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)

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Other

INTRODUCTION

Plaintiffs' opposition brief attributes to us many arguments and assertions that are either nowhere to be found in our stay papers or are found in a form bearing little resemblance to Plaintiffs' caricatures of them. But when Plaintiffs' distortions, caricatures, and straw men are cleared away, their constitutional challenge to Proposition 8 boils down to this: the institution of marriage has been deliberately defined as an opposite-sex union by virtually every society throughout history—from the ancients to the American states—*for no good reason*. Indeed, Plaintiffs say that the opposite-sex definition of marriage has been adopted in California and elsewhere solely for an affirmatively *bad reason*—a "bare … desire to harm" gays and lesbians. Pl. Opp. 11 (quoting *Romer*).

Plaintiffs' constitutional challenge (and the decision below) thus collapses under the weight of its own facial implausibility. For the simple truth is that "[t]here are millions of Americans," as one of the Plaintiffs' own expert witnesses has acknowledged, "who believe in equal rights for gays and lesbians…but who draw the line at marriage." M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED 175 (2009) (PX1273) (quoting Rabbi Michael Lerner). And the record leaves no doubt, none at all, that California, 44 other states, and the vast majority of countries throughout the world continue to draw the line at marriage because it continues to serve a vital societal interest that is equally ubiquitous—to channel poten-

tially procreative sexual relationships into enduring, stable unions for the sake of responsibly producing and raising the next generation. As the Eighth Circuit recently put it in upholding Nebraska's marriage amendment: the state's interest in "steering procreation into marriage … justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can . . . produce children by accident, but not on same-sex couples, who cannot." *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006).

It was thus entirely reasonable for Californians, like the vast majority of people throughout the world, to favor preserving the traditional definition of marriage, as they continue to study the results of experiments with same-sex marriage that are now unfolding in a handful of states and foreign countries.

ARGUMENT

1. In challenging Proponents' standing to appeal,[1] Plaintiffs and CCSF simply ignore the California Supreme Court's decision allowing *these Proponents* to

[1] Plaintiffs also challenge Imperial County's standing to appeal, citing the district court's conclusions that Imperial County " 'has no legally-protected interest relating to the state's marriage laws,' and 'may not stand in to defend Proposition 8 on appeal if the legal representatives of the state determine that defending Proposition 8 is not in the state's best interests.' " Pl. Opp. 28. Those conclusions are erroneous. *See* Stay Mtn. 23 n.9; *PG & E v. County of Stanislaus*, 947 P.2d 291, 300-01 (Cal. 1997) ("California law … explicitly provides that a county's board of supervisors, not the state Attorney General, directs and controls litigation in which a county is a party (Gov. Code, § 25203), and that county counsel, not the state Attorney General, ordinarily represents counties in civil actions (*id.*, § 26529).").

intervene to defend *this Proposition* against a state constitutional challenge after state officials declined to defend it (just as they do here). *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).[2] *Strauss* is dispositive,[3] for the Supreme Court has held that where the State "Supreme Court ha[d previously] 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," *Karcher v. May*, 484 U.S. 72, 82 (1984), they will be deemed "agents of the people of [the State] to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) ("*AOE*").[4]

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

[3] *Strauss* follows a long line of California Supreme Court decisions recognizing the unique interest that proponents have in defending the validity of initiatives. *See, e.g., 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 v. Eu*, 816 P.2d 1309, 1312 (Cal. 1991).

[4] The Arizona cases cited by CCSF, *see* CCSF Opp. 5, are all inapposite because unlike *Strauss*, none involved a post-election challenge to the validity of a

Nor does *City and County of San Francisco v. State of California*, 128 Cal. App. 4th 1030 (2005), in any way undermine this conclusion. The proposed intervenors in that case were merely supporters of Proposition 22, and the Court of Appeal emphasized that "this case *does not* present the question of whether an official proponent of an initiative . . . has a sufficiently direct and immediate interest to permit intervention in litigation challenging the validity of the law enacted." *Id.* at 1038.[5]

2. *Baker v. Nelson*, 409 U.S. 810 (1972), mandates reversal of the district court's decision, *see* Stay Mtn. 25-26, and Plaintiffs' attempts to evade that decision all lack merit. First, Plaintiffs claim this case is different because Proposition

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popular initiative that state officials had refused to defend in which the proponents defended the initiative on behalf of the State. In any event, none of those cases were brought to the attention of the Supreme Court in *AOE*. *See AOE*, 520 U.S. at 65. *The Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 460 U.S. 1077 (1983), likewise did not address whether *California* law authorizes initiative proponents to defend the measures they sponsor, and thus is not controlling here.

