**No. 10-16696**

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

---

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

**v.**

**ARNOLD SCHWARZENEGGER, et al.**
***Defendants.***

---

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

---

# BRIEF OF AMICUS CURIAE CATHOLICS FOR THE COMMON GOOD IN SUPPORT OF DEFENDANT-INTERVENORS-APPELLANTS

---

**Richard G. Katerndahl**
**Cal State Bar No. 088492**
**171 Dominican Drive**
**San Rafael, CA 94901**
**Tel.: (415)456-4269**

***Attorney for Amicus Curiae Catholics for the Common Good***

## FRAP Rule 26.1 Disclosure Statement

*Amicus curiae* Catholics for the Common Good has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. As it has no stock, there is no publicly held corporation that owns 10% or more of its stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**



**Other Authorities**

## Identity and Interest of the Amicus Curiae

Amicus curiae Catholics for the Common Good, a California corporation, is an organization led by Catholic laity, located in California and dedicated toward the fostering of a marriage culture. Catholics for the Common Good advocates for a just society using reason based on principles of Catholic social teaching. Catholics for the Common Good is independent from the Catholic Church, and is a non-partisan organization.

Catholics for the Common Good co-sponsored a coalition of Catholic organizations to support the passage of California Proposition 8 under the name of CatholicsforProtectMarriage.com. Content from its website was cited by the district court in its opinion.

Catholics for the Common Good is interested in this case, because the district court's opinion enshrined a re-definition of marriage into California law that may expose this and similar organizations and persons of good will to claims of discrimination for continuing to promote the centrality and integrity of marriage between a man and a woman for the benefit of children and society. This redefinition renders marriage a mere private relationship for the benefit of adults,

which will affect how people think about marriage and whether they decide to get marriage, and will also adversely impact children, who have a human right to a united family with their mother and father. Catholics for the Common Good files this brief pursuant to a motion under Rule 29 of the Federal Rules of Appellate Procedure.

## Introduction

The core reality missed by the district court is that in marriage, a man and a woman form a single human unit necessary for the continuation of society. "[T]heir unity in a certain sense forms a single person, the potential procreator from whom. . . a new human individual flows in material, bodily, personal continuity." Wm. E. May, Marriage: the Rock on Which the Family is Built, p. 73 (Ignatius Press 2009) (*quoting* Germain Grisez, *Dualism and the New Morality*). At the core is the reality that one man and one woman form a single human unit for the procreation that is necessary for the continuation of society. When a culture, state, or religions recognized that reality, it is called marriage. When the California voters passed Proposition 8 in 2008, they

recognized this reality, as people have done since the beginning of time. This reality is not focused on same-sex relationships, or any other type of relationship for that matter.

The district court erred when it concluded that marriage between a man and a woman "has nothing to do with children." Slip opn. at 127:27. Given society's common understanding of marriage as oriented toward bearing and rearing children, it may be assumed that the voters understood that relations between a man and a woman commonly produce children enacted Proposition 8 to reflect that reality. The district court also erred by supplanting the voter's definition of marriage with its own by finding that marriage is "state recognition of a couple's choice to live with each other." Slip opn. at 67:11-12. But the district court's definition does not reflect reality, and a court cannot change reality by its own *ipse dixit*.

Moreover, the district court's opinion reflects an extreme conception of the separation of church and state which impinges on the fundamental liberties of religious believers and organizations.

## ARGUMENT

### *I Proposition 8 passes the rational basis test pplicable to both the due process and equal protection claims in this case because the state has an interest in encouraging the natural understanding of marriage that unites a man and woman with each other and any children that naturally result from their relationship, and Proposition 8 encourages that natural understanding.*

At the outset, logically, it must be noted that the argument made in the defendant intervenors' opening brief, that this court is bound – as, indeed, was the district court, to follow the binding Supreme Court precedent of *Baker* v. *Nelson*, 409 U.S. 810 (1972) is dispositive in this case. The argument will not be repeated here, however.

### A. Under rational basis review, a law will be upheld if it supports a conceivable governmental interest, and the law does not need to be drawn precisely or with mathematical nicety.

Under the applicable constitutional standard, Proposition 8 "is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). The law should be upheld if there exists "a rational relationship between the disparity of treatment and some legitimate governmental purpose," that is, "if there is any reasonably conceivable state of facts that

could provide a rational basis for the classification." *Id.* at 320. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* at 321.

