

No. 10-16696
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,
v.
ARNOLD SCHWARZENEGGER, et al.
Defendants,
and
DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

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

Brief of *Amici Curiae* United States Conference of Catholic Bishops; California Catholic Conference; National Association of Evangelicals; The Church of Jesus Christ of Latter-day Saints; The Ethics & Religious Liberty Commission; Lutheran Church—Missouri Synod; Calvary Chapel Fellowship of Ministries of California; The Christian and Missionary Alliance; Coral Ridge Ministries; The Council of Korean Churches in Southern California; Southern California Korean Ministers Association; Holy Movement for America

In Support of Defendant-Intervenors-Appellants and Supporting Reversal

Von G. Keetch
Alexander Dushku
R. Shawn Gunnarson
KIRTON & MCCONKIE
60 East South Temple
Salt Lake City, UT 84111
(801) 328-3600

Carl H. Esbeck
Legal Counsel
Office of Governmental Affairs
NATIONAL ASSOCIATION OF EVANGELICALS
P.O. Box 23269
Washington, D.C. 20026
(202) 789-1011

Anthony R. Picarello, Jr.
Jeffrey Hunter Moon
Michael F. Moses
U.S. CONFERENCE OF CATHOLIC BISHOPS
3211 4th Street, N.E.
Washington, DC 20017-1194
(202) 541-3300

James F. Sweeney
SWEENEY & GREENE LLP
9381 East Stockton Blvd., Suite 218
Elk Grove, CA 95624
Attorney for CALIFORNIA CATHOLIC
CONFERENCE
(916) 753-1300

Attorneys for Amici Curiae Religious Organizations

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record identifies the following corporate relationships with respect to each *amicus curiae*:

The United States Conference of Catholic Bishops is a nonprofit corporation that has no parent corporation and issues no stock.

The California Catholic Conference is a nonprofit corporation that has no parent corporation and issues no stock.

The National Association of Evangelicals is a nonprofit corporation that has no parent corporation and issues no stock.

The Church of Jesus Christ of Latter-day Saints is an unincorporated association.

The Ethics & Religious Liberty Commission of the Southern Baptist Convention is a nonprofit corporation that has no parent corporation and issues no stock, and whose only member is the Convention.

The Lutheran Church—Missouri Synod is a nonprofit corporation that has no parent corporation but that has affiliated corporate entities, including Concordia Historical Institute, Concordia Publishing House, The Lutheran Church Extension Fund—Missouri Synod, Concordia Plan Services, The Lutheran Church—Missouri Synod Foundation, and Concordia University System.

The Calvary Chapel Fellowship of Ministries of California is an unincorporated network of churches.

The Christian and Missionary Alliance is a nonprofit corporation that has no parent corporation and issues no stock.

Coral Ridge Ministries Media, Inc. (“Coral Ridge Ministries”) is a nonprofit corporation that has no parent corporation and issues no stock.

The Council of Korean Churches in Southern California, Southern California Korean Ministers Association, and Holy Movement for America are unincorporated associations.

s/Alexander Dushku
Alexander Dushku
Counsel for the Amici Curiae

September 24, 2010

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIESv

STATEMENT OF INTEREST OF THE AMICI.....x

INTRODUCTION1

ARGUMENT2

 I. THIS COURT SHOULD REPUDIATE THE LOWER COURT’S DISTORTION AND CONDEMNATION OF THE RELIGIOUS BELIEFS OF CERTAIN RELIGIOUS COMMUNITIES.....2

 II. THE DIVERSE RELIGIOUS BELIEFS OF VOTERS DO NOT UNDERMINE THE CONSTITUTIONALITY OF PROPOSITION 87

 A. Religious Communities Have Rich Beliefs and Teachings About the Virtues of Traditional Marriage that Are Distinct from Their Beliefs About Homosexuality.7

 B. Voters from Religious Communities Have Numerous Secular Reasons for Supporting the Traditional Definition of Marriage.14

 C. The Religious Communities Represented Here Preach Love for, Not Hatred of, Homosexual Persons.....17

 III. RELIGIOUS BELIEFS HAVE INFORMED AMERICAN PUBLIC POLICY IN THE PAST, AND THEY RIGHTLY DO SO TODAY.19

 A. Religion Was a Formative Influence in the Great Social and Political Movements of American History.19

1. Colonial Settlement and the Founding.....	19
2. Slavery and Civil War.....	21
3. Women’s Right to Vote.....	22
4. The Civil Rights Movement.....	23
B. Religious Believers and Organizations Have a Fundamental Right to Participate Fully in the Democratic Process.....	25
1. The Constitution Guarantees Religious Believers and Organizations Freedom To Participate As Such In Public Life.	25
2. The Validity of Proposition 8 Cannot Be Judged Based on the Religious Convictions of Some of Its Supporters.....	29
CONCLUSION.....	30
CERTIFICATE OF COMPLIANCE.....	32
CERTIFICATE OF SERVICE.....	33

TABLE OF AUTHORITIES

CASES

Bd. of Educ. v. Mergens
496 U.S. 226 (1990)..... 27, 29

Capitol Square Review & Advisory Bd. v. Pinette
515 U.S. 753 (1995).....25

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah
508 U.S. 520 (1993)..... 5, 26

County of Allegheny v. ACLU
492 U.S. 573 (1989).....29

Employment Div. v. Smith
494 U.S. 872 (1990).....4

First Nat’l Bank of Boston v. Bellotti
435 U.S. 765 (1978).....25

Harris v. McRae
448 U.S. 297 (1980).....30

In re: Winship
397 U.S. 358 (1970).....28

Lynch v. Donnelly
465 U.S. 668 (1984).....5

McDaniel v. Paty
435 U.S. 618 (1978)..... 25, 26, 27

McGowan v. Maryland
366 U.S. 420 (1961)..... 29, 30

Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church
393 U.S. 440 (1969).....4

School Dist. of Abington Twp. v. Schempp
374 U.S. 203 (1963)..... 19, 21

Serbian E. Orthodox Diocese v. Milivojevich
426 U.S. 696 (1976).....4, 5

Thomas v. Review Bd
450 U.S. 707 (1981)..... 4, 5, 16, 29

Wallace v. Jaffrey
472 U.S. 38 (1985).....27

Walz v. Tax Comm’n
397 U.S. 664 (1970).....26

Watson v. Jones
80 U.S. (13 Wall.) (1871)4, 5

West Virginia State Bd. of Educ. v. Barnette
319 U.S. 624 (1943)..... 5, 28

Zorach v. Clauson
343 U.S. 306 (1952).....21

CONSTITUTIONAL PROVISIONS

United States Const.
Amend. 1 *passim*

United States Const.
Art. VI, cl. 321

RULES

Federal Rules Appellate Procedure 29(a)x

OTHER AUTHORITIES

Bernard Bailyn,
Ideological Origins of the American Revolution (1967).....20

Pope Benedict XVI,
Encyclical *Caritas in Veritate* (2009).....9

William Bradford,
Of Plymouth Plantation, 1620-1647 (Samuel Eliot Morison ed., 1956).....19

