No. 10-16696

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

BRIEF *AMICUS CURIAE* OF NATIONAL LEGAL FOUNDATION,

in Support of Defendant-Intervenors-Appellants
Urging Reversal

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Amicus Curiae, The National Legal Foundation has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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INTEREST OF *AMICUS CURIAE*

Amicus is a public interest law firm, litigating issues related to our citizens' constitutional rights—including the marriage issue before this Court. Of particular relevance here, *Amicus's* attorneys served as trial and appellate counsel for defendant-intervenor in *Equality Foundation v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) (and in all subsequent proceedings in the case). That case involved a city charter amendment in Cincinnati, Ohio, that guaranteed homosexuals equal rights, but denied them special rights regarding claims of discrimination. During that litigation, *Amicus* was involved in the appeal of the district court opinion that purported to find many "facts," which the court used to strike down the amendment. However, the court's "facts" were in reality "ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support 'constitutional facts' ...." *Id.* at 265. On appeal, the Sixth Circuit recognized the purported "facts" for what they really were, held them to a *de novo* standard of review, rejected them, and reversed the district court. *Amicus's* experience and expertise with this issue cause it to be greatly interested in addressing the same mistake made by the district court in the instant case and in arguing why the district court's "facts" are subject to *de novo* review by this Court.

In addition, *Amicus's* constituents, including those in California, have a great

interest in the outcome of this Court's decision. They seek to preserve the traditional definition of marriage, believing that it is the bedrock of society.

This Brief is filed pursuant to consent of all parties.

SUMMARY OF ARGUMENT

This Brief builds upon an argument made by the Defendant-Intervenors-Appellants: that the district court's findings of "fact" and credibility determinations are subject to *de novo* review. Defendant-Intervenors-Appellants argue that most of the district court's purported findings of fact are legislative facts. This Brief explains that these facts are also "ultimate facts," mixed questions of law and fact, "constitutional facts," or sociological judgments, all of which merit *de novo* review. This brief also highlights obvious flaws in the district court's credibility determinations of specific experts.

ARGUMENT

In its opinion, the court below made eighty findings of "fact." If those had been ordinary factual determinations, this Court would review them under a clearly erroneous standard. Fed. R. Civ. Proc. 52(a). But "ultimate facts," that is, factual findings that implicate an application of law or that "involve the very basis on which judgment of fallible evidence is to be made," are subject to *de novo* review by this Court. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 500-01 n.16 (1984).

I. MANY OF THE FACTS AT ISSUE IN THIS CASE ARE "ULTIMATE" FACTS THAT TRANSCEND ORDINARY FINDINGS OF FACT, AS DESCRIBED BY THE SUPREME COURT, AND ARE THEREFORE SUBJECT TO *DE NOVO* REVIEW BY THIS COURT.

In *Baumgartner v. United States,* 322 U.S. 665 (1944), the Supreme Court described what it meant by the term "ultimate" facts:

> Finding so-called ultimate "facts" more clearly implies the application of standards of law. And so the "finding of fact" even if made by two courts may go beyond the determination that should not be set aside here. Though labeled "finding of fact," it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court. *Particularly is this so where a decision here for review cannot escape broadly social judgments*—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.

322 U.S. 665, 671 (1944) (citations omitted) (emphasis added). Here, many of the district court's findings of fact are "ultimate facts," forming the basis on which judgment is made—particularly in the case of the many "facts" that reflect broad social judgments.

The Supreme Court continued its discussion in *Baumgartner* by describing the proper level of review for "ultimate" facts:

> Deference properly due to the findings of a lower court does not preclude the review here of such judgments [of ultimate fact]. This recognized scope of appellate review is usually differentiated from review of ordinary questions of fact by being called review of a question of law, but that is often not an illuminating test and is never self-executing.

Id. Accordingly, *de novo* review of ultimate facts is well-settled law.

Federal Rule of Civil Proceure 52(a), which also informs this Court about the standard of review, also allows *de novo* review for ultimate facts. Although Rule 52(a) applies to both ordinary and ultimate facts, the Rule "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law or fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose*, 466 U.S. at 501. The *Bose* Court explained the "vexing nature" of distinguishing "law from fact."

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.

Id. at 501 n.17. While the distinction may have been vexing in *Bose*, in this case it is entirely clear. Many of the "facts" presented to this Court intertwine fact, opinion, and the social judgments of the trier of fact, and are ultimately "inseparable from the principles through which [they were] deduced." *Id.* Many facts here cross a clear line between ordinary facts and ultimate facts. And as the Supreme Court stated in *Bose*, it is especially important that a single trier of fact

not be entrusted to derive such legal facts when the stakes are high. Surely when the factual findings of the court below impact the democratic process itself, *de novo* review is merited.

