**NO. 10-16696**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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KRISTIN PERRY, et al.,
*Plaintiffs-Appellees*,

v.

ARNOLD SCHWARZENEGGER, et al.
*Defendants*,

and

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

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

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# BRIEF *AMICUS CURIAE* OF THE ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF APPELLANTS

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## INTEREST OF THE *AMICUS CURIAE*

The Ethics and Public Policy Center is a 501(c)(3) research institution dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy. Our program on The Constitution, the Courts, and the Culture aims to promote a sound understanding of the limits on the proper role of the courts in construing the Constitution. We have a strong interest both in defending marriage and in preventing judicial usurpation of the legitimate power of citizens in each state to determine their marriage laws.

This brief is filed pursuant to consent of counsel of record for all parties.

## ARGUMENT

It must be rare, if not unprecedented, that a federal district judge has had his rulings in a case reversed three times before his final judgment is even presented for appellate review. But the occurrence of that rarity in this case barely begins to convey the breadth and depth of the judicial errors below. The purpose of this brief is to provide a survey of the district judge's remarkable course of misconduct in this case.

### I. THE DISTRICT JUDGE'S USE OF THE STATEMENT BY PROPONENTS' COUNSEL THAT "YOU DON'T HAVE TO HAVE EVIDENCE" OF THE STATE'S PROCREATIVE INTEREST IN MARRIAGE IS DISTORTING AND MISLEADING.

As Proposition 8's proponents demonstrated below and establish in their opening brief, the traditional definition of marriage reflects the elementary

biological reality that only opposite-sex unions naturally generate children. As has long been understood and acknowledged by jurists, philosophers, historians, and social scientists, the essential reason for governmental recognition of marriage is to encourage the generation of children in the optimal context of marriage and to discourage their generation in socially harmful non-marital contexts.

In the opinion under review, the district judge dismissively treated society's procreative interest in marriage: "The evidence did not show any historical purpose for excluding same-sex couples from marriage, as states have never required spouses to have an ability or willingness to procreate in order to marry." ER148. We will ignore in this brief the illogical connection between the two clauses of the district judge's sentence, as the brief of Proposition 8's proponents brief amply demonstrates that the district judge's reliance on the absence of Orwellian fertility tests is frivolous. *See* Defendant-Intervenors-Appellants' Opening Brief ("Proponents' Brief") at 60-64. We will also not undertake to repeat proponents' showing of the ample evidence in the record—and the overwhelming authorities presented to the district judge of which he should have taken judicial notice—demonstrating the state's, and society's, procreative interest in marriage.

We would instead like to call attention to an assertion by the district judge that purportedly supported his claim that the "evidence did not show any historical

purpose for excluding same-sex couples from marriage." Specifically, the district judge, in summarizing proponents' defense of Proposition 8 stated:

> During closing arguments, proponents again focused on the contention that "responsible procreation is really at the heart of society's interest in regulating marriage." When asked to identify the evidence at trial that supported this contention, proponents' counsel replied, "*you don't have to have evidence of this point*."

ER44-45 (emphasis added; citations omitted).

The clear—and, as we shall show, grossly misleading—implication of the italicized quotation in this passage is that Proposition 8's proponents offered no evidence or other authority in support of society's procreative interest in marriage. The effect of this implication was to create the false impression that the district judge had little or no choice but to rule as he did, for Proposition 8's proponents supposedly failed to muster any real defense of Proposition 8. That false implication just happened to comport with plaintiffs' public-relations offensive: As one of plaintiffs' counsel put it in sowing confusion in a national television interview, "they [Proposition 8's proponents] said during the course of the trial they didn't need to prove anything, they didn't have any evidence, they didn't need any evidence."[1] That false implication was also regurgitated by commentators assessing the district judge's opinion.[2]

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[1] Fox News Sunday, *Ted Olson on Debate Over Judicial Activism and Same-Sex Marriage*, http://www.foxnews.com/on-air/fox-news-sunday/transcript/ted-olson-debate-over-judicial-activism-and-same-sex-marriage (Aug. 8, 2010).

Let's put the passage highlighted by the district judge in its proper context.

At closing argument, counsel for proponents began by stating that "the historical record leaves no doubt … that the central purpose of marriage in virtually all societies and at all times has been to channel potentially procreative sexual relationships into enduring stable unions to increase the likelihood that any offspring will be raised by the man and woman who brought them into the world." Trial Tr. 3028:13-19. Proponents' counsel cited numerous Supreme Court (and other) cases that reflect this understanding. Trial Tr. 3027-3028.