Catechism of the Catholic Church (2d ed. 1994) 8-10, 15, 16, 18

Christian Perspectives on Legal Thought
(Michael W. McConnell, Robert F. Cochran, & Angela C.
Carmella eds., 2001)10

Colonial Origins of the American Constitution
(Donald S. Lutz ed., 1998)19

Declaration of Independence (1776).....21

The Divine Institution of Marriage (August 13, 2008),
available at [http://newsroom.lds.org/ldsnewsroom/eng/commentary/
the-divine-institution-of-marriage](http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage)..... 13, 16, 18

Frederick Douglass,
My Bondage and My Freedom (1st ed. 1855).....22

ESV [English Standard Version] Study Bible (2008)11

The Family: A Proclamation to the World, The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints (September 23, 1995)
available at [http://www.lds.org/library/display/ 0,4945,161-1-11-1,00.html](http://www.lds.org/library/display/0,4945,161-1-11-1,00.html).....13

Max Farrand,
The Records of the Federal Convention of 1787 (rev. ed.,1966)22

Holy Bible xiv, 11, 17

Ida Husted Harper,
Life and Works of Susan B. Anthony (1908)23

Thomas Jefferson,
Writings (Merrill D. Peterson ed., 1984)22

Martin Luther King,
I Have a Dream: Writings and Speeches That Changed the World (James Melvin Washington ed.,1992). 23, 24

Andreas J. Kostenberger,
God, Marriage, and Family: Rebuilding the Biblical Foundation (2004).12

Paul E. Kretzmann,
Popular Commentary of the Bible: New Testament (1922) 11, 16

Donald S. Lutz,
A Preface to American Political Theory (1992)20

Robert Middlekauff,
The Glorious Cause: The American Revolution, 1763-1789 (rev. & expanded ed., 2005).....20

Perry Miller,
Errand Into the Wilderness (1956)..... 19, 20

William Lee Miller,
Lincoln’s Virtues (2002).....22

Barack Obama, <i>Call to Renewal Keynote Address</i> , June 28, 2006, available at http://completeobamaspeecharchive.com/?p=877 (last visited Sep. 7, 2010).....	24
Pastoral Letter, “ <i>Marriage: Love and Life in the Divine Plan</i> ” November 17, 2009 (available at http://www.usccb.org/loveandlife/MarriageFINAL.pdf).....	8
Political Sermons of the American Founding Era, 1730-1805 (Ellis Sandoz ed., 1998).....	22
David Ramsay, The History of the American Revolution (Liberty Classics ed., 1990) (1789)	20
Second Vatican Council, Pastoral Constitution <i>Gaudium et Spes</i> (1965)	9
Anna Howard Shaw, <i>The Fundamental Principle of a Republic</i> (June 21, 1915), <i>Ogdensburg Advance and St. Lawrence Daily Democrat</i> , July 1, 1915, available at http://gos.sbc.edu/s/shaw.html (last visited Sep. 9, 2010).....	23

STATEMENT OF INTEREST OF THE AMICI¹

The voices of millions of Americans are represented in the broad cross-section of faith communities that join in this brief. Their theological perspectives, though often differing, converge to support two essential propositions—that the traditional, opposite-sex definition of marriage is not only constitutional but vital to the welfare of families, children and society, and that religious communities and citizens, shaped and informed by their faith, have a fundamental right to advocate for and make reasoned judgments about critical social policies like the definition of marriage. Faith communities have the deepest interest in the legal definition of marriage and in the stability and vitality of that time-honored institution. Our traditions and teachings explain, define, support, and sustain the institution of marriage, both religiously and socially. We seek to be heard—with basic fairness and accuracy—in the democratic and judicial forums where the fate of that foundational institution will be decided.

Statements of our specific interests in this case follow:

The United States Conference of Catholic Bishops (“USCCB” or “Conference”) is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the

¹ This brief is filed with the written consent of all parties, as indicated in declarations filed with this Court. *See* Fed. R. App. P. 29(a).

pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. Values of particular importance to the Conference include the defense of marriage, protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this nation's jurisprudence in that regard.

The California Catholic Conference ("California Conference") is the official public policy arm of the Roman Catholic Church in California. The California Conference's mission is to advocate for the Catholic Church's public policy agenda statement and to facilitate common pastoral efforts in the Catholic community. The California Conference speaks on behalf of California's two Catholic archdioceses, ten dioceses, the Cardinal Archbishop of Los Angeles, the Archbishop of San Francisco, the Bishops of Sacramento, Santa Rosa, Stockton, Fresno, Oakland, San Jose, Monterey, San Bernardino, Orange, and San Diego, and California's auxiliary bishops regarding public policy matters concerning the Catholic Church in California. To this end, the California Conference represents the interests of the Catholic Church and its bishops before the California Legislature, executive agencies of the State, and courts throughout California. The

California Conference has a keen interest in promoting the common good in California, including supporting traditional marriage and ensuring the welfare of stable families in which children may be appropriately nurtured and formed into responsible citizens.

The National Association of Evangelicals (“NAE”) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that biblical marriage is instituted by God, and that the government does not create marriage but is charged to protect it. NAE is grateful for the American legal tradition safeguarding biblical marriage, and believes that this jurisprudential heritage should be maintained in this case.

The Church of Jesus Christ of Latter-day Saints (“LDS Church”) is a Christian denomination with approximately 800,000 members in California and 14 million members worldwide. Marriage and the family are central to the LDS Church and its members. The LDS Church teaches that marriage between a man and a woman is ordained of God, that the traditional family is the foundation of society, and that marriage and family supply the crucial relationships through

which parents and children acquire private and public virtue. Out of support for these fundamental beliefs, the LDS Church appears in this case to defend the traditional definition of marriage as embodied in Proposition 8.

