

No. 10-16696

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

KRISTIN PERRY, et al.,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

On Appeal from the United States District Court for the Northern District of
California, Civil Case No. 09-CV-2292 (Hon. Vaughn R. Walker)

**BRIEF OF *AMICI CURIAE* LEGISLATORS FROM UNITED STATES
JURISDICTIONS THAT HAVE LEGALIZED SAME-SEX MARRIAGE
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

DANIEL H. SQUIRE
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

ALAN E. SCHOENFELD
DAVID SAPIR LESSER
ERIN G.H. SLOANE
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800

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CORPORATE DISCLOSURE STATEMENT

There is no corporation involved with *amici curiae*.

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INTEREST OF AMICI

Amici curiae are current and former elected State legislators in Connecticut, Iowa, New Hampshire, and Vermont, and members of the Council of the District of Columbia. They include Rep. Janet Ancel (Vt.); Rep. Bill Botzow (Vt.); Councilmember Muriel Bowser (D.C.); Councilmember Kwame R. Brown (D.C.); Councilmember Michael A. Brown (D.C.); Rep. Ed Butler (N.H.); Councilmember David A. Catania (D.C.); Councilmember Mary M. Cheh (D.C.); Sen. Martha Fuller Clark (N.H.); Rep. David L. Deen (Vt.); Rep. Johannah Leddy Donovan (Vt.); former Rep. Matt Dunne (Vt.); Councilmember Jack Evans, Chair *pro tempore* (D.C.); Rep. Mike Fisher (Vt.); Rep. Patsy French (Vt.); Councilmember Jim Graham (D.C.); Councilmember Vincent C. Gray, Chairman (D.C.); Rep. Helen Head (Vt.); Rep. Mary S. Hooper (Vt.); Sen. Harold Janeway (N.H.); Rep. Willem Jewett (Vt.); Rep. Mitzi Johnson (Vt.); Rep. Warren Kitzmiller (Vt.); Rep. Tony Klein (Vt.); Rep. Mark Larson (Vt.); Sen. Bette R. Lasky (N.H.); Rep. Mike Lawlor (Conn.); Rep. Vicki Lensing (Iowa); Rep. Lucy Leriche, House Assistant Majority Leader (Vt.); Rep. William J. Lippert (Vt.); Rep. Jason P. Lorber (Vt.); Rep. Mary Mascher (Iowa); Rep. Jim Masland (Vt.); Sen. Matt McCoy (Iowa); Sen. Andrew J. McDonald (Conn.); Rep. Paul McEachern (N.H.); Councilmember Phil Mendelson (D.C.); Rep. Floyd Nease, House Majority Leader (Vt.); Rep. David Pierce (N.H.); Sen. Edith Prague (Conn.); Rep. Ann Pugh (Vt.); Rep. Kesha

Ram (Vt.); Rep. Cindy Rosenwald (N.H.); Sen. Peter Shumlin, President *pro tempore* (Vt.); Rep. Shap Smith, Speaker of the House (Vt.); Rep. Jim Splaine (N.H.); Councilmember Harry L. Thomas, Jr. (D.C.); Councilmember Tommy Wells (D.C.); Rep. Rachel Weston (Vt.); and Rep. Suzi Wizowaty (Vt.).

They represent constituents in five of the six United States jurisdictions that have legalized same-sex marriage.¹ They are exceedingly familiar with the legal, political, and social landscape of their respective constituencies. As fiduciaries to their citizenry, they are keenly attuned to the well-being of families, children, and social institutions in their jurisdictions.

Since the legalization of same-sex marriage in their jurisdictions, these legislators have witnessed none of the harm to marriage and families claimed by opponents of marriage equality. They submit this brief to document the absence of any ill effects of legalizing same-sex marriage in their jurisdictions, in order to refute the argument made by the proponents of Proposition 8 and their *amici* that legalizing same-sex marriage results in a series of deleterious effects on heterosexual couples, the institution of marriage, and children reared in jurisdictions where same-sex couples are permitted to marry.

This brief is being filed with the consent of the parties.

¹ The Commonwealth of Massachusetts has submitted its own *amicus* brief, describing the Commonwealth's experience with same-sex marriage since it was legalized there in 2004.

SUMMARY OF ARGUMENT

Even under the most forgiving rational-basis review standard applied to Equal Protection claims, a government classification “must find some footing in the realities of the subject addressed by the legislation.” *Heller v. Doe*, 509 U.S. 312, 321 (1993). The rationales for Proposition 8 offered by Defendants-Intervenors-Appellants (the “Proponents”) relating to the impact of same-sex marriage on marriage and families find no footing in the realities of these social institutions, and accordingly fail to support a government classification depriving same-sex couples of the right to marry.

Proponents and their *amici* argue that Proposition 8 has a rational basis because, among other things, depriving same-sex couples of the right to marry is necessary to preserve the institution of marriage. They trot out a baseless parade of horrors to try to support this claim. Conferring marriage rights on same-sex couples, they argue, will “weaken or sever the connection in the public square between marriage and procreation,”² and will lead to the recognition of polygamous unions.³ Proponents argue that, “adopting same-sex marriage would be likely to contribute over time to a further social devaluation of marriage, as

² Brief of *Amici Curiae* National Organization for Marriage, National Organization for Marriage Rhode Island, and Family Leader in Support of the Intervening Defendants-Appellants 5 [Dkt. No. 68] (“NOM Br.”).

