NO. 10-16696

ORAL ARGUMENT SCHEDULED FOR DECEMBER 6, 2010

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.,
Defendant-Intervenors-Appellants.

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

DEFENDANT-INTERVENORS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

At the heart of this case are two competing definitions of marriage. The traditional definition of marriage—the one that has prevailed throughout recorded history in virtually all known societies and that was preserved in California by Proposition 8—holds that marriage is by its nature a *gendered* institution, for it is designed to serve society's vital interest in channeling potentially procreative sexual relationships into enduring, stable unions for the sake of responsibly producing and raising the next generation. As demonstrated in our opening brief, Prop. Br. 47-70, this understanding of the social meaning and purpose of marriage has been confirmed throughout history by all of the esteemed authorities on the subject, from the lexicographers who have defined marriage, to the eminent scholars in every relevant academic discipline who have explained marriage, to the legislatures and courts that have given legal recognition and effect to marriage.

Plaintiffs, arguing that "gender restrictions … were never part of the historical core of the institution of marriage," Pl. Br. 47 (quoting ER148), offer a competing definition of marriage that is carefully framed to be *genderless*: "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.' " Pl. Br. 47 (quoting SER102 (Cott)). The

central purposes served by marriage, Plaintiffs say, are the " 'promotion of the happiness of the parties' " to the marriage, Pl. Br. 45 (quoting *Baker v. Baker*, 13 Cal. 87, 103 (1859)), and providing "state recognition and approval of a couple's choice" to marry. Pl. Br. 49 (quoting ER102). Plaintiffs' genderless, adult-centered understanding of the *social* meaning and purposes of marriage is a recent academic invention; it can trace its pedigree no farther back than the modern movement to redefine marriage to include same-sex couples. And because it deliberately severs the abiding connection between marriage and the uniquely procreative potential of male-female unions, Plaintiffs' definition of marriage can offer no explanation for why the institution is a ubiquitous, cross-cultural feature of the human experience, nor why it is, as the Supreme Court has *consistently* emphasized, "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

The issue here, however, is not which of these competing definitions of marriage is the wiser, more prudent choice for the State of California and her communities and people. *That* issue was before the voters of California in November 2008, and they decided to preserve the traditional definition, at least for now. The issue here is whether people of good will can differ in good faith over these competing definitions of marriage. Plaintiffs, and the court below, say that the answer is no, and that those who disagree with them are not rational.

Plaintiffs, it appears, have moderated on appeal the views they expressed below about supporters of Proposition 8. They now disavow, to their credit, the claim that all "voters who supported Proposition 8 were motivated by malice or hostility toward gay men and lesbians …." Pl. Br. 104. Nonetheless, Plaintiffs assert that a belief that the traditional opposite-sex definition of marriage meaningfully serves society's interests is wholly irrational, and that professing such a belief must therefore either be a pretext to mask "[a] bare … desire to harm" gays and lesbians, Pl. Br. 97, or be the result of "simple want of careful, rational reflection …." Pl. Br. 104 (quoting *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J. concurring)). In other words, opponents of same-sex marriage, Plaintiffs claim, are either bigoted or benighted.

Under rational-basis review, this claim can admit of no exceptions—the traditional definition of marriage either has a conceivable rational justification or it does not. And so the falsity of Plaintiffs' claim is patent as soon as it is uttered. For it cannot stand up to the fact that every appellate court, both state and federal, to address the validity of traditional opposite-sex marriage laws under the United States Constitution has upheld them as rationally related to the state's interest in responsible procreation and child-rearing. These rulings certainly are not attributable to a bare desire to harm gays and lesbians or a lack of rational reflection by the judges who rendered them. Nor can Plaintiffs' claim stand up to

the fact that President Obama and a host of other well-known champions of equal rights for gays and lesbians nonetheless support the traditional definition of marriage. Nor, finally, can Plaintiffs' claim stand up to this simple truth: Every one of us, including the Members of this Court, is close to someone who opposes redefining marriage to include same-sex couples—they are our family members, our friends, our colleagues, our co-workers, and for some of us, ourselves. Are they (we) all either bigoted or benighted?

To be sure, at the extreme edges *on both sides* of the public debate over same-sex marriage are those who are animated by hostility or irrational fears and prejudice. But this is true in virtually all hotly contested debates over divisive, controversial social issues. Such debates inflame passions and arouse deeply held values and beliefs, and all too often can devolve into partisan efforts to marginalize or, worse, to demonize the other side. *See* David Boies, *Gay Marriage and the Constitution*, WSJ, July 20, 2009 (traditional definition of marriage reflects nothing more than "the residue of centuries of figurative and literal gay-bashing").

But the overwhelming majority of people *on both sides* of the same-sex marriage debate, in California and throughout the country, are good and decent Americans, coming from all walks of life, all political parties, all races and creeds. Their opinions on this issue are motivated by nothing more than "a sincere desire to do what's best for their marriages, their children, their society," ER517 (Rauch),

and are entitled to consideration and respect. And their opinions on this issue are not static, but rather are constantly evolving and changing as the debate and experience matures. *See* Jonathan Capehart, *Obama Begins Shift on Gay Marriage*, THE WASHINGTON POST, Oct. 28, 2010 (President Obama quoted as saying that attitudes on same-sex marriage evolve, "including mine.").

People of good will can and do differ in good faith on the issue of same-sex marriage, and their differences should be resolved through the political process, not here.

ARGUMENT

I. PROPONENTS HAVE STANDING.

Plaintiffs cannot deny that the Supreme Court has held that a party has standing to defend the constitutionality of a state enactment where that party has "authority under state law" to represent the people's interest in defending their laws when state officials refuse to do so. *Karcher v. May*, 484 U.S. 72, 82 (1987). In *Karcher*, the Supreme Court determined that intervening legislative officers had authority "as a matter of New Jersey law" to appear in lieu of the State's executive officers because the State's "Supreme Court has [previously] granted [legislative officers'] applications … to intervene as parties-respondent … in defense of a

legislative enactment." *Id.*[1]

Here, Plaintiffs admit that the California Supreme Court has likewise granted official initiative proponents leave to intervene to defend the validity of the measures they have sponsored when state officials refuse to do so. Pl. Br. 31 (citing *Strauss v. Horton*, 207 P.3d 48, 69 (Cal. 2009)). Indeed, in *Strauss* the California Supreme Court permitted *these very Proponents* to defend *the very Proposition at issue in this case* when the Attorney General would not do so. That should be the end of the matter, for *Karcher* is controlling where the state supreme court has permitted intervening parties to defend the State's enactment "as agents of the people" when public officials refuse to do so.[2] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).[3]

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[1] *Karcher* did not reference, let alone rely upon, the New Jersey statutes cited by Plaintiffs. *See* Pl. Br. 31 n.7.

[2] For this reason, Plaintiffs' reliance on *Don't Bankrupt Washington Committee v. Continental Illinois National Bank of Chicago*, 460 U.S. 1077 (1983), is misplaced, for that case did not involve California law, and neither the Supreme Court's summary ruling nor the papers submitted by the initiative sponsors suggested that Washington law permits sponsors to intervene to defend their initiatives, as California law does. *See* Jurisdictional Statement in *Don't Bankrupt Washington Committee*, No. 82-1445, at 3 (filed Feb. 25, 1983).

[3] Plaintiffs claim that *Arizonans* "distinguished *Karcher* on the ground that ballot measure sponsors 'are not elected representatives.' " Pl. Br. 31 (quoting *Arizonans*, 520 U.S. at 65). Here is what the Court said in full: "AOE and its members, however, are not elected representatives, and we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." 520 U.S. at 65. Clearly, the salient distinction was the absence of Arizona law authorizing sponsors to defend initiatives on behalf of the State; the

Plaintiffs nevertheless assert that "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.' " Pl. Br. 20 (quoting *In re Marriage Cases*, 183 P.3d 384, 406 (Cal. 2008)); *see also* Pl. Br. 32-33. But the party seeking leave to appear in *In re Marriage Cases*—the Proposition 22 Legal Defense & Education Fund (the "Fund")—*was not the official proponent* of the challenged initiative. As the Court of Appeal explained, "the Fund itself played no role in sponsoring Proposition 22 because the organization was not even created until one year *after* voters passed the initiative." *City and County of San Francisco v. Proposition 22 Legal Defense and Educ. Fund*, 128 Cal. App. 4th 1030, 1038 (2005). Accordingly, that court squarely held that "this case *does not present* the question of whether an official proponent of an initiative (*Elec. Code, § 342*) has a sufficiently direct and immediate interest to permit intervention in litigation challenging the validity of the law enacted." *Id*.

In concluding that this Fund lacked standing to defend Proposition 22, the California Supreme Court relied on the Court of Appeal's holding in *City and*

Court certainly did not advance the extraordinary suggestion that Article III somehow forbids States from authorizing unelected individuals to defend the State against federal constitutional challenges to its ballot initiatives. Further, unlike *Strauss*, none of the Arizona cases cited by Plaintiffs, *see* Pl. Br. 32 n.8, allowed a proponent to intervene to defend a law when State officials would not. In all events, none of these decisions were brought to the Court's attention in *Arizonans*.

County of San Francisco. *See In re Marriage Cases*, 183 P.3d at 406 & n.8. At no point in its opinion did the California Supreme Court even hint that the Fund "represent[ed] the proponent of Proposition 22," Pl. Br. 32, much less that it *was* an "initiative proponent[]," Pl. Br. 20. In contrast, the California Supreme Court's subsequent holding in *Strauss* makes clear that the official proponents of an initiative, unlike advocacy groups or members of the general public, do have standing to defend their initiative in lieu of state officials who refuse to do so.[4]

In short, as Plaintiffs concede, Proponents' standing to assert the State's interest in the validity of the initiative they have sponsored "rises or falls" on whether California law has authorized them to do so. Pl. Br. 30-31. *Strauss* dispositively resolves that issue in Proponents' favor, and Plaintiffs' claim that *In re Marriage Cases* holds to the contrary is demonstrably mistaken.[5]

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[4] Plaintiffs' erroneous description of *In re Marriage Cases* likewise fatally undermines their reliance on this precedent, *see* Pl. Br. 33, in response to Proponents' alternative submission that they have standing to vindicate "their own particularized interest in defending an initiative they have successfully sponsored, an interest that is created and secured by California law." *See* Prop. Br. 22-24. Plaintiffs also argue that, in order to create a particularized interest to defend an initiative, California must confer a cause of action on Proponents. *Id*. But the cases they cite for this proposition say only that this is *one way* in which a State may create an interest, and that method makes little sense in the context of standing *to defend*.

[5] In all events, for the reasons set forth in our opening brief, *see* Prop. Br. 24-29, as well as in the opening and reply briefs of Imperial County, Imperial County also has standing to appeal and should have been allowed to intervene in this case.

II. THE DISTRICT COURT LACKED JURISDICTION TO GRANT INJUNCTIVE RELIEF TO PERSONS NOT BEFORE THE COURT.

Even if this Court concludes that both Proponents and Imperial County lack standing to appeal the judgment below, the Court is obliged to consider whether the district court exceeded its jurisdiction. In *Arizonans*, the Supreme Court squarely held that "[e]ven if we were to rule definitively that [appellants] lack standing, we would have an obligation essentially to search the pleadings on core matters of federal-court adjudicatory authority – to inquire not only into this Court's authority to decide the questions petitioners present, but to consider, also, the authority of the lower courts to proceed." 520 U.S. at 73.

1. As we have demonstrated, Prop. Br. 29-31, the district court clearly exceeded its jurisdiction by awarding relief that Plaintiffs lacked standing to seek. Plaintiffs cannot deny that an injunction permitting them, and only them, to marry would have provided them with complete relief for the injuries they have alleged.[6] Nor can they assert that they have standing to seek relief for the injuries of *others* not before the court. To the contrary, the Supreme Court has repeatedly held that, "[i]n the ordinary case, a party is denied standing to assert the rights of third persons." *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263

[6] *See Smelt v. United States*, No. 8:09-cv-0286-DOC-MLG, Doc. 36 at 4 (July 15, 2009) (attached as Exhibit A) ("As Plaintiffs' marriage is valid within California, they cannot present an injury with respect to the recognition of their marriage by the State of California . . . and, therefore, they do not have standing to pursue their claims against the State of California.").

(1977); *see also, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").[7]

In accordance with this settled rule, this Court has held that a federal court "may not attempt to determine the rights of persons not before the court." *Zepeda v. INS*, 753 F.2d 719, 726 (9th Cir. 1983). The Court explained that this rule is rooted in plaintiffs' lack of standing to assert the interests of others absent certification as a class representative:

> [O]ur legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated. A person who desires to be a "self-chosen representative" and "volunteer champion," *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549, (1949), must qualify under rule 23. To be sure, failure to grant class relief may leave a government official – temporarily – in a position to continue treating nonparties in a manner that would be prohibited with respect to named plaintiffs. But that is the nature of the relief.

Id. at 728 n.1. Accordingly, the Court held that where, as here, a district court has issued an injunction violating this limitation on its power, this Court "must vacate and remand," for "the injunction must be limited to apply only to the individual

[7] This "ordinary" rule applies "generally," not invariably, because a district court may "entertain suits which will result in relief for parties that are not themselves directly bringing suit," but only when the party bringing the suit has been legally authorized to represent the absent party, as in the case of a trustee, a guardian ad litem, or class representative certified pursuant to Fed. R. Civ. P. 23. *Sprint Communications Co., L.P. v. APCC Servs.*, 128 S. Ct. 2531, 2543 (2010).

plaintiffs unless the district judge certifies a class of plaintiffs." *Id*. at 727.

Plaintiffs argue that "this Court limited *Zepeda* to its facts," restricting the rule to preliminary injunction cases. Pl. Br. 106 (citing *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1988)). But this Court upheld the injunction in *Bresgal* because in that case, unlike *Zepeda* or here, an injunction "extending benefit or protection to persons other than the prevailing parties in the lawsuit … *is necessary to give prevailing parties the relief to which they are entitled*." *Bresgal*, 843 F.2d at 1170-71. In contrast, the Court emphasized, "in *Zepeda* we noted expressly that in that case the injunctive relief requested could 'be granted to the individual plaintiffs without the relief inevitably affecting the entire class.' " *Id*. at 1170 (quoting *Zepeda*, 753 F.2d at 729 n.1). That *Zepeda* was a preliminary injunction case clearly was not dispositive, as demonstrated by the *Bresgal* Court's extensive analysis of whether a broad injunction was necessary to provide complete relief for plaintiffs. In any event, this Court has subsequently applied the rule that injunctive relief may not extend beyond the plaintiffs absent class certification in a permanent injunction case. *See Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994) (vacating injunction prohibiting the Defense Department from discharging any person from the service based on sexual orientation where action was not brought as a class action "except to the extent it enjoins DOD from discharging Meinhold").