The Ethics & Religious Liberty Commission (“ERLC”) is the moral concerns and public policy entity of the Southern Baptist Convention (“SBC”), the nation’s largest Protestant denomination, with over 44,000 churches and 16.3 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as marriage and family, the sanctity of human life, ethics, and religious liberty. As part of its assistance to the churches of the Southern Baptist Convention, the ERLC serves on the Convention’s Task Force on Ministry to Homosexuals. This Task Force helps congregations develop effective ministries of compassion to men and women struggling with same-sex attractions. It encourages the congregations to create compassionate, safe environments in their churches where homosexuals can find the support they need as they seek to voluntarily leave the homosexual lifestyle. Many Southern Baptist churches are currently successfully engaged in this ministry.

The Lutheran Church—Missouri Synod (“Synod”), a religious nonprofit corporation, is the second largest Lutheran denomination in North America, with approximately 6,150 member congregations which, in turn, have approximately

2,400,000 baptized members. The Synod believes that marriage is a sacred union of one man and one woman (Gen. 2:24-25), and that God gave marriage as a picture of the relationship between Christ and His bride the Church (Eph. 5:32). As a Christian body in this country, the Synod believes it has the duty and responsibility to speak publicly in support of traditional marriage and to protect marriage as a divinely created relationship between one man and one woman.

The Calvary Chapel Fellowship of Ministries of California numbers nearly 400 California churches, including some of California's largest. It believes that marriage is a sacred and spiritual institution created by God, as declared in the Holy Scriptures. For that reason, it supports the traditional definition of marriage enacted in Proposition 8.

The Christian and Missionary Alliance ("C&MA"), a Colorado nonprofit corporation, is an evangelical denomination established in 1897 with a major emphasis on world evangelization. It maintains a "big tent" stance in reference to many doctrinal matters, encouraging believers of diverse backgrounds and theological traditions to unite in an alliance to know and exalt Jesus Christ and to complete His Great Commission. As of 2008, the C&MA had 2,018 churches in the 50 states of the United States, Puerto Rico and the Bahamas with

approximately 426,000 members and adherents and 3,700 official workers. The C&MA also has over 880 missionary personnel in 51 countries around the world.

Coral Ridge Ministries is an evangelical media ministry established in 1974 by its late founder, Dr. D. James Kennedy. Its three-fold mission is to “introduce people to Jesus Christ; nurture and encourage Christians; and reform cultures—encouraging religious liberty, and lovingly applying biblical principles to all cultures and spheres of life.” Nearly 500,000 people watch or listen weekly to the nationwide television and radio broadcasts of Coral Ridge Ministries.

The Council of Korean Churches in Southern California is an unincorporated association whose foundational goals are to worship God; to learn, educate, put into practice the life and teachings of Christ, and endeavor to have loving fellowship among the church members in Southern California; and proclaim the Good News to the ends of the earth, as a witness of Jesus Christ. It has approximately 1,300 member churches in Southern California and is headed by President Rev. Yong Duk Ji.

Southern California Korean Ministers Association is an unincorporated association whose organizational purpose is to encourage fellowship among the member pastors and to learn, educate, and put into practice the life and teachings of Christ; and to assist them to make efforts to enhance faith and to participate in

evangelical mission. It has numerous member ministers in Southern California and is headed by President Rev. Jung Hyun Lee.

Holy Movement for America is an association with a major emphasis on sanctification of America by knowing and exalting Jesus Christ. As a holy member of Christ, the members and affiliates of diverse backgrounds and theological traditions are encouraged to endeavor to manifest Christ's love in word and deed. It has numerous members and affiliates in the United States and is headed by President Rev. Hee Min Park.

INTRODUCTION

We believe that traditional, opposite-sex marriage is essential to the welfare of children, family, society, and the state. That belief is based not only on the teachings of our respective religious traditions, but on carefully reasoned judgments about the nature and needs of individuals (especially minor children) and society, and on literally millions of hours of counseling and ministry over the centuries. We support the many public-policy justifications for the traditional definition of marriage set forth in the brief of the official proponents of Proposition 8. We also agree with the amicus brief of the Becket Fund for Religious Liberty that imposing same-sex marriage raises substantial religious liberty concerns.

We write separately to answer the district court's distortion and condemnation of our beliefs as irrational and illegitimate and to defend the constitutional right of citizens and associations of faith to participate fully in the democratic process. Contrary to the aspersions cast by the decision below, our beliefs about marriage are not based on hatred or bigotry. Our support for traditional marriage has vastly more to do with a rich tapestry of affirmative teachings about marriage and family than with doctrines directed at the issue of homosexuality. To be sure, our religious beliefs hold that all sexual acts outside traditional marriage are contrary to God's will. But our faiths also entreat us to

love and embrace those who reject our beliefs, not to hate or mistreat them. Bigotry is contrary to our most basic religious convictions.

The district court's use of a twisted portrayal of our beliefs as a basis for striking down Proposition 8 is not only wildly inaccurate and inflammatory but constitutionally improper. It is nothing less than judicial condemnation of religious beliefs that are sincerely held by millions of Americans. The decision below crosses a constitutional line and should be repudiated by this Court.

We also demonstrate herein that citizens and associations of faith have an unassailable First Amendment right to express and rely on their religious beliefs when participating in the democratic process. Religious institutions and believers have played pivotal roles in virtually all of the great social movements in American history, and they properly have a voice in the great marriage debate in which our Nation is now engaged. The district court's suggestions to the contrary should also be rejected.

ARGUMENT

I. THIS COURT SHOULD REPUDIATE THE LOWER COURT'S DISTORTION AND CONDEMNATION OF THE RELIGIOUS BELIEFS OF CERTAIN RELIGIOUS COMMUNITIES.

The district court's opinion is deeply troubling for its distortion and official condemnation of the religious beliefs of several faith traditions and millions of

Americans. Through its own findings, and by adopting the assertions of witnesses with little or no expertise in the relevant belief systems, the court below denounced our religious views of marriage and homosexuality as irrational, bigoted, discriminatory, dangerous, and harmful. In the court's dark portrait, religion—

- “harm[s] gays and lesbians” because of “religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships” (ER136);
- “is the chief obstacle to gay and lesbian political advances” and “progress” (ER56, 136);
- is “arrayed against the interest of gays and lesbians,” which creates a political context that is “very hostile to gay interests” (ER136);
- formed an “unprecedented” alliance during the Proposition 8 campaign “against a minority group” (ER94);
- advocated Proposition 8 using the same kind of racist arguments employed to defend segregation and miscegenation (ER 137);
- has “worked in a coordinated way [with other groups] to develop stereotypical images of gay people” (ER135);
- is an important “component to the bigotry and prejudice against gay and lesbian individuals” (ER136); and
- is a key factor “in creating a social climate that’s conducive to hateful acts ... and to prejudice and discrimination” against homosexuals (ER138).

