No. 10-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

vs.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants,

and

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

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
CASE CIV. NO. 09-2292-VRW
HON. VAUGHN R. WALKER

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Form") makes the following corporate disclosure statement: No publicly held company owns 10% or more of Eagle Forum's stock, and Eagle Forum has no parent company.

Dated: September 24, 2010

Respectfully submitted,

/s/ Lawrence J. Joseph

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum") is a nonprofit Illinois corporation founded in 1981. Eagle Forum has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. Eagle Forum's California affiliate was involved in defending that definition of marriage in the context of Proposition 8, and its members voted for Proposition 8. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court. Eagle Forum files this *amicus* brief with the consent of all parties.

STATEMENT OF THE CASE AND FACTS

In 2000, Californians adopted Proposition 22, defining marriage as being "between a man and a woman" and providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. FAMILY CODE §§300, 308.5. Various parties challenged Proposition 22, with the California Supreme Court declaring it an unlawful denial of the right to same-sex marriage that that court found implicit in the California Constitution's Equal Protection Clause. *In re Marriage Cases,* 43 Cal.4th 757, 857, 183 P.3d 384, 453 (2008).

A few months later, on November 4, 2008, over seven million

California voters approved Proposition 8 by a five-percent margin. Unlike Proposition 22's statutory amendments, Proposition 8 amended California's *Constitution,* providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, §7.5. In *Strauss v. Horton,* 46 Cal.4th 364, 207 P.3d 48 (Cal. 2009), the official sponsors of Proposition 8 (collectively, "Proponents") successfully defended Proposition 8 from constitutional attack by various petitioners and by the same state defendants (collectively, "State Defendants") who declined to defend Proposition 8 in the district court. The plaintiffs here are a same-sex female couple and a same-sex male couple who wish to marry (collectively, "Plaintiffs").

After the named defendants declined to defend Proposition 8, the district court allowed the Proponents to intervene as defendants in this action. (ER 39.) Subsequently, the district court denied a motion by several Imperial County government officials including a clerk who processes marriage applications and records (collectively, "Imperial County") to intervene as defendants. Imperial County has separately appealed the denial of its intervention and the district court's judgment.

SUMMARY OF ARGUMENT

This Court has jurisdiction to reverse or vacate the district court's decision, whether or not the Proponents have standing to defend Proposition 8. At the outset, the Proponents have standing to defend Proposition 8 because California law gives ballot-initiative proponents that right (Section I.A.1), because they have a judgment to enforce from *Strauss v. Horton* (Section I.A.2), and because they have "legislative standing" to serve as class defendants for the seven million California voters who enacted Proposition 8 (Section I.A.3). In any event, Imperial County has standing to avoid the expense and burden imposed by same-sex marriages, and only one defendant-intervener needs standing to support the Proponents' side of the litigation (Section I.B).

Assuming *arguendo* that both the Proponents and Imperial County lack standing to defend Proposition 8, this litigation presents no case or controversy (Section I.C). Even if they lack standing to defend Proposition 8 *on the merits,* the Proponents have standing to bring this litigation to this Court on appeal and for this Court to vacate the litigation for lack of a case or controversy (Section I.D).

On the merits, the district court's extensive and one-sided fact-

finding exercise is both irrelevant and non-controlling. The relevant facts are legislative facts reviewed de *novo,* not adjudicative facts, and in any event facts are not needed to evaluate the plaintiffs' due-process and equal-protection claims (Section II.A). Under the Due Process Clause, the fundamental right to marry applies to unions only of a husband and a wife, not to same-sex couples (Section II.B). Under the Equal Protection Clause, Proposition 8 does not trigger heightened scrutiny (Section II.C.1) and readily meets the rational-basis test because California voters reasonably could consider husband-wife marriage the optimal family structure for procreation and childrearing (Section II.C.2).

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVERSE OR VACATE THE DISTRICT COURT'S DECISION

In its Order setting the briefing schedule for this appeal, the Court directed the Proponents to "discuss[] why this appeal should not be dismissed for lack of Article III standing," citing *Arizonans for Official English v. Arizona,* 520 U.S. 43, 66 (1997) ("*AOE*"). Order, at 2 (Aug. 16, 2010). In *AOE,* the Supreme Court dismissed that case as moot, but in *dicta* without "definitively resolv[ing] the issue" expressed

"grave doubts" that the ballot-initiative proponents there had standing to defend the initiative on appeal. *AOE,* 520 U.S. at 66. As indicated, Eagle Forum respectfully submits that this Court has jurisdiction over this appeal, regardless of whether the Proponents have standing to defend Proposition 8. In this section, Eagle Forum analyzes the Article III implications of various permutations (*e.g.,* the Proponents have standing to defend Proposition 8, the Proponents lack standing to defend Proposition 8, etc.). First, however, Eagle Forum summarizes the Article III and prudential requirements of the standing analysis.