The other case on which Plaintiffs rely, *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981), also merely upheld injunctive relief extending beyond the plaintiffs as " 'further necessary or proper relief' to effectuate the judgment" in favor of the plaintiff. In any case, this Court's subsequent decisions make clear that "injunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification" except in cases where a broader injunction is necessary to provide complete relief to plaintiffs. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996).[8]

Other Circuits have applied the same rule. For example, the First Circuit, in an opinion joined by then-Judge Breyer, invoked this Court's decision in *Zepeda* to vacate an injunction sweeping beyond the individual plaintiff because classwide injunctive relief "is appropriate only where there is a properly certified class" unless a broader injunction is necessary to give the plaintiffs the relief to which they are entitled. *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (citing *Zepeda*, 753 F.2d at 727-28 & n.1); *see also Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Everhart v. Bowen*, 853 F.2d 1532, 1539 (10th Cir. 1988) (following *Zepeda*), *rev'd on other grounds sub nom, Sullivan v. Everhart*,

[8] In *Easyriders*, for example, the injunction against California Highway Patrol officers' enforcement of California's motorcycle helmet law could not have been practically limited to plaintiffs since officers would have no way of knowing whether a particular motorcyclist was one of "the named plaintiffs or a member of Easyriders, [so] the plaintiffs would not receive the complete relief to which they were entitled without statewide application of the injunction." *Id*. at 1502.

494 U.S. 83 (1990); *McKinnon v. Patterson*, 568 F.2d 930, 940 (2d Cir. 1977) ("Even as to declaratory relief, … the fact that this suit is not a class action precludes the judgment from being applied to prisoners other than the three named plaintiffs").

While the Supreme Court has yet to address this precise issue, it has considered the closely analogous question whether the actual injuries suffered by plaintiffs can support a broader injunction addressing inadequacies *different from those* that had produced plaintiffs' injury-in-fact. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). The Court concluded that such an injunction is improper, holding that Article III's "actual-injury requirement" necessarily means that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Id.* The same logic applies here, and limits the district court's jurisdiction to providing relief for "the injury in fact that the plaintiff[s in this case have] established." *Id.*

2. It is especially critical that this Court strictly enforce the limits of the district court's jurisdiction and Plaintiffs' standing given the unique circumstances of this case. "The essence of the standing inquiry is whether the [plaintiffs] … have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

Larson v. Volente, 456 U.S. 228, 238-39 (1982) (quotation marks omitted). Here however, if Plaintiffs' submission that Proponents lack standing is to be credited (and as we have demonstrated, it should not be), that "concrete adverseness" was wholly absent below, for the named defendants were either silent or actively assisting the Plaintiffs. But rather than simply entering a narrow default judgment awarding relief to the four individual Plaintiffs, the district court issued a sweeping constitutional decision nullifying, across the board, a democratically enacted amendment to California's constitution that reaffirms and reinstates the traditional understanding and structure of society's oldest institution.

The Supreme Court has cautioned against permitting the federal courts to be improperly used to achieve policy results that cannot be obtained in the political process, observing that "public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law." *Horne v. Flores*, 129 S. Ct. 2579, 2594 (2009); *see also id.* (citing study showing that "government officials may try to use consent decrees to 'block ordinary avenues of political change' or to 'sidestep political constraints' "). That is precisely what is threatened here if this Court simultaneously accepts Plaintiffs' claims that Proponents and Imperial County lack standing to appeal yet fails to enforce the clear limitations on the district court's jurisdiction.

Whatever one's position on the highly controversial question whether the

State of California should fundamentally redefine the age-old institution of marriage to include same-sex couples, our constitutional system surely does not permit a single federal district court judge, acting on the complaint of four individual plaintiffs in concert with a handful of carefully selected official defendants, all of whom wish to overturn the results of the election, to impose such a revolutionary cultural change on the State as a whole *without appellate review*. Any federal constitutional right that Plaintiffs may conceivably possess would be fully vindicated by an order limited to them.

III. BINDING PRECEDENT FORECLOSES PLAINTIFFS' CLAIMS.

Binding precedent from the Supreme Court and this Court mandate reversal of the district court's ruling. *See Baker v. Nelson*, 409 U.S. 810 (1972); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982). These decisions, like those of every other state or federal appellate court to consider the question, *see* Prop. Br. 46-47, hold that the traditional definition of marriage does not violate the Federal Constitution.

1. As a summary decision on the merits, *Baker* constitutes "controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976). And whatever precedential force it may have in the *Supreme Court*, *see* Pl. Br. 34, "a summary dismissal for want of a substantial federal question *fully binds* the lower courts." *Carpenters Pension Trust v.*

Kronschnabel, 632 F.2d 745, 748 (9th Cir. 1980); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 281 (8th ed. 2002) ("lower courts are to grant [Supreme Court summary dispositions] the same respect as other holdings of higher tribunals").

To undermine the controlling force of a summary disposition, subsequent " 'doctrinal developments' in the Supreme Court's jurisprudence," Pl. Br. 35 (quoting *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975)), must be necessarily incompatible with the earlier decision and plainly demonstrate that *it has been overruled*. Any more relaxed approach would be irreconcilable with the Supreme Court's repeated admonitions that lower courts may not on their own authority renounce binding precedent:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Agostini v. Felton, 521 U.S. 203, 237-38 (1997); *see also, e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("Despite what Chief Judge Posner aptly described as *Albrecht*'s "infirmities, [and] its increasingly wobbly, moth-eaten foundations, … [t]he Court of Appeals was correct in applying [the] principle [of

stare decisis] despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.").

"[B]inding authority," in other words, "is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

The Supreme Court plainly has not repudiated *Baker*'s due process or equal protection holdings, either expressly or through "doctrinal developments." Indeed, in *Lawrence v. Texas*, 539 U.S. 558 (2003), Plaintiffs' primary post-*Baker* due process case, the Court went out of its way to emphasize that the case did "*not* involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id.* at 578. Plaintiffs' other due process cases, *Turner v. Safley*, 482 U.S. 78 (1987), and *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), both addressed traditional opposite-sex marriage and recognized the connection between marriage and its procreative purposes. *See* Prop. Br. 69-70 & n.33. And both decisions expressly followed *Loving v. Virginia*, 388 U.S. 1 (1967), which was decided five years *before Baker*. *See Zablocki*, 434 U.S. at 383 (identifying *Loving* as "[t]he leading decision[ ] on the right to marry"); *Turner*, 482 U.S. at 94-95 (holding that the fundamental right to marry "under *Zablocki* … and *Loving* … appl[ies] to prison inmates").

The Supreme Court has likewise never indicated post-*Baker* that the Equal Protection Clause protects a right to marry a person of the same sex. *Romer v. Evans* had nothing to do with marriage, and neither held nor even implied that classifications affecting gays and lesbians were subject to anything other than "conventional" rational basis scrutiny under the Equal Protection Clause. 517 U.S. 620, 631-32 (1996). And while the Court has refined its sex discrimination jurisprudence since *Baker* was decided, it had, prior to that decision, already clearly "depart[ed] from 'traditional' rational-basis analysis with respect to sex-based classifications." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality) (discussing *Reed v. Reed*, 404 U.S. 71 (1971)).

2. Plaintiffs' attempt to portray *Baker* as not presenting an issue of sexual orientation discrimination is untenable. Not only did the Jurisdictional Statement spend several pages arguing that Minnesota's adherence to the traditional definition of marriage was attributable solely to "the continuing impact on our society of prejudice against non-heterosexuals," it also plainly argued that this adherence subjected "*the class of persons who wish to engage in single sex marriages*" to "invidious discrimination." ER 1609-10.

Plaintiffs also attempt to distinguish *Baker* on the grounds that (1) California recognized same-sex relationships as marriages for a few brief months before the voters' swift reversal of *In re Marriage Cases*, and (2) California has

accommodated the interests of gays and lesbians by continuing to recognize 18,000 same-sex marriages entered prior to the enactment of Proposition 8 and by recognizing other same-sex relationships as domestic partnerships, which afford essentially the same substantive rights as marriage. The first distinction is nothing more than a historical accident of no constitutional moment. *See also infra* at 75-80. And surely California's generous efforts to accommodate same-sex couples do not place its marriage laws on a *weaker* foundation than the laws upheld in *Baker*. Indeed, any distinction of *Baker* on this ground would create a perverse incentive for States that wish to preserve the traditional definition of marriage to maintain "an outright refusal … to afford *any* recognition to same-sex relationships." Pl. Br. 37.

3. This Court's decision in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), also mandates reversal of the district court's decision. Although the case arose in the context of immigration law, this Court nonetheless applied traditional rational-basis review: "We need not … delineate the exact outer boundaries of [the] limited judicial review" that applies in the immigration context, this Court explained, because "[w]e hold that Congress's decision to confer spouse status … only upon the parties to heterosexual marriages has a rational basis.… *There is no occasion to consider in this case whether some lesser standard of review should apply*." *Id.* at 1042. And contrary to Plaintiffs' contention, *see* Pl. Br. 38-39,

Adams is no more undermined by *Lawrence* or *Romer* than is *Baker*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

4. As we have demonstrated, Prop. Br. 46-47, the decision below stands in stark conflict not only with *Baker* and *Adams*, but the uniform judgment of appellate courts across the country. Although Plaintiffs, like the district court, do not even address these decisions, they plainly confirm that the decision below must be reversed.

IV. THIS COURT OWES NO DEFERENCE TO THE DISTRICT COURT'S RULING.

1. Plaintiffs argue that every so-called "finding of fact" made by the district court ought to be afforded the deference that would be given to a lower court's findings of fact regarding, say, a traffic accident. Constitutional law simply does not proceed in this manner—not in the Supreme Court, not in this Court, not in any appellate court in the country.

It is well-settled that "[l]egislative facts … are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." FED. R. EVID. 201(a), advisory comm. note to 1972 amendments. In determining legislative facts, a "judge is unrestricted in his investigation and conclusion," and "may make an independent search for persuasive data." *Id.* "This … view … renders inappropriate any limitation in the form of indisputability, and formal

requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings *at any level*." *Id*. This Court has repeatedly recognized this distinction. *See, e.g.*, *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966); *United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1244-45 (9th Cir. 1989); *cf. Valdivia v. Schwarzenegger*, 599 F.3d 984, 994 (9th Cir. 2010).

Given these principles, it is plain that an appellate court's treatment of legislative facts does not in any way turn on whether the lower court held a trial or on the contents of the record below, however it was compiled. Simply put, "[t]here are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial." *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality); *see also Lockhart v. McCree*, 476 U.S. 162, 168-69 & n.3 (1986). As a leading treatise on evidence explains:

> If the social science materials were not clearly inclined to sustain only one conclusion, and the ruling were treated as a factual ruling, the ruling, whichever way it came out, could not be reversed because it would not be clearly erroneous. Law would come to turn on fact and be susceptible to two right answers. This is not going to happen. Legislative facts are not 'evidence' in the normal sense of the word.

MCCORMICK ON EVIDENCE § 334, at 457 (6th ed., Kenneth Brown, ed. 2006).

Not surprisingly, the contrary rule urged by Plaintiffs is flatly inconsistent with the Supreme Court's approach to legislative facts, even in the very cases on

which Plaintiffs rely. In *Brown v. Board of Education*, 347 U.S. 483 (1954), for example, the Court did cite a finding made in one of the four cases under review that supported its holding. *Id*. at 494 n.10, 495. But the judge below did not "rest his decision on that ground," *id.* at 486 n.1, nor did the Court purport to defer to it. Indeed, to support its holding, the Court also cited directly to "modern authority" consisting of several works of social science. *Id*. at 494 n.11.

Similarly, while the Court in *United States v. Virginia*, 518 U.S. 515 (1996), did discuss a trial held below, it proceeded to *reject* the trial court's conclusion that an interest in educational diversity supported the State's maintenance of the Virginia Military Institute as an all-male institution, relying instead on several works of historical scholarship, among other things. *See id.* at 523-24, 535-40. These cases are by no means unique. *Compare, e.g.*, *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001) (concluding, based on findings of fact, that affirmative action program was not narrowly tailored and was "practically indistinguishable from a quota system"), *with Grutter v. Bollinger*, 539 U.S. 306, 335-36 (2003) (offering no statement of deference to district court and finding that evidence showed the program was "not transform[ed] … into a quota" and "b[ore] the hallmarks of a narrowly tailored plan"). These and many similar cases plainly cannot be reconciled with any rule requiring deference to district courts' legislative

factfinding.[9]

The Court's established practice in constitutional cases no doubt explains why in *Lockhart v. McCree*, 476 U.S. 162, 169 n.3 (1986), the Supreme Court was "far from persuaded … that the 'clearly erroneous' standard of Rule 52(a) applies to … 'legislative' facts." Not surprisingly, *every* court of appeals that has considered the issue has found *de novo* review to be appropriate. Prop. Br. 37 (citing cases).[10]

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[9] Plaintiffs argue that the Supreme Court sometimes adopts findings without discussing the standard of review. Pl. Br. 27-28 (citing *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (adopting stipulated facts); *Plyler v. Doe*, 457 U.S. 202, 207 (1982) (accepting trial court's findings without discussing standard of review)). But even applying *de novo* review, the Court is of course free to adopt trial court findings if it finds them correct.

[10] Plaintiffs claim that *Service Employees International Union v. Fair Political Practice Commission*, 955 F.2d 1312 (9th Cir. 1992), establishes that there is not "a different standard of review for legislative facts." Pl. Br. 25. There, the district court made findings regarding the dollar amounts raised by incumbents and challengers during various election cycles, and this Court subjected "these findings" to the clearly erroneous standard of review. *Id.* at 1317. But when the *SEIU* Court turned to evaluating matters more like those at issue here, it conducted an independent review. *See id.* at 1318, 1321 ("we now turn to the question whether viewpoint and content neutral contribution limits that discriminate against challengers and their supporters offend the Constitution"; finding, without citing any district court findings on the matter, that "the state has a legitimate interest in preventing corruption" but that "appellants have made no showing that limiting contributions on a fiscal year basis advances this interest"). In all events, the Supreme Court's cases control, and it is simply not true that that Court uniformly defers to findings of "discriminatory impact," as Plaintiffs claim. Pl. Br. 25. *Compare Valtierra v. Housing Auth. of the City of San Jose*, 313 F. Supp. 1, 5 (N.D. Cal. 1970) (finding that "impact" of a referendum "falls upon minorities"), *with James v. Valtierra*, 402 U.S. 137, 141 (1971) (affording no deference to

2. Plaintiffs also seek to characterize several of the district court's purported findings as "adjudicative" facts. But "the specific effects" of Proposition 8, Pl. Br. 25—including whether it imposes "stigmas against gays and lesbians," ER 120, "legitimates [their] unequal treatment," ER 128, or "perpetuate[s] … stereotype[s]" about them, *id.*—are paradigmatic legislative facts. *See, e.g.*, *Dunagin*, 718 F.2d at 748 n.8 (district court's "finding" that an alcohol-advertisement regulation did not have the effect of preventing increased alcohol consumption was "a legislative and not an adjudicative fact" and thus was not subject to "a clearly erroneous standard of review"); *Yocum v. Greenbriar Nursing Home*, 130 P.3d 213, 220 n.32 (Okla. 2005) ("[L]egislative facts" include "those which are helpful to a court in determining the … effect … of enactments."). And determinations about the "meaning" of campaign themes and messages, Pl. Br. 25—including purported "assum[ptions]" inherent in the Proposition 8 campaign, ER 108, and messages "insinuated" by campaign advertisements, ER 140—plainly encompass broad conclusions about the social and psychological impact of political messaging. *See, e.g.*, *Equality Found. of*

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district court's finding and concluding that "the record … would not support any claim that [the] law … is in fact aimed at a racial minority").

