No. _____

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com – Yes on 8, A Project of California Renewal ("ProtectMarriage.com") intervened as defendants in the district court and were the appellants in the court below.

Respondents, plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo and intervening plaintiff City and County of San Francisco, were the appellees below.

Official-capacity defendants Edmund G. Brown, Jr., as Governor of California, Kamala D. Harris, as Attorney General of California, Ron Chapman, as Director of the California Department of Public Health & State Registrar of Vital Statistics, Linette Scott, as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, Patrick O'Connell, as Clerk-Recorder for the County of Alameda, and Dean C. Logan, as Registrar-Recorder/County Clerk for the County of Los Angeles, and intervening defendant Hak-Shing William Tam were not parties to the appeal below.[1]

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[1] The Attorney General of California, although not a party to the appeal, was on the service list and filed documents in the court below and filed an amicus brief addressing the question certified to the California Supreme Court. *See* Dkt. Entries 8, 311, 352. The court below did not, however, certify to the Attorney General of California that the constitutionality of a law of the State of California was drawn into question. *See* 28 U.S.C. § 2403(b).

CORPORATE DISCLOSURE STATEMENT

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock. Petitioner ProtectMarriage.com is a primarily formed ballot committee under California law. *See* CAL. GOV. CODE §§ 82013 & 82047.5. Its "sponsor" under California law is California Renewal, a California nonprofit corporation, recognized as a public welfare organization under 26 U.S.C. § 501(c)(4).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 671 F.3d 1052. App. 1a. The Ninth Circuit's order denying rehearing en banc is reported at 681 F.3d 1065. App. 441a. The district court's findings of fact and conclusions of law are reported at 704 F. Supp.2d 921. App. 137a. The Ninth Circuit's certification order is reported at 628 F.3d 1191. App. 413a. The California Supreme Court's answer is reported at 265 P.3d 1002, 52 Cal.4th 1116. App. 318a.

JURISDICTION

The judgment below was entered on February 7, 2012. The Ninth Circuit denied a timely petition for rehearing en banc on June 5, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[2]

[2] In the event that 28 U.S.C. § 2403(b) may apply, this petition has been served on the Attorney General of California.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Proposition 8, now codified as Article I, Section 7.5 of the California Constitution, provides: "Only marriage between a man and a woman is valid or recognized in California."

INTRODUCTION

The profoundly important question whether the ancient and vital institution of marriage should be fundamentally redefined to include same-sex couples "is currently a matter of great debate in our nation," as the court below acknowledged, "and [is] an issue over which people of good will may disagree." App. 17a. Six States and the District of Columbia now recognize same-sex marriages, and two other States have enacted legislation that would recognize same-sex marriages but will not take effect unless approved by the People in referenda this fall. Many other States, on the other hand, have chosen instead to retain, at least for now, the traditional definition of marriage as the union of a man and a woman. As our Nation's founders envisioned, then, some States have chosen to "serve as a laboratory; and try [this] novel social . . . experiment[ ] without risk to the rest of the country," while others have chosen to continue evaluating the results of the experiment before making

such a profound change to this age-old, civilizing social institution. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Until the decision below, every state and federal appellate court to consider a federal constitutional challenge to state laws defining marriage – including this Court, *see Baker v. Nelson*, 409 U.S. 810 (1972) – had upheld the traditional definition, thus permitting the "earnest and profound debate about the morality, legality, and practicality of [redefining marriage] . . . to continue, as it should in a democratic society." *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

In this case, however, a divided panel of the Ninth Circuit held that the Equal Protection Clause of the Fourteenth Amendment bars the People of the State of California from adopting a constitutional amendment – Proposition 8 – that reinstated the traditional definition of marriage a few months after the California Supreme Court, in a four-to-three decision, had ordered that marriage be redefined to include same-sex couples. Proposition 8 was doomed, the panel majority reasoned, because of its "relative timing," App. 56a, and because it "change[d] the law far too little to achieve any of the effects it purportedly was intended to yield," App. 91a. Having been adopted *after* the California Supreme Court's decision in *In re Marriage Cases* interpreting the State Constitution to extend the right to marry to same-sex couples, Proposition 8's "unique and strictly limited effect" was to "take away" from same-sex couples "the official designation of 'marriage,'" while "leaving in

place all of its incidents" under the State's domestic partnership laws. App. 17a.

The panel majority held that Proposition 8's constitutionality is directly controlled by *Romer v. Evans*, 517 U.S. 620 (1996), even though that case invalidated a Colorado constitutional amendment that, far from having a "unique and strictly limited effect," imposed an "unprecedented" and "comprehensive" ban on all "legislative, executive or judicial action at any level of state or local government designed to protect the named class [of] homosexual persons or gays and lesbians," *id*. at 624. Further, the *timing* of the Colorado amendment's adoption played absolutely no role in the Court's analysis. True, the Colorado amendment operated to repeal a handful of municipal ordinances extending certain antidiscrimination protections to gays and lesbians, but the amendment was held *facially* invalid, and thus was void throughout the State, not just in those cities that had previously passed antidiscrimination ordinances. Nor did the *Romer* Court's decision leave any doubt at all that the amendment would have been struck down regardless where it came from, including a State lacking any preexisting legal protections, state or local, for gays and lesbians. Indeed, the panel majority's misreading of *Romer* would bring the case squarely into conflict with *Crawford v. Board of Education*, 458 U.S. 527 (1982), which expressly "*reject[ed]* the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede," *id.* at 535 (emphasis added). As Judge O'Scannlain recognized in his dissent from denial of rehearing en banc, the

panel majority's ruling rests on a "gross misapplication of *Romer v. Evans* . . . that would be unrecognizable to the Justices who joined it, to those who dissented from it, and to the Judges from sister circuits who have since interpreted it." App. 445a.

