NO. 10-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

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Lynn Wardle and Lincoln C. Oliphant, *In Praise of Loving: Reflections on the 'Loving Analogy' for Same-Sex Marriage*, 51 HOW. L.J. 117 (2007).....65

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Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution*, 2 U. ST. THOMAS L.J. 33 (2004).....86

Marriage Equality Amendment Bill 2009, Australian Senate Legal and Constitutional Affairs Legislation Committee Report at 37, *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/marriage_equality/report/report.pdf 93

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Michael E. Lamb, *Fathers: Forgotten Contributors to Child Development*, 18 HUM. DEV. 245 (1975).....82

Michelangelo Signorile, *Bridal Wave*, OUT MAGAZINE (December/January 1994).....98

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NOAH WEBSTER, ETYMOLOGICAL DICTIONARY (1st ed. 1869).....53

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Paula Ettelbrick, *Since When Is Marriage a Path to Liberation*, OUT/LOOK National Gay and Lesbian Quarterly, No.6, Fall 1989, *reprinted in* SAME-SEX MARRIAGE PRO AND CON: A READER (Andrew Sullivan, ed., 1997).....106

PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY (2002) 65

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Senator Barack Obama, 2008 Human Rights Campaign Presidential Questionnaire at 3, *available at* http://www.lgbtforobama.com/pdf/Obama_HRC_questionaire.pdf 106

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United Nations Convention on the Rights of the Child, Art. 7, Nov. 20, 1989, 28 I.L.M. 1456 88

W. Bradford Wilcox, et al., eds., WHY MARRIAGE MATTERS (2d ed. 2005).....57

Walter R. Schumm, *What Was Really Learned from Tasker & Golombok's (1995) Study of Lesbian & Single Parent Mothers?*, 94 PSYH. REPORTS (2004).....90

Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, & Single-Parent Families*, 65 J. MARRIAGE & FAM. 876 (2003) 92

Wendy D. Manning, et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 POPULATION RESEARCH & POL'Y REV. 135 (2004) 81

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WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES (2008) 91, 97

INTRODUCTION

"Under rational-basis review, where a group possesses distinguishing characteristics relevant to interests the State has authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Board of Trustees v. Garrett*, 531 U.S. 356, 366-67 (2001). Given that marriage is "an institution regulated and controlled by public authority . . . for the benefit of the community," *Maynard v. Hill*, 125 U.S. 190, 213 (1888), there is no doubt that the state has both interests in the institution of marriage and authority to implement them. At issue here is California's decision to reaffirm the traditional definition of marriage as a union "between a man and a woman." CAL. CONST. art. I, § 7.5. The essential question in this case, then, is whether such unions possess distinguishing characteristics that are relevant to marriage.

This is not a hard question. Indeed, because of the distinguishing *procreative* characteristics of heterosexual relationships, until quite recently "it was an accepted truth for *almost everyone who ever lived*, in any society in which marriage existed, that there could be marriages *only* between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (emphasis added). And marriage has existed in virtually all societies, from the ancients to the American states, because it serves a vital and universal societal purpose—a purpose, indeed, that makes marriage, as the Supreme Court has repeatedly emphasized, "*fundamental*

to the very existence and survival of the [*human*] *race*." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added). That purpose is, and has always been, in the words of the California Supreme Court, to "channel biological drives that might otherwise become socially destructive" into enduring family units and thereby "ensure the care and education of children in a stable environment." *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952).

Before the recent movement to redefine marriage to include same-sex relationships, it was commonly understood and acknowledged that the institution of marriage owed its very existence to society's vital interest in responsible procreation and childrearing. Indeed, no other purpose can plausibly explain the ubiquity of the institution. As Bertrand Russell put it: "But for children, there would be no need of any institution concerned with sex." BERTRAND RUSSELL, MARRIAGE & MORALS 77 (Liveright Paperbound Edition, 1970). "[I]t is through children alone that sexual relations become of importance to society, and worthy to be taken cognizance of by a legal institution." *Id.* at 156.

And until quite recently, the abiding link between marriage and society's existential interests in responsible procreation and child-rearing was routinely recognized, without a hint of controversy, not only by the California Supreme Court, as noted above, but by every state appellate court to address the purpose of marriage. Likewise, eminent scholars, from all eras and all relevant academic fields, were

agreed on the animating purpose of marriage. Blackstone put it well: the relation "of parent and child . . . is consequential to that of marriage, being its principal end and design; and it is by virtue of this relation that infants are protected, maintained, and educated." BLACKSTONE, 1 COMMENTARIES *410. Marriage has served this universal societal purpose throughout history by providing, in the words of sociologist Kingsley Davis, "social recognition and approval . . . of a couple's engaging in sexual intercourse and bearing and rearing offspring." *The Meaning & Significance of Marriage in Contemporary Society* 5, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION (Kingsley Davis, ed. 1985) (ER428).

In light of all this, it is hardly surprising that *every* appellate court decision, both state and federal, to address the validity of traditional opposite-sex marriage laws under the federal Constitution has upheld them as rationally related to the state's interest in responsible procreation and child-rearing. As the Eighth Circuit said in upholding Nebraska's marriage amendment in 2006, the state's interest in " 'steering procreation into marriage' . . . justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot." *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006). Indeed, in the first reported decision addressing the issue, the Minnesota Supreme Court emphasized the

defining link between marriage and "the procreation and rearing of children" in rejecting a gay couple's due process and equal protection challenges to Minnesota's marriage law. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). The United States Supreme Court dismissed the couple's appeal for want of a substantial federal question—and thereby affirmed the decision below on the merits. *Baker v. Nelson*, 409 U.S. 810 (1972). Not a single Justice found the couple's constitutional claims—the same ones at issue here—substantial enough even to warrant plenary review. These claims simply did not present hard questions.

The district court below, however, broke with this uniform line of appellate decisions, and did so without so much as citing, let alone addressing, a single one of them. The district court held that marriage has been universally defined and practiced as an opposite-sex institution by virtually every society in recorded history *for no good reason*. "The evidence did not show any historical purpose," according to the district court, for the opposite-sex definition of marriage. ER148. "The tradition of restricting marriage to opposite-sex couples does not further any state interest." ER159. It followed, accordingly, that the age-old, cross-cultural, opposite-sex definition of marriage is *irrational*.

Along the way to reaching this startling conclusion, it was necessary for the district court to make legislative fact "findings" that are even more startling. Most critically, the court found that there are no "real and undeniable differences" be-

tween same-sex and opposite-sex couples "that the government might need to take into account in legislating." ER157. Specifically, same-sex couples are "situated identically" and are "exactly the same" as opposite-sex couples "for all purposes relevant" to marriage in California. ER165. This finding led the district court, in turn, to the remarkable conclusion that same-sex "unions encompass the historical purpose and form of marriage," ER149, and "are consistent with the core of the history, tradition and practice of marriage in the United States," ER148.

These findings are, we respectfully submit, patently false, and only by ignoring the "history, tradition, and practice of marriage in the United States," and everywhere else, could the district court make them. Nowhere in its 136-page opinion does the district court even cite any of the evidence overwhelmingly acknowledging responsible procreation and child-rearing as the animating purpose of marriage. All of the evidence—the judicial authority from California and almost every other State, the works of eminent scholars from all relevant academic fields, the extensive historical evidence—is simply ignored. And the district court ignored it quite willfully; in the court's view, apparently only oral testimony presented at trial constituted "evidence" on the issue (and its treatment of even this evidence was egregiously selective and one-sided, *see infra* at 38-43). As the district court explained, "Blackstone didn't testify. Kingsley Davis didn't testify." ER350.

Having blinded itself to the genuine animating purpose of marriage, the district court was obliged to offer a different rationale for the institution, presumably one that is entirely indifferent to the gender of the spouses. Marriage, according to the district court, is mainly designed to provide official recognition and status to the "deep emotional bonds and strong commitments" of loving adult relationships. ER112, 115. While this purpose is indeed served by marriage, it obviously cannot begin to explain why the institution is a ubiquitous, enduring, cross-cultural feature of the human experience, nor why the right to marry ranks as *fundamental*—that is, why it is " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.' " *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). It is equally obvious that marriage is "fundamental to the very existence and survival of the [human] race," *Zablocki*, 434 U.S. at 384, not because it provides official recognition to loving adult relationships, but because it serves society's existential interest in maximizing the likelihood that children are produced and raised in a stable, enduring family environment by the couple that brought them into the world.

Finally, the district court judge found that over seven million Californians, lacking any conceivable rational basis for supporting Proposition 8, were motivated solely by animosity and condescension toward gays and lesbians. "The evidence shows conclusively," according to the district court, "that Proposition 8 en-

acts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples," ER170, and that Proposition 8's supporters were motivated either by "nothing more than a fear or unarticulated dislike of same-sex couples," ER167, or by "a moral view that there is something 'wrong' with same-sex couples," ER168. This charge is false and unfair on its face, and leveling it against the people of California is especially unfounded, for they have enacted into law some of the Nation's most sweeping and progressive protections of gays and lesbians, including a domestic partnership law that gives same-sex couples all of the same substantive benefits and protections as marriage. And it defames as anti-gay bigots not only seven million California voters, but everyone else in this Country, and elsewhere, who believes that the traditional opposite-sex definition of marriage continues to meaningfully serve society's interests—from the current President of the United States, to a large majority of legislators throughout the Nation, both in statehouses and in the United States Congress, and even to most of the scores of state and federal judges who have addressed the issue.

The simple truth is that "[t]here are millions of Americans," as one of the Plaintiffs' own expert witnesses has acknowledged, "who believe in equal rights for gays and lesbians … but who draw the line at marriage." M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED 175 (2009) (ER1351) (quoting Rabbi Michael Lerner). And the people of California, 44 other states, and the vast majority of

countries throughout the world continue to draw the line at marriage because that institution continues to serve a vital societal interest that is equally ubiquitous—to channel potentially procreative sexual relationships into enduring, stable unions for the sake of responsibly producing and raising the next generation.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs brought claims arising under federal law. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court's judgment permanently enjoining enforcement of Proposition 8 is an appealable final decision. The district court issued its ruling and ordered entry of judgment on August 4, 2010; it entered judgment on August 12, 2010. Appellants timely filed a Notice of Appeal on August 4, 2010. *See* FED. R. APP. P. 4(a)(2), 4(a)(1)(A). *See also* Part I of the Argument, *infra*.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Appellants have standing to appeal the district court's judgment.
2. Whether Proposition 8 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
3. Whether Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PERTINENT LEGAL PROVISIONS

CAL. CONST. art. I, § 7.5: "Only marriage between a man and a woman is valid or recognized in California."

U.S. CONST. amend. XIV, § 1: "… [N]o State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

"From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." *In re Marriage Cases*, 183 P.3d 384, 407 (Cal. 2008). In 2000, Californians passed an initiative statute (Proposition 22) reaffirming that understanding. *See* CAL. FAM. CODE § 308.5. In 2008, the California Supreme Court nevertheless struck down Proposition 22 and interpreted the State constitution to require that marriage be redefined to include same-sex couples. *See In re Marriage Cases*, 183 P.3d 384. At the next opportunity, just five months later, the people of California adopted Proposition 8, restoring the venerable definition of marriage and overruling their Supreme Court.

On May 22, 2009, Plaintiffs-Appellees ("Plaintiffs") filed this suit in district court, claiming that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. On May 28,

Appellants, official proponents of Proposition 8 and the primarily formed ballot measure committee designated by the official proponents as the official Yes on 8 campaign (collectively, "Proponents"), *see* CAL. ELEC. CODE § 342; CAL. GOV. CODE § 82047.5(b), moved to intervene to defend Proposition 8. The Governor, Attorney General, and other government Defendants named in Plaintiffs' complaint refused to defend Proposition 8, and on June 30, the district court granted Proponents' motion. ER206.

On July 23, the City and County of San Francisco moved to intervene as a party plaintiff to challenge Proposition 8. The district court granted San Francisco's motion on August 19, reasoning that "[t]o the extent that San Francisco claims a government interest in the controversy about the constitutionality of Proposition 8, it may represent that interest." ER215.

On September 9, Proponents moved for summary judgment. *See* ER1433.[1] The district court heard argument on the motion on October 14, and denied it from the bench. Doc. 226.[2]

Meanwhile discovery commenced and, over Proponents' First Amendment

[1] In their case management statements and at the case management hearings, Proponents repeatedly argued that a trial was unnecessary, explaining that similar challenges to the traditional definition of marriage had been decided by courts without trial and that the issues at stake turned on legislative rather than adjudicative facts. *See, e.g.*, ER1558-1565; ER213-214.

[2] Citations to "Doc.__" refer to the corresponding district court docket entry and, when specified, page numbers in such citations refer to the district court's ECF pagination.

and relevancy objections, the district court authorized sweeping discovery of "communications by and among proponents and their agents … concerning campaign strategy" and "communications by and among proponents and their agents concerning messages to be conveyed to voters, … without regard to whether the messages were actually disseminated." Doc. 214 at 17. This Court issued a writ of mandamus, holding that "[t]he freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment," and that the discovery authorized by the district court "would have the practical effect of discouraging the exercise of First Amendment associational rights." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2009) (as amended Jan. 4, 2010).

On December 15, Imperial County, its Board of Supervisors, and Deputy County Clerk Isabel Vargas (collectively, "Imperial Intervenors"), moved to intervene as defendants. They argued, *inter alia*, that Deputy Clerk Vargas issues marriage licenses and performs marriages, and thus would be directly affected by a ruling against Proposition 8 if "the state officials bound by that ruling seek to compel statewide compliance with it (as there is every reason to expect that they would.)." Doc. 311 at 9. The Imperial Intervenors thus sought to intervene to protect their "interests as a local government agency and ensure the possibility of appellate review of the important questions presented in this case, regardless of its outcome

in" district court. *Id*. at 10. The Imperial Intervenors' motion was argued and submitted on January 6, 2010, but not resolved until August 4, when the district court issued its ruling on the merits of Plaintiffs' claims. At that time, the district court denied intervention, reasoning that "Imperial County's status as a local government does not provide it with an interest in the constitutionality of Proposition 8." ER33.

Before trial, the district court also arranged for the trial to be publicly broadcast. At the district court's request, Chief Judge Kozinski approved the case for inclusion in a pilot program for recording and broadcasting district court trial proceedings, specifically providing for real-time streaming to several federal courthouses across the country and acknowledging the potential for posting the recording on the internet. *See Hollingsworth v. Perry*, 130 S. Ct. 705, 708-09 (2010). Shortly before trial commenced on January 11, the Supreme Court issued a temporary stay of any broadcast of the proceedings beyond "the confines of the courthouse in which the trial is to be held." *Hollingsworth v. Perry*, 130 S. Ct. 1132 (2010). Because public broadcast thus remained a very real possibility, Proponents withdrew before trial commenced four of their expert witnesses who were unwilling to testify under those circumstances. *See* ER1431. Two days later, on January 13, the Supreme Court stayed broadcast of the trial, pending disposition of a timely filed petition for certiorari or mandamus. *Hollingsworth*, 130 S. Ct. at 714-15. Al-

though the district court then withdrew the case from the Ninth Circuit pilot program, *see* ER176, it continued to videotape the trial, and four of Proponents' expert witnesses continued to be unwilling to testify so long as the trial was being videotaped.[3]

The case was tried from January 11 through January 27, and closing arguments were held on June 16. On August 4, the district court issued its Findings of Fact and Conclusions of Law. *See* ER34. The district court held that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution because it "unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation." ER144.

In holding that the fundamental right to marry protected by the Due Process Clause includes the right to marry a person of the same sex, the district court found that there is no "historical purpose for excluding same-sex couples from marriage,"

[3] Despite the stay, the district court, over Proponents' objections, continued videotaping the proceedings on the assurance that it was solely for the court's use in chambers as an aid to the preparation of its findings of fact. *See* ER174. On May 31, 2010, the district court, despite its previous assurances, notified the parties that they could obtain a copy of the trial recording for potential use "during closing arguments," subject to the requirement that it be kept confidential. ER173. Plaintiffs and San Francisco requested and were given copies of the recordings. *See* ER1427-30. Following closing arguments, Proponents asked the district court to order those copies returned, but the court permitted Plaintiffs and San Francisco to retain them, and made the recording part of the record, *see* ER39, in apparent violation of Local Rule 77-3.

but rather that "the exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage." ER148. The district court then asserted that Proposition 8 could not "survive the strict scrutiny required by plaintiffs' due process claim," ER152, because, as it would later explain, "Proposition 8 cannot withstand any level of scrutiny," ER158.

Addressing Plaintiffs' Equal Protection claim, the district court first held that Proposition 8 discriminates on the basis of both sex and sexual orientation, and indeed that Plaintiffs' claim of discrimination on the basis of sexual orientation "is equivalent to a claim of discrimination based on sex." ER156. The district court next determined that gays and lesbians constitute a suspect class, reasoning that "gays and lesbians are the type of minority strict scrutiny was designed to protect." ER156.

The district court nonetheless determined that "Proposition 8 fails to survive even rational basis review" because "excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest." ER157-158. Among other things, the district court concluded that "[n]one of the interests put forth by proponents relating to parents and children is advanced by Proposition 8," reasoning that "parents' genders are irrelevant to children's developmental outcomes" and that "[s]ame-sex couples can have (or adopt) and raise children." ER162-164. The district court also found that redefining marriage to include same-sex couples

would not "amount[] to a sweeping social change. ER160. The court concluded, accordingly, that California has no legitimate interest in waiting for the experience of other states with same-sex marriage to develop further before itself redefining marriage to include same-sex couples. ER160-61. After deeming Proposition 8 lacking in any rational justification, the court concluded that "what remains of proponents' case is an inference" that "Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples." ER167.

As a remedy, the district court "order[ed] entry of judgment permanently enjoining [Proposition 8's] enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8." ER171.

On August 16, this Court stayed the district court's judgment, pending appeal, after the district court had refused to do so. *See* ER3; Dkt. Entry 14.

STATEMENT OF FACTS

Plaintiffs are a gay couple and a lesbian couple who seek to have the State of California recognize their same-sex relationships as marriages. Proposition 8, however, provides that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art I, § 7.5.

SUMMARY OF ARGUMENT

1. As official proponents of Proposition 8, Appellants are authorized by California law to defend that Proposition on behalf of the people of that State. Accordingly, they have standing to defend this appeal. The Imperial Intervenors, who directly administer California's marriage laws, likewise have standing, and should have been permitted to intervene in this case.

2. Although the district court ruled that Proposition 8 is irrational, that court neither complied with established principles of rational basis review nor meaningfully engaged the legal authorities and evidence before it. Furthermore, the purported findings on which its decision turns involve issues of legislative fact. For all of these reasons, the district court's findings are entitled to no deference from this court.

