Appeal No. 10-16696

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, *et al.*,

Plaintiffs-Appellees,

vs.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants-Appellees.

and

DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors-Appellants.

On Appeal From the United States District Court
for the Northern District of California
Hon. Vaughn R. Walker
Case No. 09-cv-2292

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL LAW AND CIVIL PROCEDURE PROFESSORS ERWIN CHEMERINSKY, PAMELA S. KARLAN, ARTHUR MILLER AND JUDITH RESNIK, ET AL., IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE

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INTERESTS OF *AMICI CURIAE*

Amici are the following law professors who teach and write in the area of constitutional law and civil procedure. They participate in this case in their personal capacity; titles are used only for purposes of identification.

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Amici have a common professional interest in issues relating to constitutional fact-finding and judicial review in constitutional cases. They seek to offer this Court their professional academic perspective on these issues as they arise in this case.[1]

SUMMARY OF ARGUMENT

Amici respectfully submit this brief in response to arguments of Proponents and the National Legal Foundation ("NLF") that the district court's findings of fact based on the trial record should be disregarded because they involve "legislative" or "constitutional" facts. *See* Proponents' Br. 32-43; NLF Amicus Br. 2-20. Those arguments, although framed as a standard of review issue, amount to a radical rejection of the role of evidentiary fact-finding in constitutional litigation.

Evidentiary proceedings, and especially trials, subject bare allegations to rigorous review, expert analysis, and cross-examination. They help to avoid the danger that courts will rely on preexisting beliefs and assumptions that have little factual foundation.

Proponents and the NLF miss the target by aiming to convince this Court to ignore the district court's findings of legislative facts. Regardless of how one categorizes the different kinds of factual findings district courts make, judicial resolution of constitutional issues must be based on facts. In our system, disputes

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* have received the consent of the parties to file the instant submission.

over these facts are best resolved through adversarial proceedings before a trial court judge who can oversee the proper presentation of those facts.

Section I shows that Proponents were mistaken to assert that trial courts should not make findings of "legislative" or "constitutional" fact. To the contrary, in numerous cases appellate courts have referred to the need to rely upon a strong factual record when considering questions of broad social import. Adversarial testing at the trial court level combats decision-making based on untested and biased inferences, especially in civil rights cases involving treatment of minorities. Section II rebuts Proponents' argument that factfinding has no place in rational basis review. Courts frequently pay special attention to the evidentiary record in rational basis cases, especially when the factual context supports an inference of possible animus. Section III examines the proceedings in this case to show that the district court's fair and impartial approach supports the conclusion that its factfinding is entitled to significant respect and weight.

ARGUMENT

I. IT IS APPROPRIATE FOR COURTS TO HOLD TRIALS TO RESOLVE LEGISLATIVE FACT QUESTIONS, ESPECIALLY IN CIVIL RIGHTS CASES.

The Proponents of Proposition 8 argue that this case involves broad "legislative" questions that are ill-suited for resolution at trial. Proponents' Br. 35-36. To the contrary, lower courts can and frequently must hold trials in civil rights

cases with broad social impact. Trials enable lower courts to thoroughly develop a record of facts that helps answer the complex and important constitutional questions at the heart of such cases. "Difficult as it may be to determine legislative facts for making social and legal judgments about the constitutional rights of homosexuals, the courts have been asked to do so, they are obligated to do so, and they are as equipped as any institution to do so." *Dean v. Dist. of Columbia*, 653 A.2d 307, 330 (D.C. App. 1995).

A. In constitutional cases, appellate courts operate at their best when they can rely on a robust evidentiary record.

Appellate courts operate best when they can confidently rely on the record from below, and when that record answers most, if not all, of the courts' factual questions. In this respect, constitutional cases do not differ from garden-variety litigation.

The Supreme Court has repeatedly emphasized that it must rely on trial level factfinding in order to avoid deciding constitutional questions based on suppositions conjured out of thin air. For example, in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), the Court considered a First Amendment challenge to The Child Online Protection Act, 47 U.S.C. § 231, which criminalized the posting, for a commercial purpose, of internet materials that are harmful to minors. *Id.* at 662. After upholding the district court's grant of a preliminary injunction, the Court

remanded to the district court for a trial on the First Amendment elements -- i.e., "constitutional," "legislative," or "ultimate" factfinding:

> [T]here is a serious gap in the evidence as to the effectiveness of filtering software. For us to assume, without proof, that filters are less effective than COPA would usurp the District Court's factfinding role. [By] remanding for trial, we require the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so.

