "male and female, mother and father, husband and wife are just really optional for the family." SER 556; *see also* SER 676 at 16:25-32 (American Family Association video claiming that "the specter of children being raised in same-sex homes also turns nature on its head").

Historian George Chauncey testified about the similarities between this Protect Our Children theme and earlier anti-gay political efforts, including a series of aggressive anti-gay campaigns led by Anita Bryant in the 1970's, which depicted gay men and lesbians as "child molesters" and "homosexual predators." SER 132, 135. Professor Chauncey explained that, while the Yes on 8 advertisements were "certainly more polite than the ads that Anita Bryant used 30 years ago," SER 145, the campaign's messaging gives "a pretty strong echo of [Bryant's] idea that simple exposure to gay people and their relationships is going to somehow lead a generation of young kids to become gay." SER 146.

More broadly, voters were told that gay men and lesbians were trying to change society for the worse and interfere with the rights of heterosexuals. Thus, the official

Yes on 8 ballot argument stated that, "while gays have the right to their private lives, they do not have the right to redefine marriage for everyone else." ER 1032. The Yes on 8 campaign further warned that, "[i]f Prop. 8 fails, it opens up the door for all the other laws that the homosexual agenda wants to enforce on other people." SER 675. Voters were told that "homosexual activists won't stop at recognition, their aim is domination." SER 622. The inevitable result of same-sex marriage, the Yes on 8 campaign asserted, would be the destruction of marriage and the family itself. SER 612. To illustrate the gravity of the threat, one speaker at a statewide simulcast event likened same-sex marriage to September 11. SER 339. Another suggested that if gay men and lesbians could marry, then a man could marry a horse and a pedophile could marry a seven-year old. SER 341.

Like Colorado's Amendment 2, the purpose of Proposition 8 is clear: to place gay men and lesbians in "a solitary class," disfavored in the eyes of the law, and "withdraw[ ] from [them], but no others, specific legal protection[s]." *Romer*, 517 U.S. at 627. But "[i]t is not within our constitutional tradition to enact laws of this sort" (*id.* at 633)—which exclude a disfavored group from a right enjoyed by all others simply "to make them unequal to everyone else." *Id.* at 635. A "purpose to discriminate against [a disfavored group] cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify" the classification. *Moreno*, 413 U.S. at 534-35 (second alteration in original; internal quotation marks

omitted). Such unvarnished discrimination is unconstitutional even when based on sincerely held and widely shared moral beliefs. *See Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (internal quotation marks omitted); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Of course, this does not mean that the voters who supported Proposition 8 were motivated by malice or hostility toward gay men and lesbians—although, to be sure, some of the campaign messages reflected these feelings. As Justice Kennedy has explained, "Prejudice . . . rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring); *see also* SER 205 (San Diego Mayor Jerry Sanders: Opposition to same-sex marriage "didn't mean I hated gay people. . . . It simply meant that I hadn't understood the issue clearly enough.").

There are many reasons why someone might be opposed to marriage between individuals of the same sex. But, whatever the reason that voters supported Proposition 8, the fact remains that it embodies an irrational and discriminatory classification

that denies gay men and lesbians the fundamental right to marry enjoyed by all other citizens. That reason, standing alone, is sufficient to condemn Proposition 8 as unconstitutional.

## V. THE DISTRICT COURT DID NOT EXCEED ITS JURISDICTION.

Proponents claim that the district court's order enjoining the enforcement of Proposition 8 must be limited to Plaintiffs, and can have no wider application. They are incorrect.

The district court's injunction prohibiting Defendants, and all persons under their supervision, from enforcing Proposition 8 against any person is appropriate because it is necessary and proper to effectuate the district court's conclusion that Proposition 8 is facially unconstitutional. *See* 28 U.S.C. § 2202 (authorizing courts to grant "[f]urther necessary or proper relief based on a declaratory judgment"). Indeed, in *Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981), this Court rejected an argument that is virtually identical to the one Proponents advance here. There, the district court invalidated a California involuntary-confinement statute in a suit brought by an individual plaintiff, and issued an injunction requiring the State to hold a probable cause hearing before certifying *any* person for confinement. *Id.* at 1021 & n.5. This Court upheld the injunction, concluding that, "having declared the statutory scheme unconstitutional *on its face*, the district court was empowered under 28 U.S.C. § 2202 to grant '[f]urther necessary or proper relief' to effectuate the judgment." *Id*. at 1025

(emphasis added). "The challenged provisions were not unconstitutional as to [plaintiff] alone," the Court explained, "but as to any to whom they might be applied." *Id.*