### B. Proposition 8 reflects a common understanding of marriage based on a reality of nature: namely, that marriage unites a man and a woman with each other and any children that may result from their relationship.

A central error in the district court's opinion is that it creates its own definition of marriage. The district court ignored the common understanding of marriage as a preexisting reality, and upholding this understanding constitutes a rational basis for the distinction made in Proposition 8. This section will make four points. First, marriage is a preexisting reality, not a societal construct. Second, this preexisting reality constitutes a comprehensive union of man and woman, which not only unites them with each other but also with any resulting children as well. Third, changing gender roles do not undermine this understanding of marriage. Fourth, the district court's use of a different definition contravenes basic canons of statutory

interpretation. Fifth, the district court's new definition will cause concrete harm to children and society.

**1 Marriage as such preexists recognition by the state.**

Marriage is not simply a creation of the state to be altered at will, but rather a preexisting reality that the state recognizes. *See, e.g,, Baker v. Baker*, 13 Cal. 87, 103 (1859) (referring to the "first purpose of marriage" according to the "laws of nature"); *Standhart v. Superior Court*, 77 P.3d 451, 458 (Ariz. 2003) (stating that marriage "is a union forged between one man and one woman" and "linked to procreation"). The preexisting natural origins of marriage has been described as "well accepted and understood" at the time of the founding, and was noted by "[n]o less a liberal than [former Justice] William O. Douglas" in *Griswold v. Connecticut*. See Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 665 (2005). That is, "marriage is an objective reality prior to the state," and "an institution we may freely enter and to its nature submit." Beckwith, *Legal Neutrality and Same-Sex Marriage*, 7 Philosophia Christi 19, 23 (2005).

**2. Marriage unites a man and a woman with**

**each other and any naturally resulting children.**

Under the common understanding of marriage, marriage is a union of man and woman that not only unites them with each other but also with any children that naturally result from their union. As one article puts it, "[m]arriage is the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together." George et al., *What is Marriage?*, at 1, forthcoming in HARV. J.L. & PUB. POL'Y (Draft, Sept. 15, 2010) [*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677717 ]

Recognizing that society has an interest in upholding marriage as the union of a man and a woman does not necessarily require that the state have a social policy objective of "channeling potentially procreative conduct" into marriages." (Defendant-IntervenorsAppellants' Opening Brief ("Intervenors' Brief") at 78.) Rather, the state may recognize the relationship for what it is, and the court may uphold that

decision without having to find a sociological benefit. Simply put, marriage laws involving a union of a man and a woman were not necessarily created to "channel" sexual activity or specifically for some social objective but were a recognition from the beginning of time of the natural family that results from the union of a man and a woman.

Procreative acts leading toward the generation of children have always been understood to be essential to marriage between a man and a woman. Indeed, the district court erred when it concluded that "states have never required spouses to have an ability ... to procreate in order to marry." (Opinion at 113: 7-8.) In California, one of the lawful grounds for nullifying a marriage is if "either party was, at the time of marriage, physically incapable of entering into the marriage state ..." CAL. FAM. CODE § 2210(f).

The reality of marriage as a foundational institution in society—which unites a man and a woman with each other and any resulting children – is simply unaffected by the district court's findings that "parents' genders are irrelevant to children's developmental outcomes" and "[s]ame-sex

couples can have (or adopt) and raise children." (Slip opn. at 127-8. Unmarried friends or relatives, as well as adoptive parents, commonly step in to parent children who have lost their mothers and fathers—such situations do not affect what marriage is.

### 3 Changing gender roles do not alter this understanding of marriage.

Although the district court notes continuing to recognize marriage solely between a man and a woman is an "artifact of a time when the genders were seen as having distinct roles in society and in marriage" (Opinion at 113: 10-11), those changes do not change the fundamental character of marriage and its procreative nature. Despite changes in social relations, women remain the only citizens possessed of a womb and capable of gestating and giving birth to future citizens.

Thus, any such changes do not change the fact that the union between a man and a woman is procreative in nature (independently of the actual fruitfulness of the union), and constitutes the primary source for the continuation of society.

"Whether women divide their time between home and

market or give greater emphasis to one over the other, only men and women together can yield new life by sexually reproductive means." Kmiec, *supra* at 655 n.6. Accordingly, "there is no basis in the modern constitutional doctrines of gender equality to assume that the legal prohibition of gender stereotype has somehow led to the physical or scientific identity of the genders." *Id*. In other words, changes to gender roles I society and law do not negate the inherent, fundamental differences between men and women that form the basis for marriage laws.