The court below pronounces that irrational “moral and religious views form the *only* basis for a belief that same-sex couples are different from opposite-sex couples” for purposes of marriage. ER165 (emphasis added). The district court’s lengthy inquest into the underlying motivation for the age-old and nearly universal understanding of marriage as a male/female union resulted in this facially

implausible finding: the *sole* basis of the traditional marriage definition is deep-seated prejudice against homosexuals perpetuated by religion.

We address the patent inaccuracy of such a finding in the next section. But first we pause to highlight the danger and inappropriateness of the district court's condemnation of religious beliefs generally and (worse) the beliefs of particular religions that support the traditional definition of marriage.

Since *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), the Supreme Court has directed courts to avoid opining on religious beliefs, underscoring their incompetence to adjudicate matters of religious doctrine and faith. "Civil judges obviously do not have the competence of ecclesiastical" authorities in matters of religion. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714 n.8 (1976). Hence, "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim." *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990). The Supreme Court has instructed courts not to "engage in the forbidden process of interpreting and weighing church doctrine." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969). Civil judges are neither expositors nor adjudicators of religious beliefs. See *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."). Nor

can they impute their own understanding of the “official beliefs” of a denomination to all of its individual members; the personal beliefs of adherents may or may not align with a religious group’s teaching on a particular issue. *See id.* at 715-16.

What animates the Supreme Court’s insistence on these limitations is much broader than the need to keep courts out of an area where they lack institutional competence. Its more basic concern is the constitutional bar against government taking sides on the rightness of religious beliefs. As a matter of principle and prudence, neither the state nor its judges may endorse or condemn particular religious beliefs.

Thus, “[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.” *Serbian E. Orthodox*, 426 U.S. at 710-11 (quoting *Watson*, 80 U.S. at 728-29). Indeed, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion” or matters of conscience. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Government officials—and perhaps especially judges—may not “disapprove of a particular religion or of religion in general.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). *See also Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984)

(O'Connor, J., concurring) (repeatedly condemning “endorsement *or disapproval* of religion” under the Establishment Clause) (emphasis added).

The court below strayed far from these first principles of American democracy. Its decision amounts to an indictment of the religious beliefs of many faith communities. In the court’s telling, the religious organizations and adherents who supported Proposition 8 and traditional marriage are irrational and dangerously bigoted—the source of hateful acts and even violence. At a time when charges of bigotry and hostility toward any group are rightly viewed with grave concern, such statements can only be construed as condemnation of our religions themselves. Couched as judicial fact-finding, they constitute a virtually unprecedented attempt by a judicial officer of the United States to delegitimize the beliefs of millions of American citizens—indeed, to give hostility toward certain religions the imprimatur of law.

We acknowledge that religious beliefs are not exempt from criticism in the marketplace of ideas. But government officers acting in their official capacities are not ordinary citizens debating the issues of the day. They are organs of government power, and in the case of judges they are the voice of the law itself. Regardless of its ultimate holding in this case, we urge this Court to reject the

lower court's departure from the religious neutrality that must remain at the heart of American democracy.

II. THE DIVERSE RELIGIOUS BELIEFS OF VOTERS DO NOT UNDERMINE THE CONSTITUTIONALITY OF PROPOSITION 8.

A. Religious Communities Have Rich Beliefs and Teachings About the Virtues of Traditional Marriage That Are Distinct from Their Beliefs About Homosexuality.

Faith communities and religious organizations have a long and vibrant history of upholding marriage as the union of a man and a woman for reasons that have little or nothing to do with homosexuality. Indeed, their support for traditional marriage precedes by centuries the very notion of homosexuality as a recognized sexual orientation (*see* ER106), not to mention the recent movement for same-sex marriage. Many of this nation's prominent faith traditions have rich religious narratives that describe and extol the personal, familial, and social virtues of traditional marriage while mentioning homosexuality barely, if at all.

The adherents of many religious groups supported Proposition 8. Yet the court below singled out three faith traditions—Roman Catholic, Evangelical Protestant, and Latter-day Saint (Mormon)—for unique scrutiny, relying solely on Plaintiffs' selective submissions of doctrinal fragments as evidence. A brief review of the actual beliefs of these faith groups regarding marriage belies the district court's finding that their beliefs are rooted in anti-homosexual animus.

The Catholic Tradition. With a tradition stretching back two millennia, the Catholic Church recognizes marriage as a permanent, faithful, and fruitful covenant between a man and a woman. Marriage is at once profoundly spiritual in nature—personally instituted as a sacrament by Jesus Christ himself—and indispensable to the common good. See *Catechism of the Catholic Church* (2d ed. 1994) (“*Catechism*”), §1601. Marriage has its origin, not in the will of any particular people, religion, or state, but rather in the nature of the human person, created as male and female. “The well-being of the individual person and of both human and Christian society is closely bound up with the healthy state of conjugal and family life.” *Id.*

The Catholic bishops of the United States recently reaffirmed this classical and time-tested understanding of marriage in a pastoral letter:

Marriage is not merely a private institution, however. It is the foundation for the family, where children learn the values and virtues that will make good Christians as well as good citizens. The importance of marriage for children and for the upbringing of the next generation highlights the importance of marriage for all society.

Pastoral Letter, “Marriage: Love and Life in the Divine Plan” (Nov. 17, 2009) 7-8 (“Pastoral Letter”), available at http://www.usccb.org/loveandlife/Marriage_FINAL.pdf; see also Second Vatican Council, Pastoral Constitution *Gaudium et*

Spes (1965), Part II, Chapter 1, §§47-52; accord Pope Benedict XVI, Encyclical *Caritas in Veritate* (2009), No. 44.

The Catholic Church teaches that marriage is oriented toward two fundamental purposes: namely, the good of the spouses and the procreation of children. Pastoral Letter, at 11. Accordingly, marriage is inseparably both unitive and procreative. *Id.* The unitive meaning of marriage relates to the sexual difference and complementarity of men and women on both a biological and spiritual level, *i.e.*, body and soul (their entire person). When joined in marriage, a man and woman uniquely complement one another spiritually, emotionally, psychologically, and physically. The sexual difference of husband and wife makes it possible for them to unite in a one-flesh union capable of participating in God's creative action through the generation of new human life. Without unitive complementarity—and the corresponding capacity for procreation that is unique to such a union—there can be no marriage. *Id.* These fundamental Catholic teachings about marriage do not mention and have nothing to do with same-sex attraction.