[5] Indeed, earlier in this litigation Plaintiffs themselves acknowledged the special status California law confers upon initiative sponsors, opposing intervention by a group of Proposition 8 supporters on the ground that the group "lack[ed] a significant protectable interest in the litigation that may be impaired because it cannot establish any injury sufficient to confer Article III standing," because it was "merely one of many supporters of Prop. 8—*not one of the official sponsors*, who are already parties to this case." Doc. No. 135 at 12-13 (emphasis added). By contrast, Plaintiffs did not object to Proponents' motion to intervene as of right or, prior to opposing Proponents' stay request, dispute the district court's analysis 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.

8 "stripped" homosexuals of a right recognized by the California Supreme Court in the *Marriage Cases* decision. But if it was rational for California to adopt and maintain the traditional opposite-sex definition of marriage throughout its history, it was equally rational for California to *restore* that definition by enacting Proposition 8. *See Crawford v. Bd. of Educ.*, 458 U.S. 527, 540 (1982) ("[W]e would not interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people."). After all, the California Supreme Court's 2008 decision invalidating the State's 159-year-old definition of marriage was no more final than was the earlier California Court of Appeal decision upholding it. It was reviewed and overturned by a higher tribunal—the People themselves. Second, contrary to Plaintiffs' claim that there was no "sexual-orientation-based equal protection claim in *Baker*," Pl. Opp. 7, the Jurisdictional Statement plainly argued that Minnesota's refusal to recognize same-sex marriages subjected "*the class of persons who wish to engage in single sex marriages*" to "invidious discrimination," Doc. No. 36-3 at 8, 11 (emphasis added). Third, subsequent Supreme Court decisions have not undermined *Baker*'s validity, for lower courts are bound by *Baker* "until such time as the [Supreme] Court informs them they are not," *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quotation marks and brackets omitted), and none of the cases Plaintiffs cite come close to doing so. Indeed, *Romer v. Ev-*

ans, 517 U.S. 620 (1996), had nothing to do with whether the government must recognize same-sex relationships as marriages, and *Lawrence v. Texas*, 539 U.S. 558 (2003), expressly stated that it did "not involve whether the government must give formal recognition to any relationship that homosexual persons may seek to enter." *Id.* at 578. Nor did either case hold or even suggest that legislation affecting gays and lesbians was subject to anything more than rational basis review under the Equal Protection Clause. *See Romer*, 517 U.S. at 632 (applying rational basis scrutiny); *Lawrence*, 539 U.S. at 574-75 (declining to rest decision on equal protection grounds).[6]

3. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), likewise mandates reversal, as it held that limiting marriage to opposite-sex couples satisfies rational basis review. *Id.* at 1042. It is irrelevant that *Adams* arose in the context of immigration law, where "Congress has almost plenary power to admit or exclude aliens," *id.* at 1041, for the Ninth Circuit applied traditional rational basis review: "We need not … delineate the exact outer boundaries of [the] limited judicial review" that would apply in the immigration context, the Court explained, because

[6] *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), is even farther afield. The case upheld against a First Amendment challenge a state law school's policy requiring that student organizations be open to all students, regardless of status or beliefs. The language cited by Plaintiffs was offered simply to explain the difficulty that the law school would face in attempting instead to evaluate the legitimacy and sincerity of proffered justifications for excluding students from membership in an organization. *See id*. at 2990.

"[w]e hold that Congress's decision to confer spouse status … only upon the parties to heterosexual marriages has a rational basis …. *There is no occasion to consider in this case whether some lesser standard of review should apply*." *Id.* at 1042 (emphasis added).