In another case involving the putative rights of homosexuals, *Equality Foundation v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995),[1] the district court wrapped its own social judgments in the shroud of "fact," only to have those facts rejected by the Court of Appeals. That case involved a city charter amendment in Cincinnati, Ohio, that guaranteed homosexuals equal rights, but denied them special rights regarding claims of discrimination. The Sixth Circuit undertook a plenary review of ultimate facts that closely resemble many of the "facts" found by the court below:

> Because most, if not all, of the lower court's findings in the instant case constituted ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support "constitutional facts" (to wit, the existence of a "quasi-suspect" class, or of a fundamental right ... they are subject to plenary review.

Id. at 265. After *de novo* review, the Sixth Circuit reversed the district court's factual findings, which supported erroneous legal conclusions, including one that homosexuals constituted a quasi-suspect class. In the instant case, the factual

[1] This opinion was vacated by 518 U.S. 1001 (1996) and the case was remanded for reconsideration in light of the then-newly minted *Romer v. Evans*, 517 U.S. 620 (1996). On remand, the Sixth Circuit reaffirmed its reversal of the district court and paid no heed to the purported "findings of fact." *Equality Foundation v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

findings of the court below are remarkably similar to the *Equality Foundation* facts that were reversed under *de novo* review.

This Court's precedent also reinforces the need for *de novo* review of many of the factual findings in this case. This Court has explained that "[c]onstitutional facts are facts ... that determine the core issue of whether the [right at issue] is protected [by the Constitution]." *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002). Even when the verdict appears to be supported by substantial evidence, this Court "then conduct[s] an independent review of the record to determine whether the facts as found by the [trier of fact] establish the core constitutional fact ...." *Id.* In other words, "[i]n conducting [its] review, it is not enough for [this Court] to determine that a reasonable [trier of fact] *could have found* for the plaintiff ...." *Eastwood v. Nat'l Enquirer*, 123 F.3d 1249, 1252 (9th Cir. 2002) (emphasis added). "Rather, ... 'questions of "constitutional fact" compel [this Court to conduct a] *de novo* review.' *[The Court itself] must be convinced* ...." *Id.* (citations omitted) (emphasis added).[2]

[2] Although the cases cited here—because they best describe the principles—are First Amendment cases, the doctrine of constitutional facts is not limited to the First Amendment context. *See, e.g.*, *Turner v. Arkansas*, 407 U.S. 366, 368 (U.S. 1972); *United States v. Stewart*, 420 F.3d 1007 (9th Cir. 2005).

II. OVER AND OVER AGAIN, THE COURT BELOW INCORRECTLY ASSESSED "ULTIMATE" FACTS THAT ENTAIL THE APPLICATION OF LAW AND SOCIOLOGICAL JUDGMENTS THAT TRANSCEND ORDINARY FACTUAL DETERMINATIONS.

A. Some of the "facts" merit de novo *review because they are actually sociological judgments.*

Many of the facts that this Court should review *de novo* reflect sociological judgments, and are not true "facts" that can be conclusively proven. For example, **Finding of Fact 33**, which states that the elimination of a male-female requirement from marriage does "not deprive[] the institution of marriage of its vitality," *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 960 (N.D. Cal. 2010), vividly illustrates a sociological judgment. Many would say that the definition of what is vital to the institution of marriage was the core question that was presented to California's voters in Proposition 8. If so, 7,001,084 Californians made a different sociological judgment than the court below. California Secretary of State, 2008 State Ballot Measures 62, *available at* http://www.sos.ca.gov/elections/sov/2008_general/57_65_ballot_measures.pdf.

In reviewing Finding of Fact 33, this Court should consider that the "evidence" cited in support do not actually relate to the question of opposite sex pairings. Instead, the court below relied on prior changes in marriage laws that provided wives with property rights. Few, if any, in today's society would argue that the ability for a wife to hold property in her own name affects the vitality of

marriage. Similarly, the court below essentially compared race to gender in support of Finding of Fact 33. But while many accurate comparisons might be made between race and gender, in the case of marriage there is no sociological agreement that a marriage between a Caucasian man and an African-American woman is essentially the same as a "marriage" between a Caucasian man and an African-American man. Plainly stated, there is no support in the record for any factual finding regarding the effect on the vitality of marriage if Plaintiffs-Appellees are granted the definition they desire.

Finding of Fact 34, that "marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents," also reflects a sociological judgment—the meaning of marriage. 704 F. Supp. 2d at 961. The court below cited testimony from Plaintiffs-Appellees' expert Cott as its sole support for this "fact." While it is possible that some might marry because they seek the state's approval of their choice of a spouse, many would disagree. Many more would question why, if this is the meaning of marriage, they cannot marry at any age, regardless of the degree of their family relationship, and even to multiple people. This definition of marriage effectively reduces marriage to a state licensing of approved friendships. Since many would dispute that Finding of Fact

34 captures the meaning of marriage, it cannot plausibly be a "fact."