The Ninth Circuit's error, if left uncorrected, will have widespread and immediate negative consequences. As the policy debate progresses in other States (especially, though not exclusively, those in the Ninth Circuit), it will necessarily be skewed by the suggestion that any experiment with the definition of marriage is irrevocable. Similarly, the Ninth Circuit's determination that California's progressive domestic partnership laws uniquely undermine the State's ability to maintain the traditional definition of marriage will have the perverse effect of creating strong disincentives for States to experiment with civil union or domestic partnership laws. Indeed, even on its own terms, the ruling calls into immediate question the constitutionality of the traditional definition of marriage in other States in the Ninth Circuit that have already provided recognition and benefits to same-sex couples, such as Hawaii, Nevada, Oregon, and Washington. If allowed to stand, the decision below thus will as a practical matter "pretermit other responsible solutions" to the emerging and novel social issues raised by same-sex relationships, *District Attorney's Office v. Osborne*, 557 U.S. 52, 73 (2009), and will force States to make an all-or-nothing choice: either to retain the traditional definition of marriage without any recognition of same-sex relationships or to radically

redefine – with no possibility of reconsideration – an age-old institution that continues to play a vital role in our society today.

Even more problematic is the panel majority's conclusion that Proposition 8 serves no conceivable legitimate state interest and that the "sole purpose" of the initiative's supporters was to proclaim publicly the "lesser worth" of gays and lesbians as a class and to "dishonor a disfavored group." App. 88a, 91a. This conclusion conflicts with a host of state and federal appellate decisions upholding the traditional definition of marriage as rationally related to society's vital interest in channeling the unique procreative potential of opposite-sex relationships into enduring, stable unions for the sake of responsibly producing and raising the next generation. Indeed, the Ninth Circuit's sweeping dismissal of the important societal interests served by the traditional definition of marriage is tantamount to a judicial death sentence for traditional marriage laws throughout the Circuit.

In any event, the Ninth Circuit's charge is simply untrue, and leveling it against the People of California is especially unfair, for they have enacted into law some of the Nation's most sweeping and progressive protections of gays and lesbians. Californians of all races, creeds, and walks of life have opted to preserve the traditional definition of marriage not because they seek to dishonor gays and lesbians as a class, but because they believe that the traditional definition of marriage continues to meaningfully serve society's legitimate interests, and they cannot yet know how those interests will be affected by fundamentally

redefining marriage. As President Obama recently recognized, millions of Americans "feel very strongly" about preserving the traditional definition of marriage not "from a mean-spirited perspective," but simply because they "care about families." Robin Roberts ABC News Interview with President Obama, May 9, 2012, *available at* http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043&singlePage=true.

Unique recognition of a unique relationship in no way disapproves or dishonors other relationships that the State has chosen to recognize differently. As the First Circuit recently recognized, "preserv[ing] the heritage of marriage as traditionally defined over centuries of Western civilization . . . is not the same as 'mere moral disapproval of an excluded group.'" *Massachusetts v. United States Dep't of HHS*, 682 F.3d 1, 16 (1st Cir. 2012) (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in judgment)). Thus, while our Constitution does not mandate the traditional definition of marriage, neither does our Constitution condemn it. Rather, it leaves the definition of marriage in the hands of the People, to be resolved through the democratic process in each State.

This Court should review the decision below to resolve the conflicts it creates with the decisions of other appellate tribunals, to correct its manifest errors in disregard of this Court's precedents, and to return to the People themselves this important and sensitive issue.

STATEMENT OF THE CASE

1. "From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." *In re Marriage Cases*, 183 P.3d 384, 407 (Cal. 2008). In 2000, Californians passed Proposition 22, an initiative statute reaffirming that understanding. *See* CAL. FAM. CODE § 308.5. In 2008, the California Supreme Court nevertheless interpreted the State constitution to require that marriage be redefined to include same-sex couples and invalidated Proposition 22. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). Less than six months later, the People of California adopted Proposition 8, which amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."

2. Respondents, a gay couple and a lesbian couple, filed this suit in the district court against State officials responsible for enforcing California's marriage laws, claiming that Proposition 8 violates the Fourteenth Amendment to the United States Constitution. The district court had subject matter jurisdiction under 28 U.S.C. § 1331. All of the public officials named as defendants informed the court that they would not defend Proposition 8. Petitioners, official proponents of that measure and the primarily formed ballot measure committee designated by the proponents as the official Yes on 8 campaign committee, *see* CAL. ELEC. CODE § 342; CAL. GOV. CODE § 82047.5(b), moved to intervene to defend Proposition 8, and the

district court granted the motion. After a trial, the district court ruled that Proposition 8 violates the Fourteenth Amendment. App. 137a. Petitioners appealed, and the Ninth Circuit stayed the district court's judgment barring enforcement of Proposition 8 pending appeal.

3. One week before oral argument in the Ninth Circuit, the court of appeals announced that the panel would be composed of Circuit Judges Reinhardt, Hawkins, and Smith. Petitioners promptly moved to disqualify Judge Reinhardt primarily on the ground that his wife, Ramona Ripston, in her capacity as Executive Director of the ACLU of Southern California ("ACLU/SC"), not only had provided advice and counsel to the lawyers for Respondents in their decision to bring this challenge to Proposition 8, but had directly *participated* in this case in the district court. 9th Cir. Dkt. Entry ("Dkt. Entry") 282 at 7. Under Ms. Ripston's direct supervision, the ACLU/SC had represented parties who unsuccessfully sought to intervene in the district court as plaintiffs and parties who filed amicus curiae briefs urging the court to strike down Proposition 8. *See* N.D. Cal. Doc. No. ("Doc. No.") 62 at 2, Doc. No. 79 at 2, and Doc. No. 552 at 2. Judge Reinhardt denied the motion. Dkt. Entry 284. Despite Petitioners' focus on the ACLU/SC's *activities*, including its activities in this very case, Judge Reinhardt asserted that "the chief basis for the recusal motion appears to be my wife's *beliefs*." Dkt. Entry 295 at 3 (emphasis added). And despite acknowledging that he had "always recused himself"

when the ACLU/SC had "participated in any way" in a case while it was before the Ninth Circuit, Judge Reinhardt dismissed the significance of the ACLU/SC's having participated in this case while it was before the district court. *Id.* at 10 n.5.

The Ninth Circuit's decision striking down Proposition 8, authored by Judge Reinhardt, tracked the analysis, point-by-point, urged by the ACLU/SC in the district court. *See* Doc. No. 62, Doc. No. 552.

