Perry et al v. Schwarzenegger et al Doc. 686

GIBSON, DUNN & CRUTCHER LLP
Theodore B. Olson, SBN 38137
tolson@gibsondunn.com
Matthew D. McGill, *pro hac vice*
1050 Connecticut Avenue, N.W., Washington, D.C. 20036
Telephone: (202) 955-8668, Facsimile: (202) 467-0539

Theodore J. Boutrous, Jr., SBN 132009
tboutrous@gibsondunn.com
Christopher D. Dusseault, SBN 177557
Ethan D. Dettmer, SBN 196046
333 S. Grand Avenue, Los Angeles, California 90071
Telephone: (213) 229-7804, Facsimile: (213) 229-7520

BOIES, SCHILLER & FLEXNER LLP
David Boies, *pro hac vice*
dboies@bsfllp.com
333 Main Street, Armonk, New York 10504
Telephone: (914) 749-8200, Facsimile: (914) 749-8300

Jeremy M. Goldman, SBN 218888
jgoldman@bsfllp.com
1999 Harrison Street, Suite 900, Oakland, California 94612
Telephone: (510) 874-1000, Facsimile: (510) 874-1460

Attorneys for Plaintiffs
KRISTIN M. PERRY, SANDRA B. STIER,
PAUL T. KATAMI, and JEFFREY J. ZARRILLO

Dennis J. Herrera, SBN 139669
Therese M. Stewart, SBN 104930
Danny Chou, SBN 180240

One Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4708, Facsimile (415) 554-4699

Attorneys for Plaintiff-Intervenor
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S RESPONSE TO COURT'S QUESTIONS FOR CLOSING ARGUMENTS

Trial: January 11-27, 2010
Closing: June 16, 2010

Judge: Chief Judge Vaughn R. Walker
Magistrate Judge Joseph C. Spero

Location: Courtroom 6, 17th Floor

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Plaintiffs and Plaintiff-Intervenor hereby submit their written responses to the Court's Questions for Closing Arguments, Doc # 677. Plaintiffs and Plaintiff-Intervenor expressly reserve the right to supplement their written responses during the closing arguments scheduled for June 16, 2010. Doc # 678.

A. RESPONSES TO QUESTIONS DIRECTED TO PLAINTIFFS

1. Assume the evidence shows Proposition 8 is not in fact rationally related to a legitimate state interest. Assume further the evidence shows voters genuinely but without evidence believed Proposition 8 was rationally related to a legitimate interest. Do the voters' honest beliefs in the absence of supporting evidence have any bearing on the constitutionality of Proposition 8? *See Hernandez v. Robles*, 855 NE2d 1, 7-8 (2006) ("In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the common-sense premise that children will do best with a mother and a father in the home.").

To survive rational basis review, a classification must "bear a rational relationship to an independent and legitimate legislative end." *Romer v. Evans*, 517 U.S. 620, 633 (1996). A "law will be sustained" under the rational basis standard *only* "if it can be said to *advance* a legitimate government interest." *Id.* at 632 (emphasis added). Accordingly, if this Court finds that "the evidence shows Proposition 8 is not in fact rationally related to a legitimate state interest"—as Plaintiffs proved at trial—then Prop. 8 could not survive even rational basis review (let alone, the more stringent requirements of intermediate and strict scrutiny). The voters' allegedly "genuine[ ]"—but erroneous—views to the contrary would be insufficient to sustain Prop. 8 because the genuinely held beliefs of voters who enact an arbitrary, irrational, and discriminatory law cannot shield the measure from constitutional scrutiny. *See, e.g.*, *id.* at 635. Voters' unfounded and discriminatory stereotypes are not a substitute for *proof* that a law actually furthers a legitimate state interest. Indeed, those who disfavor a particular group often genuinely believe and accept negative stereotypes about the disfavored group, even where such stereotypes are wholly unsubstantiated. The constitutionally relevant question for rational basis purposes is whether Prop. 8 in fact "*advance[s]* a legitimate government interest" (*id.* at 632 (emphasis added))—not whether the voters *believed* that it did.

The New York Court of Appeals' decision in *Hernandez v. Robles*, 855 N.E. 2d 1 (N.Y. 2006), is not to the contrary. In that case, the court found that there was an "*absence* of" proof that

New York's prohibition on marriage by individuals of the same sex failed to further a legitimate state interest. *Id.* at 8 (emphasis added). Here, in contrast, Plaintiffs conclusively proved at trial that Prop. 8 does not advance *any* legitimate state interest, and that it is therefore irrational and unconstitutional under *any* standard of scrutiny.

2. What evidence supports a finding that maintaining marriage as an opposite-sex relationship does not afford a rational basis for Proposition 8?

Merely "maintaining marriage as an opposite-sex relationship" is not by itself a rational basis for Prop. 8. As an initial matter, neither tradition nor moral disapproval is a sufficient basis for a State to impair a person's constitutionally protected right to marry. *See Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice") (internal quotation marks omitted); *id.* at 579 ("times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress"); *id.* 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) (O'Connor, J., concurring); *Romer*, 517 U.S. at 634 (a "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest") (internal quotation marks omitted; emphasis in original); *id.* at 635 (a state practice of restricting citizens' constitutional rights cannot be perpetuated merely "for its own sake"); *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's fundamental constitutional rights); *Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack"); *see also* PX2810 at 86:25-87:3 (Court: "Tradition alone is not enough because the constitutional imperatives of the Equal Protection clause must have priority over the comfortable convenience of the status quo.").

Moreover, the evidence demonstrates that maintaining marriage as an opposite-sex relationship to the exclusion of loving and committed gay and lesbian couples does not promote any legitimate government interest. *See* Doc # 608-1 at 203-48 (PFFs 238-84). To the contrary, doing so

causes irreparable harm to gay men and lesbians and their families, and is fundamentally stigmatizing and discriminatory. *See id.* at 64-116 (PFFs 108-47) (evidence demonstrating harm to Plaintiffs and other gay and lesbian individuals and their families); *id.* at 248-73 (PFFs 285-97) (evidence demonstrating that Prop. 8 was motivated by moral disapproval and animus); *see also* Response to Question C.8, *infra*.

3. Until very recently, same-sex relationships did not enjoy legal protection anywhere in the United States. How does this fact square with plaintiffs' claim that marriage between persons of the same sex enjoys the status of a fundamental right entitled to constitutional protection?

The Supreme Court "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *see also, e.g.*, *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (marriage is "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress"); Doc # 608-1 at 273 (PCL 1). Plaintiffs are seeking invalidation of the discriminatory restrictions that Prop. 8 imposes on the *existing* constitutional right to marry—which is "fundamental[ly] importan[t] for *all* individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added). Those existing "constitutional protection[s]" for "personal decisions relating to marriage" extend to individuals in a loving, committed relationship with a person of the opposite sex or the same sex (*Lawrence*, 539 U.S. at 574) because, no matter the sex of the individuals involved in the relationship, marriage is an "expression[ ] of emotional support and public commitment" essential to personal fulfillment. *Turner v. Safley*, 482 U.S. 78, 95 (1987). Thus, just as the plaintiffs in *Loving v. Virginia*, 388 U.S. 1 (1967), were not asking the Supreme Court to recognize a new right to interracial marriage, Plaintiffs here are not asking this Court to recognize a *new* fundamental right to same-sex marriage. They are instead seeking access to an existing constitutional right that has long been denied to gay men and lesbians. The mere longevity of those discriminatory and irrational restrictions on the right to marry is a constitutionally inadequate ground for continuing to exclude gay men and lesbians from this "vital personal right." *Id.*; *see also Williams*, 399 U.S. at 239; *see also* PX2810 at 86:25-87:3.

4. What is the import of evidence showing that marriage has historically been limited to a man and a woman? What evidence shows that that limitation no longer enjoys constitutional recognition?

Evidence that marriage historically has been limited to a man and a woman does not insulate Prop. 8 from constitutional attack. *See* Responses to Questions A.2 & A.3, *supra*. The historical exclusion of gay men and lesbians from marriage is consistent with the uncontroverted evidence in this case that gay men and lesbians have suffered a history of discrimination and unequal treatment in virtually all aspects of their lives. Moreover, although there have historically been discriminatory restrictions imposed on marriage, eliminating those restrictions has not deprived marriage of its vitality and importance, but has, in fact, strengthened marriage as a social institution. *See* Doc # 608-1 at 29-45 (PFFs 37-58). For example, slaves historically were not allowed to marry but gained that right after emancipation. *See* Cott, Tr. 205:1-12 (Emancipated slaves viewed marriage as a basic civil right and assumed "that once they were legally married, that they could make valid claims about their family rights."). Similarly, although bans on interracial marriage had their origins in the colonial period, were eventually enacted by 41 States, and remained on the books in more than a dozen States as late as 1967, such restrictions are unthinkable—and flatly unconstitutional—today. *See Loving*, 388 U.S. 1; *see also Lawrence*, 539 U.S. at 577-78 ("neither history nor tradition could save a law prohibiting miscegenation from constitutional attack"). Although longstanding, none of these discriminatory restrictions on marriage ever "enjoy[ed] constitutional recognition"—and nor do discriminatory measures that restrict marriage to individuals of the opposite sex.

5. What does the evidence show regarding the intent of the voters? If the evidence shows that Proposition 8 on its face and through its consequences distinguishes on the basis of sexual orientation and sex, of what import is voter intent?

Whether or not Prop. 8 was motivated by discriminatory animus, it is unconstitutional because it facially discriminates on the basis of sexual orientation and sex. The extensive evidence that Prop. 8 was in fact motivated by moral disapproval of gay men and lesbians underscores its unconstitutionality. Indeed, where, as here, a law is subject to heightened judicial scrutiny, the "justification[s] must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Accordingly, the messages presented to voters

during the Prop. 8 campaign and the voters' motivations for supporting Prop. 8 are relevant to whether Prop. 8 was enacted to further a sufficiently important interest to survive constitutional scrutiny. Proponents' laundry list of purported state interests, invented after Prop. 8 was enacted and for the purposes of this litigation, cannot be considered under heightened scrutiny if Prop. 8 was not in fact enacted to further those interests. *See id.*; Doc # 605 at 12-15. And, if Prop. 8 was motivated simply by moral disapproval of gay men and lesbians, then it cannot survive any standard of constitutional scrutiny. *See Romer*, 517 U.S. at 634.

