Case No. 10-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

ARNOLD SCHWARZENEGGER, et al.,
Defendants, and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.,
Defendants-Intervenors-Appellants.

AMICUS CURIAE BRIEF BY THE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES

Appeal From United States District Court, Northern District of Calif.
Case No. CV-09-02292 VRW (Hon. Vaughn R. Walker, Presiding)

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INTRODUCTION

The federal constitutional rights to due process and equal protection reign supreme and trump a state's inconsistent statutory or constitutional provisions. California's Proposition 8 amended the state's constitution by ***repealing*** same-sex couples' fundamental right to marry.

On August 4, 2010, the Hon. Vaughn Walker struck down Proposition 8, concluding the evidence demonstrated that none of the six purported interests submitted by the proponents amounted to rational bases for Proposition 8. ER 167-170. The Court then concluded once these invalid justifications were stripped away, what remained was an "amply supported" inference that Proposition 8 was based on moral disapproval, animus, or the belief that same-sex couples were inferior, none of which was a proper basis on which to legislate. ER 167.

This case presents the most recent battlefront in the timeless struggle for equality by a minority group against a tyranny of the majority: Does legislation which ***repeals*** a fundamental right violate due process and equal protection where the law was premised on moral disapproval, animus, or a belief in the supremacy of the majority?

INTEREST OF AMICUS CURIAE

Since the earliest written records, those in power throughout the world have passed laws which suppress minority members of society. While the United States has made its own contributions to this shameful legacy (e.g., upholding a slave owner's "property interest" in a slave, the charade of "separate but equal," or the government's right to intern an entire race of people), it has also invalidated many discriminatory laws (voiding "restrictive covenants," abolishing segregation, striking down anti-miscegenation statutes, enjoining amendments which repeal bans on discrimination, and invalidating laws criminalizing private, consensual sexual conduct).

Today, the codification of discriminatory legislation seems like a strange remnant of a shameful past when majorities enacted laws to maintain group superiority. Yet, once again, the federal judiciary finds itself at the front line of this age-old debate – this time reviewing a state constitutional amendment *repealing* the fundamental right of same-sex couples to marry, regardless of gender or sexual orientation.

Amicus curiae the Southern Poverty Law Center ("SPLC") is internationally known for its unrelenting stance on equality by fighting

all forms of discrimination to make this nation's constitutional ideals a reality.

As a long-standing leader in the civil rights movement, *amicus curiae* believes history will judge us by our decision today. Will future generations look back and wonder how we could continue a tradition of state-sponsored discrimination? Or will they admire our commitment to the constitutional principles of due process and equal protection?

LEGAL DISCUSSION

I.

THE EQUAL PROTECTION CLAUSE PRECLUDES ANIMUS-BASED DISCRIMINATORY LEGISLATION ENACTED WITHOUT A RATIONAL BASIS

A. HISTORY IS REPLETE WITH INSTANCES OF ANIMUS-BASED LEGISLATION

It is an undeniable fact that human history is riddled with laws enacted by those in power – whether economically, militarily, politically, or by virtue of their sheer numbers – to suppress members of a minority or otherwise disenfranchised group.

Slavery, the ultimate form of minority oppression, is documented in the earliest recorded records, the Code of Hammurabi (circa 1760 B.C.). Other extreme examples can be found in the Roman persecution

of early Christians, the Spanish Inquisition, blood libel allegations, the Ottoman genocide of Armenians, Stalin's Great Purge, Hitler's Final Solution for the Jews (as well as other minorities and homosexuals), and the modern-day genocide that occurs throughout the world.

The United States has not been immune from the steady onslaught of animus-based legislation. In fact, often these discriminatory laws were so ingrained in American society that they were endorsed by courts of law, including the United States Supreme Court:

* In *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the High Court held that a slave could not obtain his freedom despite being relocated to a free-state as it would deprive his owner of property rights.

* In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court endorsed the South's Jim Crow laws under the ruse of "separate but equal," a farce which belied inferior treatment and notions of racial superiority, and which solidified another 58 years of legalized discrimination.

* In *Korematsu v. United States*, 323 U.S. 214 (1944), the forced internment of Japanese-Americans during wartime

was upheld, despite a stinging dissent stating the Court was sinking into "the ugly abyss of racism" and comparing the rationale for the action to "the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy." *Id*. at 232, 240 (dis. opn., J. Murphy).

