

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

**PROPOSED AMICUS BRIEF IN SUPPORT OF DEFENDANT-
INTERVENORS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Proposed Amicus Liberty Counsel states, pursuant to Fed. R. App. P. 26.1, that there is no parent corporation or publicly held corporation that owns 10 percent or more of its stock.

Proposed Amicus JONAH Inc. states, pursuant to Fed. R. App. P. 26.1, that there is no parent corporation or publicly held corporation that owns 10 percent or more of its stock.

Proposed Amicus Campaign for Children and Families states, pursuant to Fed. R. App. P. 26.1, that there is no parent corporation or publicly held corporation that owns 10 percent or more of its stock.

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STATEMENT OF INTEREST

The Proposed Amici are non-profit organizations that are dedicated to preserving marriage as the union of one man and one woman, the reality that children need a mother and father, and the fact that sexual orientation is not immutable – people can, and have, overcome their same-sex attractions.

Proposed Amicus Liberty Counsel is a national public policy, education, and litigation firm that has been substantially involved in drafting constitutional amendments, Defense of Marriage Acts (DOMAs), and defending them in courts throughout the country.

Proposed Amicus Campaign for Children and Families is a nonprofit organization that represents fathers, mothers, grandparents and concerned individuals who believe the sacred institutions of life, marriage and family deserve utmost protection and respect by government and society.

Proposed amicus JONAH Inc., Jews Offering New Alternatives for Healing, is a non-profit international organization dedicated to educating the world-wide Jewish community about the social, cultural and emotional factors which lead to same-sex attractions.

Proposed Amici have submitted an accompanying motion for leave to file.

I. SEXUAL ORIENTATION SHOULD NOT BE CHARACTERIZED AS A SUSPECT CLASSIFICATION.

The district court's decision that sexual orientation constitutes a suspect classification must be reversed. United States Supreme Court precedent belies the district court's conclusion that "sexual orientation," which is a characteristic based on "feelings and self-concept," is entitled to strict scrutiny review.¹ The Supreme Court has consistently reserved suspect classification for race, alienage, or national origin. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 682 & nn. 7-9 (1973) (citing cases). In deciding whether other classes should be afforded suspect classification, the Court has focused on whether the class is defined by an immutable characteristic determined solely by the accident of birth. *See Frontiero*, 411 U.S. at 686; *see also Nguyen v. I.N.S.*, 533 U.S. 53, 83 (2001) ("presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes"); *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (undocumented alien status is not an "immutable characteristic"); *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (presumption of statutory validity undermined when "legislation creat[es] classes based upon certain other immutable characteristics"); *Regents of Univ. of Cal. v. Bakke*, 438

¹ American Psychological Association, "Sexual Orientation and homosexuality," available at www.apa.org/helpcenter/sexual-orientation.aspx (last visited Sept. 17, 2010).

U.S. 265, 360 (1978) (“it is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable characteristics”); *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (“traditional indicia of suspectedness” include “immutable characteristic determined solely by the accident of birth”).

The reason for the focus on immutable characteristics is because “[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Affording suspect classification to a group that self-identifies based on characteristics that are not immutable results in arbitrary line-drawing, opening the door to a court analyzing all legislation that impacts any group of people under heightened or suspect classification. *Cleburne* is instructive as to why sexual orientation is not the type of characteristic that should be subject to suspect classification.

In *Cleburne*, the Cleburne Living Center filed suit after the city denied a special use permit “for the operation of a group home for the mentally retarded.” *Cleburne*, 473 U.S. at 435. Plaintiffs argued that “mental retardation” was a quasi-suspect classification. The Court disagreed for two primary reasons: first, “mental retardation” *does* relate to the ability of the class to participate in and contribute to

society, and (ii) those who are “mentally retarded” are not “all cut from the same pattern” – “they range from those whose disability is not immediately evident to those who must be constantly cared for.” *Id.* at 441-42. For similar reasons, the Supreme Court has held that age is not a suspect classification. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (citing cases). Significantly, the district court’s decision classifying sexual orientation as a suspect classification is contrary to controlling case law even in the Ninth Circuit. *See High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (1990), *reh’g en banc denied*, 909 F.2d 375 (9th Cir. 1990),

In *High Tech*, this Court refused to afford sexual orientation suspect classification. This Court explained that while “homosexuals have suffered a history of discrimination,” they do not meet the other criteria: “[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage” 895 F.2d at 573. This Court has consistently followed that well-reasoned conclusion in *High Tech* that sexual orientation is not a suspect classification for purposes of an equal protection claim. *See, e.g., Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003); *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *cf. Witt v. Dept. of the Air Force*,

527 F.3d 806, 817 (9th Cir. 2008) (concluding for purposes of a substantive due process claim that *Lawrence* requires something higher than rational basis review).

