NO. 10-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.
Defendants.

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

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

DEFENDANT-INTERVENORS-APPELLANTS DENNIS HOLLINGWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM'S EMERGENCY MOTION FOR STAY PENDING APPEAL

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9th Cir. R. 27-3 Certificate

Pursuant to 9th Cir. R. 27-3, Appellants respectfully certify that their motion for a stay pending appeal is an emergency motion requiring "relief … in less than 21 days" to "avoid irreparable harm."

Appellants are official Proponents of Proposition 8 and the official Yes on 8 campaign (collectively, "Proponents"), who were permitted to intervene in this case to defend that California ballot initiative. On August 4, 2010, the district court ruled that Prop 8 is unconstitutional and ordered its enforcement permanently enjoined. The district court temporarily stayed entry of its judgment to consider Proponents' motion for stay pending appeal. On August 12, the district court denied Proponents' stay motion, lifted the temporary stay on the entry of judgment, and entered judgment. *See* Doc. No. 727, Doc. No. 728. At the same time, the district court ordered another limited stay, this time until "August 18, 2010 at 5 PM PDT" in order to "permit the court of appeals to consider the issue [of a stay pending appeal] in an orderly manner." Doc. No. 727 at 2, 11. It is thus imperative that a stay pending appeal be entered on or before August 18, 2010 at 5 p.m. to avoid the confusion and irreparable injury that would flow from the creation of a class of purported same-sex marriages. *See, e.g., Advisory: If Judge Walker Says It's OK to Get Married*, GLTNN.com, Aug. 11, 2010, *available at* http://gltnewsnow.com/2010/08/11/advisory-if-judge-walker-says-it's-ok-to-get-

married/ (reporting that West Hollywood stands ready to marry gay couples "[a]s soon as the federal judge lifts the stay," and that Los Angeles County "is prepared to take immediate action to implement the court's orders if the stay is lifted") (quotation marks omitted).

Before filing their motion, Proponents notified counsel for the other parties by email and also emailed them a service copy of the motion.

Pursuant to 9th Cir. R. 27-3(a)(3)(i), the telephone numbers, email addresses, and office addresses of the attorneys for the parties are as follows:

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Dated: August 12, 2010

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Pursuant to Fed. R. App. P. 8(a)(2), Appellants respectfully seek a stay of the district court's judgment invalidating Proposition 8 pending resolution of their appeal.

INTRODUCTION

Proposition 8, a voter-initiated amendment to the California Constitution, reaffirms that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. This is the same understanding of marriage that prevailed in every State of the Union until just six years ago and still prevails in all but five states and the District of Columbia. Indeed, 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) (plurality). The district court nevertheless held that the age-old, all-but-universal opposite-sex definition of marriage embraced by Proposition 8 violates the fundamental due process right to marry rooted in "the history, tradition and practice of marriage in the United States." Doc. No. 708, Ex. A at 111.[1] It also concluded that "strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation," *id*. at 122, but that "Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause," because the traditional

[1] Citations to Exhibit A, the district court's ruling, reference the ruling's internal pagination.

definition of marriage "is simply not rationally related to a legitimate state interest," *id*. at 123.

Given that the district court did not cite a single case that had addressed these issues, one might think the court was deciding issues of first impression on a blank slate. Nothing could be further from the truth. Indeed, though the district court held that the venerable definition of marriage as the union of a man and a woman violates the Due Process and Equal Protection Clauses of the Federal Constitution, every state or federal appellate court to address the issue—including the Supreme Court in *Baker v. Nelson*, 409 U.S. 810 (1972), and this Court in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982)—has consistently rejected this conclusion. *See infra* Part II.A. The district court's conclusion that strict scrutiny applies to classifications based on sexual orientation likewise stands in stark conflict with binding authority from this Court and the unanimous conclusion of ten other federal circuit courts (all that have addressed the question) that such classifications are subject only to rational basis review. *See infra* Part II.C. And again, contrary to the district court's conclusion below, this Court, and the overwhelming majority of other courts, both state and federal, to address the issue have concluded that the opposite-sex definition of marriage rationally serves society's interest in regulating sexual relationships between men and women so that the unique procreative capacity of those relationships benefits rather than harms society, by increasing the like-

lihood that children will be born and raised in stable family units by the mothers and fathers who brought them into this world. *See infra* Part II.D.

The district court did not confront the Supreme Court's holding in *Baker*, binding authority from this Court, or any of the well established lines of authority opposed to its conclusions. It did not distinguish them. It did not explain why it believed they were wrongly decided. It did not even acknowledge their existence. It simply ignored them.

Similarly, to read the district court's confident, though often startling, factual pronouncements, one would think that reasonable minds simply cannot differ on the key legislative facts implicated by this case. Again, however, the district court simply ignored virtually everything—judicial authority, the works of eminent scholars past and present in all relevant academic fields, extensive documentary and historical evidence, and even simple common sense—opposed to its conclusions. Indeed, even though this case implicates quintessential *legislative facts*—*i.e.*, "general facts which help the tribunal decide questions of law and policy and discretion," *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971) (Friendly, J.)—the district court focused almost exclusively on the oral testimony presented at trial. *See 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");

Indiana H. B. R.R. Co. v. American Cyanamid Co., 916 F.2d 1174, 1182 (7th Cir. 1990) (Posner, J.) (legislative facts "more often are facts reported in books and other documents not prepared specially for litigation"). The district court's treatment of the trial testimony, moreover, was likewise egregiously selective and one-sided. The district court eagerly and uncritically embraced the highly tendentious opinions offered by Plaintiffs' experts and simply ignored important concessions by those witnesses that undermined Plaintiffs' claims. And it just as consistently refused to credit (or even qualify) the two experts offered by Proponents—the only defense experts who were willing to appear at trial after the district court's extraordinary attempts to video record and broadcast the trial proceedings. *See Hollingsworth v. Perry*, 130 S. Ct. 705 (2010).

The district court, for example, entertained no doubt whatsoever:

- that the virtually universal requirement that marriage be between persons of the opposite sexes was "never part of the historical core of the institution of marriage," Ex. A at 113, despite the extensive historical and documentary evidence, not to mention common knowledge, demonstrating exactly the opposite, *see infra* Part II.B;
- that "[t]he 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," Ex. A at 130, despite the undeniable biological

fact that only a man and a woman can produce offspring, whether intentionally or as the unintended result of casual sexual behavior;

- that the traditional opposite-sex definition of marriage is "nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life," Ex. A at 124, despite the extensive judicial authority, scholarship, and historical evidence demonstrating that traditional opposite-sex marriage is ubiquitous, sweeping across all cultures and all times, regardless of the relative social roles of men and women, and clearly reflects marriage's abiding concern with the unique procreative potential of opposite-sex relationships, *see infra* Part II.B;
- that the "evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes," Ex. A at 127, and, moreover, that the genetic bond between a child and its mother and father "is not related to a child's adjustment outcomes," Ex. A at 96, even though other courts considering the same evidence have recognized that it is contested, inconclusive, and far from sufficient to render *irrational* the virtually universal and deeply ingrained common-sense belief that, all else being equal, children do best when raised by their own mother and father, *see infra* Part II.D.

The district court also purported to know, with certainty, the unknowable, couching predictions about the long-term future as indisputable facts. According to the district court, "the evidence shows *beyond debate*" that allowing same-sex marriage "will have no adverse effects on society or the institution of marriage." Ex. A at 125-26 (emphasis added). The evidence relied upon by the district court was the testimony of a single expert witness who expressed "great confidence" that legalizing same-sex marriage would cause no harm to the marital institution or to society, *see* Trial Tr. 657-59,[2] and who found it "informative," but nothing more, 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 that State. *See* Trial Tr. 654-56. 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, this scanty evidence does not begin to do so. Nor did the district court take account of any contrary evidence, including that the Plaintiffs' other expert on this subject acknowledged the obvious: that adoption of same-sex marriage is a "watershed" and "turning point" in the history of the institution that will change "the social meaning of marriage," and therefore will "unquestionably [have] real world consequences," Tr. 311-13, but that "the consequences of same-sex marriage" are

[2] Excerpts from trial transcript attached as Exhibit B.

impossible to know, because "no one predicts the future that accurately." Tr. 254. *See infra* Part II.D. Given these simple realities, California voters could reasonably decide to study further the still novel and unfolding experiment with same-sex marriage in a handful of other states before embarking on it themselves. The district court dismissed this consideration, too, as *irrational*, even though it reflects the very purpose of our federalist system.