Standing is a "bedrock requirement," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471 (1982), "fundamental to the judiciary's proper role in our system of government." *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 37 (1976). Indeed, "[n]o principle is more fundamental" to that role "than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id.*

In both its constitutional and prudential strands, standing is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Bennett v. Spear,* 520 U.S. 154, 162

(1997) (interior quotations and citations omitted). Standing is "*crucial* in maintaining the tripartite allocation of power set forth in the Constitution." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 341 (2006) (interior quotations omitted, emphasis added). As such, judgments in cases without standing cannot serve as precedents:

> A lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; ... [the] earlier case can be accorded no weight either as precedent or as law of the case.

Orff v. U.S., 358 F.3d 1137, 1149-50 (9th Cir. 2004) (quoting *U.S. v. Troup,* 821 F.2d 194, 197 (3rd Cir. 1987) (alterations in *Troup*). If their jurisdiction extended beyond cases and controversies, judges could impose their personal policy choices by fiat, without public recourse.

A plaintiff's standing involves a tripartite test of a cognizable injury to the plaintiff, caused by the defendant, and redressable by the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). The plaintiff's injury must involve "a legally protected interest" and its "invasion [must be] concrete and particularized" and "affect the plaintiff in a personal and individual way." *Lujan,* 504 U.S. at 560-61 & n.1. Under the prudential "zone of interest" test, the plaintiff's injury must be "*arguably* within the zone of interests to be protected … by the

statute." *N.C.U.A. v. First Nat'l Bank & Trust, Co.,* 522 U.S. 479, 492 (1998) (emphasis and alteration in *N.C.U.A., quoting Ass'n of Data Processing Service Org., Inc. v. Camp,* 397 U.S. 150, 153 (1970)). Standing must satisfy both the constitutional and prudential tests.

Because constitutional and prudential standing apply on appeal as well as in trial courts, the standing inquiry can shift to defendants (or defendants-interveners) when they seek to appeal an adverse ruling: "the decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.'" *Diamond v. Charles,* 476 U.S. 54, 62 (1986) (*quoting Sierra Club v. Morton,* 405 U.S. 727, 740 (1972)). Certainly, "a State has standing to defend the constitutionality of its statute." *Id.* For other defendants and defendants-interveners, the standing inquiry for appeal mirrors the standing inquiry for plaintiffs. *See Diamond,* 476 U.S. at 65-66. As the Court ordered, Proponents must establish standing to seek review of Proposition 8.

Courts analyze standing from the merits views of the party seeking to establish its standing: "in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the [petitioner], and must therefore assume that on the merits

the [petitioner] would be successful in [its] claims." *City of Waukesha v. EPA,* 320 F.3d 228, 235 (D.C. Cir. 2003) (*citing Warth v. Seldin,* 422 U.S. 490, 502 (1975)); *accord Tyler v. Cuomo,* 236 F.3d 1124, 1133 (9th Cir. 2000) ("[w]hether a [party] has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits"). For the Proponents, therefore, the standing analysis assumes *arguendo* that same-sex marriage is *not* a fundamental right and that states rationally may prefer husband-wife marriage over same-sex marriage.

The district court's findings – *e.g.,* that bigotry, and only bigotry, explains Proposition 8 and that nothing distinguishes same-sex marriage from opposite-sex marriage – are irrelevant to the standing inquiry. Put simply, that "confuses standing with the merits." *Initiative & Referendum Institute v. Walker,* 450 F.3d 1082, 1092 (10th Cir. 2006); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 422 F.3d 490, 501 (7th Cir. 2005) (same); *In re Columbia Gas Systems Inc.,* 33 F.3d 294, 298 (3rd Cir. 1994) (same); *cf. Cantrell v. City of Long Beach,* 241 F.3d 674, 682 (9th Cir. 2001). But "standing in no way depends on the merits of [a party's] contention that particular conduct

is illegal." *McConnell v. FEC,* 540 U.S. 93, 227 (2003) (quoting *Warth,* 422 U.S. at 500); *City of Waukesha,* 320 F.3d at 235 (quoted *supra*); *Tyler,* 236 F.3d at 1133 (quoted *supra*). Otherwise, every losing party would lose for lack of standing.