4. After briefing and oral argument, the Ninth Circuit certified to the Supreme Court of California the question whether "under California law, the official proponents of an initiative measure" have standing "to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so." App. 416a. On November 17, 2011, the Supreme Court of California issued a unanimous opinion answering "the question posed by the Ninth Circuit in the affirmative." App. 326a. Based "upon the history and purpose of the initiative provisions of the California Constitution and upon the numerous California decisions that have uniformly permitted the official proponents of initiative measures to appear as parties and defend the validity of measures they have sponsored," App. 397a, the Supreme Court of California held that when the responsible public officials decline to defend an initiative measure,

> under article II, section 8 of the California Constitution and the relevant provisions of the

> Elections Code, the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative.

App. 402a.[3]

5. Relying on the California Supreme Court's response to the certified question, the Ninth Circuit unanimously held that Petitioners had standing to appeal the district court's decision. App. 18a.

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[3] While the case was pending before the California Supreme Court, the district court judge, Judge Vaughn Walker, retired from the bench and shortly thereafter disclosed publicly that he is gay and in a 10-year committed relationship with another man. Petitioners promptly filed a motion to vacate the district court's decision on the grounds that Judge Walker likely had a direct and substantial interest in the outcome of the case and that he therefore, at a minimum, was required to disclose to the parties both the existence of his long-term same-sex relationship and whether he and his partner had any interest in marrying if Proposition 8 was invalidated. *See* Doc. Nos. 768, 787. The district court, Judge James Ware presiding, denied Petitioners' motion, reasoning that Judge Walker had no duty to disclose even a "fervently" held desire to marry his same-sex partner. Doc. No. 797 at 9, 18. Petitioners appealed, and the Ninth Circuit affirmed Judge Ware's ruling "for substantially the reasons set forth in the district court's opinion." App. 19a.

On the merits, a divided panel held that Proposition 8 violates the Equal Protection Clause. The panel majority asserted that "[w]hether under the Constitution same-sex couples may *ever* be denied the right to marry" is "an important and highly controversial question" that it need not decide. App. 17a. The panel majority ruled that Proposition 8 is unconstitutional on the "narrow grounds" that the initiative's effect was to "take away" from same-sex couples "the official designation of 'marriage'" while "leaving in place all of its incidents" through domestic partnerships. *Id*. According to the Ninth Circuit, under this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), this "unique and strictly limited effect of Proposition 8" distinguished it from other State laws defining marriage as the union of a man and a woman, App. 17a, and rendered it wholly unsupported by any conceivable legitimate rational basis. And while the panel majority expressly disavowed any suggestion "that Proposition 8 is the result of ill will on the part of the voters of California," App. 87a, it nonetheless insisted, paradoxically, that the initiative's supporters were motivated only by a desire to "dishonor" and to "disapprove of gays and lesbians as a class," App. 87a, 91a. Judge Smith dissented. App. 95a.

Petitioners timely sought rehearing en banc. The Court of Appeals denied the petition but stayed its mandate pending the timely filing and disposition of a petition for writ of certiorari in this Court. App. 444a. Judge O'Scannlain, joined by Judges Bybee and Bea, dissented, explaining that the panel opinion had

declared unconstitutional the "definition of marriage that has existed for millennia" on the basis of a "gross misapplication of *Romer v. Evans* . . . ." App. 445a. Judge Smith also would have granted the petition. App. 443a.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Is Exceedingly Important.

The decision below requires the Nation's largest State to fundamentally redefine marriage, an institution long recognized as "more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), and "the foundation of the family and of society," *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Subject only to the Constitution, a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877)). Whether the Constitution requires California to eliminate the most longstanding, universal, and fundamental of these conditions – that a marriage consists of man and woman – is a question that should be settled by this Court.

Even on its own terms the impact of the decision below is not limited to California. The Ninth Circuit

identified two principal aspects of Proposition 8 that it found fatal: (1) that Proposition 8 overruled a prior judicial redefinition of marriage to include same-sex couples, and (2) that it left in place domestic partnerships offering same-sex couples virtually all of the legal incidents of marriage. *See* App. 17-18a. At a minimum, this reasoning calls into immediate question the marriage laws of Hawaii, Nevada, and Oregon, which extend to same-sex couples the incidents but not the designation of marriage. *See* HAW. REV. STAT. § 572B; NEV. REV. STAT. § 122A; OR. REV. STAT. § 106.300. And the people of Hawaii also amended their constitution to preserve the traditional definition of marriage as an issue for their legislature to address after the State's courts had threatened that definition. *See* HAW. CONST. art. I, § 23. Tellingly, an equal protection challenge relying on the decision below is already pending before a federal district court in Hawaii. *See Jackson v. Abercrombie*, No. 1:11-cv-00734-ACK-KSC, ECF Doc. No. 65-1, at 32-40 (D. Haw. June 15, 2012).

The decision below likewise threatens to short-circuit further democratic deliberation regarding official recognition of same-sex relationships throughout the Circuit. The decision, for example, casts doubt over the State of Washington's decision to submit to popular referendum a recently enacted statute that

would extend the designation of marriage to same-sex couples.[4]

More fundamentally, as demonstrated below, the purportedly "unique" aspects of Proposition 8 highlighted by the panel majority, App. 17a, ultimately fail to distinguish Proposition 8 as a constitutional matter from any other law defining marriage as the union of a man and a woman. *See infra* Part V.A.4-5. It is thus all but certain that the decision below, despite its professed narrowness, will in due course lead to States throughout the Circuit being forced to redefine marriage by judicial decree.

II. The Decision Below Conflicts with *Crawford v. Board of Education*.

The Ninth Circuit's decision cannot be squared with *Crawford v. Board of Education*, 458 U.S. 527 (1982), which emphatically "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." *Id.* at 535. As in this case, *Crawford* involved an equal protection challenge to a California constitutional amendment (there, Proposition 1) that superseded in part a decision of the California Supreme Court interpreting the State Constitution to go beyond the

[4] Washington, like California, has already extended the rights and responsibilities of marriage to same-sex couples through its domestic partnership laws. *See* WASH. REV. CODE § 26.60.015.

mandates of the Federal Constitution. Upholding Proposition 1, this Court expressly refused to "interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Id*. at 540. Instead, this Court held, "having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States." *Id*. at 542. Further, directly contrary to the Ninth Circuit's insistence that a different analysis is required when a state-law right is "withdrawn" than when it is not extended in the first instance, App. 68a, *Crawford* makes clear that when a State repeals a law the relevant inquiry is simply whether that law was "required by the Federal Constitution in the first place," 458 U.S. at 538.