Appellants nevertheless cite *Zepeda v. INS*, 753 F.2d 719 (9th Cir. 1983), for the proposition that "'[an] injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs.'" Prop. Br. 29-30 (quoting *Zepeda*, 753 F.2d at 727). But in *Bresgal v. Brock*, 843 F.2d 1163 (9th Cir. 1988), this Court limited *Zepeda* to its facts, holding that it "concerned a *preliminary* injunction, and is limited to that situation" because "[t]here is *no* general requirement that an injunction affect only the parties in the suit." *Id.* at 1169 (emphases added); *see also id.* (upholding an injunction that constrained the government's actions toward non-parties).

Because Proposition 8 is "unconstitutional . . . as to any to whom [it] might be applied" (*Doe*, 657 F.2d at 1025), the district court's injunction is appropriate.

## CONCLUSION

Last month, in a widely publicized tragedy, a young Rutgers student jumped to his death from the George Washington Bridge after being outed on the Internet as gay. A few days later, across the Hudson River in the Bronx, two 17-year-old young men were beaten and tortured to the brink of death by a gang of nine because they were *suspected* of being gay. Incidents such as these are all too familiar to our society. And it is too plain for argument that discrimination written into our constitutional

charters inexorably leads to shame, humiliation, ostracism, fear, and hostility. The consequences are all too often very, very tragic.

Proposition 8 was promoted as necessary to protect marriage and children, but its unmistakable purpose and effect is to isolate gay men and lesbians and their relationships as separate, unusual, dangerous, and unworthy of the marital relationship. By definition, such a law stigmatizes gay men and lesbians, and that kind of stigmatization leads, often indirectly, but certainly inevitably, to isolation and estrangement.

What can the Supreme Court mean when it says that our Constitution "neither knows nor tolerates classes among citizens," if a majority can so stigmatize a small, visible, and vulnerable minority and in the process cause such wrenching anguish? The American promise—and dream—of equality surely means *at a minimum* that the government, before "drawing a line around" some segment of its citizenry and designating them unworthy of something as important and socially meaningful as the institution of marriage, must have a legitimate and factually tenable rationale for doing so. Proposition 8 fails even this most basic level of scrutiny. It advances *no* legitimate purpose.

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Theodore B. Olson

THEODORE J. BOUTROUS, JR.
CHRISTOPHER D. DUSSEAULT
THEANE EVANGELIS KAPUR
SARAH E. PIEPMEIER
ENRIQUE A. MONAGAS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7804
Facsimile: (213) 229-7520

THEODORE B. OLSON
*Counsel of Record*
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

DAVID BOIES
JEREMY M. GOLDMAN
THEODORE H. UNO
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

*Attorneys for Plaintiffs-Appellees Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo*

Dated: October 18, 2010

## STATEMENT OF RELATED CASES

Other than the related appeal by Imperial County (No. 10-16751) identified in Proponents' Statement, Plaintiffs are aware of no related cases pending before this Court.

/s/ Theodore B. Olson

Dated: October 18, 2010

**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number** 10-16696

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (check appropriate option):

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Date: October 18, 2010

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9th Circuit Case Number(s) 10-16696

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## When All Case Participants are Registered for the Appellate CM/ECF System

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**SERVICE LIST**

Thomas Brejcha
THOMAS MORE SOCIETY
29 S. La Salle Street, Suite 440
Chicago, IL 60603

Von G. Keetch
KIRTON & McCONKIE, PC
Eagle Gate Tower
60 E. South Temple
Salt Lake City, UT 84111

Jeffrey Mateer
LIBERTY INSTITUTE
2001 W Plano Parkway, Suite 1600
Plano, TX 75075

Jeffrey Hunter Moon
Anthony R. Picarello, Jr.
Michael F. Moses
UNITED STATES CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, DC 20017

Lincoln C. Oliphant
COLUMBUS SCHOOL OF LAW
The Catholic University of America
3600 John McCormack Road, NE
Washington, DC 20064

Stuart J. Roth
AMERICAN CENTER FOR LAW AND JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002

Anita L. Staver
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

Mathew D. Staver
LIBERTY COUNSEL
1055 Maitland Center Commons
2nd Floor
Maitland, FL 32751

James F. Sweeney
SWEENEY & GREENE LLP
8001 Folsom Boulevard, Suite 101
Sacramento, CA 95826

M. Edward Whelan, III
ETHICS AND PUBLIC POLICY CENTER
1730 M Street N.W., Suite 910
Washington, DC 20036