When proponents' counsel stated that "the *evidence* shows overwhelmingly that … responsible procreation is really at the heart of society's interest in regulating marriage," ER349:5-8 (emphasis added), the district judge asked, "What was the witness who offered the testimony? What was it and so forth?" ER349:14-15. Counsel began his response:

> The *evidence before you* shows that sociologist Kingsley Davis, in his words, has described the universal societal interest in marriage and definition as social recognition and approval of a couple engaging in sexual intercourse and marrying and rearing offspring. [Emphasis added.]

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[2] *See, e.g.*, Editorial, *Proposition 8 ruling changes the debate over same-sex marriage* forever, Los Angeles Times, Aug. 4, 2010; Lisa Bloom, *On Prop 8, it's the evidence, stupid*, CNN.com, available at http://www.cnn.com/2010/OPINION/08/17/bloom.prop.8/index.html (Aug. 18, 2010); Jacob Sullum, *Is It Crazy to Call Californians Irrational?*, Reason.com, available at http://reason.com/archives/2010/08/11/ is-it-crazy-to-call-california (Aug. 11, 2010).

Counsel then cited William Blackstone's statements—which were also in evidence submitted at the trial—that the relation of husband and wife and the "natural impulse" of man to "continue and multiply his species" are "confined and regulated" by society's interests; that the "principal end and design" of marriage is the relationship of "parent and child"; and that it is "by virtue of this relation that infants are protected, maintained, and educated." ER349-350.

As proponents' counsel proceeded to work his way through "eminent authority after eminent authority"—all in evidence submitted at the trial—the district judge interrupted him to ask the peculiar question, "I don't mean to be flip, but Blackstone didn't testify. Kingsley Davis didn't testify. What *testimony* in this case supports the proposition?" ER350:16-18 (emphasis added). (We address this peculiar question, and related confusion, in our sixth point in Part III below.) Counsel responded to the district judge's question:

> Your Honor, these materials are before you. They are evidence before you.… But, your Honor, *you don't have to have evidence for this from these authorities. This is in the cases themselves. The cases recognize this one after another*. [ER350:19-351:1 (emphasis added).]

The district judge then said: "I don't have to have evidence?" ER 351:2. Counsel's response: "*You don't have to have evidence of this point if one court after another has recognized*—let me turn to the California cases on this." ER351:3-5 (emphasis added).

Only the underlined portion of the passage is what the district judge quotes—utterly out of context—in his opinion.

Counsel then proceeded to present California cases stating that the "first purpose of matrimony by the laws of nature and society is procreation," that "the institution of marriage serves the public interest because it channels biological drives … that might otherwise become socially destructive and it ensures the care and education of children in a stable environment," and that (in a ruling just two years ago) "the sexual procreative and childrearing aspects of marriage go to the very essence of the marriage relation." ER351.

Thus, in context it is clear that proponents' counsel cited extensive evidence in the record, as well as relevant legal authorities, in support of the proposition that "responsible procreation is really at the heart of society's interest in regulating marriage." Indeed, the evidence that proponents submitted (and cited in their proposed findings of fact) in support of this heretofore obvious and noncontroversial proposition was overwhelming.

When counsel stated that "you don't have to have evidence for this [that is, the procreative purpose of marriage] *from these authorities*"—sociologist Kingsley Davis and Blackstone and the other "eminent authorities" that counsel was ready to discuss when the district judge interrupted him—and that the "cases themselves" "recognize this one after another," it is crystal-clear in context that he was not

contending that he had not provided evidence or that he did not need to provide evidence *or other authority*. He was merely making the legally sound observation that the many cases recognizing the procreative purpose of marriage were an alternative and additional source of authority for the proposition.

Exactly the same is obviously true for counsel's immediate follow-up: "*You don't have to have evidence of this point if one court after another has recognized*—let me turn to the California cases on this." ER351:3-5 (emphasis added). Yet the district judge stripped the first nine words of counsel's statement from its context, distorted its meaning, and created the patently false impression that Proposition 8's proponents had refused to offer evidence and other authority in support of society's procreative interest in marriage.

## II. BEYOND HIS UNWARRANTED CERTITUDE ABOUT THE LONG-TERM EFFECTS OF SAME-SEX MARRIAGE, THE DISTRICT JUDGE DISTORTED THE MEANING OF THE MODEST ACKNOWLEDGMENT BY PROPONENTS' COUNSEL THAT THE EFFECTS CANNOT BE PREDICTED WITH CERTAINTY.