³ *Id.* at 30.

expressed primarily in lower marriage rates, higher rates of divorce and nonmarital cohabitation, and more children raised outside of marriage and separated from at least one of their natural parents.’’⁴

The empirical evidence, however, refutes these frantic claims. The experiences of United States jurisdictions that have legalized same-sex marriage demonstrate that allowing gay couples to marry exerts no negative effects on the institution of marriage or child-rearing. The emerging data from these United States jurisdictions, where same-sex marriage is of fairly recent vintage, is emphatically reinforced by the data from European countries that have legally recognized same-sex marriage for substantially longer. In short, the hard data, both domestic and foreign, confirm that the proponents’ hypothetical fears are completely unfounded, and “negative every conceivable basis” that might support Proposition 8. *Heller*, 509 U.S. at 320.

BACKGROUND

In their trial brief, proponents of Proposition 8 represented that they would prove some twenty-three specific harmful consequences of the State’s recognition of same-sex marriage. Among other things, they argued that recognizing same-sex marriage would “very likely”:

⁴ Defendant-Intervenors-Appellants’ Opening Br. 99-100 [Dkt. No. 21] (“DIA Br.”) (quoting Blankenhorn, *THE FUTURE OF MARRIAGE* 205 (2007)).

- “[e]ntail the further, and in some respects full, deinstitutionalization of marriage”;
- “[c]ontribute over time to the further erosion of the institution of marriage, as reflected primarily in lower marriage rates, higher rates of divorce and non-marital cohabitation, and more children raised outside of marriage and separated from at least one of their natural parents”;
- “[e]radicate in law, and weaken further in culture the idea that what society favors—that what is typically best for the child, the parents, and the community—is the natural mother married to the natural father, together raising their children, likely resulting over time in smaller proportions of children being raised by their own, married mothers and fathers”; and
- “[i]ncrease the likelihood that the recognition as marriages of other alternative forms of intimate relationships, such as polyamory and polygamy, will become a judicially enforceable legal entitlement.”⁵

At trial, proponents relied on the testimony of David Blankenhorn to attempt to prove that these undesirable outcomes were “very likely,” and, accordingly, to demonstrate that depriving same-sex couples of the right to marry was necessary to advance government interests. Blankenhorn testified that recognizing same-sex marriage would lead to “out-of-wedlock childbearing, rising divorce rates, the rise of non-marital cohabitation, [and] increasing use of assistive reproductive technologies.”⁶ Blankenhorn also testified, relying on evidence he presented in his own book, *The Future of Marriage*, that there were qualitative effects of legalizing

⁵ Defendant-Intervenors’ Trial Mem. 9 [N.D. Cal. Dkt. No. 295].

⁶ Findings of Fact and Conclusions of Law 45 [N.D. Cal. Dkt. No. 708] (“Order”).

same-sex marriage, in the form of *perceived* effects of legalizing same-sex marriage on the institution of marriage itself.⁷ As to child-rearing, Blankenhorn testified that social science evidence he deemed reliable “supports the conclusion that children raised by their married, biological parents do better on average than children raised in other environments.”⁸ Proponents also introduced evidence from the Netherlands, which purported to show that negative trends in marriage rates and nonmarital child-rearing were exacerbated by the legalization of same-sex marriage.⁹

Plaintiffs-appellees’ expert, economist Lee Badgett, testified credibly and authoritatively that the relevant social-science evidence clearly shows that “allowing same-sex couples to marry would not have any adverse effect on the institution of marriage or on opposite-sex couples.”¹⁰ Further, she explained the various confounding factors that rendered the Proponents’ presentation of certain

⁷ *Id.* at 46 (citing THE FUTURE OF MARRIAGE, *supra* note 4, at 202).

⁸ *Id.* at 44.

⁹ DIA Br. 101-102.

¹⁰ Order 30.

data partial and misleading.¹¹ Similarly, psychologist Letitia Anne Peplau “testified that the ability of same-sex couples to marry will have no bearing on whether opposite-sex couples choose to marry or divorce.”¹² Additional evidence at trial showed 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.””¹³ Based on this testimony and evidence, Judge Walker concluded that “the evidence shows beyond debate that allowing same-sex couples to marry has at least a neutral, if not a positive, effect on the institution of marriage and that same-sex couples’ marriages would benefit the state.”¹⁴

On appeal, Proponents and their *amici* rehash the same discredited hypotheses they unsuccessfully advanced at trial. As an alternative argument, they contend that the effects of legalizing same-sex marriage are impossible to discern, because the “unintended consequences of changing family laws have already been

¹¹ See, e.g., Trial Transcript (“Tr.”) 1443:6-1446:2 (Badgett testifying about factors confounding Proponents’ data and trial exhibits regarding marriage rates in the Netherlands). Badgett’s testimony on this and other aspects of Proponents’ presentation of the social-science evidence only underscores the need to test this evidence through the adversarial process.

¹² Order 17.

¹³ *Id.* at 47 (citing PX2898 (Langbein & Yost, *Same-Sex Marriage and Negative Externalities*, 90 SOC. SCI. Q. 2 (June 2009) at 305-306)).