In the following years, the High Court began rectifying state-sponsored discrimination enacted without any rational basis and solely based on personal animus:

* In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court held "restrictive covenants" that barred the sale of homes to blacks, Jews, or Asians were unconstitutional.
* In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court concluded segregation was impermissible and abolished the "separate but equal" doctrine.
* In *Loving v. Virginia*, 388 U.S. 1 (1967), the Court struck down anti-miscegenation laws which, like this case, had been justified based on religion and moral disapproval.

In *Loving*, religious-based justifications were advanced to support the marriage bans, as evidenced by the trial court's statement, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix." *Id*. at 3. This familiar refrain has been echoed repeatedly by those who claim to speak for a deity in their opposition to equality, regardless of the nature of the minority group.[1] See Tr. 440:19-441:2;I ER 139; II SER 140.

B. RECENT ANIMUS-BASED LEGISLATION TARGETING THE GAY AND LESBIAN COMMUNITIES

In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court grappled with Colorado's "Amendment 2," which repealed various state and local provisions that barred discrimination on the basis of sexual orientation. *Id*. at 623-624. The Court concluded Amendment 2 eliminated gays' and lesbians' legal protections against discrimination, but did not withdraw these protections from any other group, stating:

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[1] See *Snyder v. Phelps*, Docket No. 09-751, in which the Supreme Court granted certiorari where members of the Westboro Baptist Church picketed the funeral of a fallen soldier with placards reading, *inter alia*, "God Hates Fags." *Snyder v. Phelps*, 580 F.3d 206, 222 (4th Cir. 2009).

> "[Amendment 2's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests. . . . [L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a *legitimate* state interest."

Id. at 632, 634 (internal quotations, citations and ellipses omitted).

Thereafter, the Court issued a prophetic warning to those individuals who – like the proponents of Proposition 8 – seek to pass state constitutional provisions to repeal fundamental rights:

> "It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

Id. at 633 (internal quotations and citations omitted).

Several years later, the Supreme Court considered state laws which criminalized consensual sexual conduct by gays and lesbians in

the privacy of their own homes. *Lawrence v. Texas*, 539 U.S. 559 (2003). In *Lawrence*, the Court invalidated the law, holding that it violated defendants' vital due process interests in liberty and privacy. *Id*. at 578-579. The Court noted:

> "[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives".

Id. at 571.

C. THE ROLE OF THE EQUAL PROTECTION CLAUSE IN ANIMUS-BASED CASES

The Equal Protection Clause mandates that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). This is a mandate that all persons similarly situated should be treated alike. Because equal protection is unequivocal without regard to the origin of the law (legislative, initiative, or constitutional), no government action may be ordered in violation of its protections. *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737 (1964).

The general rule is that legislation is presumed valid if it is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-440 (1985). However, where fundamental rights are involved, the legislation will be invalidated where there is no rational basis for the purported state interest. *Id*. at 448. "Mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases" for treating citizens differently. *Id*. at 448; see *Lawrence*, 549 U.S. at 582 (conc. opn., J. O'Connor) ["moral disapproval, without any other asserted state interest," has never been a rational basis for legislation].

It is the power vested in the American courts of justice, of pronouncing a statute to be unconstitutional, that forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies. (Alexis de Tocqueville, Democracy in America (Francis Bowen trans. 1862) (1835), at 1:129–30.) It is also a hallmark of our system of democracy and justice.

II.
THE COURT'S FINDING THAT THE EVIDENCE FAILED TO SUPPORT THE PROFFERED INTERESTS IN PROPOSITION 8 IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. THE DISTRICT COURT'S FACTUAL FINDINGS, CONCLUSIONS OF LAW, AND REJECTION OF PROPONENTS' PURPORTED INTERESTS

After considering the evidence presented at trial, the credibility of the witnesses and the legal arguments presented by counsel, the District Court made various findings of fact. I ER 89-144. The Court then considered, and rejected, each of the six purported interests proffered by the proponents, finding that none of the reasons met the lowest rational basis test, let alone the compelling state interest test. I ER 158-167. The Court concluded that once these invalid justifications were stripped away, what remained was an "amply supported" inference that Proposition 8 was based on moral disapproval, animus, or the belief that same-sex couples were inferior, none of which was a proper basis on which to legislate. I ER 167.