The evidence presented at trial establishes that the passage of Prop. 8 was motivated by animus toward, and moral disapproval of, gay and lesbian individuals. Doc # 608-1 at 248-73 (PFFs 285-97). The explicit purpose of Prop. 8 was to strip gay and lesbian individuals of the constitutional right to marry afforded them by the California Constitution and to impose a special disability on gay and lesbian individuals alone by denying them the state constitutional protections available to all other citizens. *See* PX0001 at 9 (California Voter Information Guide: "Changes California Constitution to eliminate the right of same-sex couples to marry."). Campaign messages in support of Prop. 8 stated and implied that same-sex relationships are immoral, and portrayed same-sex relationships and families as inferior. *See, e.g.*, Chauncey, Tr. 427:16-428:22 (The official Yes on 8 voter arguments are premised on the purported inferiority of gay people and their relationships. To argue that the best situation for a child is to be with a married mother and father is to argue that the married heterosexual couple is superior.). The Yes on 8 campaign messages played on the public's fear that children would be taught in school that gay and lesbian individuals and their relationships are equal to heterosexual individuals and their relationships. Doc # 608-1 at 254-57 (PFF 289). The campaign employed some of the most enduring anti-gay stereotypes—many of which reflect messages from prior anti-gay campaigns—to heighten public apprehension, including messages that gay men and lesbians recruit and molest children, that gay and lesbian relationships are immoral or bad and should be kept "private," and that there is a powerful gay "lobby" or "agenda" intent on destroying heterosexual families and denying religious freedom. *Id.* at 254-69 (PFFs 289-94).

6. What empirical data, if any, supports a finding that legal recognition of same-sex marriage reduces discrimination against gays and lesbians?

Uncontroverted evidence demonstrates that invalidating Prop. 8 would immediately and significantly reduce discrimination against gay men and lesbians by removing discriminatory restrictions that prohibit individuals of the same sex from marrying in California. *See* Herek, Tr. 2054:7-11 (Prop. 8 is an instance of structural stigma by definition. It is part of the legal system, and it differentiates people in same-sex relationships from people in heterosexual relationships.); Meyer, Tr. 825:25-826:20, 846:22-847:12 (When gay men and lesbians have to explain why they are not married, they "have to explain, I'm really not seen as equal. I'm—my status is—is not respected by my state or by my country, by my fellow citizens."); PX0752 at 2 ("[S]ame-sex couples and their children are adversely affected by [existing] discriminatory marriage laws."); PX0760 at 1, 4 (Discriminatory marriage laws adversely affect the children of same-sex couples by stigmatizing those children and making them less financially secure); Blankenhorn, Tr. 2849:8-11 ("Gay marriage would extend a wide range of the natural and practical benefits of marriage to many lesbian and gay couples and their children."); *id.* at 2850:4-9 ("Same-sex marriage would signify greater social acceptance of homosexual love and the worth and validity of same-sex intimate relationships."); DIX0956 at 6 (Blankenhorn, *The Future of Marriage*: "Marriage matters. It significantly influences individual and societal well-being.").

Affording gay men and lesbians the right to marry would also reduce discrimination by providing them with access to certain tangible benefits, such as health insurance, that flow directly from marriage. *See* Badgett, Tr. 1350:6-9 (The American Medical Association concluded that denying same-sex couples the right to marry reduces access to health insurance and creates health-care disparities among children.); PX1261 at 7 (a California Employer Health Benefits Survey found that only 56% of California firms offered health insurance to unmarried same-sex couples in 2008.).

Moreover, empirical studies from jurisdictions where marriage between individuals of the same sex is permitted demonstrate the salutary benefits that flow from permitting gay men and lesbians to marry. *See* Badgett, Tr. 1344:3-1348:13; *see also* PX1267 (A study of same-sex couples who married in Massachusetts indicated that almost 70% of respondents felt more accepted by their

communities and 93% of respondents with children thought that their children were happier and better off as a result of their marriage.). Empirical evidence also demonstrates that marriage correlates with a variety of measurable health benefits that extend to the married individuals and their children. *See* Doc # 608-1 at 84-87 (PFF 119); *see also* Meyer, Tr. 879:18-880:18 (If Prop. 8 was no longer the law of California, the mental health outcomes of gay men and lesbians would improve.); Peplau, Tr. 577:25-579:9 (noting "very consistent" research findings that married individuals fare better, are physically healthier, live longer, engage in fewer risky behaviors, and do better on measures of psychological well-being). Indeed, empirical studies have established that gay men and lesbians living in States that do not provide them with antidiscrimination protections are at a significantly higher risk of suffering from psychiatric disorders. PX0974 at 2277.

Finally, substantial evidence demonstrates that gay and lesbian couples are stigmatized because they cannot marry. *See* Doc # 608-1 at 88-126 (PFFs 121-58). Prop. 8 necessarily relegates the relationships of gay and lesbian individuals to second-class status by communicating the official view that their committed relationships are less worthy of recognition than comparable heterosexual relationships. *See id.* at 88-92 (PFF 121); *see also* Sanders, Tr. 1277:5-1279:10; Peplau, Tr. 611: 13-19. The resulting harm from that stigmatization is profound and far-reaching. *See* Doc # 608-1 at 88-126 (PFFs 121-58).

7. What evidence supports a finding that recognition of same-sex marriage would afford a permanent—as opposed to a transitory—benefit to the City and County of San Francisco? To California cities and counties generally?

The evidence at trial established that long-term benefits flow to cities and counties from reducing discrimination and increasing the number of people who benefit from the health and wealth advantages of marriage. Discrimination and stigma have serious adverse health effects for lesbians and gay men—including increased incidence of anxiety disorders, mood disorders, and substance abuse disorders, and higher rates of attempted suicide by teens—and expose lesbians and gay men and those perceived to be gay to harassment and violence. *See* Doc # 608-1 at 151-55 (PFF 187-89) (hate crimes and physical violence); *id*. at 167-68 (PFF 199) (school bullying); Meyer, Tr. 870:13-872:10 (stigma and minority stress); *id.* at 898:11-899:8 (negative health outcomes); Chauncey, Tr.

361:11-22 (the "continuing legacies and effects" of discrimination); Zia, Tr. 1218:9-1219:6 ("I feel constantly aware that my sexual orientation could, for whatever reason, provoke violence toward me or toward my loved ones."); Kendall, Tr. 1514:6-16; PX 672-76 (Hate Crime Reports); PX0710 at RFA No. 14-15; PX 810; PX1003. Eliminating the discrimination and stigma that is created and perpetuated by Prop. 8 will result in better mental health outcomes for gay men and lesbians, less school bullying, and less harassment and violence against those who are or are perceived to be gay, and, in turn, reduce the costs that government incurs to investigate and prosecute acts of discrimination. *See* Doc # 608-1 at 96 (PFF 130); *id*. at 115-17 (PFF 154). The health benefits from the elimination of this discrimination—as well as the health benefits and higher wealth accumulation associated with marriage itself—will likely result in greater productivity by gay and lesbian workers, larger payroll and business tax revenues for local governments and the State, and a reduction in government-funded health-care costs and other social safety net services. *See* Doc # 608-1 at 117 (PFF 155); Peplau, Tr. 579:23-582:2 (health benefits of marriage); Egan, Tr. 687:23-689:10 (the relationship between the health benefits of marriage and San Francisco's revenue); *id.* at 685-86; Badgett, Tr. 1331:12-1332:9 (marriage can improve economic well-being by, among other things, promoting more efficient division of labor). Moreover, census data show that structural discrimination by a State against lesbians and gay men can result in loss of workers from that State. *See* Badgett, Tr. 1368:2-1369:4; PX1262. Finally, if Prop. 8 were struck down there would be a temporary spike in marriages of same-sex couples, and a long term more modest increase in the number of marriages that would take place in San Francisco and in other jurisdictions in California, which would produce hotel tax revenues for local government and sales tax revenues for local and state government. *See* Doc # 608-1 at 113 (PFF 152); Egan, Tr. 711:13-22.

8. What is the relevance, if any, of data showing that state and local governments would benefit economically if same-sex couples were permitted to marry? Does that relevance depend on the magnitude of the economic benefit?

"In determining the rationality of [Prop. 8]," this Court "may appropriately take into account its costs to the Nation and to the innocent [persons] who are its victims." *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982). The fact that marriage discrimination is costly to government, particularly in the

absence of credible evidence showing any benefit to society from such discrimination, underscores the irrationality and lack of justification (compelling or otherwise) for such discrimination.

The economic costs to government—whether they are precisely quantified or not—are also a proxy for the broader harms and burdens such discrimination imposes on society (for example, more hate crimes and violence, more school bullying, higher numbers of attempted suicides by teenagers, more health problems, lower productivity, loss of talent from the State, more persons dependent on a social safety net). The magnitude of the economic cost does not determine the relevancy of the evidence (but, at most, goes to its weight). Legislation that imposes such harms and burdens on society, without any countervailing benefit, is irrational and unjustifiable under any standard of scrutiny. *See Plyler*, 457 U.S. at 230.

9. What are the consequences of a permanent injunction against enforcement of Proposition 8? What remedies do plaintiffs propose?