3. The United States Constitution does not require California to abandon the age-old, deeply rooted definition of marriage as the union of a man and a woman for a novel, genderless definition that severs the link between marriage and the vital societal purposes it has always and everywhere served. Indeed, the United States Supreme Court has already decided the question, rejecting the very claims made by Plaintiffs and accepted by the district court. *See Baker v. Nelson*, 409 U.S. 810 (1972). Every other state or federal appellate court to confront the question—including this one—has agreed that the traditional definition of marriage

does not offend our Nation's Constitution. *See, e.g.*, *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982).

4. The reasons for this unanimous judgment are plain. Because same-sex marriage is wholly unknown, rather than deeply rooted, in this Nation's history and tradition, the Due Process Clause does not protect a fundamental right to marry a person of the same-sex. And history and precedent make clear that the fundamental right to marry that the Due Process Clause does protect cannot plausibly be construed as extending to same-sex couples.

5. As this Court and every other federal appellate court to consider the matter has held, gays and lesbians are not a suspect or quasi-suspect class for purposes of the Equal Protection Clause. *See, e.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990). Nor does the traditional definition of marriage, which treats men and women equally, discriminate on the basis of sex.

6. For these reasons, the traditional definition of marriage as the union of a man and a woman as reflected in Proposition 8 is subject only to rational basis review. And because there are reasonably conceivable—indeed compelling—reasons for the opposite-sex definition of marriage, Proposition 8 readily passes this most-deferential form of judicial scrutiny. First, the traditional definition of marriage reflected in Proposition 8 bears at least a rational relationship to the

State's vital interest in increasing the likelihood that children will be born and raised in stable family units by the couples who brought them into the world because it provide special recognition and support to those relationships most likely to further that interest. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 383 (1974); *Vance v. Bradley*, 440 U.S. 93, 109 (1979). Second, Proposition 8 preserves the traditional definition of marriage while California studies the effects of nascent experiments in other jurisdictions with same-sex marriage, thus furthering the State's interest in proceeding with caution when considering fundamental changes to a bedrock social institution that still serves vital societal interests.

STANDARD OF REVIEW

The issue of standing is a question of law that this Court reviews *de novo*. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). The district court's rulings that Proposition 8 violates the Equal Protection and Due Process Clauses of the United States Constitution, *see* ER152, 167, are questions of law reviewed *de novo*, *United States v. Sahhar*, 56 F.3d 1026, 1028 (9th Cir. 1995), and the same standard applies to any mixed questions of law and fact underlying these judgments, *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009). Finally, the district court's operative "factual" determinations relate to legislative facts and are therefore also subject to *de novo* review. *See infra* Part II.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

A. PROPONENTS HAVE STANDING TO APPEAL.

Proponents have standing to appeal the district court's judgment because they may directly assert the State's interest in defending the constitutionality of its laws, an interest that is indisputably sufficient to confer appellate jurisdiction. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986); *Diamond v. Charles*, 476 U.S. 54, 62 (1986). Specifically, Proponents have "authority under state law," *Karcher v. May*, 484 U.S. 72, 82 (1987), to defend the constitutionality of an initiative they have successfully sponsored, for they are acting "as agents of the people" of California "in lieu of public officials" who refuse to do so, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

In *Karcher*, the Supreme Court held that the President of the New Jersey Senate and the Speaker of the New Jersey General Assembly had standing to defend the constitutionality of a state statute when "neither the Attorney General nor the named defendants would defend the statute," 484 U.S. at 75, because New Jersey law authorized them to do so. The legislators' authority to defend the statute was clear because the "New Jersey Supreme Court ha[d] granted applications of the Speaker … and the President … to intervene as parties-respondent on behalf of

the legislature in defense of a legislative enactment." *Id*. at 82 (citing *In re Forsythe*, 91 N.J. 141, 144, 450 A.2d 499, 500 (1982)).

Here also, the California Supreme Court has permitted initiative proponents to defend initiatives they have sponsored—indeed it has done so with respect to these very Proponents and Proposition 8. *See Strauss v. Horton*, 207 P.3d 48, 69 (Cal. 2009); Order of Nov. 19, 2008, ER1617-1618 (*Strauss*, Nos. S168047, S168066, S168078 (Cal.)). Standing in this case therefore follows *a fortiori* from *Karcher*: there can be no question that California law authorizes Proponents to defend Proposition 8 on behalf of the State given that the California Supreme Court has already permitted *these very Proponents* to defend *this very Proposition* when the Attorney General would not do so. [4]

Nothing in *Arizonans for Official English v. Arizona*, undermines either the holding in *Karcher* or its clear application here. In dicta in *Arizonans*, the Supreme Court discussed, but ultimately did "not definitively resolve[,] the issue" of the standing of the principal sponsor of an Arizona ballot initiative to appeal a de-

[4] The *Karcher* Court's citation to *Forsythe* is illuminating. There, "[t]he initial adversary parties in the case were the [plaintiffs] and the Attorney General. In addition, the Court granted the applications of the Speaker of the General Assembly and the General Assembly, and the President of the Senate and the Senate to intervene as parties-respondent, all of whom, *with the Attorney General*, defend[ed] the validity of the enactment." 91 N.J. at 144, 450 A.2d at 500 (emphasis added). Here, in contrast to *Forsythe,* Proponents stood alone in *Strauss* in defending Proposition 8 against the state constitutional challenge; the Attorney General had refused in that case to do so just as he has refused to defend against the federal constitutional challenge in this case.

cision striking down that measure. 520 U.S. at 66. Citing *Karcher*, the Court explained that it had previously "recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests." *Id*. at 65. Unlike in *Karcher*, however, the Court stated that it was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Id*. For this reason, the Court expressed "grave doubts" about the standing of the Arizona initiative sponsors to appeal. *Id*. at 66.[5]

There can be no question that this case is governed by the holding in *Karcher*, not by the dicta in *Arizonans*. Under settled principles of California law, including but not limited to the very same type of legal authority relied upon by *Karcher*—a State Supreme Court decision permitting intervention—Proponents have authority to defend the constitutionality of Proposition 8 on behalf of the people of California.[6] Indeed, the California Supreme Court has explained that it is

[5] The Supreme Court specifically directed the Arizona initiative sponsors to brief the issue of their standing, yet their brief did not cite a single Arizona case on the question of state-law authorization. *Arizonans*, 520 U.S. at 64; Brief For Petitioners, *Arizonans*, No. 95-974, 1996 U.S. S. Ct. Briefs LEXIS 333, at *67-77 (May 23, 1996).

[6] In addition to *Strauss*, *see, e.g*., Petition for Extraordinary Relief, *Bennett v. Bowen*, No. S164520 (Cal. June 20, 2008) (Doc. 8-7); *Independent Energy Producers Ass'n v. McPherson*, 136 P.3d 178, 180 (Cal. 2006); *Senate of the State of Cal. v. Jones*, 988 P.2d 1089, 1091 (Cal. 1999); *Amwest Sur. Ins. Co. v. Wilson*,

necessary to permit proponents to intervene to defend initiatives they have sponsored when government officials "might not do so with vigor" in order "to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." *Building Indus. Ass'n v. City of Camarillo*, 718 P.2d 68, 75 (Cal. 1986).[7]

In addition to their state law authority to defend Proposition 8 on behalf of the people of California, Proponents also have standing to appeal because of their own particularized interest in defending an initiative they have successfully sponsored, an interest that is created and secured by California law. *See, e.g.*, *Diamond*, 476 U.S. at 54, 65 n.17 (state law may "create new interests, the invasion of which may confer standing"). Indeed, when the district court permitted Proponents to intervene in this case, it correctly recognized that, "under California law … proponents of initiative measures have the standing to … defend an enactment that is brought into law by the initiative process." ER202.

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906 P.2d 1112, 1116 (Cal. 1995); *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 581 (Cal. 1994); *Legislature of the State of California v. Eu*, 816 P.2d 1309, 1312 (Cal. 1991); *Legislature of the State of California v. Deukmejian*, 669 P.2d 17, 19 (Cal. 1983); *Brosnahan v. Eu*, 641 P.2d 200, 201 (Cal. 1982); *see also Sonoma County Nuclear Free Zone, '86 v. Superior Court*, 189 Cal. App. 3d 167, 173 (1987) (holding that initiative proponents should have been named real parties in interest in litigation involving initiative); *Vandeleur v. Jordan*, 82 P.2d 455, 456 (Cal. 1938) (proponent permitted to intervene in pre-election challenge).

[7] For similar reasons, *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank & Trust Co.*, 460 U.S. 1077 (1983), does not control the outcome here, as that case did not address whether California law authorizes initiative proponents to defend the measures they sponsor.

Under California law, the right to "propose . . . constitutional changes through the initiative process" is a "fundamental right," *Costa v. Superior Court*, 128 P.3d 675, 686 (Cal. 2006), which affords proponents a "special interest" and "particular right to be protected over and above the interest held in common with the public at large," an interest that is "directly affected" when an initiative they have sponsored is challenged in litigation. *Connerly v. State Personnel Bd.*, 129 P.3d 1, 6-7 (Cal. 2006).

It could hardly be otherwise given the role that initiatives play in California's system of government. The State's constitution expressly provides that "[a]ll political power is inherent in the people," CAL. CONST. art. II, § 1, and "[t]he initiative [is] viewed as one means of restoring the people's rightful control over their government." *Strauss*, 207 P.3d at 84. "[T]he sovereign people's initiative power" is thus "one of the most precious rights of [California's] democratic process." *Brosnahan v. Brown*, 651 P.2d 274, 277 (Cal. 1982). And the people have not left the fate of initiatives in the hands of the very elected officials they are meant to control. *Cf. People v. Kelly*, 222 P.3d 186, 200 (Cal. 2010) ("No other state in the nation carries the concept of initiatives as 'written in stone' to such lengths as to forbid their legislatures from updating or amending initiative legislation."). For all of these reasons, California courts have repeatedly allowed proponents to intervene to defend initiatives they have sponsored. *See supra* at 21 n.6 (citing cases). In-

deed, California law not only *permits* proponents to intervene to defend initiatives that their elected officials "might not do so with vigor," but it "may well be an *abuse of discretion*" to deny intervention in such circumstances. *Camarillo*, 718 P.2d at 75 (emphasis added). Any other rule would fail to respect the California people's initiative right, which, the Supreme Court of California has explained, "is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." *Strauss*, 207 P.3d at 107.

B. THE IMPERIAL INTERVENORS HAVE STANDING TO APPEAL.

In all events, the Imperial Intervenors have also filed a notice of appeal challenging the district court's order denying them intervention and its ruling on the merits. *See* ER1419-1420. Because the Imperial Intervenors should have been permitted to intervene, and because as intervening defendants bound by the district court's judgment they would have standing to appeal, this Court need not reach the question of Proponents' standing at this time. *See McConnell v. FEC*, 540 U.S. 93, 233 (2003); *Diamond*, 476 U.S. at 68.

California law makes clear that the Imperial Intervenors have an interest in this litigation sufficient to confer standing. Deputy County Clerk Vargas is a "commissioner of civil marriages," CAL. FAM. CODE § 401(a); CAL. GOV'T CODE § 24100, charged with issuing marriage licenses in compliance with California law, CAL. FAM. CODE §§ 350(a), 352, 354; *see also Lockyer v. City and County of San*

Francisco, 95 P.3d 459, 469 (Cal. 2004) (state law "place[s] the responsibility on the county clerk to ensure that the statutory requirements for obtaining a marriage license are satisfied"). Vargas, in other words, is directly responsible for enforcing Proposition 8 as part of her official duties. *See* ER1615 (AG P.I. Opp.) ("Plaintiffs err, however, in suggesting that the State performs the administrative duty of issuing and certifying marriage licenses. This duty is born[e] by local county clerks and recorders.").

Because the district court's order purports to control the official duties of Vargas and every other county clerk in the State, *see* ER171; ER2, Vargas plainly has an interest sufficient to support intervention.[8] *See American Ass'n of People*

[8] The district court's attempt to exercise this control is rooted in its assertion that "County clerks have no discretion to disregard a legal directive from the existing state defendants." ER24. But it is California *law*, not State officials, that determines whether or not a county clerk issues a marriage license: "When the substantive and procedural requirements *established by the state marriage statutes* … have not been met, the county clerk … [is] not granted any discretion under the statutes to issue a marriage license." *Lockyer*, 95 P.3d at 472-73 (emphasis added). Indeed, California's constitution prohibits state officials from relying on a trial court decision to declare a state law unenforceable under federal law. *See* CAL. CONST. art. III, § 3.5(c) ("An administrative agency . . . has no power . . . [t]o declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law … prohibit[s] the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law"); *Southern Cal. Edison Co. v. Lynch*, 307 F.3d 794, 812 (9th Cir. 2002) ("California agencies … are explicitly prohibited by the state constitution from agreeing to be enjoined from enforcing state laws that have not been declared unconstitutional by an appellate court."). In sum, the district court's judgment places Vargas in the untenable position of having to choose between the competing direc-

with Disabilities v. Herrera, 257 F.R.D. 236, 256 (D.N.M. 2008) ("This direct effect on what Coakley can and cannot do as county clerk is the direct and substantial effect that is recognized as a legally protected interest under rule 24(a)."). Once permitted to intervene as a defendant, Vargas will be bound by the district court's judgment. *See* ER2 ("Defendants in their official capacities … are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution."). She will plainly have standing to appeal.[9]

Vargas's standing to defend Proposition 8 on appeal is confirmed by the many cases in which county clerks have defended the state laws they are charged with enforcing in federal appellate courts. In *Richardson v. Ramirez*, 418 U.S. 24 (1974), for example, Richardson, the county clerk of Mendocino County, sought to intervene and was added as a party defendant in a case challenging a California constitutional provision barring ex-felons from voting, *id.* at 38. None of the original defendants—local election officials from three other California counties and the California Secretary of State—sought review of the California Supreme

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tives of California law, on the one hand, and state officials acting pursuant to the district court's judgment, on the other.

[9] Indeed, given that the district court's judgment purports to control Vargas's official duties, her standing to appeal may not even depend upon her being permitted to intervene as a party. *See Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1277 (9th Cir. 1992) ("[A] non-party who is enjoined or otherwise directly aggrieved by a judgment has standing to appeal the judgment."); *cf. United States v. Pawlinski*, 374 F.3d 536, 539 (7th Cir. 2004) (finding standing to appeal "[a]midst … welter of uncertainty" in application of state law).

Court's decision declaring the provision unconstitutional. Richardson, however, successfully petitioned the United States Supreme Court for review, and ultimately succeeded in having the California Supreme Court's decision reversed. *Id.* at 56. Similarly, *Zablocki v. Redhail*, 434 U.S. 374 (1978), involved an appeal to the Supreme Court by the county clerk of Milwaukee County from a lower court decision striking down a Wisconsin marriage law.

The district court nonetheless held that Vargas would not have standing to appeal if permitted to intervene because her "duties as a county clerk are purely ministerial and do not create a significant protectable interest that bears a relationship to the plaintiffs' claims in this litigation." ER24; *see also* ER32 ("Imperial County's ministerial duties surrounding marriage are not affected by the constitutionality of Proposition 8."). Vargas's interest in the validity of Proposition 8, however, does not turn on whether her duties are ministerial, but rather on whether she is directly charged under state law with enforcing the measure. She plainly is. Her position is thus indistinguishable from that of the county clerk in *Richardson*, who enforced California's felon voting restriction when performing "the ministerial duty of permitting qualified voters to register" to vote. *See Jolicoeur v. Mihaly*, 488 P.2d 1, 3 n.2 (Cal. 1971).

Indeed, the standing of officials charged with ministerial duties under state laws to defend those laws against constitutional attack is implicit in the very work-

ing of our legal system. Because a citizen generally cannot bring an action directly against a State in federal court, *see* U.S. CONST. amend. XI, suits challenging the constitutionality of state laws by necessity are typically brought against the officials charged with enforcing them. *See Ex parte Young*, 209 U.S. 123, 155-56 (1908). Indeed, under *Ex parte Young*, a federal court "can *only* direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action." 209 U.S. at 158 (emphasis added) (emphasis added).

For this reason, a county clerk (or deputy county clerk), entrusted by California law with the duty of issuing marriage licenses in accordance with Proposition 8, was not only a proper but a *necessary* defendant in this action. Indeed, another district court dismissed a suit challenging California's "ban on same sex marriage" because it named only the Governor and Attorney General as defendants and the plaintiff did "not allege that either the Governor or the Attorney General were charged with the duty of issuing marriage licenses or directly denied him such a license in violation of the Constitution." *Walker v. United States*, No. 08-1314, 2008 U.S. Dist. LEXIS 107664, at *7, *9 (S.D. Cal. Dec. 3, 2008). Thus, if the district court's novel view were correct, individuals suffering constitutional injury at the hands of officials performing ministerial tasks under State law would effectively be barred from recourse in federal court. That is plainly not the law.

To the contrary, "courts often have allowed suits to enjoin the performance of ministerial duties in connection with allegedly unconstitutional laws." *Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980). And if the plaintiff prevails at trial in such a suit, the official charged with such ministerial duties plainly has standing to appeal. The district court is thus simply wrong in insisting that county officials performing ministerial duties do not have standing to defend Proposition 8.

Finally, it is of no moment that neither the Attorney General nor the Administration Defendants have noticed an appeal, for "California law … explicitly provides that a county's board of supervisors, not the state Attorney General, directs and controls litigation in which a county is a party." *PG & E v. County of Stanislaus*, 947 P.2d 291, 300-01 (Cal. 1997).

C. IF THIS COURT CONCLUDES IT LACKS JURISDICTION, IT MUST VACATE THE DISTRICT COURT'S JUDGMENT TO THE EXTENT THE DISTRICT COURT EXCEEDED ITS JURISDICTION.