This Court should reaffirm its conclusion in *High Tech* because sexual orientation is readily distinguishable from the other characteristics that have received suspect classification. Significantly, the American Psychological Association explains that one's sexual orientation "exists along a continuum that ranges from exclusive heterosexuality to exclusive homosexuality and includes various forms of bisexuality." See American Psychological Association, *Sexual Orientation and homosexuality*, available at www.apa.org/helpcenter/sexual-orientation.aspx. In fact, it explains that sexual orientation "refers to feelings and self-concept." *Id.* It stands all prior suspect classification jurisprudence on its head to even suggest that suspect classification can be afforded to a class based on how people feel about or perceive themselves.

The 2009 Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation further supports the fact that sexual orientation is not immutable in that some have successfully changed their sexual orientation. *Id.* at 45 (reporting "varying degrees of satisfaction and varying perceptions of success"), 50 (some had "altered their sexual orientation;") "participants had multiple endpoints, including LGB identity, 'ex-gay' identity, no

sexual orientation identity, and a unique self-identity”), 53 (“individuals report a range of effects from their efforts to change their sexual orientation, including both benefits and harm”). Indeed, there are innumerable reported cases of individuals who have changed their sexual orientation.² Nevertheless, the district court found, contrary to the APA, that “[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.” (Finding of Fact (“FF”) no. 46). This finding is inconsistent with another of the district court’s findings that the “vast majority” of people were “consistent in self-identification, behavior and attraction throughout their adult lives.” (FF no. 43). The sizeable minority whose sexual orientation was *not* consistent is contrary to the findings that people cannot change their sexual orientation.

² See, e.g., Arthur Goldberg, *LIGHT IN THE CLOSET: TORAH, HOMOSEXUALITY, AND THE POWER TO CHANGE* 533-40 (2009); Jan Clausen, *APPLES & ORANGES: MY JOURNEY THROUGH SEXUAL IDENTITY* (1999); Richard Cohen, *COMING OUT STRAIGHT* (2000); Joe Dallas, *DESIRES IN CONFLICT: ANSWERING THE STRUGGLE FOR SEXUAL IDENTITY* (1991); Jakii Edwards, *LIKE MOTHER, LIKE DAUGHTER? THE EFFECTS OF GROWING UP IN A HOMOSEXUAL HOME* (2001); Jeff Konrad, *YOU DON'T HAVE TO BE GAY: HOPE AND FREEDOM FOR MALES STRUGGLING WITH HOMOSEXUALITY OR FOR THOSE WHO KNOW OF SOMEONE WHO IS* (1998); Alan P. Medinger, *GROWTH INTO MANHOOD: RESUMING THE JOURNEY* (2000); Dr. Joseph Nicolosi, *HEALING HOMOSEXUALITY: CASE STUDIES OF REPARATIVE THERAPY* (1993).

³ The APA’s sponsorship of this conference sympathetic to homosexuals adds more credence to their findings quoted above. The organization is certainly not

As this Court reviews the district court's findings, it bears emphasis that the Plaintiffs' "experts" concerning sexual orientation are politically active in the effort to gain marriage rights for same-sex couples. For example, just nine days after the district court's ruling, Drs. Badgett, Herek, Meyer, and Peplau spoke at an APA convention dedicated to the struggle for "marriage equality." These doctors participated in or chaired sessions entitled "Marriage Equality for Same-Sex Couples: Science and the Legal Debate," "Intersection of Law, Policy, and Scholarship in Gay Rights Debate," "Same-Sex Marriage: Impacts, Strategies, and New Directions," and "2020 Vision: Winning the Freedom to Marry This Decade."³

II. SAME-SEX RELATIONSHIPS ARE DIFFERENT THAN OPPOSITE-SEX RELATIONSHIPS.

Wholly apart from the biological and procreative differences between opposite-sex and same-sex couples, the psychological and medical risks associated with the homosexual lifestyle are contrary to the district court's conclusion that same-sex couples and opposite-sex couples are, in essence, the same. (FF nos. 48, 70). It is well documented that those engaged in the homosexual lifestyle have much greater incidence of substance abuse, mental health problems, medical

³ The APA's sponsorship of this conference sympathetic to homosexuals adds more credence to their findings quoted above. The organization is certainly not biased against homosexuals.

illness, and relationship dysfunctions. Documenting these facts, a recently published, peer-reviewed journal concludes that “it is difficult to find another group in society with such high risks for experiencing such a wide range of medical, psychological, and relational dysfunctions.” NARTH, 1 J. of Human Sexuality 1:53 (2009) (“Journal”). Significantly, a recent study prepared by the Massachusetts Department of Public Health – no enemy of homosexuals -- confirms these findings. *See* Massachusetts Department of Public Health, The Health of Lesbian, Gay, Bisexual, and Transgender (LGBT) Persons in Massachusetts, available at http://www.mass.gov/Eeohhs2/docs/dph/commissioner/lgbt_health_report.pdf (July 2009).