Id. at 671. The Court further emphasized that a trial would allow the development of a current, timely factual record. *Id.* at 672 ("[By] remanding for trial, we allow the parties to update and supplement the factual record to reflect current technological realities.").

Similarly, in *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997), the Court addressed a statute's constitutionality after remand to the district court for further factfinding. The Court stressed that:

> On our earlier review, we were constrained by the state of the record to assessing the importance of the Government's asserted interests when 'viewed in the abstract.' The expanded record now permits us to consider whether the [law was] designed to address a real harm, and whether those provisions will alleviate it in a material way.

Id. at 195.

Most recently, in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), although the Justices disagreed about the meaning and import of the trial court record, none believed that it should be *ignored*. Justice Stevens criticized the majority for

deciding the case on the basis of facial invalidity, when the parties had tried the question of validity as-applied.

> The problem goes still deeper, for the Court does all of this on the basis of pure speculation. Had Citizens United maintained a facial challenge … the parties could have developed, through the normal process of litigation, a record about the actual effects of § 203, its actual burdens and its actual benefits, on all manner of corporations and unions.

Id. at 933 (Stevens, J., dissenting). The majority did not respond to this point by invoking Proponents' supposed rule that lower-court factfinding can be freely disregarded; rather, it justified its exercise of judicial review by the existence of a thorough record in another case examining the same issue.

> That inquiry into the facial validity of the statute was facilitated by the extensive record, which was over 100,000 pages long, made in the three-judge District Court. It is not the case, then, that the Court today is premature in interpreting § 441b 'on the basis of [a] factually barebones recor[d].'

Id. at 894 (citing *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (internal citations omitted). Thus, both the dissent and the majority acknowledged that the Court should not delve into statutory review without a record developed "through the normal process of litigation." *Id*. The majority itself cited to findings of legislative facts by the trial court in *McConnell* to bolster its own findings. *Id.* at 911, 916.

In another landmark constitutional decision, *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992), the Court repeatedly grounded its constitutional analysis on the trial court's factfinding related to legislative questions. *See id.* at 885-86 (relying on trial record when considering whether the Pennsylvania law's 24-hour waiting period posed an undue burden on a woman's right to choose to terminate a pregnancy, relying on medical and sociological evidence presented at trial); *id.* at 888-92 (evaluating spousal notification provision based on the district court's factual findings about the causes and impacts of domestic violence).

These are but a few examples of the Supreme Court's emphasis on, and demonstration of, the essential role of trial court factfinding, including those that could be characterized as "legislative," in grounding constitutional analysis. *See also Turner v. Safley*, 482 U.S. 78, 99 (1987) (citing district court finding that "the Missouri prison system operated on the basis of excessive paternalism" and holding that prison marriage regulation was unconstitutional); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 437-39 (1985) (citing district court's bench trial findings, including that the statute at issue "operates to exclude persons who are mentally retarded from the community," to reject government's proffered justifications for statute as not rationally related to classification).

B. Trials enable courts to make important decisions based on evidence presented openly rather than upon untested assumptions.

Trials enable courts to make decisions based on evidence presented in formal adversarial proceedings, complete with cross examination and objective evidentiary standards, rather than on untested assumptions. *See* Kenneth L. Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75, 86 (1960) ("[W]e need not abandon hope for 'effective scrutiny' of whatever factual elements there are in [a constitutional] question. As we have seen, the judge necessarily decides these questions of legislative fact whether or not he subjects them to scrutiny, effective or not.").[2]

Presentation of legislative facts at trial through expert witnesses can also "focus the court's attention on the most relevant concerns, present the range of informed opinion on the subject, and both identify and critique the most probative literature," resulting in the court's "sharpened, presumably reliable insight into complicated matters that, without such help, would be much more difficult for the judge to understand." *Dean*, 653 A.2d at 327-28. This process helps prevent

[2] Facilitating such adversarial testing is of course central to the district court's institutional role, and district courts are in the best position to carry out this function. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.").

decision-making based on untested and biased inferences, and is therefore especially valuable in cases implicating due process and equality principles.