If this Court concludes that Proponents and the Imperial Intervenors lack standing to appeal, the judgment below must nevertheless be vacated. At a bare minimum, the district court exceeded its jurisdiction to the extent its judgment extends beyond the four Plaintiffs who were before the court. Because no class has been certified in this case, this Court "must vacate and remand," for "the injunction must be limited to apply only to the individual plaintiffs unless the district judge

certifies a class of plaintiffs." *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983).[10]

In *Zepeda*, a group of Mexican-American citizens and Mexican aliens legally in the United States brought a class action complaint and sought a preliminary injunction against the federal Immigration and Naturalization Service ("INS") and several of its officers alleging statutory and Fourth Amendment violations during INS enforcement operations. *Id*. at 722. After denying the class certification motion without prejudice, *id*., the district court issued a preliminary injunction barring the INS and officers from engaging in the challenged practices "not only against the individual plaintiffs before the court, but also against such other individuals who are not before the court." *Id*. at 728-29 n.1. This Court held that, absent class certification, extending the injunction to benefit individuals who were not before the court exceeded the district court's jurisdiction: "A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to determine the rights persons not before the court." *Id.* at 727; *see also Meinhold v. United States Dep't of Defense*,

[10] Indeed, the court below likely lacked jurisdiction altogether (and its judgment must therefore be vacated) because the Attorney General agreed that Proposition 8 was unconstitutional. *See GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 383 (1980) ("there is no Art. III case or controversy when the parties desire 'precisely the same result' " (quoting *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971) (per curiam)); *League of Women Voters of California v. FCC*, 489 F. Supp. 517, 520 (C.D. Cal. 1980) (dismissing constitutional challenge to federal statute for lack of case or controversy where defendant FCC declined to defend because it "agrees that the statute is unconstitutional").

34 F.3d 1469, 1480 (9th Cir. 1994) (vacating permanent injunction prohibiting the Defense Department from discharging any person from the service based on sexual orientation where action was not brought as a class action "except to the extent it enjoins DOD from discharging Meinhold"); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996) ("injunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification").

Here, no class was certified. Accordingly, the court below likewise exceeded its jurisdiction by extending relief beyond the four plaintiffs before it to benefit all same-sex couples in California who wish to marry. To be sure, the significance of this failure to observe jurisdictional limits will likely be *de minimis* if the Court agrees that either Proponents or the Imperial Intervenors has standing and therefore adjudicates the merits, for in that event, this Court's ruling will govern throughout California (and the rest of the Circuit) as a matter of precedent. If, however, the Court concludes that both Proponents and the Imperial Intervenors lack standing to appeal, the district court's failure to abide by the limits of its power must be corrected by vacatur, as required by *Zepeda*, in order to prevent the injunction from improperly applying throughout California even though no statewide class was certified.

II. THE DISTRICT COURT'S KEY "FACT" FINDINGS ARE DUE NO DEFERENCE AND IN ANY EVENT ARE UNRELIABLE AND ULTIMATELY IRRELEVANT.

The district court attempts to insulate its decision from review by cloaking it in "findings of fact" ostensibly derived from the trial record. Indeed, the district court dedicates nearly 100 pages of its ruling to recounting the trial proceedings, identifying the evidence it considered, and setting forth 80 separate findings of fact, as though the legal issues in the case turned on *adjudicative facts* rather than *legislative facts*. *See* ER45-144. The key legislative fact "findings" upon which the district court bases its decision, however, are due no deference from this Court, are wholly belied by the record on which they are ostensibly based, and are, in any event, irrelevant under rational basis review. We turn first to this latter point.

1. The district court's judgment is ultimately based on its conclusion that Proposition 8 fails rational basis review. *See* ER152, 157-158. In applying rational basis review, "[n]one of the factual issues raised at trial or on appeal is relevant," because this Court "need only examine whether [Proposition 8] has a conceivable basis rationally related to a legitimate governmental purpose." *Lupert v. California State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985). Indeed, given that this Court's consideration of Proposition 8's rationality must take account of any *conceivable* rationale, it is not even limited by "explanations … that may be offered by litigants or other courts." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463

(1988). And the burden remains at all times "on the one attacking the legislative arrangement to negative every conceivable basis which might support it, *whether or not the basis has a foundation in the record*." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (emphasis added).

The State, it follows, "has *no* obligation to produce evidence to sustain the rationality of" its laws. *Heller*, 509 U.S. at 320 (emphasis added). To the contrary, the State's "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* Further, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. at 111. "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Id*. at 112. Indeed, so long as the "assumptions underlying [a law's] rationales" are at least "arguable," that is "sufficient, on rational basis review, to immunize the [legislative] choice from constitutional challenge"—even if those assumptions are, in fact, "erroneous." *Heller*, 509 U.S. at 333. In short, the question before the court is not whether the legislative facts underlying the explanation for the legislation are true or false; it is whether they are "at least debatable." *Id*. at 326.

The district court simply could not have violated these well-established legal principles more pervasively. Indeed, the court effectively rejected them from the outset of its decision, opining that "the voters' determinations must find at least some support in evidence," ER59, and faulting Proponents (falsely) for "fail[ing] to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest," ER46. (We address the district court's gross mischaracterizations of the state of the record *infra* at 38-43.) The district court's *144* references to the "evidence" and "testimony" in the record,[11] standing alone, make clear that it employed standard "courtroom factfinding" to determine whether Proponents had sustained Proposition 8's rationality by a preponderance of the evidence.[12]

[11] *See, e.g.*, ER46 ("The trial evidence provides no basis for establishing that California has an interest in refusing to recognize marriage between two people because of their sex."); ER55 ("[T]he testimony shows that California has no interest in differentiating between same-sex and opposite-sex unions."); ER161 ("[P]roponents presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage."); ER164 ("Proponents failed to put forth any credible evidence that married opposite-sex households are made more stable through Proposition 8.").

[12] The district court cites *Plyler v. Doe*, 457 U.S. 202, 228 (1982), for the proposition that "[t]he court may look to evidence to determine whether the basis for the underlying debate is rational." ER153. *Plyler*, however, applied "a heightened level of equal protection scrutiny," not rational basis review, and its holding has not been "extended beyond unique circumstances that provoked its unique confluence of theories and rationales." *Kadrmas v. Dickinson Public Schools*, 487 U.S. at 459.

Again, rational basis review is satisfied whenever "legislative judgments" are "debatable," and the district court's decision to hold a trial at all was itself a determination that Proposition 8's rationality is debatable, thus mandating judgment upholding the measure.[13] As the Seventh Circuit has explained,

> [A] court holds evidentiary hearings only when necessary to resolve material disputes of fact. In constitutional law, to say that such a dispute exists—indeed, to say that one may be imagined—is to require a decision for the state. Outside the realm of 'heightened scrutiny' there is therefore never a role for evidentiary proceedings. By holding a trial, the district court conceded that there were material factual disputes—as there were. … The district court therefore should not have conducted a trial, and we disregard its conclusions.

National Paint & Coatings Ass'n v. Chicago, 45 F.3d 1124, 1127 (7th Cir. 1995). The same principles apply here, and they mandate reversal of the decision below.

2. Quite apart from the foregoing evidentiary principles governing rational basis review, it is important to emphasize again that the operative "factual" issues in this case are all matters of *legislative fact*, and the district court's fact findings are thus due no deference. As this Court has explained, "[l]egislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." *Marshall v. Sawyer*, 365 F.2d

[13] Indeed, in denying Proponents' 98-page, thoroughly supported summary judgment motion, ER1433-1549, the district court acknowledged the debate between the parties over the rationality of the state's interests in marriage "arising out of the male-female procreation process," ER193, and decided that such issues were "suitable for a fuller development at trial," ER194. *See also* ER210 (PI Order) ("In support of their argument that Prop 8 is constitutional, the intervenors have raised state interests that appear to require evidentiary support.").

105, 111 (9th Cir. 1966); *see also United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989) (Kozinski, J.) (distinguishing between "legislative facts—those applicable to the entire class of cases" and "adjudicative facts—those applicable only to the case before [the court]").[14]

The trial process is rarely well-suited for resolution of legislative fact questions. As Judge Posner has explained, "trials are to determine adjudicative rather than legislative facts." *Indiana H. B. R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990). Legislative facts, by contrast, are generally established through "facts reported in books and other documents not prepared specially for litigation or refined in its fires." *Id.*; *see also Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999) (Boudin, J.) (" 'legislative facts' … usually are not proved through trial evidence but rather by material set forth in the briefs."); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1210-11 (5th Cir. 1977) ("Trials are seldom desirable either on legislative facts or on broad factual issues."). Indeed, other courts addressing the validity of marriage laws like Proposition 8 have all but uni-

[14] Even a brief look at the operative factual issues identified by the court below demonstrates that they go to establishing general propositions, not particular facts specific to the parties. *See, e.g.*, ER209 (identifying "facts necessary to establish the appropriate level of scrutiny under the Equal Protection Clause"); ER210 (identifying "facts … necessary to determine whether the right asserted by plaintiffs is … subject to strict scrutiny under the Due Process Clause"); *see also* Monte Neil Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y 313, 319 n.17 (2008) (ER812-68).

formly eschewed trials, and not even Plaintiffs thought a trial was necessary here. *See* ER347 (Plaintiffs' counsel) ("I thought we didn't need the trial.").[15]

Further, appellate review of legislative facts such as those at issue here is "plenary." *Free v. Peters*, 12 F.3d 700, 706 (7th Cir. 1993) (Posner, J.); *see also, e.g.*, *Equality Found. v. City of Cincinnati*, 54 F.3d 261, 265 (6th Cir. 1995) (subjecting district court "findings designed to support 'constitutional facts' (to wit, the existence of a 'quasi-suspect' class, or of a fundamental right which was invaded by the Amendment) … to plenary review"), *vacated on other grounds*, 518 U.S. 1001 (1996); *United States v. Singleterry*, 29 F.3d 733, 740 (1st Cir. 1994) ("The clear error standard does not apply … when the fact-finding at issue concerns 'legislative' … facts. ... Accordingly, we need not defer to the lower court's assessment of the 'evidence' …."); *Menora v. Illinois High Sch. Ass'n*, 683 F.2d 1030, 1036 (7th Cir. 1982) (Posner, J.) (same); *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality); *see also Lockhart v. McCree*, 476 U.S. 162, 168-69 n.3 (1986); Advisory Committee Note, Fed. R. Evid. 201(federal rules leave "judicial access to legislative facts" unconstrained by "any limitation in the form of indisputability, any formal requirements of notice other than those al-

[15] There have been at least twenty other cases involving state or federal constitutional challenges to the traditional definition of marriage, and we are aware of only one in which a trial was held—and that trial was narrowly focused on whether the traditional definition of marriage satisfied strict scrutiny under the Hawaii constitution. *See Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (remanding for strict scrutiny determination).

ready inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings *at any level*") (emphasis added).

3. Finally, the findings of legislative fact on which the district court's ruling ultimately turns are, we submit, either facially incredible, belied by the record as a whole, or altogether unknowable. It is beyond debate, however, that they are all "at least debatable." The district court based its findings almost exclusively on an uncritical acceptance of the evidence submitted by Plaintiffs' experts, and simply ignored virtually everything—judicial authority, the works of eminent scholars past and present in all relevant academic fields, extensive historical and documentary evidence—that ran counter to its conclusions.[16] Most importantly, the court ignored an overwhelming body of evidence establishing the common-sense proposition that the institution of marriage has, virtually always and everywhere, been defined as a union of man and woman because its central animating societal purpose has always, and everywhere, been to channel potentially procreative sexual

[16] The trial proceedings were skewed from the outset, given that four of Proponents' expert witnesses refused to testify so long as the proceedings were being videotaped. The district court asserts that "the record does not reveal the reason behind proponents' failure to call their expert witnesses" because "[t]he timeline shows … that proponents failed to make any effort to call their witnesses after the potential for public broadcast in the case had been eliminated." ER71. But the district court, even after it withdrew the case from consideration for broadcasting, nevertheless insisted on videotaping the proceedings. *See* ER176-177; ER246-247. As Proponents' counsel explained at trial, the withdrawn experts "did not want to appear *with any recording of any sort, whatsoever*." ER258 (emphasis added).

relations into enduring, stable family unions for the sake of producing and raising the next generation. (We discuss a portion of this evidence below, at Part IV.B.) Only by ignoring this evidence was the district court able to enter such highly debatable (to say the least) findings as:

- "The tradition of restricting marriage to opposite-sex couples does not further any state interest." ER1501.
- There are no "real and undeniable differences" between same-sex couples and opposite-sex couples "that the government might need to take into account in legislating." ER157.
- Same-sex couples are "exactly the same" as opposite-sex couples "for all purposes" of marriage in California. ER165.
- Same-sex "unions encompass the historical purpose and form of marriage." ER149.
- Opposite-sex "gender restrictions … were never part of the historical core of the institution of marriage." ER148.
- Marriage's opposite-sex "gender restriction [is] … nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life." ER159.
- "The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples." ER165.
- "California need not restructure any institution to allow same-sex couples to marry." ER161.
- Same-sex marriage will not "amount[] to a sweeping social change." ER160.

But notably, the district court's uncritical acceptance of Plaintiffs' evidence did not extend to the many important concessions made by Plaintiffs' experts on cross-examination that undermined Plaintiffs' claims and the court's findings.

Perhaps the most vivid example of this selectivity relates to the district court's most extravagant, and critical, finding. The court found that "the evidence shows beyond debate" that same-sex marriage "will have no adverse effects on society or the institution of marriage." ER161. The court based this finding almost entirely on the testimony of a single expert witness, Professor Letitia Peplau, who observed that marriage and divorce rates in Massachusetts had remained relatively stable during the four-year periods before and after same-sex marriage was judicially imposed in 2004. But on cross-examination, Peplau specifically *denied* that any firm conclusions could be drawn from these short-term statistics. This is what she said: "I don't take those [statistics] as necessarily serious indicators of anything." ER241. Peplau added that she found them "informative," but that she did not "make any claims beyond that about what these data show." ER241. The district court also ignored entirely what the Plaintiffs' other pertinent expert, Professor Nancy Cott, said on cross-examination about those same Massachusetts statistics: "The divorce rate question is very hard to answer in a period of simply five years, which is all there has been same-sex marriage in Massachusetts. And that's why … I simply couldn't make a claim about that relation. …" ER232. Professor Cott, moreover, also admitted on cross-examination that adoption of same-sex marriage is perhaps a "highly distinctive" "watershed" and "turning point" event in the history of marriage, that it "definitely has an impact on the social meaning of mar-

riage," which will "unquestionably [have] real world consequences," but that it is "impossible" to know the consequences because "no one predicts the future that accurately." ER226, 228, 229-231.[17]

This, then, is the evidence that proved to the district court "*beyond debate*" that fundamentally redefining an age-old and vital social institution will have no long-term adverse effects *at all*. Assuming that any quantum of evidence could justify a court in making a finding such as this, the evidence on which the court below relied surely does not suffice.

Another instance of the district court's skewed portrayal of the proceedings concerns a colloquy between the district court and counsel for Proponents at the closing argument. The district court asserts in its opinion that when the court asked counsel to identify the evidence supporting Proponents' contention that "re-

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[17] Counsel for Proponents similarly admitted in the summary judgment hearing, "I don't know," in response to the district court's question regarding "how it [same-sex marriage] would harm opposite-sex marriages." ER216. The district court quotes in its opinion Proponents' counsel's response, without more, as though counsel had nothing else to say. ER44. What the district court does not disclose is that Proponents' counsel further answered that "it depends on things we can't know... that's my point." ER218. Counsel elaborated:

> "[T]he state and its electorate are entitled, when dealing with radical proposals for change, to a bedrock institution such as this, to move incrementally, to move with caution, and to adopt a wait-and-see attitude. Keep in mind, your Honor, this same-sex marriage is a very recent innovation. Its implications of a social and cultural nature, not to mention its impact on marriage over time, can't possibly be known now."

ER217; *see also* ER352-354.

sponsible procreation is really at the heart of society's interest in regulating marriage," "counsel replied, 'you don't have to have evidence of this point.' " ER45. The court's opinion leaves it at that, thus implying that Proponents had offered no evidence in support of this contention. In fact, counsel in this very colloquy had cited the works of "eminent authority after eminent authority" in support of this contention. Counsel stated: "Your honor, these materials are before you. They are in evidence before you." ER350.[18] Counsel then noted that, in any event, *case law* had recognized the procreative purpose of marriage as a matter of law: "But, your Honor, you don't have to have evidence for this from these authorities. This is in the cases themselves. The cases recognize this one after another." The Court then asked: "I don't have to have evidence?" And counsel responded: "*You don't have to have evidence of this point* if one court after another has recognized [it]." ER350-351. Again, only the italicized portion of counsel's answer is quoted by the district court.

The opinion below is replete with similar instances of the district court's highly selective, one-sided description of the evidence in the record.[19] In short, the

[18] The district court rejected this evidence out of hand, noting that "Blackstone didn't testify. Kingsley Davis didn't testify. What *testimony in this case* supports the proposition?" ER350 (emphasis added).

[19] For example, *compare* FF 43 (ER106-107), *with* ER240-249 (Meyer); *compare* FF 50 (ER114), *with* ER235, 237, 238 (Peplau); *compare* FF 56 (ER119), *with* ER287 (Lamb).

record in this case and the evidence considered and described by the district court are two very different things.[20]

III. THE DISTRICT COURT'S RULING IS CONTRARY TO BINDING PRECEDENT FROM THE SUPREME COURT AND THIS COURT AND THE UNIFORM JUDGMENT OF STATE AND FEDERAL APPELLATE COURTS ACROSS THE NATION.

To read the district court's opinion, one might think that the validity of the traditional opposite-sex definition of marriage under the Federal Constitution was

[20] Further, as even a cursory review of the record makes clear, *see* ER312-325, the district court plainly erred in excluding the testimony of David Blankenhorn. Mr. Blankenhorn is the founder and President of the Institute for American Values, a non-partisan think tank that for over 20 years has focused primarily on issues related to marriage, family structure, and child well-being. His numerous writings, which have been repeatedly cited in peer-reviewed journals and by the courts, include two widely acclaimed books directly relevant to the issues he testified about, *Fatherless America* and *The Future of Marriage*. *See* ER1417 (Lamb) (describing *Fatherless America* as an "interesting, provocative, and eloquent piece of social commentary" that "deserves to be widely read and thoughtfully discussed."); http://volokh.com/posts/1175097297.shtml (same-sex marriage advocate Professor Dale Carpenter describing *The Future of Marriage* as "[p]robably the best single book yet written opposing gay marriage"). Mr. Blankenhorn has frequently spoken, lectured, and offered legislative testimony about issues related to marriage, fatherhood, and family structure, and he is a regular participant in same-sex marriage debates and panel discussions with leading proponents of same-sex marriage. In short, Mr. Blankenhorn plainly exceeds the "minimal" requirements imposed by this Circuit for expert testimony, *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994), and the opinions he offered in this case flow "naturally and directly" from his body of work, *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). Given that Mr. Blankenhorn's opinions relate to legislative facts, however, there is no need "to apply formal rules of evidence to facts in the form of testimony that [this] court can independently obtain and consider in deciding the case." *Varnum v. Brien*, 763 N.W.2d 862, 881 (Iowa 2009). Accordingly, the district court's exclusion Mr. Blankenhorn's testimony is ultimately of no moment, and this Court is free to consider his testimony and writings.

an issue of first impression to be decided on a blank slate. Nothing could be farther from the truth. Indeed, the district court's holding that the United States Constitution requires the people of California to redefine marriage to include same-sex relationships contravenes binding precedent from both the Supreme Court and this Court rejecting constitutional challenges to the traditional definition of marriage. It is also contrary to the consistent decisions of every other state or federal appellate court to address the validity of the traditional definition of marriage under the Federal Constitution.