Among the district judge's many baseless contentions is his claim that "the evidence shows *beyond debate* that allowing same-sex couples to marry has at least a neutral, if not a positive effect, on the institution of marriage." ER160-161 (emphasis added). For starters, such an assertion is simply beyond the capacity of the social sciences to sustain. It is precisely for that reason that Jonathan Rauch, a leading *supporter* of same-sex marriage (and author of the book *Gay Marriage:*

*Why It Is Good For Gays, Good For Straights, And Good For America*), has condemned the district judge's ruling as "radical." As Mr. Rauch states, "that kind of sweeping certainty" about the future effects of "social policy" simply does not fit "an unpredictable world." Jonathan Rauch, *The radical gay rights ruling*, New York Daily News, Aug. 11, 2010.

Further, as proponents demonstrate, the district judge's extravagant claim rests almost entirely on the testimony of a single expert witness for plaintiffs, Professor Letitia Peplau, who specifically *disclaimed* that her limited statistics on marriage and divorce rates in Massachusetts were "necessarily serious indicators of anything." ER241:1-2. The district judge's claim also simply ignores the admission by another of plaintiffs' expert witnesses, Professor Nancy Cott, that it is "impossible" to know what the consequences of same-sex marriage would be because "no one predicts the future that accurately." ER226:17-22. And the district judge's claim also fails to acknowledge, much less address, evidence in the record about negative trends in the Netherlands—on marriage rates and nonmarital childrearing—that were exacerbated in the aftermath of that country's adoption of same-sex marriage. *See* Proponents' Brief at 101-102.

The district judge's misplaced certitude about the long-term impact of same-sex marriage stands in sharp contrast to the modest acknowledgment by proponents' counsel at the summary-judgment hearing in October 2009 that he

didn't "know" what the long-term impact of same-sex marriage would be. In his opinion, the district judge clips counsel's comment out of context in a manner that distorts his message by falsely suggesting that counsel's epistemological modesty amounted to some sort of concession that same-sex marriage did not pose any significant potential harmful effects:

> At oral argument on proponents' motion for summary judgment, the court posed to proponents' counsel the assumption that "the state's interest in marriage is procreative" and inquired how permitting same-sex marriage impairs or adversely affects that interest. Counsel replied that the inquiry was "not the legally relevant question," but when pressed for an answer, counsel replied: Your honor, my answer is: I don't know. I don't know.
>
> *Despite this response*, proponents in their trial brief promised to "demonstrate that redefining marriage to encompass same-sex relationships" would effect some twenty-three specific harmful consequences.

ER44 (emphasis added; citations omitted). Here again, the district judge's distortion mirrors plaintiffs' own distortion in their public-relations messaging. *See, e.g.*, Theodore B. Olson, *The Conservative Case for Gay Marriage*, Newsweek, Jan. 9, 2010 ("when the judge in our case asked our opponent to identify the ways in which same-sex marriage would harm heterosexual marriage, to his credit he answered honestly: *he could not think of any*") (emphasis added).

The district judge has misrepresented both counsel's comment and the entirely compatible position taken by proponents in their trial brief. At the summary-judgment hearing, the district judge asked counsel how same-sex marriage "*would harm* opposite-sex marriages." ER216:10-11 (emphasis added).

It was in response to that seeming request for an ironclad prediction that counsel stated, "Your Honor, my answer is: I don't know. I don't know." ER216:15-16. Counsel then explained:

> "[T]he state and its electorate are entitled, *when dealing with radical proposals for change, to a bedrock institution such as this* to move with incrementally, to move with caution, and to adopt a wait-and-see attitude.
>
> Keep in mind, your Honor, this same-sex marriage is a very recent innovation. *Its implications of a social and cultural nature, not to mention its impact on marriage over time, can't possibly be known now*." [ER217:1-8 (emphasis added)]

A few minutes later, when the district judge stated that "I understand your answer to that question"—the question of the harm that same-sex marriage would inflict on the institution of marriage—"is you don't know," counsel responded:

> Well, your Honor, *it depends on things we can't know*. This is a — this is a — that's my point.
>
> And the people of the State of California were entitled to step back and watch this experiment unfold in Massachusetts and the other places where it's unfolding, and to assess whether or not — oh, our concerns about this – about this new and — and heretofore unknown marital union have either been confirmed by what's happening in marriage in Massachusetts, or perhaps they've been completely allayed; but my point is: California was entitled not to follow those examples, and to wait and see. That's the whole purpose of federalism. [ER218:2-13 (emphasis added)]

Counsel also stated that "there appear to be a number of adverse social consequences in The Netherlands from" same-sex marriage, including that "the effort to channel procreative activity into [the] institution [of marriage] has abated quite a bit." Doc. 228 at 30:14-19. Counsel's larger point *at the summary-*

*judgment stage* was of course that his clients' entitlement to summary judgment did not depend on such matters, so it is hardly meaningful that he did not see fit to use the occasion to identify all the foreseeable potential harms.

