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18 **UNITED STATES DISTRICT COURT**  
 19 **NORTHERN DISTRICT OF CALIFORNIA**

20 KRISTIN M. PERRY, *et al.*,  
 21 Plaintiffs,  
 22 and  
 CITY AND COUNTY OF SAN FRANCISCO,  
 23 Plaintiff-Intervenor,  
 24 v.  
 ARNOLD SCHWARZENEGGER, *et al.*,  
 25 Defendants,  
 26 and  
 27 PROPOSITION 8 OFFICIAL PROPONENTS  
 DENNIS HOLLINGSWORTH, *et al.*,  
 28 Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

**PLAINTIFFS' RESPONSE TO  
 AMICUS CURIAE FILINGS**

Trial Dates: January 11 – January 27, 2010  
 Judge: Chief Judge Walker  
 Location: Courtroom 6, 17th Floor

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## INTRODUCTION

Plaintiffs proved at trial that Proposition 8 (“Prop. 8”) violates the Due Process and Equal Protection Clauses of the U.S. Constitution because it stripped gay men and lesbians of their right to marry, relegated same-sex couples to the inherently unequal institution of domestic partnership, and is not rationally related to any legitimate state interest. Such arbitrary and discriminatory restrictions on the “freedom to marry”—a “vital personal right[ ]” and “basic civil right[ ]” (*Loving v. Virginia*, 388 U.S. 1, 12 (1967))—are incompatible with the “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) (emphasis added).

Nothing in the *amicus curiae* briefs supporting Proponents can remedy Prop. 8’s fundamental constitutional shortcomings.

## ARGUMENT

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### **I. PROPONENTS’ AMICI HAVE NOT IDENTIFIED A LEGITIMATE STATE INTEREST FURTHERED BY PROP. 8.**

Prop. 8 violates the Due Process and Equal Protection Clauses because it eliminated the right of gay men and lesbians to enter into what the Supreme Court has described as “the most important relation in life.” *Maynard v. Hill*, 125 U.S. 190, 205 (1888). And the State stripped gay men and lesbians of this right for no legitimate reason at all. Accordingly, Prop. 8 cannot survive rational basis review—let alone, the heightened scrutiny that applies when a fundamental right is at stake and when a law discriminates on the basis of a suspect classification. *See Romer v. Evans*, 517 U.S. 620, 627, 631 (1996) (a State may not “impose[ ] a special disability upon [gay and lesbian individuals] alone” and “withdraw[ ] from” them, “but, no others, specific legal protection” that they had previously enjoyed under the state constitution).

Several of Proponents’ *amici* attempt to salvage Prop. 8 by interposing state interests purportedly advanced by this discriminatory and irrational modification of California’s marriage laws. None of these proffered interests is sufficient to satisfy the requirements of even rational basis review.

1           The American College of Pediatricians (“ACP”)—a group formed in 2002 in direct response  
2 to the American Association of Pediatrics’ public support for the parenting abilities of gay men and  
3 lesbians (*see* ACP, History of the College, at [http://www.americancollegeofpediatricians.org/History-](http://www.americancollegeofpediatricians.org/History-of-the-College.html)  
4 [of-the-College.html](http://www.americancollegeofpediatricians.org/History-of-the-College.html))—argues that Prop. 8 serves the interests of children. According to ACP, studies  
5 indicating that same-sex couples raise children as successfully as opposite-sex couples “‘suffer  
6 critical flaws.’” Doc # 374-1 at 8. The National Organization for Marriage offers a similar defense  
7 of Prop. 8. *See* Doc # 373-2 at 13 (“Children need mothers and fathers.”).

8           The evidence at trial, however, conclusively established that the children of same-sex couples  
9 are as well-adjusted as the children of opposite-sex couples. *See, e.g.*, PX0766 (JN) (American  
10 Psychological Association, Policy Statement on Sexual Orientation, Parents and Children: “There is  
11 no scientific basis for concluding that lesbian mothers and gay fathers are unfit parents on the basis of  
12 their sexual orientation.”); Tr. 1027:3-1028:2 (Lamb: Research indicates that there is not a marked  
13 difference between the effects of gay and lesbian and heterosexual parenting on child adjustment.);  
14 Tr. 2797:24-2798:3 (Blankenhorn: He is not aware of any studies showing that children raised from  
15 birth by a gay or lesbian couple have worse outcomes than children raised from birth by two  
16 biological parents.).