Plaintiffs also claim that in *Hunter v. Regents of the University of California*, 190 F.3d 1061 (9th Cir. 1999), this Court deferred to a "district court's findings that school admissions requirements satisfied strict scrutiny." Pls. Br. 26. But *Hunter* predates *Grutter*, which makes clear that findings regarding compelling interests and narrow tailoring are not subject to deferential review.

Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 264 n.1, 265 (6th Cir. 1995), *vacated on other grounds*, 518 U.S. 1001 (1996) (holding that "most, if not all, of the lower court's findings"—including, *inter alia*, that "campaign materials were riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals"— "constituted ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support 'constitutional facts' " and were thus subject to "plenary review").

3. Plaintiffs' effort to rehabilitate the district court's erroneous application of rational-basis review fares no better. The district court plainly (and improperly) imposed a burden of production, if not the burden of proof, on Proponents to sustain Proposition 8's rationality. *See* Prop. Br. 32-35. The fact that this Court has held that the party *challenging* a law may, in certain circumstances, introduce evidence and build a factual record in an attempt to meet its burden of disproving "any *reasonably conceivable state of facts* that could provide a rational basis" for the law does not excuse the district court's engaging in standard "courtroom factfinding" with respect to Proposition 8's rationality. *Heller v. Doe*, 509 U.S. 312, 320 (1993). *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 591-92 (9th Cir. 2008) (explaining that "our circuit has allowed *plaintiffs* to rebut the facts underlying defendants' asserted rationale for a classification, to

show that the classification *could not reasonably be viewed to further the asserted purpose*" and citing *Lockary v Kayfetz*, 917 F.2d 1150 (9th Cir. 1990), as an example of such a case).

V. THE TRADITIONAL DEFINITION OF MARRIAGE DOES NOT VIOLATE PLAINTIFFS' FUNDAMENTAL RIGHT TO MARRY.

We have demonstrated that under controlling Supreme Court precedent, it is simply impossible to find a free-standing fundamental right to have a same-sex relationship recognized as a marriage. *See* Prop. Br. 48-50. Plaintiffs do not—and cannot plausibly—contend otherwise. Rather, they seek to shoehorn such a right into the right to marry that has been recognized by the Supreme Court by redefining that right in a manner utterly inconsistent with history and precedent.

1. Plaintiffs do not dispute that prior to the last decade, marriage has always been limited to opposite sex unions in this Country and indeed in virtually every society throughout history. Nor do they dispute that the same rule continues to prevail today in the overwhelming majority of jurisdictions in this Country and throughout the world. And they cannot deny that marriage has been uniformly *defined* as the union of man and woman by dictionaries, legal treatises, and other eminent authorities throughout history. *See* Prop. Br. 51-60.[11] Given that

[11] Contrary to Plaintiffs' claim, *see* Pl. Br. 40, Proponents repeatedly brought many of these sources demonstrating the deeply rooted, historical understanding to the district court's attention. *See*, *e.g.*, ER 1453-59, 1469-75, 1514-19; ER 1737-39, 1742-44, 1756-58, 1760-62, 1766; ER 1775-84. In all events, as demonstrated

fundamental due process rights are defined by this Nation's "history, legal traditions, and practices," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), Plaintiffs' claim that the traditional opposite-sex definition of marriage reaffirmed by Proposition 8 violates their fundamental right to marry is simply untenable.

The same authorities also demonstrate that an animating purpose of marriage in every society throughout history has been to regulate sexual relationships between men and women to increase the likelihood that the unique procreative potential of such relationships benefits rather than harms society—specifically, by increasing the chances that the children resulting from those relationships will be born and raised in stable family units by both the mothers and the fathers who brought them into the world. Indeed, Plaintiffs are forced to concede that this societal purpose is served by marriage, *see* Pl. Br. 49, ER 1785, though they labor mightily to avoid its import by dismissing it as merely one of many marital purposes. To be sure, in various times and places marriage has served other societal purposes *in addition to* responsible procreation, and no doubt individuals marry, as they always have, for a wide variety of personal reasons. But no purpose other than responsible procreation can explain why marriage is so universal, so critical to society, or even why it exists at all—let alone why it has existed in every civilized society throughout history.

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above, this Court's review of the definition and scope of the fundamental right to marry is in nowise limited to the trial record. *See supra* at 20-23.

2. Plaintiffs claim that recognizing the overriding procreative purposes of marriage necessarily implies that the fundamental right to marry does not extend to infertile opposite-sex couples, and perhaps even that a State could eliminate marriage entirely if it determined that marriage no longer served those purposes. Pl. Br. 40. In so arguing, Plaintiffs fail to grasp the point either of our position or the Supreme Court precedents on which it is based: namely, that the scope of fundamental due process rights is determined by this Nation's history, traditions, and legal practices. And these sources make clear that the right to marry extends to opposite-sex couples as a class and does not inquire into fertility on a case-by-case basis. The overwhelming evidence recognizing the procreative purposes of marriage certainly makes clear why the right to marry has never included same-sex relationships—which as a class are never fertile—as well as why marriage is both vital and ubiquitous. But these purposes do not limit, nor would they warrant the contraction of, the right to marry beyond its established historical contours. Simply put, there is not, and has never been, a requirement of perfect fit between a right and its animating purposes. *Cf. District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008) (explaining that the Second Amendment's prefatory clause "announces a purpose" but does not limit operative right); *id*. at 2817 ("the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right");

McDonald v. City of Chicago, 130 S. Ct. 3020, 3042 (2010) (holding that the right to keep and bear arms is a fundamental right incorporated by the due process clause of the Fourteenth Amendment).[12]

In all events, the alternative purposes for marriage posited by Plaintiffs and the district court not only lack the explanatory power and universal recognition of the procreative purposes repeatedly articulated by eminent authorities throughout the ages, they also afford no better fit with the history, traditions, and practice of marriage in this or any other Nation. For while marriage has never been conditioned on a couple's ability and desire to have children, neither has it been conditioned on a couple's actual ability and desire to find "happiness" together, or their actual "personal dedication" to or even "affection" for each other. Pl. Br. 44-45.

3. Plaintiffs labor mightily to cull support for their novel interpretation of the fundamental right to marry by selectively stringing together handpicked quotations from Supreme Court precedents. But they simply cannot avoid the

[12] Plaintiffs also assert that acknowledging the procreative purposes served by marriage risks expanding the fundamental right to marry to include prohibited but potentially fertile relationships such as incestuous or polygamous relationships, Pl. Br. 50 n.13, but this contention fails for the same reason. To the contrary, as the amicus States have demonstrated, it is the abstract, ahistorical right asserted by Plaintiffs "to select the partner of one's choice" that would subject to exacting and perhaps fatal scrutiny the limits the States have traditionally placed on that choice relating to consanguinity, marital status, and even age. *See* States of Indiana, Virginia, et al. Br. 31-34 ("States Br.").

facts that (1) every Supreme Court decision that has upheld the fundamental right to marry has involved the union of a man and a woman, (2) the only Supreme Court decision to consider whether this right extended to same-sex couples unanimously and summarily rejected that suggestion, and (3) the Supreme Court cases addressing the right to marry have repeatedly emphasized the abiding connection between marriage and the unique procreative potential of sexual relationships between men and women. *See* Prop. Br. at 51, 69-70.

Contrary to Plaintiffs' suggestions, *Lawrence v. Texas*, 539 U.S. 558 (2003), did not hold or imply that the fundamental right to marry confers a right to have a same-sex relationship recognized as a marriage. The Court did hold that a State could not infringe an individual's autonomy to enter an intimate relationship with a person of the same sex by criminalizing "the most private human conduct, sexual behavior, and in the most private of places, the home." *Id*. at 567. Although Plaintiffs attempt, through ellipses and selective quotation, to draw from *Lawrence* support for a right to have such a relationship recognized as a marriage, they simply cannot overcome that Court's clear statement that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id*. at 578; *see also id*. at 567 (explaining that Texas's sodomy prohibition sought "to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of

persons to choose without being punished as criminals"); *id*. at 585 (O'Connor, J., concurring in judgment) (expressly distinguishing marriage from the law at issue in *Lawrence*). Indeed, marriage is itself official *public* recognition and regulation of a couple's union and is thus the very antithesis of the right to be let alone vindicated in *Lawrence*: as Plaintiffs themselves emphasize, instead of privacy and autonomy, they seek formal government recognition of their relationships as a marriage "to demonstrate *publicly* their commitment to one another." Pl. Stay Opp. 3.

Plaintiffs likewise trumpet the Supreme Court's statements regarding "freedom of personal choice in matters of marriage," *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639 (1974), and the importance of the right to marry "for all individuals." *Zablocki v. Redhail*, 434 U.S. at 384. But these statements do not get Plaintiffs very far, for the question in this case is not, as Plaintiffs would have it, *who* has the right to marry but rather what the right to *marry* is. And try as they might, Plaintiffs cannot avoid the clear answer that history and precedent provide to that question.

Nor do the Supreme Court cases cited by Plaintiffs support their attempt to divorce the right to marry from its traditional procreative purposes. As we have demonstrated, *see* Prop. Br. 69-70 & n.33, both *Zablocki* and *Turner v. Safley*, 482 U.S. 78 (1987), upheld the right of a woman to marry a man, and both recognized

marriage's abiding concern with the procreative potential of such opposite-sex relationships. That *Zablocki* may have discussed other rights, *as well as* the right to marry, and that *Turner* may have recognized purposes served by marriage *in addition to* responsible procreation is in no way inconsistent with the traditional understanding of marriage and its purposes.

Plaintiffs' reliance on *Griswold v. Connecticut*, 381 U.S. 479 (1965), is likewise unavailing. To be sure, that decision struck down a prohibition on contraceptive devices, finding a right to privacy that protects an individual's choice not to procreate. As later cases confirmed, however, this privacy right is distinct from marriage and extends to single individuals as well. *See Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972). While this privacy right certainly helps explain why States have never closely inquired into opposite-sex couples' childbearing ability or intentions as a precondition to marriage, it just as certainly does not negate marriage's abiding concern with the procreative *potential* of such couples.[13]

[13] Even farther afield are *Boddie v. Connecticut*, which vindicated the principle that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard," 401 U.S. 371, 377 (1971), and *Moore v. City of East Cleveland*, which struck down a law making it a crime for a grandmother to live with her grandson in light of the "venerable" "tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children," 431 U.S. 494, 504 (1977). The fact that individuals, including married individuals, have other due process rights in addition to the fundamental right to marry simply does not bear on the scope of that right or its purposes.

4. Plaintiffs also seek to recycle the district court's flawed historical analysis of the institution of marriage, largely ignoring our thorough rebuttal of the district court's reasoning. But like the district court, Plaintiffs fail to refer to a single dictionary, treatise, law, or other historical source defining marriage. Instead, they offer a definition of marriage that cannot be found in any such historical source, because it was invented by one of their expert witnesses for purposes of this case: "[M]arriage 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.' " Pl. Br. 47. While this carefully formulated definition no doubt describes some of the purposes marriage has served in some societies, it is most noteworthy for its forced, tendentious attempt to cleanse from marriage any reference to the gender of the spouses or the procreative purposes served by the institution—references that we have demonstrated are ubiquitous in genuine historical definitions and descriptions of marriage.

Plaintiffs also repeatedly invoke the tired canard that despite the testimony of eminent authorities throughout the ages, marriage cannot be designed to channel potentially procreative sexual relationships into stable family units for the benefit of any resulting children because societies have throughout history chosen to rely

on "the common-sense proposition," *Vance v. Bradley*, 440 U.S. 93, 112 (1979), that opposite-sex relationships are in general potentially procreative rather than to undertake burdensome, intrusive, and ultimately ineffective efforts to determine the fertility and childbearing intentions of individual couples seeking to marry on a case-by-case basis. We have already demonstrated that this argument is badly flawed and has been repeatedly rejected by appellate courts throughout the Nation. *See* Prop. Br. at 60-64. Plaintiffs offer no meaningful response to our arguments and do not even acknowledge the numerous cases squarely dismissing Plaintiffs' contentions.

5. Finally, Plaintiffs embrace the district court's efforts to liken the traditional, opposite-sex definition of marriage to the antimiscegenation laws and coverture restrictions on married women's rights that once applied in some jurisdictions. But we have already demonstrated that, unlike the traditional opposite-sex definition of marriage, such laws were never a universal—let alone *defining*—feature of marriage. *See* Prop. Br. at 64-68. Although Plaintiffs' expert may claim that antimiscegenation laws were viewed "as very important definitional features of who could and should marry, and who could not and should not," Pl. Br. 48, Plaintiffs offer not one scrap of historical support for this bald assertion, and contemporaneous dictionaries, treatises, and the legal history of antimiscegenation laws in this country demonstrate that it is simply false. *See*,

e.g., Prop. Br. 65-66 (contrasting leading 19th century treatise's recognition of the universal requirement that marriage partners "be of different sex" with its discussion of racial restrictions on marriage that applied only "in particular countries, or States"); *id*. at 52-53 (collecting historical dictionary definitions of marriage, none of which define marriage with reference to race); *id*. at 65 (explaining that racial restrictions on marriage were never a part of the common law and never existed in many States); High Impact Leadership Coalition et al. Br. 2-4 (same).

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In short, history and precedent do not support, but squarely foreclose, Plaintiffs' claim that the definition of marriage that has prevailed in virtually every society throughout every period of history somehow violates the fundamental right to marry.

VI. PROPOSITION 8 IS SUBJECT TO RATIONAL BASIS SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

A. Binding precedent establishes that gays and lesbians do not constitute a suspect or quasi-suspect class.

A long line of authority from this Court, beginning with *High Tech Gays v. Defense Industrial Services Clearing Office*, 895 F.2d 563, 571 (9th Cir. 1990), establishes that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny," *id.* at 573-74; *see* Fam. Res.

Council Br. 19 n.20. Plaintiffs contend that because *High Tech Gays* "premised its equal protection analysis on *Bowers v. Hardwick*, 478 U.S. 186 (1986)," this authority has been undermined by *Lawrence*. Pl. Br. 68-69. But while *High Tech Gays* did observe that *Bowers* was "incongruous" with deeming gays and lesbians members of a suspect or quasi-suspect class, it also independently analyzed the case for heightened scrutiny and found it wanting. 895 F.2d at 571, 573-74. After setting forth the requirements for such treatment—a history of discrimination, immutability, *and* political powerlessness—this Court held that gays and lesbians met the first but failed the latter two. *Id*. at 573-74. This analysis "compel[led]" the holding "that homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny." *Id*. at 574. That holding and analysis are controlling here.