¹⁴ *Id.* at 125-126.

myriad, hard to predict, and have often fallen on those least able to bear them.”¹⁵

They argue that this alleged lack of clarity about the effects of same-sex marriage is itself a rational basis to exclude gay couples from the institution of marriage in California: Voters, they contend, were motivated by anxieties about the unforeseeable long-term consequences of legalizing same-sex marriage, and were therefore entitled to “to move incrementally, to move with caution, and to adopt a wait-and-see attitude”¹⁶ with regard to same-sex marriage.

ARGUMENT

When a law such as Proposition 8 singles out a class of citizens for disfavored treatment, even under the most lenient federal Equal Protection standard, courts apply rational basis review with skepticism and demand “substantiation” of the reasons for treating the class differently. *See Romer v. Evans*, 517 U.S. 620, 633 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985); *Board of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001); *Plyler v. Doe*, 457 U.S. 202, 228-229 (1982) (rejecting hypothetical

¹⁵ NOM Br. 20; *see also id.* at 24 (“Today the first children to grow up under a same-sex marriage regime are just now reaching their teens. No social science can yet inform us as to the long-term societal impacts of this fundamental redefinition of the marriage relationship.”).

¹⁶ DIA Br. 41 n.17 (internal quotation marks omitted).

justifications for law excluding undocumented children as unsupported by record evidence); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-537 (1973).

Where “the asserted grounds for the legislative classification lack any reasonable support in fact,” *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 17 (1988), there is no rational basis for the classification, and it fails even the most lenient standard of review. *See Heller*, 509 U.S. at 321 (“[E]ven the standard of rationality as we have so often defined it must find some footing in the realities of the subject addressed by the legislation.”).

Parties challenging a government classification may produce “empirical evidence” to dispute the “plausibility of the justification raised.” *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 378 (2000); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (“[P]arties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational[.]”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-154 (1938) (“[W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason[.]”); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590-591 (9th Cir. 2008) (collecting cases, and observing that “our circuit has 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”).

Proponents’ rationales relating to the institutional impact of same-sex marriage are demonstrably false or merely hypothetical; accordingly, none of the proffered justifications could “reasonably be conceived to be true by the governmental decisionmaker,” *Vance v. Bradley*, 440 U.S. 93, 111 (1979), and “it [is] impossible to credit them,” *Romer v. Evans*, 517 U.S. 620, 635 (1996). As described in detail below, the empirical data and social science evidence relevant to Proponents’ claims patently undermine their arguments about the effects of same-sex marriage. In light of the experiences of *amici* and their constituencies—the only United States jurisdictions to have legalized same-sex marriage and to have witnessed the effects of that legalization on their citizens and social institutions—this Court should affirm Judge Walker’s finding that the Proponents’ rationales are “divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests.” *Id.* at 635; *see also Moreno*, 413 U.S. at 534.

I. NONE OF THE HARMS IDENTIFIED BY PROPONENTS HAVE BEEN VISITED UPON THE UNITED STATES JURISDICTIONS THAT HAVE LEGALIZED SAME-SEX MARRIAGE

A. There Has Been No Negative Effect On Divorce And Marriage Rates

The empirical evidence from Connecticut, Iowa, New Hampshire, Vermont, and the District of Columbia, albeit necessarily of recent vintage, shows no adverse effects of same-sex marriage on overall divorce and marriage rates.¹⁷ In most cases, these data show that trends in divorce and marriage rates that were in place before same-sex marriage was legalized were completely unaffected by the introduction of same-sex marriages. That is, these trends continued unabated, with no discernible change in the slope of these trends in the years following legalization.

The divorce data is particularly persuasive. In 2009, the year Iowa legalized same-sex marriage, the state had only 7,286 divorces,¹⁸ *its lowest annual figure*

¹⁷ These data are consistent with Badgett's testimony at trial, and the exhibits entered into evidence through her testimony. *See, e.g.*, Tr. 1330:17-19 (opining that permitting same-sex couples to marry will not adversely affect the institution of marriage or different-sex couples); *see also* PX2898 (Langbein & Yost), *supra* note 13.

¹⁸ Iowa Department of Public Health, *Vital Statistics of Iowa in Brief, 2009 Data*, http://www.idph.state.ia.us/apl/common/pdf/health_statistics/vital_stats_2009_brief.pdf (last visited Oct. 24, 2010).

since 1970.¹⁹ At the very least, then, there is no evidence that same-sex marriage has served to “destabilize” existing marriages. Likewise, New Hampshire, which legalized same-sex marriage in 2009, had only 4,845 divorces in 2009, its lowest number since at least 1995.²⁰ And while Vermont’s divorce rate increased between 2006 and 2008, it dropped in 2009, the year the State legalized same-sex marriage.²¹

As to marriage rates, the experiences of Connecticut and Iowa are representative. In Connecticut, where same-sex marriage became legal on November 12, 2008, the data indicate that the legalization of same-sex marriage may have actually decelerated a preexisting downward trend in the marriage rate. The marriage rate in Connecticut fluctuated between 2000 and 2008, but primarily

¹⁹ Rod Boshart Lee, *Marriages Up, Divorces Down in Iowa*, SIOUX CITY JOURNAL (July 23, 2010).