Cognizable interests can arise from statutes that confer rights, the denial of which constitutes injury redressable by a court. *Warth,* 422 U.S. at 500. Interests arising under either federal or state law can support Article III jurisdiction in federal court. *Id.; Cantrell,* 241 F.3d at 684 (recognizing that "state law can create interests that support standing in federal courts"). In their competing merits positions, the parties argue grand principles of due process and equal protection. While important to the merits, these foundational principles need not drive this Court's standing inquiry.[1] Instead, an "identifiable trifle"

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[1] As required for standing, a "cognizable constitutional right" is not the same as a "fundamental right." *Bates v. Jones,* 131 F.3d 843, 853 n.4 (9th Cir. 1997) (O'Scannlain, J., concurring in the result) (*en banc*). If all cognizable rights were fundamental rights, all judicial review would be strict scrutiny. *Clark v. Jeter,* 486 U.S. 456, 461 (1988) (strict scrutiny reserved for state "classifications based on race or national origin and classifications affecting fundamental rights") (citations omitted); *Berger v. City of Seattle,* 512 F.3d 582, 607 (9th Cir. 2008) ("restriction faces strict scrutiny only if it targets a suspect class or a fundamental right").

suffices for constitutional standing. *U.S. v. Students Challenging Regulatory Agency (SCRAP),* 412 U.S. 669, 689 n.14 (1973); *Council of Insurance Agents & Brokers v. Molasky-Arman,* 522 F.3d 925, 932 (9th Cir. 2008); *Nat'l Wildlife Fed'n v. Burford,* 871 F.2d 849, 854 (9th Cir. 1989). Any quantum of economic harm or burden suffices to provide standing:

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax… The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.

SCRAP, 412 U.S. at 690 (citations and interior quotations omitted).

Causation and redressability are easily shown where government action authorizes conduct that "would have been illegal without that action." *Eastern Ky. Welfare Rights Org.,* 426 U.S. at 45 n.25; *City of Los Angeles v. Lyons,* 461 U.S. 95, 105-06 (1983). Similarly, "[w]hile… it does not suffice if the injury complained of is th[e] result [of] the *independent* action of some third party not before the court, that does not exclude injury produced by determinative or coercive effect upon the

action of someone else." *Bennett v Spear,* 520 U.S. 154, 169 (1997) (citations and quotations omitted, emphasis in original). Further, "but for caus[ation] suffices for standing purposes," *Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1518 (9th Cir. 1992) (citations and interior quotations omitted), even though it is not required. *Scott v. Rosenberg,* 702 F.2d 1263, 1268 (9th Cir. 1983); *Khodara Env'tl., Inc. v. Blakey,* 376 F.3d 187, 195 (3rd Cir. 2004) ("neither the Supreme Court nor our Court has ever held that but-for causation is always needed"). Because the district court has caused whatever injury the Proponents or Imperial County have suffered and appellate reversal or *vacatur* will redress any such injury, causation and redressability easily follow. The only question, then, is whether the Proponents or Imperial County suffer a cognizable injury.

A. The Proponents Have Standing to Defend Proposition 8

The Proponents have three independent forms of standing to defend Proposition 8. *First,* as the official proponents of the Proposition 8 ballot initiative, the Proponents have standing to defend their handiwork. *Second,* as successful litigants in *Strauss v. Horton,* 46 Cal.4th 364, 207 P.3d 48 (Cal. 2009), the Proponents have standing to

defend the judgment in that case. *Third,* as class representatives of the seven million California voters who enacted Proposition 8, the individual proponents – indeed, any suitable California voters – have legislative standing to defend the constitutional amendment that they enacted. The following three sections discuss the Proponents' standing to defend Proposition 8.

1. California Law Entitles the Proponents to Defend Proposition 8 in Court

As the Proponents explain, California law entitles them to defend their ballot initiative in court. *See* Proponents' Opening Br. at 19-24. The California Constitution's provision for voter-sponsored ballot initiatives creates a state-law right that the Proponents are entitled under California law to defend, *id.* at 23, and that includes defending it in federal court. *Warth,* 422 U.S. at 500; *cf. McFadden v. Jordan,* 32 Cal.2d 330, 332, 196 P.2d 787, 788 (Cal. 1948) ("right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter"). Indeed, the State Defendants' abdication of defending Proposition 8 perfectly demonstrates why Californians themselves must defend the rights that the California Constitution extends to them.