Aside from a brief and singularly unpersuasive attempt to distinguish controlling Supreme Court precedent in its oral summary judgment ruling, *see infra* n.21, the district court never even acknowledged this overwhelming, indeed dispositive, body of authority. Not one of the many cases upholding the traditional definition of marriage is cited in the district court's nearly 140-page opinion, let alone addressed and distinguished. Yet these decisions plainly mandate rejection of Plaintiffs' claims and reversal of the district court's decision.

A. THE SUPREME COURT'S DECISION IN *BAKER V. NELSON* MANDATES REVERSAL OF THE DISTRICT COURT'S RULING.

In *Baker v. Nelson*, 409 U.S. 810 (1972), as previously noted, the Supreme Court unanimously dismissed, "for want of substantial federal question," an appeal from the Minnesota Supreme Court presenting the same questions at issue here: whether a State's refusal to authorize same-sex marriage violated the Due Process

and Equal Protection Clauses of the Fourteenth Amendment. *Id.*; *see also Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972) (ER1606); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The *Baker* Court's dismissal was a decision on the merits that is binding on lower courts on the issues presented and necessarily decided. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). *Baker*'s precedential value "extends beyond the facts of the particular case to all similar cases," *Wright v. Lane County Dist. Court*, 647 F.2d 940, 941 (9th Cir. 1981), and lower courts are bound by that decision "until such time as the [Supreme] Court informs them they are not," *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). Plaintiffs assert the same claims as those rejected in *Baker*, and they are thus foreclosed by that decision.[21]

[21] The district court's attempts to distinguish *Baker* in its summary judgment ruling are utterly unpersuasive. As an initial matter, the district court pointed to differences in the "underlying facts" in *Baker*, such as the fact that in Minnesota same-sex marriage "had never been recognized." ER182-83. Yet the district court's subsequent broad ruling plainly does not turn on such fine distinctions in "underlying facts" and, by its terms, would require *every* State to recognize same-sex marriage as a matter of law, notwithstanding any local historical idiosyncrasies. Such a result cannot be squared with *Baker*. The district court also asserts that *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), have eroded *Baker*'s foundations by demonstrating that gay and lesbian individuals may bring successful challenges to laws under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *See* ER183-184. Yet in neither *Romer* nor *Lawrence* did "the [Supreme] Court inform[]" lower courts that they are no longer bound by *Baker*. To the contrary, *Romer* had nothing to do with the constitutionality of the traditional definition of marriage—as powerfully evidenced by the very fact that the district court addressed this decision only peripherally in its nearly 140-page opinion—and *Lawrence* expressly informed lower

B. THIS COURT'S DECISION IN *ADAMS V. HOWERTON* MANDATES REVERSAL OF THE DISTRICT COURT'S RULING.

This Court has likewise rejected claims that the Federal Constitution bars the government from limiting marriage to opposite-sex couples. In *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), this Court interpreted "spouse" in a federal immigration provision to exclude partners in a purported same-sex marriage, and squarely held that "Congress's decision to confer spouse status … only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements." *Id*. at 1042. This binding decision, which the district court nowhere mentions, also requires reversal of the district court's ruling.

C. THE DISTRICT COURT'S RULING IS CONTRARY TO THE UNANIMOUS CONCLUSION OF OTHER APPELLATE COURTS ACROSS THE COUNTRY.

The district court's decision conflicts not only with *Baker* and *Adams*, but also the decisions of *every* other state or federal appellate court to address the validity of the traditional opposite-sex definition of marriage under the Federal Con-

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courts that that case did "*not* involve whether the government must give formal recognition to any relationship that homosexual persons may seek to enter." 539 U.S. at 578 (emphasis added); *see also id.* at 585 (O'Connor, J., concurring in judgment) ("That this law as applied to private, consensual conduct is unconstitutional . . . does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage.").

stitution, including the United States Court of Appeals for the Eighth Circuit, two State courts of final resort, and four intermediate State courts, including two within this Circuit. *See In re J.B.*, No. 05-09-01170-CV, 2010 Tex. App. LEXIS 7127, at *67 (Tex. Ct. App. Aug. 31, 2010); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 453 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. 1995); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973); *Baker*, 191 N.W.2d at 187. The district court's decision thus stands in stark conflict with the consistent, considered, and unanimous judgment of this Nation's appellate courts. Again, none of these cases is even cited, let alone addressed, in the decision below.

IV. PROPOSITION 8 DOES NOT VIOLATE PLAINTIFFS' FUNDAMENTAL RIGHT TO MARRY.

In *Washington v. Glucksberg*, the Supreme Court clarified and delimited the process for identifying and defining the fundamental rights protected by the Due Process Clause. The Court emphasized "two primary features" of this substantive-due-process analysis. 521 U.S. 702, 720 (1997). First, the Due Process Clause provides special protection only to "those fundamental rights and liberties which are objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id*. at 720-21. "Our Nation's history, legal traditions, and

practices thus provide the crucial guideposts for responsible decision making that direct and restrain [judicial] exposition of the Due Process Clause." *Id*. at 721. Second, identification of fundamental rights "require[s] … a careful description of the asserted fundamental liberty interest." *Id*. at 722. These principles are intentionally strict, for "extending constitutional protection to an asserted right or liberty interest, … to a great extent, place[s] the matter outside the arena of public debate and legislative action." Id. at 720. Courts "must therefore exercise the utmost care whenever . . . asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences" of judges. *Id*.

The Supreme Court has repeatedly and forcefully reiterated these principles, including just last year in *District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2322 (2009). But as demonstrated below, the district court's novel conclusion that the traditional opposite-sex definition of marriage violates same-sex couples' fundamental right to marry runs contrary to these principles at every turn.

A. THERE IS NO FUNDAMENTAL RIGHT TO MARRY A PERSON OF THE SAME SEX.

The purported right asserted by Plaintiffs to marry a person of the same sex plainly fails the test the Supreme Court has mandated for identifying fundamental rights. Far from being "objectively, deeply rooted in this Nation's history and tradition," same-sex marriage was unknown in the laws of this Nation before 2004,

and even today same-sex marriages are performed legally in only five States and the District of Columbia.[22] Thus, just as in *Osborne*, "[t]here is no long history of such a right, and [t]he mere novelty of such a claim is reason enough to doubt that substantive due process sustains it." 129 S. Ct. at 2322.

Further, here, much like in *Glucksberg*, *see* 521 U.S. at 717-18, innovations in a small handful of jurisdictions that have chosen to redefine marriage to include same-sex unions have provoked a reaffirmation of the traditional understanding of marriage in a far greater number of other jurisdictions, and, during the last dozen years, 29 States have enshrined in their Constitutions the legal definition of marriage as the union of a man and a woman.[23] And many more States, as well as the Federal Government, have likewise chosen to continue to adhere to that traditional

[22] The five States are Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire. In three of these States, same-sex marriage was imposed by judicial decree under the State constitution.

[23] *See* ALA. CONST. art. I, § 36.03 (2006); ALASKA CONST. art. 1, § 25 (1998); ARIZ. CONST. art. XXX, § 1 (2008); ARK. CONST. amend. 83, § 1-3 (2004); CAL. CONST. art. I, § 7.5 (2008); COLO. CONST. art. II, § 31 (2006); FLA. CONST. art. I § 27 (2008); GA. CONST. art. I, §IV, ¶ I (2004); IDAHO CONST. art. III, § 28 (2006); KAN. CONST. art. XV, § 16 (2005); KY. CONST. § 233a (2004); LA. CONST. art. XII, § 15 (2004); MICH. CONST. art. I, § 25 (2004); MISS. CONST. art. XIV, § 263A (2004); MO. CONST. art. I, § 33 (2004); MONT. CONST. art. XIII, § 7 (2004); NEB. CONST. art. I, § 29 (2000); NEV. CONST. art. I, § 21 (2002); N.D. CONST. art. XI, § 28 (2004); OHIO CONST. art. XV, § 11 (2004); OKLA. CONST. art. II, § 35 (2004); OR. CONST. art. XV, § 5a (2004); S.C. CONST. art. XVII, § 15 (2006); S.D. CONST. art. XXI, § 9 (2006); TENN. CONST. art. XI, § 18 (2006); TEX. CONST. art. I, § 32 (2005); UTAH CONST. art. I, § 29 (2004); VA. CONST. art. I, § 15-A (2006); WIS. CONST. art. XIII, § 13 (2006).

definition of marriage.[24] In short, here, just as in *Glucksberg*, "[t]he history of [the asserted right] in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, . . . the asserted 'right' . . . is not a fundamental liberty interest protected by the Due Process Clause." *Id*. at 728.

B. THE ESTABLISHED FUNDAMENTAL RIGHT TO MARRY CANNOT PLAUSIBLY BE CONSTRUED TO INCLUDE A RIGHT TO MARRY A PERSON OF THE SAME SEX.

The district court nevertheless asserted that the fundamental right to marry that has been recognized by the Supreme Court encompasses a right to marry a person of the same sex. Given the complete absence of same-sex marriage from "[o]ur Nation's history, legal traditions, and practices," the district court was forced to characterize the established fundamental right to marry as a generalized, abstract right to marry the person of one's choice without regard to gender. The district court thus asserted that "gender restrictions . . . were never part of the historical core of the institution of marriage," ER148, and, based on this startling premise, concluded that "Plaintiffs' unions encompass the historical purpose and form of marriage," ER149. But as demonstrated below, the district court's revi-

[24] *See* DEL. CODE ANN. tit. 13, § 101; HAW. REV. STAT. § 572-1; HAW. REV. STAT. § 572-3; 750 ILL. COMP. STAT. 5/212; IND. CODE § 31-11-1-1; MD. CODE ANN., FAM. LAW § 2-201; 19-A ME. REV. STAT. § 701.5; MINN. STAT. § 517.01; *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 5-6 (N.Y. 2006); N.C. GEN. STAT. § 51-1.2; 23 PA. CONS. STAT. § 1704; WASH. REV. CODE § 26.04.010-20; W. VA. CODE § 48-2-603; WYO. STAT. ANN. § 20-1-101; *see also* N.M. STAT. §§ 40-1-1 – 40-1-7; R.I. GEN. LAWS §§ 15-1-1 – 15-1-5; 1 U.S.C. § 7.

sionist abstractions simply cannot be squared with the historical record. And even a cursory review of Supreme Court precedent makes clear that the fundamental right to marry recognized by that Court is the right to enter a legally recognized union only with a person of the opposite sex.

1. When the Supreme Court decided *Baker* in 1972, it had long been established that the right to marry is fundamental. Indeed, *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down Virginia's antimiscegenation law as a violation of the fundamental right to marry, had been decided just five years earlier. Obviously, if there had been any merit at all in the claim that the fundamental right to marry includes the right to marry a person of the same sex, then surely the Court would not have dismissed, unanimously, the appeal for want of a substantial federal question. Equally obviously, no such right to same-sex marriage somehow became "deeply rooted in this Nation's history and tradition" since *Baker* was decided in 1972. Indeed, by that time the historical changes in the law of marriage relied on by the district court here were largely already complete. *Baker* thus necessarily forecloses the district court's due process ruling.

2. With only a handful of very recent exceptions, marriage is, and always has been, understood in every civilized society as limited to opposite-sex unions. Indeed, as noted earlier, until recently "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be

marriages only between participants of different sex." *Hernandez*, 855 N.E.2d at 8. In the words of highly respected anthropologist Claude Levi-Strauss, "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." THE VIEW FROM AFAR 40-41 (1985) (ER453-54); *see also* G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988) (ER502) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies."); *cf.* ANTHROPOLOGICAL INSTITUTE OF GREAT BRITAIN, NOTES AND QUERIES ON ANTHROPOLOGY 71 (6th ed. 1951) (ER485) (defining marriage "as a union between a man and a woman such that children borne by the woman are recognized as the legitimate offspring of both partners").

Further, the opposite-sex character of marriage has always been understood to be a central—indeed *defining*—feature of this institution, as uniformly reflected in dictionaries throughout the ages. Samuel Johnson, for example, defined marriage as the "act of uniting a man and woman for life." A DICTIONARY OF THE ENGLISH LANGUAGE (1755). Subsequent dictionaries have consistently defined marriage in the same way, including the first edition of Noah Webster's, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), and prominent dictionaries from the time of the framing and ratification of the Fourteenth Amend-

ment, *see, e.g.*, NOAH WEBSTER, ETYMOLOGICAL DICTIONARY 130 (1st ed. 1869); JOSEPH E. WORCESTER, A PRIMARY DICTIONARY OF THE ENGLISH LANGUAGE (1871). A leading legal dictionary from the time of the framing and ratification of the Fourteenth Amendment, for example, defined marriage as "[a] contract, made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife." JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES 105 (1868); *see also* JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE § 225 (1st ed. 1852) ("Marriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby. It has always, therefore, been deemed requisite to the entire validity of *every* marriage . . . that the parties should be of different sex"). Modern dictionaries continue to reflect the same understanding. The NEW OXFORD AMERICAN DICTIONARY (2010), for example, defines marriage as "the formal union of a man and a woman, typically recognized by law, by which they become husband and wife."[25]

[25] While the 2010 edition of the NEW OXFORD AMERICAN DICTIONARY retains the traditional opposite-sex definition of marriage as its principle definition of marriage, it, like some other recent dictionaries, also acknowledges the novel phenomenon of same-sex marriage. The recent vintage of such discussions—which were absent, for example, from the 2001 edition of the New Oxford American Dictionary—only underscores the lack of any grounding for the district court's newly

Nor can the longstanding definition of marriage as the union of a man and a woman plausibly be dismissed, as the court below did, as "nothing more than an artifact of a forgone notion that men and women fulfill different roles in civic life." ER159. For one thing, the district court's novel attempt to account for the restriction of marriage to opposite-sex unions is belied by the historical record, which makes unmistakably clear that this traditional rule is ubiquitous, sweeping across virtually all cultures and all times, regardless of the relative social roles of men and women. More important, the historical record leaves no doubt that the traditional definition of marriage reflects not "antiquated and discredited notions of gender," *id*., but simply the undeniable biological reality that opposite-sex unions—and only such unions—can produce children. Marriage, thus, is "a social institution with a biological foundation." Levi-Strauss, *"Introduction," in Andre Burguiere, et al. (eds.)*, 1 A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (1996). Indeed, the existential purpose of marriage in every society is, and has always been, to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, through the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by the mothers and fathers who brought them into this world.

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minted definition of marriage in the history, legal traditions, and practices of our Country.

This understanding of the central animating purpose of marriage was well expressed by William Blackstone, who, speaking of the "great relations in private life," describes the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." WILLIAM BLACKSTONE, 1 COMMENTARIES *410. Blackstone then immediately turns to the relationship of "parent and child," which he describes as "consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated." *Id*.; *see also id*. *435 ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown"). John Locke likewise writes that marriage "is made by a voluntary compact between man and woman," SECOND TREATISE OF CIVIL GOVERNMENT § 78 (1690), and then provides essentially the same explanation of its purposes:

> For the end of conjunction between male and female, being not barely procreation, but the continuation of the species, this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones, … who are to be sustained by those that got them, till they are able to shift and provide for themselves.

SECOND TREATISE OF CIVIL GOVERNMENT § 79 (1690).

Throughout history, other leading linguists, lawyers, philosophers, historians, and social scientists have likewise consistently recognized the essential connection between marriage and responsible procreation and childrearing. *See, e.g.*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (marriage "was instituted … for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children"); BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE § 39 ("The husband is under obligation to support his wife; so is he to support his children. The obligation in neither case is one of contract, but of law. The relation of parent and child equally with that of husband and wife, from which the former relation proceeds, is a civil status."); RUSSELL, MARRIAGE AND MORALS 77, 156 ("But for children, there would be no need for any institution concerned with sex. . . . [for] it is through children alone that sexual relations become of importance to society"); BRONISLAW MALINOWSKI, SEX, CULTURE, AND MYTH 11 (1962) (ER472) ("the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents"); QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (ER502) ("Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2002) ("Marriage is a socially arranged solution for the problem of getting people to stay

together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."); W. Bradford Wilcox, et al., eds., WHY MARRIAGE MATTERS 15 (2d ed. 2005) (ER1078) ("As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society."). In the words of the sociologist Kingsley Davis:

> The family is the part of the institutional system through which the creation, nurture, and socialization of the next generation is mainly accomplished. … The genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents … the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.

The Meaning & Significance of Marriage in Contemporary Society 7-8, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION (Kingsley Davis, ed. 1985) (ER430-31).

This understanding of marriage and its purposes has prevailed in California throughout its history, just as it has everywhere else. It is still implicit in many venerable features of the institution of marriage that retain vitality in California, as in other States, including the monogamous nature of the marriage relationship, *see* CAL. FAM. CODE § 2201, the lifelong term of the marriage commitment, *see id.* § 310, the obligation of fidelity between marital partners, *see id.* § 720, and the presumption of paternity afforded fathers married to the mother of a child, *see id.* § 7540. The persistence of these timeless rules—which spouses cannot contract

around, *see id*. § 1620—is difficult to understand apart from the State's interest in increasing the likelihood that children will be born to and raised in stable family units by the couples who brought them into the world. The abiding connection between marriage and responsible procreation and childrearing is also reflected in laws governing dissolution of a marriage relationship, including the limitation of summary dissolution to marriages that have not produced any children, *see id*. § 2400(a)(3), the rule that "the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstance, *id*. § 3900, and the rules governing annulments on the basis of fraud, as discussed more fully below.