Finding of Fact 47 ("California has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California," *id.* at 967), which has questionable relevance to the issue before this Court, also reflects a sociological judgment. Proposition 8 does not mandate a change in sexual orientation, nor does it reflect any apparent intention to reduce the number of gays and lesbians in California. Regardless, any finding concerning the possible interest California might have in such a policy is necessarily influenced by the fact-finder's own perception of the social values that any exclusion of gays and lesbians might advance.

Finding of Fact 48 (asserting that same-sex couples possess identical characteristics as opposite-sex couples in all respects "relevant to the ability to form successful marital unions," *id.* at 967) reflects the fact-finder's sociological judgment of what constitutes a "successful marital union." *Id*. Just as the answer to the question of what comprises a successful career is heavily influenced by the responder's own definition of a "career," the ingredients of a successful marriage can only be listed after defining marriage. And just as Finding of Fact 33 reflects a sociological judgment regarding what gives marriage its vitality, Finding of Fact 48 also reflects the crucial sociological judgment of what marriage means to the fact-finder. Certainly, many will agree that a deep emotional bond and strong

commitment are components of a successful marriage. But many others might also include other critical factors. With no societal agreement on what the ingredients of a successful marriage are, the court below relied on its own sociological judgment and compared only its own list of success factors in the context of heterosexual and same-sex relationships. A comparison of other critical factors may alter this factual finding.

In the same vein, **Finding of Fact 50** ("same-sex couples receive the same tangible and intangible benefits from marriage that opposite-sex couples receive," *id.* at 969) inherently relies on a sociological judgment of what the "tangible and intangible benefits" of marriage are. Once again, individual perceptions of the benefits of marriage differ widely throughout our society. As a result, any factual finding regarding those benefits reflects the fact-finder's own sociological judgments. For example, one might expect that many—if not most—in our society believe that the most significant tangible and intangible benefit of marriage is its procreational framework. Same-sex couples, of course, can never unintentionally create children and must always address a third party's rights and obligations towards any dependents. Hence, this obvious benefit of marriage cannot benefit same-sex couples.

Finding of Fact 52 (that "[d]omestic partnerships lack the social meaning associated with marriage, and marriage is widely regarded as the definitive

expression of love and commitment in the United States," *id.* at 970) explicitly relies on the fact-finder's own definition of "the social meaning associated with marriage." This finding relies upon the highly subjective social judgments of what both marriage and domestic partnership mean. Regardless of whether marriage and domestic partnership carry different meanings, such a finding does not inexorably lead to a conclusion that a different meaning is inferior.

Many of the district court's findings assume that the multifaceted institutions of "marriage" and "domestic partnership" have consistently universal meanings. For example, **Finding of Fact 54** (domestic partnership does not provide a "status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships," *id.* at 971) and **Finding of Fact 58** ("Proposition 8 places the force of law behind stigmas against gays and lesbians, including: gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society," *id.* at 976) both rely on assumptions regarding the status, cultural meaning, and benefits of marriage and domestic partnership. Since those sociological assumptions are inseparable from the findings themselves, these "facts" are also subject to *de novo* review by this Court. For reasons similar to those noted in connection with Finding of Fact 52, Finding of Fact 54 is highly

subjective and likely varies across society. Finding of Fact 58 is also subjective, in that it assesses the relative value of heterosexual and same-sex relationships.[3] Just as a different meaning is not necessarily an inferior one, a different meaning does not necessarily equate to stigma. In the same way, **Findings of Fact 67** ("Proposition 8 singles out gays and lesbians and legitimates their unequal treatment ... [and] perpetuates the stereotype that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents," *id.* at 979), **Finding of Fact 68** ("Proposition 8 results in frequent reminders ... that [gay and lesbian] relationships are not as highly valued as opposite-sex relationships," *id.*), and **Finding of Fact 80** ("The campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships," *id.* at 990), also assume that a different label is automatically an unequal and inferior characteristic.

Several findings of "fact" are based on sociological judgments that do not value the presence of both a mother and a father in a child's life. For example, **Finding of Fact 70** states that "[t]he gender of a child's parent is not a factor in a child's adjustment ... sexual orientation of an individual [does not dictate who] can be a good parent. ... Children raised by gay or lesbian parents are [equally] likely to be healthy, successful and well-adjusted. The research supporting this

[3] Similarly, **Finding of Fact 60** assumes that marriage is "the most socially valued form of relationship." *Id.* at 974.

