

No. 10-16696

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

*On Appeal from the United States District Court
For the Northern District of California
Hon. Vaughn R. Walker, District Judge*

**BRIEF OF *AMICUS CURIAE* ANTI-DEFAMATION LEAGUE
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Anti-Defamation League is a 501(c)(3) non-profit organization. The Anti-Defamation League has no parent corporation, and no publicly-held corporation owns ten percent or more of the Anti-Defamation League.

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IDENTITY AND INTEREST OF AMICUS

Amicus Anti-Defamation League was founded in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all. Today, it is one of the world's leading civil and human rights organizations combating anti-Semitism, all types of prejudice, discriminatory treatment and hate. The League is committed to protecting civil rights of all persons, and to assuring that each person receives equal treatment under law.

All parties have consented to the filing of all amicus briefs in this case.

SUMMARY OF ARGUMENT

Amicus Anti-Defamation League joins in support of plaintiffs-appellees' arguments, but seeks to highlight for the Court the privacy implications of the segregated system that exists as a result of Proposition 8.

In its opinion below, the district court made a finding of fact that "Proposition 8 requires California to treat same-sex couples differently from opposite-sex-couples." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010). Amicus agrees with this conclusion, and is concerned that the segregated system of marriage for opposite-sex couples and domestic partnership for same-sex couples requires public disclosure of

constitutionally-protected private information — namely, the sexual orientation of domestic partners. Requiring this disclosure therefore unconstitutionally conditions state recognition of committed same-sex relationships on the surrender of a constitutional right.

Besides the unconstitutional framework established by Proposition 8, the repeated public disclosure of sexual orientation faced by domestic partners may expose them to invidious discrimination and potential threats to their personal safety. Discrimination and hate crimes against gays and lesbians are all too prevalent in our society and the segregated system required by Proposition 8 puts gays and lesbians who wish to enter state-recognized committed relationships at risk because it forces them to disclose their sexual orientation in situations where it is completely irrelevant and potentially unsafe to do so. Extending the right to marry to same-sex couples would remedy the constitutional infirmities of the segregated system and also leave the decision of when and where to disclose one's sexual orientation to the discretion of the individual.

ARGUMENT

I. PROPOSITION 8 CAUSES THE STATE TO MAINTAIN A SEGREGATED SYSTEM WHEREIN HOMOSEXUAL DOMESTIC PARTNERS MUST EFFECTIVELY IDENTIFY THEIR SEXUAL ORIENTATION IN PUBLIC IN VIOLATION OF THEIR CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY.

The U.S. Constitution protects the fundamental right to have sensitive personal information kept private. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). And under this Circuit's precedent, this fundamental right to privacy extends not only to forced disclosure of such information to the government, but also to an assurance that the information will not be disclosed to the public.

This constitutional right to privacy includes the right to keep one's sexual orientation private. Nevertheless, the current dual system of marriages and domestic partnerships fostered by Proposition 8 requires same-sex partners to routinely reveal their sexual orientation in numerous settings where sexual orientation is irrelevant. Virtually all domestic partnerships are same-sex. Consequently, whenever domestic partners are required to identify their marital status, they are effectively required to identify their sexual orientation.

The government can only require disclosure of such private information if it can prove that it has a legitimate interest in the information

and that its actions are narrowly tailored to that interest. Courts consider a number of factors to decide if the government's interest in disclosure is proper, including the type of information, the risk of harm from its disclosure, and whether there are adequate safeguards in place to prevent further disclosure. Because gays and lesbians may face a risk of discrimination and physical harm from having their sexual orientation revealed in public, their interest in keeping this information private far outweighs any interest the government may have in requiring its repeated disclosure. In fact, the government has *no* legitimate interest in requiring homosexuals to reveal their sexual orientation publicly. Consequently, Proposition 8 requires the state to maintain a system that invades the informational privacy rights of same-sex couples.

A. Sensitive Personal Information Such As Sexual Orientation Is Protected As Private Information Within The Right To Privacy.