The panel majority's attempts to distinguish *Crawford* fail. First, this Court's findings in *Crawford* that Proposition 1 did not draw a racial classification and was not motivated by race, *see* App. 67-68a, meant only that it was not subject to strict scrutiny, *see Crawford*, 458 U.S. at 536. These findings are of no moment here, where the Ninth Circuit purported to apply rational-basis review. Second, the Ninth Circuit emphasized that even after Proposition 1, California's Constitution still provided a "more robust 'right . . . than exists under the Federal Constitution.'" App. 67a (quoting *Crawford*, 458 U.S. at 542). But this Court left no doubt that California "could have conformed its law to the Federal Constitution in every

respect" rather than "pull[ing] back only in part." *Crawford*, 458 U.S. at 542.

In short, the fundamental lesson of *Crawford* is that a State is no less free to withdraw state constitutional rights that exceed federal constitutional requirements than it was to extend them (or not) in the first place. This Court should grant review to resolve the conflict between the decision below and *Crawford*.

III. The Decision Below Fundamentally Misapplies *Romer v. Evans* and Conflicts with the Decisions of Other Appellate Courts.

Notwithstanding *Crawford*, the court below insisted that *Romer v. Evans*, 517 U.S. 620 (1996), required a different result. Noting that *Romer* invalidated Colorado's Amendment 2, "an initiative constitutional amendment that reduce[d] the rights of gays and lesbians under state law," App. 56a, the Ninth Circuit held that *Romer* directly "governs" and "controls" this case because Proposition 8 is "remarkably similar" to Amendment 2. App. 57a, 60a, 68a. This conclusion, however, is a "gross misapplication of *Romer*." App. 445a.

1. Other federal and state appellate courts have expressly rejected *Romer*-based challenges to the traditional definition of marriage. *See*, *e.g.*, *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 680 (Tex. Ct. App. 2010); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 464-65 (Ariz. Ct. App.

2003). In *Bruning*, for example, the Eighth Circuit rejected a *Romer*-based challenge to an amendment to the Nebraska Constitution that not only defines marriage as the union of a man and a woman but also forbids recognition of "the uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship." 455 F.3d at 863. The Eighth Circuit specifically "reject[ed] the district court's conclusion that the Colorado enactment at issue in *Romer* is indistinguishable" from Nebraska's marriage amendment and held that the latter's "focus is not so broad as to render Nebraska's reasons for its enactment 'inexplicable by anything but animus' towards same-sex couples." *Id*. at 868.

2. At the root of the Ninth Circuit's error is its assertion that *Romer* turned on the *timing* of Colorado's Amendment 2 rather than its *substance*. *See* App. 64a. But nothing in *Romer* suggests that Amendment 2 would have been valid had it only been enacted before Aspen, Boulder, and Denver passed ordinances banning discrimination on the basis of sexual orientation. Nor did *Romer* suggest that a constitutional amendment identical to Amendment 2 would be valid in a State that had no preexisting local laws protecting gays and lesbians from discrimination. Indeed, this Court struck down Amendment 2 *on its face*, not merely as applied in the handful of local jurisdictions that had previously enacted antidiscrimination ordinances protecting gays and lesbians. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

The panel majority's reading of *Romer* turned on the fact that Amendment 2 "withdrew" from gays and lesbians "elective" local antidiscrimination protections – that is, antidiscrimination protections "that the Fourteenth Amendment did not require . . . to be afforded to gays and lesbians" in the first place. App. 64a. But Amendment 2 "in explicit terms [did] *more* than repeal or rescind" antidiscrimination laws that were not required by the Federal Constitution. *Romer*, 517 U.S. at 624 (emphasis added). It imposed a "broad and undifferentiated disability on a single named group" by prohibiting "all legislative, executive or judicial action at any level of state or local government designed to protect the named class [of] homosexual persons or gays and lesbians." *Id.* at 624, 632. By "identif[ying] persons by a single trait and then den[ying] them protection across the board," *id*. at 633, Amendment 2 "deem[ed] a class of persons a stranger to [the] laws," *id*. at 635. It was these "exceptional" – indeed "unprecedented" – characteristics of Amendment 2 that concerned the Court, *id.* at 632-33, not the fact that it repealed a handful of local antidiscrimination laws.

In any event, there is no merit, legal or logical, in the panel majority's theory that "[w]ithdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade." App. 55a. To the contrary, under conventional equal protection analysis,

the "relative timing" of such events is wholly irrelevant. If a person of good will can rationally oppose in good faith the State's redefinition of marriage to include same-sex couples *before* the State has done so, that same person's continued opposition, for the same reasons, obviously does not somehow become irrational the moment *after* the State has done so.

3. Putting aside the red herring of its timing, it is plain that Proposition 8 differs sharply from Amendment 2 in every material respect. First, far from being "unprecedented in our jurisprudence," *Romer*, 517 U.S. at 633, or alien to "our constitutional tradition," *id*., it is difficult to think of a law with deeper roots in California's and our Nation's history and practices than one defining marriage as the union of a man and a woman. That definition has prevailed for all but 142 *days* of California's 162 *year* history, and it continues to prevail in federal law and in the overwhelming majority of the States, most often through constitutional provisions much like Proposition 8.[5] Nor is it in any way "unprecedented" or even unusual that in restoring the traditional definition of marriage the People of California

[5] Thirty States have enshrined the traditional definition of marriage in their constitutions, and the Federal Government and nine additional States have expressly codified the traditional definition of marriage by statute. *See* National Conference of State Legislatures, Defining Marriage, *at* http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx. The statutes of three other States have been interpreted to preserve the traditional definition of marriage.

exercised the "inalienable," "fundamental" right that they have reserved to themselves to "amend the[ir] Constitution through the initiative process when they conclude that a judicial interpretation or application of a preexisting constitutional provision should be changed." *Strauss v. Horton*, 207 P.3d 48, 108, 117 (Cal. 2009) (emphasis omitted). To the contrary, "there have been many instances in the past" in which they have done so. *Id.* at 115. Indeed, "past state constitutional amendments that diminished state constitutional rights . . . refut[e] [the] description of Prop. 8 as 'unprecedented.'" *Id*. at 105.