**4 The district court's creation of an alternative definition of marriage violated basic canons of constitutional construction.**

The district court found that marriage is "the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents." (Slip opn. at 670

But basic canons of constitutional construction required the district court to interpret the term "marriage" as that term is

generally understood. A constitution is "written to be understood by the voters." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008). A constitution's "words and phrases [are] used in their normal and ordinary as distinguished from technical meaning," and should not be interpreted according to a "secret or technical meaning[] that would not have been known to ordinary citizens" at the time of enactment. *Id*. As shown above and in the Intervenors' Brief at 51-58, the common understanding of marriage is of a comprehensive union of persons, oriented toward child-bearing.

However, the district court attempted to discern a new, "secret" meaning of marriage: "The right to marriage has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household." (Slip opn. at 113:12-14) This new definition is critical to the district court's argument. Because same-sex relationships would fit under the district court's chosen definition of marriage, the distinction embodied in Proposition 8 becomes discriminatory. Indeed, other courts have also found it necessary to adopt a similar definition when finding a right to same-sex marriage. *See, e.g.*, *In re Marriage Cases*, 43 Cal.4th 757, 814-15

(2008) ["[T]he right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice."]; *Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009) [marriage laws "are designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways," and married couples are "in committed and loving relationships").

The district court's new definition misses the essence of marriage. As shown above and in the Intervenors' Brief at 51-58, the traditional definition of marriage reflects the common understanding that men and women are intrinsically ordered to one another, and that marriage is a pre-existing reality. Basic canons of constructions required the district court to use this common understanding of marriage, not a definition created by the district court to serve its purposes. The district court's use of its new definition amounts to an interpretive bait-and-switch, depriving a constitutional term of its common, accepted meaning, and conveniently finding discrimination as a result.

///

///

**5 The district court's definition of marriage would cause concrete harm to children and society.**

The district court defined marriage as a private, contractual arrangement among adults for the private interests of adults. But marriage as commonly understood does not exist solely for adults—it also is intrinsically ordered toward the bearing and raising of children that naturally result from the union of a man and a woman. Indeed, every child without exception has a mother and father. And children need fathers, not simply to come into existence, but also during their childhood and beyond.

### *C. The common understanding of marriage constitutes a rational basis for upholding Proposition 8.*

**1. Proposition 8 upholds the legitimate interest in encouraging the common understanding of marriage.**

This common understanding of marriage provides an alternative rational basis to uphold Proposition 8, in addition to the state interest described in the Intervenors' Brief at pages 77 *et seq*. *See, e.g., Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (considering "traditional notions" to be a rational basis for upholding the same distinction in

marriage laws).

By upholding and supporting the only institution that unites a man and a woman to each other and any children that may result for their union as an ideal for raising and nurturing future citizens, Proposition 8 encourages persons to enter into that relationship.

**2. Reliance on the common understanding of marriage is not a bare appeal to tradition or custom; rather, the common understanding and recognition that the source of all human life is the union of a man and a woman, even through artificial means of conception, and that every person without exception has a mother and a father.**

The district court opined that "[t]radition alone cannot support legislation," (Slip opn. at 133), citing *Walker v. Illinois*, 399 U.S. 235, 239 (1970). While *Walker* states that "the antiquity of a practice" does not "insulate[] it from constitutional attack," it recognizes that traditional practices "should be weighed in the balance" when evaluating a law. Id., at 239-40. The law in question there, which authorized imprisonment for nonpayment of fines, was a "custom" alone, divorced from nature; there is nothing in nature that called for

criminal punishment for such an offense. In contrast, the common understanding of marriage is a reality of nature.

*Lawrence* v. *Texas*, 539 U.S 558 (2003), also cited by the district court, notes that "times can blind us to certain truths." *Id*., at 579. The district court would have done better to take this advice. As explained above, the truth – obscured somewhat by the time we live in --is that marriage is a union of man and woman, which not only unites them with each other but with any children that may result from the union. No new definition of marriage from the district court can change that fundamental reality.

### 3 This basis is not equivalent to moral disapproval, because recognizing that marriage unites a man and a woman with each other and with any children that may result from their union requires no approval or disapproval of same-sex couples.