Sensitive personal information is protected by the constitutional right to privacy. The Ninth Circuit has “repeatedly acknowledged that the Constitution protects an ‘individual interest in avoiding disclosure of personal matters.’” *Nelson v. NASA*, 530 F.3d 865, 877 (9th Cir. 2008) (quoting *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999)). This interest

“covers a wide range of personal matters,” including sexual activity, medical information, and financial data. *Id.* (citations omitted).

Similarly, an individual’s sexual orientation is personal information worthy of protection. Indeed, in *In re Crawford*, this Court listed “sexual orientation” as a paradigmatic example of “inherently sensitive [and] intimate information,” the disclosure of which could “lead directly to injury, embarrassment or stigma.” 194 F.3d at 960 (citation omitted) (listing HIV status and genetic makeup as other, comparable examples); *see also Sterling v. Borough of Minersville*, 232 F.3d 190, 196 n.4 (3d Cir. 2000) (holding that “forced disclosure of one’s sexual orientation” violates the right to privacy, because “such information is intrinsically private,” and collecting cases). In saying this, the Court categorized sexual orientation as information more personal and sensitive than one’s social security number. *Id.*

This right to privacy applies “both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public.” *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789-90 (9th Cir. 2002) (citing *Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977)). Thus, whenever the government requires anyone to disclose their sexual

orientation, or seeks to make such information available publicly, the right to privacy is implicated. *See In re Crawford*, 194 F.3d at 958.

B. Gay And Lesbian Couples That Register As Domestic Partners Have To Disclose Private Information, Including Their Sexual Orientation, In Numerous Situations In Violation Of Their Right To Privacy.

In direct violation of the right to informational privacy, the current segregated scheme caused by Proposition 8 inevitably forces same-sex couples to reveal their sexual orientation in numerous situations where such information is entirely irrelevant and potentially harmful. This happens because domestic partnerships in California are open only to same-sex couples, and heterosexual couples where one partner is over the age of 62. CAL. FAM. CODE § 297(b)(5)(B). Not surprisingly, an estimated 95% of domestic partnerships in California are same-sex. *See, e.g.*, Laura Meckler, *Gay Couples Get Equal Tax Treatment*, WALL ST. J., June 5, 2010, <http://online.wsj.com/article/SB10001424052748704080104575286931017169308.html>. Thus, because virtually all domestic partnerships are same-sex unions, identifying as a domestic partner identifies one as gay or lesbian.

Moreover, under California law, domestic partners are required to declare themselves as such whenever they are required to identify their marital status. *See* CAL. FAM. CODE § 297.5(a) (“Registered domestic partners shall have the same rights, protections, and benefits, and shall be

subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”); *see also id.* § 297.5(j) (“Where necessary to implement the rights of registered domestic partners under this act, gender-specific terms referring to spouses shall be construed to include domestic partners.”). Thus, as a matter of law, registered domestic partners cannot claim that they are “single” or “married” when filling out a form asking for their marital status. Consequently, anyone who reads the form can be virtually guaranteed that the person who identified their marital status as “domestic partner” is homosexual.

This forced disclosure of sexual orientation occurs in numerous circumstances, not just on official state forms, because registered partners must disclose their sexual orientation in order to comply with state law in a number of everyday situations where sexual orientation is irrelevant. For example, marital status is required when filling out payroll information, auto insurance applications, medical history surveys, public university enrollment applications, bank account forms, and loan applications.

Same-sex partners can even be forced to disclose their domestic partnership status, and thus their sexual orientation, under penalty of perjury

when called to serve on a jury or appear as a witness. The California Judicial Council has noted that asking potential jurors about their marital status during voir dire puts homosexual jurors in the “untenable situation of either disclosing their sexual orientation” or misleading the court. JUDICIAL COUNCIL OF CAL., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS 30 (Jan. 2001), *available at* <http://www.courtinfo.ca.gov/programs/access/documents/report.pdf>.