Second, far from imposing a "broad and undifferentiated disability on a single named group" or denying that group "protection across the board," *Romer*, 517 U.S. at 632-33, Proposition 8 "simply . . . restore[d] the traditional definition of marriage as referring to the union between a man and a woman," *Strauss*, 207 P.3d at 76. And it achieved this purpose in the narrowest possible manner, leaving undisturbed the numerous other laws – including the expansive domestic partnership laws – that provide gays and lesbians in California "with some of the most comprehensive civil rights protections in the nation." About Us – Equality California, *at* http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4025493 (conclusion of California's "largest statewide LGBT rights advocacy organization"). Thus, as the California Supreme Court itself recognized, there is simply no comparison between Proposition 8 and a law, such as Colorado's Amendment 2, that "sweepingly . . . leaves [a minority]

group vulnerable to public or private discrimination in *all* areas without legal recourse." *Strauss*, 207 P.3d at 102.

Finally, though Amendment 2 was so bereft of any conceivable legitimate state purpose that it could be explained only as resulting from "animus toward" and "a bare . . . desire to harm a politically unpopular group," *Romer*, 517 U.S. at 632, 634, the Ninth Circuit correctly disclaimed any "suggest[ion] that Proposition 8 is the result of ill will on the part of the voters of California." App. 87a. As we discuss more fully below, the animating purpose of marriage is bound up in the uniquely procreative nature of opposite-sex relationships, and it can be and is supported by countless people of good faith who harbor no ill will toward gays and lesbians and their relationships.

In short, the fatal flaw in Amendment 2 was its exceptionally harsh and unprecedented character, its inexplicable breadth, and the resulting "inevitable inference" of "animosity" that it raised, *Romer*, 517 U.S. at 634, not the fact that it worked a change in preexisting law. Any other reading of *Romer* is foreclosed by *Crawford*, a case that *Romer* never questioned, let alone overruled. This Court should review the Ninth Circuit's decision to resolve the conflict created by its "gross misapplication" of *Romer*.

IV. The Decision Below Conflicts with This Court's Decision in *Baker v. Nelson* and with Uniform Appellate Authority Upholding State Marriage Laws.

The Ninth Circuit's decision also conflicts with binding precedent of this Court holding that the traditional definition of marriage does not violate the Fourteenth Amendment. In *Baker v. Nelson*, 409 U.S. 810 (1972), this Court unanimously dismissed, "for want of a substantial federal question," an appeal from the Minnesota Supreme Court squarely presenting the question whether a State's refusal to recognize same-sex relationships as marriages violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Id.*; *see also Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). This Court's dismissal of the appeal in *Baker* was a decision on the merits that constitutes "controlling precedent unless and until re-examined by this Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976).

The Ninth Circuit dismissed *Baker* in a footnote, arguing that because Proposition 8 *restored*, rather than simply preserved, the traditional definition of marriage, this case "is squarely controlled by *Romer*" and *Baker* is "not pertinent here." App. 60-61a. As we have demonstrated, however, the Ninth Circuit's reading of *Romer* is misguided and, indeed, brings it into conflict with *Crawford*.

The decision below also conflicts squarely with the Eighth Circuit's decision in *Bruning*, which held that "laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States." 455 F.3d at 871. Likewise, every state appellate court to address a federal constitutional challenge to the traditional definition of marriage – including two within the Ninth Circuit – has upheld the state law at issue. *See In re Marriage of J.B. and H.B.*, 326 S.W.3d 654; *Standhardt*, 77 P.3d 451, *review denied*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App.), *review denied*, 84 Wash.2d 1008 (Wash. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker*, 191 N.W.2d 185.

To be sure, the First Circuit recently invalidated a *federal* statute, the Defense of Marriage Act, defining marriage as the union of a man and a woman for purposes of federal law. *See Massachusetts v. United States Dep't of HHS*, 682 F.3d 1, 5 (1st Cir. 2012) ("Rather than challenging the right of states to define marriage as they see fit, the appeals contest the right of Congress to undercut the choices made by same-sex couples and by individual states in deciding who can be married to whom."). While the First Circuit purported to distinguish *Baker* and relied in part on considerations of federalism and States' traditional role in regulating marriage, *see id.* at 8, 9-10, 12-13, some aspects of its decision are plainly in tension with the precedents discussed above.

This Court should grant review to resolve the conflict created by the Ninth Circuit's decision and to provide clarity in this important area of the law.

V. The Ninth Circuit's Holding That Proposition 8 Serves No Legitimate Governmental Purpose Conflicts with the Decisions of This and Other Appellate Courts.

In keeping with its dispositive focus on the timing of Proposition 8's passage, the Ninth Circuit held that the measure could be upheld only if "a legitimate interest exists that justifies the People of California's action in taking away from same-sex couples the right to use the official designation and enjoy the status of marriage – a legitimate interest that suffices to overcome the 'inevitable inference' of animus to which Proposition 8's discriminatory effects otherwise give rise." App. 69a. The court below then considered, and rejected, four societal purposes served by the traditional definition of marriage: promoting responsible procreation and child rearing; proceeding with caution when considering fundamental change to a vital social institution; protecting religious and other fundamental liberties; and preserving a valued and ancient tradition.

While each of these interests readily satisfies rational basis scrutiny, California's important interests in responsible procreation and proceeding with caution warrant specific mention. In particular, the Ninth Circuit's conclusion that Proposition 8 lacks

even a rational relationship to society's indisputable interest in responsible procreation and childrearing conflicts directly with a host of appellate decisions. And its analysis of both interests contravenes decisions of this Court defining and applying rational basis review. This Court should grant review to resolve these conflicts.

A. The Traditional Definition of Marriage Furthers Society's Vital Interest in Responsible Procreation and Childrearing.

1. The record of human history leaves no doubt that the institution of marriage as the union of man and woman is founded on the simple biological reality that opposite-sex unions – and only such unions – can produce children. Marriage, thus, is "a social institution with a biological foundation." Claude Levi-Strauss, *Introduction*, *in* 1 A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (Andre Burguiere, et al. eds., 1996).