Throughout our Nation's history, the state courts have repeatedly acknowledged and relied upon this understanding of marriage and its purposes.[26] Indeed,

[26] *See, e.g.*, *Wray v. Wray*, 19 Ala. 522, 525 (1851); *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003); *Fattibene v. Fattibene*, 441 A.2d 3, 6 (Conn. 1981); *A. v. A.*, 43 A.2d 251, 252 (Del. 1945); *Zoglio v. Zoglio*, 157 A.2d 627 (D.C. 1960); *Kennedy v. Kennedy*, 101 Fla. 239, 245 (1931); *Head v. Head*, 2 Ga. 191, 205 (1847); *Howay v. Howay*, 74 Idaho 492, 499 (1953); *Hamaker v. Hamaker*, 18 Ill. 137 (1856); *O'Connor v. O'Connor*, 253 Ind. 295, 310 (1969); *In re Estate of Oldfield*, 175 Iowa 118, 131 (1916); *State v. Walker*, 36 Kan. 297, 307 (1887); *Ledoux v. Her Husband*, 10 La. Ann. 663, 664 (La. 1855); *Conaway v. Deane*, 932 A.2d 571, 619-20 (Md. Ct. App. 2007); *Deblois v. Deblois*, 158 Me. 24, 30 (1962); *Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. 48, 52 (1810); *Sissung v. Sissung*, 65 Mich. 168, 171 (1887); *Baker v. Nelson*, 191 N.W.2d at 186; *Walker v. Walker*, 140 Miss. 340, 351 (1925); *State use of Gentry v. Fry*, 4 Mo. 120, 181 (1835); *In re Rash's Estate*, 21 Mont. 170, 174 (1898); *Collins v. Hoag & Rollins*, 122 Neb. 805, 807 (1932); *Bascomb v. Bascomb*, 25 N.H. 267 (1852); *Davis v. Davis*, 106 A. 644, 645 (N.J. Ch. 1919); *Poteet v.*

aside from the California Supreme Court's swiftly corrected decision in the *Marriage Cases*, California courts have repeatedly embraced this understanding, expressly recognizing that "the institution of marriage" serves "the public interest" because it "channels biological drives that might otherwise become socially destructive" and "it ensures the care and education of children in a stable environment," *De Burgh v. De Burgh*, 250 P.2d at 601. *See also, e.g.*, *Baker v. Baker*, 13 Cal. 87, 103 (1859) ("the first purpose of matrimony, by the laws of nature and society, is procreation"); *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 184-85 (Cal. Ct. App. 2008) ("the sexual, procreative, [and] child-rearing aspects of marriage" go "to the very essence of the marriage relation").

In short, the understanding of marriage as a union of man and woman, uniquely involving the rearing of children born of their union, is age-old, universal, and enduring. No other purpose of marriage can plausibly explain the institution's existence, let alone its ubiquity. Indeed, if "human beings reproduced asexually

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Poteet, 114 P.2d 91, 93 (N.M. 1941); *Mirizio v. Mirizio*, 150 N.E. 605, 607 (N.Y. 1926); *Allen v. Baker*, 86 N.C. 91, 97 (1882); *Mahnken v. Mahnken*, 9 N.D. 188, 192 (1900); *Hine v. Hine*, 25 Ohio App. 120, 123 (Ohio Ct. App. 1927); *Sam v. Sam*, 172 Okla. 342, 345 (1935); *Westfall v. Westfall*, 100 Or. 224, 237 (1921); *Matchin v. Matchin*, 6 Pa. 332, 337 (1847); *Rymanowski v. Rymanowski*, 105 R.I. 89, 97 (1969); *McCreery v. Davis*, 44 S.C. 195, 203 (1895); *Goodner v. Goodner*, 147 Tenn. 517, 536 (1923); *In re J.B.*, No. 05-09-01170, 2010 Tex. App. LEXIS 7127, at *46-47 (Tex. Ct. App. Aug. 31, 2010); *Sanchez v. L.D.S. Social Servs.*, 680 P.2d 753, 756 (Utah 1984); *Ryder v. Ryder*, 66 Vt. 158, 162 (1892); *Pretlow v. Pretlow*, 14 S.E.2d 381, 385 (Va. 1941); *Grover v. Zook*, 44 Wash. 489, 493-94 (1906); *Wills v. Wills*, 74 W. Va. 709, 712 (1914); *Heup v. Heup*, 172 N.W.2d 334, 336 (Wis. 1969); *In re St. Clair's Estate*, 46 Wyo. 446, 461 (1934).

and … human offspring were self-sufficient[,] … would *any* culture have developed an institution *anything like* what we know as marriage? It seems clear that the answer is No. We doubt that anyone really believes otherwise." Robert P. George, *et al.*, *What is Marriage?* at 43, forthcoming in HARV. J. L. & PUB. POL'Y (Draft, Sept. 15, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677717. And while it is true, as the district court emphasized, that the elimination of gender-based distinctions in the legal rights and responsibilities of a married man and woman rendered them "equals," it did not render them *the same*. They still needed each other's differences to create life together.

3. The district court nonetheless brushed aside all of the evidence of this core, historical purpose of marriage, blithely asserting that "states have never required spouses to have an ability or willingness to procreate in order to marry." ER148.[27] The district court did not even acknowledge the many cases squarely

[27] The district court also attempted to obscure this connection though its generic reference to "dependents." Thus, the court stated that "spouses must consent to support each other and any *dependents*," ER146 (emphasis added), as if marriage were not uniquely concerned with the support of children produced by the marriage unit and indifferently extended the same support obligations to other relatives, stepchildren, household servants, and other "dependents" of whatever stripe. In so doing, the district court echoed Plaintiffs' expert, Professor Cott, who asserted that marriage "set up men as heads of households who would be responsible economically for their spouses and for any of their dependants, whether those were biological children, adopted children, stepchildren, slaves, apprentices, et cetera." ER224. But this is not now and never has been the law. At common law, respon-

and repeatedly holding that the animating procreative purpose of marriage is in no way negated by the fact that societies have not *conditioned* marriage on procreation or otherwise "inquired into procreative capacity or intent" on a case-by-case basis "before issuing a marriage license." ER146.[28]

Any policy *mandating* that all married couples bear and raise children would presumably require enforcement measures—from premarital fertility testing to eventual annulment of childless marriages—that would surely violate constitution-

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sibilities to slaves, apprentices and other non-child "dependants" were not grounded in the laws governing marriage, but rather in the law of master and servant. The master-servant relationship was "founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him." BLACKSTONE, 1 COMMENTARIES *410. And while a husband was responsible by the operation of coverture for maintaining his wife's children from a previous relationship, the responsibility being "a debt of hers, when single," such children were not placed on equal footing with children of the marriage; indeed, "at [the wife's] death, the relation being dissolved, the husband [was] under no farther obligation" to his stepchildren. *Id*. *437. The parent-child relationship, on the other hand, was "consequential to that of marriage, being its principal end and design." *Id*. * 410. Today in California, the parent-child relationship continues to be consequential to that of marriage through the presumption of paternity assigned to fathers of their wives' children. *See* CAL. FAM. CODE § 7540. "A stepparent," however "has no legal obligation to support his or her stepchild." *Clifford S. v. Superior Court*, 38 Cal. App. 4th 747, 752 (Cal. Ct. App. 1995); *see also id.* ("A person becomes a stepparent by marrying the natural biological parent and loses stepparent status should the marriage be terminated.").

[28] *See Standhardt*, 77 P.3d at 462-63; *Baker*, 191 N.W.2d at 187; *Adams*, 486 F. Supp. at 1124-25; *In re Kandu*, 315 B.R. 123, 146-47 (Bankr. W.D. Wash. 2004); *Conaway v. Deane*, 932 A.2d at 633 (applying state constitution); *Hernandez*, 855 N.E.2d at 11 (same); *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (plurality) (same); *Morrison v. Sadler*, 821 N.E.2d 15, 27 (Ind. Ct. App. 2005) (same).

ally protected privacy rights, as several courts have noted. *See, e.g.*, *Standhardt*, 77 P.3d at 462-63; *Adams*, 486 F. Supp. at 1124-25. And such Orwellian measures would, in any event, be unreliable. Most obviously, many opposite-sex couples who do not plan to have children may experience "accidents" or "change their minds," *Morrison v. Sadler*, 821 N.E.2d 15, 24-25 (Ind. Ct. App. 2005), and at least some couples who do not believe they can have children may find out otherwise, given the "scientific (i.e., medical) difficulty or impossibility of securing evidence of [procreative] capacities," Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y at 345 (ER844). And even where infertility is clear, usually only one spouse is infertile. In such cases marriage still furthers society's interest in responsible procreation by decreasing the likelihood that the fertile spouse will engage in sexual activity with a third party, for that interest is served not only by *increasing* the likelihood that procreation occurs *within* stable family units, but also by *decreasing* the likelihood that it occurs *outside* of such units.[29]

At bottom, the district court's reasoning appears to rest on the assumption

[29] Infertile opposite-sex marriages also advance the institution's central procreative purposes by reinforcing social norms that heterosexual intercourse—which in general, though not every case, can produce offspring—should take place only within marriage. *See, e.g.*, Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y 344 (ER843) ("By normalizing and privileging marriage as the situs for man-woman intercourse and thereby seeking to channel all heterosexual intercourse within that institution, society seeks to assure that when man-woman sex does produce children, those children receive from birth onward the maximum amount of private welfare.").

that marriage can further society's interest in responsible procreation and childrearing only if opposite-sex couples are *required* to bear and raise children as a *condition* of marriage. But societies have likewise never *required* that would-be spouses actually have or form "satisfying relationships" and "deep emotional bonds and strong commitments," *see* ER112, or that each individual marriage actually further any other marital purpose asserted by Plaintiffs or the district court. In any event, the district's court premise is simply unsound. *See Nguyen v. INS*, 533 U.S. 53, 70 (2001) (even when heightened scrutiny applies, courts have not "required that the statute under consideration must be capable of achieving its ultimate objective in every instance"). Indeed, it is neither surprising nor significant that societies throughout history have chosen to forego an Orwellian and ultimately futile attempt to police fertility and childbearing intentions and have relied instead on the common-sense presumption that sexual relationships between men and women are, in general, capable of procreation. *See, e.g.*, *id*. at 69 (Congress could properly enact "an easily administered scheme" to avoid "the subjectivity, intrusiveness, and difficulties of proof" of "an inquiry into any particular bond or tie."); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315-16 (1976) (State may rely on reasonable but imperfect irrebuttable presumption rather than conduct individualized testing).[30] By so doing, societies further their vital interests in responsible

[30] California relies on a similar presumption in other areas of the law. Prior

procreation and childrearing by seeking to channel the presumptive procreative *potential* of opposite-sex relationships into enduring marital unions so that *if* any offspring are produced, they will be more likely to be raised in stable family units by the mothers and fathers who brought them into the world.[31] Again, the district court did not address any of these points, or even acknowledge the many cases embracing them.

4. The district court also asserted that the elimination of the antimiscegenation laws that once blighted many States' legal landscape supported its claim that the opposite-sex definition of marriage was "never part of the historical core of the institution of marriage." ER148. As the district court explained, "[w]hen the Su-

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to 1990, California embraced, for purposes of its law of trusts and estates, "a conclusive presumption that a woman is capable of bearing children as long as she lives." *Fletcher v. Los Angeles Trust & Sav. Bank*, 187 P. 425, 426 (Cal. 1920). Even today, California maintains "the presumption of fertility," though the presumption is now "rebuttable." CAL. PROB. CODE ANN. § 15406.

[31] Other aspects of the law confirm marriage's abiding concern with fertility and procreation. For example, concealment of known sterility is, and has always been, one of very few grounds for annulment on the basis of fraud. *See, e.g., In re Marriage of Meagher and Maleki*, 131 Cal. App. 4th 1, 7 (2005) ("annulments on the basis of fraud are generally granted only in cases where the fraud related in some way to the sexual or procreative aspects of marriage"); *Aufort v. Aufort*, 9 Cal. App. 2d 310, 311 (1935) ("the procreation of children is the most important end of matrimony, and when a woman, knowing herself to be barren and incapable of conceiving and bearing children by reason of an operation, does not disclose this fact to her intended husband he, upon discovering such sterility after marriage, is entitled to a decree of annulment on the ground of fraud"); *Baker v. Baker*, 13 Cal. 87, 103 (1859) ("A woman, to be marriageable, must at the time, be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract.").

preme Court invalidated race restrictions in *Loving*, the definition of the right to marry did not change." ER147.

But as demonstrated above, with only a handful of very recent exceptions, the opposite-sex definition of marriage has for millennia been understood to be a defining characteristic of marriage in virtually every society. The same cannot be said of racial restrictions on marriage. Even in this Country, interracial marriages were legal at common law, in six of the thirteen original States at the time the Constitution was adopted, and in many States that at no point ever enacted antimiscegenation laws. *See, e.g.*, Irving G. Tragen, *Statutory Prohibitions Against Interracial Marriage*, 32 CAL. L. REV. 269, 269 & n.2 (1944) ("[A]t common law there was no ban on interracial marriage."); Lynn Wardle and Lincoln C. Oliphant, *In Praise of Loving: Reflections on the 'Loving Analogy' for Same-Sex Marriage*, 51 HOW. L.J. 117, 180-81 (2007) (state-by-state description of historical antimiscegenation statutes); PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 31, 253-54 (2002).

And such laws have certainly never been universally understood to be a *defining* characteristic of marriage, throughout history and across civilizations. Indeed, even in pre-bellum America, a leading treatise writer on the law of marriage could describe racial restrictions on marriage as "impediments, which are known only in particular countries, or States." BISHOP, COMMENTARIES ON THE LAW OF

MARRIAGE & DIVORCE § 213 (1st ed. 1852). By contrast, the same writer recognized that "[m]arriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby. It has *always*, therefore, been deemed requisite to the *entire* validity of *every* marriage . . . that the parties should be of different sex." *Id.* § 225 (emphases added).

Furthermore, while the opposite-sex definition of marriage is inescapably connected with that institution's central procreative purposes, antimiscegenation laws were affirmatively *at war* with those purposes, for by prohibiting interracial marriages, they substantially *decreased* the likelihood that children of mixed-race couples would be born to and raised by their parents in stable and enduring family units. It is thus not surprising that the Supreme Court held that such laws violated the fundamental right to marry in *Loving*, 388 U.S. at 12. But there can be no doubt at all that *Loving* would have come out differently if the case had been brought by a same-sex couple. For a scant five years after *Loving*, a same-sex couple *did* bring such a case, citing *Loving*, and the Supreme Court in *Baker* unanimously and summarily rejected on the merits precisely the same constitutional claims upheld by the court below.[32]

[32] In addition, as the Supreme Court recognized, antimiscegenation laws were contrary to "[t]he clear and central purpose of the Fourteenth Amendment . . . to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U.S. at 10. Indeed, *Loving*'s brief explanation of its holding that antimiscegenation laws violated the fundamental right to marry focused almost

The district court likewise claimed that the elimination of the doctrine of coverture, which restricted the property (and other) rights of married women, supported its abstract, gender-blind characterization of the fundamental right to marry. *See* ER147 ("Yet, individuals retained the right to marry; that right did not become different simply because the institution of marriage became compatible with gender equality."). But, much like antimiscegenation laws, coverture was never universally understood to be a defining characteristic of marriage. Thus, even in 19th Century America, leading commentators recognized that

> There is a distinction between the marriage status and those property rights which are attendant upon and more or less closely connected with it. . . . Rights of property are attached to it on very different principles in different countries; in some there is a *communion bonorum*, in some each retain their separate property; by our law it is vested in the husband. Marriage may be good independent of any considerations of property, and the *vinculum fidei* may well subsist without them.

BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE § 37.

Nor has any society's understanding of marriage as the union of a man and a woman ever turned on whether that society embraced coverture, or any other conception of spousal roles. Indeed, coverture was never part of the civil law and thus did not apply in civil law countries or even outside the common law courts in Eng-

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exclusively on the race-based nature of these discriminatory laws. *See, e.g.*, *id*. at 12 (explaining that "the racial classifications embodied in these statutes [were] directly subversive of the principle of equality at the heart of the Fourteenth Amendment").

land or this Country. *See* BLACKSTONE, 1 COMMENTARIES *432. Nor was it ever fully established in states such as California that were originally colonized by civil law countries. *See, e.g.*, JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS 182 (1905); CAL. CONST. art. XI, § 14 (1849). Yet all of these countries and states, of course, have historically adhered to the definition of marriage as the union of a man and a woman, and nearly all continue to do so today. And even where coverture did exist, its elimination decades ago was not accompanied by any suggestion that the way would now be paved for same-sex marriages. The district court's assertion that the traditional definition of marriage simply reflects "gender roles mandated through coverture," ER147, is thus manifestly specious.

In short, in finding that the fundamental right to marry is unqualified by gender, and thus that "Plaintiffs' unions encompass the historical purpose and form of marriage," ER149, the district court invented a right that is belied by rather than rooted in our "Nation's history, legal traditions, and practices." It thus disregarded the requirement of a "careful description" of asserted fundamental rights, and abandoned "crucial guideposts for responsible decision making" under the Due Process Clause. *Glucksberg*, 521 U.S. at 721. Indeed, as the district court's decision well illustrates, the abstract right found by the district court is not only unmoored from, but palpably at war with, what centuries of history, legal tradition, and practice have always understood marriage to be.

5. The Supreme Court's cases recognizing the fundamental right to marry likewise provide no support for the ahistorical right found by the district court. All arise in the context of marriage defined as the union of a man and a woman and plainly acknowledge the abiding connection between marriage and the procreative potential of opposite-sex relationships. *See, e.g.*, *Loving*, 388 U.S. at 12 ("Marriage is … fundamental to our very existence and survival."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (The right to "marry, establish a home and bring up children … [is] essential to the orderly pursuit of happiness by free men.").