Specifically, the Journal reports that “[t]he homosexual and bisexual groups reported significantly poorer mental health in terms of anxiety, depression, suicidality, and negative affect than the heterosexual group:” “2.05 times increased risk of lifetime prevalence of depression,” “1.82 times increased risk of lifetime prevalence of suicidal attempts,” “4.00 times increased risk of 12-month prevalence of alcohol dependence,” “3.50 times increased risk of 12-month prevalence of drug dependence,” and “3.42 times increase risk of 12-month prevalence of any substance use disorder.” Journal at 1:55-58.

In addition, “30.3 percent of homosexually active women were ‘very high or drunk 3 or more days’ in the past year compared to 16.6 percent of heterosexual women,” and “8.4 percent of homosexually active women were ‘very high or drunk an average of once per week or more’ in the past year compared to 2.3 percent of heterosexual women.” *Id.* at 1:58. “Overall, 41.8 percent of lesbians and 45.6 percent of bisexuals reported they were heavy alcohol drinkers, compared with 12.7 percent of heterosexuals. Alcoholism among homosexual women is evidently so problematic that even with a support system such as Alcoholics Anonymous (AA), they do not respond as well to counseling as their heterosexual counterparts.” *Id.* There are also increased mental health concerns. For example, “[l]ifetime suicide contemplation” statistics show that “23.3 percent of homosexual women showed a lifetime risk for contemplating suicide vs. 2.3 percent of heterosexual women.” *Id.* at 1:69. The risk factors for men are very similar, at times with slightly higher or lower prevalence. *Id.* at 1:57.

The prevalence of HIV/AIDS among the homosexual community also is significantly higher than among heterosexuals. “In the 20th century, HIV/AIDS risk was approximately 430 times greater among homosexuals than among heterosexuals.” *Id.* at 1:66. In 2005, “the risks of acquiring HIV from a single act of unprotected sex within the male homosexual community in the United States

remained about 500 times greater than within the heterosexual community.” *Id.* “Lifetime prevalence for STDs in homosexual men was 75 percent compared with 16.9 percent for heterosexual men.” *Id.*

In addition, one study indicated that “[s]ame-gender sexual orientation is significantly associated with each of the suicidality measures” gauged in the study.⁴ Specifically, “gay, lesbian, and bisexual young people are at increased risk of mental health problems, with these associations being particularly evident for measures of suicidal behavior and multiple disorder[s].”⁵ A study from New Zealand singled out major depression, anxiety disorder, conduct disorder, nicotine dependence, and other substance abuse as areas in which young people who identified themselves as having a homosexual orientation were at greater risk.⁶ Studies have also shown that children raised by same-sex couples are more likely to be promiscuous and become homosexual themselves.⁷

⁴ David M. Fergusson, John L. Horwood, & Annette L. Beautrais, *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, 56 ARCHIVES OF GENERAL PSYCHIATRY 876 (Oct. 1999).

⁵ *Id.*

⁶ *Id.*

⁷ See Riggs, *Coparent or Second-Parent Adoptions by Same-Sex Couples* (Letter to the Editor), 109 PEDIATRICS 1193-1194 (June 2002); see also Richard Herrell, et al., *Sexual Orientation and Suicidality: A Co-twin Control Study in Adult Men*, 56 ARCHIVES OF GENERAL PSYCHIATRY 867 (Oct. 1999); Gary Remafedi, *Suicide and Sexual Orientation*, 56 ARCHIVES OF GENERAL PSYCHIATRY 885 (Oct. 1999); Richard C. Friedman, *Homosexuality, Psychopathology, and Suicidality*, 56

An important study in the Netherlands, where same-sex couples are allowed to marry, adopt children, and are generally treated more sympathetically in the law and culture, concluded that “[p]sychiatric disorders were more prevalent among homosexually active people compared with heterosexually active people” and that “people with same-sex sexual behavior are at greater risk for psychiatric disorders.”⁸ Given these studies, it was an abuse of discretion for the district court to have concluded that same-sex couples are “identical” to opposite-sex couples in “characteristics relevant to the ability to form successful marital unions” and that it is simply a stereotype that that engaged in homosexual activities have increased health risks. (FF nos. 48, 76). The court’s findings that children do not need a mom and a dad are similarly contrary to the findings of the medical community.