²⁰ New Hampshire Department of State, *Total Divorces in New Hampshire Since 1995*, http://nhvrinweb.sos.nh.gov/nhivs_divorce_query.aspx (login required; once logged in, select “Divorce” from the side column; select “All” for all of the options in Step 1; in Step 2, select “Year of Decree” for column 1 and “Type of Decree” for row 1; submit query by clicking the “Results” button in Step 3) (last visited Oct. 24, 2010).

²¹ U.S. Census Bureau, American Factfinder, *Vermont: Selected Social Characteristics*, [http://factfinder.census.gov/servlet/MYPTable?_bm=y&-geo_id=04000US50&-context=myp&-ds_name=ACS_2009_1YR_G00_&-tree_id=309&-_lang=en&-_caller=geoselect&-format=](http://factfinder.census.gov/servlet/MYPTTable?_bm=y&-geo_id=04000US50&-context=myp&-ds_name=ACS_2009_1YR_G00_&-tree_id=309&-_lang=en&-_caller=geoselect&-format=) (comparison of divorce rates in Vermont, 2006-2009) (last visited Oct. 24, 2010).

trended downward.²² For example, between 2001 and 2002, the marital rate in Connecticut declined from 6.2 marriages per 1,000 people, to 5.7 marriages per 1,000 people.²³ Once same-sex marriage was legalized in 2008, the decline in the marriage rate was substantially smaller, dropping from 5.6 marriages per 1,000 people in 2007, to 5.4 marriages per 1,000 people in 2008.²⁴ This evidence shows that the legalization of same-sex marriage did not exacerbate already declining marriage rates in Connecticut, and, in fact, may have actually slowed the pace of the marriage rate decline.

Iowa legalized same-sex marriage in 2009; that year, there was a significant increase in the number of marriage licenses granted—an increase of more than 1,500 licenses over 2008, for a total of 21,139 marriages.²⁵ In fact, Iowa granted more marriage licenses in 2009 than it had since 2000.²⁶ The available data from

²² Connecticut Department of Public Health, *Vital Statistics*, http://www.ct.gov/dph/cwp/view.asp?a=3132&q=394598&dphNav_GID=1601&dphPNavCtr=|#46987 (under “Registration Reports and Methods” and then “Tables only (xls),” click on year, and then proceed to Table 2A; to calculate the marital rate per year, divide the number of marriages in a given year by the population that year; multiply the resulting number by 1,000) (last visited Oct. 24, 2010).

²³ *Id.*

²⁴ *Id.*

²⁵ Lee, *supra* note 19.

²⁶ *Id.*

New Hampshire,²⁷ Vermont,²⁸ and the District of Columbia²⁹ are consistent with those from Connecticut and Iowa.³⁰

B. There Is No Evidence That Same-Sex Marriage Negatively Affects The Child-Bearing Or Child-Rearing Aspects Of “Traditional” Marriage

Proponents of Proposition 8 insist that the state has a rational interest in prohibiting same-sex couples from getting married in order to protect the child-bearing and child-rearing aspects of “traditional” marriage. In particular, they

²⁷ New Hampshire Department of State, *Total Divorces in New Hampshire Since 1995*, http://nhvrinweb.sos.nh.gov/nhivs_marriage_query2.aspx (login required; once logged in, select “Marriage” from the side column; select “All” for all of the options in Step 1; in Step 2, select “Year of Marriage” for column 1 and “Ceremony Type” for row 1; submit query by clicking the “Results” button in Step 3) (last visited Oct. 24, 2010).

²⁸ Vermont Department of Health, *Vital Statistics Summary of Vermont 1857-2008*, <http://healthvermont.gov/research/stats/2008/documents/2008tbla1.pdf> (last visited Oct. 24, 2010).

²⁹ The data for D.C. were obtained from the Council of the District of Columbia and the District of Columbia Superior Court, and are on file with counsel for *amici curiae*.

³⁰ At trial plaintiffs-appellees showed that the marriage rate increased in Massachusetts after the Commonwealth legalized same-sex marriage in 2004. They produced disaggregated marriage-rate data to show that this increase was not attributable exclusively to the first wave of same-sex couples marrying in the Commonwealth, but, rather, to an increased marriage rate among heterosexual couples. *See* Tr. 1465:6-1466:3. There is no similarly comprehensive disaggregated data available for Connecticut, Iowa, New Hampshire, Vermont, or the District of Columbia; but based on an analysis of geography, demographics, and the sequence of jurisdictions legalizing same-sex marriage, there is good reason to believe that disaggregated data from these jurisdictions would not yield different results.

argue, legalizing same-sex marriage will increase the number of children raised outside of wedlock.³¹ However, in states that have provided for same-sex marriage, the available data show no deleterious effect on the incidence of children raised outside of marriage: As discussed above, each trend in child-bearing and child-rearing that existed prior to the legalization of same-sex marriage has continued unabated—and has not been exacerbated by—gay couples marrying.

In Vermont, the rate of single-mother births and children born to single parents began to increase well before the legalization of same-sex marriage: The percentage of women having children outside of marriage increased from 2006 (24%) to 2008 (36%).³² That figure actually *decreased* in 2009 (34.5%), the year same-sex marriage was legalized.³³ Likewise, there was a steady increase in the percent of children living in single-parent homes (25% in 2000 to 32% in 2008).³⁴

³¹ See, e.g., DIA Br. 100 (predicting “more children raised outside of marriage and separated from at least one of their natural parents” as a result of legalizing same-sex marriage).

