No. 10-16696

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS
DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 VRW
The Honorable Vaughn R. Walker

OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL OF PLAINTIFFS-APPELLEES KRISTIN M. PERRY ET AL.

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INTRODUCTION

Plaintiffs respectfully oppose the emergency motion for stay pending appeal filed by Proposition 8 Official Proponents ("Proponents").

As the Supreme Court has recently held, "[a] stay is not a matter of right." *Nken v. Holder*, 129 S. Ct. 1749, 1760 (2009). Instead, applicants seeking the extraordinary relief of a stay must demonstrate that they satisfy a well-established four-factor test, which requires, among other things, a "*strong* showing that [the stay applicant] is likely to succeed on the merits" and a showing that "the *applicant*" itself—rather than some other party—"will be irreparably injured absent a stay." *Id.* at 1761 (emphases added; internal quotation marks omitted). This Proponents cannot do.

After a full, three-week trial on the merits of Plaintiffs' constitutional claims, the district court found in a thorough, 136-page opinion that "Plaintiffs have demonstrated by *overwhelming* evidence that Proposition 8 violates their due process and equal protection rights and that they will continue to suffer these constitutional violations until state officials cease enforcement of Proposition 8." Doc #708 at 138 (emphasis added). Proponents' oversized stay motion simply reproduces (sometimes, verbatim) the same arguments Proponents unsuccessfully advanced on summary judgment and then failed to substantiate at trial. Indeed, Proponents' evidentiary presentation was anemic—they "failed to present even one credible witness on the government interest in Proposition 8" (Doc #727 at 6)—and the district court's compre-

hensive factual findings thoroughly exposed the fatal evidentiary flaws in their defense of Proposition 8.

Moreover, Proponents' generalized interest in defending Proposition 8 is no different from that of any other California voter who supported the initiative, and Proponents have "failed to articulate even one specific harm they may suffer as a consequence of the injunction" against Proposition 8. Doc #727 at 5. Thus, not only have Proponents failed to establish the *irreparable* injury that is a prerequisite to a stay, but they have also failed to demonstrate the concrete and particularized injury that is a prerequisite to Article III standing. Unless and until an appellant satisfies that irreducible requirement of appellate jurisdiction, a stay cannot issue.

Indeed, the *only* harm at issue here is that suffered by Plaintiffs and other gay and lesbian Californians each day that Proposition 8's discriminatory and irrational deprivation of their constitutional rights remains in force. *See*, *e.g.*, Doc #727 at 9. As the district court found, and the Attorney General and the Governor confirmed in their oppositions to a stay filed in the district court (Doc #716, 717), "California has *no interest* in waiting and *no practical need* to wait to grant marriage licenses to same-sex couples." Doc #708 at 128 (emphases added). Accordingly, Proponents' motion for a stay pending appeal should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are gay and lesbian California residents who are in serious, long-term relationships and who wish to marry. Doc #708 at 56-57 (FF #1-4). As a direct result of Proposition 8, Plaintiffs were denied this right solely because their prospective spouses are of the same sex. *Id.* They filed the underlying suit to obtain the right to marry the person of their choice—to demonstrate publicly their commitment to one another and obtain all the benefits that come with official recognition of their relationships. *Id.* at 27-29, 115; *see also* Doc #1.

The district court granted Proponents' motion to intervene on June 30, 2009 (Doc # 76), and the parties were then "given a full opportunity to present evidence in support of their positions" at a bench trial from January 11-27, 2010. Doc #708 at 13. Plaintiffs and Plaintiff-Intervenor presented a total of seventeen witnesses at trial—eight lay witnesses and nine experts. *Id.* The district court found that each of Plaintiffs' witnesses was credible. *Id.* at 27-37.

Proponents, in contrast, "elected not to call the majority of their designated witnesses to testify at trial and called not a single official proponent of Proposition 8." Doc #708 at 37. Proponents, in fact, *withdrew* four of their expert witnesses on the

first day of trial.[1] They presented only Dr. Kenneth Miller to opine on the alleged political power of gay men and lesbians, and Mr. David Blankenhorn to opine on the definition and purpose of marriage. *Id.* at 37, 39-40. The district court determined that Mr. Blankenhorn's opinions were "unreliable and entitled to essentially no weight" (*id.* at 51), and that Dr. Miller's opinions were "entitled to little weight and only to the extent they are amply supported by reliable evidence." *Id.* at 56.

On August 4, 2010, the district court ruled in favor of Plaintiffs, declared Proposition 8 unconstitutional under the Fourteenth Amendment, and directed that a permanent injunction issue against its enforcement. Doc #708 at 138. The district court found that "Proponents' evidentiary presentation was dwarfed by that of plaintiffs" and that Proponents "failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest." *Id.* at 13. The court concluded that "Proposition 8 fails to advance any rational basis in singling out gay

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[1] Proponents suggest that they withdrew their witnesses because—even after Justice Kennedy had issued a temporary stay—"public broadcast of the trial [was] still a possibility." Stay Mtn. 14. But this is frivolous. Indeed, "proponents failed to make any effort to call their witnesses after the potential for public broadcast in this case had been eliminated" by the Supreme Court's issuance of a permanent stay two days later. Doc #708 at 38. And, in fact, the depositions of all four of those expert witnesses were so favorable to *Plaintiffs*, that Plaintiffs used those depositions affirmatively at trial. *See* Tr. 1497:17-1501:19 (Paul Nathanson); PX2546 (same); Tr. 1188-89, 1194-95 (Loren Marks); Tr. 1501:20-1503:2 (Katherine Young); PX2544 (same); Tr. 2314:18-2319:9 (Daniel Robinson).

men and lesbians for denial of a marriage license" and "does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples." *Id.* at 137. Proponents filed a Notice of Appeal the same day. Doc #713. The day *before* the district court issued its ruling, Proponents preemptively moved to stay the judgment. The district court denied the motion because Proponents "fail[ed] to satisfy any of the factors necessary to warrant a stay," but temporarily stayed its judgment until August 18, 2010, at 5:00 p.m. PDT to permit this Court to consider a stay request. Doc #727 at 2, 11.