III. CHILDREN NEED A FATHER AND A MOTHER

A. Male Gender Identity and Female Gender Identity are Each Uniquely Important to a Child’s Development.

We live in a world demarcated by two genders, male and female. There is no

Archives of General Psychiatry 887 (Oct. 1999); see also J. Michael Bailey, *Homosexuality and Mental Illness*, 56 ARCHIVES OF GENERAL PSYCHIATRY 883 (Oct. 1999).

⁸ Theo G. M. Sandfort, *et al.*, *Same-Sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence Study (NEMESIS)*, 58 ARCHIVES OF GENERAL PSYCHIATRY 867 (Jan. 2001).

third or intermediate category. Sex is binary. A healthy developing boy needs to affirm and embrace his maleness.⁹

Although, no one knows exactly what “causes” a person to identify as homosexual, as the APA acknowledges, environmental factors play a part.¹⁰ Without question, some boys have more difficulty embracing their maleness than girls do their femaleness, and this may explain, in part, why male homosexuals far outnumber female lesbians.¹¹ Homosexuality in boys often stems from gender nonconformity. This nonconformity in boys results in two, seemingly opposite, reactions. First, in the early stages, the boy shuns his maleness. Second, as this disassociation with males progresses, the boy ultimately idolizes the male and longs to have his inner self filled with the maleness he lacks, and thus becomes attracted to males. “Childhood gender nonconformity turns out to be a very strong predictor of adult sexual preference among . . . males.”¹² Speaking of this gender

⁹ See Mathew D. Staver, *SAME-SEX MARRIAGE: PUTTING EVERY HOUSEHOLD AT RISK* (2004).

¹⁰ See *supra* note 1.

¹¹ Joseph Nicolosi, *A PARENTS’ GUIDE TO PREVENTING HOMOSEXUALITY* 24 (InterVarsity Press 2002) [hereinafter *PREVENTING HOMOSEXUALITY*].

¹² A.P. Bell, N.S. Weinberg & S.K. Hammersmith, *SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN* 76 (1981).

nonconformity, an organization that works with males desiring to leave the homosexual lifestyle describes the following:

Somehow, even as boys or young teenagers, we felt like we were never “man enough.” We felt like we didn’t live up to the masculine ideal. . . . It was more than low self-esteem; it was low gender esteem – a deficiency in our core sense of gender upon which our whole self image is built. Other males just seemed naturally masculine, but masculinity never came naturally to us. We aspired to it but were mystified by how to achieve it. Among other males, we felt different and lonely.

Feeling deficient as males, we pined to be accepted and affirmed by others, especially those whose masculinity we admired most. We began to idolize the qualities in other males we judged to be lacking in ourselves. Idolizing them widened a gulf we imagined between ourselves and the so-called “real men” In idolizing them, we increased our sense of our own masculine deficiency. It also dehumanized the men we idolized, putting them on a pedestal that deified them and made them unapproachable.

At the same time we idolized certain male traits or maleness generally, many of us came to fear other boys and men. Born with unusually sensitive and gentle personalities, we found it easy for many of us to feel different from and rejected by our more rough-and-tumble peers growing up. . . . Many of us felt rejected by our fathers and feared that we could never measure up or would never really matter to them.¹³

Maintaining the boundaries of gender, as traditional marriage certainly does, is particularly important for boys. “Girls can continue to develop in their feminine identification through the relationship with their mothers. On the other hand, a boy

¹³ http://www.peoplecanchange.com/Rott_Problems.htm.

has an additional developmental task – to disidentify from his mother and identify with his father.”¹⁴ Clinical Professor of Psychiatry at UCLA, Ralph R. Greenson, described this developmental process:

[T]he male child, in order to maintain a healthy sense of maleness, must replace the primary object of his identification, the mother, and must identify instead with his father. I believe it is the difficulties inherent in this additional step of development, from which girls are exempt, which are responsible for certain special problems in the man’s gender identity, his sense of belonging to the male sex. . . . The male child’s ability to disidentify will determine the success or failure of his later identification with his father.¹⁵

Dr. Nicolosi explains that

Repeatedly, researchers have found the classic triadic (three-way) relationship in the family backgrounds of homosexual men. In this situation, the mother often has a poor or limited relationship with her husband, so she shifts her emotional needs to her son. The father is usually nonexpressive and detached and often is critical as well. So in the triadic family pattern we have the detached father, the over involved mother, and the temperamentally sensitive, emotionally attuned boy who fills in for the father where the father falls short.¹⁶

Other studies of male homosexuals suggest that the father need not be *hostile* toward the son, but rather merely *indifferent* or emotionally unavailable,¹⁷ and that

¹⁴ Nicolosi, PREVENTING HOMOSEXUALITY, at 23.