B. THE HISTORICAL "TRADITION" OF ANIMUS AND STEREOTYPING OF GAYS AND LESBIANS CANNOT BE DISCOUNTED IN RELATION TO THE DECISION BY A BARE MAJORITY OF VOTERS TO DIVEST GAYS AND LESBIANS OF FUNDAMENTAL MARRIAGE RIGHTS

It would be convenient to discount the District Court's finding that Proposition 8 was based on moral disapproval, animus or the belief

in heterosexual superiority. Unfortunately, prior experience grounded in reality does not allow for such a facile rejection of something that has been borne out time and time again. Indeed, if history has taught us anything, it is that:

> "***[F]anaticism and ignorance is forever busy, and needs feeding. And soon, your Honor, with banners flying and with drums beating we'll be marching backward, BACKWARD, through the glorious ages of that Sixteenth Century when bigots burned the man who dared bring enlightenment and intelligence to the human mind.***"

Spencer Tracy as Henry Drummond, Inherit the Wind (1960).

The existence of prejudice and "severe opprobrium often manifested against homosexuals" was recognized by our highest court in *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985). Homosexuals "have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is likely to reflect deep-seated prejudice rather than rationality." *Id*. (internal quotations, citations and ellipses omitted).

"For centuries, the prevailing attitude toward gay persons has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." R. Posner, Sex and Reason (Harvard University Press 1992), at 291.

"It is . . . uncontroversial that gays as a group suffer from stigmatization in all spheres of life. The stigma has persisted throughout history, across cultures, and in the United States." Note, "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification," 98 Harv. L. Rev. 1285, 1302 (1985).

Our nation's history is replete with examples of laws, regulations and policies that condemned homosexuals and denied them equal standing based on stereotypes, bias, moral convictions and, indeed, prejudice. See, e.g. *Rowland, supra*, 470 U.S. at 1016, n.9, referencing *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167 (4th Cir. 1976) [denial of equal access to university facilities justified as an attempt to prevent potential increase for "homosexual contacts" held invalid under First Amendment's rights to expression and association]; *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (en banc) (Norris J., concurring) [in support of regulation barring re-enlistment by homosexuals, Army suggested "that the opprobrium directed towards gays does not constitute prejudice in the pejorative sense of the word, but rather is simply appropriate public disapproval of persons who engage in immoral behavior."].

It is important to focus on some of the sources of cultural and individual bias against homosexuals which the District Court noted in its findings (see I ER 120-121, 128, 131-144), because this role cannot be discounted in evaluating the voters' decision to approve a Constitutional amendment which was expressly analyzed in the ballot pamphlet: "ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY." E.R. 1029-1030 (emphasis in original).

Examining the source of prejudice against homosexuals in a more blunt fashion, renowned legal scholar Martha Nussbaum discusses the sex-based "disgust" that is often associated with gays and its impact on arguments proffered in favor of laws denying equal status to homosexuals. Martha Nussbaum, From Disgust to Humanity: Sexual Orientation & Constitutional Law (Oxford Univ. Press 2010), at 2-8.

Parental fears about homosexuality are particularly acute when it comes to the prospect that their own children might be exposed to the notion of homosexuality and might somehow morph into becoming gay. Ropers & Pence, American Prejudice With Liberty & Justice for Some, (Plenum Press 1995) at 129-130 [noting parental reactions, including extreme example of a father beating his son to death because he was

worried his son was becoming a homosexual]. Such fears are bolstered by the unsupported belief that homosexuals are child molesters or try to co-opt children into a gay lifestyle. See I ER 128 [¶67(c) and (d)].

Fears that gays, lesbians and their "lifestyle" will adversely impact children's physical and psychological well-being has played a role in voter enacted legislation denying equal protection to gays and lesbians. See, e.g., *Evans v. Romer*, 882 P.2d 1335, 1339-1340 (Colo. 1994), afd. *Romer v. Evans*, 517 U.S. 620 (1996); *Nussbaum,* at 108 [proponents attempted to justify Amendment 2 on unwanted forced acceptance of "gay ideology," the physical and psychological well being of children, and the suggestion that homosexuals are often child molesters]. It also played a significant role in the advertising campaign in favor of Proposition 8 which drew on similar fears that children would be taught homosexuality in schools. I ER 140-144.