Finally, the district court judge, ignoring this Court's directive that "the question of [voter] motivation" is not "an appropriate one for judicial inquiry," *Southern Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970), even purported to read the minds of the seven million Californians who voted for Proposition 8, and he found them filled with nothing but animosity and condescension toward gays and lesbians. "The evidence shows conclusively," according to the district court, "that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples," Ex. A at 135, and that Proposition 8's supporters were motivated by "nothing more" than "a fear or unarticulated dislike of same-sex couples" and "the belief that same-sex couples simply are not as good as opposite-sex couples." *Id*. at 132. This charge is false and unfair on its face, and leveling it against the people of California is especially cruel, 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 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 the legitimate interests of society—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 truth is that a majority of Californians have simply decided not to experiment, at least for now, with the fundamental meaning of an age-old and still vital social institution. *See infra* Part II.D.

This Court need not tarry over the district court's purported fact findings, however, for its legal errors alone are palpable and destined for reversal. 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.), and it is unrestricted by the testimony and evidence considered below, for plainly "[t]here are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial," *see Dunagin v. Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality). *Cf. Lockhart v. McCree*, 476 U.S. 162, 170 n.3 (1986). Nor need this Court attempt to predict how it would resolve these disputed issues of legislative fact: where, as here, the standard of review is rational basis,

"the very admission that the facts are arguable . . . immunizes from constitutional attack the [legislative] judgment represented by" Proposition 8. *Vance v. Bradley*, 440 U.S. 93, 112 (1979). Indeed, the "legislative choice" reflected by Proposition 8 "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509 U.S. 312, 320 (1993).

For all of these reasons, as well as others elaborated more fully below, the district court's decision will almost certainly be reversed by this Court. It is thus imperative that a stay pending appeal be entered on or before August 18, 2010 at 5 p.m. Pacific Time (the time the district court's judgment is set to go into effect, *see* Doc. No. 727 at 11), to avoid the confusion and irreparable injury that would surely flow from the creation of a class of purported same-sex marriages entered in reliance on the district court's decision but in direct contravention of a lawful provision of the California Constitution and the manifest will of the people of that State.

STATEMENT

"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"), a gay couple and a lesbian couple, 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 27, Plaintiffs filed a motion for preliminary injunction.

The next day, 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.

Also on June 30, the district court tentatively denied Plaintiffs' preliminary injunction motion, preferring instead to hold a trial on Proposition 8's constitution-

ality. *See* Doc. No. 76 at 4.[3] At a July 2 hearing, counsel for Plaintiffs consented to this course of action, stating that "[w]e accept it, and we are prepared to go forward on that basis." July 2, 2009 Tr. of Hr'g, Doc. No. 78 at 12. Plaintiffs did not appeal the denial of their preliminary injunction motion. At the same hearing, Proponents questioned the need for a trial, pointing out that similar challenges to the traditional definition of marriage had been decided by courts without trial, and explaining that the issues at stake concerned legislative rather than adjudicative facts. *Id.* at 24-25.

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 San Francisco claims a government interest in the controversy about the constitutionality of Proposition 8, it may represent that interest." Aug. 19, 2009 Tr. of Hearing, Doc. No. 162 at 56. The district court further directed that it would be "appropriate" for "the Attorney General and San Francisco [to] work together in presenting facts pertaining to the affected government interests." *Id.*

Also on August 19, the district court held a case management conference to

[3] Citations to "Doc. No.__" refer to the corresponding district court docket entry and, when specified, page numbers in such citations refer to the district court's ECF pagination. Also, trial exhibits marked with an asterisk (*) are available at https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html, a website established by the district court.

schedule further proceedings in the case. In advance of the conference, the parties submitted case management statements, with Proponents explaining at length their view that a trial was unnecessary. *See* Doc. No. 139 at 9-16. The district court set the case on an expedited schedule, culminating in a January 11, 2010 trial date. *See* Doc. No. 160.

On September 9, Proponents moved for summary judgment. *See* Doc. No. 172-1. The district court heard argument on the motion on October 14, and denied it from the bench. *See* Oct. 14, 2009 Minute Entry, Doc. No. 226. Also in October, Proponents moved to realign the Attorney General as a party plaintiff in light of his joinder in Plaintiffs' opposition to Proponents' motion for summary judgment and his embrace of Plaintiffs' constitutional claims. *See* Doc. No. 216. On December 23, the district court denied the motion. *See* Doc. No. 319.

Meanwhile discovery commenced and, over Proponents' First Amendment 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. No. 214 at 17. In the district court's view, the First Amendment simply offered no protection against "the disclosure of campaign communications" beyond "the identities of rank-and-file volunteers and

similarly situated individuals." Doc. No. 252 at 3. This Court responded by granting Proponents' petition for 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).[4]

On December 15, Imperial County, its Board of Supervisors, and Deputy County Clerk Isabel Vargas (collectively, "Imperial County"), moved to intervene as defendants. Imperial County 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. No. 311 at 9. Imperial County thus sought to intervene to protect its "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. Imperial County's

[4] *See also id.* at 1158 ("The district court applied an unduly narrow conception of First Amendment privilege. Under that interpretation, associations that support or oppose initiatives face the risk that they will be compelled to disclose their internal campaign communications in civil discovery. This risk applies not only to the official proponents of initiatives and referendums, but also to the myriad social, economic, religious and political organizations that publicly support or oppose ballot measures. The potential chilling effect on political participation and debate is therefore substantial.").

motion was argued and submitted on January 6, 2010. The district court, however, did not rule on that motion until August 4, concurrent with issuing its ruling on the merits. 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." Doc. No. 709 at 18.

Before trial, the district court also arranged for the trial to be publicly broadcast. At the district court's request, Chief Judge Kozinski of this Court approved the case for inclusion in a purported 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*, 130 S. Ct. at 708-09. On January 11, in response to a stay application from Proponents, the Supreme Court entered a temporary stay of any real-time streaming or 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). Shortly before commencement of trial, on the morning of January 11, with public broadcast of the trial still a possibility, Proponents withdrew four of their expert witnesses. *See* Doc. No. 398. On January 13, after full consideration of Proponents' application, 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. The district court then

withdrew the case from the Ninth Circuit pilot program. *See* Trial Tr. 674.[5]

The case was tried from January 11 through January 27, and closing arguments were held on June 16. On August 3, the district court announced that it would release its ruling the next day. Proponents filed a motion asking the district court to stay its judgment pending appeal in the event the court invalidated Proposition 8. *See* Doc. No. 705.[6] On August 4, the district court issued its Findings of Fact and Conclusions of Law. *See* Ex. A. 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." *See* Ex. A at 109.

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 rea-

[5] The district court 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* Trial Tr. at 754. On May 31, 2010, the district court nevertheless 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. Doc. No. 672 at 2. Plaintiffs and San Francisco requested copies of the recordings. *See* Doc. Nos. 674, 675. 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* Ex. A at 4.

[6] Proponents submitted to the district court the grounds advanced here, although Proponents' stay application in the district court necessarily did not specifically address the district court's opinion.

soned that there simply is not "any historical purpose for excluding same-sex couples from marriage," 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." *Id*. at 113. The district court then asserted that Proposition 8 could not "survive the strict scrutiny required by plaintiffs' due process claim," *id*. at 117, because, as it would later explain, "Proposition 8 cannot withstand any level of scrutiny," *id*. at 123.

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." *Id*. at 121. 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." *Id*. In reaching this conclusion, the district court recognized that same-sex couples, unlike opposite-sex couples, "are incapable through sexual intercourse of producing offspring biologically related to both parties," but determined that there is no reason "why the government may need to take into account fertility when legislating." *Id*. at 122.

The district court nonetheless did not apply strict scrutiny under the Equal Protection Clause. Instead, it 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." *Id*. at 122-23. As an "example of a legitimate state interest in not issuing marriage licenses to a particular group," the court identified "a scarcity of marriage licenses or county officials to issue them," but concluded that "marriage licenses in California are not a limited commodity." *Id*. at 123.