¹⁵ Ralph R. Greenson, *Dis-Identifying From Mother: Its Special Importance for the Boy*, 49 INT’L J. PSYCHOANALYSIS 370 (1968).

¹⁶ Nicolosi, PREVENTING HOMOSEXUALITY, at 71-72.

¹⁷ Leif J. Braaten & C. Douglas Darling, *Overt and Covert Homosexual Problems among Male College Students*, 71 GENETIC PSYCHOL. MONOGRAPHS 302-03 (1965).

male homosexuality is often associated with poor parental relations.¹⁸ “In summary, then, it would seem that the family pattern involving a combination of a dominating, overly intimate mother *plus* a detached, hostile or weak father is beyond doubt related to the development of male homosexuality.”¹⁹ Other experts have explained in detail the development process.

From birth to approximately eighteen months, boys receive their foundational security primarily from their mothers. “Ideally, an infant’s first year or two of life is spent developing a deep, secure bond of love with the mother that leads to a healthy sense of personal identity.”²⁰ Sociologist David Popenoe noted that “fathers tend to stress competition, challenge, initiative, risk taking and independence. Mothers in their care-taking roles, in contrast, stress emotional

¹⁸ See John R. Snortum, Jams F. Gillespie, John E. Marshall, John P. McLaughlin & Ludwig Mossberg, *Family Dynamics and Homosexuality*, 24 PSYCHOL. REPORTS 763 (1969) (noting that the “present findings lend strong support to the earlier results obtained by Bieber” and “the pathological interplay between a close-binding controlling mother and a rejecting and detached father”); Marvin Siegelman, *Parental Background of Male Homosexuals and Heterosexuals*, 3 ARCHIVES SEXUAL BEHAV. 10 (1974); William Byne & Bruce Parsons, *Human Sexual Orientation: the Biologic Theories Reapprised*, 50 ARCHIVES GEN. PSYCHIATRY 236 (1993) (“perhaps a majority, of homosexual men report family constellations similar to those suggested by Bieber et al. to be causally associated with the development of homosexuality (e.g., overly involved, anxiously over controlling mothers, poor father-son relationships.)”).

¹⁹ Daniel G. Brown, *Homosexuality and Family Dynamics*, BULL. MENNINGER CLINIC, Sept. 1963, at 232.

²⁰ Bob Davies & Lori Rentzel, COMING OUT OF HOMOSEXUALITY 44 (1993).

security and personal safety.”²¹ Popenoe continues, “While mothers provide an important flexibility and sympathy in their discipline, fathers provide ultimate predictability and consistency. Both dimensions are critical for an efficient, balanced, and human child-rearing regime.”²²

Beginning at the age of approximately eighteen months and continuing to roughly the age of five, the boy needs verbal and physical affirmation of his maleness. Around eighteen months, the boy is able to begin to see the differences between male and female. At this time the father becomes more significant and the boy tries to reach out to him, and thus form a closer bond with the father. Once the boy’s gender identity is formed, he can develop gender stability.²³ Bonding with the father is critical during these formative years. Of course, a boy raised in a dysfunctional or nonfunctional family is not doomed to grow up homosexual, but such a family structure may predispose the young boy to homosexual considerations. It is typically during this phase of the boy’s development that he emphasizes his gender identity and strongly differentiates between boys and girls. Thus, “the normally developing boy spurns the company of little girls.”²⁴

²¹ David Popenoe, *LIFE WITHOUT FATHER* 144 (1996).

²² *Id.* at 146.

²³ See A.P. Bell, N.S. Weinberg & S.K. Hammersmith, *SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN* (1981).

²⁴ Nicolosi, *PREVENTING HOMOSEXUALITY*, at 49.

There are many ways that a boy may resist associating with a masculine identity. Dr. Richard Fitzgibbons describes a so-called “sports wound,” by which he means that a boy who is not athletic can be teased by his peers, and such teasing can negatively affect the boy’s self-image, his relationships with peers, his gender identity, and his body image. He notes that a boy’s negative view of his masculinity and his loneliness can lead him to crave the masculinity of his male peers.²⁵ Sometimes fathers can agitate a boy’s masculinity when the boy fails to conform to the image that the father demands, whether it is in sports or in any other masculine characteristic.