4. Plaintiffs say little about due process, but they are plainly wrong that our argument logically implies that the state could constitutionally restrict marriage to only fertile opposite-sex couples. The highly intrusive inquiries necessary to police and enforce such a requirement would surely run afoul of constitutionally protected privacy rights, as several courts have noted. *See, e.g.*, Stay Mtn. 34-35. Further, as explained in our stay motion, *see id.* at 35, even infertile marriages between men and women further the procreative purposes of marriage by decreasing the likelihood that the fertile partner will produce children out of wedlock and by strengthening legal and social norms that seek to channel and confine sexual relationships between men and women to marriage.

5. Plaintiffs' contention that *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) is no longer controlling has already been rejected by this Court. Indeed, the plaintiff in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), expressly argued that the "rational basis standard for sexual orientation announced in *High Tech Gays* is [no longer controlling] in light of *Lawrence*, given its (now-discredited) reliance on *Bowers* [*v. Hardwick*,

478 U.S. 186 (1986)]." Brief of Appellant, *Witt*, No. 06-35644 at 51 n.9 (9th Cir. Oct. 12, 2006). This Court, however, held that the rational basis standard established by the *High Tech Gays* decision "was not disturbed by *Lawrence*, which declined to address equal protection." *Witt*, 527 F.3d at 822.

Indeed, Plaintiffs effectively concede that *High Tech Gays* correctly held that sexual orientation is not immutable, for Plaintiffs admit that 30% of lesbians and 13% of gay men experience meaningful choice about their sexual orientation. *See* Pl. Opp. 13. Such statistics would be unthinkable for any class that the Supreme Court has recognized as suspect. *See Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 n.13 (D.C. Cir. 1991) (Ruth Bader Ginsburg, J.) ("The immutable characteristic notion, as it appears in Supreme Court decisions, is tightly-cabined. … [I]t is a trait determined *solely* by the accident of birth. ") (quotation marks omitted).[7]

Further, *Cleburne* makes clear that a minority group is politically powerless for purposes of equal protection analysis only if it has "no ability to attract the attention of the lawmakers." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432,

[7] *Hernandez-Montiel v. INS* held only that Mexican "gay men with female sexual identities in Mexico" form a "particular social group" *for purposes of the asylum laws*. 225 F.3d 1084, 1087 (9th Cir. 2000). Accordingly, it has not affected this Court's equal protection decisions, which have continued to apply rational basis review to classifications based on homosexuality after *Hernandez-Montiel* was decided. *See Witt*, 527 F.3d at 821; *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003).

445 (1985). This Court specifically held in *High Tech Gays* that "homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers.' " 895 F.2d at 574. Plaintiffs are correct that the record here is "vastly different": *High Tech Gays* was decided *20 years ago*. Since then, of course, the political power of gays and lesbians has increased exponentially, especially in California. *See* Stay Mtn. 44 n.16. Indeed, other than redefining marriage, it is difficult to identify a single major policy initiative that the State's gay and lesbian community has failed to see enacted into law. It is little wonder that Governor Schwarzenegger and Plaintiffs alike acknowledge "California's long history of leading the way in recognizing the rights of gay and lesbian families." Pl. Opp. 33.

6. The traditional definition of marriage easily survives rational basis scrutiny, for it serves the State's interests in responsible procreation and childrearing. Plaintiffs' argument that children raised by two same-sex parents do just as well children raised by their mothers and fathers simply fails to come to grips with our responsible procreation argument. Unlike same-sex couples, opposite-sex couples can produce children, often without forethought, through even casual sexual behavior. In nearly every case, the question is *not* whether those children will be raised by two opposite-sex parents or by two same-sex parents, but rather whether they will be raised, on the one hand, by both their mother and father, or, on the

other hand, by their mother alone, often with the assistance of the State. And there is simply no dispute that children raised in the former circumstances do better, on average, than children raised in the latter, or that the State has a direct and compelling interest in avoiding the financial burdens and social costs too often associated with single parenthood.[8] Indeed, even Plaintiffs' expert Professor Michael Lamb agrees that "[c]hildren clearly benefit when they have two parents, both of whom are actively involved." Trial Tr. 1077. Thus, even if Plaintiffs were right that it matters not whether children are raised by their own parents or by any two males or any two females, it would still be perfectly rational for the State to make special provision through the institution of marriage for the unique procreative risks posed by sexual relationships between men and women.