17           Plaintiffs’ *amici*—including organizations representing family and marriage therapists and the  
18 children of gay and lesbian parents—confirm that “no empirical scientific evidence supports the  
19 conclusion that heterosexual couples are better parents than same-sex couples.” Doc # 561 at 18  
20 (Brief of American Association for Marriage & Family Therapy, California Division, and others)  
21 (capitalization altered); *see also* Doc # 554 at 11-12 (Brief of the Progressive Project and COLAGE).  
22 In fact, not only is Prop. 8 unnecessary to protect children, but its discriminatory exclusion of gay  
23 men and lesbians from the revered institution of marriage is positively *harmful* to children because it  
24 stigmatizes the children of same-sex couples by signaling that their parents’ relationships are inferior  
25 to the relationships of opposite-sex couples. *See* Doc # 550-1 at 20 (the children of same-sex couples  
26 suffer “stigma . . . if the State itself labels their parents’ relationship as ‘different’ and implicitly of  
27 lesser standing”) (Brief of the American Anthropological Association; American Psychoanalytic  
28

1 Association; American Academy of Pediatrics, California; and others); Doc # 561 at 20 (Brief of the  
2 American Association for Marriage & Family Therapy, California Division, and others).

3 In any event, even if there were some question as to the relative parenting abilities of same-  
4 sex and opposite-sex couples—and there is not—Prop. 8 would not be rationally related to the State’s  
5 interest in child welfare because California law expressly authorizes adoption by unmarried same-sex  
6 couples. *See* Cal. Fam. Code §§ 297.5(d), 9000(b); *Sharon S. v. Sup. Ct.*, 73 P.3d 554, 569 (Cal.  
7 2003). Nor does California law impose any other restrictions on the right of same-sex couples to  
8 raise children. *See, e.g.*, PX0710 at RFA No. 60 (Attorney General admits “that in determining who  
9 shall raise a child and what is in the best interest of a child, the law of the State of California prohibits  
10 discrimination on the basis of sexual orientation”). Thus, whether or not Prop. 8 remains on the  
11 books, same-sex couples in California will be free to adopt and raise children.

12 The ACP and National Organization for Marriage also argue that Prop. 8 advances a  
13 legitimate state interest because permitting same-sex couples to marry “may weaken” the institution  
14 of marriage, make it less likely that opposite-sex couples will marry, and, in turn, decrease the rate of  
15 natural reproduction. Doc # 374-1 at 9; *see also* Doc # 373-2 at 15 (“Society needs babies.”). But, as  
16 demonstrated at trial, there is absolutely no empirical evidence to support the unfounded assertion of  
17 Proponents’ *amici* that permitting same-sex couples to marry will discourage opposite-sex couples  
18 from marrying and reproducing. *See* PFF § IX.C.2 (excluding same-sex couples from marriage has  
19 no effect on opposite-sex relationships). Data from the Netherlands, for example, indicate that  
20 permitting same-sex couples to marry did not increase the rate of non-marital cohabitation, the  
21 number or percent of unmarried couples with children, or the number or percent of single-parent  
22 families. PX2866, DIX2639, DIX2426. And, in Belgium, marriage rates actually *increased* after  
23 same-sex marriage was authorized in 2003. DIX2627. Thus, far from weakening the institution of  
24 marriage, permitting Plaintiffs and other same-sex couples in loving, committed relationships to  
25 marry will strengthen the institution and the relationships of both same-sex and opposite-sex couples.  
26 *See* PX0767 at 3 (Am. Psychol. Ass’n, Professional Association Policies: “[A]nthropological  
27 research supports the conclusion that a vast array of family types, including families built upon same-  
28 sex partnerships, can contribute to stable and humane societies.”).

1 The efforts of the Becket Fund for Religious Liberty to identify a legitimate state interest  
2 furthered by Prop. 8 are equally unavailing. According to the Becket Fund, “[l]egalizing same-sex  
3 marriage without also providing robust protections for conscientious objectors seriously undermines  
4 religious liberty.” Doc # 376 at 7. But, as emphasized in the *amicus* brief filed in support of  
5 Plaintiffs by the Unitarian Universalist Legislative Ministry California and other religious groups, the  
6 California Supreme Court has already squarely and authoritatively rejected this rationale in the  
7 *Marriage Cases*, where it explained that

8       affording same-sex couples the opportunity to obtain the designation of marriage  
9       will not impinge upon the religious freedom of any religious organization,  
10       official, or any other person; no religion will be required to change its religious  
11       policies or practices with regard to same-sex couples, and no religious officiant  
12       will be required to solemnize a marriage in contravention of his or her religious  
13       beliefs.