This Court, of course, has already determined as much in *Witt v. Department of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008). *See* Prop. Br. 70-71 n.34.[14] Contrary to Plaintiffs' contentions, *see* Pl. Br. 69 n.19, the issue preserved by the plaintiff in *Witt* for potential en banc consideration was not whether *Lawrence*

[14] This Court's sister circuits have likewise uniformly continued to apply rational-basis review in this context post-*Lawrence*. *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 (10th Cir. 2008); *Lofton v. Secretary of the Dep't of Children & Family*, 358 F.3d 804, 818 (11th Cir. 2004).

upset circuit precedent rejecting heightened equal protection scrutiny for gays and lesbians, but simply whether the line drawn by the military's Don't Ask Don't Tell policy between "gay and straight" service members failed even rational-basis review. *See* Brief of Appellant at 49-50, *Witt* (No. 06-35644).

Nor does *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), in any way undermine *High Tech Gays*' continuing force. While the Court in that case stated in passing that its "decisions have declined to distinguish between [homosexual] status and conduct," *id.* at 2990, it did not even address, let alone purport to resolve, whether gays and lesbians constitute a suspect or quasi-suspect class under the Equal Protection Clause. At any rate, to the extent the Court's passing observation has any relevance here, it simply *underscores* the degree to which "[h]omosexuality … is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes," because "[t]he behavior or conduct of such already recognized classes is *irrelevant* to their identification," *High Tech Gays*, 895 F.2d at 573-74, not integral to it, as *Christian Legal Society* suggests is the case for homosexuals.[15]

[15] Conduct, of course, is just one of the complex array of factors that, singly or in some combination, have been posited as defining features of homosexuality. *See* Prop. Br. 71-72. Some courts, like this one, have focused on this behavioral aspect of homosexuality in distinguishing it from established suspect and quasi-suspect classifications. *See High Tech Gays*, 895 F.2d at 573-74; *Woodward v. United States*, 871 F.2d at 1076. In reaching the same conclusion, other courts have looked to other aspects of homosexuality, like the "subjective and unapparent

Plaintiffs' reliance on *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), is likewise misplaced. There, this Court held that "gay men with female sexual identities in Mexico" form a "particular social group" for purposes of the asylum laws. *See id.* at 1087. In reaching this determination, the Court reasoned that "[s]exual orientation and sexual identity are immutable" in the sense that "they are so fundamental to one's identity that a person should not be required to abandon them." *Id.* at 1093. That formulation, however, is not how immutability is defined for purposes of equal protection law. *See* Prop. Br. 73-74. And in the equal protection context, this Court has squarely held that homosexuality is not immutable, *see High Tech Gays*, 895 F.2d at 573-74, and it has continued to apply rational-basis review to classifications based on homosexuality after *Hernandez-Montiel*. *See Witt*, 527 F.3d at 821; *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003).

B. Homosexuality is a complex and amorphous phenomenon, distinguishing gays and lesbians from other classes the Supreme Court has recognized as suspect or quasi-suspect.

Further, we have demonstrated that homosexuality is a complex, amorphous phenomenon lacking any consensus definition and that the proposed suspect class of gays and lesbians thus differs sharply from other groups that the Supreme Court has singled out for heightened scrutiny. *See* Prop. Br. 71-72 & n.36; *see also* Prof.

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characteristics such as innate desires, drives, and thoughts," that some identify as its defining features. *Equality Found. v. Cincinnati*, 128 F.3d at 294.

Paul McHugh, M.D. Br. 2-18 ("McHugh Br."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46 (1985) (declining to extend suspect status to an "amorphous" class of individuals); *cf. Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (rejecting suspect class status for transsexuals because, *inter alia*, "the complexities involved merely in defining the term 'transsexual' would prohibit" such classification). Indeed even Plaintiffs' own experts disagree about the proper definition of the proposed suspect class. *See* McHugh Br. 13-14.

Plaintiffs respond that same-sex couples who wish to marry should be assumed to be homosexuals. Pl. Br. 65. But such a case-specific assumption provides no clear basis for identifying the proposed suspect class that could apply in all of the various circumstances in which members of this putative class would undoubtedly raise equal protection challenges. Plaintiffs also respond that most individuals can identify themselves as homosexual or straight, but self-identification is only one of several competing definitions of sexual orientation. Finally, Plaintiffs invoke popular "assumptions" regarding the existence of homosexuals as a discrete class. But the fact that many people may not understand the complexity of defining homosexuality does not eliminate that complexity. Nor is the difficulty in identifying the proposed suspect class merely theoretical—as prominent studies and Plaintiffs' own experts recognize, the competing definitions

describe very different groups that have remarkably little overlap and range in size from 1 to 21 percent of the population. *See* Prop. Br. 72 & n.36.

C. Plaintiffs misapprehend the requirements for heightened protection under the Equal Protection Clause.

To qualify for heightened scrutiny under the Equal Protection Clause, the burdened class must have experienced a history of discrimination, be defined by an immutable characteristic, *and* be politically powerless. *High Tech Gays*, 895 F.2d at 573.

Plaintiffs contend that heightened scrutiny may apply absent political powerlessness and immutability. Not only is this argument flatly inconsistent with *High Tech Gays*, but it also cannot be squared with Supreme Court authority. Indeed, political powerlessness is plainly a *sine qua non* of protected status: When a group does not lack political power, it can hardly claim the "extraordinary protection from the majoritarian political process" provided by heightened equal protection scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Furthermore, the Supreme Court has plainly recognized political powerlessness and immutability as "traditional indicia of suspectedness," *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974), and the groups it has singled out for heightened protection have uniformly satisfied those requirements.

Plaintiffs' cases are not to the contrary. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), does not hold or imply that political powerlessness is not a

prerequisite for heightened equal protection scrutiny, but only that *all* government racial discrimination, including "reverse discrimination," is subject to heightened equal protection scrutiny. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.). Furthermore, if *Adarand* were taken to suggest that political powerlessness is unnecessary to establish suspect class status in the first instance, it would also entail the surprising suggestion that a history of discrimination is unnecessary as well.

Nor does *Frontiero v. Richardson*, 411 U.S. 677 (1973), dispense with the requirement of political powerlessness. There, a plurality of the Court observed that "*when viewed in the abstract*, women do not constitute a small and powerless minority," *id*. at 686 n.17, but that in reality women faced "pervasive … discrimination, … perhaps most conspicuously in the political arena," *id.* at 686, and remained "vastly under-represented in this Nation's decisionmaking councils," *id.* at 686 n.17.

Plaintiffs claim that *Nyquist v. Mauclet*, 432 U.S. 1 (1977), dispensed with immutability as a prerequisite to suspect status because it treated "resident aliens as a suspect class despite their ability to opt out of that class voluntarily." Pl. Br. 60 & n.15. But a key distinguishing characteristic that defines this class—birth in a foreign country—is "determined solely by the accident of birth," *Frontiero*, 411 U.S. at 686, and thus is immutable as that term is defined by the Supreme Court.

See also Parham v. Hughes, 441 U.S. 347, 351 (1979) (identifying "alienage" as an "immutable human attribute[]").

Finally, Plaintiffs claim that this Court, in *Christian Science Reading Room Jointly Maintained v. San Francisco*, 784 F.2d 1010 (9th Cir. 1986), held that " 'an individual religion meets the requirements for treatment as a suspect class,' even though religion is not immutable." *See* Pl. Br. 60 n.15 (quoting *id.* at 1012). But *Christian Science Reading Room* simply applied rational-basis review to strike down a regulation distinguishing between "religious organizations and all others," 784 F.2d at 1016; the language Plaintiffs quote was dicta. Further, the Supreme Court has identified the Free Exercise Clause, not the Equal Protection Clause, as the source of heightened constitutional protection against religious discrimination. *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004).

D. Gays and lesbians do not meet the requirements for suspect or quasi-suspect classification.

***History of Discrimination*.** We do not dispute that gays and lesbians have suffered a history of discrimination. But as this Court correctly held twenty years ago in *High Tech Gays*, that history, standing alone, does not warrant applying heightened equal protection scrutiny to laws that classify on the basis of homosexuality. *See* 895 F.2d at 573. That decision, if anything, is on even firmer ground now, given that, as Plaintiffs' expert Professor Chauncey notes, "it is hard to think of another group whose circumstances and public reputation have changed

so decisively in so little time. For several decades now, *and especially since the 1990s*, Americans have become more familiar with their lesbian and gay neighbors and more supportive of them." ER 1903; *see also* ER 1902 (explaining that "most [anti-gay discriminatory measures] were dismantled between the 1960s and 1990s").

Immutability. As we have demonstrated, heightened scrutiny is reserved for groups defined by "an immutable characteristic determined solely by accident of birth." Prop. Br. 73-74; *accord Johnson v. Robison*, 415 U.S. at 375 n.14. As their own experts admit, Plaintiffs cannot prove that homosexuality is determined solely by accident of birth. *See* Prop. Br. 74 & n.38; *see also* McHugh Br. 18-22. Plaintiffs completely ignore this legal requirement, which alone is fatal to their argument for heightened scrutiny under the Equal Protection Clause.

In addition, we have demonstrated, and Plaintiffs' experts admit, that homosexual orientation shifts over time for a substantial number of individuals. *See* Prop. Br. 74 & n.39; McHugh Br. 22-29. To take just one example, the Chicago Study—which Plaintiffs' experts recognize as "the authoritative source of data" on sexuality, *see* Prop. Br. 72—demonstrates that 90 percent of women and 80 percent of men who have had same-sex intimate partners as adults have also had opposite-sex partners. ER 1207. Plaintiffs argue that this shows only "that some gay men and lesbians may have experimented with heterosexual intimacy,"

Pl. Br. 64, but the same study shows that *25 percent* of individuals who have had same-sex partners in *the last year* have also had opposite-sex partners, and that *approximately half of men* and *nearly two-thirds of women* who have had same-sex partners in *the last five years* have also had opposite-sex partners. ER 1207. Plainly these numbers cannot be dismissed as evidence of nothing more than "experimentation."

Plaintiffs also rely on testimony from their expert Professor Herek, but his own research reports that 13 percent of self-identified gay men and 30 percent of self-identified lesbians say that they experience a meaningful degree of choice in their sexual orientation. ER 1912. These statistics, even at face value, are utterly inconsistent with any finding that gays and lesbians are a class defined by an immutable characteristic. Indeed, statistics such as these would be unthinkable for other classes, such as women or racial minorities, that the Supreme Court has singled out for heightened protection under the Equal Protection Clause.[16]

Political Power. Plaintiffs likewise ignore the controlling legal test of political power established by the Supreme Court and applied by this Court. *See*

[16] Further, the fact that any given individual reports that he or she experiences little or no choice with respect to homosexual orientation does not mean that his or her orientation has not changed in the past, or that it might not change in the future. *See* ER 1716-17 (Herek) (acknowledging that study does "not really shed any light" on the question "whether people's sexual orientation had changed"); ER 1718 (Herek) (acknowledging that "if you are trying to predict for any specific individual whether their identify will predict their sexual behavior in the future, especially, that can be problematic").

City of Cleburne v. Cleburne Living Ctr., 473 U.S. at 445; *High Tech Gays*, 895 F.2d at 574 (citing *Cleburne*). And it is no wonder, because the evidence is overwhelming that gays and lesbians have the "ability to attract the attention of the lawmakers." *Cleburne*, 473 U.S. at 445. In California, the Speaker of the Assembly is openly gay, ER 1709; a majority of the members of the legislature have received a 100% rating from the largest gay rights group in the state, Equality California, *see* Equality California, *2009 Legislative Scorecard* at 5-7, *at* http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/EQCA_LEG_SCORECARD_2009.PDF; and California has passed more than 60 pieces of legislation sponsored by Equality California over the last decade alone, *see* Equality Cal. Br. 1-2—virtually the entire political agenda of California's LGBT community during this period except redefining marriage. At the federal level, gays and lesbians have a staunch ally in Speaker Pelosi, among many other legislators, ER 1720[17]; President Obama has adopted a raft of initiatives sought by gay interest groups, *see* Concerned Women of America Br. 8-9 ("CWA Br."); he has appointed more gays and lesbians in the first two years of his administration to positions than President Clinton did in his entire

[17] *See also* http://www.hrc.org/scorecard/ (rating Pelosi at 100% for three consecutive Congresses).

eight years in office[18]; Congress has enacted hate crimes legislation sought by the LGBT community, *see* 18 U.S.C. § 249(a)(2); and the House earlier this year voted to end the military's Don't Ask Don't Tell policy, *see* CWA Br. 8. *See generally* CWA Br. (detailing gays' and lesbians' political power).[19]

Plaintiffs try to evade this Court's holding in *High Tech Gays* that gays and lesbians have the ability to attract the attention of lawmakers on the ground that this case has a "vastly different record." Pl. Br. 69. Indeed it does. The political power of gays and lesbians has increased exponentially over the last two decades: all of the achievements detailed above (and countless others) have occurred since *High Tech Gays* was decided; the allies of gays and lesbians have become far more numerous and powerful since that time, *see, e.g.* ER 1884 (listing scores of civil rights organizations, unions, national organizations, elected officials, and others endorsing the No-on-8 cause); and the vast majority of the numerous local, state,

[18] http://www.foxnews.com/politics/2010/10/26/obama-appoints-record-number-gay-officials/?test=latestnews

[19] Plaintiffs ask the Court to ignore the political power of gays in California, but where there are significant regional variations in a group's power, it surely makes sense to assess political power within the juridical entity that enacted the challenged law. Thus, in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 495-96 (1989), where the Supreme Court analyzed the validity of racial quotas enacted by the City of Richmond, the Court properly focused on the fact that blacks were a majority of the City Council and whites were a minority. In any event, while the ability of gays and lesbians to attract the attention of lawmakers is particularly noteworthy in California, their achievements in Washington, D.C. make clear that they plainly do not lack this ability at the federal level.

and federal laws now protecting gays and lesbians postdate *High Tech Gays*.[20]

Plaintiffs point out that many states since *High Tech Gays* have reaffirmed the traditional definition of marriage. But in 1990, no state in the union had redefined marriage to include gays and lesbians, and no state had a domestic partnership regime extending the tangible benefits of marriage to gays and lesbians. Thus, even on the metric highlighted by Plaintiffs, the political landscape shows the increasing power of gays and lesbians.