The Supreme Court's understanding of this fundamental right is well illustrated by *Zablocki v. Redhail*, 434 U.S. 374 (1978), a decision trumpeted by Plaintiffs throughout this litigation. There, the Court struck down a Wisconsin statute barring residents with child support obligations from marrying, absent proof that the supported child was not and would not become a public charge. The Court reiterated the abiding connection between marriage and procreation, *id.* at 383 (quoting *Loving* and *Skinner*); framed the right to marry as a right to bear and raise children "in a traditional family setting," *id.* at 386; and observed that the challenged law would frustrate the purposes of marriage by leading, as a "net result," to "sim-

ply more illegitimate children," *id*. at 390.[33]

V. PROPOSITION 8 IS NOT SUBJECT TO HEIGHTENED EQUAL PROTECTION SCRUTINY.

The district court also asserted that Proposition 8 draws a distinction between heterosexuals and gays and lesbians and that "gays and lesbians are the type of minority strict scrutiny was designed to protect." ER156. The court thus concluded that Proposition 8 should be subject to strict scrutiny under the Equal Protection Clause. *See* ER157. But a long line of binding precedent from this Court squarely establishes that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny." *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d at 573-74; *see also, e.g., Witt v. Department of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).[34] Ten other federal circuit

[33] The district court was thus plainly wrong in asserting that *Zablocki* recognized a right to marry "without regard to the possibility of procreation." ER186. The district court's similar assertion about *Turner v. Safley*, 482 U.S. 78 (1987), fares no better. There, the Supreme Court struck down a Missouri prison regulation prohibiting inmates from marrying absent permission from the prison superintendant. The Court identified various elements of marriage that "[t]aken together" were "sufficient to form a constitutionally protected marital relationship in the prison context." *Id*. at 96. Two of those elements—the expectation of eventual consummation and the legitimization of children—clearly reflect the abiding link between marriage and procreation. *See id*. Indeed, the case likely would have come out differently but for inmates' expectation that their marriages would be fully consummated, for the Court distinguished an earlier case that upheld a marriage ban "for inmates sentenced to life imprisonment." *Id.*

[34] In its summary judgment ruling, the district court states that *Lawrence v. Texas* "undermined *High Tech Gays*" because *High Tech Gays* relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986). ER188-189. While in *High Tech Gays* this Court

courts—all that have addressed the issue—agree.[35]

The unanimity of these decisions is no accident, for the question whether gays and lesbians satisfy the requirements for suspect-class status is not a close one. As an initial matter, homosexuality is a complex and amorphous phenomenon that defies consistent and uniform definition. As well-respected researchers have concluded, "[t]here is currently no scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual." Lisa M. Diamond & Ritch C. Savin-Williams, *Gender and Sexual Identity*, *in* HANDBOOK OF APPLIED DEVELOPMENTAL SCIENCE 101, 102 (Richard M. Lerner et al., eds. 2003) (ER714-15). Indeed, the "more carefully researchers

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did observe that *Bowers* was "incongruous" with deeming gays and lesbians a suspect or quasi-suspect class, the court independently analyzed the case for heightened scrutiny and found it wanting. *High Tech Gays*, 895 F.2d at 571, 573-74. At any rate, this Court has already rejected the argument that *Lawrence* undermines *High Tech Gays*. The Plaintiff in *Witt* argued that the "rational basis standard for sexual orientation announced in *High Tech Gays* is [no longer controlling] in light of *Lawrence*, given its (now-discredited) reliance on *Bowers*." Brief of Appellant, *Witt*, No. 06-35644 at 51 n.9 (9th Cir. Oct. 12, 2006). This Court, however, held that the rational basis standard established by *High Tech Gays* "was not disturbed by *Lawrence*, which declined to address equal protection." *Witt*, 527 F.3d at 822.

[35] *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Bruning*, 455 F.3d at 866-67 (8th Cir. 2006); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see also Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (applying rational basis scrutiny to classification based on sexual orientation).

map these constellations—differentiating, for example, between gender identity and sexual identity, desire and behavior, sexual versus affectional feelings, early-appearing versus late-appearing attractions and fantasies, or social identifications and sexual profiles—the more complicated the picture becomes, because few individuals report uniform inter-correlations among these domains." *Id*. For example, the University of Chicago study, which Plaintiffs' experts recognize as "a very comprehensive survey" that is "still considered the authoritative source for data" on sexuality, ER298-299 (Herek), found that among individuals who reported some degree of same-sex behavior, attraction, or self-identity, only for 15% of women and 24% of men did all three categories overlap. EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 299 (1994) (ER1201). In this respect, the proposed class of gays and lesbians clearly differs from other classifications—race, sex, alienage, national origin, and illegitimacy—that the Supreme Court has singled out for heightened protection.[36]

[36] Even Plaintiffs' experts candidly acknowledge the subjective, uncertain, multifaceted definitions of the gay and lesbian population. As Professor Badgett explains, "[s]exual orientation is not an observable characteristic of an individual as sex and race usually are." ER747. Thus, she admits, one "complication is defining what one means by 'sexual orientation,' or being gay, lesbian, bisexual, or heterosexual. Sexuality encompasses several potentially distinct dimensions of human behavior, attraction, and personal identity, as decades of research on human sexuality have shown." ER1018. *See also* ER887 (Peplau) ("Sexual identity, attractions, and behavior can be varied, complex, and inconsistent"); ER946 (Meyer)

Further, as this Court's precedent establishes, gays and lesbians also fail two essential requirements for receiving heightened scrutiny under the Equal Protection Clause: They are neither politically powerless nor are they defined by an immutable characteristic. *See High Tech Gays*, 895 F.2d at 573-74. Heightened scrutiny is reserved for groups that are "politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985). This Court held that gays and lesbians failed this test 20 years ago, *see High Tech Gays*, 895 F.2d at 574, and since that time their political power has grown exponentially.[37]

Heightened scrutiny is also reserved for groups defined by "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality); *see also Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 n.13 (D.C. Cir. 1991) (Ruth Bader Ginsburg, J.) ("[T]he 'immutable characteristic' notion, as it appears in Supreme Court decisions, is tightly-cabined. It does not mean, broadly, something done that cannot be undone. Instead, it is a

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("[D]epending on how it is defined and measured, 1%-21% of the population could be classified as lesbian or gay to some degree.").

[37] This is especially true in California. As Equality California (a leading gay and lesbian rights organization) acknowledges, since the late 1990s California has moved "from a state with extremely limited legal protections for lesbian, gay, bisexual and transgender (LGBT) individuals to a state with some of the most comprehensive civil rights protections in the nation." ER679 (About Equality California). Indeed, other than redefining marriage, it is difficult to identify a single major policy initiative the State's gay and lesbian community has failed to see enacted into law.

trait determined *solely* by accident of birth."). But according to the American Psychiatric Association, "there are no replicated scientific studies supporting any specific biological etiology for homosexuality." American Psychiatric Association, *Gay/Lesbian/Bisexuals* (2009) (ER964).[38] Further, the empirical evidence leaves no doubt that homosexual orientation can shift over time and in fact does so for a significant number of individuals. Indeed, the University of Chicago study found that only 20 percent of men and 10 percent of women who have had *any* same-sex intimate partners since age 18 have had *only* same-sex intimate partners since that age. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 310-12 (ER1207-1208).[39]

Despite all this, the district court flatly asserted that that "strict scrutiny is the appropriate standard of review to apply to . . . classifications based on sexual

[38] Even Plaintiffs' experts have not suggested otherwise. Professor Herek admits that "we don't really understand the origins of sexual orientation in men or in women." ER301. Professor Peplau writes that "[a]vailable evidence indicates that biological contributions to the development of sexual orientation in women are minimal." ER902; *see also* ER1115 (Chauncey) ("[w]hether homosexuality is . . . chosen or determined"—like many other questions regarding homosexuality—turns on "opinions [that] are in the realm of ideology and thus subject to contestation").

[39] Plaintiffs' experts did not dispute this point. Professor Peplau, for example, acknowledges that women's sexual orientation is "fluid, malleable, shaped by life experiences, and capable of change over time." ER811; *see also id*. ("Female sexual development is a potentially continuous, lifelong process in which multiple changes in sexual orientation are possible"); ER300 (Herek) (conceding that "we certainly know that people report that they have experienced a change in their sexual orientation at various points in their life").

orientation." ER157. The court below simply *ignored*—did not even mention—this Court's contrary precedent, the considered judgment of every other circuit court that has addressed the matter, and the well-established requirements for suspect classification.[40]

The district court did not, however, actually apply heightened scrutiny, erroneously concluding instead that Proposition 8 could not survive even rational basis review.

VI. PROPOSITION 8 SATISFIES RATIONAL BASIS REVIEW.

Because Proposition 8 neither infringes a fundamental right nor discriminates against a protected class, it is subject to rational basis review. *See Glucksberg*, 521 U.S. at 728; *Heller v. Doe*, 509 U.S. at 319-20. Under this "paradigm of

[40] The district court's suggestion that Proposition 8 discriminates on the basis of sex, *see* ER155-56, is also erroneous. Every other court to address this question under the Federal Constitution, and every state high court addressing this question under a state constitution—with one superseded exception—has rejected the claim that the traditional definition of marriage discriminates on the basis of sex. *See Baker*, 409 U.S. at 810; *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. at 143; *Singer*, 522 P.2d at 1192; *Marriage Cases*, 183 P.3d at 436; *Hernandez*, 855 N.E.2d at 6; *Andersen v. King County*, 138 P.3d at 988-90 (plurality); *Baker v. Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999); *but see Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23. Simply put, defining marriage as the union of a man and a woman "does not discriminate on the basis of sex because it treats women and men equally." *Wilson*, 354 F. Supp. 2d at 1307-08. The traditional definition of marriage thus "plainly does not constitute discrimination on the basis of sex as that concept is commonly understood." *In re Marriage Cases*, 183 P.3d at 436. Again, the district court did not even acknowledge the existence of this overwhelming body of precedent, let alone address it.

judicial restraint," courts have no "license . . . to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). Rather, Proposition 8 must be "accorded a strong presumption of validity," and it "cannot run afoul of the [Fourteenth Amendment] if there is a rational relationship between [its] disparity of treatment" of same-sex and opposite-sex couples "and some legitimate governmental purpose." *Heller*, 509 U.S. at 320. Indeed, because "the institution of marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential." *Bruning*, 455 F.3d at 867.

Further, "the fact that the line" drawn by Proposition 8 between opposite-sex couples and all other types of relationships "might have been drawn differently at some points is a matter for legislative, rather than judicial consideration." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). For, as the Supreme Court has explained, "courts are compelled under rational-basis-review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 320-21; *see also Vance*, 440 U.S. at 102 n.20 (finding it "irrelevant . . . that other alternatives might achieve approximately the same results").

Finally, as explained above, *see supra* Part II, Proposition 8 "must be upheld … if there is any reasonably conceivable state of facts that could provide a rational

basis" for it, and Plaintiffs thus bear "the burden . . . to negative every conceivable basis which might support it." *Id*. at 320. The district court's contrary conclusions notwithstanding, Plaintiffs have not come close to carrying this heavy burden.

A. PROPOSITION 8 PLAINLY FURTHERS CALIFORNIA'S VITAL INTEREST IN RESPONSIBLE PROCREATION AND CHILDREARING.

As demonstrated above, *see supra* Part IV, a central—indeed animating—purpose of marriage, always and everywhere, has been to further society's interest in increasing the likelihood that children will be born to and raised by the couples who brought them into the world in stable and enduring family units. As aptly expressed by the United States Congress: "At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child rearing. Simply put, government has an interest in marriage because it has an interest in children." Committee on the Judiciary Report on DOMA, H. Rep. 104-664 at 48. The traditional opposite-sex definition of marriage reflected in Proposition 8 plainly bears at least a rational relationship to this interest. Because only sexual relationships between men and women can produce children, such relationships have the potential to further—or harm—this interest in a way, and to an extent, that other types of relationships do not. By retaining the traditional definition of marriage, California preserves the abiding link between that institution and this traditional purpose, a purpose that still serves vital interests that are uniquely implicated

by male-female relationships. And by providing special recognition and encouragement to committed opposite-sex relationships, Proposition 8 seeks to channel potentially procreative conduct into relationships where that conduct is likely to further, rather than harm, society's interest in responsible procreation and childrearing.

1. "[I]t seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised." *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982). Indeed, "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society." *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004). The Supreme Court has consistently confirmed this societal interest, holding repeatedly that marriage is "fundamental to our very existence and survival." *E.g.*, *Loving*, 388 U.S. at 12.

Underscoring the state's interest in marriage is the undisputed truth that when procreation and childrearing take place outside stable family units, children suffer. As a leading survey of social science research explains:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face

> higher risks of poor outcomes than do children in intact families headed by two biological parents. Parental divorce is also linked to a range of poorer academic and behavioral outcomes among children. There is thus value for children in promoting strong, stable marriages between biological parents.

KRISTEN ANDERSON MOORE, ET AL., MARRIAGE FROM A CHILD'S PERSPECTIVE, CHILD TRENDS RESEARCH BRIEF at 6 (June 2002) (ER404).

In addition, when parents, and particularly fathers, do not take responsibility for their children, society is forced to step in to assist, through social welfare programs and by other means. Indeed, according to a Brookings Institute study, $229 billion in welfare expenditures between 1970 and 1996 can be attributed to the breakdown of the marriage culture. Isabel V. Sawhill, *Families at Risk*, *in* SETTING NATIONAL PRIORITIES: THE 2000 ELECTION AND BEYOND at 108 (Henry J. Aaron & Robert Danton Reischauer, eds. 1999).

More than simply draining State resources, the adverse outcomes for children so often associated with single parenthood and father absence, in particular, harm society in other ways, as well. As President Obama has emphasized:

> We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home or become teenage parents themselves. And the foundations of our community are weaker because of it.

Barack Obama, Statement at the Apostolic Church of God (June 15, 2008) (*quoted at* ER219), *available at*

http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html. Indeed, even Plaintiffs' expert Professor Lamb agrees that "[t]he increase in father's absence is particularly troubling because it is consistently associated with poor school achievement, diminished involvement in the labor force, early child bearing, and heightened levels of risk-taking behavior." ER256.[41]

Conversely, children benefit when they are raised by the couple who brought them into this world in a stable family unit. "[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage." Moore, et al., *Marriage From a Child's Perspective*, CHILD TRENDS RESEARCH BRIEF at 6 (ER404). These benefits appear to flow in substantial part from the biological connection shared by a child with both mother and father. *See*

[41] The California legislature has likewise recognized these problems, expressly finding that "unwed pregnancies" "affect community health and success," §§ 18993, 18993.1(g), and that "[t]he consequences of . . . fatherlessness are significant and far reaching," CAL. WELF. & INST. CODE 18993.1(f); *see also id*. at § 18993.1(c) ("Children who grow up without fathers are five times more likely to be poor, twice as likely to drop out of school, and much more likely to end up in foster care or juvenile facilities"); *id.* § 18993.1(e) ("Boys without a father in the home are more likely to become incarcerated, unemployed, or uninvolved with their own children when they become fathers"). Accordingly, California has established a grant program that seeks to "[r]educe the number of . . . unwed pregnancies," *id*. § 18993, "reduce the number of children growing up in homes without fathers," *id.* § 18993.2(b), and "[p]romote responsible parenting and the involvement of the father in the economic, social, and emotional support of his children," *id*.

id. at 1-2 (ER399-400) ("[I]t is not simply the presence of two parents, … but the presence of *two biological parents* that seems to support children's development."); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, & Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 890 (2003) (ER394) ("The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents.").

In addition, there is little doubt that children benefit from having a parent of each gender. As Professor Norval Glen explains, "there are strong theoretical reasons for believing that both fathers and mothers are important, and the huge amount of evidence of relatively poor average outcomes among fatherless children makes it seem unlikely that these outcomes are solely the result of the correlates of fatherlessness and not of fatherlessness itself." Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 SOC'Y 27 (2004) (ER448). Many others agree. *See, e.g.*, DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD & MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN & SOCIETY 146 (1996) ("The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable."); JAMES Q. WILSON, THE MARRIAGE PROBLEM 169 (2002) ("The weight of scientific evidence seems clearly to support the view that fathers matter."); BLANKENHORN, FATHER-

LESS AMERICA 25 (ER524) ("In virtually all human societies, children's well-being depends decisively upon a relatively high level of paternal investment."). Indeed, prior to his embrace of the movement to redefine marriage to include same-sex couples, even Plaintiffs' expert Professor Lamb believed that "[b]oth mothers and fathers play crucial and qualitatively different roles in the socialization of the child." Michael E. Lamb, *Fathers: Forgotten Contributors to Child Development*, 18 HUM. DEV. 245, 246 (1975) (*quoted at* ER254).[42]

2. Same-sex relationships obviously do not implicate the State's interest in responsible procreation in the same way that opposite-sex relationships do. Contrary to the district court's naked assertions, one need not embrace particular "moral and religious views," ER165, or "antiquated and discredited notions of gender," ER159, to grasp this distinction. It is a simple and undeniable matter of biological fact. *See Nguyen v. INS*, 533 U.S. at 73 ("To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it."); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. at 471 (plurality) ("We need not be medical doctors to discern

[42] *See also, e.g.*, MICHAEL E. LAMB, ED., THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 10 (1997) (*see* ER256) ("boys growing up without fathers seemed to have 'problems' in the areas of sex-role and gender-identity development, school performance, psychosocial adjustment, and perhaps in the control of aggression"); Lamb, *Fathers: Forgotten Contributors*, 18 HUM. DEV. 260 ("it is disturbing that there appears to have been a devaluation of the father's role in western society such that many children may suffer affective paternal deprivation") (*see* ER255).

that . . . [o]nly women may become pregnant."). Same-sex relationships "are thus different, immutably so, in relevant respects" from opposite-sex relationships. *City of Cleburne*, 473 U.S. at 442. And given this biological reality, as well as marriage's central concern with responsible procreation and childrearing, the distinction that societies have uniformly made throughout the ages between same-sex couples, who are categorically incapable of natural procreation, on the one hand, and opposite-sex couples, who are in general capable of procreation, on the other hand, "is neither surprising nor troublesome from a constitutional perspective." *Nguyen*, 533 U.S. at 63.[43] For as the Supreme Court has made clear, "where a group possesses distinguishing characteristics relevant to interests the State has authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Board of Trustees v. Garrett*, 531 U.S. at 366-67; *accord Cleburne*, 473 U.S. at 441 (Where "distinguishing characteristics" relevant to legitimate state interests exist, "the courts have been very reluctant, as they should be in our federal system and with our respect for the separations of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.").

[43] In light of the compelling interests served by marriage and the close connection between those interests, on the one hand, and the undeniable biological differences between same-sex couples and opposite-sex couples as classes, on the other hand, Proposition 8 readily satisfies even heightened scrutiny. *See, e.g.*, *Nguyen*, 533 U.S. at 62-70, 73; *Michael M.*, 450 U.S. at 470-76, 479-81; *Adams*, 486 F. Supp. at 1124-25.