ARGUMENT

Proponents fail even to cite the leading Supreme court decision establishing the standards for granting a stay, which makes clear that, because a stay holds a ruling in abeyance pending review, it is considered an "intrusion into the ordinary processes of administration and judicial review." *Nken*, 129 S. Ct. at 1757 (internal quotation marks omitted). Under *Nken*, the party seeking a stay "bears the burden of showing that the circumstances justify an exercise of [the court's] discretion." *Id*. at 1761. In determining whether the moving party has met that exacting burden, courts consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (internal quotation marks omit-

ted). The moving party must establish *at least* the first two factors to obtain a stay. *Id.*

I. Proponents Cannot Possibly Make A "Strong Showing" That They Are Likely To Prevail In Their Appeal.

To obtain a stay, Proponents must make a strong showing that they will prevail on both of Plaintiffs' constitutional claims—each of which stands as an independent basis for the district court's injunction. And Proponents also must demonstrate that they have standing to invoke this Court's appellate jurisdiction. Proponents fail on all counts. Indeed, the district court acted well within its broad discretion when it denied Proponents' stay request because Proponents' eight-page preemptive stay motion—which was filed the day *before* the district court issued its decision—did not "discuss the likelihood of their success with reference to the court's conclusions" or "whether the court of appeals would have jurisdiction to reach the merits of their appeal." Doc #727 at 3.

A. Proponents' Appeal Is Meritless.

The district court's detailed Credibility Determinations, Findings of Fact, Conclusions of Law, and Order demonstrate the substantial volume of factual evidence and legal precedent supporting each of Plaintiffs' claims.

1. Neither *Baker v. Nelson* Nor *Adams v. Howerton* Is Controlling.

Proponents argue that *Baker v. Nelson*, 409 U.S. 810 (1972), forecloses Plaintiffs' claims. Stay Mtn. 25. That assertion is fundamentally at odds with the limited scope of that nearly forty-year-old decision, and was squarely rejected by the district court on summary judgment. *See* Doc #228 at 75-79.

In *Baker*, the Supreme Court dismissed "for want of a substantial federal question" an appeal from a Minnesota Supreme Court decision rejecting federal due process and equal protection challenges to the State's refusal to issue a marriage license to a same-sex couple. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The Supreme Court's summary dismissals are binding on lower courts only "on the precise issues presented and necessarily decided" (*Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)), and only to the extent that they have not been undermined by subsequent "doctrinal developments" in the Supreme Court's case law. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (internal quotation marks omitted).

Neither requirement is met here. The issue in *Baker* is different from that presented by Plaintiffs' constitutional challenge because, unlike California, Minnesota had not used the ballot initiative process to strip its gay and lesbian citizens of their previously recognized right to marry, and because there was no sexual-orientation-based equal protection claim in *Baker*. *See* Jurisdictional Statement at 16, *Baker* (No.

71-1027) ("The discrimination in this case is one of gender."). Moreover, the Supreme Court's subsequent equal protection and due process jurisprudence has fatally undermined *Baker*. *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (invalidating a state criminal prohibition on same-sex intimate conduct under the Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 627 (1996) (striking down, on equal protection grounds, a Colorado constitutional amendment prohibiting governmental action to protect gay and lesbian individuals against discrimination); *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in [the context of sexual orientation].").

Proponents' reliance on *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), is equally misplaced. Stay Mtn. 26. That decision upheld a federal immigration law that granted an admissions preference to opposite-sex—but not same-sex—spouses of American citizens. The court explained that "Congress has almost plenary power to admit or exclude aliens" and "the decisions of Congress" in the area of immigration are therefore "subject only to limited judicial review." *Adams*, 673 F.2d at 1041. No such "plenary power" is implicated in this case, and the "limited judicial review" undertaken in *Adams* is therefore inapplicable to Plaintiffs' constitutional challenge to Proposition 8. In any event, the district court was free to depart from *Adams*'s reasoning in light of the subsequent jurisprudential developments in *Romer* and *Lawrence*.

See Witt v. Dep't of the Air Force, 527 F.3d 806, 820-21 (9th Cir. 2008).

2. Proposition 8 Violates The Due Process Clause Of The Fourteenth Amendment.

Proponents next argue that they are likely to prevail on Plaintiffs' due process claim because the right to marry has always been understood as excluding same-sex couples and because marriage is inextricably tied to procreation. Apparently, on Proponents' view, conditioning a marriage license on a couple's willingness or ability to procreate would be "administratively burdensome and intolerably intrusive, [and] unreliable" (Stay Mtn. 35), but not barred by any principle of due process. According to Proponents, only those who can procreate have a due process *right* to marry; the rest of the citizenry enjoys access to marriage only for as long as the government (or a plebiscite majority) permits. This argument is baseless, as the district court found.