Plaintiffs seek (1) a declaratory judgment that Prop. 8 violates the U.S. Constitution, and (2) a permanent injunction that prohibits Defendants from enforcing or applying Prop. 8. Plaintiffs envision that such an injunction would include an order requiring Defendants to direct all persons under their supervision not to enforce or apply Prop. 8. Such an injunction would terminate enforcement of Prop. 8 not just in Alameda and Los Angeles Counties, but throughout the entire State of California. That is because under the California Health & Safety Code, the local officials who typically issue marriage licenses, perform civil marriages, and maintain marriage records do so only "under the supervision and direction of the State Registrar." § 102295. Indeed, the State Registrar is charged with ensuring that there shall be "uniform compliance" with the State's prescriptions concerning marriage. *Id.* § 102180. The California Supreme Court confirmed that the functions of county officials with respect to marriage are only ministerial in nature, and that such local officials have no discretion to disregard the mandate of the state authorities. *See Lockyer v. City & County of San Francisco*, 95 P.3d 459, 472 (Cal. 2004). Thus, once Defendant Mark Horton, State Registrar of Vital Statistics, complies with an order to direct all local registrars not to enforce or apply Prop. 8, no local official within the State lawfully could continue doing so.

10. Even if enforcement of Proposition 8 were enjoined, plaintiffs' marriages would not be recognized under federal law. Can the court find Proposition 8 to be unconstitutional without also considering the constitutionality of the federal Defense of Marriage Act?

Yes. Plaintiffs have challenged only Prop. 8 in this litigation. The Court need not—and in the absence of a federal defendant, should not—address the federal Defense of Marriage Act in this litigation. It may be that the Court's ruling will have implications for the Defense of Marriage Act and other similar laws that discriminate against gay men and lesbians. But such implications, if any, will depend on the parameters of this Court's decision.

11. What evidence supports a finding that the choice of a person of the same sex as a marriage partner partakes of traditionally revered liberties of intimate association and individual autonomy?

Plaintiffs put forth substantial and uncontested evidence at trial that the choice of a person of the same sex as a marriage partner invokes the liberties of intimate association and individual autonomy. As the Supreme Court has explained, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Lawrence*, 539 U.S. at 567. And the choice of a marriage partner invokes one of the most—if not *the* most—"intimate and personal choices a person may make in a lifetime, [a] choice[ ] central to personal dignity and autonomy," which is "central to the liberty protected by the Fourteenth Amendment." *Id.* at 574.

Testimony of multiple experts and of Plaintiffs themselves confirms that these liberties are precisely what is at stake in the choice of a same-sex marriage partner. Indeed, Proponents' own purported expert on marriage, David Blankenhorn, evoked these same principles, explaining that marriage—whether between heterosexual or gay or lesbian couples—is a "personal bond." Blankenhorn, Tr. 2913:8-2916:10. He went on to explain that "I believe that today the principle of equal human dignity must apply to gay and lesbian persons. In that sense, insofar as we are a nation founded on this principle, we would be *more* American on the day we permitted same-sex marriage than we were the day before." DIX0956 at 2 (Blankenhorn, *The Future of Marriage*); *see also* Blankenhorn, Tr. 2805:8-20. Put another way, as Professor Cott explained, "a marriage once formed

is a zone of liberty for the partners within it." Cott, Tr. 228:5-6. Professor Cott similarly described the "zone of privacy and intimacy and familial harmony that marriage ideally should create." *Id.* at 247:19-20.

The testimony of Plaintiffs demonstrates these concepts in personal terms. For example, Plaintiff Kristin Perry explained that the ability to choose her spouse is a fundamental aspect of her personal autonomy—it "symbolizes maybe the most important decision you make as an adult, who you choose. No one does it for you." Perry, Tr. 155:4-6. Her inability to marry Sandy Stier denies her this autonomy. *Id.* at 159:2-11.

Describing why she is a plaintiff in this case, Sandy Stier explained that "I would like to get married, and I would like to marry the person that I choose and that is Kris Perry." Stier, Tr. 167:11-13. Ms. Stier went on to explain that she feels it is important for the next generation "to at least feel like the option to be true to yourself is an option that they can have, too." *Id.* at 180:15-16. Similarly, an American Psychoanalytic Association Position Statement on marriage by same-sex couples has explained that "the milestone of marriage moves a couple and its children into full citizenship in American society." PX0752 at 1.

Of course, the importance that attaches to the "choice" of a person of the same sex as a marriage partner does not mean that gay men and lesbians choose their sexual orientation or could choose to marry a person of the opposite sex. Gay men and lesbians, like all other citizens, have the right to choose the individual with whom they wish to spend their life in marriage. The evidence in this case clearly demonstrates, however, that the vast majority of individuals experience little or no choice in their sexual orientation, and that marrying someone of the opposite sex is not a realistic, viable option for gay men and lesbians. *See* Response to Question C.5, *infra*.

12. If the evidence of the involvement of the LDS and Roman Catholic churches and evangelical ministers supports a finding that Proposition 8 was an attempt to enforce private morality, what is the import of that finding?

The evidence at trial established that the LDS and Roman Catholic churches played an instrumental role in the passage of Prop. 8. *See, e.g.*, Segura, Tr. 1609:12-1610:6 (The coalition between the Catholic Church and the LDS Church against a minority group was "unprecedented.");

Doc # 608-1 at 18-23 (PFFs 26-28). They produced and funded campaign messages in support of Prop. 8, which stated and implied that same-sex relationships are immoral. *See* Doc # 608-1 at 250-68 (PFFs 287-93). Moral disapproval of gay and lesbian individuals, however, is not a legitimate government interest. *See Lawrence*, 539 U.S. at 577 ("the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice"); *see also* Response to Question A.2, *supra*. Indeed, the Supreme Court "acknowledged" in *Lawrence* that, "for centuries[,] there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives." 539 U.S. at 571. "These considerations," however, did "not answer the question before" the Court in *Lawrence*. *Id.* "Our obligation," the Court explained, "is to define the liberty of all, not to mandate our own moral code." *Id.* (internal quotation marks omitted). Because Prop. 8 was an attempt to enforce private moral beliefs about a disfavored minority—and does not further any legitimate state interest—it is unconstitutional.

B. RESPONSES TO QUESTIONS DIRECTED TO PROPONENTS

1. Assuming a higher level of scrutiny applies to either plaintiffs' due process or equal protection claim, what evidence in the record shows that Proposition 8 is substantially related to an important government interest? Narrowly tailored to a compelling government interest?

There is no evidence in the record to suggest that Prop. 8 is even rationally related to a legitimate government interest—let alone, substantially related to an important government interest or narrowly tailored to further a compelling government interest. *See* Doc # 608-1 at 203-48 (PFFs 238-84). To the contrary, Prop. 8 causes irreparable harm to gay men and lesbians and their families, and is fundamentally discriminatory. *See id.* at 64-116 (PFFs 108-47) (evidence demonstrating harm to Plaintiffs and other gay and lesbian individuals and their families); *id.* at 248-73 (PFFs 285-97) (evidence demonstrating moral disapproval and animus). Indeed, Proponents cannot conceivably satisfy the requirements of either intermediate or strict scrutiny because they rely exclusively on *post*

hoc rationalizations and do not defend any of the arguments advanced in support of Prop. 8 during the campaign itself—such as the purported risk that, in the absence of Prop. 8, children would be taught in school about marriage between individuals of the same sex. The Supreme Court has made clear, however, that, to survive heightened scrutiny, the "justification[s]" offered to defend a discriminatory measure "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533.

2. Aside from the testimony of Mr. Blankenhorn, what evidence in the record supports a finding that same-sex marriage has or could have negative social consequences? What does the evidence show the magnitude of these consequences to be?

Mr. Blankenhorn's unsubstantiated opinion testimony is insufficient to support a finding that affording gay men and lesbians the right to marry has or could have negative social consequences. In fact, Mr. Blankenhorn testified at length on cross-examination as to the *positive* social consequences that would result from eliminating discriminatory restrictions on the right of gay men and lesbians to marry. *See, e.g.*, Blankenhorn, Tr. 2850:21 (permitting gay men and lesbians to marry would be "a victory for . . . the American idea"); *see also id.* at 2846:17-2853:12. Nor is there any other evidence in the record that could support a finding that marriage by individuals of the same sex would in fact have negative implications. Proponents' only other witness, Kenneth Miller, did not opine on this subject. While Proponents subjected each of the credible and well-qualified experts called by Plaintiffs to lengthy cross-examination, none offered any testimony that would lend support to the premise that allowing gay men and lesbians to marry has or could have negative consequences. Indeed, they testified to precisely the opposite. Dr. Nancy Cott, an expert on the history of marriage and the ways that marriage has changed over time, testified that she is unaware of any empirical basis on which to conclude that allowing individuals of the same sex to marry would increase the divorce rate. Cott, Tr. 249:9-13. She further testified that allowing gay men and lesbians to marry would fulfill the key defining characteristics of the institution of marriage, and that, "by excluding same-sex couples from the ability to marry and engage in this highly-valued institution, . . . society is actually denying itself another . . . resource for stability and social order." Cott, Tr. 251:12-252:23. Dr. Anne Peplau, an expert on couple relationships, testified that allowing same-sex couples to marry would

benefit gay men and lesbians, and would not cause fewer heterosexuals to marry or more heterosexuals to divorce. Peplau, Tr. 594:11-606:12. Dr. Lee Badgett, an economist, testified that Prop. 8 inflicts substantial economic harm on same-sex couples and their children living in California. Badgett, Tr. 1330:14-16. Accordingly, the evidence before the Court cannot support a conclusion that allowing gay men and lesbians to marry would harm society.

3. The court has reserved ruling on plaintiffs' motion to exclude Mr. Blankenhorn's testimony. If the motion is granted, is there any other evidence to support a finding that Proposition 8 advances a legitimate governmental interest?

If the testimony of Mr. Blankenhorn is excluded (and indeed even if it is not), there is no evidence in the record to support a finding that Prop. 8 advances legitimate government interests. As Plaintiffs have explained in detail, and with evidentiary citations, in PFFs 229-97, the record in this case clearly demonstrates that Prop. 8 in fact serves no legitimate government interest.