In all events, Plaintiffs are simply wrong that the evidence conclusively establishes that the widespread and deeply rooted belief that children do best when raised by both their biological mother and their biological father is *irrational*.[9]

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[8] *See, e.g.*, Stay Mtn. 49-50 n.20; SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 1, 2 (1994) (DIX124) ("Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parents' race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries.").

[9] Large-scale studies analyzing thousands of families across many years demonstrate beyond doubt the benefits children receive from being raised by their married, biological parents. *See, e.g.*, Stay Mtn. 49-50 n.20; DIX124; Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and*

While Plaintiffs trumpet studies purporting to compare adjustment outcomes for children raised by gay and lesbian couples with those raised by heterosexuals, Professor Lamb could not identify at trial *even a single study* comparing children raised by same-sex couples with children raised *by their married, biological parents*. *See* Trial Tr. 1160-84. Furthermore, even on their own terms the same-sex parenting studies are fundamentally flawed, as most are based on miniscule, non-random, non-representative samples and often rely on self-reporting of parents at a single point in time. *See* DIX131, Stay Mtn. Ex. C; David H. Demo & Martha J. Cox, *Families With Young Children: A Review of Research in the 1990s*, 62 J. MARRIAGE & FAM. 876, 889 (2000) (DIX749) ("a persistent limitation of these studies … is that most rely on small samples of White, middle-class, previously

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Emotional Well-Being of the Next Generation, 15 FUTURE CHILD. 75, 89 (2005) (DIX2). Indeed, prior to his embrace of the movement to redefine marriage to include same-sex couples, even Plaintiffs' expert Professor Lamb repeatedly recognized that children benefit from being raised by both their mothers and their fathers. *See, e.g.*, MICHAEL E. LAMB, ED., THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 10 (1997) (see Trial Tr. 1073) ("[B]oys growing up without fathers seemed to have 'problems' in the areas of sex-role and gender-identity development, school performance, psychosocial adjustment, and perhaps in the control of aggression."); Michael E. Lamb, *Fathers: Forgotten Contributors to Child Development*, 18 HUM. DEV. 245, 246 (1975) (see Trial Tr. 1070) ("[B]oth mothers and fathers play crucial and qualitatively different roles in the socialization of the child."). And while researchers may sometimes include adoptive parents in their samples of "biological" parents, they do so because adoptive parents are "*a rare family form in virtually all studies*," not because these researchers do not know what the term "biological" means. ROBERT A. JOHNSON ET AL., THE RELATIONSHIP BETWEEN FAMILY STRUCTURE AND ADOLESCENT SUBSTANCE ABUSE 6 n.3 (1996) (PX1040) (emphasis added).

married lesbians and their children"); *see also Lofton v. Sec'y, Dep't Children & Family Serv.*, 358 F.3d 804, 825-26 & n.26 (11th Cir. 2004).

Second, Plaintiffs argue that prohibiting same-sex couples from marrying does not itself advance the State's interest in responsible procreation. But even if it were true that redefining marriage to include same-sex couples would not undermine the State's interest in responsible procreation—and as we have explained, there are good reasons to fear that it would, *see* Stay Mtn. 52-59—Plaintiffs simply cannot avoid the force of *Johnson v. Robinson*, 415 U.S. 361 (1974), and other binding Supreme Court decisions that make clear that this is not the relevant constitutional inquiry. *See* Stay Mtn. 51. Rather, the traditional opposite-sex definition of marriage must be upheld so long as recognizing opposite-sex unions as marriages furthers legitimate interests that would not be furthered, or would not be furthered to the same degree, by recognizing same-sex unions as marriages. And that test is plainly satisfied here.