"Plaintiffs' unions encompass the historical purpose and form of marriage" because Plaintiffs seek to marry the person with whom they are in a loving, committed relationship and to join together with that person to form a permanent and publicly recognized familial bond. Doc #708 at 116; *see also Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (marriage is an expression of emotional support and public commitment); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). As the district court concluded—contrary to Proponents' unfounded assertions—Plaintiffs' due process claim thus does not require recognition of a new right to "same-sex marriage." Doc #708 at

115-116; *see Loving v. Virginia*, 388 U.S. 1 (1967); *In re Marriage Cases*, 183 P.3d 384, 421 (Cal. 2008).

By prohibiting same-sex couples from marrying, Proposition 8 materially and substantially burdens gay and lesbian individuals' fundamental right to marry. Accordingly, it can survive only if it is "narrowly drawn" to serve a "compelling state interest[ ]." *Carey v. Populations Servs. Int'l, Inc.*, 431 U.S. 678, 686 (1977); *see also* Doc #708 at 119. Proponents did not even attempt to establish that Proposition 8 comes close to meeting this onerous standard and failed to substantively address it in their summary judgment motion or trial brief. *See* Doc #202 at 35; Doc #605 at 18. Indeed, as discussed below, and as the district court found, Proposition 8 cannot satisfy even *rational basis* review.

3. Proposition 8 Violates The Equal Protection Clause Of The Fourteenth Amendment.

Proponents also argue that they are likely to prevail on Plaintiffs' equal protection claim. They argue that heightened scrutiny ought never apply to laws that discriminate against gay men and lesbians because (1) "homosexuality is a complex and amorphous phenomenon," and (2) gay men and lesbians are now politically powerful—despite the fact that they consistently lose referenda in which their fundamental rights are subject to a popular vote. Stay Mtn. 43. In place of the narrowly tailored, compelling governmental interests needed to justify discrimination against a suspect

class, Proponents posit three interests that are rationally furthered, Proponents argue, by stripping gay men and lesbians of their right to marry and relegating them to a separate contractual relation known as "domestic partnership."

As the district court found based on an extensive factual record developed at a twelve-day trial, however, Proposition 8 cannot survive *any* level of equal protection scrutiny. Proposition 8 irrationally and discriminatorily stripped gay and lesbian individuals of their right to marry, imposing a "special disability" on them for no reason other than to express moral disapproval. *See* Doc #708 at 127, 133-37; *see also id.* at 134 ("The evidence shows that, by every available metric, opposite-sex couples are not better than their same-sex counterparts; instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equal."). Such a "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer*, 517 U.S. at 634 (emphasis in original; internal quotation marks omitted).

a. Strict Scrutiny Is The Appropriate Standard Of Review.

The district court found that "the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect." Doc #708 at 123. That conclusion has firm support in Supreme Court precedent and the extensive evidentiary record compiled in this case.

Strict scrutiny is appropriate where a group has experienced a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (internal quotation marks omitted). The district court found, and Proponents did not dispute, that "[t]he evidence at trial shows that gays and lesbians experience discrimination based on unfounded stereotypes and prejudices specific to sexual orientation." Doc #708 at 121. Proponents also admitted that "same-sex sexual orientation does not result in any impairment in judgment or general social and vocational capabilities." *Id*. at 78. These findings—and admissions by Proponents—are sufficient to trigger strict scrutiny of Proposition 8. *Id*.

Proponents nevertheless contend that gay and lesbian individuals do not warrant heightened scrutiny because sexual orientation is purportedly an "amorphous phenomenon" and gay and lesbian individuals allegedly possess significant political power. Stay Mtn. 43. The overwhelming evidence presented at trial refutes both of these claims.

At trial, Plaintiffs marshaled a wealth of evidence that demonstrates that sexual orientation is highly resistant to change. Plaintiffs' expert Dr. Gregory Herek testified, for example, that "the vast majority of gays and lesbians have little or no choice in their sexual orientation; and therapeutic efforts to change an individual's sexual ori-

entation have not been shown to be effective and instead pose a risk of harm to the individual." Doc #708 at 18. Plaintiffs also introduced studies finding that 87% of gay men and 70% of lesbians had no choice about their sexual orientation. *Id*. at 76-77.

On the other hand, the district court found that Proponents failed to introduce any evidence whatsoever to contradict Plaintiffs' showing that sexual orientation is highly resistant to change, concluding that "[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation." Doc #708 at 76.

The evidence on the issue of the political power of gay men and lesbians was similarly one-sided. Plaintiffs' expert, Dr. Gary Segura, testified that "gays and lesbians possess less power than groups granted judicial protection." Doc # 708 at 36. Indeed, the fact that the United States now has an African-American President and a female Speaker of the House does not make racial or sex-based classifications any less suspect.

In contrast, the district court found that Proponents' expert, Dr. Kenneth P. Miller, was not qualified as an expert on gay and lesbian politics, lacked credibility, and that his testimony should be given "little weight." Doc #708 at 56. Moreover, Dr. Miller conceded that "gays and lesbians currently face discrimination and that current discrimination is relevant to a group's political power." *Id*. at 55.