In addition, and of particular import in this case, examination of legislative facts at trial can help protect the constitutional rights of minorities from majoritarian animus. For instance, where a legislature lacks "political courage" to schedule hearings to explore the potentially discriminatory impact of certain policies, courts can nevertheless do so through the trial process, to "assure constitutional due process and equal protection of the laws for minorities, without fear of electoral consequences." *Dean*, 653 A.2d at 330.

This dynamic is even more true of voter initiatives, which occur without any formalized hearing or debate (other than through political advertising) before enactment into law. As Plaintiffs' expert, Stanford Political Science Professor Gary Segura explained during trial, ballot initiatives can succeed by "inflam[ing] momentary passions," and homosexuals have been targeted more than any other minority group by such initiatives. Tr. 1552-53. *See also* Philip P. Frickey, The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere, 34 Willamette L. Rev. 421 (1998) (direct democracy through a referendum process "allows each citizen to follow her preconceptions anonymously and unaccountably").

Accordingly, judicial review of ballot propositions, including through examination of so-called legislative facts, is entirely appropriate. Proponents' own expert Kenneth Miller has asserted that judicial review of ballot initiatives "is nothing unusual." Kenneth Miller, Courts as Watchdogs of the Washington State Initiative Process, 24 Seattle U. L. Rev. 1053, 1085 note 12 (2001) (noting that "52% of initiatives passed in California, Oregon, Colorado, and Washington from 1960 to 2000 were challenged in court, and 54% of those saw part or all of the ballot proposition struck down").

II. EVEN IN CONDUCTING RATIONAL BASIS REVIEW, COURTS MUST CONSIDER EVIDENCE REGARDING QUESTIONS OF STATE INTEREST, FIT, AND ANIMUS.

Proponents reject the concept of factfinding in rational basis cases, and contend that none of the factual issues raised in this trial was relevant to the rational relationship of Proposition 8 to any legitimate government purpose. Proponents' Br. 32-35. Their argument appears to be that any need to resolve facts, indeed any examination of the facts at all, means that the statute *a fortiori* must pass the rational basis test. This argument contradicts both Supreme Court precedent and common sense.

Though rational basis scrutiny certainly affords a high degree of deference to the legislative decision-makers, an Article III judge, at whatever level, still has a constitutional responsibility to analyze whether the statute meets the test. That

analysis, of course, must be based on an adversarial process that allows challengers an opportunity to prove that the statute does not pass constitutional muster. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463 (1988) ("[t]hose challenging the legislative judgment must convince us that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker"). It is a "heavy burden", *id.*, but it is not impossible, and it has been discharged many times before.

A. The Supreme Court routinely examines the evidence in rational basis cases.

The Supreme Court has never shied away from evaluating the facts to ensure that a legislative or voter enactment has a rational relationship to a legitimate government interest. For example, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court held that "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Id.* at 632. *Romer* considered a voter initiative banning anti-discrimination laws that addressed sexual orientation. *Id*. The Court looked at the justifications proffered by the State, as well as the practical effect the initiative would have on other civil rights laws and on homosexuals. *Id.* at 623-35. The Court held that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." *Id.*

As with the voter enactment in *Romer*, the Court has likewise not hesitated to strike down congressional enactments when the evidence shows that the law has no rational relationship to a legitimate government purpose. In *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court held that the Food Stamp Act "create[d] an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment." *Id.* at 532-33. The Act prohibited households containing unrelated individuals from participating in the food stamp program. *Id.* at 529. The Court first considered the purposes of the Act as expressed in the congressional record, and found that "[t]he challenged statutory classification … is clearly irrelevant to the stated purposes of the Act." *Id.* at 534. The Court then asked if the law might further some other legitimate interest, and found that even if it accepted the reasons offered by the Government at trial (prevention of fraud), "the challenged classification simply does not operate so as rationally to further the prevention of fraud." *Id.* at 537. Because the facts contradicted the Government's justification for the law, the Court concluded that "the classification here in issue is not only 'imprecise', it is wholly without any rational basis." *Id.* at 538.