In a last ditch effort to demonstrate political powerlessness, Plaintiffs draw comparisons to the power of African Americans and women. As for African Americans, any comparison is inapposite since "the clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious *racial* discrimination in the States." *Loving v. Virginia*, 388 U.S. 1, 10 (1967); *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (The Equal Protection Clause's

[20] Twenty years ago, for example, laws prohibiting sexual orientation discrimination in employment and punishing hate crimes committed on the basis of sexual orientation were extremely rare. Today, such laws are commonplace. *See, e.g.*, 18 U.S.C. § 249; Human Rights Campaign ("HRC"), State Hate Crimes Laws, *available at* http://www.hrc.org/documents/hate_crime_laws.pdf (last visited August 4, 2010) (As of June 1, 2009, 31 states and D.C. have laws that address hate crimes based on sexual orientation); HRC, Statewide Employment Laws & Policies, *available at* http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf (August 4, 2010) (As of July 26, 2010, 21 states and D.C. prohibit discrimination based on sexual orientation); HRC, The State of the Workplace at 4 (2009), *available at* http://www.hrc.org/documents/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf (last visited August 4, 2010) (As of 2008, 181 cities and counties banned employment discrimination on the basis of sexual orientation).

"central mandate is *racial* neutrality in governmental decisionmaking.") (emphasis added).

As for women, the plurality in *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973), identified five ways in which the plight of women mirrored that of slaves: There was a time when neither could hold office, neither could serve on juries, neither could bring suit in their own names, neither had the legal capacity to hold or convey property, and both were denied the right to vote for much of American history. None of these special disabilities have ever been visited upon gays and lesbians because of their sexual orientation. The plurality also noted that "women are vastly under-represented in this Nation's decisionmaking councils." 411 U.S. at 686 n.17. At that time, there were no women in the United States Senate, and less than four percent of the members of the House of Representatives were women even though women constituted a majority of the electorate. By contrast, gays and lesbians today constitute over three percent of the California legislature, including the Speaker, *see* ER 1797, and almost 1% of the U.S. House of Representatives, *see* ER 1708—and there may well be other gays serving in Congress. Given the percentage of gays and lesbians in the population, the degree of their underrepresentation, if any, simply pales when compared to the facts in *Frontiero*. Moreover, the majority in *Cleburne* did not even reference, let alone place dispositive weight upon, the relative underrepresentation of disabled

legislators.

E. Proposition 8 does not discriminate on the basis of sex.

As the overwhelming majority of appellate courts to consider the matter have recognized, the traditional definition of marriage treats men and women equally and thus does not discriminate on the basis of sex. *See* Prop. Br. 75 n.40; Fam. Res. Council Br. 9-16. Plaintiffs' reliance on *Loving* is foreclosed by the Supreme Court's decision in *Baker*, which summarily rejected, despite appellants' repeated citations to *Loving*, the claim that limiting marriage to opposite-sex couples constitutes unconstitutional sex discrimination. *See* ER 1610-14. *Baker* is not only controlling, but clearly correct, for *Loving* involved race discrimination, not sex discrimination. And in the sex-discrimination context, unlike the race-discrimination context, "[a]ll of the [Supreme Court's] seminal … decisions … have invalidated statutes that single out men or women as a discrete class for unequal treatment." *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999) (collecting cases).

Furthermore, the *Loving* Court easily saw Virginia's antimiscegenation laws for what they were, regardless of their purported equal treatment of blacks and whites: "measures designed to maintain White Supremacy," with "patently no legitimate overriding purpose independent of invidious racial discrimination." 388 U.S. at 11. The definition of marriage as the union of a man and a woman, by

contrast, serves vital societal interests and cannot be dismissed as a relic of "outdated and unfounded" gender stereotypes. Pl. Br. 72; *see* Prop. Br. 53-59, 66-68. Indeed, even the California Supreme Court in *In re Marriage Cases* rejected the argument that California's marriage laws—including Proposition 22, the identically worded predecessor to Proposition 8—were "grounded in an outdated stereotypical view of the appropriate roles of men and women in a marriage." 183 P.3d at 440 n.58.

Finally, the premise of Plaintiffs' sex-discrimination theory, as set forth by Plaintiffs and the district court, is that if Plaintiff "Perry were a man," she and Plaintiff Stier could marry. Pl. Br. 71-72 (quoting ER 154). But this assertion is at war with the essential theory of Plaintiffs' case: that because of their homosexual orientation, marriage to a member of the opposite sex is not a meaningful option. So if she became a man but remained homosexual, marriage to a woman would no longer be an option for Plaintiff Perry. It is plain, then, that the gravamen of Plaintiffs' complaint is not gender discrimination but how Proposition 8 affects them *as gays and lesbians*.

VII. PROPOSITION 8 ADVANCES VITAL STATE INTERESTS, AND THUS PLAINLY SATISFIES RATIONAL BASIS REVIEW.

Proposition 8 advances California's vital interests in responsible procreation and childrearing and in proceeding with caution when considering fundamental changes to the institution of marriage, and thus easily satisfies rational-basis

review.[21] Indeed, in light of the importance of these interests, *see* Prop. Br. 78; SF Br. 9 (conceding that "society has a paramount interest in 'providing status and stability to the environment in which children are raised'"), as well as their close connection to the traditional definition of marriage, Proposition 8 satisfies heightened scrutiny as well.

[21] Like the district court, *see*, ER 168, Plaintiffs attempt to dismiss these interests as "post hoc" justifications, Pl. Br. 54-55 n.14, 97. But under rational-basis review, of course, lawmakers "need not actually articulate at any time the purpose or rationale supporting [a] classification." *Heller*, 509 U.S. at 320. Indeed, "*it is entirely irrelevant* for constitutional purposes whether the conceived reason for [Proposition 8] actually motivated" California's voters. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). This is particularly true in the context of a ballot initiative, for it is obviously not possible to identify a single animating purpose of seven million voters, and so the voters' decision must be upheld if it can be justified on any conceivable rational basis. *See Romer*, 517 U.S. at 631 (citing *Heller*, 509 U.S. at 319-20). In any event, even a cursory look at the campaign materials demonstrates that the ProtectMarriage.com campaign clearly articulated these purposes, not only in the official ballot argument, but in video and printed materials. *See, e.g.*, ER 1032 ("Proposition 8 protects marriage as an essential institution of society. While death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father."); *id*. (Proposition 8 "*restores the definition of marriage* to what the vast majority of California voters already approved and human history has understood marriage to be."); ER 2006 ("Marriage involves a complex web of social, legal, and spiritual commitments that bind men and women for one overriding societal purpose: to create a loving environment for the raising up of children."); ER 1036-37; ER 1039. Indeed, Plaintiffs concede that the argument "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." Pl. Br. 77. Further, because Proposition 8 preserves the traditional definition and form of marriage and thus provides special encouragement and support to those relationships that uniquely further the interests that marriage has always served, its purposes are evident "from its text, structure, and operation." *Nguyen v. INS*, 533 U.S. 53, 67-68 (2001).

A. Rational basis review is not limited to economic legislation.

Plaintiffs complain that the rational basis standard applicable here is the same as that "a court might apply to everyday economic legislation." Pl. Br. 3. But the Supreme Court has made clear that rational-basis review applies in "areas of *social and* economic policy" so long as the challenged law, like Proposition 8, "neither proceeds along suspect lines nor infringes fundamental constitutional rights." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *accord Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001); *Cleburne*, 473 U.S. at 440. Indeed, the Supreme Court has repeatedly applied rational-basis review beyond the context of laws that "adjust in nice gradations the economic benefits and burdens of life in American society." Pl. Br. 3. *See*, *e.g.*, *Glucksberg*, 521 U.S. at 728 (assisted suicide); *Romer*, 517 U.S. at 632 (Colorado's Amendment 2); *Heller*, 509 U.S. at 314, 319-21 ("involuntary civil commitments of those alleged to be mentally retarded"); *Cleburne*, 473 U.S. at 446-47 (discrimination against the mentally retarded); *Maher v. Roe*, 432 U.S. 464, 478 (1977) (abortion funding); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976) (discrimination against the aged).

B. Proposition 8 is closely related to California's vital interest in responsible procreation and childrearing.

We have demonstrated that a central—indeed animating—purpose of marriage, always and everywhere, has been to further society's compelling interest

in increasing the likelihood that children will be born to and raised in enduring and stable family units by the couples who brought them into the world. *See* Prop. Br. 54-60, 78. Because only sexual relationships between men and women can produce children, such relationships have the potential to further—or harm—this interest in a way that other types of relationships do not. *See id*. 77-87. As state and federal courts across the country have repeatedly recognized, it follows that the "commonsense distinction," *Heller v. Doe*, 509 U.S. 312, 326 (1993), that our law has always drawn between opposite-sex couples, on the one hand, and all other types of relationships—including same-sex couples—on the other hand, plainly bears a rational relationship to "the government interest in 'steering procreation into marriage.' " *Bruning*, 455 F.3d at 867; *see also* Prop. Br. 82-83, 91-93; States Br. 12-29.

Plaintiffs do not dispute that "traditional opposite-sex marriage" furthers this interest. Pl Br. 57; *accord id*. 23. Indeed, in the proceedings below they expressly conceded that " 'responsible procreation' may provide a rational basis for the State's recognition of marriages by individuals of the opposite-sex." ER 1785. Plaintiffs likewise have been forced to acknowledge the biological reality that same-sex relationships do not implicate this interest in the same way opposite-sex relationships do. As Plaintiffs' lead counsel conceded below, same-sex couples "don't present a threat of irresponsible procreation" but "heterosexual couples who

practice sexual behavior outside their marriage are a big threat to irresponsible procreation." ER355. These concessions—forced grudgingly out of Plaintiffs by undeniable biological facts—are the end of this case, for it is well settled both that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not," *Johnson*, 415 U.S. at 383, and, conversely, that the government may make special provision for a group if its activities "threaten legitimate interests … in a way that other [groups' activities] would not," *Cleburne*, 473 U.S. at 448; *see generally Vance*, 440 U.S. at 109 (law may "dr[aw] a line around those groups … thought most generally pertinent to its objective").

1. Without acknowledging the "host of judicial decisions" upholding the line drawn by the traditional definition of marriage on these essential grounds, *Bruning*, 455 F.3d at 867; *see also* Prop. Br. 91-92 (collecting cases), Plaintiffs claim that the rule set forth in *Johnson* and other cases is limited to circumstances where some line must be drawn to allocate scarce resources. *See* Pl. Br. 88. Leaving aside the obvious point that some lines must be, and always have been, drawn somewhere between those relationships that the State recognizes as marriages and those that it does not if the institution of marriage is to have any meaning at all, Plaintiffs are simply wrong that the rule is limited to cases involving scarce resources.

While *Johnson* upheld the Government's decision to provide educational benefits to active service veterans but not to conscientious objectors who provided alternative service outside the military, neither the Government nor the Court justified this decision on the ground of scarcity. Rather, the Court accepted the Government's argument that providing the benefits to veterans furthered interests that would not be served by providing the benefits to conscientious objectors. *See* 415 U.S. at 381-83. *Vance* upheld the Government's decision to establish a mandatory retirement age for foreign-service but not civil-service employees. Plainly no principle of scarcity prevented the Government from extending the mandatory retirement age to all employees, but the Court held that the line Congress drew between these two groups of employees was nonetheless justified because the interests served by mandatory retirement were in general more pertinent to foreign-service than to civil-service employees. *See* 440 U.S. at 106-09. And *Cleburne*—which struck down a municipal zoning law requiring special use permits for homes for mentally retarded individuals but not for other similar uses that implicated the city's legitimate interests in the same way—obviously did not turn on any sort of scarcity.

More generally, these cases simply reflect the broader principle that "where a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those

differences does not give rise to a constitutional violation," *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001)—a rule that indisputably applies generally without regard to resource scarcity. *See also, e.g.*, *Cleburne*, 473 U.S. at 441 (similar); *Vacco v. Quill*, 521 U.S. 793, 799 (1997) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."). Plaintiffs' contrary argument—that when the State recognizes opposite-sex marriages *because* they serve the State's procreative interests, it is constitutionally obliged to also recognize same-sex marriages even though they do not similarly further those interests—is a *non sequitur* that is not, of course, the law. To the contrary, by definition, a line drawn between those who most clearly implicate a government interest and those who do not cannot be said to "rest[ ] on grounds wholly irrelevant to the achievement of the State's objective," as it must to fail rational-basis review. *Heller*, 509 U.S. at 324.

Plaintiffs are thus simply wrong in contending that California's refusal to recognize same-sex relationships as marriages must itself further the State's interest in responsible procreation. *See* Pl. Br. 57. To be sure, these interests are, we submit, furthered by California's refusal to do so—as we have demonstrated, there are substantial reasons for concern that redefining marriage to include same-sex relationships would weaken that institution and harm the interests it has traditionally served. *See* Prop. Br. 93-104. But the relevant constitutional inquiry

is whether the distinction drawn by the traditional definition of marriage between opposite-sex couples and all other types of relationships bears "a rational relationship" to "some legitimate governmental purpose," *Heller*, 509 U.S. at 320, not, as Plaintiffs would in effect have it, whether that distinction is *necessary* to advance that purpose, *see, e.g.*, *Vance*, 440 U.S. at 102 n.20 (holding it "irrelevant … that other alternatives might achieve approximately the same results"). Indeed, even where heightened scrutiny applies, the Supreme Court has rejected the argument that a statutory distinction may be upheld only if it is necessary to achieve the government's purpose. *See Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981) (plurality) (rejecting argument that statutory rape statute punishing only males was "not *necessary* to deter teenage pregnancy because a gender-neutral statute, where both male and female would be subject to prosecution, would serve that goal equally well" as, *inter alia*, not reflecting "[t]he relevant inquiry").[22]

2. Plaintiffs also argue that the classification drawn by the traditional definition of marriage does not bear a rational relationship to the state's

[22] Contrary to Plaintiffs' contentions, see Pl. Br. 57-58, 89, *Romer* does not reflect a different rule. *Romer* struck down Amendment 2 not because its treatment of gays and lesbians was unnecessary to further the purposes served by "Colorado's antidiscrimination laws protecting other minority groups," Pl. Br. 58, but because the sweeping disparity of treatment it established between gay men and lesbians, on the one hand, and all other citizens, on the other hand, did not bear a reasonable relationship to any government purpose. *See* 517 U.S. at 633, 635.

indisputably legitimate—indeed compelling—interest in responsible procreation because opposite-sex couples who are unable or unwilling to procreate are permitted to marry. *See* Pl. Br. 89. But it is well settled that rational-basis review allows the State to draw bright lines, "rough accommodations," *Heller*, 509 U.S. at 321, and "commonsense distinction[s]," *id*. at 326, based on "generalization[s]," *id*., presumptions, *see Murgia*, 427 U.S. at 315, and "common-sense proposition[s]," *Vance*, 440 U.S. at 112. And "courts are compelled under rational-basis review to accept [such] generalizations," *Heller*, 509 U.S. at 321, presumptions, and propositions unless they hold true in "so few" circumstances "as to render [a line based upon them] wholly unrelated to the objective" of the law drawing that line, *Murgia*, 427 U.S. at 315-16; *see also Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) (upholding categorical rule that was based on an assumption that the legislature "might have concluded" was "often enough" true).