The Catholic Church also teaches that all unmarried persons, regardless of their sexual orientation or inclination, are called by God to the vocation of chastity. *Catechism*, §§2337-59. This teaching is grounded in the inherent dignity of the

human person, whom God has created in his own image. *Id.* at §2338. To be sure, the Church recognizes that “the number of men and women who have deep-seated homosexual tendencies is not negligible,” but dictates that “they must be accepted with respect, compassion, and sensitivity.” *Id.* at §2358. “Every sign of unjust discrimination in their regard should be avoided.” *Id.* As is the case with unmarried heterosexual persons, homosexual persons are likewise called to chastity. *Id.* at §2359. Homosexual persons are “called to fulfill God’s will in their lives and, if they are Christians, to unite to the sacrifice of the Lord’s Cross the difficulties they may encounter from their condition.” *Id.*

The Evangelical Protestant Tradition. “The Protestant reformers of the sixteenth and seventeenth centuries supplanted the Catholic sacramental model of marriage with a social model.” John Witte, Jr., *God’s Joust, God’s Justice*, in *Christian Perspectives on Legal Thought* 414 (Michael W. McConnell, Robert F. Cochran, & Angela C. Carmella eds., 2001). Marriage was understood as “an independent social institution ordained by God, and equal in dignity and social responsibility with the church, state, and other social units.” *Id.*

For five centuries the various denominational voices of Protestantism have taught marriage from a biblical view focused on uniting a man and woman in a divinely sanctioned companionship for the procreation and rearing of children.

One Bible commentary from the early twentieth century, still used today, explains that “[t]he state of holy matrimony with its resulting family life is the basis of all true soundness in society and of the stability of the state.... The Bible indicates plainly what the purposes of marriage is ... companion[ship] ... [and] lawful procreation of children.” 2 Paul E. Kretzmann, *Popular Commentary of the Bible: New Testament* 124 (1922) (“Popular Commentary”).

A contemporary biblical commentary, widely used by Evangelical Protestants, teaches that marriage is a social institution of divine origin:

Marriage is the fundamental institution of all human society. It was established by God at creation, when God created the first human beings as “male and female” (Gen. 1:27) and then said to them, “Be fruitful and multiply and fill the earth” (Gen. 1:28).

Marriage begins with a commitment before God and other people to be husband and wife for life. . . . Jesus says that a married couple constitutes a unity that “God has joined together” (Matt. 19:6). . . .

Some kind of public commitment is also necessary to a marriage, for a society must know to treat a couple as married and not as single. . . .

Both Genesis 2:24 and Matthew 19:5 view the “one flesh” unity that occurs [*i.e.*, consummation] as an essential part of the marriage.

ESV [English Standard Version] Study Bible 2543-44 (2008).

A distinguished Evangelical scholar recently wrote that marriage is “a sacred bond between a man and a woman, instituted by and publicly entered into before God” and “characterized by permanence, sacredness, intimacy, mutuality, and

exclusiveness.” Andreas J. Kostenberger, *God, Marriage, and Family: Rebuilding the Biblical Foundation* 272-73 (2004) (“Biblical Foundation”). Moreover, “Scripture plainly reveals that the bearing and raising of children is an elemental part of God’s plan for marriage.” *Id.*

As with Catholic doctrine, the issue of homosexuality is far from central to Evangelical teachings on marriage. Their primary concern is the biblical model of marriage as a procreative, faithful, complementary, monogamous, permanent and socially beneficial union between man and woman—not homosexuality or other departures from that model.

The Latter-day Saint (Mormon) Tradition. Marriage and the family (understood as husband, wife, and children) are central to the doctrine and beliefs of The Church of Jesus Christ of Latter-day Saints. In 1995, the LDS Church’s apostolic leadership issued a formal doctrinal proclamation on marriage and the family. It declared in part that

marriage between a man and a woman is ordained of God and that the family is central to the Creator’s plan for the eternal destiny of His children Children are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity.

The Family: A Proclamation to the World, The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints (September 23,

1995) (“*Family Proclamation*”), available at <http://www.lds.org/library/display/0,4945,161-1-11-1,00.html>. The *Family*

Proclamation emphasizes the tie between marriage and the rearing of children:

Husband and wife have a solemn responsibility to love and care for each other and for their children. . . . Parents have a sacred duty to rear their children in love and righteousness, to provide for their physical and spiritual needs, and to teach them to love and serve one another, observe the commandments of God, and be law-abiding citizens wherever they live.

Id. It concludes by “call[ing] upon responsible citizens and officers of government everywhere to promote those measures designed to maintain and strengthen the family [husband, wife, and children] as the fundamental unit of society.” *Id.*

In August 2008, the LDS Church issued a statement explaining the reasons for its support of Proposition 8. After quoting from the *Family Proclamation*, the statement focused on procreation and the education of children:

Only a man and a woman together have the natural biological capacity to conceive children. This power of procreation . . . is sacred and precious. Misuse of this power undermines the institution of the family and thereby weakens the social fabric. Strong families serve as the fundamental institution for transmitting to future generations the moral strengths, traditions, and values that sustain civilization.

The Divine Institution of Marriage (August 13, 2008) (“*Divine Institution*”), available at <http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage>.

As with Catholic and Evangelical teachings, LDS teachings on marriage center on what marriage is and not on deviations from the marital model, be it homosexual conduct, same-sex unions, cohabitation, adultery, etc.

In sum, these religious understandings of traditional marriage are rooted in beliefs about God's will concerning men, women, children, and society, rather than in the far narrower issue of homosexuality. Religious teachings may indeed address homosexuality and other departures from the marriage norm. But such issues are secondary and at the margins of religious discourse on marriage. In the religious traditions mischaracterized by the court below—and in numerous others the court did not address—the conviction that marriage is the union of a man and a woman is doctrinally and logically prior to teachings about homosexual relationships. Indeed, it is only the recent movement for same-sex marriage that has made it more common for religious organizations to include discussions of homosexuality in their teachings on marriage. The findings of the court below that religious beliefs regarding marriage are rooted in anti-homosexual bigotry is based on a distortion of our beliefs—one we find unrecognizable.

B. Voters from Religious Communities Have Numerous Secular Reasons for Supporting the Traditional Definition of Marriage.