These cases are not outliers, especially in the equal protection context. The Supreme Court has time and again shown itself willing to examine whether, *in fact*, the challenged law is rationally related to a legitimate government interest. *See,*

e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (relying on extensive legislative factfinding from below, including expert trial testimony on mental health issues, to hold that a zoning ordinance requiring a special use permit for homes for mentally disabled people did not withstand rational basis scrutiny), *superseded by statute*, Fair Housing Act, 42 U.S.C. § 3604; *Turner v. Safley*, 482 U.S. 78 (1987) (examining trial record and concluding that prison correspondence regulation was "reasonably related to legitimate security interests," but prison marriage regulation was not, and was therefore unconstitutional).

Indeed, in several of the cases cited by Proponents, the Court evaluated facts to determine if the enactment at issue was rationally related to a legitimate government interest, contrary to Proponents' assertion that such review is impermissible. For example, Proponents cite *Heller v. Doe* for the proposition that "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citations omitted). The *Heller* Court went on to state, however, that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Id.* at 321. In reviewing "the realities" of the legislation at issue – a law classifying mentally retarded people differently than mentally ill people for purposes of involuntary commitment – the *Heller* Court cited no less than eight books on

psychiatry and mental health, as well as three legal and scientific journal articles, in support of its finding that the classification was justifiable. The extensive factfinding in the *Heller* opinion belies Proponents' assertion that such facts are irrelevant in rational basis cases.

Proponents' reliance on *Kadrmas v. Dickinson Public Schools* is unconvincing for the same reason. Although the Court held that the statute at issue passed rational basis scrutiny, it did so after a review of the statute's effect on the parties and an inquiry into its justifications, both real and hypothetical. *Kadrmas*, 487 U.S. at 461, 463. Rather than rubber-stamping the law, the *Kadrmas* Court actually examined the record to decide whether the law's purpose was legitimate and whether the classification was arbitrary and irrational. *Id.* The factfinding from below proved highly relevant to the Court's decision-making. *See id.* at 464 (citing findings of the Supreme Court of North Dakota and transcript of oral argument).

B. Laws that present an inference of discriminatory animus are particularly appropriate for careful judicial review.

"[I]f the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534; *cf. City of Cleburne*, 473 U.S. at 448 ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city

action violative of the Equal Protection Clause, and the city may not avoid the strictures of that clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'") (citations omitted). The very purpose of equal protection review of legislative enactments is "to ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. Therefore, even in the rational basis context, courts must take extra care to scrutinize the factual basis for a legislative classification where an inference of animus exists. *See id.* ("[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.").

When considering whether the Food Stamp Act's distinction between related and unrelated households furthered any legitimate government interest, the Court found the distinction so "clearly irrelevant to the stated purposes of the Act" that it needed to dig deeper into the record. *Moreno*, 413 U.S. at 534. The legislative record showed that the Act was intended to prevent "hippies" from participating in the program. *Id.* When the Government offered another purpose for the law – to prevent food stamp fraud – the Court rejected it based on the facts before it. The Court found that "in practical operation, the [Act] excludes from participation, not those who are 'likely to abuse the program,' but, rather, only those persons who are

so desperately in need of aid that they cannot even afford to alter their living arrangements." *Id.* at 538. Thus, the evidence of antipathy towards a group of people necessitated a review of the "practical operation" of the law, to determine whether it in fact gave effect to the government's proffered purpose or to the impermissible antipathy suggested by the evidence. Because the Court found the latter to be true, the law did not pass rational basis scrutiny. *Id*.

Similarly, in addressing the voter enactment banning homosexuals from inclusion in anti-discrimination laws, the *Romer* Court found that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. The Court evaluated the State's proffered purposes for the law, and concluded that the facts did not support them. "It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interest; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 635.