The very act of registering as domestic partners itself involves an unconstitutional intrusion into same-sex couples’ privacy rights. In order to gain domestic partnership status, couples must file a Declaration of Domestic Partnership with the state. CAL. FAM. CODE § 297(a). The domestic partnership statute then requires the Secretary of State to maintain a separate registry of all domestic partnerships. *Id.* § 298.5(b). This registry contains the registrants’ names, addresses, and the dates of their filings. Moreover, according to the Secretary of State, “the information contained in the Registry is public.” Cal. Secretary of State, Domestic Partners Registry, Frequently Asked Questions, Question 12, <http://www.sos.ca.gov/dpregistry/faqs.htm> (noting also that the information in the registry is available “by phone or upon written request”) (last visited October 25, 2010). Members of the public can obtain the registry on CD-ROM for just \$20, and sort the

database by name, street address, zip code, and date of registration.

In contrast, marriage licenses are registered with local county recorders, and, as a practical matter, lists of married couples are only available when requested county-by-county. *See* CAL. HEALTH & SAFETY CODE § 102285. And unlike same-sex domestic partners, married couples do not have to disclose their addresses.

Thus, same-sex couples who want the benefits available to opposite-sex couples in marriage must put their sexual orientation on statewide public record, along with their address. Not only is this an intrusion into their privacy, but as discussed below, *see infra* pp. 11-12, 17-20, it also subjects homosexual couples to a heightened likelihood of victimization through hate crimes and harassment. The California Attorney General has even recognized that the prospect of being forced to publicly disclose their sexual orientation may prevent gays and lesbians from registering as domestic partners altogether. *See* 84 Op. Cal. Att’y Gen. 55, 58 (2001) (“From the legislative record, including committee reports, concerning the enactment of Family Code sections 297-299.6, it is apparent that for some segments of society, a social stigma may attach to those eligible to register as domestic partners. Conceivably, harassment of

domestic partners may result from the disclosure of their common residence addresses.”) (internal citation omitted).

C. The State Cannot Prove That It Has A Legitimate Interest In Requiring Gays And Lesbians To Disclose Their Sexual Orientation And That Its Actions Are Narrowly Tailored To Any Such Interest.

The right to informational privacy is not absolute, but is “a conditional right which may be infringed upon a showing of proper governmental interest.” *Planned Parenthood*, 307 F.3d at 790 (citation omitted). Nevertheless, in order to require someone to disclose constitutionally protected personal information, the government must prove that it will use the information to advance a legitimate state interest and that its actions are narrowly tailored to that purpose. *See id.*

To determine whether the state’s interest is legitimate, courts do not simply look to the government’s reasons for requiring disclosure, but must weigh those reasons against any competing interests. *See id.* This Court has considered the following factors in making this determination: 1) “the type of [information] requested”; 2) “the potential for harm in any subsequent nonconsensual disclosure”; 3) “the adequacy of safeguards to prevent unauthorized disclosure”; 4) “the degree of need of access”; and 5) “whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.” *In re Crawford*,

194 F.3d at 959 (citation omitted); *see also Planned Parenthood*, 307 F.3d at 790; *Nelson v. NASA*, 530 F.3d at 877-78. None of these factors weighs in favor of forced disclosure of one's sexual orientation.

First, as this Court has recognized, sexual orientation is the type of information that is “inherently sensitive [and] intimate,” the disclosure of which could “lead directly to injury, embarrassment or stigma.” *In re Crawford*, 194 F.3d at 960 (citation omitted). Sexual orientation is a paradigmatic example of information that “is not generally disclosed by individuals to the public” at large. *Id.* at 958. And even where homosexual individuals might decide to “come out” and reveal their sexual orientation publicly, they may not want to disseminate this information statewide on a public record. Coming out even to one's closest friends and relatives can be an intensely personal event for many. Consequently, one's sexual orientation is not the type of information that anyone should be required to disclose on a regular basis, particularly when such information has no relevance to the matter at hand.