Specifically, for political reasons, the State Defendants have declined to defend the California Constitution, CAL. CONST. art. I, §7.5, against a weak constitutional challenge that the U.S. Supreme Court, this Court, and the California Supreme Court already have rejected. *Baker v. Nelson,* 409 U.S. 810 (1972); *Adams v. Howerton,* 673 F.2d 1036 (9th Cir. 1982); *Strauss v. Horton,* 46 Cal.4th 364, 207 P.3d 48 (Cal. 2009). The initiative power has its highest utility when politically powerful, entrenched groups – such as those represented by the Plaintiffs and the State Defendants – fail to respect the will of the People, the highest authority in California's Constitution.

Like the legislators who had "authority under state law," based on the New Jersey Supreme Court's allowing them to represent that state's interests, *Karcher v. May,* 484 U.S. 72, 82 (1987) (*citing In re Forsythe,* 91 N.J. 141, 144, 450 A.2d 499, 500 (1982)), the Proponents also have "authority under state law" to defend Proposition 8. *Strauss v. Horton,* 46 Cal.4th at 398-99, 207 P.3d at 69. That suffices to distinguish *AOE* and to answer the "grave doubts" that the U.S. Supreme Court expressed there about initiative-proponent standing.

2. The Proponents Have Standing to Enforce *Strauss v. Horton* against the State Defendants

In *Strauss v. Horton,* 46 Cal.4th at 465-67, 207 P.3d at 116-17, the State Defendants advanced – and the California Supreme Court rejected – arguments that Proposition 8 somehow violated the California Constitution. Because the same Proponents participated in that litigation, the judgment represents an instance of these Proponents prevailing over the State Defendants on the lawfulness of Proposition 8, which the Proponents can enforce against the State Defendants. *Salazar v. Buono,* 130 S.Ct. 1803, 1814 (2010) ("[h]aving obtained a final judgment granting relief on his claims, Buono had standing to seek its vindication").[2] Under the circumstances, the Proponents have standing to enforce *Strauss*.

3. The Proponents Have "Legislative Standing"

As indicated *supra,* California empowers its citizens with the power both to propose and to enact legislation via the initiative process.

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[2] Mutual collateral estoppel is available against governments, *Montana v. U.S.,* 440 U.S. 147, 153 (1979), which includes state governments. *Helene Curtis, Inc. v. Assessment Appeals Bd.,* 76 Cal.App.4th 124, 133 (1999); *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.,* 425 F.3d 708, 714 (9th Cir. 2005).

CAL. CONST. art. XVIII. With such referenda, California's entire voting public constitutes the State's highest legislative authority. The U.S. Supreme Court has approved legislative standing for "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act … if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines v. Byrd,* 521 U.S. 811, 823 (1997) (*citing Coleman v. Miller,* 307 U.S. 433 (1939)). On the other hand, the Court has rejected legislative standing where the legislator-plaintiffs "have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Id.* at 824. While all seven million Californians who voted for Proposition 8 therefore collectively would have legislative standing, the few individual Proponents could not allege that their personal votes were sufficient to enact Proposition 8.

To the extent that a legislative standing requires a majority block, FED. R. CIV. P. 23 enables the Proponents to serve as class defendants for the seven million Californians who voted for Proposition 8:

> Rule 23 does not differentiate on its face between plaintiff and defendant class actions. Defendant

> class actions are authorized by the language stating that a class "may sue or be sued." Thus, the test for adequate representation of a defendant class is similar to that employed to determine whether a plaintiff will fairly protect the interests of the class members and the [analysis for plaintiff classes] is fully applicable. The defendant class member or members named and served by plaintiff must be represented by qualified counsel and they must have common interests with and not be antagonistic towards their fellow class members.

7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE Civ. §1770 (3d ed.) (footnotes omitted). Indeed, any representative California voters could seek certification as a defendant class to defend successful ballot initiatives, without needing the ballot-initiative proponents to participate as named defendants.[3]

B. Imperial County Has Standing to Defend its Actions from Interference

Of course, if the Court allows Imperial County's intervention, its merits appeal will become timely[4] and will present the issue of

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[3] The Proponents meet the criteria for class certification. FED. R. CIV. P. 23(a)(1)-(4) (numerosity, typicality, adequacy, and commonality).