Such biases, prejudices and fears are rarely espoused openly – it "is like racial hatred: it does not always announce itself in polite company." *Nussbaum,* at 26. Nevertheless, prevailing cultural prejudice is the overriding value system that animates and justifies institutional and individual prejudices against gays and lesbians.

C. THE EVIDENCE PRESENTED AT TRIAL SUPPORTS THE COURT'S FINDING THAT PROPOSITION 8 WAS ROOTED IN MORAL DISAPPROVAL, ANIMUS AND/OR A BELIEF IN HETEROSEXUAL SUPERIORITY

1. PLAINTIFFS' EXPERTS

Political scientist Gary Segura testified on behalf of plaintiffs:

> "[R]eligion is the chief obstacle for gay and lesbian 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."

TR 1565-1566; see I ER 136.

Segura further testified that where one group is able to marginalize another or otherwise paint the group as morally inferior, a threat to children or a threat to freedom, the range of compromise becomes dramatically limited and it is very difficult to engage in the normal give-and-take of the legislative process because one group believes the other is composed of inherently bad people. TR 1560-1561; see I ER 139. One of the ways the proponents of Proposition 8 did this was to run a campaign advertisement implying that if Proposition 8

failed, the public schools were going to turn people's daughters into lesbians. TR 1579; see I ER 142.

George Chauncey, a professor of history and American studies at Yale University, was called by plaintiffs to offer testimony on social history, especially as it related to gays and lesbians. I ER 64. Chauncey testified:

* Many clergy in churches considered homosexuality a sin, preached against it and have led campaigns against gay rights. TR 395; see I ER 136.
* The religious arguments mobilized in the 1950s to argue against interracial marriage and integration as against God's will are mirrored by arguments that were mobilized in the Prop 8 campaign and many of the campaigns since Anita Bryant's "Save Our Children" campaign, which argue that homosexuality itself or the recognition of their equality is against God's will. TR 440-441; see I ER 137.
* The "Save Our Children" campaign sought to overturn an enactment that added sexual orientation to an anti-discrimination law and drew on and revived earlier

stereotypes of homosexuals as child molesters. II SER 132-133.

* The campaigns for a decades-long series of initiatives against gay rights show ongoing animus and hostility which use a similar intent and some of the same imagery. II SER 131-132, 140.

* The term "the gay agenda" was mobilized in the late 1980s and early 1990s in support of initiatives designed to overturn gay rights laws. The term tries to construct the idea of a unitary agenda and picks up on long-standing stereotypes. TR 564; I ER 139.

* The Proposition 8 Official Voter Guide's arguments evoked these same fears and contained stereotypical images of gay people. II SER 140-145.

2. ANIMUS-BASED CAMPAIGN LITERATURE

During discovery, the Attorney General conceded that "some of the advertising in favor of Proposition 8 was based on fear of and prejudice against homosexual men and women." V ER 1054. That hate, intolerance and animus were the bases behind Proposition 8 is also

evidenced by the following passages from various religious groups' leaflets, resolutions, and position papers on the issue:

* "Sacred Scripture condemns homosexual acts as 'a serious depravity.'" PX 0770; see I ER 139.

* "The Bible clearly teaches that homosexual behavior is an abomination and shameful before God." PX 0771; see I ER 137-138.

* "[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." PX 2839; see I ER 138.

* "Legalizing 'same-sex marriage' would convey a societal approval of a homosexual lifestyle, which the Bible calls sinful and dangerous both to the individuals involved and to society at large." PX 0168; see I ER 139.

* 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 those children"; and "legal recognition of homosexual unions . . .would mean . . . the approval of deviant behavior." II SER 325-328.

* "Children need to be protected from gays and lesbians." PX 0079; see I ER 142.