14 *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008); *see also* Doc # 559 at 15 (“The First  
15 Amendment would . . . preserve every religion’s ability to make its own rules concerning its own  
16 religious marriages.”) (Brief of Unitarian Universalist Legislative Ministry California). The  
17 California Supreme Court has thus provided the protection for religious liberty that the Becket Fund  
18 seeks.

19 Moreover, to the extent that the Becket Fund expresses concern that religious groups may be  
20 required under California law to provide gay and lesbian couples access to their physical facilities,  
21 those requirements are imposed by generally applicable state laws that prohibit discrimination in  
22 public accommodations on the basis of sexual orientation. *Compare* Doc # 376 at 9 (“Religious  
23 institutions . . . provide a broad array of programs and facilities to their members and to the general  
24 public, such as hospitals, schools, adoption services, and marital counsel.”) (Brief of the Becket Fund  
25 for Religious Liberty), *with* Cal. Civ. Code § 51(b) (prohibiting discrimination in “all business  
26 establishments of every kind whatsoever”). Prop. 8 does not exempt religious groups from these  
27 generally applicable anti-discrimination laws, and its invalidation will not change the fact that  
28 religion cannot be used to justify discrimination in access to public accommodations. Whether the  
opposition of some religious groups to same-sex marriage is “motivated by love,” as one of  
Proponents’ *amici* argues (Doc # 384 at 8 (Brief of the Ethics and Religious Liberty Commission of

1 the Southern Baptist Convention) (capitalization altered)), or by more nefarious considerations, the  
 2 “governmental interest” in vindicating the guarantees of due process and equal protection  
 3 “substantially outweighs” the “burden” that anti-discrimination laws impose on the “exercise of . . .  
 4 religious beliefs.” *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *see also id.* (holding  
 5 that schools that enforce racially discriminatory admissions standards on the basis of religious  
 6 doctrine do not qualify as tax-exempt organizations under the Internal Revenue Code).

7 **II. PROPONENTS’ AMICI HAVE NOT ESTABLISHED THAT HEIGHTENED SCRUTINY IS**  
 8 **INAPPLICABLE TO PROP. 8.**

9 Prop. 8 fails even rational basis review because it does not further any legitimate state interest.  
 10 Nevertheless, the appropriate standard of review in this case is strict scrutiny because Prop. 8 denies  
 11 gay men and lesbians their fundamental right to marry and discriminates on the basis of a suspect  
 12 classification. *See P.O.P.S. v. Gardner*, 998 F.2d 764, 767-68 (9th Cir. 1993) (“Statutes that directly  
 13 and substantially impair [the right to marry] require strict scrutiny.”); *Palmore v. Sidoti*, 466 U.S.  
 14 429, 432-33 (1984). The arguments of Proponents’ *amici* that Prop. 8 should be subjected to a lesser  
 15 standard of scrutiny are legally and factually flawed.

16 The Family Research Council argues that the fundamental right to marry does not extend to  
 17 same-sex couples because the Supreme Court’s decisions uniformly “relat[e] marriage to procreation  
 18 and childrearing,” and that Plaintiffs’ due process claim therefore does not warrant strict scrutiny.  
 19 Doc # 370-1 at 12; *see also* Doc # 373-2 at 15 (“the U.S. Supreme Court has repeatedly pointed to the  
 20 link between marriage and procreation”) (Brief of National Organization for Marriage). But, in fact,  
 21 the Supreme Court has repeatedly recognized that the importance of marriage transcends its  
 22 procreative element. The Court has emphasized that marriage is an “expression[ ] of emotional  
 23 support and public commitment” (*Turner v. Safley*, 482 U.S. 78, 95 (1987)), “a coming together for  
 24 better or for worse” (*Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)), and a relationship that is  
 25 “intimate to the degree of being sacred.” *Id.*; *see also* Doc # 574 at 7 (“The purposes of civil  
 26 marriage are to enable two individuals who choose to integrate their lives, legally and emotionally,  
 27 and to express their commitment publicly, to do so.”) (Brief of Family Law Professors). For that  
 28 reason, the Court has invalidated prohibitions on inmate marriages—even though some inmates will

1 never have the opportunity to consummate their marriage and others will have to wait years to do so  
2 (*Turner*, 482 U.S. at 99)—and upheld the right of married individuals to use contraception to prevent  
3 procreation. *Griswold*, 381 U.S. at 485. Indeed, if the fundamental right to marry were premised  
4 exclusively on an interest in procreation, the State could deny that right to any individual who was  
5 unable or unwilling to procreate. Thus, just as the Due Process Clause protects the right to marry of  
6 opposite-sex couples who will not procreate due to biology, incarceration, or mere personal choice,  
7 the Due Process Clause similarly protects the right of gay men and lesbians to enter into that “most  
8 important relation in life.” *Maynard*, 125 U.S. at 205.