High Tech Gays v. Defense Industry Security Clearance Office, 895 F.2d 563 (9th Cir. 1990), does not foreclose heightened scrutiny. That decision explicitly relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See High Tech Gays*, 895 F.2d at 571 ("by the [*Bowers*] majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class"). Because *Lawrence* explicitly overruled *Bowers*, this Court is free to revisit whether sexual orientation is a suspect or quasi-suspect classification. *See Witt*, 527 F.3d at 820-21.[2]

Moreover, *High Tech Gays*' conclusion that sexual orientation is "behavioral" (895 F.2d at 573)—and thus not immutable—has been authoritatively rejected by the Supreme Court. *See Christian Legal Soc'y*, 130 S. Ct. at 2990 ("Our decisions have declined to distinguish between status and conduct in th[e] context" of gay and lesbian sexual orientation). That conclusion also directly conflicts with this Court's more recent decision in *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), which

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[2] Nor does *Witt* prevent the Court from applying heightened equal protection scrutiny. That case involved an equal protection challenge to the "Don't Ask, Don't Tell" policy that was not premised on the differential treatment of heterosexuals and gay and lesbian individuals. *See* 527 F.3d at 821; *id*. at 823-24 & n.4 (Canby, J., concurring in part and dissenting in part); *see also* Doc #228 at 39 (Court: "'Don't ask; don't tell' condemns conduct or expression, whereas we're not dealing here with expressive

held—consistent with the evidence in this case—that "[s]exual orientation and sexual identity are immutable," "[h]omosexuality is as deeply ingrained as heterosexuality," sexual orientation is "fundamental to one's identity," and gay and lesbian individuals "should not be required to abandon" their identity to gain access to fundamental rights. *Id*. at 1093 (internal quotation marks omitted).

Finally, *High Tech Gays*' finding that gay men and lesbians are not politically powerless was a factual determination decided on a vastly different record than the one before this Court. 895 F.2d at 574. In finding at the summary-judgment stage that gay men and lesbians are not politically powerless, *High Tech Gays* cited nothing more than the existence of various anti-discrimination measures in certain States. *Id.* Here, the trial evidence—including the extensive and credible testimony of Plaintiffs' expert, Professor Segura—demonstrates that, even taking such measures into account, gay men and lesbians lack political power and are highly vulnerable to discriminatory ballot initiatives.

b. Proponents Have Not Identified A Rational Basis To Support Proposition 8.

In their stay motion, Proponents argue that three governmental interests are rationally furthered by Proposition 8: (1) "increasing the likelihood that children will be

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[Footnote continued from previous page]
conduct; we're dealing with a classification.").

born to and raised by both their natural parents in stable, enduring family units" (Stay Mtn. 48); (2) preventing "negative consequences over time to the institution of marriage" (*id.* at 54); and (3) giving legal effect to "religious doctrine and moral precept[s]" that disapprove of gay and lesbian relationships. *Id.* at 63. Plaintiffs demonstrated by "overwhelming evidence" that none of these asserted governmental interests—to the extent they are legitimate governmental interests at all—are rationally furthered by Proposition 8. Doc #708 at 125-34.

i. Procreation and "Natural" Parenting. Proponents argue that the government has a legitimate interest in promoting a "traditional" family structure under which children are raised by their natural (*i.e.*, genetic) parents in a married household. They argue that Proposition 8 rationally promotes this interest by reserving "special recognition and support" for those relationships that may ultimately develop into what Proponents have deemed the "optimal environment" for children—opposite-sex marriages. Stay Mtn. 50, 53. The law permits the government, Proponents insist, to withhold "special recognition and support" from relationships that cannot lead to their "ideal" family structure. *Id.* at 51, 53.

Proponents' argument fails for two reasons. First, the overwhelming evidence presented at trial conclusively demonstrates that children raised in two-same-sex-parent households are just as likely to be well-adjusted as children raised in "tradi-

tional" married households. *See*, *e.g.*, Doc #708 at 96-98 (FF #69: detailing factors that affect a child's development, none of which includes the sexual orientation or gender of the child's parents), (FF #70: detailing evidence that supports the finding that the gender of a child's parent is not a factor in a child's adjustment and noting that "the research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology"), (FF #71: having a male and female parent does not increase the likelihood that a child will be well-adjusted), (FF #72: the genetic relationship between a parent and a child is not related to a child's adjustment outcomes).

Proponents claim this conclusion is "unsupportable" in view of three trial exhibits that Proponents contend "back[ ] up" "the commonsense notion that children will do best with a mother and father in the home." Stay Mtn. 50 n.20 (internal quotation marks omitted). But Proponents called no witness to testify to this supposedly "widely shared and deeply engrained view" that children do best in "the presence of two biological parents." *Id.* And none of the studies now cited by Proponents remotely supports the notion that children raised by their married "biological" parents

have better adjustment outcomes than those raised in two-same-sex-parent households.[3]

Second, even if there were credible social science to support the view that children achieve better adjustment outcomes when they are raised by "traditional" married couples than when raised by same-sex couples—and there is no such evidence—prohibiting gay men and lesbians from marrying does not even indirectly advance that objective. As the district court observed (and Proponents do not dispute), Proposition 8 does not encourage gay and lesbian individuals to marry persons of the opposite sex, increase the number of marriages between heterosexual couples, or lead to increased stability in opposite-sex marriage. Doc #708 at 85. Nor does prohibiting gay men and lesbians from marrying make it more likely that opposite-sex couples will marry and raise children. *Id.* at 129.