Plaintiffs called Hak-Shing William Tam, one of the proponents of Proposition 8, to testify as a hostile witness. Tr. 1889; see I ER 63. Tam admitted that he sent out a letter (see II SER 348) which provided,

> "This November, San Francisco voters will vote on a ballot to 'legalize prostitution.' This is put forth by the SF city government, which is under the rule of homosexuals. They lose no time in pushing the gay agenda – after legalizing same-sex marriage, they want to legalize prostitution. What will be next? On their agenda list is: legalizing having sex with children. . . .We can't lose this critical battle. If we lose, this will very likely happen. . . . 1. Same-Sex marriage will be a permanent law in California. One by one, other states would fall into Satan's hand. 2. Every child, when growing up, would fantasize marrying someone of the same sex. More children would

> become homosexuals. Even if our children is safe, our grandchildren may not. What about our children's grandchildren?" [2]

3. THE PROPONENTS' VIDEOS DEMONSTRATED ANIMUS

In addition to the literature and other written material, various videos were introduced into evidence establishing that Proposition 8 was actually motivated by moral disapproval, animus, and a belief in heterosexual superiority.

ProtectMarriage.com's video of the Wirthlin parents from Massachusetts warns that "re-defining marriage" impacts every level of society, especially children, and claims that in Massachusetts, homosexuality and gay marriage will soon be taught and promoted in every subject, including math, reading, social studies and spelling. IV SER 674; see I ER 142.

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[2] According to Chauncey, this letter is consistent in its tone with a much longer history of anti-gay rhetoric. It reproduced many of the major themes of the anti-gay rights campaigns of previous decades and a longer history of anti-gay discrimination. TR 553-554; see I ER 141-142. Chauncey opined that Tam displayed the deep fear that simple exposure to homosexuality or to same-sex marriages would lead children to become gay. Finally, the issue was not just marriage equality itself – it was any sympathy to homosexuality. Tam opposes the idea that children could be introduced in school to the idea that there are gay people in the world. TR 558-560; see I ER 143.

In fact, at one point, Mrs. Wirthlin casts herself in the role of the victim, stating,

> "The tolerance that the gay community cries out for is not demonstrated to people who have differing points of view. There is no tolerance. The hate, the disparaging remarks, the hostility that we face were so astonishing."

IV SER 674, at 3:40-3:56.

1. This ad implies that the very exposure to the idea of homosexuality threatens children and threatens their sexual identity. It also suggests that gays and lesbians asking to have their relationships acknowledged is an imposition on other people, as opposed to a recognition of their fundamental rights. TR 530-531; see 1 ER 142.

In the Perkins-McPherson-Prentice Video (IV SER 675), a number of outrageous and inflammatory statements are made, including:

* "The devil wants to blur the lines between right and wrong when it comes to family structure." *Id*. at :14-:17.
* "If Prop 8 fails it opens up the door for all the other laws that the homosexual agenda wants to force on other people. We will see the further demise of the family." *Id*. at :22-:31.

Contained in the American Family Association Video "Proposition 8 and the Case for Traditional Marriage," (IV SER 676) are a number of statements designed to play on fear, hatred and intolerance:

* "How do cultures change? How do they stop being one thing and become another? Things that have been tradition and custom are replaced by an entirely new reality. More importantly, who decides what those changes should be? What happens when there is a conflict between the will of the people and the will of a few?" *Id*. at :34-:59.

* "The California Supreme Court, in a 4-3 decision, ruled that in California homosexuals have to have the same opportunity to marry as heterosexuals. This is an outrageous violation of not only the will of the people, but it is also a clear breach of public trust in regards to their duties and powers as their representatives of the state supreme court." *Id*. at 1:13-1:38.

* "Marriage is defined in a certain way because it is defining a certain thing. It means something. By extending marriage to cover couples of the same sex we will set in

trade the changes in principle that will undermine marriage itself. This is a major assault on the whole underpinnings of Western civilization." *Id*. at 14:07-14:36.

* "One concern for many Christians is the influence of a culturally triumphant homosexual movement on our children. If traditional marriage goes by the wayside, then in every public school children will be indoctrinated with a message that is absolutely contrary to the values that their family is attempting to teach them at home " *Id*. at 15:38-15:57.

* "Combined with the influential images coming from the media, children will face the constant onslaught of the message that homosexuality is not only something to tolerate, it's something to celebrate." *Id*. at 16:08-16:21.

* "Also of deep concern is the open hostility toward Christianity of some cultural radicals in the homosexual movement. As that hostility manifests itself in the class between gay rights and religious freedoms, religion

increasingly finds itself losing in court." *Id*. at 18:23-18:44.