The court next turned to evaluating the legitimate interests Proponents identified for Proposition 8. The district court placed those interests into six categories, and proceeded to find each of them wanting. For example, 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." *Id*. at 127-29. The district court also found it "beyond debate" that adoption of same-sex marriage will have no adverse societal consequences and 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. *Id* at 125-26. And at any rate, the district court concluded that redefining marriage to include same-sex couples would not "amount[] to sweeping social change." *Id*. at 125. After deeming Proposition 8 lacking in any rational justification, the court con-

cluded 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." *Id*. at 132.

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." *Id*. at 136. The district court also temporarily stayed entry of judgment, directing the other parties "to submit their responses on or before August 6, 2010," and further directing that at that time Proponents' stay motion would "stand submitted." *See* Doc. No. 710 at 2.

On August 12, the district court denied Proponents' stay motion, lifted the temporary stay on the entry of judgment, and entered judgment. *See* Doc. No. 727, Doc. No. 728. According to the district court, not a single stay factor weighs in Proponents' favor. *See* Doc. No. 727 at 10. At the same time, the district court ordered another limited stay, this time until "August 18, 2010 at 5 PM PDT" in order to "permit the court of appeals to consider the issue [of a stay pending appeal] in an orderly manner." *Id*. at 2, 11.

ARGUMENT

In deciding whether to issue a stay pending appeal, this Court considers: (1)

appellant's likelihood of success on the merits; (2) the likelihood of irreparable harm absent a stay; (3) the likelihood of substantial injury to other parties if a stay is issued; and (4) the public interest. *See, e.g.*, *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). As demonstrated below, each of these factors favors a stay of the district court judgment at issue here.

I. PROPONENTS HAVE STANDING TO APPEAL

Contrary to the district court's suggestion, *see* Doc. No. 727 at 3-6, Proponents' standing to appeal is no obstacle to staying the district court's judgment. Proponents have standing to appeal the district court's judgment because they 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 "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. In particular, in other cases the "New Jersey Supreme Court ha[d] granted applications of the Speaker of the General Assembly and the President of the Senate

to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment." *Id*. at 82. Here also, the California Supreme Court has granted the application of initiative proponents to defend initiatives they have sponsored but the State Attorney General and other public officials refuse to defend—indeed it has done so with respect to these Proponents and Proposition 8. *See Strauss v. Horton*, 207 P.3d 48, 69 (Cal. 2009); Order of Nov. 19, 2008, *Strauss*, Nos. S168047, S168066, S168078 (Cal.) (Doc. No. 8-10). California law thus allows proponents 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). Thus, Proponents may directly assert the State's interest in defending the constitutionality of its laws, an interest that is indisputably sufficient to confer appellate standing. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986); *Diamond v. Charles*, 476 U.S. 54, 62 (1986).[7]

California law thus distinguishes this case from *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). In that case, the Ninth Circuit held that proponents of an Arizona initiative had standing to appeal a decision striking down the

[7] Because California law thus makes clear that California does grant Proponents the authority to *defend* Proposition 8, it does not matter whether California "California grant[s] proponents the authority or the responsibility to *enforce* Proposition 8." Doc. No. 727 at 4 (emphasis added).

measure. *Id.* at 58. In dicta, the Supreme Court expressed "grave doubts" about proponents' standing. *Id*. at 66; *see also id.* ("we need not definitively resolve the issue"). Citing *Karcher*, the Court acknowledged that it had "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," but explained 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*. at 65. Here, by contrast, 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—establishes Proponents' authority "as agents of the people of Arizona to defend, in lieu of public officials," the constitutionality of Proposition 8.

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 v. Charles*, 476 U.S. at 54, 65 n.17 (1986) (state law may "create new interests, the invasion of which may confer standing"). 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), that 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) (quotation marks omitted).

For all of these reasons, California courts have repeatedly allowed proponents to intervene to defend initiatives they have sponsored.[8] Indeed, when the district court permitted Proponents to intervene in this case, it expressly 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." July 2, 2009 Tr. of Hr'g, Doc. No. 78 at 8.

In all events, proposed Defendant-Intervenors Imperial County, its Board of Supervisors, and Deputy County Clerk Isabel Vargas, have noticed an appeal from both the order denying intervention and the district court's decision on the merits. *See* Doc. No. 719; *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994) (holding that the district court "erred in denying the gov-

[8] *See, e.g.*, Petition for Extraordinary Relief, *Bennett v. Bowen*, No. S164520 (Cal. June 20, 2008) (Doc. No. 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*, 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 v. Deukmejian*, 669 P.2d 17, 19 (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 (Cal. Ct. App. 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).

ernment's motion to intervene in a limited way for the purpose of appeal" and thus "proceed[ing] with the merits of the case"); *United States ex rel. McGough v. Covington Tech. Co.*, 967 F.2d 1391, 1392 (9th Cir. 1992) (same); 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3902.1 ("If final judgment is entered with or after the denial of intervention, however, the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed."). Under California law, Vargas is a "commissioner of civil marriage," 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. Because the district court's order purports to control the official duties of Vargas and every other commissioner of civil marriage in the State, *see* Ex. A at 136, Vargas plainly has standing to appeal that order.[9] Ac-

[9] The district court denied Imperial County's motion to intervene on the ground that it would not have standing to appeal an adverse judgment because the County's "ministerial duties surrounding marriage are not affected by the constitutionality of Prop 8." Doc. No. 709 at 17. This assertion is patently incorrect and almost certain to be reversed on appeal. True, Imperial County's duties with respect to marriage are "ministerial," but what that means is that they are directly controlled by operation of California law, including Proposition 8. *See Lockyer v. City and County of San Francisco*, 95 P.3d 459, 472-73 (Cal. 2004). Indeed, if a same-sex couple approaches Deputy Clerk Vargas for a marriage license, the constitutionality of Proposition 8 not only affects, but directly controls Vargas's ministerial duty to grant or withhold the license. And if Vargas objected to Proposition 8's constitutionality, California law vests her with "standing to bring a court action to challenge" it. *Lockyer*, 95 P.3d at 486 n.29 (emphases omitted). It would make little sense to maintain that Vargas has standing only to challenge, but not defend, the laws that govern her official actions. Indeed, a county clerk is not only a prop-

cordingly, 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.

II. PROPONENTS ARE LIKELY TO SUCCEED ON THE MERITS

A. The District Court's Judgment Conflicts with Binding Supreme Court and Ninth Circuit Precedent, as well as the Overwhelming Weight of Authority of Courts Across the Nation

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 Supreme Court and Ninth Circuit precedent as well as the consistent

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er defendant in this action, but a necessary one. *See Walker v. United States*, No. 08-1314, 2008 U.S. Dist. LEXIS 107664, at *9 (S.D. Cal. Dec. 3, 2008) (dismissing suit challenging California's ban on same-sex marriage that named only the Governor and Attorney General as defendants because "Plaintiff does 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"); *see also Bishop v. Oklahoma*, 333 Fed. App'x 361, 365 (10th Cir. 2009) (unpublished) (ordering dismissal of claims against Oklahoma Governor and Attorney General because "these claims are simply not connected to the duties of the Attorney General or the Governor. Marriage licenses are issued, fees collected, and the licenses recorded by the district court clerks."); *cf. Perez v. Sharp*, 32 Cal. 2d 711, 712 (1948) ("petitioners seek to compel the County Clerk of Los Angeles County to issue them a … license to marry").

The district court attempts to marshal *Lockyer* and it's discussion of ministerial duties to argue that "[c]ounty clerks have no discretion to disregard a legal directive from the existing state defendants," Doc. No. 709 at 9, but county clerks' legal duties with respect to marriage flow not from the ipse dixit of State officials but directly from California law. *See, e.g.*, CAL. FAM. CODE § 350(a) ("Before entering a marriage … the parties shall first obtain a marriage license from a county clerk."); *id*. § 352 ("No marriage license shall be granted if either of the applicants lacks the capacity to enter into a valid marriage."); *Id.* § 354(b) ("[I]f the clerk deems it necessary, the clerk may examine the applicants for a marriage license on oath at the time of the application.").

and all-but unanimous judgment of courts across the Country. This overwhelming body of precedent confirms that the Federal Constitution simply provides no warrant for striking down the traditional definition of marriage as reaffirmed in Prop 8.

i. The Supreme Court's Decision in *Baker* Mandates Reversal.