The unique procreative potential of sexual relationships between men and women implicates vital social interests. On the one hand, procreation is necessary to the survival and perpetuation of society and, indeed, the human race; accordingly, the responsible creation, nurture, and socialization of the next generation is a vital – indeed existential – social good. On the other hand, irresponsible procreation and childrearing – the all too frequent result of casual

or transient sexual relationships between men and women – commonly results in hardships, costs, and other ills for children, parents, and society as a whole. A central purpose of marriage in virtually every society, then, is and always has been to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, through the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.

This understanding of marriage has been uniformly recognized by eminent authorities throughout the ages. Blackstone put it well: the relation "of parent and child . . . is consequential to that of marriage, being its principal end and design; and it is by virtue of this relation that infants are protected, maintained, and educated." 1 WILLIAM BLACKSTONE, COMMENTARIES *410; *see also id*. *435 ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown").[6] And it has prevailed in California

[6] *See also*, *e.g.*, JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§ 78-79 (1690); BARON DE MONTESQUIEU, 2 THE SPIRIT OF LAWS 96, 173 (1st American from the 5th London ed.,

(Continued on following page)

throughout its history, just as it has everywhere else. *See*, *e.g.*, *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952) (marriage "channels biological drives that might otherwise become socially destructive" into enduring family units to "ensure[ ] the care and education of children in a stable environment"). Indeed, prior to the recent movement to redefine marriage to include same-sex relationships, it was commonly understood, without a hint of controversy, that the institution of marriage owed its very existence to society's vital interest in responsible procreation and childrearing. That is why, no doubt, this Court has repeatedly recognized marriage as "fundamental to our very existence and survival." *E.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

2. Not surprisingly, "a host of judicial decisions" have concluded that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455

1802); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) ("marriage"); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE § 39 (1852); BRONISLAW MALINOWSKI, SEX, CULTURE, AND MYTH 11 (1962); KINGSLEY DAVIS, *The Meaning & Significance of Marriage in Contemporary Society*, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION 1, 7-8 (Kingsley Davis, ed. 1985); G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988); JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2002); W. BRADFORD WILCOX, ET AL., EDS., WHY MARRIAGE MATTERS 15 (2d ed. 2005).

F.3d at 867; *see also*, *e.g.*, *Dean*, 653 A.2d at 363; *Baker*, 191 N.W.2d at 186-87; *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 677-78; *Standhardt*, 77 P.3d at 461-64; *Singer*, 522 P.2d at 1195, 1197. Indeed, the decision below collides directly with the Eighth Circuit's 2006 decision upholding Nebraska's constitutional amendment affirming the traditional definition of marriage. The State's interest in "'steering procreation into marriage,'" the Eighth Circuit held, "justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot." *Bruning*, 455 F.3d at 867.

3. In breaking with this substantial body of appellate authority, the Ninth Circuit rejected as irrational the concern that "opposite-sex couples were more likely to procreate accidentally or irresponsibly when same-sex couples were allowed access to the designation of 'marriage.'" App. 74-75a. But, as noted below, there plainly is a rational basis for concern that officially embracing an understanding of marriage as nothing more than a loving, committed relationship between consenting adults, severed entirely from its traditional procreative purposes, would necessarily entail a significant risk over time of weakening the institution of marriage and its ability to further the important social interests it has always served. *See infra* Part V.B.

More important, however, the Ninth Circuit's reasoning contravenes well-settled principles of rational-basis review. This Court's precedent makes clear that

"where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (quotation marks omitted). It follows, then, that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not," *Johnson v. Robison*, 415 U.S. 361, 383 (1974), and, conversely, that the government may make special provision for a group if its activities "threaten legitimate interests . . . in a way that other [groups' activities] would not," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Thus, the relevant inquiry is not, as the Ninth Circuit would in effect have it, whether restoring the traditional definition of marriage was *necessary* to avoid harm to that institution. Rather, the question is whether recognizing opposite-sex relationships as marriages furthers interests that would not be furthered, or would not be furthered to the same degree, by recognizing same-sex relationships as marriages. *See*, *e.g.*, *Andersen v. King County*, 138 P.3d 963, 984-85 (Wash. 2006) (plurality); *Morrison v. Sadler*, 821 N.E.2d 15, 23, 29 (Ind. Ct. App. 2005); *Standhardt*, 77 P.3d at 463.

The answer to that question is clear. Unlike relationships between men and women, sexual relationships between individuals of the same gender cannot produce children – let alone do so as the unintended

result of even casual sexual behavior. Thus, as Respondents themselves acknowledged below, unlike "heterosexual couples who practice sexual behavior outside their marriage" and thus present "a big threat [of] irresponsible procreation," same-sex couples "don't present a threat of irresponsible procreation." Trial Tr. 3107 (Doc. No. 693 at 155).

Under *Johnson* and *Cleburne*, that is the end of the matter. As other appellate courts have repeatedly recognized, it is the unique procreative capacity of opposite-sex relationships – including the very real threat it can pose to the interests of society and to the welfare of children conceived unintentionally – that the institution of marriage has always sought to address. *See*, *e.g.*, *Bruning*, 455 F.3d at 867; *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Morrison*, 821 N.E.2d at 24-26. Given this central concern of marriage, the "commonsense distinction," *Heller v. Doe*, 509 U.S. 312, 326 (1995), that marriage has always drawn between same-sex couples and opposite-sex couples "is neither surprising nor troublesome from a constitutional perspective," *Nguyen v. INS*, 533 U.S. 53, 63 (2001); *see also id*. at 73 ("To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it."). To the contrary, it is plainly reasonable for the People of California, like virtually every society throughout human history, to maintain a unique institution to address the unique challenges posed by the unique

procreative potential of sexual relationships between men and women.

4. The Ninth Circuit claimed that this Court's ruling in "*Johnson* concerns decisions not to *add* to a legislative scheme a group that is unnecessary to the purposes of that scheme," but has no application to decisions to "*subtract*[ ] a disfavored group from a scheme of which it already was a part." App. 74a. According to the Ninth Circuit, while society's interest in responsible procreation and childrearing might justify "a failure to afford the use of the designation of 'marriage' to same-sex couples in the first place," under *Romer* "it is irrelevant to a measure *withdrawing* from them, and only them, use of that designation." App. 75a.