The rational basis for Proposition 8's definition of marriage as uniting a man and a woman with each other and any children that may result from their union has a secondary effect of precluding other relationships to be recognized as

equivalent.[1]

While it is undeniable that some people view same-sex relationships with disapproval, the rational basis for Proposition 8 does not primarily stand on moral disapproval. Instead, the primary purpose of Proposition 8 is to recognize, and thereby encourage, the procreative nature of the relationship between a man and a woman. Proposition 8's primary *effect* is to recognize potentially procreative relationships between one man and one woman; even if, as a secondary, unintended effect, it excludes people whose relationships are by their very nature non-procreative, still, it clearly does not exhibit the same type of targeting of certain

---

[1] This analysis—distinguishing between a primary purposes and a secondary corollary—is analogous to the principle of double effect, a concept describe approvingly by the Supreme Court in *Vacco v. Quill*, 521 U.S. 793(1997) [upholding the state's distinction between medical practices designed to kill a patient (which were prohibited), and medical practices designed to alleviate a patient's pain but that would have as a side effect the hastening of death (which were not prohibited)]. *Id*. at 808, n.11. This distinction recognized in *Vacco* provides a useful rubric for evaluating the differences between *Lawrence* and this case.

relationships that was present in *Lawrence* or *Romer*.[2]

**4. Lacking an evidentiary basis for finding that the voters enacted Proposition 8 out of animus or an intent to harm homosexuals as a class, the district court's evident attempt to supply the deficiency by blaming religious disapproval of homosexual conduct for putting obstacle in the path of their complete social acceptance rests on a dangerously extreme conception of the separation of church and state.**

**a. The district court's decision made much of the critical support afforded to Proposition 8 and other**

[2] Concerning the claim that the state has a valid interest in encouraging reproduction within marriage, the district court opined that Proposition 8 actually "discourages that norm because it requires some sexual activity and child-bearing and child-rearing to occur outside marriage." (Opinion at 128:20-22.) This misapplies the rational basis test. The district court disregarded the proffered justification because, in the district court's eyes, the law does not encourage the state's interest in each and every application. But a narrow tailoring requirement is a component of strict scrutiny, not rational review. *See Alaska v. EEOC*, 564 F.3d 1062, 1068 (9th Cir. 2009).

One of the asserted state interests was encouraging "naturally reproductive" relationships—by definition, relationships between a man and a woman—as well as encouraging the probability that children will be raised by their biological parents. Slip opn. at 127. Marriage between a man and a woman promotes naturally reproductive relationships both by providing a set of legal benefits to married couples, and by constituting societal approbation of the relationship. Thus, the distinction embodied in California's law is rationally related to the state's interest in encouraging marriage as the union of a man and a woman.

**"harm" done by religion.**

Early in its opinion (Slip opn., p. 8), the district court posited, "The state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose." citing L*awrence* v *Texas*, *supra*, 539 US at 571, and *Everson* v *Board of Education of Ewing Township*, 330 US 1, 15 (1947) [the seminal 20th century case enunciating the principle of separation of church and state]. Near the end of the opinion, it stated its conclusion that,"[t]he evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples." Slip opn., p. 130. In between, it elaborated its bill of particulars against the mischief wrought by religion in this case, mostly collected in Findings Nos, 18 and 77.

Finding No. 18 recites:

> Protect Marriage is a "broad coalition" of individuals and organizations, including the Church of Jesus Christ of Latter-Day Saints (the "LDS Church"), the California Catholic Conference and a large number of evangelical churches.
>
> a. PX2310 About ProtectMarriage.com, Protect Marriage (2008): Protect Marriage "about" page identifies a "broad-based coalition" in support of Proposition 8;

b. PX0577 Frank Schubert and Jeff Flint, Passing Prop 8, Politics (Feb 2009) at 47: "We had the support of virtually the entire faith community in California.";

c. Tr 1585:20-1590:2 (Segura: Churches, because of their hierarchical structure and ability to speak to congregations once a week, have a "very strong communication network" with churchgoers. A network of "1700 pastors" working with Protect Marriage in support of Proposition 8 is striking because of "the sheer breadth of the [religious] organization and its level of coordination with Protect Marriage.");

d. Tr 1590:23-1591:12 (Segura: An "organized effort" and "formal association" of religious groups formed the "broad-based coalition" of Protect Marriage.);

e. Tr 1609:12-1610:6 (Segura: The coalition between the Catholic Church and the LDS Church against a minority group was unprecedented.");