In *Baker v. Nelson*, 409 U.S. 810 (1972), 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) (Doc. No. 36-3 at 6); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The same-sex couple in *Baker* placed primary reliance on *Loving v. Virginia*, 388 U.S. 1 (1967), which had been decided five years earlier. 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), and its 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). Plaintiffs' claims are the same as those rejected in *Baker*, and the district court's decision thus conflicts with a binding Supreme Court authority. *See also Lawrence v. Texas*, 539 U.S. 558,

585 (2003) (O'Connor, J., concurring in judgment) (concluding that "preserving the traditional institution of marriage" is a "legitimate state interest").

ii. This Court's Decision in *Adams* Mandates Reversal.

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 likewise forecloses Plaintiffs' claims.

iii. The District Court's Ruling Is Contrary to the All But Unanimous Conclusion of Other Courts Across the Country.

The district court's decision is also contrary to the overwhelming weight of judicial authority addressing the validity of the traditional opposite-sex definition of marriage under the Federal Constitution, including decisions by the United States Court of Appeals for the Eighth Circuit, two State courts of final resort, two intermediate State courts within this Circuit in decisions that were denied review by the States' supreme courts, and virtually every other court to address the issue. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123,

148 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 453 (Ariz. Ct. App. 2003), *review denied by Standhardt v. MCSC*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. Ct. App. 1995); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App.), *review denied by* 84 Wn.2d 1008 (Wash. 1974); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973); *Baker*, 191 N.W.2d at 187; *but see Massachusetts v. United States Dep't of Health & Human Serv.*, No. 1:09-11156-JLT, 2010 U.S. Dist. LEXIS 67927 (D. Mass. July 8, 2010); *Gill v. Office of Personnel Mgmt.*, No. 09-10309-JLT, 2010 U.S. Dist. LEXIS 67874 (D. Mass. July 8, 2010). The sheer weight of authority opposed to the district court's decision further confirms that that decision will likely be reversed on appeal.

B. There Is No Fundamental Right to Same-Sex Marriage.

Substantive due process "specially protects those fundamental rights and liberties which are," (1) "objectively, deeply rooted in this Nation's history and tradition," and (2) "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation marks and citations omitted). This test is 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; *accord District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2322 (2009). The purported right to marry a person of the same sex plainly fails this test. Indeed, same-sex marriage was unknown in the laws of this Nation before 2004, and same-sex marriages are now performed legally in only five States and the District of Columbia.[10]

The district court nevertheless attempted to redefine the established fundamental right to marry into an abstract right to marry the person of one's choice without regard to gender, asserting that "plaintiffs' relationships are consistent with the core of the history, tradition and practice of marriage in the United States." Ex. A at 113. But history and precedent make clear that the fundamental right to marry recognized by the Supreme Court is the right to enter a legally recognized union only with a person of the opposite sex.

1. With only a handful of very recent exceptions, marriage is, and always has been, understood—in California, in this Country, and indeed in every civilized society—as limited to opposite-sex unions. Indeed, 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 v. Robles*, 855 N.E.2d at 8. In the words of highly respected anthro-

[10] 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 relevant State constitution.

pologist 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) (Trial Exhibit DIX63); *see also* G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988) (DIX79) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring can be found in all societies.").

The opposite-sex character of marriage has always been understood to be a central and 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 Amendment, *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). Modern dictionaries continue to reflect the same understanding. The NEW OXFORD AMERICAN DICTIONARY (2001), 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."[11]

Nor can this understanding plausibly be dismissed, as the court below did, as nothing more than an "artifact of a time when the genders were seen as having distinct roles in society and in marriage." Ex. A at 113. Rather, it reflects 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, an overriding purpose of marriage in every society is, and has always been, to approve and regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In

[11] To be sure, some recent dictionaries, while retaining the traditional opposite-sex definition of marriage as their principle definition, also acknowledge the novel phenomenon of same-sex marriage. *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). The recent vintage of such discussions only underscores the lack of any grounding for the district court's newly minted definition of marriage in the history, legal traditions, and practices of our Country.

particular, through the institution of marriage, societies have sought 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.

This understanding of the central purposes of marriage is 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." 1 WILLIAM BLACKSTONE, 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: it is by virtue of this relation that infants are protected, maintained, and educated." *Id*.; *see also id*. *35 ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children"). 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, 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"); BERTRAND RUSSELL, MARRIAGE AND MORALS 156 (1929) ("But for children, there would be no need for any institution connected with sex. . . . [for] it is through children alone that sexual relations become of importance to society"); QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 ("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 (2003) ("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."). In the words of the eminent sociologist Kingsley Davis, "[t]he 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) (DIX50).

This understanding of marriage and its purposes has also prevailed in California, just as it has everywhere else. Indeed, 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, " *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952); that "the first purpose of matrimony, by the laws of nature and society, is procreation," *Baker v. Baker*, 13 Cal. 87, 103 (1859); and thus that "the sexual, procreative, [and] child-rearing aspects of marriage" go "to the very essence of the marriage relation," *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 184-85 (Cal. Ct. App. 2008).

In short, the understanding of marriage as a union of man and woman, uniquely involving procreation and the rearing of children by those who brought them into the world, is age-old, universal, and enduring. Indeed, this oft-expressed understanding of the origins and defining purposes of marriage was essentially undisputed prior to the very recent advent of the movement for redefining that institu-

tion to include same-sex relationships. The United States Congress, in defining marriage for all federal-law purposes as the "legal union between one man and one woman as husband and wife," 1 U.S.C. § 7, thus stood on firm historical ground when it expressly found that, "[a]t 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 district court brushed aside the abiding connection between marriage and "responsible procreation and child rearing," blithely asserting that "states have never required spouses to have an ability or willingness to procreate in order to marry." Ex. A at 113. The district court did not even acknowledge the wealth of precedent squarely and repeatedly holding that the animating procreative purposes of marriage are in no way belied 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." Ex. A at 111. *See Standhardt*, 77 P.3d at 462; *Adams*, 486 F. Supp. at 1124-25; *In re Kandu*, 315 B.R. at 146-47; *Conaway v. Deane*, 932 A.2d 571, 633 (Md. Ct. App. 2007) (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).[12]

Not only would such an inquiry be administratively burdensome and intolerably intrusive, it would also be unreliable. Most obviously, many opposite-sex couples who do not plan to have children may experience "accidents" or "change their minds," *Morrison*, 821 N.E.2d at 24-25, 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," Monte Neil Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y 313, 345 (2008) (DIX1028). 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.[13] It is thus neither surprising nor

[12] *Cf. Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 475 (1981) (plurality) (rejecting as "ludicrous" argument that California's law criminalizing statutory rape for the purpose of preventing teenage pregnancies was "impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females who are, by definition, incapable of becoming pregnant"); *id.* at 480 n.10 (Stewart, J., concurring) (rejecting argument that the statute was "overinclusive because it does not allow a defense that contraceptives were used, or that procreation was for some other reason impossible").

[13] Infertile marriages also advance the institution's central procreative purposes by reinforcing social norms that heterosexual intercourse—which in most cases can produce offspring—should take place only within marriage.

significant that States 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 opposite-sex couples are, in general, capable of procreation. *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53, 69 (2001) (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.").[14] Again, the district court did not address any of these points, or even acknowledge the many cases embracing them.

Nor, contrary to the district court's assertion, *see* Ex. A at 112, does the elimination of the antimiscegenation laws that once blighted many States' legal landscape somehow support the district court's startling and patently inaccurate claim that "gender restrictions . . . were never part of the historical core of the institution of marriage." Ex. A at 113. 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 this Country and indeed in virtually every society. The same cannot be said for racial restrictions on marriage. Even in this Country, interracial marriages were legal at common law, in six

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

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. 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 either that the Supreme Court held that such laws violated the fundamental right to marry in *Loving*, 388 U.S. at 12, or that, a scant five years later, the Supreme Court in *Baker* unanimously and summarily rejected on the merits precisely the same constitutional claims asserted by Plaintiffs here.