Second, there is a real potential for harm where same-sex couples are required to identify their sexual orientation publicly. Gays and lesbians are disproportionately the target of violent hate crimes and invidious discrimination. *See infra* pp. 17-20. Indeed, the most common

type of hate crime in California for the past decade, apart from race-based crime, has been crime motivated by a bias against homosexuality, and the most likely location of any hate crime is one's residence. *See infra* pp. 19-20 (discussing state and national hate crime statistics).

Third, the state does not have adequate safeguards in place to prevent this potential harm. In fact, the state has *no* safeguards in place. To the contrary, the state makes the information available on a public record. Notably, this same level of access to personal information does not apply to opposite-sex married couples.

Fourth, there is no need for the state to grant access to this personal information to anyone, let alone the entire public. No one in the general public has a need to know the sexual orientation of the people registering as domestic partners. Likewise, businesses and agencies do not need this information, even though same-sex couples are required to divulge it on myriad documents in the course of daily life. *See supra* p. 7.

Fifth, there is no express statutory mandate or articulated public policy that requires sexual orientation information to be shared publicly. In fact, the state has articulated policies to the contrary. For example, the state has an affirmative policy of *prohibiting* employers and owners from requiring employment and housing applicants to reveal their sexual

orientation. *See* CAL. GOV'T CODE § 12955(b) (housing); *id.* § 12940(d) (employment).

All told, the state of California has no legitimate interest in requiring an individual's sexual orientation to be a part of a public record or to be revealed routinely in daily life. Indeed, “[i]t is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity.” *Sterling*, 232 F.3d at 196. Even if the state had an interest in obtaining this information, judging by its practical effects, the domestic partnership statute is not narrowly tailored to that interest.

II. THE SEGREGATED SYSTEM RESULTING FROM PROPOSITION 8 UNCONSTITUTIONALLY CONDITIONS THE GRANT OF A BENEFIT FROM THE STATE ON GAYS' AND LESBIANS' SURRENDER OF THEIR CONSTITUTIONAL RIGHT TO PRIVACY.

California's domestic partnership law, found at California Family Code §§ 297 *et seq.*, provides for state recognition of same-sex committed relationships. Section 297.5(a) specifically provides that “[r]egistered domestic partners shall have the same *rights, protections, and benefits*, and shall be subject to the same responsibilities, obligations, and duties under law, . . . as are granted to and imposed upon spouses.” (emphasis added). Thus, domestic partnership, like marriage, is a benefit

conferred by the state of California on those persons who seek to have state recognition of their committed relationship.

However, as detailed *supra* in Section I.B. of this brief, same-sex couples cannot take advantage of this benefit in California without disclosing their sexual orientation, which is information that they have a constitutional right to keep private. This system thus conditions the grant of a state benefit on the sacrifice of a constitutional right.

A. The State Is Prohibited From Making State Recognition Of A Committed Relationship Conditional On The Sacrifice Of An Individual’s Constitutional Right To Informational Privacy.

Government benefits cannot be conditioned on the surrender of constitutionally-protected rights. The Supreme Court has long recognized that although the government may deny a government benefit to a person for “any number of reasons, . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests” *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). This principle has also been articulated as a prohibition on the State from using the promise of a benefit to “produce a result which [it] could not command directly.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

As explained *supra* in Section I, one’s sexual orientation is constitutionally protected from disclosure – in other words, the State cannot

command that anyone disclose his or her sexual orientation. Justice Alito recently reiterated this fundamental prohibition on the State in his concurrence in *John Doe #1 v. Reed*, 130 S. Ct. 2811 (2010). *Reed* was a challenge by petition signers who opposed Washington State’s disclosures of those signers’ names in response to requests under the State’s Public Records Act. Justice Alito warned that permitting the State “to require petition signers to disclose all kinds of demographic information, *including the signer’s . . . sexual orientation*, . . . runs headfirst into a half century of [Supreme Court] case law, which firmly establishes that individuals have a right to privacy of belief and association.” *Id.* at 2824 (Alito, J., concurring) (citations omitted).