Further, contrary to the district judge's suggestion in his opinion, there is no tension between counsel's statements at the summary-judgment hearing and appellant-proponents' position in their trial brief. The district judge asserts that "proponents in their trial brief promised to 'demonstrate that redefining marriage to encompass same-sex relationships' *would effect* some twenty-three specific harmful consequences" (emphasis added). But the "would effect" phrase, with its supposed certitude, is the district judge's own invention. What proponents actually say in their trial brief in the passage that the district judge clips from is:

> Although they are not required to do so [because they are entitled to judgment in any event], Proponents will further demonstrate that redefining marriage to encompass same-sex relationships *would very likely harm* [23 listed] interests. [Doc. 295, at 8-9 (emphasis added).[3]]

The probabilistic phrasing of "would very likely harm" is obviously completely compatible with counsel's epistemological modesty at the summary-judgment hearing as well as with his concern about "radical proposals for change to a bedrock institution." And the relevant question under rational-basis review is (at

[3] The citation given by the district judge is pages "13-14" of the trial brief. The passage is on the pages *numbered* 8 and 9, which, counting unnumbered pages, are the 13th and 14th pages of the document.

most) merely whether it is reasonable to be concerned that same-sex marriage *might* have adverse consequences.

## III. THE DISTRICT JUDGE MADE AN EXTRAORDINARY SERIES OF TRIAL-RELATED DECISIONS THAT BENEFITED PLAINTIFFS.

We will not recount here the multiple legal errors contained in the district judge's opinion. We would instead like to highlight a remarkable series of trial-related decisions by the district judge, all of which were legally erroneous and all of which predictably operated to benefit plaintiffs and the ideological cause of same-sex marriage.

First is the district judge's decision from the outset to have the parties proceed to factual discovery in a case that, to the extent that it involves any facts at all, involves *legislative* rather than *adjudicative* facts—facts that are the proper stuff of documentary submissions, not of live trial testimony. (See Proponents' Brief at 35-38.) That decision surprised even plaintiffs' lawyers: When the district judge declared to plaintiffs' counsel at the case-management conference, "There certainly is some discovery that is going to be necessary here, isn't there?," plaintiffs' counsel offered this appropriately puzzled reply, "Well, I'm not sure.… Is there discovery necessary? If there is, what is it? What form would it take?" Doc. 78 at 22:25-23:5.

Second is the remarkably intrusive discovery, grossly underprotective of First Amendment associational rights, that the district judge authorized plaintiffs to

undertake into the *internal campaign communications* of Proposition 8's sponsors. The district judge's order was overturned in substantial part by an extraordinary writ of mandamus issued by this Court, which declared that "[t]he freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment" and that the discovery authorized by the district judge "would have the practical effect of discouraging the exercise of First Amendment associational rights." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2009) (as amended Jan. 4, 2010). But the portion of the district judge's order that survived enabled plaintiffs to conduct scorched-earth discovery. And the sweeping judicial invasion of the core political speech rights and associational rights of Proposition 8 supporters had the added effect of intimidating opponents of same-sex marriage from ever daring to exercise those rights again.

Third is the district judge's decision to proceed to trial rather than to resolve the case, as nearly all other courts have done in similar cases, on summary judgment. Even plaintiffs' counsel acknowledged in his closing argument post-trial that "I thought we didn't need the trial" (even as he praised the trial, evidently for its public-relations impact, as "an enormously enriching and important undertaking"). ER347:16-17; *see also* statement of Mr. Olson at Trial Tr. 2983:23-24 ("I believe that this case could be decided on whatever Mr. Cooper means by legislative facts").