Just as in *Romer*, the arguments presented to voters in support of Proposition 8 raise an inference of antipathy towards homosexuals. The district court invited both sides to present evidence on the motivations of Proposition 8's proponents at trial. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 936-938 (2010). Plaintiffs presented extensive evidence, including testimony by experts and lay witnesses,

that Proposition 8 was motivated by animus towards homosexuals. *Id*. Proponents, by contrast, "called not a single official proponent of Proposition 8 to explain the discrepancies between the arguments in favor of Proposition 8 presented to voters and the arguments presented in court." *Id.* at 944. Nonetheless, the court thoroughly reviewed proponents' six proffered purposes behind the law, and found none of them to be supported by the evidence. *Id.* at 938, 998-1003. "In the absence of a rational basis, 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." *Id.* at 1002. The court correctly applied the rule that moral disapproval alone cannot be a legitimate government interest, and found that Proposition 8 therefore violated the equal protection clause of the Fourteenth Amendment. *Id.* at 1003.

The Supreme Court cases cited above make clear that, far from being irrelevant, evidence of animus meant that the court needed to carefully review the factual context of Proposition 8 to determine whether it had any rational relationship to a *legitimate* government interest, and not merely to privately held biases. The cases cited by Proponents acknowledge that a classification raising an inference of animus calls for a more thorough review than other rational-basis cases. *See*, *e.g.*, *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution

presumes that, *absent some reason to infer antipathy*, even improvident decisions will eventually be rectified by the democratic process . . . .") (emphasis added); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1997) (same). Accordingly, there was nothing improper about Judge Walker's thorough review of the factual context surrounding Proponents' asserted justifications for Proposition 8. To the contrary, it was his constitutional obligation to exercise such an exacting and precise review, given the inference of impermissible animus raised by the record.

III. IN LIGHT OF THE PROCESS THAT PRODUCED THEM, THIS COURT SHOULD NOT DISTURB THE FINDINGS MADE BY THE DISTRICT COURT.

Proponents argue that the district court engaged in biased evidentiary rulings and factual determinations. Proponents Br. 38-43. *Amici* submit that, to the contrary, the proceedings demonstrate the utmost procedural fairness. Under any standard of review, this Court should credit and adopt the trial court's findings because they result from rigorous and exacting application of the Federal Rules of Evidence, and are supported by reliable research and by the unanimous consensus of mainstream social science experts.

A. The district court gave all parties a full opportunity to present evidence and made appropriate evidentiary determinations.

Evidence going to sociological or legislative facts requires uniform and objective scrutiny of its reliability. The district court conducted the appropriate degree of scrutiny by drawing from the most frequently applied and effective

standards available when it evaluated the trial material presented by both the Plaintiffs and the Proponents: the standards set forth in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[3]

As a result of the district court's conscientious approach, the parties received an equal and fair opportunity to present reliable evidence. With respect to expert witnesses, for example, the court detailed the educational history and scholarship of the Plaintiffs' experts, each of whom hold doctoral degrees in their field and/or are professors at major universities, noting any their degrees, courses taught, and peer-reviewed scholarship directly relevant to the experiences of gays and lesbians. *See Perry*, 704 F.Supp.2d at 940-44. Proponents did not challenge the qualifications of these witnesses. *Id.* at 938. Based on those qualifications as well as the content and demeanor of the witnesses' trial presentation, the court credited their testimony. *Id.*

The court applied the same criteria to Proponents' witnesses, noting that Proponents' main witness, David Blankenhorn, does not hold a higher degree in the fields of sociology, psychology or anthropology that were relevant to his proposed testimony, and that his publications have not been subject to peer review.

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[3] It is also worthy of note that Proponents did not object at trial to the application of the Federal Rules and the *Daubert* standard. Proponents *relied on* Federal Rule 702 and *Daubert* throughout their pretrial motion *in limine* regarding expert evidence. *See* Mem. in Opp. to Pls.' Mot. to Exclude Expert Evidence (document 302).

Id. at 946. Nonetheless, the court allowed Mr. Blankenhorn to testify at trial. *See* Proponents' Br. 38.

The district court's ultimate conclusions regarding expert testimony were fully consistent with Rule 702, *Daubert*, and other relevant case law. Quite simply, as the court found, Mr. Blankenhorn's testimony regarding the definition of marriage, the detrimental impact of same-sex marriage on children, and the damage same-sex marriage could do to marriage as an institution had no basis in peer-reviewed methodologies, unlike the conclusions offered by Plaintiffs' witnesses. *Id.* at 947-49.