conclusion is accepted beyond serious debate in the field of developmental psychology." *Id.* at 980. Imposing its own perspective on the role of a mother and a father, the court below dismissed the vigorous debate this topic by characterizing it as not a serious one. (*See* Br. Def.-Intervenors-Appellants at 89-91 & n.47 and sources cited there for a discussion of the vigor of the debate.)[4] **Finding of Fact 71** ("Children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both ... does not increase the likelihood that a child will be well-adjusted." *Perry*, 704 F. Supp. 2d at 981) and **Finding of Fact 72** ("The genetic relationship between a parent and a child is not related to a child's adjustment outcomes." *Id.*) also reflect the district court's devaluation of a mother and a father

Findings of Fact 70, 71, and 72 also rely on the district court's own definition of what constitutes a well-adjusted child—certainly something that many members of society would hotly debate. **Finding of Fact 69** defines "well-adjusted" with three criteria: "(1) the quality of a child's relationship with his or her parents; (2) the quality of the relationship between a child's parents or significant adults in the child's life; and (3) the availability of economic and social resources." *Id.* at 980. These, however, are not universal measures of whether or not a child is "well-adjusted." They are driven by the fact-finder's own definition

[4] The same is true for many of the other Findings which will be discussed in this paragraph and following.

of "well-adjusted" and reflect yet another sociological judgment.

Finding of Fact 56 ("children of same-sex couples benefit when their parents can marry," *Id.* at 973) implicates the question of what constitutes a "benefit" to children of same-sex couples. While there is widespread consensus that children are better off when their parents are married, that consensus is based on studies of children with married heterosexual parents. The question, however, of how children of married opposite-sex parents compare with the children of same-sex couples, is simply unknown. *See* Trial Tr. 1160:11-1184:11 (Lamb) (Plaintiffs-Appellees' expert acknowledging the absence of studies comparing children of married opposite-sex parents with children of same-sex couples); *see also, supra* n.4 and accompanying text.

B. Some of the "facts" merit de novo *review because they are "ultimate" facts that entail the application of law and are thus not ordinary facts.*

Finding of Fact 43 ("Sexual orientation refers to an enduring pattern of sexual, affectional or romantic desires for and attractions to men, women or both sexes. ... [It] can be expressed through self-identification, behavior or attraction. The vast majority of people are consistent [in sexual orientation] ... throughout their adult lives." *Perry*, 704 F. Supp. 2d at 964) effectively posits that homosexuality is clearly defined and represents a fixed class. This is not only an ultimate fact that implicates a finding of law but it also flatly ignores compelling

contradictory evidence. As demonstrated in the record, the definition of homosexuality is highly unsettled. *See Appendix, Evidence Establishing the Absence of a Common Scientific Definition of Homosexual, Gay, Lesbian, Bisexual, and Other Related Terms*. Although one expert did make statements similar to the court's finding, *Perry*, 704 F. Supp. 2d at 964, the court below failed to address the many contradicting statements in the record. *See Appendix*.

In addition, the court below failed to explain the conflict between its finding of a distinct class that renders Proposition 8 eligible for heightened scrutiny and Supreme Court precedent—as well as precedent of this Court and the decisions of other courts. (*See* Br. Def.-Intervenors-Appellants 70-75 (collecting cases and demonstrating that homosexuals are not a suspect or quasi-suspect class even post-*Lawrence v. Texas*, 539 U.S. 558 (2003).)

Similarly, **Finding of Fact 44** ("Sexual orientation is commonly discussed as a characteristic of the individual ... fundamental to a person's identity and is a distinguishing characteristic that defines gays and lesbians as a discrete group. Proponents' assertion that sexual orientation cannot be defined is contrary to the weight of the evidence." 704 F. Supp. 2d at 964) is another key underpinning of the lower court's conclusion that sexual orientation is a protected class, rendering Proposition 8 eligible for heightened scrutiny. *Id.* at 994. As a result, this Court should review *de novo* this ultimate fact. The court below dismissed substantial

contradicting evidence—some even from Plaintiffs-Appellees' experts. (*See* Brief *Amicus Curiae* of Paul R. McHugh, M.D., Section I.) Instead, the court below merely stated that the "weight of the evidence" supports its finding and failed to offer any explanation for why the uncontroverted evidence that sexual orientation can change—in at least some instances—should be ignored. (*See id.*, Section II.)

Finding of Fact 45 ("Proponents' campaign for Proposition 8 assumed voters understood the existence of homosexuals as individuals distinct from heterosexuals." *Perry*, 704 F. Supp. 2d at 964) is yet another ultimate fact, since it forms the basis for the district court's conclusion that Proposition 8 seeks to discriminate against gays and lesbians. It is simply impossible to ascertain how voters might interpret campaign materials. *See* Br. Def.-Intervenors-Appellants 104-09; *see also, U.S. Term Limits v. Thornton*, 514 U.S. 779, 921 (1995) ("inquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of ... voters") (Thomas, J, dissenting, joined by Rehnquist, C.J., O'Connor, and Scalia, JJ.). While some voters may view homosexuals as a distinct group of people, many others may not. Regardless, assuming *arguendo* that homosexuals constitute a *legally cognizable* group does not imply a desire to harm that group. **Finding of Fact 79** ("The Proposition 8 campaign relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian. ... the advertisements

insinuated that learning about same-sex marriage could make a child gay or lesbian and that parents should dread [that]." *Perry*, 704 F. Supp. 2d at 988) also divined voter's intent by assuming that voters supported Proposition 8 because of campaign "insinuations."