4. Why should the court assume that the deinstitutionalization of marriage is a negative consequence?

For the concept of what it means to "deinstitutionalize" marriage, Proponents rely entirely on Mr. Blankenhorn. Mr. Blankenhorn, of course, lacks training and expertise in any of the fields on which one would draw to consider and evaluate this issue, including anthropology, history, and sociology. Perhaps for that reason, Mr. Blankenhorn was quite vague as to what would and would not amount to the "deinstitutionalization" of marriage. To the extent that "deinstitutionalization" includes the removal of unfounded and discriminatory restrictions on one or both of the participants in a marriage, this Court should not assume that outcome to be a negative one, and the evidence proves otherwise. For example, as explained by Dr. Nancy Cott, the removal of historically accepted restrictions on the freedom and individuality of women in a marriage, and the lifting of restrictions that have existed over time concerning marriage across different races, are positive developments that have fulfilled the meaning of marriage and helped it to remain a vibrant and important social institution. Even Proponents seem to acknowledge that eliminating from the meaning of marriage restrictions that are discriminatory and harmful does not weaken the institution, and Proponents do

not and cannot argue that those changes have harmed either the institution of marriage or society at large.

But even to the extent one assumes that the "deinstitutionalization" of marriage is a harmful or negative thing, the record is devoid of credible, reliable evidence sufficient to show that affording gay men and lesbians the right to marry would lead to such deinstitutionalization. To the contrary, the evidence shows that removing a remaining, unfounded and discriminatory restriction from the meaning of marriage would strengthen, rather than weaken, the institution. Cott, Tr. 251:12-252:23. Dr. Badgett evaluated data from jurisdictions where individuals of the same sex are permitted to marry, such as Massachusetts, the Netherlands, and Belgium, and concluded that there is no evidence of the "deinstitutionalization" described by Mr. Blankenhorn, and no reason to believe that any "deinstitutionalization" would occur in California. *See, e.g.*, Doc # 608-1 at 209-14 (PFF 247). Further, as Dr. Cott explained in her testimony, Mr. Blankenhorn's concern over deinstitutionalization has "more to do with changes that have occurred in heterosexual mores about love and sex outside of marriage than it does to do with the question of same-sex couples wanting to enter the marriage institution and gain its stability and its formal imprimatur." Cott, Tr. 337:7-11; *see also id.* at 336:3-8 ("Between 1965 and 1980, not only in the United States, but in all the industrialized world, from Europe to Japan, these indicators, the rate at which people married, the rate at which people divorced, one sank . . . one rose, and the rate of out-of-wedlock pregnancies, these underwent very, very sharp shifts"). Indeed, Mr. Blankenhorn himself conceded on cross-examination that allowing gay men and lesbians to marry would "be a victory for the worthy ideas of tolerance and inclusion" and "a victory for, and another key expansion of, the American idea." Blankenhorn, Tr. 2850:10-21. Mr. Blankenhorn conceded that allowing gay men and lesbians to marry "would probably reduce the proportion of homosexuals who marry persons of the opposite sex and, thus, would likely reduce instances of marital unhappiness and divorce" (*id.* at 2851:25-2852:7), and also "would likely be accompanied by a wide-ranging and potentially valuable national discussion of marriage's benefits, status and future." *Id.* at 2852:18-24.

5. What evidence in the record shows that same-sex marriage is a drastic or far-reaching change to the institution of marriage?

Simply put, there is no evidence that permitting same-sex couples to marry would effect a drastic or far-reaching change to the institution of marriage. First, as Professor Cott testified, civil marriage has never been a static institution. Historically, it has changed, sometimes dramatically, to reflect the evolving needs, values, and understanding of society. Doc # 608-1 at 29-30 (PFF 37); *see also id.* at 30-37 (PFFs 38-48). Indeed, the institution of marriage has changed repeatedly over its history, from the elimination of the doctrine of coverture, to permitting interracial couples to marry, to permitting "no fault" divorces. *See id.* at 29-37 (PFFs 37-48). And Proponents' witnesses, Mr. Blankenhorn and Dr. Young, agreed that "the institution of marriage is constantly evolving" and "always changing." *Id.* at 30 (PFF 38). The institution has easily weathered those changes, and is still seen as a significant institution resonating with social meaning. *Id.* at 64-66 (PFF 108). Indeed, even today—after all these changes—"Marriage matters. It significantly influences individual and societal well-being." DIX0956 at 6 (Blankenhorn, *Future of Marriage*). And allowing same-sex couples to marry is no more drastic than any of those changes.

While Proponents speculate that permitting same-sex couples to marry could result in a parade of horribles, when asked point blank, their lead counsel admitted that Proponents "don't know" whether allowing same-sex couples to marry would harm heterosexual relationships. He further admitted that whether any harm exists "can't possibly be known now . . . . It may well be that there are no harms." PX2810 at 23:10-16, 24:5-8, 29:14-18. And Proponents have not introduced *any* evidence that permitting same-sex couples to marry would transform marriage as an institution. Doc # 608-1 at 215-16 (PFF 248). Proponents' purported expert, Mr. Blankenhorn, even conceded that he could not prove that permitting same-sex couples to marry would have any actual impact on the institution of marriage. *Id.* And Mr. Blankenhorn's *opinion* that permitting same-sex couples to marry would further deinstitutionalize marriage is not credible, reliable, supported by the evidence, or entitled to substantial weight. *Id.* at 222-26 (PFFs 253-58). Indeed, he even acknowledged that "The Marriage Movement: A Statement of Principles," which was published in part by his organization, The Institute for American Values, did *not* include homosexuality or marriage by individuals of the

same sex as one of the reasons the institution of marriage was allegedly "weakening." Blankenhorn, Tr. 2911:9-2913:5.

More specifically, even though marriage by individuals of the same sex has been permitted in the Netherlands since 2001, and in Massachusetts since 2004, Proponents have not identified any harm caused by the removal of discriminatory marriage restrictions in those jurisdictions. *See* Doc # 608-1 at 217-21 (PFF 250). Indeed, the evidence actually demonstrates the opposite. For example, evidence from the Netherlands suggests that the marriage rate, divorce rate, and nonmarital birth rate *were not affected* by permitting individuals of the same sex to marry. *Id.* Similarly, since marriage has been made available to individuals of the same sex in Massachusetts, the divorce rate has not increased; in fact, the Massachusetts divorce rate is the lowest in the Nation. *Id.* at 221-22 (PFF 251).

6. What evidence in the record shows that same-sex couples are differently situated from opposite-sex couples where at least one partner is infertile?

No evidence in the record shows that same-sex couples are differently situated from opposite-sex couples where at least one partner is infertile. In fact, Plaintiffs presented testimony from Dr. Anne Peplau establishing, based on years of research, that same-sex couples and opposite-sex couples are fundamentally the *same* in terms of their relationships, what they are looking for in a relationship, and what makes the relationship successful or unsuccessful. Peplau, Tr. 583:12-594:10; *see also* Badgett, Tr. 1331:3-5 ("my opinion is that same-sex couples are very similar to different-sex couples in most economic and demographic characteristics"). These similarities do not depend on whether the couple has the ability to procreate together.

On cross-examination, Proponents' counsel asked whether Dr. Peplau would agree "that gay and lesbian couples do not accidentally have children," and Dr. Peplau responded "can two lesbians spontaneously accidentally impregnate each other, not to my knowledge." Peplau, Tr. 640:13-22. Of course, in this respect gay men and lesbians are similarly situated to an opposite-sex couple where at least one partner is infertile.

7. Assume the evidence shows that children do best when raised by their married, biological mother and father. Assume further the court concludes it is in the state's interest to encourage children to be raised by their married biological mother and father where possible. What evidence if any shows that Proposition 8 furthers this state interest?

There is no evidence that Prop. 8 furthers any state interest that may exist in encouraging children to be raised by their married, biological mother and father. Prop. 8 does not change California's laws and policies that permit gay and lesbian individuals to have, adopt, or raise children. *See* Doc # 608-1 at 244-45 (PFF 279). Nor does prohibiting marriage by individuals of the same sex have any effect on whether biological parents will choose to raise their biological children or whether biological parents will choose to marry or remain married to raise those children. To the contrary, to the extent the State has an interest in what is "best" for children, the evidence shows that Prop. 8 affirmatively harms the interests of children and does not promote the achievement of good child-adjustment outcomes. *See, e.g.*, *id*. at 227-41 (PFFs 260-80). By denying same-sex couples with children the right to marry, Prop. 8 deprives the children of those couples the legitimacy that marriage confers on children and the sense of security, stability, and increased well-being that accompany that legitimacy. *See, e.g.*, *id*. at 111-12, 115 (PFFs 142, 145). Indeed, the evidence shows that Prop. 8 stigmatizes the children of same-sex couples by relegating their parents to the separate and unequal institution of domestic partnership. *See, e.g.*, *id.* at 116 (PFF 146). Moreover, because certain tangible and intangible benefits flow to a married couple's children by virtue of the State's (and society's) recognition of that bond, Prop. 8 denies children of same-sex couples access to those benefits. *See, e.g.*, *id*. at 112-15, 116 (PFFs 143-44, 147).

8. Do California's laws permitting same-sex couples to raise and adopt children undermine any conclusion that encouraging children to be raised by a married mother and father is a legitimate state interest?