But Proponents contend that they need not demonstrate that prohibiting gay men and lesbians from marrying advances their governmental objective. It is rational, Proponents claim, to provide "special recognition and support" of a marriage license

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[3] Indeed, the evidence at trial demonstrated that social scientists in the field typically use the term "biological parent" not to identify genetic parents, but to identify parents who raised a child from birth (including adoptive parents), as distinguished from stepparents. Tr. 1190-94. The trial transcript further reflects that when Proponents' expert (later withdrawn) was confronted with this fact, he "offer[ed] that he should delete the word 'biological'" from his expert report. Tr. 1194.

only to those couples that ultimately may raise children in a traditional family. But that does not accurately describe the legal effect of Proposition 8. Proposition 8 did not create a new benefit and bestow it only on opposite-sex couples who can procreate. On November 4, 2008, Proposition 8 stripped gay and lesbian individuals of the right to marry that, on November 3, *both* they and heterosexuals enjoyed. It is that extinguishment of the fundamental right to marry that must rationally advance a governmental objective. The evidence produced at trial demonstrates beyond serious dispute that prohibiting gay men and lesbians from marrying will have no effect on the number of children raised in opposite-sex married households. Indeed, as the district court observed, because Proposition 8 denies to children raised by gay men and lesbians the protective benefits of marriage, "[t]he only rational conclusion in light of the evidence is that Proposition 8 makes it *less* likely that California children will be raised in stable households." Doc #708 at 131 (emphasis added).

ii. Preventing Deinstitutionalization of Marriage. Proponents also argue that Proposition 8 is necessary to forestall the "deinstitutionalization" of marriage. *See* Stay Mtn. 52-59. That Proponents would continue to press this argument is surprising: When the district court asked their counsel point blank what harm would come to opposite-sex married couples if gay and lesbian couples could marry, Proponents' counsel mustered only an "I don't know." Doc #708 at 11. And Proponents

presented no witness who discussed data or studies tending to show that permitting gay men and lesbians to marry harms the institution of marriage. Tellingly, Proponents make virtually no mention of the one witness they presented at trial to testify to this issue, David Blankenhorn, whom the district court found neither credible nor qualified to offer opinion testimony. Doc #708 at 51. Proponents' complete failure of proof is accurately reflected in the district court's factual finding 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." *Id.* at 85-86 (FF #55).

As they do elsewhere, Proponents try to plug that evidentiary hole with citations to stray trial exhibits used in cross-examination of Plaintiffs' experts. But the tactic fails again here as Proponents disregard key aspects of the evidence they claim resolves this case in their favor. For example, Proponents assert that the divorce rates in Massachusetts "changed for the worse" after 2004, when same-sex couples were permitted to marry. Stay Mtn. 56. But the CDC data to which Proponents cite shows that the Massachusetts divorce rate was *lower* for every measured year starting in 2004 than it was from 1999-2003. PX1309. The testimony at trial was consistent. *See*, *e.g.*, Doc #708 at 85 (FF #55). Similarly, Proponents' assertion that there was an "admission" that permitting same-sex couples to marry would "profoundly alter" the

institution of marriage is demonstrably false. *Compare* Stay Mtn. 52-53, *with* Tr. 268 (Cott).

Proponents further contend that evidence that the institution of marriage might be harmed if gay and lesbian couples could marry is unnecessary because reluctance to change a societal institution is reason enough to perpetuate discriminatory patterns of exclusion from that institution. But, as the district court correctly concluded, "[t]radition alone . . . cannot form a rational basis for a law." Doc #708 at 126. "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." *Williams v. Illinois*, 399 U.S. 235, 239 (1970); *see also* Doc #708 at 126. Adherence to "tradition" is an adequate basis for legislation only when doing so serves some independent societal interest. Here, Proponents failed to adduce evidence of any such interest—because there is none.

iii. Giving Effect to Moral Disapproval of Gay Relationships. Proponents' last asserted rational basis—which follows on the heels of an energetic straw-man exercise in which Proponents claim, outlandishly, that the district court "attributes anti-gay animus to all who" oppose same-sex marriage—is that the State may give effect to the "religious doctrine and moral precept" of those who adhere to a "traditional definition of marriage." Stay Mtn. 60, 63. "[R]eligion and morality," Propo-

nents claim, "have always played a prominent and entirely proper role in American political life," and here could justify stripping gay men and lesbians of their right to marry. *Id.* at 64.

This line of argument cannot be reconciled with the Supreme Court's view that "individuals' moral views are an insufficient basis upon which to enact a legislative classification." Doc #708 at 132; *see also Lawrence*, 539 U.S. at 582 ("[m]oral disapproval" of gay men and lesbians, "like a bare desire to harm the group, is an interest that is insufficient to satisfy" even rational basis review); *In re Golinski*, 587 F.3d 901, 903 (9th Cir. 2009) (Kozinski, J.) (amended order) ("disapproval of homosexuality isn't itself a proper legislative end"). But Proponents see no inconsistency. *Lawrence*, Proponents contend, "held only that moral disapproval of homosexual relationships could not justify a law *criminalizing*" those same relationships. Stay Mtn. 65 (emphasis in original). But the government, Proponents assert, is not obliged to continue providing "official recognition and support" to those engaged in gay and lesbian relationships if the government deems them immoral. *Id.* at 65.