9 Other *amici* supporting Proponents argue that gay men and lesbians do not constitute a  
10 suspect or quasi-suspect class and that rational basis review should therefore be applied to Plaintiffs’  
11 equal-protection claim. Paul McHugh, a “scholar of psychiatry with a professional interest in  
12 orientation issues,” argues that “emerging evidence suggests that homosexuality is not an innate  
13 characteristic” and that heightened equal-protection scrutiny is therefore inappropriate. Doc # 379 at  
14 5, 9. As an initial matter, Mr. McHugh’s argument is irrelevant because the Supreme Court has held  
15 that heightened scrutiny is appropriate whenever a group has suffered a history of discrimination  
16 based on a “characteristic” that “frequently bears no relation to ability to perform or contribute to  
17 society.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985) (internal  
18 quotation marks omitted); *see also Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (persons  
19 “who have been discriminated against on the basis of race or national origin” are a suspect class  
20 because they have “experienced a ‘history of purposeful unequal treatment’” and “been subjected to  
21 unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities”).  
22 Even where that characteristic may not be strictly or absolutely “immutable,” the history of  
23 unwarranted discrimination is sufficient to trigger heightened scrutiny. *See Christian Sci. Reading  
24 Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1012 (9th Cir. 1986)

1 (holding that “an individual religion meets the requirements for treatment as a suspect class,” even  
2 though religion is not immutable).<sup>1</sup>

3 In any event, Ninth Circuit precedent establishes that sexual orientation is indeed an  
4 immutable characteristic. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000)  
5 (“[s]exual orientation and sexual identity are immutable”); *id.* (“[h]omosexuality is as deeply  
6 ingrained as heterosexuality”) (quoting *Gay Rights Coalition of Georgetown Law Ctr. v. Georgetown*  
7 *Univ.*, 536 A.2d 1, 34 (D.C. 1987)); *see also Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009)  
8 (“sexual orientation forms a significant part of a person’s identity,” and “influences the formation of  
9 personal relationships between all people—heterosexual, gay, or lesbian—to fulfill each person’s  
10 fundamental needs for love and attachment”) (internal quotation marks omitted).

11 The evidence presented at trial substantiates the fact that sexual orientation is not a personal  
12 choice and is highly resistant to change. According to empirical research, 88% of gay men report that  
13 they had “no choice at all” about their sexual orientation, and 83% of lesbians report they had “no  
14 choice at all” or only a small amount of choice about their sexual orientation. Tr. 2056:4-25 (Herek  
15 discussing PX0930). Similarly, a 2009 Report of the American Psychological Association Task  
16 Force on Appropriate Therapeutic Responses to Sexual Orientation found that “enduring change to an  
17 individual’s sexual orientation is uncommon” and that the “results of scientifically valid research  
18 indicate that it is unlikely that individuals will be able to reduce same-sex attractions or increase  
19 other-sex sexual attractions through” sexual-orientation change efforts. PX0888 at 2, 3; *see also* Tr.

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21 <sup>1</sup> Neither Proponents nor their *amici* dispute that gay men and lesbians have been subjected to a  
22 history of discrimination in this country. *See* PX0707 at RFA No. 14 (Proponents admit “that  
23 in the past gays and lesbians experienced discrimination in the United States”). That long and  
24 often violent history dwarfs the regrettable (but isolated) acts of retaliation reported by some  
25 supporters of Prop. 8 and discussed by *amicus* Institute for Marriage and Public Policy.  
26 *Compare* Doc # 388 at 16 (“reports of Yes on Prop 8 signs being defaced, damaged,  
27 dislocated, or stolen are almost too numerous to track reliably”), *with* PX2566 at 2-4 (Letter  
28 from John W. Macy of the U.S. Civil Services Comm’n to The Mattachine Society of  
Washington, Feb. 25, 1966 (refusing to lift the federal government’s policy barring the  
employment of gay men and lesbians due to the “revulsion of other employees by homosexual  
conduct,” “the unavoidable subjection of the sexual deviate to erotic stimulation through on-  
the-job use of common toilet[s],” and “the offense to members of the public who are required  
to deal with a known or admitted sexual deviate”), *and* PX0868 at 5, 9 (reporting 29 bias-  
motivated murders in 2008 of gay and lesbian individuals).