The elimination of the doctrine of coverture likewise provides no support for the district court's gender-blind view of the fundamental right to marry. Much like antimiscegenation laws, coverture was never universally understood to be a defining characteristic of marriage. 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. 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 England or this Country. *See* BLACKSTONE, 1 COMMENTARIES at * 432 ("in the civil law the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries: and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband"). 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) ("From the civil, rather than the common law, are derived those property rights of married women which are recognized in Louisiana, California, and others of the Southwestern States, originally colonized by the Spanish and French."); CAL. CONST. art. XI, § 14 (1849) (providing that property owned by a wife before marriage and acquired after marriage by gift, by will, and by inheritance "shall be her separate property" and adopting community property system for other property acquired during the marriage). 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 was not accompanied by any change in the traditional opposite-sex definition of marriage. The district court's assertion that the traditional definition of marriage simply reflects "gender roles mandated through coverture," Ex. A at 112, is thus manifestly incorrect. Further, unlike antimiscegenation laws, coverture was never held to violate the fundamental right to marry. *Cf. United States v. Yazell*, 382 US 341, 352-53 (1966) ("We have no federal law relating to the protection of the separate property of married women. We should not here invent one and impose it upon the States, despite our personal distaste for coverture provisions such as those involved in this case."). Coverture was abolished gradually on a state-by-state basis, primarily by legislative rather than judicial action, and this precedent thus provides no support whatsoever for the district court's precipitate attempt to abolish once and for all the traditional definition of marriage by judicial decree.

In short, in finding that the fundamental right to marry is unqualified by gender, the district court wholly failed even to acknowledge—let alone confront—the wealth of historical, scholarly, and other support for the traditional opposite-sex understanding of marriage and its essential procreative purposes. The district court thus ignored a central and defining feature of our "Nation's history, legal traditions, and practices" with respect to marriage, 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(quotation marks omitted). 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.

2. 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."); *cf. Bowers v. Hardwick*, 478 U.S. 186, 215 (1986) (Stevens, J., dissenting) (describing marriage as a "license to cohabit and to produce legitimate offspring").

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 Plain-

tiffs 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 close connection between marriage and procreation, *id.* at 383 (quoting *Loving* and *Skinner*); further framed the right to marry as a right to bear and raise children "in a traditional family setting," *id.* at 386; and reasoned that the challenged law would frustrate the purposes of marriage by leading, as a "net result," to "simply more illegitimate children," *id*. at 390.

Further, when the Supreme Court decided *Baker* in 1972, it had long been well established that the right to marry is fundamental, and the historical changes in the law of marriage relied on by the district court were already largely complete. *Baker* thus necessarily establishes that the fundamental right to marry does not include the right to marry a person of the same sex.

C. Proposition 8 Is Not Subject to Heightened Equal Protection Scrutiny.

When "individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement … the Equal Protection Clause requires only a rational means to serve a legitimate end." *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985). Because only opposite-sex relationships are potentially naturally procreative and same-sex relationships categorically are not, couples in same-sex relationships are undeniably

not similarly situated to those in opposite-sex relationships with respect to the central purposes of marriage. This distinction is not only "relevant to interests the State has authority to implement," but, as demonstrated above, it forms the very foundation of what marriage has always, and everywhere, been understood to be.

The district court nevertheless concluded that Proposition 8 classifies individuals based on sexual orientation and that "strict scrutiny is the appropriate standard of review to apply to classifications based on sexual orientation." Ex. A at 122. The district court failed to acknowledge, however, that this Court's binding precedent establishes that classifications based on sexual orientation are subject only to rational basis review. *See e.g., Witt v. Department of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990). Ten other federal circuit courts—all that have addressed the issue—agree. *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); *Stefan 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, 632 (1996) (applying "conventional" rational basis scrutiny to classification based on sexual orientation).

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, "there 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) (DIX934). 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.[15]

[15] 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." M.V. LEE BADGETT, MONEY, MYTHS, & CHANGE: THE ECONOMIC LIVES OF LESBIANS & GAY MEN 47 (2001) (DIX950). 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." M.V. Lee Badgett, *Dis-*

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." *Cleburne*, 473 U.S. at 445. This Court held that gays and lesbians failed this test 20 years ago, *see High Tech Gays*, 895 F.2d at 574; *see also Ben-Shalom v. Marsh*, 881 F.2d at 465-66 (same), and since that time their political power has grown exponentially.[16] 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). But according to the American Psychiatric Association, "there

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crimination Based on Sexual Orientation: A Review of the Literature in Economics and Beyond, *in* SEXUAL ORIENTATION DISCRIMINATION: AN INTERNATIONAL PERSPECTIVE 19, 21 (M.V. Lee Badgett & Jefferson Frank, eds. 2007) (DIX2654). *See also* Letitia Anne Peplau & Linda D. Garnets, *A New Paradigm for Understanding Women's Sexuality & Sexual Orientation*, 56 J. SOC. ISSUES 329, 342 (2000) (DIX1235); Laura Dean, Ilan H. Meyer, et al., *Lesbian, Gay Bisexual, and Transgender Health: Findings and Concerns*, 4 J. GAY & LESBIAN MEDICAL ASS'N 102, 135 (2000) (DIX1248).

[16] 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." About Equality California, *available at* http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4025493 (last visited August 4, 2010).

are no replicated scientific studies supporting any specific biological etiology for homosexuality." American Psychiatric Association, *Sexual Orientation* (2010), *available at* http://www.healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx (last visited August 4, 2010).[17]

Despite all this, the district court flatly asserted that "gays and lesbians are the type of minority strict scrutiny was designed to protect" and that "strict scrutiny is the appropriate standard of review to apply to . . . classifications based on sexual orientation." Ex. A. at 121-22. 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.[18]

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[17] 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." Trial Tr. 2285. Professor Peplau writes that "[a]vailable evidence indicates that biological contributions to the development of sexual orientation in women are minimal." Letitia Anne Peplau, et al., *The Development of Sexual Orientation in Women*, 10 ANNUAL REV. SEX RESEARCH 70, 81 (1999) (DIX1239). Professor Peplau also acknowledges that women's sexual orientation is "fluid, malleable, shaped by life experiences, and capable of change over time." Linda D. Garnets & Letitia Anne Peplau, *A New Look at Women's Sexuality & Sexual Orientation*, in CSW UPDATE, NEWSLETTER OF THE UCLA CENTER FOR THE STUDY OF WOMEN at 5 (Dec. 2006) (DIX1010). *See* LETITIA ANNE PEPLAU, ET AL., THE DEVELOPMENT OF SEXUAL ORIENTATION IN WOMEN at 93; Trial Tr. at 2212 (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").

[18] The district court's suggestion that Proposition 8 discriminates on the basis of sex, *see* Ex. A at 120-21, is also erroneous. Every other court to address this question under the Federal Constitution, and every state high court addressing this

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

D. 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 judicial restraint," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993), 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 government purpose." *Heller*, 509 U.S. at 320. That rational relationship "is not subject to courtroom factfinding and may be based on rational speculation

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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*, 354 F. Supp. 2d at 1307-08; *In re Kandu*, 315 B.R. at 143; *Singer*, 522 P.2d at 1192; *Marriage Cases*, 183 P.3d at 436; *Hernandez v. Robles*, 855 N.E.2d at 6; *Andersen v. King County*, 138 P.3d 963, 988-90 (Wash. 2006) (plurality); *Baker v. Vermont*, 744 A.2d at 880 n.13; *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.

unsupported by evidence or empirical data." *Id.* (quotation marks omitted). Further, "courts are compelled under rational-basis-review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* at 320-21 (quotation marks omitted). In short, 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 of negating "every conceivable basis which might support it." *Id*. at 320 (quotation marks omitted). The district court's contrary conclusions notwithstanding, Plaintiffs have not come close to carrying this heavy burden.