If the boy is rejected by his peers, and if his father demeans the boy’s self-image, ignores him, or does little to affirm the boy’s masculinity, the boy can end up rejecting his maleness while at the same time craving it.

Our fear and hurt at feeling rejected by the male world often led us to disassociate ourselves from the masculine – the very thing we desired most. These feelings also led us to prejudice as some of us began consciously or subconsciously to deride men as inferior. . . . Often we succumbed to the common psychological phenomenon of being most critical of what we most envied. Or most feared. . . .

In our own experience, and from the experience of many gay men we have known, it seems very rare for a man who struggles with homosexuality to feel that he was sufficiently loved, affirmed and mentored by his father growing up, or that he identified with his father

²⁵ Richard Fitzgibbons, *The Origins and Therapy of Same-Sex Attraction Disorder*, in *HOMOSEXUALITY IN AMERICAN PUBLIC LIFE* 86-97 (1999).

as a male role model. In fact, oftentimes the father-son relationship is marked by either actual or perceived abandonment, extended absence, hostility or disinterest (a form of abandonment).²⁶

The boundaries of male and female are critically important for the development of boys to men.

Commenting on lesbianism and how it may differ from male homosexuality,

Dr. Nicolosi writes:

Male homosexuality tends to follow a relatively predictable developmental pattern, . . . but lesbianism is less predictable and more likely to alternate, during the woman's lifetime, with periods of heterosexuality. Many lesbians believe their sexuality is a choice they made as an outgrowth of their feminist political interests. Still, I believe the most common pathway to lesbianism is a life situation that creates a deeply ambivalent attitude toward femininity, conveying the internal message "it's not safe or desirable to be a woman."²⁷

Psychoanalyst Elaine Siegel says that her lesbian patients typically experienced a severe arrest in ego development.²⁸ The mother may sometimes act generally immature, be emotionally fragile and even aloof from the needs of her daughter, and thus the daughter may reject the femininity of the mother. A narcissistic (self-absorbed) mother may interfere with her daughter's separation and individuation and propel her in the direction of lesbianism, but severe hurt by a male may also

²⁶ http://www.peoplecanchange.com/Root_Problems.htm.

²⁷ Nicolosi, PREVENTING HOMOSEXUALITY, at 150-51.

²⁸ Elaine Siegel, FEMALE HOMOSEXUALITY, CHOICE WITHOUT VIOLATION: A PSYCHOANALYTIC STUDY (1988).

communicate the same message of insecurity and vulnerability. Psychiatrist

Richard Fitzgibbons states the following:

A number of women who become enthralled in same-sex relationships had fathers who were emotionally insensitive, alcoholic, or abusive. Such women, as a result of painful childhood and teenage experiences, have good reason to fear being vulnerable to men. . . .

Women who have been sexually abused or raped as children or adolescents may find it difficult or almost impossible to trust men. They may, therefore, turn to a woman for affection and to fulfill their sexual desires.²⁹

In order to promote a healthy self-esteem and identification with her feminine identity, “there should be a warm mother-daughter intimacy along with a father who does not promote identification of the daughter with himself. Indeed, a healthy relationship with Mom provides the most important foundation for the incorporation of femininity and heterosexuality.”³⁰ Sometimes a healthy identification between the mother and daughter may face a traumatic interruption. Such interruptions may include severe depression in the mother which causes the father to take over the child rearing, in which case the mother may be withdrawn and the father becomes the object of strength and stability.³¹ “In terms of

²⁹ Fitzgibbons, *supra* note 23, at 85-97.

³⁰ Nicolosi, PREVENTING HOMOSEXUALITY, at 156.

³¹ See Kenneth Zucker & Susan Bradley, GENDER IDENTITY DISORDER AND PSYCHOSEXUAL PROBLEMS IN CHILDREN AND ADOLESCENTS, at 252-53 (1995) (a study of twenty-six girls with gender identity disorder, revealed that nearly

psychosocial transmission, the message to the daughters seemed to be that being female was unsafe. The mothers had a great deal of difficulty in instilling in their daughters a sense of pride and confidence about being female.”³²

“Women who become lesbians have usually decided, on an unconscious level, that being female is either undesirable or unsafe.”³³ Sometimes the girl might experience early sexual molestation, or she might perceive her mother as a negative or weak feminine object she wants to avoid, or perhaps she may have experienced some rejection from a male. One study of lesbianism noted: “The girls had difficulty in forming an emotional connection to their mothers. In some instances, it seemed to us that either a girl failed to identify with her mother, or disidentified from her mother because she perceived her mother as weak, incompetent or helpless. In fact, many of the mothers devalued their own efficacy and regarded the female gender role with disdain.”³⁴

A girl’s relationship with her mother and an unhealthy interaction with her father are certainly factors leading to lesbianism. Relative to their counterparts with heterosexual parents, the adolescent and young adult girls raised by lesbian

seventy-seven percent of the mothers had histories of depression; all had been depressed during the infancy of their daughters).