The fact that faith communities and their members sustain marriage with vibrant religious narratives does not mean that their support for the traditional

definition of marriage is based on exclusively spiritual reasons. On the contrary, even if religious voters put aside their religious beliefs, they would still have numerous “secular” reasons for supporting the traditional definition of marriage. Religious discourse itself is permeated with publicly accessible, secular reasons for traditional marriage. For in the traditions maligned by the district court, and in many others, marriage and family life are not detached from the practical realities of daily life but rather are the human context in which God intended that men, women, and children be nourished, taught, and empowered to participate in all aspects of life. Nor, in these religious views, is marriage solely a private matter, but rather the foundation on which an enduring society must be built.

Hence, while the Catholic Catechism speaks of marriage as a sacrament, it also describes marriage as existing for the well-being of the spouses and for “the procreation and education of children,” which are essential to the existence and health of society. *Catechism* §2201. It stresses the duty of fathers and mothers to educate their children in “moral values” and in making “good use of freedom.” *Id.* §§2207, 2221. Marriage and family should be intergenerational in focus, inculcating the duty “to care and take responsibility for the young, the old, the sick, the handicapped, and the poor.” *Id.* §2207. “Family life is an initiation into life in

society”—it provides “the foundations for freedom, security, and fraternity within society.” *Id.*

Evangelical teachings stress many of the same themes. Traditional marriage exists for the companionship of the spouses and the “lawful procreation of children.” 2 Popular Commentary, at 124. “[T]he bearing and raising of children is an elemental part of God’s plan for marriage,” and fathers and mothers have vital responsibilities for their children. Biblical Foundation, at 272-73.

LDS marriage teachings likewise emphasize procreation, child welfare, “transmitting to future generations the moral strengths, traditions, and values that sustain civilization” and the traditional family as “the fundamental unit of society.” *Divine Institution*. In explaining its position on Proposition 8, the LDS Church quoted the U.N. Universal Declaration of Human Rights and the work of a professional sociologist. *Id.*

In brief, religious discourse brims with publicly accessible reasons for supporting traditional marriage and Proposition 8. Members of faith communities, moreover, do not have monolithic religious beliefs; nor do they think exclusively in religious terms or unthinkingly adopt the views of their religious leaders. One cannot merely assume, as did the court below, that religious voters who supported Proposition 8 did so on religious grounds. *See Thomas*, 450 U.S. at 715-16. They,

too, are American citizens who take seriously their civic duty to evaluate public policy issues and cast informed votes based on their own judgment of what is best for society. The opening brief of the official proponents sets forth numerous secular reasons for Proposition 8. There is no reason to think that religious voters did not have many of those same reasons in mind when they cast their ballots.

C. The Religious Communities Represented Here Preach Love for, Not Hatred of, Homosexual Persons.

The court below accused religion itself, and particularly the beliefs of faith groups like the present amici, of being anti-homosexual. Quite the contrary, whatever the failings (past or present) of particular individuals within our religious communities, our diverse beliefs unite in condemning hatred and mistreatment of homosexuals. It is morally wrong. Period.

We believe that God calls us to love homosexual persons, even as we steadfastly uphold a marriage definition that we believe is both divinely ordained and best for families and society. Animosity toward homosexuals violates the biblical command to “love thy neighbour as thyself.” *Matthew 22:39* (King James). An evangelical commentator writes, “The beloved verse John 3:16, ‘For God so loved *the world* that he gave his only Son, that whosoever believes in him should not perish but have eternal life,’ includes homosexuals just as it does all sinners.” Biblical Foundation, at 223. Homosexuals “must be accepted with

respect, compassion, and sensitivity,” Catholic doctrine unequivocally declares. Unjust discrimination is condemned. *Catechism* §2358. The LDS Church has stated that its “opposition to same-sex marriage neither constitutes nor condones any kind of hostility towards homosexual men and women,” emphasizing that LDS Church members have “Christian obligations of love, kindness and humanity” toward homosexuals. *Divine Institution*.²

The love that our respective faiths exhort us to exemplify does not undercut, but instead reinforces, our considered judgment that the traditional definition of marriage best serves the good of individuals and society. This judgment is informed by our moral reasoning, our religious convictions, and our long practical experience counseling and ministering to adults and children. The district court’s misrepresentation of that judgment as mere bigotry is not only inaccurate but an insult and a threat to our religious communities.

² The trial record plainly shows that most religions that supported Proposition 8 teach that all people are sinners and that believers are called to love all people. *See, e.g.*, PX52 (Catholic); PX0005 (Evangelical); Doc.#384 at 9 (Southern Baptist).

III. RELIGIOUS BELIEFS HAVE INFORMED AMERICAN PUBLIC POLICY IN THE PAST, AND THEY RIGHTLY DO SO TODAY.

A. Religion Was a Formative Influence in the Great Social and Political Movements of American History.

The district court’s opinion suggests that the influence of religious believers and organizations on the debate over same-sex marriage is sinister and novel. Not so. Their advocacy for Proposition 8 fits within a pattern established over centuries. *See School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212 (1963) (“religion has been closely identified with our history and government”). Religion has informed the most significant movements in American history, as the following examples demonstrate.

1. Colonial Settlement and the Founding.

America’s beginnings were suffused with the light of religious faith. It is a commonplace that the Europeans who settled in America were people of faith who understood their quest in religious terms.³ “When the English undertook to plant

³ *See The Mayflower Compact* (1620), reprinted in *Colonial Origins of the American Constitution* 32 (Donald S. Lutz ed., 1998) (declaring that the Puritans would venture to America “for the glory of God, and advancement of the Christian Faith, and the Honour of our K[ing] and Countrey”); accord William Bradford, *Of Plymouth Plantation, 1620-1647* at 25 (Samuel Eliot Morison ed., 1956). *See also* Perry Miller, *Errand Into the Wilderness* 114 (1956) (rejecting historical accounts of Virginia’s settlement that omit religion, because seventeenth century cosmology defined “a world where every action found its rationale, not in politics or in economics, but in religion”).

colonies in America, they commenced—whatever they ended with—not with propositions about the rights of man or with the gospel of wealth, but with absolute certainties concerning the providence of God.”⁴

Religious language and beliefs shaped public discourse about America’s break from Great Britain and its constitutional founding. Scholars have noted that the leading intellectual influence during this critical period was the King James Bible.⁵ The American Revolution cannot be understood without taking into account the religious teachings that inspired patriots and publicly justified their actions.⁶ The clergy “connected religion and patriotism, and in their sermons and prayers, represented the cause of America as the cause of heaven.”⁷

⁴ *Id.* at 115.