1. As this Court recognized in *Adams*, limiting marriage to opposite-sex couples satisfies rational basis review, because same-sex relationships, unlike opposite-sex relationships, "never produce offspring." 673 F.2d at 1042-43. Contrary to the district court's naked assertions, one need not embrace particular "moral and religious views," Ex. A at 130, or "antiquated and discredited notions of gender," *id*. at 124, 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 that . . . [o]nly women may become pregnant."). And while there are numerous

rational bases supporting Proposition 8, this simple distinction goes to the heart of the matter. Because only the relationship of a man and a woman can "produce offspring," such relationships uniquely implicate the vital societal interest in increasing the likelihood that children will be born to and raised by both their natural parents in stable, enduring family units.

While it is true that "[s]ame-sex couples can have (or adopt) and raise children," Ex. A at 128, 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, heterosexual couples who practice sexual behavior outside their marriage are a big threat to irresponsible procreation." Trial Tr. 3107; *see also* Doc. No. 202 at 25 (Plaintiffs' Opp. S.J.) (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 aspect 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.*, *Hernandez*, 855 N.E.2d at 7; *Morrison*, 821 N.E. 2d at

24-25.[19] The district court's caricature of the State's procreative interest as "promoting opposite-sex parenting over same-sex parenting," *see* Ex. A at 127, is thus wide of the mark.[20] Likewise, the fact that California permits same-sex couples to

[19] The threats to society from "irresponsible procreation" are plain. 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, in light of this threat, the State of California has established a grant program targeted at "reduc[ing] the number of … unwed pregnancies," recognizing that such pregnancies "affect community health and success." CAL. WELF. & INST. CODE §§ 18993, 18993.1(g). The program thus aims to "reduce the number of children growing up in homes without fathers as a result of [unwed] pregnancies" and to "[p]romote responsible parenting and the involvement of the father in the economic, social, and emotional support of his children." *Id*. § 18993.2(b). More than simply draining State resources, fatherlessness harms society by leading to increased criminal and other anti-social behavior. *See 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."). President Obama has emphasized these concerns: "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." Barack Obama, Statement at the Apostolic Church of God (June 15, 2008) (*quoted at* Trial Tr. 62), *available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html. Even Plaintiffs' expert Professor Lamb agrees "[t]hat the 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." Trial Tr. at 1073.

[20] At any rate, the district court's startling conclusion that a child does not benefit from being raised by its own married mother and father, and that indeed it is *irrational* to believe otherwise, is plainly unwarranted. 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. at 602; *see also Gonzalez 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 par-

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. And California addresses this issue by enlarging the pool of potential adoptive parents to include not only same-sex couples but "any otherwise qualified single adult or two adults,

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ents"). Indeed, "[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 8; *see also id*. at 4; *Lofton*, 358 F.3d 804, 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") (quotation marks and brackets omitted).

This widely shared and deeply engrained view is backed up by social science. *See, e.g.*, Kristin Anderson Moore, et al., *Marriage From a Child's Perspective*, CHILD TRENDS RESEARCH BRIEF at 6 (June 2002) (*DIX26) ("Research 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."); *id.* at 1-2 ("[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) (DIX21) ("The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents."); *see also* Affidavit of Professor Steven Lowell Nock, *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ont. Sup. Ct. Justice 2001) (DIX131, attached as Exhibit C) (detailing flaws in same-sex parenting scholarship and studies). In light of all of this evidence, the district court's conclusions that "the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes," Ex. A at 127, and that the biological bond between a child and its mother and father "is not related to a child's adjustment outcomes," Ex. A at 96, are simply unsupportable.

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.

In sum, same-sex relationships neither advance nor threaten the State's interest in responsible procreation in the way that opposite-sex relations 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. 361, 383 (1974); *see also Board of Trustees v. Garrett*, 531 U.S. 356, 366-67 (2001) ("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") (quotation marks omitted); *Vance*, 440 U.S. at 109 (law may "dr[aw] a line around those groups ... thought most generally pertinent to its objective"). Not surprisingly, "a host of judicial decisions" have relied on the unique 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 Wilson*, 354 F. Supp. 2d at 1309; *In re Kandu*, 315 B.R. at 146-47; *Adams*, 486 F.

Supp. at 1124-25; *Baker*, 191 N.W.2d at 186; *Standhardt*, 77 P.3d at 462-64; *Singer*, 522 P.2d at 263-64. This is true not only of virtually every 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 630-31; *Hernandez*, 855 N.E.2d at 7 (N.Y. 2006); *Andersen v. King County*, 138 P.3d at 982-83 (plurality); *Morrison v. Sadler*, 821 N.E.2d at 25. The district court does not even cite, let alone address, any of these decisions. Rather, the district court dismisses out of hand the notion that procreation and childrearing has anything to do with the traditional opposite-sex definition of marriage, and thus condemns as *irrational* all those who disagree, including scores of federal and state court judges, not to mention *this* Court.

2. Proposition 8 also allows California to proceed with caution when considering fundamental changes to a vitally important social institution. In the famous words of Edmund Burke, "it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages to common purposes of society or on building it up again, without having models and patterns of approved utility before his eyes." REFLECTIONS ON THE REVOLUTION IN FRANCE 90 (1790). And, contrary to the district court's conclusion that "California need not restructure any institution to allow same-sex couples to marry," Ex. A at 126, Plaintiffs' own expert Professor Nancy Cott of Harvard and oth-

er prominent supporters of same-sex marriage admit that redefining marriage to include same-sex couples would profoundly alter that institution. *See* Trial Tr. 268 (Cott). Indeed, when Massachusetts legalized same-sex marriage, 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." *Id*. And, as Yale Law School Professor William Eskridge, a prominent gay rights activist, explains, "enlarging the concept [of marriage] to embrace same-sex couples would necessarily transform it into something new." WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 19 (2006) (PX2342).

As an initial matter, redefining marriage in this manner 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 222 (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 ("[T]hose 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.").

As Plaintiffs' own expert Professor Cott conceded, redefining marriage in this manner would also change the public meaning of marriage, and changing the public meaning of marriage will "unquestionably [have] real world consequences." Tr. 311-13 (Cott). 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. Tr. 254.[21] But there is plainly a rational basis for concern that officially embracing an understanding of marriage as nothing more than a loving, committed relationship between consenting adults, unconnected to 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, some gay rights advocates favor same-sex marriage *because* of these likely adverse effects. They forcefully argue that "[s]ame-sex marriage is a breathtakingly subversive idea," E.J. Graff, *Retying the Knot*, THE NATION, June 24, 1996 at 12 (DIX1445), that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart," Ellen

[21] 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." JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, & GOOD FOR AMERICA 172 (2004) (DIX81). *See also id.* at 84 ("How the numbers will shake out is impossible to say.").

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," *see* Graff, *Retying the Knot* at 12. And 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) (*DIX49). He explains that the deinstitutionalization of marriage is associated with "high levels of non-marital childbearing, cohabitation, and divorce." *Id.* at 858; *see also* Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 SOC'Y 25, 26 (2004) (*DIX60); Trial Tr. 2774-77 (Blankenhorn).

The pivotal finding of the district court that led it to reject this state interest 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 opposite-sex marriages." Ex. A at 83-84 (Finding 55). Indeed, 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." Ex. A at 125-26. The court relied on the

testimony of a lone psychologist who looked only at marriage and divorce rates in Massachusetts during the four-year periods before and after judicial imposition of same-sex marriage in that state in 2004. *See* Finding 55. Leaving aside the obvious fact that it is far too soon to draw any meaningful empirical conclusions based on the scant experience with this novel experiment, the data that is available provides little comfort to those who are concerned with preserving, let alone *renewing*, the strength of marriage as an institution. In Massachusetts, both the divorce rate and the marriage rate changed for the worse from 2004 to 2007. *See, e.g.*, CDC, Divorce Rates By State, *available at* http://www.cdc.gov/nchs/data/nvss/Divorce%20Rates%2090%2095%20and%2099-07.pdf (PX1309) *and* CDC, National Marriage and Divorce Rate Trends, *available at* http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (PX2345) (divorce rate in Massachusetts *increased* 4.5 percent while national average *decreased* by 2.7 percent). 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 do not attempt to control for any of these variables. *See* Finding 55.