California's laws permitting same-sex couples to raise and adopt children undermine Proponents' contention that Prop. 8 furthers the State's purported interest in encouraging children to be raised by a married mother and father. Doc # 605 at 13-14. Prop. 8 did not change the provisions of California law that expressly authorize adoption by unmarried same-sex couples and did not otherwise restrict the ability of same-sex couples to raise children. *See In re Marriage Cases*, 183 P.3d 384, 452 n.72 (Cal. 2008) ("the governing California statutes permit same-sex couples to adopt

and raise children and additionally draw no distinction between married couples and domestic partners with regard to the legal rights and responsibilities relating to children raised within each of these family relationships"); Cal. Fam. Code §§ 297.5(d), 7601, 7602, 7650, 9000(b); *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005); *Sharon S. v. Superior Court*, 73 P.3d 554, 569 (Cal. 2003). Indeed, research shows that any such distinction between same-sex parents and opposite-sex parents would be contrary to the needs and interests of children. *See, e.g.*, Nanette Gartrell & Henny Bos, *U.S. National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 J. Pediatrics (forthcoming July 2010, available online) (concluding that adolescents who have been raised in lesbian-mother families since birth demonstrate healthy psychological adjustment). Prop. 8 therefore does nothing to further the State's purported interest in encouraging children to be raised by a married mother and father.

9. How does the Supreme Court's holding in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) square with an emphasis on the importance of a biological connection between parents and their children?

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Supreme Court rejected a constitutional challenge to a California statute that declared it "irrelevant for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband." *Id*. at 119. The Court held that a biological father had neither a procedural due process right nor a liberty interest in a relationship with his daughter where the child's mother was married to another man at the time of birth. It emphasized that, in California, the "marital family," not the biological family, "has been treated as a protected family unit under . . . historic practices." *Id*. at 124. *Michael H.*—and California's tradition of protecting the "marital family"—therefore undermine Proponents' reliance on the purported importance of ensuring a biological connection between parents and their children.

10. Assume the evidence shows that sexual orientation is socially constructed. Assume further the evidence shows Proposition 8 assumes the existence of sexual orientation as a stable category. What bearing if any do these facts have on the constitutionality of Proposition 8?

Plaintiffs agree that Prop. 8 assumes the existence of sexual orientation as a stable and readily-identifiable category. Doc # 608-1 at 135-37 (PFFs 168-69). Indeed, even supporters of

Prop. 8 were able to identify gay and lesbian individuals or couples. PX0480; *see also* PX1867 at 42, 63-64, 81; PX1868 at 21, 33, 48, 61, 72, 94, 98; PX2153; PX2156; PX2597. Further, the evidence demonstrated that sexual orientation is essential to one's identity. *See* Response to Question A.11, *supra*. Fundamentally, then, Prop. 8 discriminates on the basis of a readily-definable category.

Moreover, whether sexual orientation is socially constructed is entirely irrelevant to the question whether people should be afforded constitutional protection on the basis of sexual orientation. For example, classifications based on race, a readily-identifiable category, are subject to strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223 (1995). But the evidence at trial demonstrated that race is socially constructed. *See* Herek, Tr. 2178:2-16 ("[T]he definition of which races are which, which ones are separate from each other, what type of skin coloring or what type of ancestry involves a person being of a particular race, all of those things are socially constructed."); *see also* Meyer, Tr. 954:3-24 ("identities change and they are responsive to the social context in many different ways, but—obviously, the population itself doesn't change, but how people refer to themselves might change"); Doc # 608-1 at 138-39 (PFF 172).

11. Why is legislating based on moral disapproval of homosexuality not tantamount to discrimination? *See* Doc #605 at 11 ("But sincerely held moral or religious views that require acceptance and love of gay people, while disapproving certain aspects of their conduct, are not tantamount to discrimination."). What evidence in the record shows that a belief based in morality cannot also be discriminatory? If that moral point of view is not held and is disputed by a small but significant minority of the community, should not an effort to enact that moral point of view into a state constitution be deemed a violation of equal protection?

Legislative action based on moral disapproval of gay men and lesbians as a group *is* discrimination, and mere moral disapproval is not a legitimate government interest. *See Lawrence*, 539 U.S. at 579 ("the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice"); *see also* Response to Question A.2, *supra*. Accordingly, whether that "moral point of view" is held unanimously—or whether it is disputed by a significant minority of the population—it is not a sufficient basis for sustaining legislation.

12. What harm do proponents face if an injunction against the enforcement of Proposition 8 is issued?

Excluding individuals of the same sex from the institution of marriage harms Plaintiffs, their children, and hundreds of thousands of other gay men and lesbians (and their families) throughout California. Allowing gay men and lesbians to marry harms no one. Doc # 608-1 at 205-26 (PFFs 243-58). Indeed, Proponents' counsel admitted that Proponents "don't know" what effect, if any, marriage by individuals of the same sex would have on opposite-sex marriage. PX2810 at 23:10-16; 24:5-8; *see also id.* at 29:14-18 (further admitting that "[i]t may well be that there are no harms"). And Proponents' own purported expert, Mr. Blankenhorn, admitted that "[i]t's impossible to be completely sure" whether allowing gay men and lesbians to marry would further the deinstitutionalization of marriage. *See* Blankenhorn, Tr. 2780:13-17. Tellingly, Proponents presented no evidence whatsoever that the 18,000 same-sex marriages that took place between the California Supreme Court's decision in the *Marriage Cases* and the passage of Prop. 8 have harmed Proponents or anyone else. Thus, if an injunction against the enforcement of Prop. 8 is issued and more gay and lesbian couples are allowed to marry in California, Proponents would not be harmed in any way.

Additionally, no amount of supposed uncertainty about the legal status of marriages performed while Prop. 8 is enjoined and this case is on appeal can outweigh the compelling need for immediate injunctive relief to alleviate the irreparable harm that Plaintiffs are suffering each day that Prop. 8 remains on the books. After all, the burden of any such legal uncertainty would be borne principally by Plaintiffs and those gay men and lesbians who decide to get married while this case is on appeal. Gay and lesbian individuals who wish to wait until all appeals in this matter have run their course before marrying would be free to do so, while those who cannot or do not wish to wait longer than they already have would enjoy the same freedom to marry as all other citizens.

C. RESPONSES TO QUESTIONS DIRECTED TO PLAINTIFFS AND PROPONENTS

1. What party bears the burden of proof on plaintiffs' claims? Under what standard of review is the evidence considered?

Prop. 8 infringes on Plaintiffs' fundamental right to marry (as well as their fundamental right to privacy and personal autonomy) and discriminates on the basis of sexual orientation and sex. Because Prop. 8 impairs fundamental rights and discriminates on the basis of suspect classifications, Proponents bear the burden of proving that Prop. 8 is narrowly tailored to further a compelling state interest. *See P.O.P.S. v. Gardner*, 998 F.2d 764, 767-68 (9th Cir. 1993) ("Statutes that directly and substantially impair [the right to marry] require strict scrutiny."); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Palmore*, 466 U.S. at 432-33. In the alternative, if the Court concludes that strict scrutiny is not appropriate, then Proponents would bear the burden of proving that Prop. 8 is substantially related to an important state interest because Prop. 8 infringes on Plaintiffs' right to marry and their right to privacy and personal autonomy—which are significant liberty interests—and discriminates on the basis of sexual orientation and sex, which are both (at a minimum) quasi-suspect classifications. *See Virginia*, 518 U.S. at 533 ("The burden of justification is demanding and it rests entirely on the State. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.") (internal quotation marks, alterations, and citation omitted); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008). If the Court concludes that rational basis review applies, then it should examine the interests that Proponents offer for Prop. 8 to determine whether they are legitimate state interests. *See Romer*, 517 U.S. at 635 (examining the "rationale *the State offers* for Amendment 2") (emphasis added). If the interests are legitimate, then Plaintiffs would be required to prove that Prop. 8 does not in fact "advance" those interests. *Id.* at 632.

2. Does the existence of a debate inform whether the existence of a rational basis supporting Proposition 8 is "debatable" or "arguable" under the Equal Protection Clause? *See Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 469 (1981); *FCC v. Beach Communications, Inc*., 508 U.S. 307, 320 (1993).

The public debate about authorizing marriage between individuals of the same sex has no bearing on the legal issue before the Court on Plaintiffs' equal protection claim: Whether Prop. 8 unconstitutionally discriminates against gay men and lesbians in violation of the Fourteenth Amendment. The fact that some segment of the population may strongly support a discriminatory measure—and may be engaged in a public debate on the issue—cannot conceivably shield the law from the requirements of equal protection. The issues that the Supreme Court confronted in a number of its most significant equal protection cases were the subject of widespread public debate at the time of the Court's decision (*see, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954); *Loving*, 388 U.S. 1)—but such debate did not cause the Court to hesitate when invalidating discriminatory legislation. This holds true whether the Court applies strict scrutiny, intermediate scrutiny, or rational basis review. Indeed, there can be no question that the issue before the Court in *Romer*—the availability of antidiscrimination protections for gay men and lesbians—was the subject of extensive public debate—but the Court did not take that debate into account when invalidating the Colorado constitutional amendment stripping gay men and lesbians of their antidiscrimination protections. 517 U.S. at 635.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), and *FCC v. Beach Communications, Inc*., 508 U.S. 307 (1993), simply state that, where there are "plausible rationales" underlying a statute, a court should not substitute its assessment of those rationales for those of the legislature (or voters). *Beach Commc'ns*, 508 U.S. at 320. Here, there is not even a "plausible," "debatable," or "arguable" rationale underlying Prop. 8 because the evidence demonstrated that Prop. 8 does not in fact "advance a legitimate government interest." *Romer*, 517 U.S. at 632. It instead singles out gay men and lesbians for disfavored treatment under the law by stripping them of their fundamental right to marry. While some people might strongly support branding gay men and lesbians with a mark of second-class citizenship, such naked discrimination is not "plausibl[y]," "debatabl[y]," or "arguabl[y]" a legitimate government interest.

3. What does the evidence show the difference to be between gays and lesbians, on the one hand, and heterosexuals on the other? Is that difference one which the government "may legitimately take into account" when making legislative classifications? *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985).

The evidence demonstrates that gay and lesbian individuals and heterosexuals are similarly situated with respect to marriage. *See* Doc # 608-1 at 126-34 (PFFs 159-66). The only difference is that gay and lesbian individuals desire to marry a person of the same sex and heterosexual individuals desire to marry a person of the opposite sex. But this difference is not one that the government "may legitimately take into account" when making legislative classifications (*Cleburne*, 473 U.S. at 446), because it "bears no relation to ability to perform or contribute to society." *Id*. at 441 (internal quotation marks omitted); Doc # 608-1 at 131-34 (PFFs 164-66).