* "The State, through the Legislature, and more importantly through activist judges, are [sic] tightening the noose against Christians and Christian ministries here in the State of California." *Id*. at 19:18-19:29.

* "More and more religious individuals and religious groups are finding the ability to freely express their faith restricted and even forbidden by law." *Id*. at 19:94-19:53.

* "I've never been so frightened in my life as I am for this country because California is a big state and its influences are huge. We're on the forefront of a lot of things, you know, fashion trends, we do have Hollywood in Southern California. We have San Francisco in Northern California and all of their gay agenda." *Id*. at 22:06-22:23.

* "So, pastors who are watching this, look, let's vote on whether we stop the gay marriage juggernaut in California as the Armageddon. If we lose this, we are gonna lose in a lot of other ways, including freedom of religion." *Id*. at 23:07-23:26.

4. THE PROPONENTS' WITNESSES

The proponents elected not to call the majority of their designated witnesses to testify at trial and did not call a single official proponent of Proposition 8 to explain the discrepancies between the arguments in favor of Proposition 8 and the six purported interests advanced to justify the Amendment. I ER 70.

Proponents did call Kenneth Miller, a professor of government at Claremont McKenna, to testify on their behalf. I ER 73. Miller conceded during his testimony, "My view is that at least some people voted for Proposition 8 on the basis of anti-gay stereotypes and prejudice." TR 2608; see I ER 139. Additionally, he admitted that a principle of political science holds that it is undesirable for a religious majority to impose its religious views on a minority. TR 2692-2693; see I ER 87.

At trial, proponents withdrew a number of their expert witnesses. II ER 258. Thereafter, the videotaped depositions of two of the witnesses were entered into evidence: (1) Katherine Young, a professor of religious studies at McGill University (IV SER 677); and (2) Paul Nathanson, a PhD in religious studies from McGill (IV SER 678).

Young testified that there was a religious component to bigotry and prejudice against gay and lesbian individuals (IV SER 677, at 6:41-7:15) and Nathanson testified that religions teach that homosexuals are sinful and that this teaching leads to violence against gays (IV SER 678, at 4:17-5:51, 7:47-8:14, 9:34-11:39, 13:07-14:21).

5. PROPONENT'S EXPERT DISCUSSES ANIMUS-BASED HOSTILITY AGAINST GAYS AND LESBIANS

Proponent's expert discussed at great length the nexus between religion's hostility towards homosexuality and the increase in violence against the gay and lesbian communities. IV SER 678. Specifically, Nathanson testified that over the last 50 years, both religion and society had been very hostile towards homosexuality and that this hostility caused homosexuals to be discriminated against and even placed in physical danger. *Id*. at 7:47-8:14.

Nathanson also discussed hatred against the gay and lesbian community and defined it as "culturally propagated hostility," a cultural force rather than an emotion that can lead to violence against gays and lesbians. Nathanson even recounts the terrifying events surrounding the death of Matthew Shepard, poignantly describing how he was attacked by a group of people, killed and left impaled on a fence. *Id*., at 9:34-

11:39. Finally, Nathanson testified that believes that the teaching of certain religions that homosexual relations are a sin and an abomination contributes to gay bashing and that, in a direct sense, are the primary cause of culturally propagated hostility against gay people is religious teachings. *Id*., at 13:07-14:21.

Unfortunately, the case of Matthew Shepard is not an isolated incident. Indeed, violent hate crimes against gays and lesbians are notable because they tend to be especially brutal, "an intense rage is present in nearly all homicide cases involving gay male victims". It is rare for a victim to just be shot; he is more likely to be stabbed multiple times, mutilated, and strangled. "They frequently involved torture, cutting, mutilation... showing the absolute intent to rub out the human being because of his (sexual) preference." Donald Altschiller. Hate Crimes: a reference handbook (ABC-CLIO 2005), at 26–28.[3]

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[3] The fact that animus-based crimes tend to be especially brutal and involve torture is borne out by some horrific and senseless crimes:

* April 1990: Michael Boothe was beaten to death by a gang of up to six men close to a public lavatory in what police called "an extraordinarily severe beating, of a merciless and savage nature". " Two face 30 years in jail for homophobic murder". Times (London). 13 May 2006.
* June 2004: Brian Williamson's murderer used a machete to stab and chop him some 77 times. Barbara Gayle. "Man

pleads guilty to murdering gay activist". Jamaica Gleander. 4 May 2006.