As *Romer* emphasized, however, equal protection analysis focuses on "the *classification* adopted," requiring only "that the *classification* bear a rational relationship to an independent and legitimate legislative end." 517 U.S. at 632-33 (emphasis added). Obviously, the rationality of a *classification* does not turn on the manner in which it was adopted – if it was reasonable for California to draw a line between opposite-sex couples and other types of relationships for 158 years *before* the California Supreme Court's sharply divided ruling in the *Marriage Cases*, it is also reasonable for California to draw the same line *after* that short-lived decision. And if it is reasonable for Congress and at least 41 other States to distinguish between opposite-sex couples and other types of relationships for purposes of marriage, it is rational

for California to do so as well. Indeed, this Court has, in the takings context, squarely rejected the proposition that there is a legally material difference between repealing a benefit and declining to extend it in the first instance, emphasizing that "*[f]or legal purposes . . . the two situations are identical*." *Bowen v. Gilliard*, 483 U.S. 587, 604 (1987) (emphasis added). This Court's rational-basis decisions likewise have applied the same mode of analysis to legislation withdrawing legal rights as it has to legislation refusing to extend rights in the first instance. *See*, *e.g.*, *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 356, 360 n.2 (2009); *Central State Univ. v. American Ass'n of Univ. Professors*, 526 U.S. 124, 127 (1999); *Lyng v. Automobile Workers*, 485 U.S. 360, 371 (1988); *Bowen*, 483 U.S. at 598-601; *Fritz*, 449 U.S. at 176-77; *City of New Orleans v. Dukes*, 427 U.S. 297, 303-05 (1976).

5. The Ninth Circuit also condemned Proposition 8 because it limits the use of "the designation of 'marriage,' while leaving in place all the substantive rights and responsibilities of same-sex partners." App. 84a. The court reasoned that "[i]n order to be rationally related to the purpose of funneling more child-rearing into families led by two biological parents, Proposition 8 would have had to modify . . . in some way" California's laws granting same-sex couples the same rights as opposite-sex couples to form families and raise children. App. 72a.

But it is simply inconceivable that Proposition 8 stands on *weaker* constitutional footing than would an amendment that restored the traditional definition

of marriage *and* repealed California's generous domestic partnership laws. In any event, the animating purpose of marriage is not to prevent gays and lesbians from forming families and raising children. Rather, it is to help steer potentially procreative conduct into stable and enduring family units by providing recognition, encouragement, and support to committed opposite-sex relationships. For the overwhelming majority of pregnancies – especially unintended pregnancies – the question is *not* whether the child will be raised by two opposite-sex parents or by two same-sex parents, but rather whether the child will be raised by both its mother and father or by its mother alone, often relying on the assistance of the State. *See*, *e.g.*, William J. Doherty, *et al*., *Responsible Fathering*, 60 J. MARRIAGE & FAMILY 277, 280 (1998). And there simply can be no dispute that children raised by their mother and father do better, on average, than children raised solely by their mother, and that the State has a direct and compelling interest in avoiding the public financial burdens and social costs too often associated with single motherhood. *See*, *e.g.*, SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 1 (1994); KRISTEN ANDERSON MOORE, ET AL., MARRIAGE FROM A CHILD'S PERSPECTIVE, CHILD TRENDS RESEARCH BRIEF 6 (June 2002). Thus, regardless of whatever provisions the State may make regarding the families of gays and lesbians, it is plainly rational for the State to make special provision through the institution of marriage to address the unique social risks

posed by potentially procreative sexual relationships between men and women.

B. Proposition 8 Serves California's Legitimate Interest in Proceeding Cautiously When Considering Redefining the Institution of Marriage.

It is simply not possible to foresee with certainty the long-term consequences of fundamentally redefining marriage in a way that severs its inherent connection with the procreative and childrearing purposes it has always served. Indeed, Respondents' own expert conceded as much at trial. Trial Tr. 254 (Doc. No. 453 at 41) (admitting that "[t]he consequences of same-sex marriage is an impossible question to answer"). But there is very little doubt, as Respondents' expert also conceded, that redefining marriage by law would "definitely [have] an impact on the social meaning of marriage" and that changing the public meaning of marriage would "unquestionably [have] real world consequences." Trial Tr. 311-13 (Doc. No. 453 at 98-100). And it is plainly reasonable for the voters of California to be concerned that redefining marriage could, over time, weaken the institution of marriage and its ability to serve its vital purposes. Indeed, a diverse group of 70 prominent scholars from all relevant academic fields recently expressed "deep[ ] concerns about the institutional consequences of same-sex marriage for marriage itself":

> Same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage. It would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget.

WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD 18-19 (2008). *See also* Trial Tr. 2776-77, 2780-82 (Doc. No. 530 at 193-94, 197-99) (testimony of David Blankenhorn). Surely it is not irrational for Californians to proceed cautiously on this sensitive and controversial social issue by continuing to observe and assess the results of redefining marriage in other jurisdictions before doing so themselves and putting at risk the key interests served by this fundamental, civilizing social institution. By adopting Proposition 8, the People of California demonstrated that they are not yet ready to take that step, nor to allow unelected judges to impose that result. This is the genius of our federal system at work.

The Ninth Circuit identified ways in which Californians purportedly could have designed Proposition 8 to track this cautionary interest more closely, such as by including a sunset provision requiring the People to "vote again" to preserve the traditional definition of marriage after a certain period of time. App. 80a. Of course, the People are free to "vote again" whenever they so choose, just as they did in enacting Proposition 8. Thus the notion that placing the traditional definition of marriage in the California Constitution forever shields that issue from democratic

deliberation has no basis in fact. *See Strauss*, 207 P.3d at 60 ("more than 500 amendments to the California Constitution have been adopted since ratification of California's current Constitution in 1879"). In any event, the question whether there were alternatives that would serve Californians' cautionary interest as effectively as Proposition 8 was for the voters to decide; narrow tailoring arguments such as those urged by the Ninth Circuit plainly have no place in rational basis review. *See*, *e.g.*, *Heller*, 509 U.S. at 321; *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175 (1980).