Moreover, any difference with respect to procreation is not a basis for barring gay men and lesbians from marrying because marriage has never been limited to procreative unions. Doc # 608-1 at 45-46, 203-05 (PFFs 59-61, 238-42). And, to the extent that Proponents claim that gay and lesbian couples are less stable and monogamous in their relationships than heterosexual couples, there is no empirical support for this negative stereotype. Peplau, Tr. 585:22-586:8. In any event, even if such a difference did exist, the State of California does not condition marriage on monogamy; indeed, even philanderers and serial divorcers are permitted to marry in California. *See* Doc # 608-1 at 46 (PFF 62). Finally, any difference that did exist in this regard would no doubt be the direct result of precisely the discrimination being challenged in this case: exclusion from the institution of marriage. The public recognition that attends marriage, the legal obligations created by marriage, and the emotional and tangible investments that spouses make in their joint relationship serve as deterrents to relationship dissolution. *Id.* at 64-87 (PFFs 108-19); Peplau, Tr. 613:9-614:12 (Marriage is an important barrier to the dissolution of a relationship.); PX1245 at 413 (review by Anne Peplau and Adam Fingerhut: "Marriage would help couples feel closer and strengthen their relationships, in part by creating structural barriers to relationship dissolution."); Peplau, Tr. 612:6-612:18 ("[P]eople associate with marriage a degree of seriousness and sort of gravitas that leads them to take those obligations seriously."). Plaintiffs' testimony confirmed that marriage would solidify their

relationships. *See, e.g.*, Katami, Tr. 89:17-90:3 ("[H]aving a marriage would grow our relationship. It represents us to our community and to society.").

4. What does the evidence show the definition (or definitions) of marriage to be? How does Professor Cott's proposed definition of marriage fit within Mr. Blankenhorn's testimony that competing definitions of marriage are either focused on children or focused on spousal affection? *See* Cott, Tr. 201:9-14 and 222:13-17; Blankenhorn, Tr. 2742:9-18 and 2755:25-2756:1.

Professor Cott testified that civil marriage is a capacious, complex institution that has never been static, but instead has changed, sometimes dramatically, to reflect the changing needs, values, and understanding of our evolving society. Doc # 608-1 at 29-30 (PFFs 37-38). Still, marriage has several key defining characteristics: A "mutual consent between partners who freely choose each other, and their commitment to establish a continuing stable relationship as the foundation for a household in which they will economically support one another and their dependents, and enable themselves to compose a family." Cott, Tr. 251:13-252:3. In short, the emphasis in modern marriage is the creation of a private arena—a zone of liberty, privacy, and intimacy for those within it. Doc # 608-1 at 31-32 (PFF 40).

In contrast, Mr. Blankenhorn testified that there are two competing, irreconcilable definitions of marriage—one of which is focused on a sexual relationship and the other on a private commitment made by two adults to love each other and receive support and recognition from others. Blankenhorn, Tr. 2742:9-19; 2755:24-2756:1. Of these two possible competing definitions, Mr. Blankenhorn maintains that the proper definition of marriage is a "socially-approved sexual relationship between a man and a woman" entered into for the purpose of procreation. *See id.* at 2742:9-10. Mr. Blankenhorn's competing definitions of marriage, however, are unsupported by scholarship, are artificially narrow, and fail to accurately define the institution.

Professor Cott's definition of marriage does not "fit" into either of Mr. Blankenhorn's definitions. Rather, the definition Professor Cott advances captures elements of both of Mr. Blankenhorn's definitions. Marriage is fundamentally an intimate commitment between two people who choose to build a life and home together—with or without children. This definition of marriage recognizes that, for many, marriage may include childrearing or the legitimization of

children, but at its core, procreation is not required for a relationship to constitute a "marriage" as understood through the history of our Nation.

Lastly, it should be noted that, in contrast to Professor Cott's extensive independent scholarly work on the subject of marriage, there is no evidence that Mr. Blankenhorn's views are based on anything more than his limited review of what others have written. *See* Blankenhorn, Tr. 2742:8-24 (Blankenhorn's views are "drawn from scholarly investigations"); *id.* at 2897:15-2899:13 ("I'm simply repeating things that they say. . . . I'm a transmitter here of findings of these eminent scholars."). Mr. Blankenhorn also admitted that he had never even read a Supreme Court decision discussing marriage, which is of course central to this litigation. *See id.* at 2909:7-12.

5. What does it mean to have a "choice" in one's sexual orientation? *See e.g.*, Tr. 2032:17-22; PX0928 at 37.

Having a "choice" necessarily entails being able to voluntarily decide between two (or more) viable options. Because "[s]exual orientation is a term that we use to describe an enduring sexual, romantic, or intensely affectional attraction to men, to women, or to both men and women" (Herek, Tr. 2025:3-7), having "choice" in one's sexual orientation would amount to choosing the sex of the person to whom one is attracted. Not surprisingly, no party argued or put on any evidence that heterosexuals feel as though they have a "choice" regarding the sex to which they are attracted. And the overwhelming evidence demonstrates that the same is true for gay men and lesbians. Doc # 608-1 at 142 (PFF 175); *see also* Herek, Tr. 2054:12-2057:16, 2252:1-10; PX0928; PX0930. One cannot choose the sex to which one is attracted, and it therefore follows logically that a man who is attracted only to men would not choose to marry a woman. Doc # 608-1 at 60, 141 (PFFs 96, 174); *see also* Herek, Tr. 2324:6-10 (If two women want to marry, it is a safe assumption that they are lesbians.).

Notably, despite Proponents' repeated attempts to conflate the two concepts, "choice" is not the same thing as "change." Some percentage of individuals may experience a change in their sexual orientation at some point during their lifetime, but that does not mean that the individual could at any point *voluntarily choose* to change his or her sexual orientation. There are many reasons why a change may occur—for example, a man may be married to a woman before he realizes that he is gay. *See* Herek, Tr. 2042:13-2043:19, 2202:7-22. But, by definition, "choice" requires a voluntary

decision, and there is no testimony or evidence to support the notion that one consciously decides on his or her sexual orientation. *See* PX0912 at 1-2 ("We recommend the term *sexual orientation* because most research findings indicate that homosexual feelings are a basic part of an individual's psyche and are established much earlier than conscious choice would indicate."); *see also* Herek, Tr. 2319:23-2320:10.

Even Proponents' own (withdrawn) expert on immutability, Professor Robinson, conceded that sexual orientation is not readily subject to change. *See* Herek, Tr. 2315:20-15 (reading deposition testimony of Prof. Robinson). And the testimony of multiple other witnesses repeatedly confirmed this. *See* Perry, Tr. 141:14-19 (Kris Perry feels that she was born with her sexual orientation and that it will not change); Stier, Tr. 166:24-167:9 (Sandy Stier is 47 years old and has fallen in love one time in her life—with Perry); Zarrillo, Tr. 77:4-5 (Jeffrey Zarrillo has been gay "as long as [he] can remember"); Katami, Tr. 91:15-17 (Paul Katami has been a "natural-born gay" "as long as he can remember"); Zia, Tr. 1210:22-25 (Helen Zia is a lesbian and thinks she has been a lesbian all her life); Kendall, Tr. 1509:24-1510:1 (Ryan Kendall reported that neither reversal therapy he tried was successful in changing him from gay to heterosexual).

Moreover, there was uncontroverted empirical evidence that *attempting* to change one's sexual orientation will almost invariably be unsuccessful and, in fact, harmful (if not life-threatening). As the "Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation" explained:

> [E]nduring change to an individual's sexual orientation is uncommon. . . . [T]he results of scientifically valid research indicate that it is unlikely that individuals will be able to reduce same-sex attractions or increase other-sex sexual attractions through SOCE [sexual orientation change efforts].

PX0888 at 2-3; *see also* Herek, Tr. 2033:6-2034:9; PX0888 at 3.

6. In order to be rooted in "our Nation's history, legal traditions, and practices," *see Washington v. Glucksberg*, 521 U.S. 702, 710 (1997), is it sufficient that a practice has existed historically, or need there be an articulable purpose underlying the practice?

There is no question that marriage is deeply rooted in our Nation's history, traditions, and practices. Indeed, the "freedom to marry has long been recognized as one of the vital personal rights

essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12; *see also Maynard*, 125 U.S. at 211 (marriage is "the foundation of the family and of society"). Moreover, marriage promotes numerous "articulable"—and extraordinarily important—purposes that extend well beyond simple procreation. Marriage "is of fundamental importance for all individuals" (*Zablocki*, 434 U.S. at 384)—including those who cannot, or choose not to, procreate. The love, "emotional support," friendship, comfort, and encouragement that spouses provide each other enable personal self-fulfillment, and are essential parts of what it means to be married. *Turner*, 482 U.S. at 95. Thus, whether or not an "articulable purpose" is required for a practice to be rooted in our Nation's history, traditions, and practices, marriage is inextricably and unquestionably linked to "articulable purposes" that are promoted whether a marriage involves individuals of the same sex or individuals of the opposite sex.

7. If spouses are obligated to one another for mutual support and support of dependents, and if legal spousal obligations have no basis in the gender of the spouse, what purpose does a law requiring that a marital partnership consist of one man and one woman serve?

Plaintiffs agree that spouses are obligated to one another for mutual support and the support of dependants. *See* Cott, Tr. 201:3-18 (A core feature of marriage in the United States is that it is based on "a couple's choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another."); *see also id.* at 209:4-210:9, 251:13-252:3. Plaintiffs further agree that the sex of the spouse is irrelevant to legal spousal obligations. *See id.* at Tr. 243:5-244:10, 244:21-25. Indeed, changes in society have led spousal roles to become more gender-neutral over time, and changes in the law have ended gender-determined roles for spouses—"to no apparent damage to the institution." *Id.* at 245:9-247:3. Accordingly, there is no purpose in limiting marriage to opposite-sex couples. Individuals in marriages of two men or two women are equally capable—and equally obligated—to provide mutual support and support for their dependents as individuals in opposite-sex marriages.