³² *Vermont: Selected Social Characteristics*, *supra* note 21.

³³ *Id.*

³⁴ Kids Count Data Center, *Vermont Children in Single-Parent Families by Number and Percent*, <http://datacenter.kidscount.org/data/bystate/StateLanding.aspx?state=VT> (click “full set” of Featured Indicators in the “Profiles” section of the page; select “Custom Profile” under “Indicators;” click “Family and Community” and then “Family Structure;” select “Children in single-parent families” and click “Submit”) (last visited Oct. 24, 2010).

These statistics clearly demonstrate a long-term trend that preceded, and is therefore unrelated to, the legalization of same-sex marriage.

Similarly, in Connecticut, one of the first states to adopt same-sex marriage, the data show no correlation to births outside of marriage. Connecticut legalized same-sex marriage in 2008; the total number of children born to unmarried mothers began to increase many years before that, from 12,572 in 2000 to 14,671 in 2008.³⁵ The data show no impact of the legalization of same-sex marriage on this trend. Likewise, the data show no effects from the legalization of same-sex marriage on the number of women who had children outside of marriage,³⁶ or the percentage of children living in single-parent households.³⁷

³⁵ Connecticut Department of Public Health, *Vital Statistics: Connecticut Resident Births, 2000-2008*, http://www.ct.gov/dph/cwp/view.asp?a=3132&q=394598&dphNav_GID=1601&dphPNavCtr=|#46987 (number of children in Connecticut born to unmarried mothers each year; under “Registration Reports and Methods” and then “Tables only (xls),” click year and proceed to Table 3) (last visited Oct. 24, 2010).

³⁶ U.S. Census Bureau, American Factfinder, *Connecticut: Selected Social Characteristics*, http://factfinder.census.gov/servlet/MYPTTable?_bm=y&-context=myp&-qr_name=ACS_2009_1YR_G00_CP2_1&-ds_name=ACS_2009_1YR_G00_&-tree_id=309&-redoLog=true&-_caller=geoselect&-geo_id=04000US09&-format=&-_lang=en (fertility rates among unmarried women in Connecticut) (last visited Oct. 24, 2010).

³⁷ Kids Count Data Center, *Connecticut Children in Single-Parent Families by Number and Percent*, <http://datacenter.kidscount.org/data/bystate/StateLanding.aspx?state=CT> (Click “full set” of Featured Indicators in the “Profiles” section of the page; select “Custom Profile” under “Indicators;” click “Family and Community” and then “Family Structure;” select “Children in single-parent families” and click “Submit”) (last visited Oct. 24, 2010).

The same trends are evident in New Hampshire, which showed a steady increase from 2000 to 2009 in the number of children born to unwed mothers (244.19 per 1,000 births in 2000, to 332.04 per 1,000 births in 2009),³⁸ well before the legalization of same-sex marriage in the state.³⁹

C. The Available Qualitative Data Confirm That There Has Been No Negative Effect On Marriage And Divorce Rates, Or On Child-Bearing And Child-Rearing

There is also emerging qualitative data indicating that predictions of rampant deleterious effects from the legalization of same-sex marriage have not been borne out in the eyes of those living with it.⁴⁰

Vermont's experience is illustrative. In 1999 and 2000, when the Vermont legislature was considering whether to introduce civil unions for same-sex couples, opponents of the bill—like the proponents of Proposition 8—predicted a parade of

³⁸ New Hampshire Department of State, Division of Vital Records, *Number of Children Born to Unmarried Mothers in New Hampshire Since 1995*, <http://nhvrinweb.sos.nh.gov/security/sitelogin.aspx?Message=1&Login=1&RedirectTo=aHR0cDovL25odnJpbndlYi5zb3MubmguZ292L25oaXZzX2Rpdm9yY2VfcXVlcnkYXNweA==> (login required; once logged in, select “statistical, birth rate” from the side column; do not change any of the options in step 1; select years 2000 through 2009 in Step 2; in Step 3 group columns by “Year of Birth” and group rows by “Mother Married (During Pregnancy);” submit query by clicking the “Results” button in Step 5) (last visited Oct. 24, 2010).

³⁹ There is no available data on this point for Iowa or the District of Columbia.

⁴⁰ Contrary to the Proponents' dire prediction, *see supra* notes 3 & 5 and accompanying text, none of these jurisdictions has witnessed a movement for the legalization of polygamous relationships.

horribles should the legislation be enacted. Yet nine years later, when a commission of the legislature conducted a careful analysis of the potential effects of same-sex marriage prior to passing a bill legalizing it in 2009, the commission found that “the dire consequences predicted by many for Vermont upon enactment of the civil union law did not come to pass.”⁴¹ In copious testimony before the legislative commission on same-sex marriage, citizens from every walk of life consistently explained that they noticed no negative effects on their lives after Vermont recognized civil unions in 2002. More importantly, Vermont citizens uniformly testified that living with civil unions assured them that same-sex marriage in Vermont would present no real threat to heterosexual marriage.⁴² And *amici* have found no evidence indicating that these Vermonters’ predictions were wrong.⁴³

The qualitative experience of *amici* confirms the same to be true in every jurisdiction from which they hail. The undersigned state legislators have observed first-hand the impact—or lack thereof—of same-sex marriage on their constituents

⁴¹ Vermont Office of Legislative Counsel, REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION 11-12 (Apr. 21, 2008).