Finding of Fact 46, which effectively states that sexual orientation is "generally" immutable ("Individuals do not generally choose their sexual orientation ... [and cannot] change ... sexual orientation", *id.* at 966), is also an ultimate fact supporting the district court's legal conclusion that the amorphous class of sexual orientation should receive heightened protection. But as demonstrated at trial, the origin of sexual orientation is entirely unsettled. Despite this controversy, the court below did not address contradicting evidence. Instead, the court below relied entirely on a single expert and selected testimony from the parties, with the notable exclusion of testimony from Plaintiff-Appellee Stier regarding her previous, loving heterosexual marriage during which she had no lesbian feelings. Stier Dep. 198:24-199:3; Trial Tr. 161:22-25, 162:4-6, 165:13-14, 172:24 (Stier); s*ee also* Stier Dep. 22:11-15, 24:1-5.

Finding of Fact 55, that "[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages," 704 F. Supp. 2d at 972, is intertwined with the district court's legal

holding that there is no rational basis to define marriage as between a man and a woman. Without this finding, any voter concern about a possible negative impact on traditional marriage would constitute a rational basis for Proposition 8. This finding, then, is critical to the overall decision. Yet the court below provided very limited support for this key finding—statistics from only four years collected in Massachusetts where same-sex marriage is permitted and isolated speculations about what may or may not occur.

Finding of Fact 62 ("Proposition 8 does not affect the First Amendment rights of those opposed to marriage for same-sex couples. Prior to Proposition 8, no religious group was required to recognize marriage for same-sex couples." *Id.* at 976) evaluates the possible First Amendment impact of the district court's decision to invalidate Proposition 8. In support of its finding, the court below cited a passage from the California Supreme Court's recent decision, *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008), which speculated that allowing same-sex couples to marry would have no impact on religious freedom because there is no requirement for religious officiants to perform same-sex marriages. Religious beliefs, however, extend well beyond a religious ceremony. It is entirely unknown how citizens who disapprove of homosexual activity on the basis of their sincerely-held religious convictions might be impacted as they express that belief. Thus, this is a legal conclusion, relying on pure speculation, which also merits *de novo*

review.

Indeed, **Finding of Fact 77**, that "[r]eligious beliefs that gay and lesbian relationships are sinful or inferior ... harm gays and lesbians," *id.* at 985, contradicts Finding of Fact 62. A court's declaration that a sincerely-held religious belief is harmful to a protected class is a significant legal conclusion—and one that has repercussions for citizens who hold those religious beliefs. As a result, this Court should review these findings *de novo*.

C. Some of the "facts" merit de novo *review because they both entail the application of law and reflect sociological judgments.*

Finding of Fact 51 ("Marrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals," *id.* at 969) concludes that opposite sex marriage "is an unrealistic option for gay and lesbian individuals." If true, this fact could support Plaintiffs-Appellees' argument that Proposition 8 discriminates by "excluding" gays and lesbians from marriage. Whether Proposition 8 discriminates is, of course, an ultimate fact that should be reviewed *de novo*. In addition, the question of whether marriage to an opposite sex spouse is a realistic option also reflects the fact-finder's sociological judgment. In support of its finding, the court below relied on the testimony of a few individuals, which do not necessarily reflect all gay people's feelings, and broad generalizations that dismiss the record of many gays and lesbians in opposite sex marriages.

The court below categorized its subjective **Finding of Fact 61** among its

findings "that Proposition 8 enacted a private moral view without advancing a legitimate government interest." *Id.* at 975. Finding of Fact 61 concludes that Proposition 8 "codifies distinct and unique roles for men and women in marriage." *Id.* at *140. This is subjective and reflects the fact-finder's own sociological judgments by reading unspoken words into Proposition 8. In support of its finding, the court below cited many facts that demonstrate positive roles that could—if viewed through a different lens of sociological judgment—support a legitimate government interest. Instead, the sociological judgments of the court below categorized the cited examples of traditional male and female roles in marriage as bad, and not as anything that should be encouraged by the State.

III. THIS COURT IS NOT BOUND BY THE CREDIBILITY DETERMINATIONS OF THE COURT BELOW AND SHOULD RECHARACTERIZE THE CREDIBILITY OF SEVERAL EXPERTS.