The presumption that sexual relationships between men and women can result in pregnancy and childbirth holds true for the vast majority of couples and is plainly sufficient to render rational, at least, the "commonsense distinction" the law has always drawn between opposite-sex couples, on the one hand, and same-sex couples, who are categorically incapable of natural procreation, on the other hand. Furthermore, as we have already demonstrated, any attempt to ensure a closer fit between marriage and society's interest in responsible procreation would be

burdensome, intolerably intrusive, and ultimately ineffective. *See* Prop. Br. 60-64. For all of these reasons, it is not surprising that courts have repeatedly rejected the argument that allowing opposite-sex couples who cannot, or do not intend to, have children to marry defeats the rational relationship between marriage and responsible procreation. *See id*. 61 n.28.

Indeed, as the district court recognized in *Adams v. Howerton*, because case-by-case inquiries into fertility are simply not a "real alternative" for achieving society's "compelling interest in encouraging and fostering procreation … and providing status and stability to the environment in which children are raised," allowing "legal marriage as between all couples of opposite sex" is "the least intrusive alternative available to protect the procreative relationship." 486 F. Supp. 2d 1119, 1124-25 (1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982). Accordingly, that court concluded that the traditional definition of marriage could survive even strict scrutiny. *Id*.; *see also Nguyen v. INS*, 533 U.S. 53, 69-70 (2001) (even where heightened scrutiny applies, courts have not "required that the statute under consideration must be capable of achieving its ultimate objective in every instance" and Congress may enact "an easily administered scheme" to avoid "the subjectivity, intrusiveness, and difficulties of proof" of "an inquiry into any particular bond or tie"). Similarly, applying heightened scrutiny in a closely analogous context, the Supreme Court rejected as "ludicrous" an argument that a

law criminalizing statutory rape for the purpose of preventing teenage pregnancies was "impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant." *Michael M.*, 450 U.S. at 475 (plurality); *see also id*. at 480 n.10 (Stewart, J., concurring) (rejecting argument that the statute was "overinclusive because it does not allow a defense that contraceptives were used, or that procreation was for some other reason impossible," because, *inter alia*, "a statute recognizing [such defenses] would encounter difficult if not impossible problems of proof"). For all of these reasons, society's undisputed and compelling interest in channeling procreation into marriage plainly suffices to sustain Proposition 8 against Plaintiffs' constitutional attack.

3. California's interest in responsible procreation and childrearing does not depend on any judgment about the relative parenting capabilities of opposite-sex and same-sex couples. *See* Prop. Br. 84-87. Plaintiffs' discussion of the same-sex parenting literature nonetheless confirms that the instinctive, commonsense belief that married biological parents provide the optimal environment for raising children is entirely rational. Plaintiffs fail to cite to a single study comparing outcomes for the children of married biological parents and those of same-sex parents. Thus, Plaintiffs have failed to undermine, let alone remove "from debate," the studies showing that married biological parents provide the best structure for

raising children. *See* Prop. Br. 78-82, 87; Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE CHILD 75, 89 (2005) (ER 371) ("Research clearly demonstrates that children growing up with two continuously married parents are less likely than other children to experience a wide range of cognitive, emotional, and social problems, not only during childhood, but also in adulthood…. This distinction is even stronger if we focus on children growing up with two happily married biological parents."); *see also* American College of Pediatricians Br. 4-16 ("ACP Br.").[23]

Plaintiffs respond that "[i]f one is studying the impact of parenting by same-sex couples, … the appropriate comparison group is unmarried heterosexual parents." Pl. Br. 86. But such studies would say nothing about whether the benefits of marriage would flow equally to children of gays and lesbians as they do to the children of married biological parents. And even if Plaintiffs framed the right question, the studies they trumpet fail to follow their own methodology: during cross-examination, their expert, Dr. Lamb, admitted that the studies he

[23] The weakness of Plaintiffs' position is underscored by their reliance on the deposition testimony of Dr. Paul Nathanson, Proponents' withdrawn expert on *comparative religion*, who expressly disclaimed expertise in fields relevant to the same-sex parenting literature. ER 1997-2000. In any event, Dr. Nathanson clearly expressed his view that it was in society's interest for children to be raised by their biological mothers and fathers. ER 2001-02.

relied upon drew no distinction between the children of married and unmarried heterosexual couples. ER 271.

As Professor Steven Nock of the University of Virginia has demonstrated, the same-sex parenting literature is a shell game, carefully constructed with two critical steps designed to ensure the desired results. *See* ER 596; *see also*, *e.g.*, ACP Br. 6-8. First, researchers start with the assumption that the children of heterosexuals and gays and lesbians have the same outcomes, a dubious assumption in light of the many studies showing that family structures with only one non-biological parent are suboptimal. *See, e.g.*, ER 362, 545.

Second, the studies use "miniscule" samples. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 168 n.9 (2001) (ER 1942, 1951). The small samples allow the many differences observed between the children of opposite-sex and same-sex couples to be dismissed as statistically insignificant, leaving the initial assumption undisturbed.[24] The 2010 meta-analysis trumpeted by Plaintiffs makes this very

[24] *See, e.g.*, Wainright, J., *Delinquency, Victimization, and Substance Use Among Adolescents With Famale Same-Sex Parents*, 20 JOURNAL OF FAMILY PSYCHOLOGY 526, 528 (2006) (ER 1897) (children of same-sex parents fared worse than the children of opposite sex parents including being more likely to have sex under the influence of alcohol or drugs and more likely to encounter problems related to alcohol); FIONA TASKER, GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT 127-33 (1997) (ER 1969-75) (finding children of lesbians more likely to engage in premarital promiscuous sex than children of opposite sex couples).

point: "some of the findings of no differences may miss real differences … because some studies use levels of significance that may be too restrictive for their very small samples." Judith Stacey & Timothy J. Biblarz, *How Does the Gender of Parents Matter?* JOURNAL OF MARRIAGE AND FAMILY 3, 8 (2010). And to make matters worse, the tiny samples are not randomly selected, and thus the meta-analysis cited by Plaintiffs acknowledges that "[t]his research remains disproportionately on White, middle-class families." *Id.* at 10.[25]

Plaintiffs respond that while past studies lacked representative samples "now there is a study based upon the most representative sample imaginable—the United States Census." Pl. Br. 87. But even this lone study itself concedes that "the census data are far from ideal for the subject under study here." SER 572. Further, this study did not purport to find broad similarities between children of same-sex and opposite-sex couples. Rather, it focused narrowly on grade retention—whether children were held back in school—and did not measure any other aspects of child adjustment. SER 577. The study noted "the unadjusted means show that own children of heterosexual married couples are significantly less likely to be left back in school than own children of same-sex couples." SER 588. It thus tells us

[25] Plaintiffs also cite five professional organizations' policy statements, but these pronouncements rest on the same inconclusive studies relied on by Plaintiffs here, and thus amount to little more than manifestos of prevailing orthodoxy, just as were prior unfavorable statements issued by these very organizations regarding homosexuality.

nothing that undermines the widely shared understanding that married biological parents provide the optimal environment for raising children.[26]

Plaintiffs cite Professor Norval Glenn as acknowledging that "[t]here *have* been dozens of studies of same-sex parenting." Pl. Br. 86 (quoting ER 447). But, Professor Glenn continues, "this body of research leaves open the question about the relative efficacy of same-sex and opposite-sex parenting." ER 447. He notes that "[t]he research that would provide relevant evidence has not been done, and … is not likely soon to be done." ER 448. Indeed, he fears the pertinent research will never be conducted

> due to the political struggle for same-sex marriage. Given the widespread support for same-sex marriage among social and behavioral scientists, it is becoming politically incorrect in academic circles even to suggest that arguments being used in support of same-sex marriage might be wrong. There already seems to be some reluctance on the part of researchers and scholars to address issues concerning fatherlessness and the relative merits of same-sex and opposite-sex parenting.

Id.

Plaintiffs claim that "[Proponents] offered no witness … and identified no

[26] Plaintiffs also claim that "whereas earlier opponents of same-sex parenting complained of the absence of 'long-term, longitudinal studies,' … now there are studies that have followed children from infancy into early adulthood." Pl. Br. 87. But the study cited by Plaintiffs as paradigmatic looked at a small sample, did not include gay fathers, and did not purport to compare same-sex parents to married biological parents. *See* SER 460, 468. Although not all of Plaintiffs' studies share the complete universe of flaws, the fact remains that none makes a relevant comparison with a robust random sample.

basis in social science" to support the proposition that children benefit from being raised by their married biological parents. Pl. Br. 83.[27] Not only have we cited authoritative studies making just this point, *see* Prop. Br. 78-81, 87, Plaintiffs' own studies acknowledge that "[s]tudies of family structure and children's outcomes nearly universally find at least a modest advantage for children raised by their married biological parents." *E.g.*, SER 568.

Finally, Plaintiffs claim that a "tide" of research shows that adopted children do just as well as children raised by their biological parents and thus demonstrates that the biological connection between children and parents is irrelevant. Pl. Br.

[27] Plaintiffs claim that after Proponents' withdrawn expert Professor Marks was shown that some studies he relied on included a small number of adopted children as biological children, "he offered to revise his opinion that married biological parents were the ideal family structure … by *deleting the word 'biological.'* " Pl. Br. 84. To the contrary, while Marks agreed that the word "biological" should be deleted with respect to some of the studies he cited, Marks Depo. at 147, 277-78, he characterized the assertion that the inclusion of adopted children in some of the studies invalidated his conclusions as "ridiculous." Marks Depo. at 185. (Marks Deposition excerpts are attached as Exhibit B.) Marks ultimately concluded that even with "marriage-based adoptive families as the wild card … there is a potent outcome difference when you combine biology and marriage." *Id.* at 169-70.

Plaintiffs' claim that Marks refused to endorse the proposition "that children benefit from having a parent of each gender," Pl. Br. 84-85, rests on a semantic game. Marks referred to himself as "agnostic" as to the theory of "gender-differentiated parenting," only because he considered gender to be "defined as cultural as opposed to sex, which would be more biologically driven." Marks Depo. at 203-04. He clearly articulated that children benefit from having parents with biologically different sexes, a mother and a father: "I don't think I make any specific arguments that argue a whole lot about the cultural construct of gender. I'm dealing with sex, a "biological father and biological mother." *Id.* at 203; *see also* ACP Br. 16-27.

83-84. Yet, as one of the very studies cited by Plaintiffs acknowledges, "many studies and several meta-analyses have shown that adopted children lag behind in physical growth, school performance, and language abilities; show more attachment and behavior problems; and are substantially overrepresented in mental health referrals and services for learning problems." SER 490. The study also recognizes that "adoptees have to cope with difficulties connected with the lack of *genetic relatedness* … to their adoptive parents." SER 491.

Further, adoptive parents must pass through a rigorous screening process and are therefore disproportionately likely to be "well educated" and to provide their "adopted children with an enriched and nurturing environment." SER 491. Thus, evidence that the children of *all* married, biological parents have similar outcomes to a tiny subclass of children raised by carefully screened adoptive parents does not refute, but *supports*, the idea that, *all things being equal*, the interests of children are best served when they are raised by their married, biological parents.

Plaintiffs, in short, have not come close to disproving the instinctive, deeply ingrained belief that, all else being equal, children are most likely to thrive when raised by the father and mother who brought them into this world. And Plaintiffs certainly have not shown this belief to be *irrational*.

C. Proposition 8 advances California's interest in proceeding with caution when considering a fundamental change to a vital social institution.

Our opening brief demonstrated why Californians reasonably may decide to await further results of nascent experiments with same-sex marriage in other jurisdictions before fundamentally redefining that bedrock institution. Prop. Br. 93-104. Plaintiffs say that our "failure of proof"—evinced by a lack of supporting affidavits or witness testimony discussing "data" and "studies"—means that this interest in proceeding with caution cannot be sustained. Pl. Br. 92-94. But it is Plaintiffs, not we, who bear the burden of proof. And the burden they bear is not merely to show by a preponderance of the evidence that concerns about the long-term societal impact of fundamentally redefining marriage are unwarranted, but to demonstrate conclusively that such concerns are not even "plausible," "reasonably conceivable," "debatable," or "arguable." *Heller*, 509 U.S. at 320, 326, 333. In other words, Plaintiffs must show that those who believe society should further study the issue before fundamentally redefining marriage are not just wrong, but *irrational*.

Plaintiffs cannot, of course, meet this heavy burden. They deride the idea that redefining marriage to include same-sex couples could have negative long-term consequences as simply a "theory," Pl. Br. 93, but due to the novelty of same-sex marriage, opinions about its potential effects—whether positive, negative, or

indifferent—are *necessarily* theoretical.

And while the future societal consequences of redefining marriage cannot yet be known with certainty, concerns about them are certainly *rational*. They are rooted principally in recognition of the fact that eliminating the necessary presence of a man and a woman from the legal definition of marriage decisively severs any inherent connection between that institution and societal interests in responsible procreation and childrearing, thus leading to the eminently reasonable concern that over time such a change would harm marriage's ability to serve these vital interests. Indeed, these concerns are shared by scores of scholars from all relevant disciplines, *see, e.g.*, WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD 18-19 (2006), recognized as reasonable by prominent supporters of same-sex marriage, *see, e.g.*, William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE CHILDREN 97, 110 (2005), and based in substantial part on the arguments made in *support* of same-sex marriage and their necessary implications, *see, e.g.*, DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 127-69 (2007) (ER 1800-1842.). *See generally* Nat'l Org. Marriage Br.

The feeble evidence Plaintiffs marshal against this precautionary interest does nothing to undercut its obvious rationality. Indeed, even the authors of the "seminal" 2009 study that Plaintiffs say "empirically tested" claims that redefining marriage could harm the institution of marriage, Pl. Br. 92, acknowledged that

"[w]e cannot say that we have disproved the existence of a link between laws permitting gay marriage and a negative impact on 'family values' indicators," and that "it may be too early to tell exactly what the effects of laws regulating same-sex marriage are at this point because the debates over gay marriage and its legal recognition and bans are in their infancy," SER 671.

Plaintiffs also point to testimony of various experts—Professors Cott, Peplau, and Badgett and Mr. Blankenhorn—that purportedly undermines this interest. Pl. Br. 17-18. But as we have shown, while Professors Cott and Peplau discussed short-run data from Massachusetts' still-infant experience with same-sex marriage, both disclaimed giving it much credence. *See* Prop. Br. 39-41. Professor Badgett's opinions are likewise based on short-run data from some of the tiny number of "States and countries where [same-sex marriage] has been permitted." *See* Pl. Br 17. But the limited empirical data available from the brief experience of a handful of jurisdictions that have redefined marriage does not begin to suffice to eliminate reasonable concerns about the societal impact of fundamentally redefining marriage.[28] And while Mr. Blankenhorn acknowledged

[28] Plaintiffs point to testimony from Professor Badgett asserting that post-same-sex marriage statistics from the Netherlands are in line with preexisting trends, but the evidence in the record shows that several preexisting negative trends were exacerbated following that Nation's redefinition of marriage. *See* Nat'l Org. Marriage Br. 28-29. This data, from the jurisdiction that has longest recognized same-sex relationships as marriages, provides little comfort to those who are concerned about the possible consequences of such a seismic change.

that heterosexuals have contributed to the weakening of marriage through the process of deinstitutionalization, he also opined that redefining marriage to include same-sex couples would "significantly further and in some respects culminate" that process. SER 282.