This cannot be a serious argument: According to Proponents, the government cannot jail gay men and lesbians, but it can withdraw from them anything else that the government might describe as a benefit—including the fundamental right of marriage. Taken at face value, this argument would also permit the government to withdraw

from gay and lesbian citizens the right to vote (because they might vote for persons who do not reject them as immoral), the right to receive a driver's license (because it might permit the assertedly immoral elements to congregate), or the right to laws protecting them from discrimination. *But see Romer*, 517 U.S. at 627.

What made the anti-sodomy law at issue in *Lawrence* unconstitutional is not simply that the statute imposed criminal penalties, but also that the statute, in the guise of a regulation on "homosexual conduct," targeted persons based on a fundamental aspect of their identity—their sexual orientation. Calling it "amorphous" and not susceptible to "consistent and uniform definition" (Stay Mtn. 43), Proponents deny that sexual orientation is an identifiable status, much less a fundamental aspect of anyone's identity; to them, it is just a species of conduct. But as the Supreme Court recently confirmed in *Christian Legal Society*, a court ought not "distinguish between status and conduct in [the context of sexual orientation]," 130 S. Ct. at 2990 , and the district court's findings amply support this conclusion. *See* Doc #708 at 73-78.

In regulating gay and lesbian conduct, Texas's anti-sodomy law targeted gay men and lesbians for *who* they are. *Lawrence* stands for the proposition that mere moral disapproval of a group of citizens, without more, is not a rational basis to treat them unequally. This is no less so when the price affixed to one's status is the withdrawal of fundamental rights as opposed to conviction for a crime. *See Romer*, 517

U.S. at 633; *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (while "[p]rivate biases may be outside the reach of the law," the "law cannot, directly or indirectly, give them effect" at the expense of a disfavored group).

B. Proponents Lack Standing To Invoke This Court's Appellate Jurisdiction.

Proponents' failure to make the requisite "strong showing" that they are likely to prevail on appeal is underscored by Proponents' inability to establish standing to appeal. In the absence of an appellant with the requisite standing to appeal, there is no appellate jurisdiction and a stay cannot issue.

To invoke the jurisdiction of the court of appeals, an appellant must meet the requirements of Article III standing. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997). Where private persons have intervened in a lawsuit to defend a state law, and the trial court has ruled for the plaintiff, the intervenors cannot by themselves prolong the litigation through an appeal unless the intervenors independently establish their Article III standing. *See Diamond v. Charles*, 476 U.S. 54, 68-71 (1986).

No state defendant has yet noticed an appeal in this case—and, given their refusal to defend Proposition 8 at trial, it appears unlikely that they will do so. *See* Opp'n to Stay of Att'y Gen. at 2 ("the Attorney General will not be appealing the district court's Order permanently enjoining the enforcement of Proposition 8"). Without

a state defendant to invoke this Court's jurisdiction, Proponents cannot prosecute this appeal on their own because, as the district court found, "nothing in the record shows proponents face the kind of injury required for Article III standing." Doc #727 at 6. Indeed, ballot proposition proponents are not materially different from citizens dissatisfied with the government's failure to enforce a generally applicable law and thus cannot demonstrate the irreducible constitutional minimum to pursue an appeal: a "concrete" injury "particularized" to themselves and not shared generally by the public. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Proponents devote five pages of their stay motion to advancing three alternative rationales for their purported standing—an unmistakable sign that Proponents themselves recognize the jurisdictional flaws in their appeal and powerful proof that they do not have a "strong" chance of winning on appeal. Proponents first contend that they have standing under *Karcher v. May*, 484 U.S. 72 (1987), because they purportedly possess "authority under state law to defend the constitutionality of an initiative they have successfully sponsored as agents of the people of California." Stay Mtn. 19 (internal quotation marks and citation omitted). But the Supreme Court's statement in *Karcher* that two New Jersey legislators had properly appealed a district court decision invalidating a state statute was premised on a New Jersey Supreme Court decision that explicitly afforded the "New Jersey Legislature . . . authority under state law

to represent the *State's* interests" in litigation. *Id.* at 82 (citing *In re Forsythe*, 450 A.2d 499, 500 (N.J. 1982)) (emphasis added); *see also Arizonans for Official English*, 520 U.S. at 65 ("We have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests.").

Proponents can identify no provision of California law that authorizes them to represent the interests of the State of California in this case. While California courts have permitted initiative proponents to intervene in state-court litigation in defense of their initiatives, none of those decisions permits the proponents to represent the interests of the *State*, as opposed to their *own* interests in defending a ballot initiative or "guard[ing] the people's right to exercise initiative power." Stay Mtn. 20 (quoting *Building Indus. Ass'n v. City of Camarillo*, 718 P.2d 68, 75 (Cal. 1986)). But Proponents' own interests in preserving Proposition 8 and their right to invoke the initiative process are insufficient to confer Article III standing because those interests are no different from the generalized interests of every other voter who supported the ballot measure and who has an interest in defending the "exercise" of the "initiative power." *See Lujan*, 504 U.S. at 560.