³² *Id.* at 253.

³³ Nicolosi, PREVENTING HOMOSEXUALITY, at 148.

³⁴ Zucker & Bradley, GENDER IDENTITY DISORDER, at 252.

mothers appear to have been more sexually adventurous and less chaste. . . .³⁵

Sexual abuse may also play a critical role. “In women, abuse can lead to a deep fear and even hatred of men if the perpetrator is a male. Men are no longer ‘safe.’ The woman’s deep need to connect with another individual leads her right into close relationships with other women, often women who have been wounded in similar ways. This sets the stage for lesbian bonding to occur.”³⁶ If the mother has a history of severe and chronic sexual abuse by a father, stepfather or a close relative, or if she experienced domestic violence, causing her to feel unsafe with males, she can transmit these feelings to her daughter. “The girl who has been unable to make a satisfactory identification with a same-sex love object (the mother) will harbor repressed rage against the very thing she loves because, on the one hand, she desires it but, on the other hand, she has been hurt by it.”³⁷

Whether it is male homosexuality or female lesbianism, one common feature between the two is rejecting, idolizing, and longing to fill the emotional deficit of the same sex.

[H]omosexuality represents not an *indifference to* gender but a *deficit* in gender. Deficit-based behavior comes from a heightened sensitivity to what one feels one lacks, and it is characterized by compulsivity

³⁵ Judith Stacey and Timothy Biblarz, 66 AM. SOCIOLOGICAL REV. at 170.

³⁶ Anita Worthen & Bob Davies, SOMEONE I LOVE IS GAY 83 (1996).

³⁷ Nicolosi, PREVENTING HOMOSEXUALITY, at 158.

and drivenness – but a person will persist in the behavior despite social disadvantage and grave medical risk.³⁸

Despite these natural facts about child development, the district court found that “Children do not need to be raised by a male parent and a female parent to be well adjusted,” “[t]he gender of a child’s parent is not a factor in a child’s adjustment,” and concluded that “the evidence shows beyond any doubt that parents’ genders are irrelevant to children’s developmental outcomes.” (FF nos. 70, 71; Opinion at 127). As one expert stated, “[t]he notion that all ‘family forms’ are equally as helpful or healthful for children has no basis in science.” A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J. L. & Fam. Stud. 213, 213 (2004). Same-sex marriage guarantees that a child will be deprived of either the same or opposite sex parent. Such deprivation is inherently harmful to the child.

B. State and Federal Courts Have Re-affirmed the Link Between Marriage and Procreation.

State and federal courts facing comparable challenges to marriage laws have rejected the claim that assisted reproduction technology has broken the link between marriage and procreation. *See* Opinion at 128 (Proposition 8 does not relate to child-rearing and parentage). For example, the Washington Supreme

³⁸ *Id.* at 44.

Court held that, “encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.” *Andersen v. King County*, 138 P.3d 963, 982 (Wash. 2006).

[A]s *Skinner* [*v. Oklahoma*, 316 U.S. 535 (1942)], *Loving* [*v. Virginia*, 388 U.S. 1 (1967)], and *Zablocki* [*v. Redhail*, 434 U.S. 374 (1978)] indicate, marriage is traditionally linked to procreation and survival of the human race. Heterosexual couples are the only couples who can produce biological offspring of the couple. And the link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple's willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis.

Andersen, 138 P.3d at 982-83.

Similarly, Judge Graffeo of the New York Court of Appeals noted that:

The binary nature of marriage -- its inclusion of one woman and one man -- reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female. Marriage creates a supportive environment for procreation to occur and the resulting offspring to be nurtured. Although plaintiffs suggest that the connection between procreation and marriage has become anachronistic because of scientific advances in assisted reproduction technology, the fact remains that the vast majority of children are conceived naturally through sexual contact between a woman and a man.

Hernandez v. Robles, 7 N.Y. 3d 338, 370 (N.Y. 2006) (Graffeo, J. concurring).

The Eighth Circuit Court of Appeals concluded that the state could rationally find that “[b]y affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws ‘encourage procreation to take place within the socially recognized unit that is best situated for raising children.’” *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006). “Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State’s justification ‘lacks a rational relationship to legitimate state interests.’” *Id* at 867-68.