1 2039:1-3 (Herek: No major mental health organization endorses the use of therapies designed to  
2 modify sexual orientation).

3 Finally, the National Legal Foundation contends that gay men and lesbians possess such a  
4 significant amount of political power that they do not qualify as a suspect or quasi-suspect class for  
5 equal-protection purposes. Doc # 382; *see also* Doc # 370-1 at 20 (Brief of Family Research  
6 Council). According to the National Legal Foundation, gay men and lesbians enjoy substantial  
7 political power because they have “powerful political allies,” receive contributions from corporations  
8 and unions, and are favorably portrayed by some media outlets. Doc # 382 at 2, 3, 8 (capitalization  
9 altered). But, even if relative political power were sufficient to deny heightened equal-protection  
10 scrutiny to a group that continues to suffer pervasive and unjustified societal discrimination—which  
11 it is not (*see Murgia*, 427 U.S. at 313)—gay men and lesbians could not be denied heightened  
12 scrutiny on this ground because they possess less political power than other suspect and quasi-suspect  
13 classes, including racial minorities and women. *See* Doc # 567 at 11 (the political powerlessness  
14 inquiry “urged by [Proponents] would necessarily require a reexamination of established Equal  
15 Protection jurisprudence by eliminating all suspect classifications, including race and gender”) (Brief  
16 of Asian Law Caucus, California State Conference of the NAACP, Mexican American Legal Defense  
17 and Education Fund, and others); *see also Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 452  
18 (Conn. 2008) (“With respect to the comparative political power of gay persons, they presently have  
19 no greater political power—in fact, they undoubtedly have a good deal less such influence—than  
20 women did in 1973, when the United States Supreme Court, in *Frontiero [v. Richardson]*, 411 U.S.  
21 677 (1973) (plurality opinion)], held that women are entitled to heightened judicial protection.”).

22 Gay men and lesbians are vastly underrepresented in political offices across the country. Of  
23 the more than half million people who hold political office at the local, state, and national levels, less  
24 than 300 are openly gay. *Kerrigan*, 957 A.2d at 446. No openly gay person has ever served in the  
25 United States Cabinet, on any federal court of appeals, or in the United States Senate. *Id.* at 447. In  
26 contrast, African-Americans have served as President of the United States, Attorney General, and  
27 Secretary of State, as well as in the United States Senate and on the U.S. Supreme Court. Similarly,  
28 women currently head the Departments of State, Homeland Security, and Labor, and the 111th

1 Congress includes seventeen female Senators and seventy-eight female representatives. *See*  
2 Congressional Research Service, *Membership of the 111th Congress: A Profile 5* (2008); *see also*  
3 DIX0271 at 1-2 (USA Today/Gallup poll: 43% of Americans would not vote for a generally  
4 qualified homosexual presidential candidate nominated by their party versus 5% who would not vote  
5 for a similarly qualified black candidate and 11% who would not vote for a woman.).

6 Moreover, despite their “purportedly powerful political allies,” gay men and lesbians have  
7 been unable to secure federal legislation to protect themselves from discrimination in housing,  
8 employment, and public accommodations (PX0707 at RFA Nos. 35, 36 ); fewer than half the States  
9 prohibit sexual-orientation discrimination in employment, housing, and public accommodations (Tr.  
10 1545:6-1546:6 (Segura)); and, in the past fifteen years, voters have used initiatives or referenda to  
11 repeal or prohibit marriage rights for gay and lesbian individuals 33 times. Tr. 1553:14-19 (Segura).  
12 Indeed, as Professor Segura testified, “[t]here is no group in American society who has been targeted  
13 by ballot initiatives more than gays and lesbians.” Tr. 1551:25-1552:12.

14 In light of the underrepresentation of gay men and lesbians in elected office, their inability to  
15 obtain meaningful legal protections through the political process, and the frequency with which they  
16 are denied or stripped of basic civil rights by popular vote, heightened equal-protection scrutiny is  
17 necessary to safeguard the fundamental rights of gay men and lesbians against arbitrary and  
18 discriminatory action by democratic majorities. Where the political process fails, it is squarely the  
19 province of the courts to intervene on behalf of unpopular and politically vulnerable minorities. *See*  
20 *Romer*, 517 U.S. at 635; *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967).

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**CONCLUSION**

Because neither Proponents nor their *amici* have identified a legitimate state interest furthered by Prop. 8, this Court should declare Prop. 8 unconstitutional and permanently enjoin its enforcement.

Respectfully submitted,

DATED: February 26, 2010

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