Thus, since the State of California cannot require its citizens to disclose their sexual orientation directly, it is also prohibited from coercing them into doing so with the promise of domestic partnership and all of the rights, benefits, and protections that it brings. Yet Proposition 8 requires the State to do just that, since it forbids the State from recognizing committed same-sex relationships in a manner that does not require disclosure of sexual orientation. Accordingly, the segregated system resulting from Proposition 8 is fatally flawed by the inclusion and perpetuation of an unconstitutional condition.

B. The Disclosure Of Sexual Orientation Is Not Rationally Related To The State's Grant Of Recognition Of Committed Relationships Between Its Citizens.

Although conditioning the grant of a benefit on the surrender of a right is not absolutely forbidden, in order to pass constitutional muster the condition must be at least rationally related to the benefit. *See Parks v. Watson*, 716 F.2d 646, 652 (9th Cir. 1983) (“[A] condition requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred.”) In *Parks*, the City denied the plaintiff company’s petition to vacate certain City streets unless the company agreed to dedicate to the City certain land with valuable geothermal wells without just compensation from the City. Because the conveyance of the geothermal property “had no relationship to the public’s interest in the vacation of the streets,” such as “control of traffic, pollution, or access,” the condition was held to be unconstitutional. *Id.* at 651 & n.1.

Likewise, in the present case, there is no rational relationship between the State of California’s recognition of committed personal relationships and the sexual orientation of the members of those relationships. As the evidence overwhelmingly demonstrated and the district court concluded below, the State of California has no interest in

differentiating between same-sex and opposite-sex unions. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d at 963-991. Indeed, from the State's perspective, the statutory benefits provided by marriage and domestic partnership and the duties that accompany those institutions do not relate in any way to the sexual orientation of the members of those relationships, as evidenced by the fact that domestic partners are granted all of the same rights and responsibilities "as are granted to and imposed upon spouses." CAL. FAM. CODE § 297.5(a).

Thus, since sexual orientation bears no rational relationship to the State's recognition of committed relationships, Proposition 8's segregated system that conditions the grant of such recognition on disclosure of constitutionally-protected information is unlawful.

III. THE SEGREGATED SYSTEM REQUIRED BY PROPOSITION 8 AND THE DISCLOSURE OF SEXUAL ORIENTATION THAT RESULTS FROM THAT SYSTEM ARE PARTICULARLY DAMAGING BECAUSE GAYS AND LESBIANS ARE SUBJECT TO INVIDIOUS DISCRIMINATION AND VIOLENCE BASED ON THEIR HOMOSEXUALITY.

In addition to the above-mentioned arguments and other sound legal arguments made against Proposition 8 in the briefs of the Appellees and other amici, this Court should also consider the practical implications of the segregated system required by Proposition 8. Discrimination and

violence against gays and lesbians is widespread in the United States and in California, and the repeated disclosure of domestic partners' sexual orientation can make people who enter into such relationships targets for such treatment.

Data show that gays and lesbians experience considerable discrimination in their everyday lives. More than 1 in 10 sexual minority adults has experienced housing or employment discrimination. *See* Gregory Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States*, 24 J. INTERPERSONAL VIOLENCE 54, 68-69 (January 2009). One study has extensively detailed employment discrimination for lesbian, gay, bisexual, and transgender ("LGBT") persons, concluding, *inter alia*, that 16% to 68% of LGBT people report experiencing employment discrimination, and that gay men earn 10% to 32% less than similarly qualified heterosexual men. *See* Lee *et al.*, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, THE WILLIAMS INSTITUTE, U.C. LOS ANGELES, at 2-3 (June 2007) *available at* <http://escholarship.org/uc/item/5h3731xr>. This discrimination reaches across both the private and public sectors. *See, e.g.*, *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Education and Labor*, 111th Cong., 1st Sess. 47-50 (2010)

(statement of R. Bradley Sears, Executive Director, The Williams Institute). Considering such bias, it is clear why gays and lesbians may not be inclined to disclose their sexual orientation, although under California's segregated system they may not have a choice.

