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ELECTRONICALLY FILED

Ms. Molly C. Dwyer
Clerk of Court
United States Court of Appeals
for the Ninth Circuit
James R. Browning U.S. Courthouse
95 Seventh Street
San Francisco, CA 94119-3939

Re: *Perry v. Brown*, 10-16696 (Reinhardt, Hawkins, N.R. Smith)
(argued December 6, 2010)

Dear Ms. Dwyer,

I write on behalf of Appellants in response to the September 9, 2011 Fed. R. App. P. 28(j) letter filed by Appellees. That letter brings to this Court's attention the recent decision in *Diaz v. Brewer*, No. 10-16797 (9th Cir. Sept. 6, 2011), a copy of which is attached to Appellees' letter.

In *Diaz*, a panel of this Court affirmed "the district court's order granting a preliminary injunction to prevent a state law from taking effect that would have terminated eligibility for health-care benefits of state employees' same-sex partners." Slip. op. at 16900. That decision did not, however, address the constitutionality of the traditional definition of marriage as the union of a man and a woman, let alone call into question the unanimous body of appellate decisions rejecting due process and equal protection challenges to this definition under the Federal Constitution. *See, e.g., Baker v. Nelson*, 409 U.S. 810 (1972); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

Furthermore, California law, unlike the law preliminarily enjoined in *Diaz*, provides same-sex domestic partners "the same rights, protections, and benefits" afforded married spouses. Cal. Fam. Code § 297.5.

Finally, although the Court in *Diaz* did reject Arizona's contention that the law at issue there was "rationally related to the state's interests in cost savings and reducing administrative burdens," Slip. op. at 16908, it did not address, let alone reject, the compelling interests urged by Appellants in support of Proposition 8 here, including promoting responsible procreation and childrearing and proceeding with caution when considering fundamental changes to a vitally important social institution.[1]

For all of these reasons, the decision in *Diaz* has little bearing on this case.

Respectfully submitted,

s/ Charles J. Cooper

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Counsel for Defendant-Intervenors-Appellants Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com

cc: All Counsel

[1] The Court in *Diaz* also stated in passing that "[t]he district court properly concluded that the denial of benefits to same-sex domestic partners cannot promote marriage, since such partners are ineligible to marry." Slip. op. 16908-09. Appellants have never sought to justify Proposition 8 on the ground that it would encourage gay or lesbian individuals to marry.