In forecasting the future, the district court also turned a blind eye to the experience of the Netherlands, which instituted same-sex marriage in 2001. 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, *available at* http://statline.cbs.nl/StatWeb/publication/?DM=SLEN&PA=37772ENG&D1=0-4&D2=a&LA=EN&VW=T (DIX1887); Statistics Netherlands, Unmarried Couples With Children 1995-2009, *available at* http://statline.cbs.nl/StatWeb/publication/?DM=SLEN&PA=37312ENG&D1=35,38-40&D2=a&LA=EN&HDR=G1&STB=T&VW=T (DIX2639); Statistics Netherlands, Total Single Parent Households, 1995-2009), *available at* http://statline.cbs.nl/StatWeb/publication/?DM=SLEN&PA=37312ENG&D1=31,46&D2=a&LA=EN&HDR=G1&STB=T&VW=T (DIX2426). 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. Certainly, 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 adverse societal consequences from adoption of same-sex marriage is not only debatable, but is being hotly debated by reasonable people of good will on both sides, in California and throughout the country.

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. To the contrary, our system of federalism is designed to permit "novel social … experiments" like the redefinition of marriage to be undertaken in individual States, thus minimizing the "risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As same-sex marriage advocate Jonathan Rauch recognizes, there is wisdom in "find[ing] out how gay marriage works in a few states" while "let[ting] the other states hold back." Pew Forum on Religion & Public Life, *An Argument for Same-Sex Marriage: An Interview With Jonathan Rauch*, April 24, 2008, *available at* http://pewforum.org/Gay-Marriage-and-Homosexuality/An-Argument-For-Same-Sex-Marriage-An-Interview-with-Jonathan-Rauch.aspx (DIX1035). 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." Trial Tr. 1456-57. The district court's ruling improperly short-circuits this process and the "earnest and profound debate about the morality, legality, and practicality" of redefining marriage that is currently taking place in California and around the Nation. *Glucksberg*, 521 U.S. at 735; *cf. Schalk and Kopf v. Austria,* App. No. 30141/04 ¶¶

58, 61-62 (June 24, 2010) (European Court of Human Rights) (declining to "rush to substitute its own judgment in place of that of the national authorities" and 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").

3. 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. 166, 179 (1980). 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 (internal quotation marks omitted); *see also Romer*, 517 U.S. at 634-45 (drawing "inference" of animus only because the challenged law 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" or by the "belief that same-sex couples simply are not as good as opposite-sex couples." Ex. A at 132.

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 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.[22] Even some leading advocates for same-sex marriage reject the extreme view embraced by the district court, recognizing instead that most traditional marriage supporters are "motivated by a sincere desire to do what's best for their marriages, their children, their society." RAUCH,

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[22] *See* Senator Barack Obama, 2008 Human Rights Campaign Presidential Questionnaire at 3, *available at* http://www.lgbtforobama.com/pdf/Obama_HRC_questionaire.pdf ("I do not support gay marriage. Marriage has religious and social connotations, and I consider marriage to be between a man and a woman.").

GAY MARRIAGE at 7 (2004). Indeed, Plaintiffs' own witnesses acknowledged that voters had a variety of legitimate reasons for supporting Proposition 8.[23]

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 decreed such an inquiry off-limits, *see Southern*

[23] 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," Trial Tr. 1302 (Sanders); a "feeling that marriage is tied to procreation," Trial Tr. 1304 (Sanders); "preserv[ing] the historical tradition of marriage in this country," Trial Tr. 1303 (Sanders); "a sincere desire to do what's best for their marriages, their children, their society," Trial Tr. 509-10 (Chauncey); and a "negative reaction to … activist judges," Trial Tr. 1772-73 (Segura). Indeed, Plaintiffs' experts have found that a sizeable proportion of gays and lesbian themselves oppose legalizing same-sex marriage. *See* Ken Cimino & Gary M. Segura, *From Radical to Conservative: Same-Sex Marriage, and the Structure of Public Attitudes* at 28, Table 5, Annual Meeting of the American Political Science Association, Washington, D.C., Aug. 31-Sept. 4, 2005, *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/4/1/5/4/p41545_index.html#get_document (DIX2649) (26.5% of self-identified LGBT individuals polled opposed legalizing same-sex marriage); Gregory M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample* at 19, SEX. RES. & SOC. POLICY (2010); *published online at* http://www.springerlink.com/content/k186244647272924/fulltext.pdf (prepublication draft *PX930) (22.1% of self-identified LGB individuals polled opposed legalizing same-sex marriage).

Alameda Spanish Speaking Org. v. Union City, 424 F.2d at 295 (explaining that the question of voter motivation is simply "not … an appropriate one for judicial inquiry."), but even if the subjective motivations of the millions of Californians who voted for 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," Ex. A at 134, 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. "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." Argument

in Favor of Proposition 8, California General Election Official Voter Information Guide at 56 (Nov. 2008) (*PX1).

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 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, Ex. A at 134, there is nothing coded or subliminal about these legitimate concerns.

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 justifica-

tions, render that definition constitutionally suspect. 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, Ex A at 8, 133, is simply contrary to this Nation's enduring political traditions. As the Supreme Court has long recognized, marriage has "more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). And from the dawn of the American Revolution, which was preached from the pulpits, to the abolitionist preachers who rallied the anti-slavery cause, to the religious leaders who inspired the civil rights movement, religion and morality have always played a prominent and entirely proper role in American political life. *See Glucksberg*, 521 U.S. at 735 (noting that "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the *morality*, legality, and practicality of physician-assisted suicide," and permitting "this debate to continue, as it should in a democratic society") (emphasis added).

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.[24] *Lawrence* held only that moral disapproval of homosexual relationships could not justify a law *criminalizing* "the most private human conduct, sexual behavior, in the most private of places, the home," *id*. at 567, *see also id.* at 571, and *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 privacy within the home 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*, No. 08-1371, slip op. at 21 n.17 (U.S. June 28, 2010) (emphasizing "the distinction between state *prohibition* and state *support*"); *Maher v. Roe*, 432 U.S. 464, 477 (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."). The majority of Californians, like the vast majority of Americans, 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 supporting this traditional

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

definition with its laws.

III. IRREPARABLE HARM IS CERTAIN IN THE ABSENCE OF A STAY.

"[I]t is clear that a state suffers irreparable injury whenever an enactment of its people … is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).[25] Further, absent a stay pending appeal, same-sex couples will be permitted to marry in the counties of Alameda and Los Angeles—and possibly throughout the California. *See* Jean Elle and Jessica Greene, *Here Come the Brides?*, NBC BAY AREA, Aug. 6, 2010, *available at* http://www.nbcbayarea.com/news/politics/Here-Come-the-Brides-100114279.html (reporting that if stay is lifted San Francisco is "preparing to perform hundreds of same-sex marriages starting today and running through the weekend" and will extend hours and keep offices "open all weekend"); Kim Lamb Gregory, *County Prepared for Ceremonies if Proposi-*

[25] In denying a stay, the district court faulted Proponents for focusing on harms its ruling would inflict on the State of California and its People. *See* Doc. No. 727 at 7. But as we have explained, the interests of the State and its People are the very interests California law authorizes Proponents to represent in this litigation, especially where as here they are not represented "with vigor" by the Attorney General and other public officials. *See supra* Part I. In addition, California grants Proponents a direct interest in the validity of Proposition 8 which would unquestionably be harmed if a stay is not entered. *See id*. Further, the district court ignored the harm that will flow absent a stay to Proposed Intervenor Imperial County, a governmental entity that will be affected by the district court's ruling and which has also appealed that ruling.

tion. 8 Stay Is Lifted, VENTURA COUNTY STAR, August 5, 2010, *available at* http://www.vcstar.com/news/2010/aug/05/county-prepared-for-ceremonies-if-prop-8-stay-is/ (reporting that "[i]f a window opens that allows same-sex couples to be married in California, the Ventura County Clerk and Recorder's Office is prepared to issue marriage licenses immediately"). Such same-sex marriages will be licensed under a cloud of uncertainty and, should Proponents succeed on appeal, will be invalid *ab initio*. Indeed, in 2004, the City and County of San Francisco precipitately issued marriage licenses to same-sex couples, resulting in approximately 4,000 purported same-sex marriages in about one month's time. *See Lockyer v. City and County of San Francisco*, 95 P.3d at 465, 467. The California Supreme Court held that San Francisco lacked authority for its actions, and ordered that "all same-sex marriages authorized, solemnized, or registered by the city officials must be considered void and of no legal effect from their inception." *Id*. at 495. Specifically, the Court ordered San Francisco to:

> (1) identify all same-sex couples to whom the officials issued marriage licenses, solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that this court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity, and that these officials have been directed to correct their records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples an opportunity to demonstrate that their marriages are not same-sex marriages and thus that the official records of their marriage licenses and marriages should not be revised, (4) offer to refund, upon request, all marriage-related fees paid by or on behalf of same-sex couples, and (5) make appropriate corrections to all relevant records.