To the extent that expert testimony is even relevant in light of the above discussion, the district court compounded its mistakes in its treatment of experts. Just as Rule 52(a) does not bind this Court to the district court's assessment of ultimate facts, Rule 52(a) does not bind this Court to the credibility determinations of the lower court. *See Bose*, 466 U.S. at 500; *see also id. at* 518-19 (Rehnquist, J., dissenting) (construing the majority opinion as a statement of an appellate court's ability to review *de novo* all aspects of the lower court's findings, including the credibility of witnesses. Here, the credibility determinations are not those that

involve evaluating a witness's demeanor. Instead, here, the court below applied flawed and inconsistent standards in assessing the experts. The stakes of this case "are too great to entrust them finally to the judgment of the trier of fact." *Bose*, 466 U.S. at 501 n.17. Accordingly, this Court may subject the district court's credibility determinations to *de novo* review, under the same principles that allow *de novo* review of ultimate facts.

A. Expert testimony standards, as described by this Court, qualify Mr. Blankenhorn as an expert on marriage, fatherhood, and family structure, thus his testimony should be given considerable weight.

Mr. Blankenhorn has spent more than twenty years "studying, writing, and educating others about issues of family policy and family well-being, with a particular focus on the institution of marriage." Blankenhorn Decl. ¶ 2. He has lectured and written extensively on these subjects and has frequently testified about marriage to federal and state legislative committees. *Id.* But despite his impressive résumé and long-term focus on the key subject in this case, the court below concluded that Mr. Blankenhorn was not a qualified expert. 704 F. Supp. 2d at 946. In the face of Mr. Blankenhorn's demonstrated knowledge, skill, and experience on these critical subjects, the district court's flawed finding cannot be reconciled with this Court's instruction that a qualified expert possesses "at least the minimal foundation of knowledge, skill, and experience required in order to give 'expert' testimony" on the subject of marriage and fatherhood, *Thomas v.*

Newton Int'l Enters., 42 F.3d 1266, 1269 (9th Cir. 1994). This Court should invoke its authority to review the district court's credibility determinations in order to correctly apply *Thomas* and correct the inappropriate dismissal of Mr. Blankenhorn's testimony.

B. The court below erred by admitting deposition testimony of withdrawn experts Young and Nathanson.

In stark contrast with its rejection of Mr. Blankenhorn as an expert, the court below was only too eager to allow the inclusion of videotaped deposition testimony of Professor Katherine Young and Dr. Paul Nathanson at trial. In response to the district court's repeated efforts to obtain permission to broadcast the trial procedures, Professor Young and Dr. Nathanson both withdrew as experts. *Perry*, 704 F. Supp. 2d at 944. "When an expert witness is put forward as a testifying expert at the beginning of trial, the prior deposition testimony of that expert in the same case is an admission against the party that retained him. Where an expert witness is withdrawn prior to trial, however, the prior deposition testimony of that witness may not be used." *Glendale Fed. Bank, FSB v. United States*, 39 Fed. Cl. 422, 425 (1997).

Furthermore, the court took statements from the withdrawn experts out of context and mischaracterized their field of expertise in order to support its holding. For example, the court below cited several deposition statements of Dr. Nathanson, an expert on religious attitudes towards Proposition 8. 704 F. Supp. 2d at 944.

The selected statements, however, related to racial and gender restrictions in the law and sociological and psychological impact on children—areas in which Dr. Nathanson was not qualified as an expert. *See id.* at 957, 959, 980. The court below also selectively used Professor Young's deposition testimony, choosing statements regarding racial and gender restrictions in the law and psychological assessments of gays and lesbians. *Id.* at 959, 968. Professor Young, however, is an expert on comparative religion and the universal definition of marriage. *Id.* at 944-45.

CONCLUSION

For the foregoing reasons, this Court should conduct a *de novo* review of the key findings of the court below. In light of the likely results of that review and for the reasons stated in the Brief of the Defendant-Intervenors-Appellants, this Court should reverse the judgment of the district court.

Respectfully submitted,
this 24th day of September 2010

s/ Steven W. Fitschen
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APPENDIX

Trial Evidence Establishing the Absence of a Common Scientific Definition of Homosexual, Gay, Lesbian, Bisexual, and Other Related Terms

- John Gonsiorek, *The Emperical Basis for the Demise of the Illness Model of Homosexuality,* in *Homosexuality: Research Implications for Public Policy* 115, 120 (John Gonsiorek & James Weinrich, eds.) (1991) ("The largest methodological problem in the scientific study of homosexuality is how to define and obtain a representative – or even useful – homosexual sample."). S*ee also*, Ilan Meyer & Patrick Wilson, *Sampling Lesbian, Gay, and Bisexual Populations,* 56 J. of Counseling Psychology 23 (2009).