Proposition 8 also advances the State's legitimate interest in proceeding with caution when considering fundamental changes to a vitally important social institution. Plaintiffs caricature this interest as adherence to "tradition alone." Pl. Opp. 21 (quotation marks omitted). But reluctance to fundamentally redefine marriage stems not from blind allegiance to tradition but rather from an eminently reasonable concern that decisively severing marriage from its procreative purposes would

harm the institution's ability to serve these still important societal interests. *See* Stay Mtn. 53-55; Trial Tr. 2780-81 (Blankenhorn). The empirical foundation for the district court's conclusion that this concern is unfounded—indeed, is not even debatable—is short-run data from Massachusetts' experience with same-sex marriage. *See* Doc. No. 708 at 83-84 (Finding 55). But as Plaintiffs' own expert Professor Cott admitted, "the divorce rate question is very hard to answer in a period of simply five years, which is all there has been same-sex marriage in Massachusetts. And that's why … I simply couldn't make a claim about that relation …." Trial Tr. 337.[10] In sum, the only thing beyond debate about the possible long-term societal consequences of same-sex marriage is the district court's error in claiming to foresee them beyond debate. *See* Stay Mtn. 54-59.

Finally, Plaintiffs are doubly wrong in claiming that we advance "giving legal effect to religious doctrine and moral precepts that disapprove of gay and lesbian relationships" as a rational basis for Proposition 8. Pl. Opp. 16 (quotation marks and brackets omitted). First, we do not argue that moral or religious values standing alone provide a rational basis for Proposition 8, but rather that their pres-

[10] Plaintiffs challenge our claim that Professor Cott acknowledged that same-sex marriage would profoundly alter the institution of marriage. *See* Pl. Opp. 20-21. But when same-sex marriage was judicially imposed in Massachusetts, Professor Cott stated publicly that "[o]ne could point to earlier watersheds, but perhaps none quite so explicit as this particular turning point." Trial Tr. 267-68. And at trial, she admitted that gay marriage is "arguably a highly-distinctive turning point." *Id*. at 268.

ence does not alone taint or in any way invalidate the many secular rationales for defining marriage as the union of a man and a woman. *See* Stay Mtn. 63-66. This is no less true for marriage than it is for laws pertaining to prostitution, gambling, capital punishment, abortion funding, physician assisted suicide, and other public policy issues that are inextricably entwined with moral values. Second, religious support for the traditional definition of marriage predates by centuries the modern demands for same-sex marriage and has a doctrinal basis in the sacred nature of matrimony that is wholly distinct from religious teachings regarding homosexuality and cannot reasonably be dismissed as nothing more than moral disapproval of homosexuality. For these reasons, Plaintiffs' attempt to equate reverence for the traditional definition of marriage and hypothetical laws prohibiting gays and lesbians from voting, getting a driver's license, or receiving protection from anti-discrimination laws is utterly baseless.

7. Plaintiffs argue that the chaos and harms that would clearly befall California absent a stay are irrelevant because they have been disclaimed by the Governor and the Attorney General. But the State's interests are ultimately those of its People, and the actions of the state defendants in this case only confirm the People's wisdom in authorizing initiative proponents to represent their interests when their elected officials refuse to do so. *See supra* Part I; Stay Mtn. at 66 n.25.

8. Plaintiffs claim that it is "constitutionally irrelevant" whether they would

opt to marry if given the opportunity while appeal of this case is pending. Pl. Opp. 32. It is unsurprising that Plaintiffs would disclaim concrete plans to marry pending appeal: given their claim that their marriages would remain valid even if the district court's decision is reversed, they no doubt fear their marriages would moot their case and require vacatur of the district court's decision. But because Plaintiffs have *no* concrete plans to marry, not only will a stay not harm them, but their standing to maintain this action is doubtful. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (holding " 'some day' intentions" insufficient to establish standing). At any rate, Plaintiffs' claims of harm to themselves, like their claims regarding the public interest, depend entirely on their claim that Proposition 8 is unconstitutional, *see* Pl. Opp. 31-34, which we have already refuted. *See Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) ("To the extent plaintiffs … maintain that irreparable harm will occur to them because Proposal 2 violates their federal constitutional rights, that does not help them. As we have shown, they have little likelihood of establishing that Proposal 2 violates the Federal Constitution.").

CONCLUSION

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

Dated: August 16, 2010

Respectfully submitted,

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

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the enlargement of brief size granted by court order dated August 13, 2010. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 15 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

Dated: August 16, 2010

By /s/ Charles J. Cooper

9th Circuit Case Number(s) 10-16696

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