Fourth is the district judge's surprising New Year's Eve edict, in which he rushed to override longstanding prohibitions on televised coverage of federal trials in order to authorize broadcasting of the trial in this case. That order was made in utter disregard of the magnified harassment and abuse that witnesses in support of Proposition 8 would reasonably anticipate from broadcasting. That order was blocked by the Supreme Court in a ruling that rebuked the district judge for his poor judgment:

> The District Court attempted to change its rules at the eleventh hour to treat this case differently than other trials in the district. Not only did it ignore the federal statute that establishes the procedures by which its rules may be amended, its express purpose was to broadcast a high-profile trial that would include witness testimony about a contentious issue. If courts are to require that others follow regular procedures, courts must do so as well.

*Hollingsworth v. Perry*, 130 S. Ct. 705, 714-715 (2010). Even then, the district judge continued to videotape the trial, even though proponents' counsel informed him that several defense witnesses would not testify if the videotaping continued. *See* ER70-71.

Fifth is the district judge's uncritical acceptance of those portions of the testimony of plaintiffs' experts that run contrary to centuries of understanding of what marriage is and what marriage is for—and his neglect of their concessions. *See, e.g.*, Proponents' Brief, at 38-43, 51-60, 85-93. The trusting reader would have no idea from the district judge's opinion how deeply invested plaintiffs' experts are in the cause of same-sex marriage and how many of them would

directly benefit from the very ruling they were testifying in support of.[4] We do not mean to suggest that those facts suffice to discredit their testimony. But a sober

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[4] Here is some information on the bias of plaintiffs' experts:

Gregory Herek is a former president of the Association of Lesbian and Gay Psychologists, *see* PX2326 at 2, and he and his same-sex partner are registered domestic partners in California (according to California domestic partnership records produced in discovery by California's Secretary of State). On his blog Beyond Homophobia, he advocated for same-sex marriage and against Proposition 8. *See*, *e.g.*, Beyond Homophobia: A weblog about sexual orientation, prejudice, science and policy by Gregory Herek, *Field Poll: Proposition 8 May Have a Photo Finish*, http://www.beyondhomophobia.com/blog/2008/10/31/field-poll-toss-up/ (Oct. 31, 2008, 14:51 PT).

Gary Segura and his same-sex partner have registered as domestic partners in California. He contributed money to the campaign against Proposition 8. Trial Tr. 1657. He has emphasized the personal financial interest that he and other gays in California have in same-sex marriage: "Gays not being able to get married costs a ton, as I can attest, because what you can do for a $15 marriage license cost me thousands of dollars." *See* Stanford University, *Presidential Politics Lecture 5*, http://www.youtube.com/watch?v=KVAus_2hk4A, starting at 1:39:30; *see also* ER105 (district judge's Finding of Fact # 39 stating in part that "[m]aterial benefits … resulting from marriage can increase wealth").

Lee Badgett is a lesbian and is party to a same-sex marriage. *See* PX1273 at x. She contributed money to the campaign against Proposition 8 and has written a book (*When Gay People Get Married*) advocating same-sex marriage. She was awarded a fellowship for persons "engaged in advocacy work focused on LGBTQ equality and liberation." *See* PX2321 at 53; Rockwood Leadership Institute, *Fellowship for Lesbian, Gay, Bisexual, Transgender and Queer Advocacy*, http://www.rockwoodfund.org/article.php?id=183. The *Advocate* magazine ("The World's Leading Gay News Source") named her "one of our best and brightest activists." *See* PX2321 at 53.

George Chauncey, chair of Yale University's LGBT studies program, is gay and has been in a long-term same-sex relationship. *See* PX847, at 169. His book *Why Marriage?* advocates same-sex marriage.

factfinder would consider a witness's partiality in assessing the witness's testimony.

Sixth is the district judge's profound misunderstanding that the live trial testimony on matters of legislative fact has an exclusive, or highly privileged, claim on his consideration. That misunderstanding is most sharply captured in the district judge's comment (presented in context in Part I), "I don't mean to be flip, but Blackstone didn't testify. Kingsley Davis didn't testify. What *testimony* in this case supports the proposition [that society has a procreative interest in marriage]?" ER350:16-18 (emphasis added). The district judge's question—"What *testimony* in this case supports the proposition?"—wasn't just flip. It was obtuse. Even if one indulges the mistaken assumption that there was any need for a trial in the case, live witness testimony is merely one form of trial evidence. Exhibits

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Ilan Meyer is recognized as "an outspoken advocate for LGBTQ rights." *See* National Sexuality Resource Center, *Sexual Health and Healthy Sexuality 2010 Summer Institute Faculty*, http://nsrc.sfsu.edu/SI_faculty. He contributed money to the campaign against Proposition 8. *See* Trial Tr. at 891-892.