Proponents assert that the court should have given weight to Mr. Blankenhorn's testimony despite its inability to meet the minimal requirements of *Daubert*, because his testimony relates to "legislative" facts. *See* Proponents' Br. 43 n.20; *see also* NLF Amicus Br. 20-21. In other words, according to Proponents, courts should exercise less control, not more, over testimony by purported experts in cases of major constitutional significance. Proponents offer no explanation for how an arbitrary, standardless approach to consideration of expert testimony aids appellate review or rational basis analysis. Moreover, the district court's thorough review of Mr. Blankenhorn's testimony demonstrates that, by any measure, it was unreliable and lacking in scientific foundation.

Furthermore, the policy behind sometimes applying a more relaxed evidentiary approach to legislative fact examination derives from the way *legislatures* enact laws. *See G.M. Enter., Inc. v. Town of St. Joseph*, 350 F.3d 631, 640 (7th Cir. 2003) (because "municipalities must be given a reasonable opportunity to experiment with solutions . . . [a] requirement of *Daubert*-quality evidence would impose an unreasonable burden on the legislative process") (internal quotation marks omitted). This logic does not support a more relaxed standard in the voter initiative context.

Finally, Proponents cannot claim that the district court deprived them of the opportunity to present evidence to support alternative factfinding. Rather, throughout the trial, Proponents failed to present probative and reliable evidence in support of Proposition 8 other than that grounded in moral condemnation.

B. The district court's findings are based on a fair and impartial reading of the trial record.

As the court correctly observed during summary judgment proceedings, resolution of the central question of the government's interest in Proposition 8 required a more developed factual record. Summ. J. Hr'g Tr. 81. The court acknowledged that in resolving that question legislative fact questions might arise, but that "embedded within such legislative facts are certain assumptions about human behavior and relationships that have simply not been developed in the record that is now before the Court" and that are "essential" to the resolution of

that legal question. *Id.* The court's subsequent conclusions that Proposition 8 deprives same-sex couples of their fundamental right to marry under the Due Process Clause and that it discriminates against same-sex couples in violation of the Equal Protection Clause are properly based upon factual findings, well-grounded in the ultimate trial record, including findings related to the meaning of marriage (FF 19-41), and the potential consequences of allowing same-sex marriage to continue (FF 33, 55, 64-66).

Proponents accuse the district court of "uncritical acceptance" of evidence offered by Plaintiffs' experts and of "ignor[ing] an overwhelming body of evidence" that marriage has always been understood as "limited to opposite-sex unions." Proponents' Br. 38, 51; *see also* NLF Amicus Br. 8. According to Proponents, this so-called "body of evidence" includes anthropological literature by Claude Levi-Strauss and Branislaw Malinowski, dictionary definitions of marriage dating back to 1755, and snippets of quotations from Blackstone, Locke, and various other historians and scholars. Proponents' Br. 52-59. As discussed below, this material fails to demonstrate error or bias in the court's findings about the meaning of marriage.

First, the court hardly ignored historical evidence about the meaning and scope of marriage. *See* FF 19 ("Marriage in the United States has always been a civil matter...."); FF 22 ("When California became a state in 1850, marriage was

understood to require a husband and a wife."); FF 26 ("Under coverture, a woman's legal and economic identity was subsumed by her husband's upon marriage. The husband was the legal head of household."); FF 27 ("Marriage between a man and a woman was traditionally organized based on presumptions of a division of labor along gender lines.").

The court appropriately considered factors other than historical practice, however, in determining the meaning of marriage as it relates to this case. That is so because recognizing that most people have historically understood marriage as taking place between a man and a woman says virtually nothing about whether such an understanding ought to constrain the present and future practice of legal marriage in California. The historical explanations of marriage that Proponents cite took place in a world in which same-sex relationships occurred in the dark, under penalty of criminal prosecution, or (more often) were repressed entirely. It is no surprise for example, that Joel Prentice Bishop's Commentaries on the Law of Marriage and Divorce, *see* Proponents' Br. 56, would have discussed the legal obligations of marriage in terms of opposite sex persons, because it was first published in 1852 with the purpose, according to Bishop, of providing an "elementary treatise" on the law of marriage and divorce *at that time*. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE iv (1882). Baseline societal assumptions inherent in this and other historical sources do not inform

how marriage is or must be understood during a time in which open and life-long romantic relationships between same-sex couples who are raising children together are increasingly common.