⁴² *Id.*

⁴³ Iowa’s experience is comparable. An editorial marking the one year anniversary of same-sex marriage in Iowa declared that “Iowans’ lives haven’t changed one whit” in the year since the Iowa Supreme Court’s decision paving the way for the change. Jennifer Hemmingsen, *Same-Sex Marriage: It’s A Big Deal*, CEDAR RAPIDS GAZETTE (Mar. 30, 2010).

and their jurisdictions' social institutions. Their collective experience resoundingly demonstrates that Proponents' arguments about the deinstitutionalizing effect of same-sex marriage are plainly wrong.

II. THE COMPARATIVELY LONGER EXPERIENCES OF EUROPEAN COUNTRIES ALSO SHOW NO NEGATIVE EFFECTS OF LEGAL SAME-SEX MARRIAGE

The evidence stemming from countries where same-sex marriage has been legal for longer than in United States jurisdictions, serves to rebut further any claim of negative impact. Same-sex marriage was legalized in the Netherlands in 2001. It was quickly followed by Belgium in 2003, and now there are ten foreign jurisdictions that allow same-sex couples to marry.⁴⁴ Contrary to the arguments made by proponents and their *amici*, since legalizing same-sex marriage these jurisdictions have not seen any significant changes in trends regarding divorce or marriage rates, or the incidence of childbirth outside marriage and single parenting. There is no evidence of the impact that proponents and their *amici* suggest, and, in some cases, the pertinent rates have even been changing in a positive direction since the legalization of same-sex marriage.

⁴⁴ Argentina (2010), Belgium (2003), Canada (2005), Iceland (2010), the Netherlands (2001), Norway (2009), Portugal (2010), South Africa (2006), Spain (2005), and Sweden (2009).

A. Same-Sex Marriage Has Not Exerted Any Negative Effects On Divorce Rates

There is no evidence of increased marital dissolution associated with same-sex marriage. In Spain, the divorce rate increased between 2005 and 2007, but it decreased again in 2008.⁴⁵ There was a slight increase in the Norwegian divorce rate from 2003 to 2005 (2.4 per 1,000 people in 2005, from 2 to 2.3 per 1,000 people in the period 1997 to 2003), and a slight decrease from 2006 to 2008 (2.3 per 1,000 to 2.1).⁴⁶ In Portugal, the total divorces and divorce rate had already risen significantly from 1997 to 2007, from 14,078 and 1.4 per 1,000 people to 25,411 and 2.4 per 1,000, prior to the legalization of same-sex marriage in 2010.⁴⁷ In South Africa, in contrast, just as the marriage rate has increased,⁴⁸ the number of published divorces has *declined* from 37,098 in 1999 to 28,924 in 2008.⁴⁹

⁴⁵ Eurostat, *Divorces*, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tps00013&plugin=1> (last visited Oct. 24, 2010) (“*Divorces*”). As Badgett’s testimony showed, the increase in Spain’s divorce rate in 2005 was attributable to liberalization of the country’s divorce laws. *See* Tr. 1354:17-19.

⁴⁶ *Divorces*, *supra* note 45.

⁴⁷ *Id.*; Eurostat, *Divorce indicators*, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=demo_ndivind&lang=en (last visited Oct. 24, 2010).

⁴⁸ *See infra* notes 62 & 63 and accompanying text.

⁴⁹ Statistics South Africa, *Marriages and Divorces 2008*, at 31 (“Statistics South Africa”), <http://www.statssa.gov.za/publications/P0307/P03072008.pdf> (last visited Oct. 24, 2010).

In other cases, divorce rates have remained relatively stable before and after same-sex marriage's legalization. In the Netherlands, the rate ranged only from 1.9 to 2.3 per 1,000 people from 1997 to 2008.⁵⁰ In discussing the period preceding same-sex marriage, when only same-sex partnerships were the norm,⁵¹ Professor Badgett illustrates that crude divorce rates in Scandinavian countries showed “little change after same-sex couples began registering, providing no evidence of harm to heterosexual marriage.”⁵² The same is true in Belgium, where the divorce rate has varied only within four tenths of a percentage point between 2003 and 2008.⁵³ Per 1,000 people, there were 3 divorces in 2003 and 2004, 2.9 in 2005, 2.8 in 2006 and 2007, and 3.3 in 2008.⁵⁴ In Sweden, from 2001 to 2008, the divorce rate ranged from 2.2 to 2.4 per 1,000 people, with slight fluctuations each

⁵⁰ *Divorces, supra* note 45.

⁵¹ Several foreign nations, including Belgium, the Netherlands, and Norway, permitted registered same-sex partnerships or registered cohabitation before legalizing same-sex marriage. M.V. Lee Badgett, *WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE* 9 (fig. 1.1) (2009) [PX1273] (“WHEN GAY PEOPLE GET MARRIED”).

⁵² *WHEN GAY PEOPLE GET MARRIED* 70. Although there is no data available for Iceland post-legalization, there was “no meaningful difference” in “total break-up rate” for couples in Iceland from 1991 to 1996 and 1997 to 2004, the latter being the period during which same-sex partnerships were introduced. *Id.* at 71 (rate increased only from 4.6 to 4.7).