Proponents are therefore wrong when they contend that, even if they lack standing to represent the State's interests in this appeal, they "have standing to appeal be-

cause of their own particularized interest in defending an initiative they have successfully sponsored." Stay Mtn. 21. The Supreme Court has never "identified initiative proponents as Article-III-qualified defenders of the measures they advocated." *Arizonans for Official English*, 520 U.S. at 65. And for good reason. Proponents' purported interest in prohibiting Plaintiffs from marrying is nothing more than a "'value interest[ ]'" shared with every Californian who voted in favor of Proposition 8. *Id.* at 65 (quoting *Diamond*, 476 U.S. at 62); *see also Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 460 U.S. 1077 (1983) (summarily dismissing, for lack of standing, appeal by an initiative proponent from a decision holding the initiative unconstitutional).

Finally, Proponents attempt to piggy-back on the purported standing of Imperial County. But the district court *denied* the motion of Imperial County to intervene in this case because "Imperial County's status as a local government"—and its purely "ministerial" role in administering the State's marriage laws—"do[ ] not provide it with an interest in the constitutionality of Proposition 8 or standing to defend Proposition 8 on appeal." Doc # 709 at 10, 18. Proponents cannot make a "strong showing" of likely standing based on nothing more than sheer speculation that this Court will reverse the denial of Imperial County's motion to intervene and hold that Imperial County itself would have standing to appeal—which, for the reasons identified by the

district court, it would not. *See id.* at 17 ("Imperial County itself, as a political subdivision of California, has no legally-protected interest relating to the state's marriage laws," and "may not stand in to defend Proposition 8 on appeal if the legal representatives of the state determine that defending Proposition 8 is not in the state's best interests.").[4]

II. Proponents Have Failed To Establish That They Will Likely Suffer Irreparable Injury In The Absence Of A Stay.

In addition to evaluating whether the party seeking a stay has made a "strong showing" of likelihood of success, courts also consider "whether *the applicant* will be irreparably injured absent a stay." *Nken*, 129 S. Ct. at 1761 (emphasis added); *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). As in the district court, however, "proponents make no argument that they—as opposed to the state defendants or plaintiffs—will be irreparably injured absent a stay," and thus "have not given the court any basis to exercise its discretion to grant a stay." Doc #727 at 8. Indeed, Propo-

[4] Imperial County, after filing its own appeal of the district court's denial of its motion to intervene, Docket No. 10-16751, has now filed, in that separate appeal, what purports to be a "joinder" in Proponents' motion for a stay pending appeal. Regardless of whether a nonparty such as Imperial County is free to "join" Proponents' motion, Imperial County's "joinder" simply repeats the same baseless arguments rejected by the district court in its order denying Imperial County's motion to intervene. Nothing in Imperial County's "joinder" can change the fact that, as a political subdivision of the State delegated "ministerial" responsibilities for administering the State's marriage laws, it lacks a "significant protectable interest" in the outcome of this litigation.

nents' failure even to argue that they will suffer irreparable harm in the absence of a stay is sufficient, standing alone, to fatally undermine their stay request—and also reinforces the fact that Proponents have not suffered any concrete and particularized injury for Article III purposes. Unable to show that they will suffer any harm in the absence of a stay, Proponents assert that allowing the district court's decision to take immediate effect "would inflict harm on affected couples, place administrative burdens on the State, and create general chaos, confusion, and uncertainty." Stay Mtn. 68. But both the Governor and the Attorney General are parties to this case, neither has indicated an intention to appeal the district court's ruling (and the Attorney General has, in fact, affirmatively disavowed any such intention), and both oppose a stay. *See* Opp'n to Stay of Att'y Gen. at 2. As the Governor made clear in his stay opposition, allowing the district court's judgment to take effect "does not burden any governmental interest." Doc #717 at 8; *see also* Doc #727 at 7 ("state defendants have disavowed the harms identified by proponents"); Opp'n to Stay of Att'y Gen. at 2. The positions of the Governor and the Attorney General—who are responsible for overseeing the day-to-day administration and enforcement of the State's laws—should carry dispositive weight here. *See* Doc #727 at 10.

[Footnote continued from previous page]

Doc #709 at 3 (internal quotation marks omitted).

Moreover, Proponents' attempt to generate the specter of "chaos, confusion, and uncertainty" in the absence of a stay rests on the fundamentally flawed premise that same-sex marriages performed while this case is on appeal would be invalidated if the district court's decision were eventually reversed. But, as the district court held, this is simply incorrect as a matter of California law, because, under *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), "married couples' rights vest upon a lawful marriage." *Id.* at 120-21. Because marriages performed while Proposition 8 is enjoined by court order would be lawful at the time they took place, a subsequent decision reversing the district court's injunction could not disturb vested marriage rights.

In any event, any risk that such marriages would subsequently be invalidated is borne exclusively by the same-sex couples who make the decision to get married—and "Proponents have not . . . alleged that any of them seek to wed a same-sex spouse." Doc #727 at 7. For the people who put Proposition 8 on the ballot to assert the interests of gay and lesbian couples as a basis for continuing to exclude them from marriage is a true case of the fox guarding the henhouse.

III. A Stay Will Cause Substantial Irreparable Harm To Plaintiffs.

When a party seeks a stay pending appeal, the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531,

542 (1987). A court can issue a stay only when the balance of equities tips in the movant's favor. *Nken*, 129 S. Ct. at 1761-62. Proponents cannot possibly meet that burden because they have not alleged that they will suffer any harm in the absence of a stay and because Proposition 8 is causing ongoing, substantial, and irreparable harm to Plaintiffs. *See* Doc #727 at 9 ("the trial record left no doubt that Proposition 8 inflicts harm on plaintiffs and other gays and lesbians in California").