⁵ See Donald S. Lutz, A Preface to American Political Theory 135, 136 (1992) (listing the Bible as the leading source of citation in American political writings between 1760-1805).

⁶ See, e.g., Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789* at 49-50 (rev. & expanded ed., 2005) (“Although Americans entered the revolt against Britain in several ways, their religion proved important in all of them ... because, more than anything else in America, religion shaped culture.”); Bernard Bailyn, *Ideological Origins of the American Revolution* 268 (1967) (describing “the mutual reinforcement that took place in the Revolution between the struggles for civil and religious liberty”).

⁷ 1 David Ramsay, *The History of the American Revolution* 185 (Liberty Classics ed., 1990) (1789).

When independence came, the Declaration left no doubt that Americans considered God the source of their rights:⁸

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.⁹

The founding generation manifested its deep concern with preserving a place for religious belief and religious believers in America's vibrant democratic culture by prohibiting religious tests for federal office in the 1787 Constitution (*see* U.S. Const. art. VI, cl. 3), and then amending the Constitution to secure religious liberty as America's first freedom. *See* U.S. Const. amend. 1.

2. Slavery and Civil War.

Religious convictions and language also set the terms of the debate over slavery, abolition, and the Civil War. Thomas Jefferson wrote, "Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep for

⁸ *See Schempp*, 374 U.S. at 212 ("the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him"); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.").

⁹ Declaration of Independence (1776).

ever”¹⁰ George Mason denounced slavery at the Philadelphia Convention, saying that it would “bring the judgment of heaven.”¹¹

Half a century later, Frederick Douglass united religion and patriotism in denouncing slavery: “Standing with God and the crushed and bleeding slave on this occasion, I will ... in the name of the constitution and the bible, which are disregarded and trampled upon, dare to call into question and to denounce ... everything that serves to perpetuate slavery.”¹² Civil War brought speeches and sermons asserting divine support for the Union cause.¹³ Lincoln’s presidential speeches were “suffused with” religious references that inspired and sustained the terrible fight to end slavery.¹⁴

3. Women’s Right to Vote.

Suffragists turned to religious language and belief to advocate their cause. Susan B. Anthony argued that giving women the vote would bring moral and religious issues “into the political arena” because such matters were of special

¹⁰ Thomas Jefferson, *Notes on the State of Virginia* (1787), reprinted in Thomas Jefferson: Writings 289 (Merrill D. Peterson ed., 1984).

¹¹ 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 370 (rev. ed., 1966) (George Mason).

¹² Frederick Douglass, *What to the Slave Is the Fourth of July?*, July 5, 1852, reprinted in *My Bondage and My Freedom* 442 (1st ed. 1855).

¹³ See, e.g., Horace Bushnell, *Popular Government by Divine Right*, Nov. 24, 1864, reprinted in *2 Political Sermons of the American Founding Era, 1730-1805*, at 120 (Ellis Sandoz ed., 1998) (“Our cause, we love to think, is especially God’s”).

¹⁴ William Lee Miller, *Lincoln’s Virtues* 50 (2002).

importance to women.¹⁵ In an oration advocating women's suffrage, Anna Howard Shaw said that "[m]en and women must go through this world together from the cradle to the grave; it is God's way"¹⁶

4. The Civil Rights Movement.

The civil rights movement depended heavily on the rhetorical power of ministers and the language of religious belief. Martin Luther King wrote from Birmingham Jail that "human progress ... comes through the tireless efforts and persistent work of men willing to be co-workers with God"¹⁷ His best-known speeches relied on religious imagery. In "I Have a Dream," he declared that freedom would hasten "that day when all of God's children ... will be able to join hands and to sing in the words of the old Negro spiritual, 'Free at last, free at last; thank God Almighty, we are free at last.'"¹⁸ The night before he was murdered,

¹⁵ Letter from Susan B. Anthony to Dr. George E. Vincent, Aug. 1904, in 3 Ida Husted Harper, *Life and Works of Susan B. Anthony* 1294 (1908).

¹⁶ Anna Howard Shaw, *The Fundamental Principle of a Republic* (June 21, 1915), *Ogdensburg Advance and St. Lawrence Daily Democrat*, July 1, 1915, available at <http://gos.sbc.edu/s/shaw.html> (last visited Sep. 9, 2010).

¹⁷ Martin Luther King, *Letter from Birmingham Jail* (1963), reprinted in *I Have a Dream: Writings and Speeches That Changed the World* 92 (James Melvin Washington ed., 1992).

¹⁸ Martin Luther King, *I Have a Dream* (1963), reprinted in *id.* at 105-06.

Dr. King delivered a sermon echoing the biblical story of Moses, assuring the congregation that “we, as a people, will get to the promised land.”¹⁹

These and other significant moments in American history were shaped and informed by religious belief. The issue is not whether religious believers were always right in the causes they espoused. Like citizens inspired by secular beliefs, sometimes they were wrong. But to suggest that religious believers and organizations are trespassing when they enter the public debate over same-sex marriage and draw upon their religiously-informed beliefs seriously misconceives the place of religion in American life. In his campaign for President, then-Senator Barack Obama acknowledged that “the majority of great reformers in American history ... were not only motivated by faith, but repeatedly used religious language to argue for their cause.”²⁰ From this he reasoned that “to say that men and women should not inject their ‘personal morality’ into public policy debates is a practical absurdity.”²¹

Yet the district court’s ruling effectively requires this very “practical absurdity,” overturning the electoral result chosen by millions of religious *and* secular voters because some of them are “motivated by faith” or use “religious

¹⁹ Martin Luther King, *I See the Promised Land* (1968), reprinted in *id.* at 203.

²⁰ Barack Obama, *Call to Renewal Keynote Address* (June 28, 2006), available at <http://completeobamaspeecharchive.com/?p=877> (last visited Sep. 7, 2010).

²¹ *Id.*

language to argue for their cause.” Its findings with respect to religious beliefs should be soundly rejected as a constitutionally forbidden exercise, and its judgment reversed.

B. Religious Believers and Organizations Have a Fundamental Right to Participate Fully in the Democratic Process.

1. The Constitution Guarantees Religious Believers and Organizations Freedom to Participate as Such in Public Life.

Religious proponents of Proposition 8 do not owe their participation in the debate over same-sex marriage to official sufferance. They have a fundamental constitutional right to participate fully and freely in the processes of self-government, *and to do so as believers*. Their right to engage in political speech during a referendum campaign is unquestionable, lying “at the heart of the First Amendment’s protection.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). The same protection applies with undiminished force to religious speech. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . [G]overnment suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.”). Churches and other religious organizations enjoy the same

protection. *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970). The First Amendment's Religion Clauses safeguard religious belief by "categorically prohibit[ing] government from regulating, prohibiting, or rewarding religious beliefs as such," *McDaniel v. Paty*, 435 U.S. 618, 626 (1978), and by barring government from adopting "an official purpose to disapprove of a particular religion or of religion in general." *City of Hialeah*, 508 U.S. at 532.