Lockyer, 95 P.3d at 498.

Repeating that experience on a state-wide scale would inflict harm on the affected couples, place administrative burdens on the State, and create general chaos, confusion, and uncertainty. Indeed, in interpreting Proposition 8 not to apply retroactively, the California Supreme Court deemed it imperative to avoid "disrupt[ing] thousands of actions taken in reliance on the *Marriage Cases* by these same-sex couples, their employers, their creditors, and many others, throwing property rights into disarray, destroying the legal interests and expectations of thousands of couples and their families, and potentially undermining the ability of citizens to plan their lives." *Strauss*, 207 P.3d at 122.

Given the broad repercussions of invalidating purported same-sex marriages—including the effects on employers, creditors, and others, as well as same-sex couples—the district court plainly erred in focusing narrowly on harms to persons who "seek to wed a same-sex spouse." *See* Doc. No. 727 at 7.[26] Indeed, for precisely these reasons, the Attorney General (who has sided with Plaintiffs on the merits), opposed Plaintiffs' unsuccessful motion for a preliminary injunction because of "the potential harm to a *broad section of the general public* from subse-

[26] Further, because this is not a class action, Plaintiffs are certainly not entitled to disclaim the harms to other same-sex couples that would flow from the invalidation of their marriages, despite the district court's suggestion to the contrary. See Doc. No. 727 at 7-8.

quent invalidation of possibly thousands of marriages, as well as the ongoing uncertainty about their validity that would undoubtedly persist until a *final determination by an appellate court*." Doc. No. 34 at 13 (emphasis added). While the Attorney General now opposes Proponents' request for a stay, his initial assessment of the risks of prematurely authorizing same-sex marriages is plainly correct.

Further, contrary to the district court's assertions, *see* Doc. No. 727 at 8, *Strauss* does not establish that same-sex marriages performed pursuant its injunction will be deemed valid regardless of the outcome of this case on appeal. In *Strauss*, to be sure, the California Supreme Court held that Proposition 8 did not retroactively invalidate same-sex marriages entered between that Court's decision in *In re Marriage Cases* and Proposition 8's enactment. 207 P.3d at 119-22. Those marriages, however, were upheld on the basis of the California Supreme Court's substantive interpretation of Proposition 8, not a subsequently reversed trial court decision addressing the validity of that provision. Further, if the district court is correct that marriages entered during the pendency of the appeal would remain valid even if Proposition 8 is ultimately upheld on appeal, this would only *underscore* the urgency of a stay, for Plaintiffs would otherwise have the option of mooting this case simply by marrying while the appeal is pending.

IV. OTHER PARTIES WILL NOT BE SUBSTANTIALLY INJURED BY A STAY.

In contrast, a stay will at most subject Plaintiffs to a period of additional delay pending a final determination of whether they may enter a legally recognized marriage relationship. During this time, Plaintiffs will have access to the rights and responsibilities of marriage through domestic partnership, *see* CAL. FAM. CODE § 297.5—a status Plaintiffs Stier and Perry already have, *see* Trial Tr. 153:4-6.[27]

It is not even clear that Plaintiffs would opt to marry if given the choice while appeal of this case is pending. Both Perry and Stier and Katami and Zarrillo could have gotten married before Proposition 8 was enacted in 2008, but both couples chose not to. *See* Trial Tr. 80:2-3 (Zarrillo) (He and Katami have been in a relationship for nine years.); Trial Tr. 169:16-170:11 (Stier) (explaining why she and Perry did not get married in 2008). Indeed, Plaintiff Stier admitted that she did not get married in 2008 because she did not "want any possibility of [marriage] be-

[27] The district court dismissed the availability of domestic partnerships as a means of minimizing the harms Plaintiffs might experience while this case is on appeal. *See* Doc. No. 727 at 9. Yet Plaintiffs' own experts readily acknowledged the lack of any empirical evidence that redefining marriage to include same-sex couples would provide same-sex couples and their children benefits or protection from harms above and beyond those benefits and protections already available through domestic partnerships. *See, e.g.*, Trial Tr. 608 (Peplau) (acknowledging that there are no empirical studies comparing same-sex spouses and domestic partners); Trial Tr. 961-963, 969 (Meyer) (acknowledging lack of empirical support for proposition that gays and lesbians have worse mental health outcomes in California than in any jurisdiction that recognizes same-sex marriage); Trial Tr. 1184 (Lamb) (acknowledging lack of empirical studies comparing children of married same-sex spouses with children of California same-sex domestic partners); Trial Tr. 2302 (Herek) (acknowledging lack of empirical support for link between traditional definition of marriage and hate crimes against gays and lesbians).

ing taken away from us" and thus told Perry to "wait until we know for sure that we can be permanently married." Trial Tr. 170:4-6. Such certainty, of course, will not be available in this case until all avenues for appeal have been exhausted. Further confirming their lack of urgency, Plaintiffs did not appeal the district court's denial of their preliminary injunction motion, and now more than a year has gone by while the parties conducted discovery, participated in trial, and waited for the district court's decision. And even now, Plaintiffs have not represented that they even desire to marry immediately. Indeed, in opposing Proponents' request for a stay, they have taken the position that "[w]hether Plaintiffs marry immediately or at a time of their choosing could not be less relevant." Doc. No. 718 at 10.[28]

V. THE PUBLIC INTEREST WEIGHS IN FAVOR OF A STAY.

"The State of California and its citizens have already confronted the uncertainty that results when marriage licenses are issued in a gender-neutral manner prior to the issuance of a final, judicial determination of legal and constitutional issues. The State and its citizens have a profound interest in not having to confront that uncertainty again." Administration's Opposition to Plaintiffs' Motion for Preliminary Injunction, Doc. No. 33 at 2. While the Governor now contends that the

[28] The district court also purported to factor into its harms analysis the impact of Proposition 8 on "gays and lesbians in California" other than Plaintiffs. Doc. No. 727 at 9. Yet, as noted above, Plaintiffs have not brought this case as a class action, and they therefore do not represent the interests of anyone other than themselves.

district court's yet-to-be-reviewed decision resolves this uncertainty, he is plainly wrong.

Further, by enacting Proposition 22 in 2000 and Proposition 8 in 2008, the people of California have declared clearly and consistently that the public interest lies with preserving the definition of marriage as the union of a man and a woman. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("[T]he district court should give due weight to the serious consideration of the public interest in this case that has already been undertaken by the responsible state officials in Washington, who unanimously passed the rules that are the subject of this appeal."); *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d at 1126-27 ("[O]ur consideration of the public interest is constrained in this case, for the responsible public officials in San Francisco have already considered that interest. Their conclusion is manifested in the Ordinance that is the subject of this appeal."). And while it is always "in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy," *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (quotation marks omitted), such considerations are particularly weighty here, as "it is difficult to imagine an area more fraught with sensitive social policy considerations than" regulation of marriage, *Smelt v. County of Orange, California*, 447 F.3d 673, 681 (9th Cir. 2006). The people of California

have expressed their "concerns and beliefs about this sensitive area" and "have defined what marriage is": "a consensual, contractual, personal relationship between a man and a woman, which is solemnized." *Id*. at 680 (quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court should stay the district court's judgment pending appeal.

Dated: August 12, 2010

Respectfully submitted,

s/ Charles J. Cooper
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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

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Date: August 12, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August 2010, I caused to be served on the following counsel a true and correct copy of the foregoing via electronic mail:

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