While it is true, as the district court stated, that "[s]ame-sex couples can have (or adopt) and raise children," ER163, they cannot "have" them in the same way opposite-sex couples do—as the often unintended result of even casual sexual behavior. Thus, as even Plaintiffs' counsel acknowledged, same-sex couples "don't present a threat of irresponsible procreation .... On the other hand, hetero-sexual couples who practice sexual behavior outside their marriage are a big threat to irresponsible procreation." ER355; *see also* ER1432, Plaintiffs' Opp. S.J. (Doc. 202 at 32) (acknowledging that " 'responsible procreation' may provide a rational basis for the State's recognition of marriages by individuals of the opposite-sex"). And as courts have repeatedly explained, it is this unique procreative capacity of heterosexual relationships—and the very real threat it can pose to the interests of society and to the welfare of the children born in such circumstances—that the institution of marriage has always sought to address. *See, e.g.*, *Bruning*, 455 F.3d at 867; *Hernandez*, 855 N.E.2d at 7; *Morrison*, 821 N.E.2d at 24-25. The fact that some same-sex couples do raise children thus does not begin to undermine the rationality of the traditional definition of marriage.[44] For as the Supreme Court has

[44] Likewise, the fact that California permits same-sex couples to adopt does nothing to undermine the State's interest in increasing the likelihood that children will be born to and raised by both of their natural parents in stable, enduring family units. Adoption is society's provision for caring for children who, for whatever reason, *will not* be raised in this optimal environment. *See In re Guardianship of Santos*, 195 P. 1055, 1057 (Cal. 1921); DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 191-92 (2007) (ER778-779). And California addresses this issue by

explained, "a common characteristic shared by beneficiaries and nonbeneficiaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups." *Johnson v. Robison*, 415 U.S. 361, 378 (1974). That is plainly the case here.[45]

3. The district court's assertion that "same-sex parents and opposite-sex parents are of equal quality," like its caricature of the State's interest in responsible procreation as "promoting opposite-sex parenting over same-sex parenting," *see*

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enlarging the pool of potential adoptive parents to include not only same-sex couples but "any otherwise qualified single adult or two adults, married or not." *Sharon S. v. Superior Court*, 73 P.3d 554, 570 (Cal. 2003). It is simply implausible that by recognizing and providing for the practical reality that the ideal will not be achieved in all cases, a State somehow abandons its interests in promoting and increasing the likelihood of that ideal.

[45] The State separately provides for the children of same-sex couples through the institution of domestic partnership, which provide the same substantive obligations and benefits of marriage. *See* CAL. FAM. CODE § 297.5. Despite the district court's claim that Proposition 8 harms these children by denying them the benefits of marriage, see ER163-164, there is no empirical evidence whatsoever that these children would obtain any incremental benefits through marriage above and beyond those which they receive through domestic partnership. Indeed, Plaintiffs' expert Professor Lamb conceded that he was unaware of any study "that looks at the specific benefits flowing to children whose parents are together under domestic partnership law in California." ER287; *see also* American Academy of Pediatrics, Statement regarding Coparent or Second-Parent Adoption by Same-Sex Parents (ER1061) ("legislative initiatives assuring legal status equivalent to marriage for gay and lesbian partners, such as the law approving civil unions in Vermont, can also attend to providing security and permanence for the children of those partnerships"). In all events, the "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

ER162, is simply beside the point.[46] Indeed, these assertions fail even to come to grips with the critical fact underlying society's interest in responsible procreation—the unique potential for relationships between men and women to produce children "by accident." *E.g.*, *Bruning*, 455 F.3d at 867.

"Despite legal contraception, numerous studies have shown that unintended pregnancy is the common, not rare, consequence of sexual relationships between men and women." Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution*, 2 U. ST. THOMAS L.J. 33, 47 (2004). And the question in nearly every case of unintended pregnancy is *not* whether the child will be raised by two opposite-sex parents or by two same-sex parents, but rather whether it will be raised, on the one hand, by both its mother and father, or, on the other hand, by its mother alone, often with the assistance of the State. *See, e.g.*, William J. Doherty, et al., *Responsible Fathering*, 60 J. MARRIAGE & FAMILY 277, 280 (1998) (ER530) ("In nearly all cases, children born outside of marriage reside with their mothers."). And there simply can be no dispute that children raised in the former

[46] The district court's assertion that "Proposition 8 does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents, FF 43, 46, 51," ER162, is even farther afield. The findings cited in support of this proposition make clear that by this the district court meant only that Proposition 8 was unlikely to encourage gays and lesbians to marry individuals of the opposite sex. But marriage has always been uniquely concerned with steering potentially procreative sexual conduct (*i.e.*, sexual relationships between men and women) into stable marital relationships. Its rationality in no way depends on its also steering those not inclined to engage in such conduct into such relationships.

circumstances do better, on average, than children raised in the latter, or that the State has a direct and compelling interest in avoiding the financial burdens and social costs too often associated with single parenthood. *See, e.g.*, SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 1 (1994) (ER545) ("Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parents' race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries."). Indeed, even Plaintiffs' expert Professor Lamb admits that research has consistently shown that children raised by heterosexual parents generally fare best when raised by their married, biological parents, ER261-262; that "on average, children being raised by two, married heterosexual parents do better than children being raised by single or divorced heterosexual parents," ER259-60; and that "[c]hildren clearly benefit when they have two parents, both of whom are actively involved," ER257. Thus, even if Plaintiffs were right that it matters not whether a child is raised by the child's own parents or by any two males or any two females, it would still be perfectly rational for the State to make special provision through the institution of marriage for the unique procreative risks posed by sexual relationships between men and women.

4. At any rate, the district court's startling conclusions that "the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes," ER162, and that "[t]he genetic relationship between a parent and a child is not related to a child's adjustment outcomes," ER131—and indeed that it is *irrational* to believe otherwise—simply cannot be squared with a wealth of contrary scholarship and empirical studies, as discussed above, nor with the most basic instincts embedded in the DNA of the human species. The law "historically … has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *see also, e.g.*, BLACKSTONE, 1 COMMENTARIES at *435 ("providence has … implant[ed] in the breast of every parent that natural . . . insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish."); *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child."); *cf.* United Nations Convention on the Rights of the Child, Art. 7, Nov. 20, 1989, 28 I.L.M. 1456, 1460 ("as far as possible, [a child has the right] to know and be cared for by his or her parents"). As the Eleventh Circuit has noted, "[a]lthough social theorists . . . have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia

of human experience discovered a superior model." *Lofton v. Secretary of the Dep't of Children and Family Servs.*, 358 F.3d at 820. Courts have thus repeatedly upheld as rational the "commonsense" notion that "children will do best with a mother and father in the home." *Hernandez*, 855 N.E.2d at 7-8; *see also, e.g.*, *Bruning*, 455 F.3d at 867; *Lofton*, 358 F.3d at 825-26; *cf. Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) ("the optimal situation for the child is to have both an involved mother and an involved father").

The district court rejected this instinctive, commonsense belief, uncritically accepting Professor Lamb's testimony regarding studies purporting to compare adjustment outcomes for children raised by gay and lesbian couples with those raised by heterosexuals. Yet these studies do not come close to establishing that the widely shared and deeply instinctive belief that children do best when raised by both their biological mother and their biological father is *irrational*. Indeed, Professor Lamb could not identify at trial *even a single study* comparing children raised by same-sex couples with children raised *by their married, biological parents*. *See* ER263-287. Furthermore, as many scholars have noted, there are "significant flaws in the[se] studies' methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents." *Lofton*, 358 F.3d at 825; *see also id*. (not-

ing "the absence of longitudinal studies following child subjects into adulthood").[47]

In light of the limitations of these studies, it is not surprising that a diverse group of 70 prominent scholars from all relevant academic fields recently concluded:

> [N]o one can definitively say at this point how children are being affected by being reared by same-sex couples. The current research on children reared by them is inconclusive and underdeveloped—we do not yet have any large, long-term, longitudinal studies that can tell us much about how children are affected by being raised in a same-sex household. Yet the larger empirical literature on child well-being suggests that the two sexes bring different talents to the parenting enterprise, and that children benefit from growing up with both biological parents.

WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 18 (2008). The district court's confident assertions to the contrary notwithstanding, the voters of California, in the words of the Eleventh Circuit,

> could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to

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[47] *See generally* Affidavit of Professor Steven Lowell Nock, *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ont. Sup. Ct. Justice 2001) (ER596-677) (detailing flaws in same-sex parenting scholarship and studies); Judith Stacy & Timothy J. Birblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 AM. SOC. REV. 159, 161-62, 168 n.9 (2001) (ER1367-68, 1374) (same); Norval D. Glen, *The Struggle for Same-Sex Marriage*, 41 SOC'Y 25, 26-27 (2004) (ER447-48) (same); ROBERT LERNER & ALTHEA NAGAI, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING 6, 56 n.27 (ER683, 686) (same); Walter R. Schumm, *What Was Really Learned from Tasker & Golombok's (1995) Study of Lesbian & Single Parent Mothers?*, 94 PSYH. REPORTS 422, 423 (2004) (ER710) (same); David H. Demo & Martha J. Cox, *Families With Young Children: A Review of Research in the 1990s*, 62 J. MARRIAGE & FAM. 876, 889-90 (2000) (ER702-703) (same).

> bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm.

Lofton, 358 F.3d at 825 (quoting *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 999-1000 (Mass. 2003) (Cordy, J., dissenting)).

In sum, sexual relationships between individuals of the same sex neither advance nor threaten the State's interest in responsible procreation in the same manner, or to the same degree, that sexual relationships between men and women do. And when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, [courts] cannot say that the statute's classification … is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. at 383; *see also Vance*, 440 U.S. at 109 (law may "dr[aw] a line around those groups ... thought most generally pertinent to its objective"); *Garrett*, 531 U.S. at 366-67.[48] Not surprisingly, "a host of judicial decisions" have relied on the unique

[48] The district court repeatedly asserts (with evident disregard to the settled principles of rational basis review, *see supra* Part II) that "Proponents failed to put forth any credible evidence that married opposite-sex households are made more stable through Proposition 8." *E.g.*, ER164. But there can be no doubt that *marriage* makes *opposite-sex relationships* more stable, *see, e.g.*, Wendy D. Manning, et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 POPULATION RESEARCH & POL'Y REV. 135, 136 (2004) ("A well-known difference between cohabitation and marriage is that cohabiting unions are generally quite short-lived."), and by doing so promotes the State's interest in responsible procreation and childrearing. Under *Johnson* and other controlling Supreme Court authori-

procreative capacity of opposite-sex relationships in concluding that "the many laws defining marriage as the union of one man and one woman … are rationally related to the government interest in 'steering procreation into marriage.' " *Bruning*, 455 F.3d at 867-68; *see also In re J.B.*, 2010 Tex. App. LEXIS 7127, at *57-60; *Wilson*, 354 F. Supp. 2d at 1308-09; *In re Kandu*, 315 B.R. at 145-47; *Adams*, 486 F. Supp. at 1124-25; *Baker*, 191 N.W.2d at 186-87; *Standhardt*, 77 P.3d at 462-64; *Singer*, 522 P.2d at 1197. This is true not only of *every* appellate court to consider this issue under the Federal Constitution, but the majority of State courts interpreting their own constitutions as well. *See Conaway v. Deane*, 932 A.2d at 630-34; *Hernandez*, 855 N.E.2d at 7-8 (N.Y. 2006); *Andersen v. King County*, 138 P.3d at 982-85 (plurality); *Morrison v. Sadler*, 821 N.E.2d at 23-31.[49] Without

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ties, the relevant inquiry is not whether redefining marriage to include same-sex marriages would harm that institution, but rather, is whether recognizing opposite-sex relationships as marriages furthers interests that would not be furthered, or would not be furthered to the same degree, by recognizing same-sex relationships as marriages. *See, e.g.*, *Andersen*, 138 P.3d at 984; *Morrison*, 821 N.E.2d at 23. And as demonstrated above, the answer to this inquiry is clear. In all events, there are good reasons to believe that redefining marriage would weaken that institution and its ability to further the interests it has traditionally served. *See infra* Part V.B.

[49] A number of foreign nations have reached the same conclusion. *See* French National Assembly, *Report Submitted on Behalf of the Mission of Inquiry on the Family and Rights of Children*, No. 2832 at 77 (English translation at http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf and original at http://www.assemblee-nationale.fr/12/pdf/rap-info/i2832.pdf) ("Above all else then, it is the interests of the child that lead a majority of the Mission to refuse to change the parameters of marriage."); Marriage Equality Amendment Bill 2009, Australian Senate Legal and Constitutional Affairs Legislation Committee Report at 37, *available at*

even citing, let alone addressing, any of these decisions, the district court dismisses out of hand the proposition that procreation and childrearing have anything to do with the traditional opposite-sex definition of marriage and thus effectively condemns as *irrational* scores of federal and state court judges who have disagreed.

B. PROPOSITION 8 ALLOWS CALIFORNIA TO PROCEED WITH CAUTION WHEN CONSIDERING FUNDAMENTAL CHANGES TO A VITALLY IMPORTANT SOCIAL INSTITUTION.

As the Supreme Court has long recognized, marriage is an institution in which "the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888); *see also Williams v. North Carolina*, 317 U.S. 287, 303 (1942) ("the marriage relation [is] an institution more basic in our civilization than any other"). "Given the critical importance of civil marriage as an organizing and stabilizing institution of society, it is eminently rational for [the people of California] to postpone making fundamental changes to it until such time as there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made." *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 1003 (Mass. 2003) (Cordy, J., dissenting).

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http://www.aph.gov.au/senate/committee/legcon_ctte/marriage_equality/report/report.pdf (noting "range of compelling evidence from those in opposition to the Bill" including evidence related to "preserving the narrower and common definition [of marriage] on the basis of 'natural procreation' and on the potential effect of same-sex parenting on children").

1. Contrary to the district court's belief that "California need not restructure any institution to allow same-sex couples to marry," ER161, almost everyone else—"regardless of their sexual, political, or theoretical orientations—uniformly acknowledge[s] the magnitude of the differences between the two possible institutions of marriage" at issue here, Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y at 324 (ER823). Even prominent same-sex marriage activists admit that redefining marriage to include same-sex couples would alter that institution. For example, when Massachusetts legalized same-sex marriage, Plaintiffs' own expert Professor Cott stated publicly that "[o]ne could point to earlier watersheds [in the history of marriage], but perhaps none quite so explicit as this particular turning point." ER228. Indeed, as Yale Law School Professor William Eskridge, a prominent gay rights activist, explains, much gay and lesbian support for same-sex marriage is *premised* on the understanding that "enlarging the concept [of marriage] to embrace same-sex couples would necessarily transform it into something new." ER1400. Nor is this widely shared belief in anyway surprising. As aptly expressed by David Blankenhorn at trial, "If you change the definition of the thing, it's hard to imagine how it could have no impact on the thing. . . . If you change the structure of the thing, it's hard to imagine how you could not have an effect on the content of the thing." ER343-44. It is plainly reasonable for the people of California to be concerned about the potential consequences of such a profound

definition of such an ageless, bedrock social institution.

As an initial matter, redefining marriage to include same-sex relationships would eliminate California's ability to provide special recognition and support to those relationships that uniquely further the vital interests marriage has always served. *See* BARACK OBAMA, THE AUDACITY OF HOPE 263 (2006) ("I believe that American society can choose to carve out a special place for the union of a man and a woman as the unit of child rearing most common to every culture."). Plaintiffs surely have not met their burden of proving that the voters could not have entertained any rational concern that this profound change could harm those interests. *See, e.g.*, *Vance*, 440 U.S. at 111.

Further, it is simply impossible to "escape the reality that the shared social meaning of marriage . . . has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin." *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006). Indeed, Plaintiffs' expert Professor Cott, as noted earlier, *see supra* 40-41, conceded that redefining marriage by law would impact the public meaning of marriage, and that changing the public meaning of marriage will "unquestionably [have] real world consequences." ER229-31. Professor Cott also admits the self-evident truth that it is impossible to predict with confidence the long-term social consequences of same-sex marriage. ER226. "[P]redicting the future of marriage"

is indeed "risky business." Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 849 (2004) (ER409).[50]

But there is plainly a rational basis for concern that officially embracing an understanding of marriage as nothing more than public recognition of the "emotional bonds and strong commitments" of loving relationships between consenting adults, ER112, severed entirely from its traditional procreative purposes, would necessarily entail a significant risk of negative consequences over time to the institution of marriage and the interests it has always served. Indeed, a large group of prominent scholars from all relevant academic fields recently expressed "dee[p] concerns about the institutional consequences of same-sex marriage for marriage itself." WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD 18-19. As they explained:

> Same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage. It would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget. Finally, same-sex marriage would likely corrode marital norms

[50] Other prominent advocates of same-sex marriage agree that it is impossible to predict the long-term societal consequences that will flow from same-sex marriage: "Gay marriage may bring both harms and benefits. Because it has never been tried in the United States, Americans have no way to know just what would happen." ER520 (Jonathan Rauch). *See also, e.g.*, William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE CHILDREN 97, 110 (2005) ("[W]hether same-sex marriage would prove socially beneficial, socially harmful, or trivial is an empirical question that cannot be settled by any amount of armchair theorizing. There are plausible arguments on all sides of the issue, and as yet there is no evidence sufficient to settle them.").

> of sexual fidelity, since gay-marriage advocates and gay couples tend to downplay the importance of sexual fidelity in their definition of marriage.

Id. at 19; *see also* George, *What is Marriage?* at 31 ("[I]f marriage is understood as … an essentially emotional union that has no principled connection to organic bodily union and the bearing and rearing of children … then marital norms, especially the norms of permanence, monogamy, and fidelity, will make less sense.").

The people of California, surely, could reasonably share these concerns. Indeed, some gay rights advocates favor same-sex marriage *because* of these likely adverse effects. They openly argue that "[s]ame-sex marriage is a breathtakingly subversive idea," ER968, that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart," Ellen Willis, contribution to *"Can Marriage be Saved? A Forum,"* THE NATION, July 5, 2004 at 16-17, and that "[i]f same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers," ER968; *see also* WHARTON, PHILIPS, I DO, I DON'T: QUEERS ON MARRIAGE 58-59 (2004) ("Bush is correct, however, when he states that allowing same-sex couples to marry will weaken the institution of marriage. It most certainly will do so, and that will make marriage a far better concept than it previously has been."). Or as another same-sex marriage advocate put it, gays and lesbians should "demand the right to marry not as a way of adhering to society's

moral codes but rather to debunk a myth and radically alter an archaic institution." Michelangelo Signorile, *Bridal Wave*, OUT MAGAZINE 161 (Dec.-Jan. 1994); *see also id*. (gays and lesbians should "fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely"). Statements such as these, of course, do nothing to alleviate the concerns that many Californians reasonably have about the effects of redefining marriage to include same-sex relationships.

2. More fundamentally, Professor Andrew Cherlin of Johns Hopkins University, a same-sex marriage supporter, identifies same-sex marriage as "the most recent development in the deinstitutionalization of marriage," which he defines as the "weakening of the social norms that define people's behavior in … marriage." Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 848, 850 (2004) (ER407).[51] This weakening of social norms entails shifting the focus of marriage from serving vital societal needs (including the needs of children) to facilitating the personal fulfillment of individuals. In other words, people become less likely "to focus on the rewards to be found in fulfilling socially valued roles such as the good parent or the loyal and supportive spouse"; instead "personal choice and self-development loom large in people's

[51] Plaintiffs' expert Professor Badgett likewise defines "deinstitutionalization" as "the fading away of the social and legal meanings of marriage that structure how married people live their lives," and writes that "many demographers take for granted the 'deinstitutionalization of marriage.' " ER1336.

construction of their marital careers." ER413. Cherlin predicts that if deinstitutionalization continues, "the proportion of people who ever marry could fall further," and, "because of high levels of nonmarital childbearing, cohabitation, and divorce, people will spend a smaller proportion of their adult lives in intact marriages than in the past." ER418. The process of deinstitutionalization could even culminate, Cherlin writes, in "the fading away of marriage," to the point that it becomes "just one of many kinds of interpersonal romantic relationships." ER418.