But while government may not act based on an intention to establish or undercut religion, religious reasons may legitimately inform a voter's choice regarding a public policy initiative like Proposition 8. No religious test conditions democratic participation on voters having the "correct" beliefs or motivations. *See McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment) ("A law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants."). It is no more objectionable for people of faith to be influenced by their deeply held religious beliefs when advocating or voting for a public policy than for other voters to rely on their deeply held secular beliefs. *Id.* at 641 ("Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally."). In short, people have the right to participate in democracy as they

are. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (The Constitution forbids government from treating “religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.”) (citation and quotation marks omitted). Far from having to check their religious beliefs at the door before entering the public square, citizens of faith are entitled to rely on their religious beliefs in debating and making decisions about important matters of public policy. *See McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment) (“[G]overnment may not as a goal promote ‘safe thinking’ with respect to religion and fence out from political participation those, such as ministers, whom it regards as over-involved in religion.”).

Naturally, differing religious groups will align on different sides of an issue depending on their religious beliefs. Numerous faith groups, for example, supported Proposition 8 while many others opposed it. *See Strauss v. Horton*, Br. Cal. Council of Churches, *et al.* (Cal. Jan. 13, 2009) (opposing Proposition 8). But government officials cannot pronounce the religious beliefs of one set of voters enlightened and another benighted. Nor can they display hostility toward religion generally. *Wallace v. Jaffrey*, 472 U.S. 38, 52-54 (1985) (government may not prefer one religion over another or religion over irreligion).

The district court breached its duty of neutrality by denouncing religion—or at least those religious beliefs that would uphold the traditional definition of marriage—as an illegitimate basis for supporting Proposition 8. *See* ER136 (“Religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians.”). If affirmed, such exclusion would disenfranchise citizens who support the traditional definition of marriage for religious reasons (while leaving enfranchised those who for equally religious reasons *oppose* the traditional definition of marriage), thereby invading their right to participate in self-government—perhaps “the most fundamental individual liberty of our people.” *In re Winship*, 397 U.S. 358, 385 (1970) (Black, J., dissenting).

The decision below also offends the basic principle that government cannot “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Barnette*, 319 U.S. at 642. The court below essentially declared that it is beyond the pale of legitimate political discourse and democratic decision making—not just mistaken, but unreasonable as a matter of law—to hold and rely on the belief that marriage should be limited to a man and a woman. This is government orthodoxy par excellence, encompassing both politics and religion, because it affords official privilege to certain religious and secular views and

imposes official sanctions—including formal judicial disapproval—on those who dissent. Courts do not “issu[e] national decrees as to what is orthodox and what is not.” *County of Allegheny v. ACLU*, 492 U.S. 573, 677-78 (1989) (Kennedy J., concurring in the judgment in part and dissenting in part).

The district court’s opinion imputes distorted religious beliefs to seven million California voters and then holds that Proposition 8 fails because voters relied solely on those beliefs instead of on secular values. This the First Amendment forbids.

2. The Validity of Proposition 8 Cannot Be Judged Based on the Religious Convictions of Some of Its Supporters.

Even if the court below had accurately depicted the religious beliefs of the three *denominations* it scrutinized—and it did not—the court lacked the authority to attribute those beliefs to all *individual voters* identified with each denomination. As the Supreme Court has explained, “[i]ntrafaith differences ... are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences....” *Thomas*, 450 U.S. at 715. And even if such wholesale attribution of religious beliefs were possible, those beliefs would be irrelevant because legislation is not judged by the private motivations of its supporters. *See Mergens*, 496 U.S. at 249 (“what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the

legislators who enacted the law.”). Confusing legislative motive with legislative purpose contradicts numerous decisions holding that legislation is not invalid because it “merely happens to coincide or harmonize with the tenets of some or all religions.” *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). As the Court illustrated, “[t]hat the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.” *Harris v. McRae*, 448 U.S. 297, 319 (1980). On that reasoning it has rejected challenges to Sunday Closing laws and abortion restrictions. *See McGowan*, 366 U.S. at 442; *Harris*, 448 U.S. at 319-20.

Accordingly, Proposition 8 must be assessed by its objective purposes, “not the possibly religious *motives*” of those who drafted and advocated it.

CONCLUSION

The constitutionality of Proposition 8 cannot turn on the district court’s disapproval of religious beliefs that extol the traditional definition of marriage. Indeed, the presumed religious beliefs of voters and faith communities are irrelevant to the analysis. For the reasons stated in the official proponents’ brief, the traditional definition of marriage—supported and opposed by religious and secular voters alike during the Proposition 8 campaign—should be upheld and the decision below reversed.

Respectfully submitted,

/s/Alexander Dushku

Von G. Keetch
Alexander Dushku
R. Shawn Gunnarson
KIRTON & McCONKIE
60 East South Temple
Salt Lake City, UT 84111
(801) 328-3600

Carl H. Esbeck
Legal Counsel
Office of Governmental Affairs
NATIONAL ASSOCIATION OF
EVANGELICALS
P.O. Box 23269
Washington, D.C. 20026
(202) 789-1011

Anthony R. Picarello, Jr.
Jeffrey Hunter Moon
Michael Moses
U.S. CONFERENCE OF CATHOLIC
BISHOPS
3211 4th Street, N.E.
Washington, DC 20017-1194
(202) 541-3300

James F. Sweeney
SWEENEY & GREENE LLP
9381 East Stockton Blvd., Suite 218
Elk Grove, CA 95624
Attorney for CALIFORNIA CATHOLIC
CONFERENCE
(916) 753-1300

September 24, 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief of *Amici Curiae* has been produced using the proportional font 14-point Times New Roman. I also certify that this brief contains 6,724 words, as calculated by Microsoft Word 2007, in compliance with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

/sAlexander Dushku
Alexander Dushku
Counsel for Amici Curiae

September 24, 2010

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 24, 2010.

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

/s/ Alexander Dushku
Alexander Dushku
Counsel for the Amici Curiae

September 24, 2010