Nancy Cott has called herself "somewhat between a neutral party and an advocate." *See* Trial Tr. at 255:15-16. She has donated her time and money to fighting traditional marriage. *See* Alternatives to Marriage Project, 2002 Annual Report at 13, *available at* http://www.unmarried.org/annual-reports.html; *see also* Trial Tr. 256. She joined amicus briefs supporting same-sex marriage in cases in the New York, New Jersey, and Washington courts. *See* Trial Tr. at 255-256.

submitted in evidence at trial are another form. And a judge is of course free to, and expected to, take judicial notice of various factual matters.

Each of these errors (to the extent not blocked by higher courts) operated to make a national spectacle of this case and to grossly exaggerate the weight that the testimony of plaintiffs' experts deserved—exactly as if it were the district judge's resolve to turn the case into a high-profile, culture-transforming, history-making, *Scopes*-style show trial advancing the ideological cause of same-sex marriage.

## IV. THE DISTRICT JUDGE'S ACTIONS THREATENED TO PREJUDICE PROPONENTS' APPELLATE RIGHTS.

The district judge also took a series of actions that threatened to—and that seem to have been designed to—prejudice proponents' rights on appeal.

First, little more need be said here about the district judge's many unsupported or highly contestable factual findings or about his attempt to insulate them from review by mischaracterizing the record and treating them as though they were adjudicative facts. It is worth highlighting, though, that some of the district judge's pivotal purported "findings of fact" are not factual findings at all but rather the district judge's (highly contestable) *predictions*. Take, for example, purported finding of fact 55: "Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages." Apart from the fact (discussed above) that the certitude of this prediction is not supported

by plaintiffs' own experts, this is plainly a matter on which reasonable people can and do hold a broad range of forecasts and is the very stuff of policymaking.

Second is the district judge's inexplicable delay in ruling on the motion to intervene filed in December 2009 by Imperial County and its officers and his eventual wrongful denial of that motion to intervene. Briefing on the motion made the district judge well aware of the position (a position that, we believe, was mistaken, for the reasons set forth in the briefs of proponents and of Imperial County) that Imperial County's intervention to defend Proposition 8 would be necessary to ensure the participation of a defendant who was willing and able to appeal a ruling adverse to Proposition 8. Indeed, the fact that the district judge regarded that position as substantial, *see* ER6-8, provided yet another compelling reason why he should have granted Imperial County's motion to intervene, for there is surely a strong public interest in ensuring full and effective appellate review of a decision that would radically redefine the foundational institution of American society. At the very least, it was incumbent on the district judge to rule promptly on Imperial County's motion, as doing so would have enabled Imperial County and its officers to pursue an expedited appeal that would have allowed them to become intervenor-defendants by the time of the district judge's final judgment. Although we believe it will be determined ultimately to have been

ineffectual, the primary effect of the district judge's mishandling of Imperial County's motion to intervene was to jeopardize proponents' right of appeal.

Third, the district judge denied proponents' motion for a stay of his judgment pending appeal. As the district judge well understood, immediate implementation of his radical ruling would have dramatically altered the status quo on marriage in California before this Court had the opportunity to review his manifest errors. This Court properly stayed the district judge's judgment—the remarkable third time that one of his rulings in this case was reversed.

## V. THE ONLY PLAUSIBLE EXPLANATION FOR THE DISTRICT JUDGE'S COURSE OF MISCONDUCT IS THAT HE HARBORS A DEEP-SEATED ANIMUS AGAINST TRADITIONAL MARRIAGE.

What can possibly account for the remarkable series of errors discussed in this brief? Simple incompetence is not a plausible explanation. For starters, the district judge is very experienced and generally well regarded. Further, the thoroughly one-sided nature of the errors is inconsistent with the random pattern that incompetence would generate.

We respectfully submit that the inescapable explanation for the district judge's performance in this case is that he harbors a deep-seated animus against traditional marriage and that he has been unwilling or unable to contain his animus. That understanding ought to inform this Court's entire review of the district judge's ruling.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendant-Intervenors-Appellants' Opening Brief and in Movant-Appellants' Opening Brief in No. 10-16751, this Court should reverse the district court's ruling invalidating Proposition 8 and should direct that court to enter judgment against Plaintiffs.

Dated: September 24, 2010

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,092 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2003 word processing software in Times New Roman 14-point font.

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## 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.

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