Other sources within Proponents' "body of evidence" do not support their position at all. The Proponents cite Claude Levi-Strauss's work *The View From Afar* in support of the point that it is universal across societies for marriage to occur between a man and a woman. Proponents' Br. 52. But this volume - indeed, the very same page Proponents cite - also explains that from the perspective of the modern fieldworker, "married couples . . . were closely united by sentimental bonds, by economic cooperation in every case, and by a common interest in their children." Claude Levi-Strauss, The View from Afar 40 (1985) (emphasis added). This description accords with the court's finding that marriage is 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." FF 34. In any event, however, mining works of anthropology or philosophy for generic references to marriage does not yield valid justifications for the rejection of the district court's findings about the meaning of marriage.

Proponents also argue that the district court selectively evaluated the evidence presented at trial in determining that same-sex marriage will not have future adverse effects on society or the institution of marriage. Proponents' Br. 40-41. In support of that finding, the court relied in part upon statistics from Massachusetts showing that marriage and divorce rates there had remained stable during the period after same-sex marriage became legal. Proponents assert that the court ignored Dr. Letitia Peplau's testimony on cross-examination that she did not take those figures "as serious indicators of anything," and that "she did not 'make any claims beyond what these data show.'" Proponents' Br. 40. According to Proponents, the court also ignored the testimony on cross-examination of Dr. Nancy Cott, who stated that allowing same-sex marriage will have "real world consequences." Proponents' Br. 41; *see also* NLF Amicus Br. 18.

Even if this unremarkable recitation of trial testimony amounted to significant counter-evidence, which it does not, Proponents fail to note that the district court's rejection of the notion that same-sex marriage would be detrimental to the institution of marriage is squarely supported by evidence in addition to the Massachusetts statistics, including the undisputed facts that (1) eliminating the doctrine of coverture has not deprived marriage of its vitality in spite of evidence that "the primacy of the husband as the legal and economic representative of the couple . . . was seen as <u>absolutely essential to what marriage was</u>", FF 33(a)-(c)

(citing the testimony of Professor Nancy Cott) (emphasis added)); and (2) eliminating racial restrictions on marriage has not damaged the institution of marriage or reduced its popularity in spite of evidence that there was widespread societal alarm that removal of racial restrictions would degrade and devalue marriage, FF 33(d)-(f).

In comparison, Proponents offered not one affidavit or allegation that any California resident was or would be less likely to get married or would value his or her marriage less in the wake of marriage equality in California. *See* Pls. Br. 94. With this factual picture in mind, it was certainly reasonable for the district court to reject the assumption, unsupported by data, that same-sex marriage would trivialize or weaken the institution of marriage for everyone else or would otherwise harm society, and to exclude such considerations from its analysis of whether a legitimate government interest supports Proposition 8.

C. The district court's findings are consistent with the findings of other courts that have reviewed similar evidence.

Far from reflecting a biased or skewed perspective on the trial evidence, the district court's findings echo those made by other trial courts that have considered related sociological and psychological data, particularly data relating to whether same-sex marriage and parenting poses a risk to child development.

In *Howard v. Child Welfare Agency Review Board*, No. 1999-cv-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004), *aff'd*, *Dep't of Human Services v.*

Howard, 238 S.W.3d 1 (Ark. 2006), the court held a bench trial to consider the validity of a regulation restricting foster parent eligibility based on sexual orientation. *Id.* at *1. The court considered expert evidence - including testimony offered by Dr. Michael Lamb, who is also an expert in the instant action - on the question of whether the sexual orientation of parents is a predictor of healthy child development. *Id.* at *5. Dr. Lamb testified that a parent's sexual orientation is not one of the predictors of child development and that there is no basis for the statement that heterosexual parents can better guide children through adolescence than gay parents. *Id.* at *5-*6.