* July 2004: 18-year-old Scotty Joe Weaver was been beaten, strangled and stabbed numerous times, partially decapitated, and his body was doused in gasoline and set on fire. Samira Jafari. "Killing of gay teen raises issue of intolerance in state". Associated Press. 2 August 2004.
* October 2005: Jody Dobrowski was beaten so badly he had to be identified by his fingerprints. "Men jailed for gay barman murder". BBC. 16 June 2006.
* January 2006: White at home, Julio Luciano and Isaac Triviño were stabbed 22 and 35 times, respectively, and then the house was set fire. H.B. "Self confessed killer of two gay men gets 20 years for starting a fire". Spanish News. 4 March 2009.
* February 2006: Gisberta Salce Júnior was tortured and raped with sticks over a period of 3 days, then tossed into a water-filled pit and left to die. "Protest over Trans Murder Hate Crime in Portugal." Independent News. 8 June 2006.
* July 2006: Six men were attacked with baseball bats and knives after leaving a gay pride festival, with one victim being injured so severely that he underwent extensive facial reconstructive surgery. Rex Wockner. "Baseball bat attack at san diego pride celebration." Bay Times. 3 August 2006.
* March 2007: Ryan Keith Skipper was found dead from 20 stab wounds and a slit throat. Afterwards, the killers drove around in Skipper's blood-soaked car and bragged of killing him because "he was a faggot." Tad Stahnke, *et al*. Violence Based on Sexual Orientation and Gender Identity Bias: 2008 Hate Crime Survey (Human Rights First 2008).
* December 2007: Craig Gee was attacked by four men. Part of his skull was reduced to powder and his leg was broken during the attack. "Sorry, we can't help you". Sydney Star Observer.

Animus-based actions have recently gone farther and affected society's youth. Recently, the United States has seen a rash of teenage suicides throughout our colleges, high schools and even junior highs by students who have been tormented based on their sexual orientation.

On September 19, 2010, 13-year old Seth Walsh, a student who was constantly bullied by his peers because he was gay, hanged himself in his family's backyard soon after a particularly venomous bullying session had apparently occurred. As his family started to prepare for a memorial, they discovered Seth's MySpace page had been defaced with pornography and demonic symbols. "Gay Teen Endured a Daily Gauntlet." Los Angeles Times. 8 October 2010.

III.

ANIMUS-BASED LAWS WHICH STRIP MINORITY GROUPS OF FUNDAMENTAL RIGHTS WITHOUT A RATIONAL BASIS ARE UNCONSTITUTIONAL AND SUBJECT MINORITIES TO THE TYRANNY OF THE MAJORITY

Let us not mince words. Although the campaign for Proposition 8 was cloaked in terms of defending "traditional marriage," its actual foundation was its appeal to voters' fears of, and biases against, gay and lesbian citizens. The television and radio commercials, the mailers, the fliers, and the simulcasts did an excellent job of pushing voters to allow

themselves to strip away rights from their fellow citizens. By stating that Proposition 8 was merely designed to restore so-called "traditional marriage," the ballot measure's proponents afforded a safe harbor to many who would be reluctant to deprive gays and lesbians of constitutional rights; voters who voted "yes" on the proposition could rest assured they were voting ***for*** something ("traditional marriage") instead of ***against*** something (people's fundamental rights).

Furthermore, those same voters could find solace in the belief that others shared a moral disapproval of same-sex couples. In this manner, although very few yes voters likely realized it, let alone desired it, the result was that a majority imposed upon a minority the majority's ideas and practices as rules of conduct. In other words, and unfortunately for this nation's long tradition of protecting and encouraging individuals' rights to liberty, the very act of putting fundamental constitutional rights to a vote subjected minority citizens to the tyranny of the majority.

Justice Scalia has stated, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples." *Lawrence*, 539 U.S. at 601 (Dis. Opn., J. Scalia). Nowhere was this euphemism more obvious than at the trial held in this

case. During trial, proponents set forth six purported interests, in their attempt to argue the rational basis to deprive same-sex couples of the right to marry; however, proponents failed to call any witnesses to explain the discrepancy between these six interests and those expressed in their literature and videos. I ER 70.