Others agree with this assessment. Professor Norval Glenn, for example, believes that the traditional purposes of marriage—"regulation of sexual activity and the provision for offspring that may result from it"—has been weakened by the gradual "blurring of the distinction between marriage as an institution and mere close relationships," and fears that "acceptance of the arguments made by some advocates of same-sex marriage would bring this trend to its logical conclusion, namely, the definition of marriage as being for the benefit of those who enter into it rather than as an institution for the benefit of society, the community, or any social entity larger than the couple." Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 SOC'Y 25, 26 (2004) (ER447); *see also id*. (expressing concern about same-sex marriage advocates' "politically motivated denial of the value of fathers for the socialization, development, and well being of children"). And David Blankenhorn has written that adopting same-sex marriage "would mean marriage's

complete or nearly complete deinstitutionalization." DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 178 (2007) (ER777A); *see* ER341-42. And, "[t]o the degree that adopting same-sex marriage requires the further deinstitutionalization of marriage," Blankenhorn fears that "adopting same-sex marriage would be likely to contribute over time to a further social devaluation of marriage, as expressed primarily in lower marriage rates, higher rates of divorce and nonmarital cohabitation, and more children raised outside of marriage and separated from at least one of their natural parents." *Id.* at 205 (ER782). *See also* George, *What is Marriage?* at 17-18 ("Yes, social and legal developments have already worn the ties that bind spouses to something beyond themselves and thus more securely to each other. But recognizing same-sex unions would mean cutting the last remaining threads. After all, underlying adherence to the marital norms already in decline are the principled connections in people's minds between marriage, bodily union, and children. Enshrining the revisionist view would not just wear down but tear out this foundation, and with it any basis for reversing other recent trends to restore the many social benefits of a healthy marriage culture.").

3. The pivotal finding of the district court that led it to reject these widely shared concerns was its unequivocal prediction that "[p]ermitting same-sex couples to marry will not affect the number of opposite sex-couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of oppo-

site-sex marriages." ER118-19. Indeed, as previously discussed, *supra* at 39-41, the district court flatly asserted that it is "beyond debate" that allowing same-sex marriage "will have no adverse effects on society or the institution of marriage." ER161-62. Again, even assuming that sufficient evidence could ever be marshaled to predict with "beyond debate" certainty the long-term societal consequences of a seismic change in a venerable social institution, the scanty evidence on which the district court relied does not begin to do so. *See* Part II, supra.

To the contrary, empirical data that is available provides little comfort to those who are concerned with preserving, let alone *renewing*, the strength of marriage as an institution. Indeed, the Massachusetts data relied upon by the district court shows that both the divorce rate and the marriage rate actually changed for the worse from 2004 to 2007. *See, e.g.*, CDC, Divorce Rate By State (ER1362); CDC, Marriage Rate By State (ER1414). To be sure, as the district court acknowledged, divorce and marriage rates are affected by a myriad of factors, including race, employment status, and education, but this complexity only underscores the court's error in relying on statistics that cover only a blink of time and do not attempt to control for any of these variables. *See* ER118-19. Even Plaintiffs' experts, as noted earlier, disclaimed any reliance on these data. *See* Part II, *supra*.

In forecasting the future, the district court also turned a blind eye to the experience of the Netherlands, which in 2001 became the first county to institute

same-sex marriage. Data submitted at trial demonstrated that a pre-existing downward trend in marriage rates and a pre-existing upward trend in single parent and cohabiting families with children were all exacerbated in the aftermath of redefining marriage. *See, e.g.*, Statistics Netherlands, Marriages 1950-2008 (ER970); Statistics Netherlands, Unmarried Couples With Children 1995-2009 (ER981); Statistics Netherlands, Total Single Parent Households, 1995-2009 (ER978).[52] That is not to say that same-sex marriage necessarily caused the acceleration of these negative trends, but the data at a minimum underscore the tenuous, *and debatable*, basis of the district court's predictions. But it is plainly not irrational for an informed observer acquainted with this data to have pause over the potential adverse consequences of this fundamental change to a vital social institution. To the contrary, the possibility of long-term adverse societal consequences from redefining marriage to include same-sex relationships is not only "debatable," but is being hotly debated by reasonable people of good will on both sides, in California and throughout the country. *Heller*, 509 U.S. at 326.

4. The United States Constitution does not require California summarily to embrace changes that may weaken the vital institution of marriage or its ability to further the important interests it has traditionally served. Rather, our Constitution

[52] In addition, as Plaintiffs' expert Professor Badgett has observed, marriage rates for same-sex couples have proved to be extremely low in the Netherlands. *See* ER1339 ("only about 25% of same-sex couples are in a legally recognized relationship, as opposed to 80% of Dutch heterosexual couples").

establishes a federal system that permits a diversity of approaches to difficult and uncertain social issues. And "[i]t is one of the happy incidents" of that system that "novel social … experiments"—like the redefinition of marriage—may be undertaken in individual States "without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The people of California, like those of the numerous other States that have decided, at least for now, to adhere to the time-tested definition of marriage, are entitled to await the results of these experiments. As same-sex marriage advocate Jonathan Rauch recently put it:

> [T]o my great gratitude—and I think it's almost inspirational how right the country has gotten this—the public has refused to be rushed. The public has come to understand that we can take our time with this. And the way to do this is let different states do different things. Let's find out how gay marriage works in a few states. Let's find out how civil unions work. In the meantime, let the other states hold back.

ER872. Indeed, Plaintiffs' own expert Professor Badgett believes "that social change with respect to same-sex marriage in this country is taking place at a sensible pace at this time with more liberal states taking the lead and providing examples that other states might some day follow." ER291-92. The district court's "categorical" ruling improperly seeks to "pretermit other responsible solutions" to the complex issues raised by same-sex relationships that are being tested and considered in California and other States, *District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2322 (2009), and to "short-circuit," *id.*, the "earnest and profound debate

about the morality, legality, and practicality" of redefining marriage that is currently taking place throughout the Nation. *Glucksberg*, 521 U.S. at 735. Indeed, even the European Court of Human Rights recently declined to "rush to substitute its own judgment in place of that of the national authorities," holding that the right to marry secured by Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not require Council of Europe member nations to recognize same-sex relationships as marriages in the absence of a "European consensus regarding same-sex marriage." *Schalk and Kopf v. Austria*, App. No. 30141/04 ¶¶ 58, 61-62 (June 24, 2010).

C. PROPOSITION 8 IS NOT TAINTED BY ANIMUS OR OTHER IMPERMISSIBLE CONSIDERATIONS.

Because "there are plausible reasons"—indeed compelling reasons—for California's adherence to the traditional definition of marriage, judicial "inquiry is at an end." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 179. Proposition 8 simply "*cannot* run afoul" of the Fourteenth Amendment, *Heller*, 509 U.S. at 320 (emphasis added), for "it is a familiar practice of constitutional law that [a] court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," *Michael M.*, 450 U.S. at 472 n.7; *see also Romer*, 517 U.S. at 634-36 (drawing "inference" of animus only because the challenged law made homosexuals "stranger[s] to [the] law" altogether and was not "directed to any identifiable legitimate purpose or discrete objective"). The district court

thus erred as a matter of law in drawing the "inference" that Proposition 8 was motivated solely by an irrational and bigoted "fear or unarticulated dislike of same-sex couples," ER167, "a moral view that there is something 'wrong' with same-sex couples," ER168, or a "belief that same-sex couples simply are not as good as opposite-sex couples," ER167.

1. At any rate, the inference of anti-gay hostility drawn by the district court is manifestly false. It defames more than seven million California voters as homophobic, a cruelly ironic charge, as noted earlier, given that California has enacted some of the Nation's most progressive and sweeping gay-rights protections, including creation of a parallel institution, domestic partnerships, affording same-sex couples all the benefits and obligations of marriage. Nor can the court's inference be limited to California, for it necessarily attributes anti-gay animus to *all* who affirm that marriage, in its age-old form as the union of a man and a woman, continues to rationally serve society's interests, including the citizens and lawmakers of the 45 States that have maintained that definition, the Congress and President that overwhelmingly passed and signed into law the federal Defense of Marriage Act, a large majority of the federal and state court judges who have addressed same-sex marriage, and the current President of the United States.[53]

[53] *See* Senator Barack Obama, 2008 Human Rights Campaign Presidential Questionnaire at 3, *available at*

Indeed, as Plaintiffs' experts themselves have found, even a sizeable proportion of gays and lesbian themselves oppose legalizing same-sex marriage.[54] For some this may be based on the view that "[m]arriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships." Paula Ettelbrick, *Since When Is Marriage a Path to Liberation*, OUT/LOOK National Gay and Lesbian Quarterly, No.6, Fall 1989, *reprinted in* SAME-SEX MARRIAGE PRO AND CON: A READER 120 (Andrew Sullivan, ed., 1997).[55] For others, it may reflect recognition of marriage's traditional "procreative meaning," or respect for "other people's sacred traditions." Camille Paglia, *Connubial Personae* 10 Percent, May-June 1995, *reprinted in* SAME SEX MARRIAGE: PRO AND CON, A READER 140 (Andrew Sullivan, ed., 1997). But it surely does not reflect animus toward or moral disapproval of same-sex couples.

Not surprisingly, some leading advocates for same-sex marriage reject the harsh view embraced by the district court, recognizing instead that most traditional

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http://www.lgbtforobama.com/pdf/Obama_HRC_questionaire.pdf ("I do not support gay marriage. . . . I consider marriage to be between a man and a woman.").

[54] *See* ER1013 (Segura) (28.7% of self-identified LGBT individuals polled opposed legalizing same-sex marriage); ER1166 (Herek) (22.1% of self-identified LGB individuals polled opposed legalizing same-sex marriage).

[55] *See* George, *What is Marriage?* at 32 ("In their statement 'Beyond Same-Sex Marriage," more than 300 'LGBT' and 'allied' scholars and advocates—including prominent Ivy League professors—call for legal recognition of sexual relationships involving more than two partners.").

marriage supporters are "motivated by a sincere desire to do what's best for their marriages, their children, their society." RAUCH, GAY MARRIAGE at 7 (ER517). Indeed even Attorney General Brown, who embraced nearly every other allegation made by the Plaintiffs, denied that "Prop. 8 was driven by moral disapproval of gay and lesbian individuals." ER1054. And Plaintiffs' own witnesses acknowledged that voters had a variety of legitimate reasons for supporting Proposition 8.[56]

2. In all events, the district court's "inference" regarding the subjective motivations of seven million Californians is based on a tendentious description of no more than a handful of the cacophony of messages, for and against Proposition 8, that were before the electorate during the hard fought and often heated initiative campaign. Not only has this Court made clear that the question of voter motivation is simply "not … an appropriate one for judicial inquiry," *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970), but even if the subjective motivations of the millions of Californians who voted for

[56] Plaintiffs' witnesses acknowledged, for example, that possible motivations for supporting Proposition 8 included: avoiding "undermin[ing] the purposes of ensuring that, insofar as possible, children would be raised by the man and woman whose sexual union brought them into the world," ER288 (Sanders); a "feel[ing] that marriage is tied to procreation," ER290 (Sanders); "preserv[ing] the historical tradition of marriage in this country," ER290 (Sanders); "a sincere desire to do what's best for their marriages, their children, their society," ER233-34 (Chauncey); "prioritiz[ing] the rights of children over the competing rights of gay people," ER295-96 (Segura); and a "negative reaction to … activist judges," ER293-94 (Segura).

Proposition 8 could somehow be discerned from the campaign advertisements that so concerned the district court, those advertisements still would provide no warrant whatsoever for impugning the good faith of the California electorate.

Thus, though the district court faulted supporters of Proposition 8 for focusing on "protecting children," ER169, there is nothing surprising or sinister about this concern. After all, as demonstrated above, a central and abiding purpose of marriage has always been to promote responsible procreation and thereby increase the likelihood that children will be born and raised in an enduring and stable family environment by the men and women who brought them into the world. As an overwhelming majority of Congress has recognized, "Simply put, government has an interest in marriage because it has an interest in children." Committee on the Judiciary Report on DOMA, H. Rep. 104-664 at 48. If there were any doubt about how or why Proposition 8 would protect children, it was surely dispelled by the official ballot materials, which clearly set forth this traditional justification: "Proposition 8 protects marriage as an essential institution of society. While death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father." ER1032.

It is likewise unremarkable that those who strongly support the traditional understanding of marriage and its core procreative purposes—whether for secular, moral, or religious reasons—would be opposed to a different understanding being

taught to their young school children in public elementary schools. The official ballot materials, again, put the point simply: same-sex marriage "is an issue for parents to discuss with their children according to their own values and beliefs." *Id*. Indeed, even parents without strong moral or political views about the purposes and definition of marriage might well reasonably fear that discussions of same-sex marriage would inevitably entail matters relating to procreation and sexuality that should be postponed until children have reached a certain level of maturity. *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 958 (7th Cir. 2002) (Posner, J., concurring) (crediting school's "fear that if it explains sexual phenomena, including homosexuality, to school children … it will make children prematurely preoccupied with issues of sexuality"). The district court's dark insinuations to the contrary notwithstanding, ER169, there is nothing coded or subliminal about these legitimate concerns.

3. Nor does the fact that the traditional definition of marriage finds support in religious doctrine and moral precept, no less than in its traditional secular justifications, render that definition constitutionally suspect. *Cf. McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (Constitution permits laws "whose reason or effect happens to coincide or harmonize with the tenets of some or all religions"); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (upholding law that was "as much a reflection of 'traditionalist' values" as it was "an embodiment of the views of any par-

ticular religion"). The district court's insistence that neither "ethical and moral principles" nor "religious beliefs" can have any legitimate role in the ongoing political debate regarding the redefinition of marriage in this Country, ER44, 168, is simply contrary to this Nation's enduring political traditions. As President Obama has recognized:

> [S]ecularists are wrong when they ask believers to leave their religion at the door before entering into the public square. Frederick Douglas, Abraham Lincolm, Williams Jennings Bryan, Dorothy Day, Martin Luther King—indeed, the majority of great reformers in American history—were not only motivated by faith, but repeatedly used religious language to argue for their cause. So to say that men and women should not inject their 'personal morality' into public policy debates is a practical absurdity. Our law is by definition a codification of morality, much of it grounded in the Judeo-Christian tradition.

Barack Obama, *Call to Renewal Keynote Address* (June 28, 2006), available at http://www.barackobama.com/2006/06/28/call_to_renewal_keynote_address.php. This is especially true of marriage, which the Supreme Court has long recognized has "more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill*, 125 U.S. at 205; *Smelt v. County of Orange, California*, 447 F.3d 673, 681 (9th Cir. 2006) ("it is difficult to imagine an area more fraught with sensitive social policy considerations" than the regulation of marriage). As with other issues that are inextricably intertwined with moral values, such as the death penalty, gambling, prostitution, polygamy, and assisted suicide, legislation regarding marriage must inevitably choose between, or attempt to balance, compet-

ing moral views. "In this sense, there is no truly neutral marriage policy." George, *What is Marriage?* at 43. It is thus not surprising that "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the *morality*, legality, and practicality" of redefining marriage to include same-sex relationships. *Glucksberg*, 521 U.S. at 735 (emphasis added). And it is likewise not only inevitable, but entirely proper, that voters' decisions be informed by their most deeply held values and beliefs as this vitally important issue is resolved, as it should be, through the democratic process. Until that time, this court should allow "this debate to continue, as it should in a democratic society." *Glucksberg*, 521 U.S. at 735; *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality) ("In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.").

4. Nor can the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), be understood to have brought this long tradition to a grinding halt and to have effectively expelled from the political process Americans whose views on issues of profound social and cultural importance are entwined with their faith or moral values.[57] *Lawrence* held only that moral disapproval of homosexual rela-

[57] *Compare Turner v. Safley*, 482 U.S. 78, 96 (1987) (because "many religions recognize marriage as having spiritual significance," for many Americans, "the commitment of marriage may be an exercise of religious faith"), *with* Barack Obama, Civil Forum on the Presidency at 20 (August 16, 2008), transcript *available at* http://www.rickwarrennews.com/docs/Certified_Final_Transcript.pdf ("I

tionships could not be enforced "through operation of the criminal law," *id*. at 571, and thus could not alone justify a law prohibiting and punishing as a crime "the most private human conduct, sexual behavior, and in the most private of places, the home," *id*. at 567. Further, *Lawrence* specifically said that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id*. at 578. It by no means follows from *Lawrence*'s protection for intimate privacy within the home, then, that California may not provide official recognition and support for those relationships that uniquely further the interests that marriage has always been understood to serve. *See, e.g.*, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2989 n.17 (2010) (emphasizing "the distinction between state *prohibition* and state *support*"); *Maher v. Roe*, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternate activity consonant with legislative policy."); *Hernandez*, 855 N.E.2d at 10 ("Plaintiffs here do not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a state-conferred benefit that the Legislature has rationally limited to opposite-sex couples.").

In short, the majority of Californians, like the vast majority of Americans

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believe that marriage is the union between a man and a woman. … [F]or me as a Christian, it's also a sacred union.")

and people throughout the world, have made clear that they support the traditional definition of marriage. That this support may be based on a variety of grounds—religious and moral, as well as secular—does not prevent the State of California from preserving this traditional definition in its laws.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling invalidating Proposition 8 and direct that court to enter judgment rejecting Plaintiffs' claims.

Dated: September 17, 2010

Respectfully submitted,

s/ Charles J. Cooper
Charles J. Cooper
Attorney for Appellants

STATEMENT OF RELATED CASE

Pursuant to Ninth Circuit Rule 28-2.6, Appellants certify that there is a related appeal pending in this court, *Perry, et al. v. Schwarzenegger, et al.*, No. 10-16751, which arises out of the same district court case as the present appeal.

Dated: September 17, 2010

s/ Charles J. Cooper
Charles J. Cooper
Counsel for Appellants

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 10-16696

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Signature of Attorney or Unrepresented Litigant: s/ Charles J. Cooper

("s/" plus typed name is acceptable for electronically-filed documents)

Date: September 17, 2010

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 17, 2010.

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

s/ Charles J. Cooper
Charles J. Cooper