f. PX2597 Email from Prentice to Lynn Vincent (June 19, 2008): Prentice explains that "[f]rom the initial efforts in 1998 for the eventual success of Prop 22 in 2000, a coalition of many organizations has existed, including evangelical, Catholic and Mormon groups" and identifies Catholic and evangelical leaders working to pass Proposition 8;

g. PX0390A Video, Ron Prentice Addressing Supporters of Proposition 8, Excerpt: Prentice explains the importance of contributions from the LDS Church, Catholic bishops and evangelical ministers to the Protect Marriage campaign;

h. PX0577 Frank Schubert and Jeff Flint, Passing Prop 8, Politics at 46 (Feb 2009): "By this time, leaders of the Church of Jesus Christ of Latter Day Saints had endorsed Prop 8 and joined the campaign executive committee. Even though the LDS were the last major denomination to join the campaign, their members were

> immensely helpful in early fundraising, providing much-needed contributions while we were busy organizing Catholic and Evangelical fundraising efforts."

Slip opn., pp. 59-60.

Finding No. 77 is a more broad-based indictment of the impact of religious beliefs on the acceptance of homosexuals:

> Religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians.
> a. PX2547 (Nathanson Nov 12, 2009 Dep Tr 102:3-8: Religions teach that homosexual relations are a sin and that contributes to gay bashing); PX2546 (video of same);
> b. PX2545 (Young Nov 13, 2009 Dep Tr 55:15-55:20, 56:21-57:7: There is a religious component to the bigotry and prejudice against gay and lesbian individuals); see also id at 61:18-22, 62:13-17 (Catholic Church views homosexuality as "sinful."); PX2544 (video of same);
> c. Tr 1565:2-1566:6 (Segura: "[R]eligion is the chief obstacle for gay and lesbian political progress, and it's the chief obstacle for a couple of reasons. * * * [I]t's difficult to think of a more powerful social entity in American society than the church. * * * [I]t's a very powerful organization, and in large measure they are arrayed against the interests of gays and lesbians. * * * [B]iblical condemnation of homosexuality and the teaching that gays are morally inferior on a regular basis to a huge percentage of the public makes the * * * political opportunity structure very hostile to gay interests. It's very difficult to overcome that.");
> d.PX0390 Video, Ron Prentice Addressing Supporters of Proposition 8, Part I at 0:20-0:40: Prentice explains that "God has led the way" for the Protect Marriage campaign and at 4:00-4:30: Prentice explains that "we do mind" when same-sex couples want to take the name "marriage" and apply it to their relationships, because "that's not what

God wanted. * * * It's real basic. * * * It starts at Genesis 2.";

e. Tr 395:14-18 (Chauncey: Many clergy in churches considered homosexuality a sin, preached against it and have led campaigns against gay rights.);

f. Tr 440:19-441:2 (Chauncey: The religious arguments that were mobilized in the 1950s to argue against interracial marriage and integration as against God's will are mirrored by arguments that have been mobilized in the Proposition 8 campaign and many of the campaigns since Anita Bryant's "Save Our Children" campaign, which argue that homosexuality itself or gay people or the recognition of their equality is against God's will.);

g. PX2853 Proposition 8 Local Exit Polls - Election Center 2008, CNN at 8: 84 percent of people who attended church weekly voted in favor of Proposition 8;

h. PX0005 Leaflet, James L Garlow, The Ten Declarations For Protecting Biblical Marriage at 1 (June 25, 2008): "The Bible defines marriage as a covenantal union of one male and one female. * * * We will avoid unproductive arguments with those who, through the use of casuistry and rationalization, revise biblical passages in order to condone the practice of homosexuality or other sexual sins.";

i. PX0770 Congregation for the Doctrine of Faith, Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons at 2: "Sacred Scripture condemns homosexual acts as 'a serious depravity.'";

j. PX0301 Catholics for the Common Good, Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons, Excerpts from Vatican Document on Legal Recognition of Homosexual Unions (Nov 22, 2009): There are absolutely no grounds for considering homosexual unions to be "in any way similar or even remotely analogous to God's plan for marriage and family"; "homosexual acts go against the natural moral law" and "[u]nder no circumstances can * * * be approved"; "[t]he homosexual inclination is * * * objectively