⁵³ Statistics Belgium, *Evolution du nombre de divorces par région, 1990-2009*, http://statbel.fgov.be/fr/statistiques/chiffres/population/mariage_divorce_cohabitation/divorces/index.jsp (last visited Oct. 24, 2010).

⁵⁴ *Divorces, supra* note 45.

year.⁵⁵ Taken together, these data cast serious doubt on any argument that marriages are more likely to end because the institution of marriage is opened to same-sex couples.

B. Same-Sex Marriage Has Not Exerted Any Negative Effects On Marriage Rates

In many of the foreign jurisdictions where same-sex marriage has been legalized, the marriage rates were decreasing well before same-sex marriage was introduced, and those trends were not exacerbated by its legalization. For example, prior to Spain's legalization of same-sex marriage, the marriage rate was trending precipitously downward: Per 1,000 people, there were 5.7 marriages in 1990, 5.2 in 1998, and 4.2 in 2008.⁵⁶ And in the Netherlands, the overall marriage rate has been trending downward since 1990. In 1990, the marriage rate was 6.5 per 1,000 people; that rate dropped to 5.5 per 1,000 people in 1998, and to 4.5 per 1,000 people in 2008.⁵⁷ In fact, a closer analysis of the data reveals that there was actually a small uptick in total marriages and the corresponding marriage rate in

⁵⁵ *Id.*

⁵⁶ See Eurostat, *Marriages and Births Outside Marriage, 1990-2008* (“*Marriages and Births*”), <http://europa.eu/rapid/pressReleasesAction.do?reference=STAT/10/130&type=html> (last visited Oct. 24, 2010).

⁵⁷ *Id.*

2008, relative to the previous four years—well after same-sex marriage was legalized there.⁵⁸

The proponents and their *amici* cite certain data from the Netherlands, claiming that marriage rates “have worsened since that nation legalized same-sex marriage.”⁵⁹ But their presentation of the available data is partial and misleading. Dutch demographers who have studied these declining marriage rates suggest that they were caused by economic recession and a long-term decline in Dutch birth rates, leading to a decline in the marriageable population.⁶⁰ The “long-term perspective” on these figures shows “mainly a longer-term drop in marriages, whatever the reasons for short-term fluctuations.”⁶¹ There is no evidence—and neither proponents nor their *amici* cite any—tying these trends to the legalization of same-sex marriage.

⁵⁸ In the Netherlands, there were 75,438 marriages (4.6 per 1,000 people) in 2008, compared to 72,369 marriages (4.4 per 1,000 people) in 2006. *See* United Nations Statistics Divisions, *Table 23: Marriages and Crude Marriage Rates, by Urban/Rural Residence: 2004-2008* (“United Nations Table 23”), <http://unstats.un.org/unsd/demographic/products/dyb/dyb2008.htm> (last visited Oct. 24, 2010); *see also* Tr. 1351:16-1354:3, 1443:6-1446:2, 1460:9-23 (Badgett testimony showing a long-term decline in the marriage rate, with no adverse impact related to permitting same-sex couples to marry beginning in 2001).

⁵⁹ NOM Br. 28.

⁶⁰ *See* WHEN GAY PEOPLE GET MARRIED, *supra* note 51, at 70 (citing the work of demographers Jan Latten and Joop Garssen).

⁶¹ *Id.*

In South Africa, which legalized same-sex marriage in 2006, marriage rates have steadily risen, with an annual increase of 2.9% since 1999: In 1999, 140,458 marriages were registered and in 2008, the number was 186,522.⁶² As one South African commentator put it, “opponents of gay marriage often justify their position in abstract terms, contending that granting gay men and women equal access somehow erodes the institution and tears at the very fabric of society. In South Africa, four years after the legalisation of gay marriage, no such catastrophe has come to pass.”⁶³

In some jurisdictions, there has been no discernible change in the marriage rates since the recognition of same-sex marriage. In Belgium, which legalized same-sex marriage in 2003, there was a noticeable drop in marriages between 1990 and 1998, but the rate of decrease slowed substantially during the years of legal same-sex marriage.⁶⁴ There were 6.5 marriages per 1,000 people in 1990.⁶⁵ That

⁶² Statistics South Africa, *supra* note 49, at 1, 14.

⁶³ Robert Mckay, *Much More Than A Piece Of Paper*, THE TIMES (SOUTH AFRICA) (Feb. 22, 2010).

⁶⁴ *See Marriages and Births*, *supra* note 56.

⁶⁵ *Id.*

number dropped to 4.4 marriages per 1,000 people by 1998, and stayed relatively consistent for the next decade, dropping only to 4.3 in 2008.⁶⁶

C. Same-Sex Marriage Has Not Exerted Any Negative Effects On Child-Bearing Or Child-Rearing

Over the last 20 years, child-bearing outside of marriage has been dramatically increasing across the world. This upward trend long pre-existed the legalization of same-sex marriage in European countries, and there was no discernible impact on this trend from the legalization of same-sex marriage. In Norway, for example, which legalized same-sex marriage in 2009, the number of births outside of marriage increased from 38.6% in 1990 to 49% in 1998 and 55% in 2008.⁶⁷ Likewise, in Iceland, which legalized same-sex marriage in 2010, the rate increased from 1990 to 2008 (55.2% in 1990, 64.0% in 1998, and 64.1% in 2008).⁶⁸ As Professor Badgett explains, Scandinavian countries “have had high

⁶⁶ *Id.* The data from the other foreign jurisdictions show preexisting trends that, like those in the jurisdictions already discussed, are unlikely to be affected by the recent legalization of same-sex marriage. *See id.* (providing marriage data for Iceland, Norway, Portugal, and Sweden); United Nations Table 23, *supra* note 58 (showing marriage data for Argentina).