Each of these purported interests were found to fall far short, and the Court held that "many of the purported interests... are nothing more than a fear or unarticulated dislike of same-sex couples." I ER 167. Indeed, the strategy of the "Yes on 8" campaign permitted people to strip rights from fellow citizens, without forcing those people even to acknowledge, let alone articulate, the fears or dislikes that drove them to vote that way.

The fear-mongering, on display in so many of the exhibits entered at the trial (and detailed *supra*) likely convinced many voters to cast "yes" votes; those yes votes, therefore, were rooted firmly in the fecund soil that is animus. The message of the "Yes on 8" campaign, can aptly be summarized as "Something horrible is going to happen to society if we afford gays equal rights and the resulting equal opportunity to openly exist within society." The campaign materials did not attempt to assert

what that "something horrible" was. They did not deal with facts. Instead, they made vague insinuations and inchoate threats– essentially: "Your children will have to learn that gay people exist, and that, after they learn this, they will become gay themselves!" (See FF 79; PX0099 Video, It's Already Happened (mother's expression of horror upon realizing her daughter now knows she can marry a princess)).

Elections in this media-driven age are frequently filled with appeals to baser instincts, appeals which are not necessarily based on facts. There was a reason why the campaign did not try to specifically define the negative effects of granting equal marriage rights to same-sex couples– as soon as there was an attempt to make specific the vague insinuations and inchoate threats, the latter disintegrated completely. The fact that the campaign was, as shown at trial, virtually fact-free (and dependent on sly implications) leads strongly to the conclusion that animus toward gays and lesbians was the campaign's driving force. How else can one explain the apparent need of the campaign to appeal to the primal nature (your kids are at risk!) of the electorate?

At trial, however, the rules of evidence and fact-driven nature of litigation acted as a mighty wind which blew away the smokescreen of

amorphous innuendo and left behind only unprovable assertions. In this manner, the campaign was exposed as a naked attempt to forge a majority without having to resort to reason; instead, it was shown to have done so with emotional manipulation and by creating fear.

That a majority was obtained cannot be disputed, as the election results speak for themselves. That the resulting majority became effectively tyrannical, when the California Constitution was amended to strip away gay citizens' right to marry, cannot be disputed either. Although the platitude "we must protect marriage" was the campaign's rallying cry, the resulting chain of events was similar to that described by Plato: "This and no other is the root from which a tyrant springs; when he first appears he is a protector."

James Madison wrote in Federalist Paper 51: "It is of great importance in a republic not only to guard the society against the oppression of its rulers but to guard one part of the society against the injustice of the other part. If a majority be united by a common interest, the rights of the minority will be insecure." The Founding Fathers' recognition that minority rights are constantly at risk led them to draft

the Bill of Rights, and to install a system of checks and balances. It is necessary that these rights now be preserved by this Court.

> "A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. 'The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect'…. No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."

Bowers v. Hardwick, 478 U.S. 186, 211 (1986) (Dis. Opn. J. Blackmun), maj. opn. overruled in *Lawrence*, 539 U.S. at 578 ["*Bowers* was not correct when it was decided, and it is not correct today."]

Simply stated, the District Court's conclusion that Proposition 8 was not based on any of the six purported justifications but rather based on moral disapproval, animus, or the belief that same-sex couples are inferior, is amply supported by the evidence in this case. ER 167.

Despite this, those seeking to deny equal rights to a minority group continue to doggedly regurgitate the same hateful rhetoric and sow the same seeds of fear. Even worse, they attempt to couch themselves as victims of hatred by the very people they are choosing to

oppress. See Wirthlin Video, IV SER 674, at 3:40-3:56 ["The tolerance that the gay community cries out for is not demonstrated to people who have differing points of view. There is no tolerance. That hate, the disparaging remarks, the hostility that we face were so astonishing."].

However, the simple fact is that moral disapproval, animus and a belief in the inferiority of minority groups is not a proper basis on which to pass legislation that repeals a groups fundamental rights. *Romer*, 517 U.S. at 633. The judgment, therefore, should be affirmed.

CONCLUSION

The SPLC submits that because Proposition 8 is an animus-based law which ***repeals*** a fundamental right without any rational basis, it violates both due process and equal protection.

Dated: October 25, 2010

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 6,952 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(&)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2010.

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