Indiana’s Court of Appeals similarly found that “the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by ‘natural’ means.” *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005).

By contrast [with assisted reproduction], procreation by “natural” reproduction may occur without any thought for the future. The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from “casual” intercourse. Second, even where an opposite-sex couple enters into a marriage with no intention of having children, “accidents” do happen, or persons often change their minds about wanting to have children. The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the “natural” procreation of children

in the first place, but it also encourages them to stay together and raise a child or children together if there is a “change in plans.”

Id. The Indiana court explained that the state’s interest is not necessarily to encourage and promote “natural procreation” at the expense of other forms of becoming parents. *Id.* Instead, the state’s interest in defining marriage as the union of one man and one woman “both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly.” *Id.*

The Arizona Court of Appeals similarly found that the institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. *Standhardt v. Superior Court*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003).

Allowing all opposite-sex couples to enter marriage under Arizona law, regardless of their willingness or ability to procreate, does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing. First, if the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns. Second, in light of medical advances affecting sterility, the ability to adopt, and the fact that intentionally childless couples may eventually choose to have a child or have an unplanned pregnancy, the State would have a difficult, if not impossible, task in identifying couples who will never bear and/or raise children. Third, because opposite-sex couples have a fundamental right to marry, *Loving [v. Virginia]*, 388 U.S. at 12, 87 S. Ct. 1817, excluding such couples from marriage could only be justified by a compelling state interest, narrowly

tailored to achieve that interest, *Glucksberg* [*v. Washington*], 521 U.S. at 721, 117 S. Ct. 2258, which is not readily apparent. For these reasons, the State's decision to permit all qualified opposite-sex couples to marry does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing.

Id. at 462. The *Standhardt* court also rejected the argument that linking marriage and procreation is not reasonable because same-sex couples also raise children who would benefit from the stability provided by marriage. *Id.*

The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships.

Id. at 462-463.

In his dissent in *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003), Justice Cordy explained that the Legislature could rationally conclude that:

So long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere

for those purposes. If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur.

798 N.E.2d at 1003 (Cordy, J. dissenting).

Other courts have confirmed the continuing validity of the link between procreation and marriage contrary to the district court's conclusion that California's decision to continue to define marriage as between one man and one woman has nothing to do with procreation. *See e.g., Baker v. Nelson*, 291 Minn. 310 (1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis"); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) ("The state has a compelling interest in encouraging and fostering procreation of the race."), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (finding that this "central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples"). The link between marriage and procreation remains as relevant today as it did in the years before assisted reproduction.

The New York Court of Appeals explained that

The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggests that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule -- some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes -- but the Legislature could find that the general rule will usually hold.

Hernandez, 7 N.Y.3d at 359-360. For example, the Legislature “might consider and credit studies that document negative consequences that too often follow children either born outside of marriage or raised in households lacking either a father or a mother figure, and scholarly commentary contending that children and families develop best when mothers and fathers are partners in their parenting.” *Goodridge*, 798 N.E.2d at 999 (J. Cordy, dissenting).

As Professor Dent observed, “By every measure – physical and mental health, academic performance, social adjustment, and obedience to law – children raised by their biological parents who are married and live together fare better than other children.”³⁹ “[R]ecognizing same-sex marriage will sever the connection between marriage and child-rearing.”⁴⁰

³⁹ George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 *BYU J. Pub. L.* 419, 428-29 (2004).

⁴⁰ *Id.* at 431-432.

Professor Duncan observed that “marriage provides two significant additional benefits to society that justify its preservation:”

Related to this reality of sex equality in marriage is the message that the law of marriage conveys about the relative worth of men and women, particularly in their roles as fathers and mothers. Redefining marriage to include same-sex couples is a legal endorsement of the fungibility of men and women, mothers and fathers. In other words, when the state says that “any two persons” are equivalent to a mother and father, it is also saying that a mother or a father makes no unique contribution to child well-being. In the United States there are 16,473,000 children living in mother-only homes and 3,297,000 children in father-only homes. In the face of these numbers, it is eminently reasonable for the state to shrink from sending a legal message that men (fathers) are not essential to marriage or that women (mothers) can be dispensed with without consequences.⁴¹

⁴¹ William C. Duncan, *The State Interests in Marriage*, 2 Ave Maria L. Rev. 153, 171 (2004).

CONCLUSION

For these reasons, the district court's opinion should be reversed.

Dated this 24th of September, 2010.

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STATEMENT OF RELATED CASES

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

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