> disordered and homosexual practices are sins gravely contrary to chastity"; "[a]llowing children to be adopted by persons living in such unions would actually mean doing violence to homosexual behavior is an abomination and shameful before God.";
>
> m. PX2839 Evangelical Presbyterian Church, Position Paper on Homosexuality at 3: "[H]omosexual practice is a distortion of the image of God as it is still reflected in fallen man, and a perversion of the sexual relationship as God intended it to be.";
>
> n. PX2840 The Christian Life —— Christian Conduct: As Regards the Institutions of God, Free Methodist Church at 5: "Homosexual behavior, as all sexual deviation, is a perversion of God's created order.";
>
> o. PX2842 A L Barry, What About * * * Homosexuality, The Lutheran Church-Missouri Synod at 1: "The Lord teaches us through His Word that homosexuality is a sinful distortion of His desire that one man and one woman live together in marriage as husband and wife.";
>
> p. PX2844 On Marriage, Family, Sexuality, and the Sanctity of Life, Orthodox Church of America at 1: "Homosexuality is to be approached as the result of humanity's rebellion against God.";
>
> q. Tr 1566:18-22 (Segura: "[Proponents' expert] Dr Young freely admits that religious hostility to homosexuals [plays] an important role in creating a social climate that's conducive to hateful acts, to opposition to their interest in the public sphere and to prejudice and discrimination.");
>
> r. Tr 2676:8-2678:24 (Miller: Miller agrees with his former statement that "the religious characteristics of California's Democratic voters" explain why so many Democrats voted for Barack Obama and also for Proposition 8.).

Slip opn., Pp. 102-3.

**b. An exaggerated conception of the separation of church and state makes religiously motivated or informed voters "strangers to [the] laws" of their states**

It cannot be gainsaid that many religious traditions have expressed moral disapproval of homosexual relationships. But, as previously discussed, this is not a case in which the majority seeks to criminalize private adult consensual conduct (*Lawrence* v. *Texas*, *supra*, 539 U.S. at 578) or in which passage of the law can only be explained on the basis of "a bare desire to harm the group" (*id*., at 582-583, O'Connor, J., conc.) *quoting Romer* v. *Evans*, *supra*, 517 U.S. at 634, *quoting United States Dep't of Agric*. v. *Moreno*, 413 U.S. 528, 535 (U.S. 1973) [legislative purpose to discriminate against "hippies" in provision of food stamps invalid].

Ironically, what made the law in *Romer* inexplicable, in the view of the majority, other than as an expression of "animosity" toward homosexuals was that it sought to "deem a class of persons a stranger to its laws" by "making a general announcement that gays and lesbians shall not have any particular protections from the law." *Romer*, *supra* at 634-635.

But that is precisely the same effect the district court's exaggerated conception of the separation of church and state aims at accomplishing toward religiously motivated or informed voters: making them "strangers to [the] laws" of their states. This represents quite an evolution from Blackstone's definition of the law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."

While the Supreme Court's jurisprudence establishes the principle that moral concerns by themselves cannot justify the kind of extreme intrusions on private sexuality presented in *Romer* and *Lawrence*, it is also well-established that the concerns about an establishment of religion invoked by the district court's reliance on *Everson* v *Board of Education of Ewing Township*, supra, 330 US 1, do not invalidate any legislation which reflects moral judgments. In *Harris* v. *McRae*, 448 U.S. 297 (U.S. 1980), the Supreme Court rejected an Establishment Clause challenge to an abortion funding ban under Medicaid:

> Although neither a State nor the Federal

> Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another," *Everson* v. *Board of Education*, 330 U.S. 1, 15, it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U.S. 420, 442. That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.
> *Ibid*. The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. 491 F.Supp., at 741. See also *Roe* v. *Wade*, 410 U.S., at 138-141. In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.

Id., at , 319-320.

In a book published over a decade before *Lawrence* v. *Texas, supra*, 539 U.S. 558, was decided, but which criticized *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), and anticipated its overruling, former Solicitor General Charles Fried reflected at some length on the application of the distinction drawn in *Harris* v. *McRae, supra*, and the development of constitutional equal protection doctrine concerning legislative treatment of homosexuals:

> The constitutional problem with abortion turns on whether the life of an innocent person is at stake. In the case of homosexuality, the most that can be said is that society must be allowed some scope to shape its culture, to influence what kind of society it will be: educating children and defining family structures are among the most pervasive and longstanding examples. So in *Harris* v. *McRae*, the abortion funding case, the court said that the government, though it may not criminalize abortion, may express its disapproval of abortions by refusing to pay for them. . . . When organized society expresses a strong judgment of value, this cannot help but put pressure on those who disagree. And it is the function of legal doctrine to develop the lines separating the right of individuals to ignore organized society's value judgments from the right of society to make and give life to such judgments. A first cut draws that line between the absolute prohibitions of the criminal law and situations where the government manages its own affairs or confers benefits. But that distinction is only a beginning: some benefits areso general and essential that withholding them may put as much pressure on individuals as the threat of prison. Legal reasoning will recognize this and work out a further system of distinctions.
>
> What would be unreasonable would be to insist that any pressure from government is allowable only if it can pass the same constitutional test as the final pressure of the criminal law. . . . A more pluralistic vision values slippage between what the state wants and how individuals make their lives. The evolving doctrines of constitutional liberty are a way of keeping the two from getting too close, while allowing each to exist. In the end, what is important is that the majority be able to take substantial steps toward fashioning the kind of community it wants, without making it impossible for dissenters and nonconformists to make their own lives while living in the same cities and town.

Chas. Fried, *Order and Law: Arguing the Reagan*

*Revolution – A Firsthand Account* (Simon & Schuster 1991 [ISBN0-671- 72575-0]), pp. 83-84.

---

If society is to have "scope to shape its culture" and "influence the deepest elements of its culture and structure: family structure and a climate of self-discipline" (*ibid.*), religion and morals must not be lopped off on the Procrustian bed of the district court's extreme vision of separation of church and state which purports to give therapeutic profession organizations and the social science academy *at any given time* -- for their standards change (Slip opn., p. 99:1-3) -- the equivalent of a "heckler's veto" over any legislation that reflects moral concerns that do not pass the test of "secularity" wielded by these authorities.[3]

---

[3] This is not to say that religiously informed or motivated arguments do not have to be expressed in terms appropriate to policy debates.

> Religious as much as secular individuals must translate their personal beliefs into a language that is accessible to all. This is a consequence of political reality as well as an obligation of the virtuous republican legislator. So long as they are put forth in terms and on premises that permit a debate about their general wisdom and usefulness, religiously based

**D. Exclusion of religious perspectives from the formulation of laws impairs the free exercise of religion and damages the body politic.**

---

> arguments that are relevant to resolution of a public policy issue should not be disqualified from participating in the discussion solely because of their religious origin or character.
>
> In terms of current constitutional doctrine, what we argue suggests more careful attention to the legislative or administrative motivation that should serve to invalidate governmental action under the establishment clause. Laws should not be declared unconstitutional because they have religious origins, or because their proponents are motivated by their personal religious beliefs, or even because their public effects coincide with private religious beliefs, all of which have been advanced at one time or another as proper bases for striking down laws under the establishment clause. The illicit establishment clause motivation should be much narrower: the intention disproportionately to help or to hinder the beliefs or practices of a particular religious sect or of religion generally, or to implement sectarian control of government or government control of religion. This formulation of the illicit establishment clause motivation protects establishment clause values while leaving broad possibilities for the public participation and influence of religion in the formation of public policy.

Frederick Mark Gedicks and Roger Hendrix, Democracy Autonomy and Values: Some Thoughts on Religion and Law in Modern America, 60 S. Cal. L. Rev. 1579, 1616-1617 (1987).

> When religious morality is excluded from politics, the religious individual is alienated from public life. One cannot use as a basis for public action her religious individuality -- those very thoughts, feelings, and beliefs that carry the greatest personal meaning and thus are most likely to move her to public action. Unless one succeeds in disguising her religious morality with the arguments of secularism, the political arena is closed to her. The knowledge that the political system rejects an individual's personal religious experiences as being wholly subjective and irrelevant makes her feel separated, illegitimate, and inferior.
>
> The stability of any liberal democracy depends on a perception of the people that their law treats everyone more or less equally and does not affirmatively dictate different results based upon the status of those that it governs. Liberal states that do not respect this reality are either forced into authoritarianism or are overthrown. If the religious people who constitute the majority of Americans come to believe, as many already do, that the law making process does not respect their religious beliefs (at least to the extent that it respects secular beliefs), then they themselves will respect neither the process nor the laws that it generates.

Frederick Mark Gedicks and Roger Hendrix, *Democracy Autonomy and Values: Some Thoughts on Religion and Law in Modern America, supra,* 60 S. Cal. L. Rev. at 1599-1600 (fn. omitted).