8. The California Family Code requires that registered domestic partners be treated as spouses. Cal. Fam. Code § 297.5. Businesses that extend benefits to married spouses in California must extend equal benefits to registered domestic partners. *See Koebke v Bernardo Heights Country Club*, 36 Cal. 4th 824, 846 (2005) ("We interpret [Cal. Fam. Code § 297.5(f)] to mean that there shall be no discrimination in the treatment of registered domestic partners and spouses."). If, under California law, registered domestic partners are to be treated just like married spouses, what purpose is served by differentiating—in name only—between same-sex and opposite-sex unions?

The fact that California grants gay and lesbian individuals virtually all the tangible rights associated with marriage but denies them the label of "marriage" serves no purpose but to stigmatize and discriminate against gay and lesbian individuals. *See* Doc # 608-1 at 64-106 (PFFs 108-32).

The word "marriage" has a unique meaning, and there is a significant symbolic disparity between domestic partnership and marriage. Doc # 608-1 at 69-72 (PFF 110). As Proponents' purported expert, Mr. Blankenhorn, admitted, "the word 'marriage'" is "much bigger, much more powerful and potent as a role in society than merely or only the enumeration of its legal incidents." Blankenhorn, Tr. 2790:5-9. The unique cultural value and social meaning of "marriage" cannot compare to the legal benefits of domestic partnerships. *See* Cott, Tr. 208:9-17 ("I appreciate the fact that several states have extended . . . most of the material rights and benefits of marriage to people who have civil unions or domestic partnerships. But there really is no comparison, in my historical view, because there is nothing that is like marriage except marriage."); Peplau, Tr. 611:1-7 ("I have great confidence that some of the things that come from marriage, believing that you are part of the first class kind of relationship in this country, that you are . . . in the status of relationships that this society most values, most esteems, considers the most legitimate and the most appropriate, undoubtedly has benefits that are not part of domestic partnerships."); *see also* Stier, Tr. 179:5-18 (explaining that being able to marry Perry would "change my life dramatically. . . . I would feel more secure. I would feel more accepted. I would feel more pride."). Proponent Tam's testimony also confirmed that the label "marriage" matters. *See* Tam, Tr. 1962:17-24 ("Because the name of 'marriage' is so important, especially for us parents to teach our . . . kids, all right? . . . Everyone fantasize whom they will marry when they grow up.").

Domestic partnerships—even if they confer virtually all the material benefits of marriage—stigmatize gay and lesbian individuals and relegate them to the status of second-class citizens. *See, e.g.*, Meyer, Tr. 966:6-8 (Domestic partnerships stigmatize gay and lesbian individuals.); Badgett, Tr. 1342:14-1343:12 (Some same-sex couples who might marry would not register as domestic partners because they see domestic partnership as second-class status, value marriage because it is socially validated by the community, and dislike domestic partnership because it sounds too clinical.); *id.* at 1471:1-1472:8 (Same-sex couples value the social recognition of marriage, and believe that the alternative status conveys a message of inferiority.); Katami, Tr. 115:3-116:1 (Domestic partnerships "make[] you into a second, third, and . . . fourth class citizen now that we actually recognize marriages from other states. . . . None of our friends have ever said, 'Hey, this is my domestic partner.'"); Herek, Tr. 2044:20-2045:22 (But the difference between domestic partnerships and marriage is more than simply a word. "[J]ust the fact that we're here today suggests that this is more than a word . . . clearly, [there is] a great deal of strong feeling and emotion about the difference between marriage and domestic partnerships."); Blankenhorn, Tr. 2850:4-21 (agreeing that "Same-sex marriage would signify greater social acceptance of homosexual love and the worth and validity of same-sex intimate relationships"); Doc # 608-1 at 72-75 (PFFs 112-13).

Prop. 8 reflects and propagates the stigma that gay and lesbian individuals do not have intimate relations similar to those of heterosexual couples and conveys the State's judgment that same-sex couples are inherently less deserving of society's full recognition through the status of civil marriage than heterosexual couples. This distinction is stigmatizing—and thus unconstitutional. *See Virginia*, 518 U.S. at 554; *Brown*, 347 U.S. at 494; *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950); *Sweatt v. Painter*, 339 U.S. 629, 634-35 (1950); *see also Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment"); *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) (laws creating "separate but equal" accommodations "put[ ] the brand of . . . degradation upon a large class of our fellow-citizens").

9. What evidence, if any, shows whether infertility has ever been a legal basis for annulment or divorce?

The ability or willingness of married couples to produce children has never been a prerequisite to the validity of a marriage under American law. *See* PX0709 at RFA No. 52 (Administration admits "that California law does not restrict heterosexual individuals with no children and/or no intent to have children from marrying on the basis of their status as a heterosexual individual with no children and/or no intent to have children."); Doc # 608-1 at 45 (PFF 59). Nor has infertility ever been a legal basis for divorce. *See* Cott, Tr. 222:22-223:22 ("There has never been a requirement that a couple produce children in order to have a valid marriage. . . . Nor has [the inability to have children] been a ground . . . for divorce."). There is no evidence in the record that an opposite-sex couple not capable of procreating together has *ever* been barred from marrying simply because their union would not be naturally procreative. Accordingly, Proponents' assertion that "the institution of marriage is, and always has been, uniquely concerned with promoting and regulating naturally procreative relationships between men and women" is factually incorrect and has no support in the trial record. Doc # 605 at 6.

10. How should the failure of the Briggs Initiative (Proposition 6 in 1978) or the LaRouche Initiative (Proposition 64 in 1986) be viewed in determining whether gays and lesbians are politically powerless?

Because the Briggs Initiative and the LaRouche Initiative would have affected the rights of a far broader segment of the population than merely gay and lesbian individuals, the coalitions that formed and ultimately defeated those initiatives were not concerned exclusively with gay and lesbian rights. Thus, the defeat of these initiatives does not demonstrate that gay men and lesbians are politically powerful. To the contrary, the evidence clearly shows that gay and lesbian individuals lack political power to defend their basic rights. *See* Doc # 608-1 at 176-95 (PFFs 202-28).

The Briggs Initiative involved issues of free speech and free expression as well as the rights of public school teachers. Proponents' political power expert Kenneth Miller testified that the Briggs Initiative, "by its terms, would have allowed public schools to fire teachers, teachers aides, school administrators, or counselors found to be advocating, imposing, encouraging or promoting homosexual activity or—publicly or indiscreetly engaging in said acts." Miller, Tr. 2476:3-8. As

Professor George Chauncey testified, that far-reaching initiative generated opposition from not only gay rights groups but also from "many teachers groups" and "noted politicians" concerned about the "ominous censorship of teachers." Chauncey, Tr. 505:5-12.

The LaRouche Initiative also involved more than gay and lesbian rights. Professor Miller testified that the LaRouche Initiative "sought to make persons with HIV subject to quarantine and isolation." Miller, Tr. 2476:22-23. When asked if the initiative directly affected the rights of gay men and lesbians, Professor Miller replied that the initiative "directly affected people . . . infected by [the] HIV virus." *Id.* at 2476:14-18. Because HIV afflicts both heterosexuals and gay men and lesbians, the LaRouche Initiative cannot be characterized as simply an anti-gay measure.

In contrast to the Briggs and LaRouche initiatives, initiatives that specifically target the rights of gay men and lesbians have been overwhelmingly successful. *See* Segura, Tr. 1554:14-19 (33 of 34 ballot initiatives banning marriage equality have been passed in the last decade; in Arizona the initiative failed the first time but was passed the second time); *id.* at 1552:9-12 ("Gays and lesbians lose 70 percent of the contests over other matters. They have essentially lost a hundred percent of the contests over same-sex marriage and now on adoption."); *see also* PX1869 at *1056-57.

Moreover, to the extent that the Briggs and LaRouche Initiatives were anti-gay measures, the most remarkable thing is not that they failed, but that they reached the ballot at all—and captured the votes of millions of Californians. As Dr. Segura testified, the evaluation of the political power of a minority group must consider not only outcomes, but also the kinds of political battles the minority group is required to fight. Segura, Tr. 1539:10-25; 1663:2-3. Minority groups with meaningful political power do not have to endure public debate over whether it would be in children's best interests to bar members of the group from the profession of teaching. The fact that such a debate took place at all illustrates the lack of political power of gay men and lesbians.

11. What are the constitutional consequences if the evidence shows that sexual orientation is immutable for men but not for women? Must gay men and lesbians be treated identically under the Equal Protection Clause?

As a threshold matter, the evidence conclusively demonstrates that sexual orientation is not a choice—it is not consciously changeable for the vast majority of men or women, whether they are heterosexual, gay, or lesbian. *See* Response to Question C.5, *supra*. While the empirical evidence

demonstrated a slight variation in response patterns for gay men and lesbians to the question "How much choice do you feel that you had about being [lesbian/gay]/bisexual?" (*see* PX0928 at 37; PX0930 at 7), the *vast majority* of lesbians (84% in one study, 70% in another) said that they perceived having *"no"* or *"very little"* choice. PX0928 at 39; PX0930 at 27; *see also* Herek, Tr. 2054:15-2056:25.

Moreover, even if sexual orientation were changeable, gay men, lesbians, and heterosexuals should all be treated equally under the Equal Protection Clause. Once heightened scrutiny is applied in the equal protection context, it applies to *any* law premised on a suspect classification. For example, it is impermissible to discriminate against blacks or whites, even though whites have not suffered a history of discrimination and are not politically powerless. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). Similarly, it is impermissible to discriminate against women or men. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 204 (1976). Because sexual orientation is properly considered a suspect or quasi-suspect classification, discrimination based on sexual orientation is inherently suspect whether it targets a gay man, a lesbian, or a heterosexual.