Plaintiffs also claim that the finite and limited number of same-sex marriages that took place in the wake of *In re Marriage Cases* and remain valid today have not weakened marriage in California. But there is no reason to expect that these few marriages performed just two years ago would produce any meaningful data on the consequences of redefining marriage to include same-sex couples. Much more salient is the action sparked by the court decision that led to those marriages—the enactment of Proposition 8, which reaffirmed the State's commitment to the traditional understanding of marriage as the union of a man and a woman.

D. Proposition 8's rationality is not undermined by its alleged effects on gays and lesbians and their children.

Throughout their brief, Plaintiffs assert that the traditional definition of marriage reaffirmed by Proposition 8 stigmatizes and harms gays and lesbians and deprives them and their children of the benefits of marriage. Indeed, Plaintiffs recklessly insinuate that the traditional definition of marriage is somehow responsible for suicides and hate crimes. *See* Pl. Br. 106-07. Such inflammatory claims are false, regrettable, and ultimately do not bear on Proposition 8's

rationality.[29]

1. Contrary to Plaintiffs' bald assertion, we do not agree that Proposition 8 sends a "discriminatory message" that gay and lesbian individuals are "inferior" and "not good enough," nor that the traditional definition of marriage "does profound and enduring stigmatic harm to gay men and lesbians—and their families." Pl. Br. 56. Society defines marriage as an opposite-sex relationship, not because such couples are virtuous or morally praiseworthy, but because of the unique potential such relationships have either to harm, or to further, society's interests in responsible procreation. That is why the fundamental right to marry has never been conditioned on an inquiry into the virtues and vices of individuals seeking to marry. Society cannot stop the immoral or irresponsible from engaging in potentially procreative sexual relationships and presumes that even such individuals are more likely to take care of the children that result from their sexual activity if they are married than if they are not.

Conversely, the fact that same-sex relationships are not recognized as marriages does not reflect a judgment by the State that individuals in such relationships are inferior or undeserving, but simply the fact that such relationships do not implicate society's interest in responsible procreation in the same way that

[29] San Francisco also claims that Proposition 8 costs it money. But California's Legislative Analyst authoritatively determined that over the long run Proposition 8 would "likely [have] little fiscal impact on state and local governments." ER 1030.

opposite-sex relationships do. It is simply not stigmatic for the law to treat different things differently. *See, e.g., Johnson*, 415 U.S. at 383.

Plaintiffs themselves brought this point into sharp focus below, unwittingly, with a hypothetical example of a reprobate opposite-sex couple who "can get married the morning after meeting each other at a night club," while an upstanding same-sex couple in an enduring, committed relationship cannot. ER 1796. But society plainly has a vital interest in encouraging the opposite-sex couple, if and when they do decide to have sexual relations, to marry and to commit themselves to take responsibility for raising any children produced by their union, whether intentionally or *unintentionally*, into responsible, productive citizens. These vital societal interests are plainly related to the uniquely procreative capacity of opposite-sex relationships, and it is plainly rational for the State to maintain a unique institution to serve these interests. *See* Prop. Br. 82-85.

2. There is simply no empirical basis for Plaintiffs' assertion that California's decision to adhere to the traditional definition of marriage leads to hate crimes against gays and lesbians or to suicides or any other type of adverse mental health outcome for these individuals. To the contrary, Plaintiffs' expert Professor Herek admitted at trial that there is no empirical support for the claim that there is a link between hate crimes against gays and lesbians and the traditional definition of marriage. ER 302. Indeed, according to authoritative FBI

statistics, the per capita rate of hate crimes based on sexual orientation is much lower in California than in Massachusetts, which has recognized same-sex relationships as marriages since 2004. *See* ER 1890. Similarly, Plaintiffs' expert Professor Meyer admitted that he is unaware of any empirical data suggesting that gays and lesbians suffer from worse mental health outcomes in California than they do in Massachusetts, the Netherlands, or any other jurisdiction that recognizes same-sex relationships as marriages. *See* ER 249-53.

3. As we have already demonstrated, California protects same-sex relationships and provides for the children of same-sex couples through the institution of domestic partnership, and there is no empirical evidence whatsoever that those children would obtain any incremental benefits above and beyond those available through domestic partnership if their same-sex parents were married. *See* Prop. Br. 85 n.45. While Plaintiffs trumpet Mr. Blankenhorn's statement that children raised by same-sex couples might benefit if their parents were permitted to marry, see Pl. Br. 51, they ignore his further statement that he believes essentially the same benefits "can be achieved through … domestic partnerships." ER 345.[30]

[30] Nor is there any merit in Plaintiffs' claim that, like antimiscegenation laws, the age-old definition of marriage is "at war" with its traditional purposes. Pl. Br. 50-51. Not only did the Supreme Court unanimously reject this analogy, *see Baker*, 409 U.S. 810, but relationships between men and women of different races are exactly the same as any other opposite-sex relationships in all respects

4. In all events, the voters were entitled to weigh any speculative potential benefits that might result from redefining marriage to include same-sex relationships against the risk that such a seismic change would weaken that bedrock institution and the vital interests it has traditionally served. *See* Prop. Br. 93-104; *supra* at 66-70. Indeed, "[b]y maintaining the traditional definition of marriage while simultaneously granting legal recognition and expanded rights to same-sex relationships, the [State] has struck a careful balance to satisfy the diverse needs and desires of Californians." *In re Marriage Cases*, 143 Cal. App. 4th 873, 935-36 (Cal. Ct. App. 2006), *rev'd*, 183 P.3d 384 (Cal. 2008). The Constitution simply does not "authorize the judiciary to sit as a super legislature" to second guess the wisdom or desirability" of the balance the people of California have struck. *Heller v. Doe*, 509 U.S. at 319; *see also, e.g.*, *Williamson*, 348 U.S. at 487 ("it is for the legislature, not the courts, to balance the advantages and disadvantages" of economic or social regulation); *Glucksberg*, 521 U.S. at 722 (unless "a challenged state action implicate[s] a fundamental right," there is no need for "complex balancing of competing interests"); *Board of Trustees of the Univ. of Ala.*, 531 U.S. at 357-58 (so long as its actions are rational, State may "quite hard headedly—and perhaps hardheartedly" refuse to accommodate

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relevant to the fundamental purposes of marriage. In particular, interracial opposite-sex relationships, just like any other such relationships, can in general produce children, often unintentionally, through even casual sexual behavior. The same is simply not true of same-sex relationships. *See* Prop. Br. 82-87.

competing interests). Accordingly, so long as the traditional definition of marriage is rationally related to a legitimate state interest, Plaintiffs' contentions regarding the alleged harms that definition inflicts are relevant only to democratic policy decisions, and can provide no basis for judicial invalidation of Proposition 8.[31]

VIII. NOTHING IN CALIFORNIA LAW NOR THE CIRCUMSTANCES SURROUNDING ITS ENACTMENT RENDERS PROPOSITION 8 UNCONSTITUTIONAL.

A. The circumstances that led to Proposition 8's enactment do not distinguish it from the laws of other states that protect the traditional definition of marriage.

1. Plaintiffs and San Francisco repeatedly characterize Proposition 8 as "stripping" gays and lesbians of their preexisting rights. As even the California Supreme Court recognized, however, "describ[ing] Proposition 8 as 'eliminating' or 'stripping' same-sex couples of a fundamental constitutional right … drastically overstates the effect of Proposition 8 on the fundamental state constitutional rights of same-sex couples." *Strauss*, 207 P.3d at 102. Such hyperbole also obscures the reality that for all but four-and-a-half months of California's 161-year existence, marriage has been defined as the union of a man and a woman. The California Supreme Court's decision in *In re Marriage Cases*, which briefly interrupted that practice, was overturned by the voters at the first possible opportunity. Indeed,

[31] Although San Francisco claims that *Plyler v. Doe*, 457 U.S. 202 (1982), permits this Court to find Proposition 8 irrational in light of the harms it allegedly inflicts, the Supreme Court has confined that anomalous decision to its facts. *See* Prop. Br. 34 n.12.

that decision was no more final than the earlier California Court of Appeal decision upholding the State's traditional definition of marriage: It was reviewed and overturned by a higher tribunal—the People themselves.

Further, the United States Constitution is simply not a one-way ratchet that forever binds a State to laws and policies that go beyond what the Fourteenth Amendment would otherwise require. Such a regime not only would be "destructive of a State's democratic processes and of its ability to experiment," but it would affirmatively "discourage[ ] the States from providing greater protection" to their citizens than the Fourteenth Amendment requires. *Crawford v. Board of Educ.*, 458 U.S. 527, 535, 539 (1982). "In short, having gone beyond the requirements of the Federal Constitution, [California] was free to return … to the standard prevailing generally throughout the United States." *Id*. at 542.

2. Plaintiffs' description of Proposition 8 as "stripping" gays and lesbians of a preexisting constitutional right is plainly a gambit to align this case with *Romer*. But the features of Colorado's Amendment 2 that led to its invalidation are simply not present here. Most importantly, Colorado's law, which "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect" gays and lesbians, simply lacked any "rational relationship to legitimate state interests," *Romer*, 517 U.S. at 624, 632, an infirmity that does not afflict Proposition 8.

Furthermore, unlike Amendment 2, Proposition 8 does not impose "a broad and undifferentiated disability" that inexplicably "denies … protection across the board," *id*. at 632-33, but rather acts with narrow precision, restoring the traditional definition of marriage while otherwise leaving undisturbed the manifold rights and protections California law provides gays and lesbians. *See Strauss v. Horton*, 207 P.3d at 102 (contrasting Proposition 8 and its "limited effect" with a law like Amendment 2 that "sweepingly … leaves [a minority] group vulnerable to public or private discrimination in *all* areas without legal recourse"). And far from being a "peculiar" or "exceptional" law "unprecedented in our jurisprudence," *Romer*, 517 U.S. at 632, 633, Proposition 8 simply restored to California law the definition of marriage as it has existed not only throughout California's history, but throughout the history of the civilized world.[32]

3. Nor is Proposition 8 part of an "arbitrary and contradictory patchwork of marriage regulations." Pl. Br. 58. As an initial matter, of the five categories of

[32] For similar reasons, Proposition 8 is also nothing like the California constitutional amendment struck down in *Reitman v. Mulkey*, 387 U.S. 369 (1967). That measure was enacted in reaction to laws prohibiting racial discrimination in housing, but it "struck more deeply and more widely" than "just repeal[ing] an existing law." *Id.* at 377, 380. By broadly establishing a "right to discriminate on racial grounds … immune from legislative, executive, or judicial regulation at any level of the state government," *id*. at 376, 377, its only conceivable purpose was impermissibly "authorizing the perpetuation of … private discrimination," *id.* at 375. In any event, the issue in *Reitman* was not whether the challenged law passed rational-basis review, but whether the State's facilitation of private racial discrimination constituted race discrimination by the State. *See id.* at 378.

couples Plaintiffs say California marriage law creates, three are present in every state that maintains the traditional definition of marriage: (1) unmarried opposite-sex couples, (2) married opposite-sex couples, and (3) unmarried same-sex couples.

Furthermore, there is nothing "arbitrary and contradictory" about the other two categories, which consist of same-sex couples legally married before the passage of Proposition 8 that California recognizes as married. Because the California Supreme Court refused to stay the effect of *In re Marriage Cases* until the people could vote on Proposition 8, *see In re Marriage Cases*, No. S147999, 2008 Cal. LEXIS 6807, at *1-2 (Cal. June 4, 2008), that court was promptly forced to decide whether Proposition 8 operated to invalidate the same-sex marriages that took place between *In re Marriage Cases* and Proposition 8's passage. In holding that Proposition 8 did not apply retroactively, the court acted to protect the vested rights of same-sex couples who had married in reliance on its earlier decision. *See Strauss*, 207 P.3d at 122. So-called "grandfather clauses" that preserve rights that were vested before a change in the law are common and constitutionally unremarkable. Even where heightened scrutiny applies, the Constitution "does not require that a regulatory regime singlemindedly pursue one objective to the exclusion of all others," *Coyote Publishing, Inc. v. Miller*, 598 F.3d 592, 610 (9th Cir. 2010), and the fact that California has struck a "balance" between the interests

served by the traditional definition of marriage and other "important but competing state interests" does not render its interest in preserving the traditional definition of marriage "any less substantial" than if it had struck a different balance, *id.* at 606.

The California Legislature has now purported to extend this rationale to the finite and limited pool of same-sex couples who were legally married outside of California before Proposition 8 was adopted and who subsequently move to California. *See* CAL. FAM. CODE § 308(b). To the extent this statute can be squared with Proposition 8, *see Strauss*, 207 P.3d at 122 n.48 (declining to reach the question), it would be for similar reasons as preserving the pre-Proposition 8 California same-sex marriages. To the extent it cannot be squared with Proposition 8, the statute was simply beyond the power of California's Legislature to enact. Either way, it can provide no basis for invalidating Proposition 8.

4. These features of California marriage law ultimately have their roots in the *In re Marriage Cases* decision. That short-lived decision simply cannot be taken to place the traditional definition of marriage in California on shakier constitutional footing than in states that have never recognized same-sex relationships as marriages, for "the Fourteenth Amendment [does not] require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Crawford*, 458 U.S. at 540. If it was rational for California to adhere to the traditional definition

of marriage for the first 159 *years* of its existence, it was equally rational for California to *restore* that definition after a 143-*day* hiatus by enacting Proposition 8.

B. Proposition 8 is not irrational in light of other California laws.

California, like other States, has vital interests in encouraging men and women in potentially procreative relationships to form stable and lasting bonds for the purpose of bearing and raising any offspring that may result from their union. And many Californians, like others, have legitimate concerns about the consequences of abandoning the age-old definition of marriage in favor of a new and all-but-untested one that decisively severs the institution's inherent connection to responsible procreation and childrearing. These interests, rooted in indisputable biological and historical fact, are not undermined by any other provision of California law.