The district court held that Plaintiffs have a constitutional right to marry the person of their choice—even if that person is of the same sex. Each day that right is denied to Plaintiffs is a day that can never be returned to them—a wrong that can never be remedied. For that reason, this Court repeatedly has held that the denial of a fundamental constitutional right is an irreparable injury. *See*, *e.g.*, *Nelson v. NASA*, 530 F.3d 865, 872-73 (9th Cir. 2008). As the district court found, "a stay would force California to continue to violate plaintiffs' constitutional rights and would demonstrably harm plaintiffs and other gays and lesbians in California." Doc #727 at 9. It "would not be equitable . . . to allow the state to continue to violate the requirements of federal [constitutional] law" during this appeal—"especially when there are no adequate remedies available to compensate . . . Plaintiffs for the irreparable harm that would be caused by the continuing violation." *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009).

Proponents nevertheless argue that "a stay will at most subject Plaintiffs to a period of additional delay pending a final determination of whether they may enter a legally recognized marriage relationship." Stay Mtn. 70. In so doing, Proponents simply refuse to recognize the legal truth that state-sanctioned discrimination causes all those who suffer its sting irreparable damage, depriving them of freedom and inflicting emotional distress and psychological harm each day.

Finally, whether "Plaintiffs would opt to marry if given the choice while appeal of this case is pending" is constitutionally irrelevant. Stay Mtn. 70. Plaintiffs have a constitutional right to choose the timing of their marriage—just as they have a constitutional right to choose to marry a person of the same sex. *See* Doc #727 at 9 ("Whether plaintiffs choose to exercise their right to marry now is a matter that plaintiffs, and plaintiffs alone, have the right to decide."). Proponents' contention that Plaintiffs should continue to be denied those rights until a final resolution of this appeal disregards the very reason for the district court's decision—the unwarranted and wrongful deprivation of Plaintiffs' fundamental rights.

IV. The Public Interest Favors Immediate Enforcement Of The Judgment.

As citizens of a Nation profoundly committed to the principle of equal rights, the public has a substantial interest in permitting Plaintiffs to exercise their fundamental right to marry. "Proposition 8 harms the State of California" (Doc #727 at 10), and

as the Governor's stay opposition explained, is inconsistent "with California's long history of leading the way in recognizing the rights of gay and lesbian families." Doc #717 at 6-7. Similarly, this Court has explained that "all citizens have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). The district court's judgment thus advances the shared interest of all citizens in enforcing the Constitution's guarantees and reinforces this "Nation's basic commitment . . . to foster the dignity and well-being of all persons within its borders." *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970). Staying that judgment would, in the words of Proponents' own witness, prevent the Nation from furthering its commitment to "equal human dignity" and stop us from becoming "*more* American." Doc #708 at 50 (quoting David Blankenhorn) (emphasis added); *see also* Doc #727 at 10 ("The evidence presented at trial and the position of the representatives of the State of California show that an injunction against enforcement of Proposition 8 is in the public's interest.").

Proponents' public-interest arguments cannot possibly displace these weighty constitutional considerations.

First, Proponents again point to the interest in avoiding "'uncertainty'" regarding the status of marriages performed while this case is on appeal. Stay Mtn. 71. But

the Attorney General—the chief legal officer of the State—and the Governor—the chief executive of the State—do not believe that any such uncertainty is a basis for continuing to deny Plaintiffs their fundamental constitutional rights. Doc #716, 717; Opp'n to Stay of Att'y Gen. Indeed, any risk regarding the validity of same-sex marriages falls squarely on Plaintiffs and other gay and lesbian individuals—not on the State or on the public in general—and these individuals are fully capable of making their decision whether to marry with these considerations in mind.

Second, Proponents purport to find in the narrow voting margin in favor of Proposition 8 a "clear[ ] and consistent[ ]" articulation of a public interest in preserving the definition of marriage as between a man and a woman. Stay Mtn. 72. But as the district court correctly held:

> When challenged, . . . the voters' determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives.

Doc #708 at 26.

In short, the public's overriding interest in ensuring the recognition and protection of the constitutional rights of *all* citizens weighs decisively in favor of giving the district court's ruling immediate effect and against issuance of a stay.

V. In The Alternative, The Court Should Expedite This Appeal To The Greatest Extent Possible.

Proponents have failed to meet their burden of proving that a stay is appropriate, and none should be entered. But, in the event that the Court decides to issue a stay, Plaintiffs respectfully request that this Court expedite this appeal to the greatest extent possible. Expedited treatment would be warranted because, if a stay is granted, Plaintiffs will continue to suffer irreparable harm each day that Proposition 8 remains in force. Accordingly, if a stay is granted, Plaintiffs request that this Court order that Proponents' opening brief be filed by September 15, 2010; that Plaintiffs' answering brief be filed by October 15, 2010; and that the reply brief, if any, be filed by October 29, 2010. Plaintiffs further respectfully request that oral argument be heard no later than November 15, 2010.

CONCLUSION

For the foregoing reasons, the Court should deny Proponents' emergency motion for stay pending appeal.

Dated: August 13, 2010

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the enlargement of brief size granted by court order dated August 13, 2010. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 35 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

Dated: August 13, 2010

By /s/ Theodore B. Olson

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