⁶⁷ *Marriages and Births, supra* note 56.

⁶⁸ *Id.*

and rising rates of nonmarital births since the 1970s, with roughly half of all babies born to unmarried mothers.”⁶⁹

In the specific case of the Netherlands, the “nonmarital birth rate has been rising steadily since the 1980s, and sometime in the early 1990s the nonmarital birthrate started increasing at a somewhat faster rate.”⁷⁰ The pace and trajectory of this trend, which was apparent at least six years before same-sex marriage was allowed in the Netherlands, have remained unchanged since legalization.⁷¹

Contrary to Proponents’ claim that a preexisting upward trend in the incidence of single-parent and cohabitating families with children in the Netherlands was exacerbated by the legalization of same-sex marriage,⁷² Professor Badgett credibly testified at trial that the rate of change was *exactly the same* year over year, and that, in fact, there was no break in that rate of change—either upward or downward—after same-sex marriage became legal.⁷³

⁶⁹ WHEN GAY PEOPLE GET MARRIED, *supra* note 51, at 72.

⁷⁰ *Id.* at 75.

⁷¹ *Marriages and Births*, *supra* note 56.

⁷² DIA Br. 102.

⁷³ Tr. 1447:20-1448:1; *see also* PX2829 (data reflecting non-marital birth rate in the Netherlands, 1950 to 2008 and showing a long-term increase in the rate of non-marital live born children, with no impact related to permitting same-sex couples to marry beginning in 2001).

Relatedly, the ratio of single parent households has also long been increasing. Belgian single-parent households made up 33.7% of all households with children in 2008.⁷⁴ This statistic is a result of a 32% increase between 1991 and 2004, all but one of those years being prior to the legalization of same-sex marriage.⁷⁵ Likewise, in Norway, the single parenting rate rose from 2001 until 2007, and stabilized after same-sex marriage legalization.⁷⁶ These data do not point to any definitive conclusions about the effect of same-sex marriage on the circumstances under which children are born and raised. Nevertheless, there is no rational evidence of the link to same-sex marriage the proponents suggest.

CONCLUSION

Amici curiae current and former state legislators from Connecticut, Iowa, New Hampshire, Vermont, and the District of Columbia respectfully submit that the available data from these jurisdictions show that the legalization of same-sex marriage has had no negative effect on the institution of marriage or on the well-

⁷⁴ La Ligue des Familles (Belgium), *Le Droit a des Ressources Garanties en cas de Separation* 2-3 (Feb. 2010), <http://www.citoyenparent.be/Files/media/etudes/2010/analyse.le-droit-a-des-ressources-garanties-en-cas-de-separation-2010.pdf> (last visited Oct. 24, 2010).

⁷⁵ Office National d'Allocations Familiales pour Travailleurs Salariés (Belgium), *Les Familles Monoparentales en Belgique* 11 (2008), <http://www.onafts.be/Fr/Documentation/Publication/Studies/FOCUS2008-2F.pdf> (last visited Oct. 24, 2010).

⁷⁶ Statistics Norway, *Children Statistics*, http://www.ssb.no/english/subjects/02/01/20/barn_en/tab-2010-04-29-01-en.html (last checked Oct. 24, 2010).

being of children born or raised in jurisdictions where gay couples can marry. The evidence is in accord from Massachusetts, which is submitting its own *amicus* brief, as well as from European countries that have long permitted same-sex marriage. Proposition 8 lacks any rational basis because its proffered justifications are without factual support. Accordingly, the district court's findings of fact and conclusions of law should be upheld.

October 25, 2010

Respectfully submitted,

s/ Alan E. Schoenfeld

Alan E. Schoenfeld

David Sapir Lesser

Erin G.H. Sloane

WILMER CUTLER PICKERING

HALE AND DORR LLP

399 Park Avenue

New York, New York 10022

(212) 230-8800

Daniel H. Squire

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Avenue NW

Washington, DC 20006

(202) 663-6000

*Counsel for Amici Curiae Legislators
from United States Jurisdictions that
Have Legalized Same-Sex Marriage*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Brief of *Amici Curiae* Legislators from United States Jurisdictions that Have Legalized Same-Sex Marriage in Support of Plaintiffs-Appellees and Affirmance is proportionately spaced, has a typeface of 14 points and contains 6,050 words, exclusive of exempted portions.

s/ Alan E. Schoenfeld
Alan E. Schoenfeld

CERTIFICATE OF SERVICE

I certify that on October 25, 2010, I electronically filed the foregoing Brief of *Amici Curiae* Legislators from United States Jurisdictions that Have Legalized Same-Sex Marriage in Support of Plaintiffs-Appellees and Affirmance with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users (either as entities or through individual attorneys representing those offices), and that service will be accomplished by the appellate CM/ECF system.

s/ Alan E. Schoenfeld
Alan E. Schoenfeld