According to the *Howard* court, of the eight expert witnesses testifying at trial, "[t]he most outstanding of the expert witnesses was Dr. Michael Lamb." *Id.* at *8. The trial court explained:

> Without a single note to refer to and without any hint of animus or bias, for or against any of the parties, Dr. Lamb succinctly provided full and complete responses to every single question put to him by all counsel and was very frank in responding to inquiries from the court. Of all of the trials in which the court has participated, whether as a member of the bench or of the bar, Dr. Lamb may have been the best example of what an expert witness is supposed to do in a trial, simply provide data to the trier of fact so that the trier of fact can make an informed, impartial decision.

Id. Like the district court in this case, and after review of similar evidence, the *Howard* court ultimately issued various factual findings supporting the conclusion that being raised by gay parents does not pose a detriment to children. *Id.* at *13. On that ground, the court concluded that the regulation was not in accordance with

the Child Welfare Agency's role to promote the health, safety, and welfare of children and therefore violated the Separation of Powers doctrine. *Id.* at *13.

In affirming that ruling, the Arkansas Supreme Court relied upon lengthy excerpts from the trial court decision, including factual findings supporting the conclusion that being raised by gay parents does not harm child development. *Howard*, 238 S.W.3d at 6-7. *See also id.* at 10 (Brown, J., concurring) ("[T]he trial court found that being raised by gay and lesbian parents does not increase adjustment problems for children. There is no rational basis in the form of studies or empirical data that sustains the regulation.").

Likewise, in *In re Adoption of Doe*, 06-cv-33881, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd*, *In re Adoption of Doe*, 08-cv-3044 (Fla. Dist. Ct. App. Sept. 22, 2010), the trial court evaluated evidence offered by Dr. Lamb and other experts when considering the validity of a law restricting adoption to heterosexual parents. *Id.* at *8-*10. The court detailed the expert evidence as to whether adoption by gay parents could harm children, particularly that provided by Dr. Lamb, and observed that "the assumption that children raised by gay parents are harmed is not a reliable finding. In fact, it is contrary to the consensus in the field." *Id.* at *9. The court ruled that Florida's adoption law had no rational basis and thus violates the Florida Constitution. *Id.* at *29.[4]

[4] The reviewing court in *Doe* also concluded that a trial and factual findings related

Finally, in *Baehr v. Miike*, No. 91-cv-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd, Baehr v. Lewin*, 950 P.2d 1234 (Haw. 1997), the trial court discussed expert testimony that child development is most impacted by the quality of care a child receives from parents, not whether the parents are heterosexual, or whether parents and child are biologically related. *Id.* at *14-15. The *Baehr* court found that testimony to be "especially credible." *Id.* at *10. In this case, through the testimony of Dr. Lamb, the district court considered similar studies "showing that adopted children or children conceived using sperm or egg donors are just as likely to be well-adjusted as children raised by their biological parents." *Perry*, 704 F.Supp.2d at 935.

As the above discussion demonstrates, the district court's factual findings regarding the impact of same-sex marriage or parenting on children are consistent with mainstream scientific thought and with other trial courts' analysis, and reflect a fair and close analysis of the evidence offered at trial. There is no indication whatsoever that the court's remaining findings arise from bias or an outcome-oriented approach to the evidence; to the contrary, they stand out for their careful attention to the facts within an extensive trial record, and are entitled to weight upon review by any higher court.

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to the sociological evidence were appropriate and necessary in the case. *In re Adoption of Doe*, 08-cv-3044 at *18.

CONCLUSION

For the foregoing reasons, this Court should credit and adopt the factual findings of the district court and affirm the judgment that Proposition 8 is unconstitutional.

Dated: October 25, 2010

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR APPEAL NUMBER NO. 10-16696

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Brief of *Amici Curiae* complies with the type-volume limitation of Fed. R. App. P. 32(a)(5)and (6) as it is proportionately spaced, has a typeface of 14 points, and contains 6,737 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Date: October 25, 2010

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CERTIFICATE OF SERVICE

APPEAL NUMBER 10-16696

I hereby certify that on this 25th day of October, 2010, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registed CM/ECF users. I have mailed the foregoing document by First-Class mail, postage prepaid, to the following non-CM/ECF participants:

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