[4] A putative intervener's timely notice of appeal of a judgment or other order sits dormant until its motion to intervene is granted, either by the trial court or on appeal, but becomes active once intervention is

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standing. *Diamond,* 476 U.S. at 62. If Imperial County further satisfies the Court that it has standing to appeal, then the Proponents would not need standing because their defendant-intervener status would entitle them to participate in Imperial County's appeal. *Diamond,* 476 U.S. at 64. If Imperial County has standing, the Proponents need not.

Imperial County plainly has standing to challenge an injunction that affects it, whether as a party (if its intervention is allowed) or as a non-party (if its intervention is denied). *Class Plaintiffs v. Seattle,* 955 F.2d 1268, 1277 (9th Cir. 1992) ("non-party who is enjoined or otherwise directly aggrieved by a judgment has standing to appeal the judgment"). At the most basic level, the processing of same-sex marriages, with new same-sex or sex-neutral forms, increases Imperial County's workload, which easily qualifies as the "identifiable trifle" needed for standing. In that sense, the district court simply erred in thinking that Imperial County's "ministerial duties" renders Imperial County ineligible to participate here: "an identifiable trifle is enough for standing to fight

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granted. *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE Juris. § 3902.1 (2d ed.).

out a question of principle" because "the trifle is the basis for standing and the principle supplies the motivation." *SCRAP,* 412 U.S. at 690.

C. If the Proponents and Imperial County Lack Standing to Defend Proposition 8, the District Court Lacked a Case or Controversy

If neither Proponents nor Imperial County have standing to defend Proposition 8, the district court had a different problem: it lacked a case or controversy under Article III. As the district court noted when considering Proponents' motion to intervene, the State defendants already had indicated that they concurred with the Plaintiffs. *See* Order, at 3 (June 30, 2009) ("their interest is not represented by another party, as no defendant has argued that Prop 8 is constitutional") (ER 206). The parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and dismiss the action. *Id.* Thus, when an appellate court finds that litigation lacks an Article III case or controversy, the appellate court must remand with an order to dismiss.

"In a long and venerable line of cases, [the U.S. Supreme] Court

has held that, without proper jurisdiction, a court cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 84 (1998). The Supreme Court's "insistence that proper jurisdiction appear begins at least as early as 1804, when [the Court] set aside a judgment for the defendant at the instance of the losing plaintiff *who had himself* failed to allege the basis for federal jurisdiction." *Steel Co.,* 523 U.S. at 95 (*citing Capron v. Van Noorden,* 6 U.S. (2 Cranch) 126 (1804)) (emphasis in original). If the Proponents and Imperial County lack standing, this Court must dismiss this action for lack of an adverse party.

D. Even if They Lack Standing to Defend Proposition 8, the Proponents Have Standing to Appeal

Even if they lack standing *to defend Proposition 8,* the Proponents nonetheless have standing to question the district court's jurisdiction for its judgment. As indicated, the standing inquiry is "crucial" for maintaining separation of powers, *Cuno,* 547 U.S. at 341, so the entry of an adverse judgment without jurisdiction violates "the separation-of-powers principle, the aim of which is to protect… the whole people from improvident laws." *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise,* 501 U.S. 252, 271 (1991). "For a court to

pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Steel Co.,* 523 U.S. at 101.

In bringing the district court's *ultra vires* action to this Court on appeal, the Proponents have standing enough to challenge the entry of judgment without an Article III case or controversy: "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, *but also that of the lower courts in a cause under review,* even though the parties are prepared to concede it." *FW/PBS,* 493 U.S. at 231 (interior quotations omitted, emphasis added); *see also, e.g., Am. Lung Ass'n v. Reilly,* 962 F.2d 258, 262-63 (2d Cir. 1992) (affirming the denial of intervention but nonetheless reviewing district court's subject-matter jurisdiction for underlying action).[5]

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[5] When challenging *ultra vires* government conduct, the zone-of-interest test either does not apply or implicates the zone of interests of the overriding constitutional issue of the government's acting lawlessly. *Haitian Refugee Ctr. v. Gracey,* 809 F.2d 794, 812 (D.C. Cir. 1987); *Chiles v. Thornburgh,* 865 F.2d 1197, 1211 (11th Cir. 1989). Thus, even if Proposition 8 did not affect the Proponents within the zone of any relevant statute, that would not impede the Proponents' challenging the district court's *ultra vires* judgment with this appeal.