- Edward Laumann, *et al.*, *The Social Organization of Sexuality* 290 (1994) ("To quantify or count something requires unambiguous definition of the phenomenon in question. And we lack this in speaking of homosexuality.").

- Laura Dean, *et al.*, *Lesbian, Gay, Bisexual, and Transgender Health*, 4 J. of the Gay and Lesbian Med. Ass'n 102, 135 (2000) ("Unfortunately, there is still no general consensus on the definitions of these terms," *i.e.*, heterosexual, homosexual, bisexual, gay, and lesbian.). *See also* M.V. Lee Badgett, *Money, Myths, and Change* 29-30 (2001); Fritz Klein *et al.*, *Sexual Orientation: A Multi-Variable Dynamic Process* in 11 J. of Homosexuality 35 (1985); Meyer & Wilson, *supra*; John Gonsiorek, *et al.*, *Definition & Measurement of Sexual*

Orientation, 25 Suicide & Life Threatening Behavior (Supp) 40 (1995).

- Meyer & Wilson, *supra* at 29 (noting that LGB population "is difficult to define conceptually").

- Nock Affidavit 10-11 ("Moreover, we do not have an agreed-upon definition of homosexuality. Is a homosexual a person whose erotic interests are focused on those of the same sex? Is a homosexual a person who sometimes engages in sexual acts with a member of the same sex? Is a homosexual a person who thinks of himself or herself as a homosexual? Does a single sexual act with a person of the same sex define a person as homosexual? … Is homosexuality 'learned' (i.e., socially constructed), or is it transmitted genetically? Finally, is male homosexuality the same phenomenon as female homosexuality?").

- Dean, *et al.*, *supra* at 102 ("Lesbian, gay and bisexual (LGB) people are defined by their sexual orientation, a definition that is complex and variable. Throughout history and among cultures the definition of sexual orientation shifts and changes."); *see also* Trial Tr. 2116:21-2117:12 (Herek); Janis Bohan, *Psychology & Sexual Orientation: Coming to Terms* 13 (1996); Simon Lewin & Ilan Meyer, *Torture and Ill-Treatment Based on Sexual Identity*, 6 Health & Human Rights 161, 163-64 (2002).

- M.V. Lee Badgett, *Discrimination Based on Sexual Orientation* in *Sexual Orientation Discrimination: An International Perspective* 21 (M.V. Lee Badgett & Jefferson Frank, eds., 2007) ("The first complication is defining what one means by 'sexual orientation,' or being gay, lesbian, bisexual, or heterosexual. Sexuality encompasses several potentially distinct dimensions of human behavior, attraction, and personal identity, as decades of research on human sexuality have shown."). *See* Trial tr. 1658:14-1659:10 (Segura).

- The Williams Institute, *Best Practices for Asking Questions about Sexual Orientation on Surveys* 6 (2009) ("Questions about sexual orientation have been asked on large-scale and population surveys in recent decades. … The questions on these large-scale surveys have varied widely, however ....").

- Trial tr. 1658:14-1659:10 (Segura). *See also* Badgett, *Money, Myths, & Change*, *supra*, 47 ("Sexual orientation is not an observable characteristic of an individual as sex and race usually are."); Trial tr. 2066:5-6 (Herek).

- Letitia Anne Peplau & Linda D. Garnets, *A New Paradigm for Understanding Women's Sexuality and Sexual Orientation*, 56 J. of Social Issues 330, 337 (2000) ("the phenomena of sexual orientation are not fixed and universal, but rather highly variable across time and place").

- Gregory Herek, *Why Tell if you're Not Asked?* in *Out in Force: Sexual*

Orientation and the Military 201 (Gregory Herek *et al.*, eds., 1996) ("Although heterosexual and homosexual behaviors alike have been common throughout human history, the ways in which cultures have made sense of these behaviors and the rules governing them have varied widely."). *See also* John Gonsiorek, *The Definition and Scope of Sexual Orientation* in Gonsiorek & Weinrich, *supra*, 1, 2-3 (1991); Trial tr. 446:8-448:3 (Chauncey).

- Institute of Medicine, *Lesbian Health: Current Assessment & Directions for the Future* 23 (1999) ("Views of sexual identity and sexual behavior can vary significantly across cultures and among racial and ethnic groups, so it should not be assumed that a lesbian sexual identity is the same for lesbians of different racial, ethnic, or cultural backgrounds.").