1. Certainly these interests are not undermined by California's decision to provide same-sex couples with essentially the same rights and responsibilities of marriage through domestic partnerships, *see* CAL. FAM. CODE § 297.5, while preserving the denomination of marriage, and the encouragement and support it provides, to those relationships—committed opposite-sex couples—most likely to further the interests marriage has traditionally served. Although Plaintiffs claim that domestic partnerships "stigmatize" gays and lesbians by branding their

relationships "with a mark of inferiority," Pl. Br. 53-54, it is simply not stigmatic to treat different things differently. *See supra* at 70-73. Further, Plaintiffs' claim is belied by the fact that California's domestic partnership legislation was authored, sponsored, supported, and hailed by leading advocates of gay and lesbian rights.[33] And when an alternative status such as domestic partnerships is in place, many gays and lesbians choose that alternative even when marriage is also available. *See, e.g.*, ER 1880 (many Californians entered domestic partnerships during months in 2008 when same-sex relationships could be recognized as marriages); ER 1879 (almost 30% of same-sex couples in the Netherlands enter registered partnerships rather than have their relationships recognized as marriages). Indeed, research by Plaintiffs' expert Professor Herek shows that more self-identified gays, lesbians, and bisexuals support civil unions or domestic partnerships than support redefining marriage to include same-sex relationships. ER1166 (finding that 89.1% support civil unions, while 77.9% support redefining marriage). Some gay and lesbian rights advocates prefer an alternative institution over redefining marriage in light of the biological, historical, and cultural

[33] The California legislation that extended the rights and benefits of marriage to domestic partners was authored by members of California's Gay and Lesbian Legislative Caucus and sponsored by Equality California. *See* ER 1875. Upon its enactment, Equality California's Executive Director stated that "[w]e are overjoyed by the historic passage of this critical civil-rights bill for same-sex couples and their families," and he thanked "each of the legislators who stood up for civil rights by voting for this bill." ER1876.

differences between heterosexual and homosexual relationships. *See, e.g.*, ER 1859 ("Larger gains with respect to dignity very likely might be had with the development of a body of family law which is for and by gay and lesbian people. A version of civil unions or domestic partnership may very likely be the way to go then."). And, as Professor Badgett has acknowledged, some gay rights advocates fear that redefining marriage to include same-sex couples could "marginalize and stigmatize some families" by "creating a hierarchy of relationships within the GLBT community." ER 1920.

For all these reasons, California's maintenance of domestic partnerships for same-sex couples bears no resemblance to the "separate-and-inherently-unequal" system of racially segregated education struck down in *Brown v. Board of Education*, 347 U.S. 483 (1954). Pl. Br. 53-54. As even Attorney General Brown argued: "Such hyperbole ignores inconvenient historical facts. Domestic partnerships and civil unions, unlike Jim Crow laws, were not conceived by a majority group for the purpose of oppressing a minority group. Rather, they were sponsored by gay and lesbian rights groups." Answer Brief of Attorney General and State of California, *In re Marriage Cases* at 46 (Cal. June 14, 2007) (ER 1789). Nor did Jim Crow laws, unlike the traditional definition of marriage, advance interests wholly independent from invidious discrimination.

In sum, California has gone far beyond any legal requirement, and far

beyond the practice of almost every other state, in affording gays and lesbians legal protections, including virtually all the rights, benefits, and privileges of marriage. It is simply specious to argue that by doing so the State has put the traditional definition of marriage on *weaker* constitutional footing than in those states that have done *nothing* to recognize same-sex relationships.

2. Plaintiffs and San Francisco maintain that by enacting other laws regulating parenting and childrearing, California has disclaimed the procreative interests traditionally served by marriage. Those interests, however, reflect biological and historical realities that simply cannot be erased by judicial or legislative fiat. Furthermore, Plaintiffs and San Francisco ignore the most pertinent statement of policy related to these issues in California law—Proposition 8 itself. Indeed, the people of California could not have more forcefully underscored the "state's current interest … in preserving the traditional definition of marriage" than "by having [it] enshrined in the state Constitution." *Strauss*, 207 P.3d at 122. Proposition 8 thus indisputably confirms California's abiding interest in the traditional institution of marriage and the purposes it has universally served. What is more, California law plainly recognizes irresponsible procreation and fatherlessness as pressing social problems. *See* Prop. Br. 80 n.41. Against this backdrop, it is untenable to claim that California has somehow rejected the interests served by the traditional definition of marriage.

Indeed, Plaintiffs' and San Francisco's conception of what it would take for California rationally to maintain the traditional opposite-sex definition of marriage surely could not be met by any family law system that has ever existed. They apparently would require, among other things, that California: forbid "the old [and] the infertile" from marrying, Pl. Br. 89; limit marriage to couples with an "intent" to have children, SF Br. 11; reserve "parental status" to married couples, SF Br. 11; and completely prohibit "gay men and lesbians [from] rais[ing] children," Pl. Br. 80. It is absurd to suggest that the Constitution would look more favorably on such a draconian and implausible regime.

In the final analysis, Plaintiffs and San Francisco would permit this Court to credit the traditional procreative purposes of marriage only if California single-mindedly pursued them in all areas of her law, while at the same time failing to make any provision whatsoever to accommodate the interests implicated by the practical realities that gays and lesbians form relationships, that some gays and lesbians raise children, that some children will be born outside of marriage, and that some marriages end due to death or divorce or otherwise do not suffice to care for children. This is plainly not the law, *see Coyote*, 598 F.3d at 610, and such rigidity is particularly inappropriate when the Court is employing the "paradigm of judicial restraint" applicable here. *FCC v. Beach Commc'ns*, 508 U.S. at 314. Simply put, neither the fact that California could do more to promote responsible

procreation and childrearing through the institution of marriage nor the fact that California has enacted other laws to help ensure the welfare of all of its children in anyway suggests that the institution of marriage in California no longer plays a meaningful role in furthering the compelling interests it has always served.

C. The campaign to pass Proposition 8 does not undermine its constitutionality.

1. Plaintiffs argue that (i) the district court was correct in "finding" that the motivation of seven million voters in supporting Proposition 8 was animus towards gays and lesbians, and (ii) that snippets from a handful of public messages among the cacophony of voices debating Proposition 8 constituted a proper and sufficient basis from which to deduce this motive. To build their case, Plaintiffs first quote *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 862 (2005), for the proposition that to discern the purpose of an enactment courts engage in an objective inquiry that can take account of "the traditional external signs that show up in the 'text, legislative history, and implementation of the statute.' " Of course, the snippets of advertisements cited by the district court are none of these things, so Plaintiffs leap beyond *McCreary* to argue that these snippets are part of the " 'historical context' " from which a court may discover collective intent. Pl. Br. 99. Remarkably, Plaintiffs cite *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970) ("*SASSO*"), for this proposition. *SASSO*, however, expressly rejected the notion that "the question of motivation for

[a] referendum (apart from a consideration of its effect) is an appropriate one for judicial inquiry." *Id* at 295.

When considering constitutional challenges to referenda, the Supreme Court has likewise *never* relied on the subjective motivations of referenda sponsors or voters. Instead, the Court looks to text and effects. *See Hunter v. Erickson*, 393 U.S. 385 (1969); *James v. Valtierra*, 402 U.S. 137 (1971); *Crawford v. Board of Educ.*, 458 U.S. at 543-45 (characterizing "claim of discriminatory intent on the part of millions of voters as but 'pure speculation' " and refusing to "impugn the motives of the State's electorate"); *Romer v. Evans*, 517 U.S. 620 (1996). As the Sixth Circuit has correctly recognized, the Supreme Court's referendum cases thus make clear that a reviewing court "may not even inquire into the electorate's possible actual motivations for adopting a measure via initiative or referendum." *Equality Found. of Greater Cincinnati v. Cincinnati*, 128 F.3d at 293 n.4; *see also Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986).

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982), is not to the contrary. There the Court examined the text of the statute and its effect and—as in every other referendum case finding an unconstitutional purpose—ascribed a discriminatory purpose to the electorate *only* by concluding that the *effects* of the

law precluded any other purpose. 458 U.S. at 471.[34]

2. Like the district court, Plaintiffs, San Francisco, and their amici selectively quote from a mere handful of the cacophony of messages that were before the voters in the hard fought Proposition 8 campaign in a vain attempt to paint the initiative as driven by animus and bigotry. When understood in context, however, even these cherry-picked messages for the most part reflect valid reasons for supporting the traditional definition of marriage.

Like the district court, Plaintiffs and San Francisco highlight statements expressing the view that marriage protects children and parental concerns about what their young children will be taught about marriage. But as we have already explained, neither message is in any way sinister or improper. *See* Prop. Br. 108-09.[35]

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[34] In *confirming* this conclusion, the Court did state that "[n]either the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature" of the challenged initiative. *Id.* Significantly, however, the Court of Appeals (this Court) "f[ound] it unnecessary" to address whether the law "was motivated by a discriminatory purpose," *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338, 1342 (9th Cir. 1980), and thus cannot be said to have looked to *any* evidence of such purpose.

[35] Plaintiffs claim that the education-based argument was "highly misleading." Pl. Br. 101 n.26. But they cannot deny that: (1) California law requires school districts that provide comprehensive sexual health education to "teach respect for marriage," CAL. EDUC. CODE § 51933(b)(7); (2) following Massachusetts' redefinition of marriage second graders in that State were read a book celebrating same-sex marriage without prior parental notification, *see Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008); and (3) while same-sex marriage was legal in California, a class of first grade public school students was taken on a field trip

Other statements trumpeted by Plaintiffs and San Francisco reflect other legitimate concerns. San Francisco, for example, makes much of a snippet from an official campaign document stating that a vote against Proposition 8 would destroy "the sanctity of marriage." *See* SF Br. 22 (quoting ER 1036). Read in context, however, the statement was simply part of an argument that redefining marriage would deinstitutionalize marriage:

> If Proposition 8 is defeated, the sanctity of marriage will be destroyed and its powerful influence on the betterment of society will be lost. The defeat of Prop. 8 would result in the very meaning of marriage being transformed into nothing more than a contractual relationship between adults. No longer will the interests of children and families even be a consideration. We will no longer celebrate marriage as a union of husband and wife, but rather a relationship between 'Party A' and 'Party B.'

ER 1036.[36]

Though often inartfully or unpersuasively expressed, most of the other highlighted messages likewise reflect legitimate views about the potential widespread impact of redefining marriage, the importance of both a mother and a

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to San Francisco's City Hall to celebrate their teacher's same-sex wedding, *see* ER 2005. These facts are surely sufficient to give a reasonable parent grounds for concern about how same-sex marriage might be taught to young children.

[36] A similar example is the simulcast statement of a Princeton University lecturer cited by both Plaintiffs and San Francisco. *See* Pl. Br. 100 & SF Br. 21 (citing SER 552-53). The statement was part of a broader discussion explaining that a primary purpose of marriage is to bind mothers and fathers to their children. And the problem with affirming same-sex marriage, that discussion makes clear, is that legally redefining marriage to do so sends a message that "kids are not entitled to a … relationship with their genetic parents." SER 552.

father to a child's development, and the potential for redefining marriage to include same-sex couples to start society down an undesirable slippery slope.[37]

3. We do not deny that some extreme statements reflecting bigotry were made on *both* sides of the hard-fought Proposition 8 debate, as is perhaps inevitable whenever divisive issues implicate individuals' most deeply held values and beliefs. *See, e.g.*, ER 2007 (anti-Proposition 8 advertisement reflecting anti-Mormon bigotry). But while "negative attitudes" may often accompany unconstitutional laws, "their presence alone does not a constitutional violation make." *Board of Trustees v. Garrett*, 531 U.S. at 367. Indeed, so long as a law is rationally related to a legitimate state interest, such attitudes are not constitutionally fatal. *See id.*; *see also Michael M. v. Superior Court*, 450 U.S. at 472 n.7 (plurality).

In particular, though Plaintiffs place great emphasis on certain bigoted and uninformed statements made by Dr. Hak-Shing William Tam, there is no more basis to impute such homophobic views to the more than seven million

[37] In addition, many of the materials cited were not part of the official ProtectMarriage.com Yes on 8 campaign, and some may have never been made public at all. One of the items Plaintiffs cite, for example, is a document—plainly a draft—attached to an email sent to ProtectMarriage.com chairman Ron Prentice from an individual affiliated with a different organization. *See* SER 615-27; Pl. Br. 103 (citing SER 622). In a declaration filed with the district court, Mr. Prentice explained that "neither I nor ProtectMarriage.com is aware of what version, if any, of this document [was] ultimately published, and neither I nor Protect Marriage ever provided any edits or response to this email." ER1774.

Californians who supported Proposition 8 than there would be to impute the anti-religious bigotry of a small number of Proposition 8 opponents to the millions of Californians who voted against Proposition 8. Certainly, nothing in the evidence suggests that extremist views were held by more than a small sliver of the electorate on either side of the Proposition 8 debate.

Indeed, the evidence affirmatively undercuts the notion that Dr. Tam's views could have influenced the election in any meaningful way. According to his uncontroverted testimony, he had no involvement in formulating the official ProtectMarriage.com campaign's strategy or messaging, ER 1715, and he did not share his discriminatory viewpoints on homosexuality with anyone from ProtectMarriage.com at any time during the campaign, ER 1714. Dr. Tam's negligible influence on the campaign is well illustrated by the very "campaign material" Plaintiffs cite—a letter containing offensive, inflammatory rhetoric that they claim Dr. Tam "posted … on his website." Pl. Br. 101-02 (citing SER 349). In reality, Dr. Tam testified that he sent the letter to approximately 100 people and that he did not even know that a recipient had posted it on the internet. *See* ER 1712-13. Furthermore, the letter appears not to have been posted *until after the campaign was over*. *See* SER 349 (showing "last updated" date of September 4,

2009).[38] Even farther afield are the personal views Dr. Tam expressed *during his trial testimony*, which could not possibly have affected the Proposition 8 campaign. *See* Pl. Br. 100.

* * *

In the end, it appears that Plaintiffs themselves are unconvinced by their claim that Proposition 8 was motivated by a "desire to relegate gay men and lesbians to second class status," or even that voter motivation is relevant: Like their witnesses, *see* Prop. Br. 107 n.56, Plaintiffs concede that "[t]here are many reasons why someone might be opposed to marriage between individuals of the same sex," but they argue that Proposition 8 is nonetheless unconstitutional "*whatever* the reason that voters supported" it because it "embodies an irrational and discriminatory classification that denies gay men and lesbians the fundamental right to marry enjoyed by all other citizens." Pl. Br. 104-05. Plaintiffs, in other words, apparently recognize that Proposition 8's constitutionality turns not on voter motivation but rather on whether or not it is rationally related to a legitimate state interest. If that is Plaintiffs' position, they are right—and because Proposition 8 advances legitimate, indeed compelling, state interests, this Court is bound to

[38] Plaintiffs and San Francisco also cite other documents apparently posted on Dr. Tam's personal website. That website, however, consists largely of articles written in Chinese and had been visited only about 1600 times as of *2010*. *See* ER 1983-84, 1989-90; ER 2003. It could not have played any meaningful role whatsoever in shaping the views of the more than seven million individuals who voted for Proposition 8.

uphold it. For as the Supreme Court has explained, regardless of what "reasoning in fact underlay the legislative decision," so long as "there are plausible reasons" supporting the legislation, judicial "inquiry is at an end." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

CONCLUSION

For these reasons, the district court's ruling should be reversed.

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Respectfully submitted,

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