II. PROPOSITION 8 COMPLIES WITH BOTH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES

The district court held that Proposition 8 violates the Fourteenth Amendment's Due Process and Equal Protection Clauses, based in large part on a one-sided review of Plaintiffs' evidence. After demonstrating that the district court's "facts" are neither relevant nor controlling (Section I.A, *infra*) Eagle Forum addresses the district courts' Due Process and Equal Protection analyses (Sections I.B, I.C, *infra*). In each case, the district court erred as a matter of law.

A. The District Court's Extensive Fact-Finding Is Neither Relevant Nor Controlling

In cases like this, an equal-protection plaintiff "must convince the court that the *legislative* facts on which the classification is *apparently* based *could not reasonably be conceived to be true* by the governmental decisionmaker," a burden that "the plaintiff can carry … by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact." *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 17 (1988) (interior quotations omitted, emphasis added). As explained in more detail in Section II.C.2, *infra,* the standard is not what *is true,* but what the decisionmaker *could reasonably believe to be true.* Needless to say, "this burden is … a

considerable one," *id.; Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (those attacking the rationality of legislative classifications have the burden "to negative every conceivable basis which might support it") (internal quotations omitted), but it is the only way that plaintiffs can prevail.

The district court confused this evidentiary test as an invitation for a trial and judicial fact-finding, but the Equal Protection Clause immunizes such laws from attack even if the decisionmaker acted on merely *arguable* legislative facts. *Vance v. Bradley,* 440 U.S. 93, 110-12 (1979). "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993); *Heller v. Doe,* 509 U.S. 312, 320 (1993) (same). Because a merely arguable basis will support state action, the district court wasted considerable effort on trying to prove things that are not only incapable of proof but also irrelevant if proved.[6]

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[6] If it *approves* of the district court's fact-finding, this Court should remand for further fact-finding because the district court favored testimonial evidence over scholarly evidence, *see, e.g.,* ER 350 ("Blackstone didn't testify. Kingsley Davis didn't testify."), but the

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Similarly, in *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981), the plaintiff marshaled "impressive supporting evidence at trial to prove that the probable consequences of the ban on plastic nonreturnable milk containers" would be counterproductive. That evidence served no purpose because it attacked the "*empirical* connection between" the ban and the legislative purpose, without "challeng[ing] the *theoretical* connection" between the two. *Id.* (emphasis in original). As explained in Section II.C.2, *infra,* the data on which the Plaintiffs would need to rely simply do not exist to negative the procreation and childrearing rationale for traditional husband-wife marriage, and yet those data are Plaintiffs' burden to produce.

At bottom, the fact-finding below represents the views of one district judge. Other judges have reached opposite conclusions, *see* Proponents' Opening Br. at 91-93 (collecting cases), as have various experts. *See id.* at 78-82, 85-90 (collecting expert opinion). That alone

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Plaintiffs (not the Proponents) bear the burden to negative every possible basis for Proposition 8. Because Messrs. Blackstone and Davis cannot testify, the Plaintiffs perhaps could find scholars of their work to provide testimony to the district court or prevail upon the district court to accept original scholarship in written form.

suffices to establish that Proposition 8 satisfies the Equal Protection Clause. *See Lockhart v. McCree,* 476 U.S. 162, 170 n.3 (1986) ("[t]he difficulty with applying [the clearly-erroneous] standard to 'legislative' facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies … has reached a [contrary] conclusion"); *National Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1127 (7th Cir. 1995) ("district court … should not have conducted a trial, and we disregard its conclusions"). Because "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature," *Clover Leaf Creamery,* 449 U.S. at 470, the district court's purported facts – even if they were somehow true – cannot negative a rational basis for Proposition 8.

B. Same-Sex Marriage Is Not a Fundamental Right

Under a substantive due-process analysis, the U.S. Supreme Court has recognized "heightened protection against government interference with certain fundamental rights and liberty interests," which courts are "reluctant to expand … because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," and can appear to be simply the "policy preferences" of the

presiding judge or judges. *Washington v. Glucksberg,* 521 U.S. 702, 719 (1997). To cabin any possible impulse to impose policy preferences by judicial fiat, the Supreme Court limits fundamental rights to "those fundamental rights and liberties which are, *objectively,* deeply rooted in this Nation's history and tradition." *Glucksberg,* 521 U.S. at 720-21 (emphasis added, interior quotations omitted).