Furthermore, even if some laws based on a suspect classification could receive a lower level of scrutiny, that still does not mean that gay men and lesbians could be treated differently for equal protection purposes. The legal term "immutable" is not synonymous with the word "changeable." Instead, the equal protection test set forth by the Ninth Circuit is whether sexual orientation is a trait so fundamental to one's identity that the State should not ask people to change it to enjoy a right enjoyed by all others. The Ninth Circuit has already answered that question in the affirmative for both gay men and lesbians, holding that "[s]exual orientation and sexual identity are immutable" and that "[h]omosexuality is as deeply ingrained as heterosexuality." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (internal quotation marks omitted). Accordingly, even if change were possible, heightened scrutiny would still be appropriate because it is not constitutionally acceptable for the State to demand either men or women to change their sexual orientation.

Finally, though relevant to the suspect classification inquiry, "immutability" has never been recognized as necessary to or dispositive of that inquiry. *See Christian Sci. Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1012 (9th Cir. 1986) (holding that "an

individual religion meets the requirements for treatment as a suspect class," even though religion is not immutable). Indeed, the Supreme Court has concluded that where a group has experienced "a history of purposeful unequal treatment" and "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)), there is an overwhelming probability that laws singling out such a group for adverse treatment are grounded on irrational and illegitimate considerations. Because there can be no reasonable dispute that gay men and lesbians have suffered a history of discrimination and are defined by a "characteristic" that "frequently bears no relation to ability to perform or contribute to society," heightened scrutiny is appropriate without regard to whether sexual orientation is immutable. *Cleburne*, 473 U.S. at 440-41.

12. How many opposite-sex couples have registered as domestic partners under California law? Are domestic partnerships between opposite-sex partners or same-sex partners recognized in other jurisdictions? If appropriate, the parties may rely on documents subject to judicial notice to answer this question.

The evidence suggests that approximately 3,000 opposite-sex couples are registered as domestic partners under California law. The record shows that, according to the California Secretary of State's Office, a total of 55,684 couples registered as domestic partners in California between 2000 and 2009. *See* DIX2647. The Secretary of State does not track whether these couples are same-sex or opposite-sex, but Plaintiffs presented evidence that approximately 5% to 6% of California's registered domestic partnerships are opposite-sex couples. *See* PX1263 at 14; PX1280. Applying those percentages to the total number of registered domestic partnerships reported by the Secretary of State yields an estimated range of between 2,784 and 3,341 opposite-sex couples registered as domestic partners under California law.

The following jurisdictions, besides California, have statutes that explicitly recognize civil unions and domestic partnerships from other States: Connecticut, New Hampshire, New Jersey, and Washington. PX1263, App. 3; *see also* Conn. Gen. Stat. § 46b-28a; N.H. Rev. Stat. Ann. § 457:45; Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States

and Foreign Nations, N.J. Att'y Gen. Formal Opinion No. 3-2007, at 1; Wash. Rev. Code Ann. § 26.60.090.

13. Do domestic partnerships create legal extended family relationships or in-laws?

Family Code § 297.5 provides that domestic partners will receive all the rights and responsibilities of spouses under California law. That provision does not specifically reference the rights of domestic partners with respect to the relatives of a partner, and it does not include language defining terms such as "mother in law" to include relatives of a domestic partner. There are a number of California statutes that specifically grant rights to the relatives of a spouse, using terms like "parent of a spouse." *See, e.g.*, Cal. Prob. Code § 6402 (providing for intestate succession to "parents of a predeceased spouse or the issue of those parents"). Numerous other California statutes use terms like "mother-in-law," "father-in-law," "brother-in-law," and "sister-in-law." *See, e.g.*, Cal. Corp. Code § 21400 (limiting benefits paid by fraternal societies and lodges to persons other than specified family members, including certain in-laws, of deceased members); Cal. Lab. Code § 3503 (limiting dependents for workers' compensation purposes to include certain relatives including in-laws); Cal. Code Civ. Proc. Code § 170.9 (exception from restrictions on gifts to judges for gifts from certain family members, including certain in-laws).

Whether statutes using such terminology apply to relatives of a domestic partner, by operation of Family Code § 297.5, has not been addressed by any judicial or administrative decision of which we are aware. Further, as the testimony of Ms. Helen Zia compellingly demonstrated, the in-law and extended family relationships created by marriage have a strong social meaning that is uniquely associated with marriage. *See* Zia, Tr. 1232:11-1237:22.

14. What does the evidence show regarding the difficulty or ease with which the State of California regulates the current system of opposite-sex and same-sex marriage and opposite-sex and same-sex domestic partnerships?

The passage of Prop. 8 has resulted in a crazy quilt of marriage regulations that involves five categories of citizens: (1) opposite-sex couples, who are permitted to marry, and to remarry upon divorce; (2) the 18,000 same-sex couples who married after the California Supreme Court's decision in the *Marriage Cases* but before the enactment of Prop. 8, whose marriages remain valid but who

are not permitted to remarry if divorced or widowed; (3) unmarried same-sex couples, who are prohibited by Prop. 8 from marrying and restricted to the status of domestic partnership; (4) same-sex couples who entered into a valid marriage outside California before November 5, 2008, who are treated as married under California law, but not permitted to remarry if divorced or widowed; and (5) same-sex couples who entered into a valid marriage outside California on or after November 5, 2008, who are granted the rights and responsibilities of marriage, but not the designation of "marriage" itself.

Prop. 8 has unquestionably increased the challenges and costs of administering California's already complex marriage and domestic partnership laws, which had spawned a significant amount of costly and inefficient litigation even before Prop. 8 was enacted. *See, e.g.*, *Koebke*, 36 Cal. 4th 824 (whether businesses that offer benefits to married couples are required to offer them to couples who are registered domestic partners); *Velez v. Smith*, 142 Cal. App. 4th 1154 (2006) (whether the putative spouse doctrine applied based on a couple's local domestic partnership registration); *Ellis v. Arriaga*, 162 Cal. App. 4th 1000 (2008) (whether the putative spouse doctrine applied based on a party's mistaken belief that his former partner had submitted the couple's domestic partnership registration form to the Secretary of State); *Marriage of Garber*, 2008 Cal. App. Unpub. LEXIS 8259 (Oct. 9, 2008) (whether duty to pay spousal support was terminated by supported former spouse's entry into a registered domestic partnership).

Moreover, the California Legislature has found it necessary to amend the domestic partnership statute and related statutes every year since adoption of comprehensive domestic partnership legislation in 2003 to address ambiguities and disparities in treatment of married couples and domestic partners. *See, e.g.*, Stats. 2003, ch. 752 (AB 17); Stats. 2004, ch. 947 (AB 2580) (amending domestic partner statute to clarify that reference to date of marriage should be deemed to refer to the date of a domestic partnership registration, and addressing enforceability of premarital/pre-registration agreements of domestic partners); Stats. 2005, ch. 416 (SB 565) (amending Revenue & Taxation Code to protect domestic partners from reassessment of real property upon transfers between partners to the same extent spouses are protected); Stats. 2005, ch. 418 (SB 973); Stats. 2006, ch. 802 (SB 1827); Stats. 2007, ch. 426 (SB 105); Stats. 2007, ch. 555 (SB 559);

Stats. 2007, ch. 567 (AB 102); Stats. 2008, ch. 197 (AB 2673); *see also* Survivors' Home Protection Act (AB 103) (pending legislation that would protect domestic partners from property taxes and potential loss of their homes following the death of their partner and allow same-sex couples to enter into confidential domestic partnership agreement so their personal information is not publicly available). Finally, when significant changes to the rights and obligations of domestic partners have been made, the Legislature has required the Secretary of State to send multiple notices to all registered domestic partners regarding the changes. *See* http://www.sos.ca.gov/dpregistry/faqs.htm#question4.

15. If the court finds Proposition 8 to be unconstitutional, what remedy would "yield to the constitutional expression of the people of California's will"? *See* Doc #605 at 18.

No remedy short of an order permanently enjoining Prop. 8's enforcement in its entirety would be sufficient. If a state constitutional provision is inconsistent with the Fourteenth Amendment of the U.S. Constitution, it can no longer be given effect—regardless of its level of public support. U.S. Const. art. VI; *see also, e.g.*, *Romer*, 517 U.S. at 635; *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967); *cf. Washington v. Seattle Sch. Dist. No.1*, 458 U.S. 457, 487 (1982).

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GIBSON, DUNN & CRUTCHER LLP
Theodore B. Olson
Theodore J. Boutrous, Jr.
Christopher D. Dusseault
Ethan D. Dettmer
Matthew D. McGill
Amir C. Tayrani
Sarah E. Piepmeier
Theane Evangelis Kapur
Enrique A. Monagas

By: /s/
Theodore B. Olson

and

///

///

///

BOIES, SCHILLER & FLEXNER LLP
David Boies
Steven C. Holtzman
Jeremy M. Goldman
Rosanne C. Baxter
Richard J. Bettan
Beko O. Richardson
Theodore H. Uno
Joshua Irwin Schiller

Attorneys for Plaintiffs
KRISTIN M. PERRY, SANDRA B. STIER,
PAUL T. KATAMI, and JEFFREY J. ZARRILLO

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
DANNY CHOU
Chief of Complex and Special Litigation
RONALD P. FLYNN
VINCE CHHABRIA
ERIN BERNSTEIN
CHRISTINE VAN AKEN
MOLLIE M. LEE
Deputy City Attorneys

By: /s/
Therese M. Stewart

Attorneys for Plaintiff-Intervenor
CITY AND COUNTY OF SAN FRANCISCO

ATTESTATION PURSUANT TO GENERAL ORDER NO. 45

Pursuant to General Order No. 45 of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

By: /s/
Theodore B. Olson