- Trial tr. 446:8-448:3 ("Q. And most historians now would argue that categories of sexual difference that were available to people changed over time, correct? A. Yes. Most historians would argue that. Q. And although the gay male world of the prewar years was remarkably visible and integrated into the straight world. It was a world very different from our own, is that right? A. I did write that, yes. Q. Okay. Only in the 1930's, 40's, and 50's did the now conventional division of men based on the sex of their partners replace the division of men based on their imaginary gender status as the hegemonic way of understanding sexuality, correct? A. I was referring there particularly to men

in immigrant communities, working class communities. So as I show in another point in the book those sorts of identities had emerged earlier in middle class culture, so that broadly there is a shift in that period. … And the ascendency of the term 'gay' reflected a reorganization of sexual categories, correct? A. Yes. Q. There was a transition from an early twentieth century culture divided into queers and men on the basis of gender status to a late twentieth century culture divided into …homosexuals and heterosexuals on the basis of sexual object choice, correct? A. Yes. A. Any such taxonomy is necessarily inadequate as a measure of sexual behavior, correct? A. Yes, I did write that. Q. The most striking difference between the dominant sexual culture of the early twentieth century and that of our own era is the degree to which the earlier culture permitted men to engage in sexual relations with other men, often on a regular basis, without requiring them to regard themselves or to be regarded as gay, correct? A. Yes. And here, again, I am generalizing for purposes of the introduction, I believe, to the particular groups of people I will talk about later in the book. They were different from other groups. Q. And there were many men involved in same-sex relationships at that time who were also on intimate terms with women and went on to marry them, correct? A. Yes.") (Chauncey).

- Klein, *et al*, *supra*, 39-40 (1985) (Klein sexual orientation grid; seven variables

(sexual attraction, sexual behavior, sexual fantasies, emotional preference, social preference, self-identification, hetero/gay lifestyle) each to be rated for past, present and ideal; "requires a subject to provide 21 ratings in a seven by three grid").

- Alfred Kinsey *et al.*, *Sexual Behavior in the Human Male* 638 (1948) (Kinsey heterosexual/homosexual rating scale).

- Peplau & Garnets, *supra*, 342, Table 1, (Old Perspective on Women's Sexual Orientation: "Sexual activity is central to sexual orientation." New Perspective: "Relationships are central to sexual orientation.").

- Michael Shively & John DeCecco, *Components of Sexual Identity*, 3 J. of Homosexuality 41, 45-46 (1977) (critiquing Kinsey and others' "bipolar" model of homosexuality, in which "homosexuality is expressed at the expense of heterosexuality or heterosexuality is expressed at the expense of homosexuality"; proposing model where both physical and affectional preference are "viewed as two independent continua of affectional heterosexuality and affectional homosexuality").

- Gonsiorek, Definition & Measurement of Sexual Orientation, *supra*, at 7 (setting forth the Sell scale of sexual orientation, seventeen multiple-choice questions covering about four pages).

- Gregory Herek, *Homosexuality* in *Encyclopedia of Psychology* 151 (2000) (A.E. Kazdin, ed.) ("Because the term encompasses many distinct phenomena, however, attempting to identify the origins of homosexuality and, more broadly, sexual orientation is a difficult task."); Trial tr. 2264:11-15 (Herek) ("What I have said in my expert report and elsewhere is that there are many different theories about the origins of sexual orientation in general; not just homosexuality but also heterosexuality. And there really is no consensus on what the origins are of a person's sexual orientation."); *see also* Trial tr. 2267:19-2268:2 (Herek); Garnets & Peplau, *supra*, at 4.

- Trial tr. 487:14-17 ("Q. Although, the statistics are imprecise, the best figures we have now, in your opinion, are that somewhere between 2 and 5 percent of the population is gay and lesbian, correct? A. Yes.") (Chauncey).

- Trial tr. 1709:2-9 ("Q. And you believe that four to seven percent of the U.S. population is openly gay or lesbian, correct? A. Umm, as you and I discussed during my deposition, there is a broad scholarly disagreement over the size of the gay and lesbian population. And I believe my answer in deposition is the same one I will give now, which is that it is my belief that the answer is somewhere between four and seven percent ....") (Segura).

- Trial tr. 629:23-630:1 ("Q. Do you have an estimate of what the percentage

would be of the population in the United States that's gay and lesbian? A. The estimate that I would use would be something like two to three percent who identify as gay or lesbian.") (Peplau).

- Klein *et al.*, *supra*, at 35 ("This study gives evidence that sexual orientation cannot be reduced to a bipolar or even tripolar process, but must be recognized within a dynamic and multi-variate framework.").

- Badgett, *Discrimination Based on Sexual Orientation*, *supra*, at 21 ("For economists and other social scientists interested in survey-based comparisons of economic outcomes by sexual orientation, the different possible measures of sexual orientation obviously pose an empirical challenge."). Gonsiorek, *The Definition and Scope of Sexual Orientation*, *supra*, at 9 (1991) ("Given such significant measurement problems, one could conclude there is serious doubt whether sexual orientation is a valid concept at all.").

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I electronically filed the foregoing Brief *Amicus Curiae* of The National Legal Foundation in the case of *Perry, et al., v. Schwarzenegger, et al*., No. 10-16696, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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