And it has a profound effect on the society, as well, as

the Pope remarked recently during his state visit to the United Kingdom:

> As we reflect on the sobering lessons of the atheist extremism of the twentieth century, let us never forget how the exclusion of God, religion and virtue from public life leads ultimately to a truncated vision of man and of society and thus to a "reductive vision of the person and his destiny" (Caritas in Veritate, 29).

ADDRESS OF HIS HOLINESS BENEDICT XVI, Palace of Holyroodhouse – Edinburgh (Sept. 16, 2010) [*available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/september/documents/hf_ben-xvi_spe_20100917_societa-civile_en.html]

> And then, the next day:
>
> Each generation, as it seeks to advance the common good, must ask anew: what are the requirements that governments may reasonably impose upon citizens, and how far do they extend? By appeal to what authority can moral dilemmas be resolved? These questions take us directly to the ethical foundations of civil discourse. If the moral principles underpinning the democratic process are themselves determined by nothing more solid than social consensus, then the fragility of the process becomes all too evident - herein lies the real challenge for democracy.
>
> ***
>
> The central question at issue, then, is this: where is the ethical foundation for political choices to be found? The Catholic tradition maintains that the objective norms

> governing right action are accessible to reason, prescinding from the content of revelation. According to this understanding, the role of religion in political debate is not so much to supply these norms, as if they could not be known by non-believers – still less to propose concrete political solutions, which would lie altogether outside the competence of religion – but rather to help purify and shed light upon the application of reason to the discovery of objective moral principles. . . . Without the corrective supplied by religion, though, reason too can fall prey to distortions, as when it is manipulated by ideology, or applied in a partial way that fails to take full account of the dignity of the human person. Such misuse of reason, after all, was what gave rise to the slave trade in the first place and to many other social evils, not least the totalitarian ideologies of the twentieth century. This is why I would suggest that the world of reason and the world of faith – the world of secular rationality and the world of religious belief – need one another and should not be afraid to enter into a profound and ongoing dialogue, for the good of our civilization.
>
> Religion, in other words, is not a problem for legislators to solve, but a vital contributor to the national

///

///

> conversation. In this light, I cannot but voice my concern at the increasing marginalization of religion, particularly of Christianity, that is taking place in some quarters, even in nations which place a great emphasis on tolerance. There are those who would advocate that the voice of religion be silenced, or at least relegated to the purely private sphere. . . . And there are those who argue – paradoxically with the intention of eliminating discrimination – that Christians in public roles should be required at times to act against their conscience. These are worrying signs of a failure to appreciate not only the rights of believers to freedom of conscience and freedom of religion, but also the legitimate role of religion in the public square. I would invite all of you, therefore, within your respective spheres of influence, to seek ways of promoting and encouraging dialogue between faith and reason at every level of national life.

ADDRESS OF HIS HOLINESS BENEDICT XVI,

Westminster Hall - City of Westminster (Sept. 17, 2010)

[*available at*

http://www.vatican.va/holy_father/benedict_xvi/travels/2010/in

dex_regno-unito_en.htm ]

## CONCLUSION

If this court were not bound by the binding Supreme Court precedent of *Baker Nelson*, 409 U.S. 810 (1972) – which, of course, it is! --it could not fail to recognize the persuasive force of its own decision in *Adams* v. *Howerton*, 673 F.2d 1036 (9th Cir. Cal. 1982), upholding preferential immigration status afforded by Congress to

heterosexual marriage partners on the very same grounds that support the enactment of Proposition 8 by the citizens of California:

> Congress has determined that preferential status is not warranted for the spouses of homosexual marriages. Perhaps this is because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores. In any event, having found that Congress rationally intended to deny preferential status to the spouses of such marriages, we need not further "probe and test the justifications for the legislative decision." [Citation omitted.]

*Id.*, at 1042-1043. The judgment of the district court should be reversed and judgment entered in favor of the defendant intervenors.

Respectfully submitted,

/s/ Richard G. Katerndahl
Richard G. Katerndahl

Attorney for proposed Amicus Curiae Catholics for the Common Good

## CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing BRIEF OF AMICUS CURIAE CATHOLICS FOR THE COMMON GOOD IN SUPPORT OF DEFENDANT-INTERVENORS-APPELLANTS is double-spaced and was printed in proportionately-spaced 14-point CG Times type. It contains 6,979 words (inclusive of footnotes, but exclusive of captions, tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2007.

Executed on September 24, 2010 at San Rafael, California.

/s/ Richard G. Katerndahl
Richard G. Katerndahl