Although *husband-wife marriage* unquestionably is a fundamental right under the federal Constitution, *Turner v. Safley,* 482 U.S. 78, 95 (1987) ("the decision to marry is a fundamental right"); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental"), the federal Constitution has never recognized the unrestricted right to marry *anyone.* Instead, the fundamental right that the U.S. Supreme Court has recognized applies only to marriages between one man and one woman: "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia,* 388 U.S. 1, 12 (1967). Unlike opposite-sex marriage, same-sex marriage is not fundamental to the existence and survival of the human race. Indeed, the Supreme Court has held that same-sex marriage is *not* marriage and not a fundamental right. *Baker,*

409 U.S. at 810; *cf. Howerton,* 673 F.2d at 1040. *Baker* should have ended this matter.[7]

It is also significant that twenty of the thirty-seven states that ratified the Fourteenth Amendment – and nine of the thirteen states that joined the union after 1868 – have, in much more homosexual-friendly times, amended their constitutions to define marriage as a union between husband and wife.[8] While "not conclusive in a decision as to whether that practice accords with due process," the "fact that a practice is followed by a large number of states is … plainly worth

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[7] Although the Supreme Court resolved *Baker* summarily, such dispositions "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided," *Hawaiian Telephone Co. v. State of Hawaii Dept. of Labor & Indus. Relations,* 614 F.2d 1197, 1198 (9th Cir. 1980) (*quoting Mandel v. Bradley,* 432 U.S. 173, 176 (1977)), and "ha[ve] the effect of a holding that the proffered ground is meritless." *White Mountain Apache Tribe v. State of Ariz., Dept. of Game & Fish,* 649 F.2d 1274, 1282 (9th Cir. 1981). Taking the Supreme Court at its word, nothing has undermined *Baker* with respect to same-sex marriage. *Lawrence v. Texas,* 539 U.S. 558, 578 (2003) (*Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

[8] *See* Proponents' Opening Br. at 49 n.23. Fourteen of the twenty-one states without constitutional amendments have adopted the husband-wife definition of marriage by statute, *id.* at 50 n. 24, and two have done so via their common law. *Id.*

considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McKeiver v. Pennsylvania,* 403 U.S. 528, 548 (1971). In ratifying these constitutional amendments, these states acted with the same solemnity with which they ratified the Fourteenth Amendment. That certainly suggests that – whatever the states had in mind in 1868 – the idea of same-sex marriage is not "deeply rooted."

C. Denying Marriage to Same-Sex Couples Does Not Violate the Equal Protection Clause

Differential treatment based on sexual orientation does not trigger heightened scrutiny under the Equal Protection Clause. California has an unquestionable interest in supporting responsible and stable procreation and childrearing through husband-wife marriage, which easily satisfies the rational-basis test.

1. The Plaintiffs' Claimed Discrimination Does not Trigger Heightened Scrutiny

Under the Equal Protection Clause, courts evaluate differential treatment based on sexual orientation under the rational-basis test. *Romer v. Evans,* 517 U.S. 620, 631-32 (1996). Homosexuals in California are clearly not a politically marginalized group that triggers strict scrutiny solely from its powerlessness. Nor does Proposition 8 trigger

intermediate scrutiny as gender discrimination under the Equal Protection Clause.

For intermediate scrutiny even potentially to apply, the defendant must have acted *because of* the plaintiff's gender, not merely in spite of it. *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979). Proposition 8 is facially neutral with respect to gender because it applies equally to same-sex female couples and same-sex male couples, as the two sets of Plaintiffs demonstrate. Thus, something other than gender drives any differential treatment.[9]

If the manifest sexual abuse in *Oncale v. Sundowner Offshore Services, Inc.* nonetheless required a showing that it "actually constituted "*discrimina[tion]* … because of … sex," 523 U.S. 75, 81 (1998) (emphasis and ellipses in original), the Plaintiffs here have no

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[9] In *Loving,* the Supreme Court rejected – for good reason – Virginia's claim that its miscegenation statute applied neutrally, treating whites and blacks equally. *Loving,* 388 U.S. at 8-9. In that case, however, the statute *did not* apply equally to whites and non-whites, had a race-based purpose, and indeed was "designed to maintain White Supremacy." *Loving,* 388 U.S. at 11-12. Accordingly, the Court correctly applied heightened scrutiny. *Lawrence,* 539 U.S. at 600 (Scalia, J., dissenting). By contrast, Proposition 8 has no *gender-based* purpose whatsoever. Even the district court tied Proposition 8 to *anti-homosexual* animus, not anti-female or anti-male animus. ER 167.

chance of making the required showing. "The critical issue… is whether members of one sex are exposed to disadvantageous terms or conditions … to which members of the other sex are not exposed." *Oncale,* 523 U.S. at 81 (interior quotations omitted). Here, any differential treatment relates to a couple's perceived sexual orientation, treating *male and female* same-sex couples the same, but arguably treating those same-sex couples differently than opposite-sex couples. Whatever that is,[10] it is not differential treatment *because of gender*.