In addition to suffering discrimination, gays and lesbians are also frequently victimized for their sexual orientation. Indeed, one need not look farther than recent headlines to see evidence that harassment of and violence against gays and lesbians is a current and widespread problem. *See, e.g.,* Michael Wilson & Al Baker, *Lured Into a Trap, Then Tortured for Being Gay*, N. Y. TIMES, Oct. 8, 2010, <http://www.nytimes.com/2010/10/09/nyregion/09bias.html> (nine gang members beat and torture three men they suspected of being gay); Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N. Y. TIMES, Sept. 29, 2010, http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?_r=2&src=me&ref=home page (Rutgers student commits suicide after being outed on the internet).

Sexual orientation is the second most prevalent bias motivation behind hate crimes in California, following only racial or ethnic motivation. *See* Cal. Attorney General Edmund G. Brown, Jr., *Hate Crime in California: 2009*, iii-iv (2009) available at <http://ag.ca.gov/cjsc/publications/hatecrimes/hc09/preface09.pdf> ("In 2009, hate crimes with a sexual orientation bias

motivation were the second most common type of hate crime,” accounting for nearly a quarter of all hate crimes); *id.* (for the past decade, “hate crimes with a sexual orientation motivation ha[ve] consistently been the second most common hate crime.”). The same is true for the United States overall. FBI, 2008 Hate Crime Statistics, Incidents and Offenses, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2008>. Nearly 4 in 10 gay men and 1 in 8 lesbians have experienced an antigay hate crime or harassment. See Herek, *Hate Crimes and Stigma-Related Experiences*, at 54, 71.

Finally, hate crimes are most frequently committed near homes or residences. See *Hate Crime in California: 2009*, at 27 (showing that “residence/home/driveway” was the most likely location for a hate crime to occur, accounting for nearly 1 in 3 crimes); FBI, 2008 Hate Crime Statistics, Location Type, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2008> (showing that a third of all hate crimes based on sexual orientation bias were committed in or near residences). This fact is particularly troubling in California’s segregated system, since information about residence is on public record in the domestic partnership registry, exposing gays and lesbians who seek state recognition of their relationships to potential danger.

CONCLUSION

Proposition 8 results in a segregated system that requires gays and lesbians to constantly disclose sexual orientation in violation of their constitutionally-protected right to keep such information private. Moreover, because same-sex couples cannot obtain the benefit of domestic partnership without revealing their sexual orientation, the system required by Proposition 8 results in the State imposition of an unconstitutional condition.

This unconstitutional scheme could be cured by extending the right to marry to gay and lesbian couples. Such a change would protect the informational privacy rights of same-sex partners to the same extent enjoyed by heterosexual married couples and would remove the unconstitutional condition from State recognition of same-sex committed relationships. Further, a unified scheme would help protect gay and lesbian couples from discrimination and hate crimes. At present, however, Proposition 8 stands in the way, and subjects registered same-sex couples to a continual violation of their right to privacy, to the detriment of their dignity and safety.

Accordingly, Amicus Anti-Defamation League agrees with Plaintiffs-Appellees that the judgment below should be affirmed.

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**CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(C)
AND CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,226 words, excluding parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii), as counted by the Microsoft Word 2007 application.

DATED: October 25, 2010

/s/ Victoria F. Maroulis

CERTIFICATE OF SERVICE

I, Victoria F. Maroulis, a member of the Bar of this Court, hereby certify that on October 25, 2010, I electronically filed the foregoing Amicus Brief Of Anti-Defamation League in Support of Plaintiffs-Appellees with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing Amicus Brief Of Anti-Defamation League in Support of Plaintiffs-Appellees by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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