2. Proposition 8 Satisfies the Rational-Basis Test

For equal-protection challenges like this, the rational-basis test does not even require the decisionmaker to get it right. Instead, it is enough that a plausible policy may have guided the decisionmaker and that the relationship between plausible policy and government action is not irrational:

> The Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based *rationally may*

[10] *Amicus curiae* Family Research Center ("FRC") argues that, even with respect to homosexuals and heterosexuals, Proposition 8's definition of marriage is facially neutral. FRC Br. at 16-20.

> *have been considered to be true by the governmental decisionmaker,* and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992) (citations omitted, emphasis added). Under the rational-basis test, government action need only "further[] a legitimate state interest," which requires only "a plausible policy reason for the classification." *Id.* Moreover, courts give economic and social legislation a presumption of rationality and "the Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462-63 (1988) (interior quotations omitted). Proposition 8 easily meets this test.

The most widely recognized purpose of marriage is to provide a stable and loving structure for procreation and childrearing. As defined by Proposition 8, marriage serves that legitimate end. *Loving,* 388 U.S. at 12 (tying marriage to "our very existence and survival"). Children born within a marriage have the uniquely valuable opportunity to know their own biological mother and father. Scholarly research (ER 404), numerous reported decisions, Proponents' Opening Br. at 91-93, and

common understanding clearly establish these social goals as both worthy and well-served by marriage as defined by Proposition 8. By contrast, same-sex marriage obviously cannot serve these goals.[11]

Although the typical rational-basis plaintiff has a difficult evidentiary burden to negative every possible basis on which the legislature may have acted, the Plaintiffs here face an *impossible* burden. Although the district court wants to believe that "[t]he genetic relationship between a parent and a child is not related to a child's adjustment outcomes" (ER 131), and that "parents' genders are irrelevant to developmental outcomes" (ER 162-164), there are simply no longitudinal studies that test same-sex versus opposite-sex marriages. Proponents' Opening Br. at 90 n.47. While Eagle Forum submits that the Plaintiffs *never* will be able to negative the value of

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[11] The district court reasons that marriage cannot be about procreation and childrearing because California allows infertile couples and couples who do not want children to marry. (ER 157.) First, unlike strict scrutiny, the rational-basis test does not require the state to narrowly tailor marriage to the legitimate purposes of procreation and childrearing. Second, some couples marry with the intent not to have children or with the mistaken belief they are infertile, yet later do have children. Third, by reinforcing the family unit, husband-wife marriage at least reinforces marriage's procreation and childrearing function even when particular marriages are childless.

traditional husband-wife families for childrearing, Plaintiffs clearly cannot prevail when the data *required by their theory of the case* do not yet exist. Unlike legislators, the Plaintiffs cannot ask that we take their word (or even their evidence) for it.

CONCLUSION

For the foregoing reasons, Eagle Forum respectfully submits that this Court must take one of two paths, depending on whether Proponents or Imperial County have standing to defend Proposition 8. If either the Proponents or Imperial County have standing to defend Proposition 8, this Court should reverse the district court and remand with instructions to dismiss for failure to state a claim. Alternatively, if neither Proponents nor Imperial County have standing to defend Proposition 8, this Court should vacate the district court's decision and judgment for lack of jurisdiction under Article III.

Dated: September 24, 2010

Respectfully submitted,

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BRIEF FORM CERTIFICATE

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE and Circuit Rule 32-1 of the U.S. Court of Appeals for the Ninth Circuit, I certify that the accompanying "*Amicus Curiae* Brief of Eagle Forum Education & Legal Defense Fund in support of Appellants in Support of Reversal" is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 6,491 words, including footnotes, but excluding this Brief Form Certificate, the Table of Authorities, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. I have relied on Microsoft Word 2007's word-count feature for the calculation.

Dated: September 24, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2010, I electronically filed the foregoing "*Amicus Curiae* Brief of Eagle Forum Education & Legal Defense Fund in support of Appellants in Support of Reversal" with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report did not show any participants in the case as unregistered for CM/ECF use.

/s/ Lawrence J. Joseph

Lawrence J. Joseph