C. The Purpose of Proposition 8 Is Not To "Dishonor" Gays and Lesbians.

Because "there are plausible reasons" for California's adherence to the traditional definition of marriage, judicial "inquiry is at an end." *Fritz*, 449 U.S. at 179. *See*, *e.g.*, *Heller*, 509 U.S. at 320; *Romer*, 517 U.S. at 631-36. At any rate, there is no truth to the panel majority's charge that Proposition 8 is nothing more than an effort to "dishonor a disfavored group" and to proclaim the "lesser worth" of gays and lesbians as a class. App. 88a, 91a. This charge makes sense *only* if marriage is itself nothing more than, as the panel majority would have it, *see* App. 91a, an honorific bestowed by society on relationships it approves and withheld from relationships it disapproves. But support for the traditional definition of marriage is rooted precisely in *resisting* this reductive view of marriage in favor of one that maintains the

inherent link between the institution and its traditional procreative purposes. And this traditional view of marriage has nothing to do with disapproval of gays and lesbians.

The Ninth Circuit's charge of anti-gay animus is, moreover, at war with its own acknowledgment that the question whether marriage should be redefined to include same-sex couples is one "over which people of good will may disagree." App. 17a. A person who seeks only to dishonor gays and lesbians and to proclaim their lesser worth as a class is not, obviously, a person of good will who has no "desire to harm" gays and lesbians as a class. The Ninth Circuit's charge thus defames over seven million California voters and countless other Americans who believe that traditional marriage continues to serve society's legitimate interests, including the citizens and lawmakers of at least 41 other States, the Members of Congress and President who supported enactment of the federal Defense of Marriage Act, the large majority of state and federal judges who have addressed the issue, and until very recently President Obama.

In sum, as one of Respondents' own expert witnesses acknowledges, there are "millions of Americans . . . who believe in equal rights for gays and lesbians . . . but who draw the line at marriage." M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED 175 (2009) (quoting Rabbi Michael Lerner). Because "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group," maintaining "the traditional institution of marriage"

is a "legitimate state interest." *Lawrence v. Texas*, 539 U.S. 558, 585-86 (2003) (O'Connor, J., concurring in judgment).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

July 30, 2012

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671 F.3d 1052
United States Court of Appeals,
Ninth Circuit.

Kristin M. PERRY; Sandra B. Stier; Paul T. Katami; Jeffrey J. Zarrillo, Plaintiffs-Appellees,
City and County of San Francisco,
Intervenor-Plaintiff-Appellee,
v.
Edmund G. BROWN, Jr., in his official capacity as Governor of California; Kamala D. Harris, in her official capacity as Attorney General of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as Clerk-Recorder for the County of Alameda; Dean C. Logan, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants,
Hak-Shing William Tam, Intervenor-Defendant,
and
Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Mark A. Jansson; ProtectMarriage.com-Yes On 8, a Project of California Renewal, as official proponents of Proposition 8,
Intervenor-Defendants-Appellants.
Kristin M. Perry; Sandra B. Stier; Paul T. Katami; Jeffrey J. Zarrillo, Plaintiffs-Appellees,
City and County of San Francisco,
Intervenor-Plaintiff-Appellee,
v.

Edmund G. Brown, Jr., in his official capacity as Governor of California; Kamala D. Harris, in her official capacity as Attorney General of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as Clerk-Recorder for the County of Alameda; Dean C. Logan, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants,
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and
Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Mark A. Jansson; ProtectMarriage.com-Yes On 8, a Project of California Renewal, as official proponents of Proposition 8, Intervenor-Defendants-Appellants.

Nos. 10-16696, 11-16577. | Argued and Submitted Dec. 6, 2010. | Submission Withdrawn Jan. 4, 2011. | Resubmitted Feb. 7, 2012. | Argued and Submitted Dec. 8, 2011. | Filed Feb. 7, 2012.

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Appeal from the United States District Court for the Northern District of California, Vaughn R. Walker, Chief District Judge, Presiding (No. 10-16696), James Ware, Chief District Judge, Presiding (No. 11-16577). D.C. Nos. 3:09-cv-02292-VRW, 3:09-cv-02292-JW.

Before: STEPHEN REINHARDT, MICHAEL DALY HAWKINS, and N. RANDY SMITH, Circuit Judges.

Opinion

Opinion by Judge REINHARDT; Partial Concurrence and Partial Dissent by Judge N.R. SMITH.

OPINION

REINHARDT, Circuit Judge:

Prior to November 4, 2008, the California Constitution guaranteed the right to marry to opposite-sex couples and same-sex couples alike. On that day, the People of California adopted Proposition 8, which amended the state constitution to eliminate the right

of same-sex couples to marry. We consider whether that amendment violates the Fourteenth Amendment to the United States Constitution. We conclude that it does.

Although the Constitution permits communities to enact most laws they believe to be desirable, it requires that there be at least a legitimate reason for the passage of a law that treats different classes of people differently. There was no such reason that Proposition 8 could have been enacted. Because under California statutory law, same-sex couples had all the rights of opposite-sex couples, regardless of their marital status, all parties agree that Proposition 8 had one effect only. It stripped same-sex couples of the ability they previously possessed to obtain from the State, or any other authorized party, an important right – the right to obtain and use the designation of 'marriage' to describe their relationships. Nothing more, nothing less. Proposition 8 therefore could not have been enacted to advance California's interests in childrearing or responsible procreation, for it had no effect on the rights of same-sex couples to raise children or on the procreative practices of other couples. Nor did Proposition 8 have any effect on religious freedom or on parents' rights to control their children's education; it could not have been enacted to safeguard these liberties.

All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation of 'marriage,' which symbolizes state legitimization and societal recognition of their committed

relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. The Constitution simply does not allow for "laws of this sort." *Romer v. Evans,* 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

"Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court." *Sweatt v. Painter,* 339 U.S. 629, 631, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). Whether under the Constitution same-sex couples may *ever* be denied the right to marry, a right that has long been enjoyed by opposite-sex couples, is an important and highly controversial question. It is currently a matter of great debate in our nation, and an issue over which people of good will may disagree, sometimes strongly. Of course, when questions of constitutional law are necessary to the resolution of a case, courts may not and should not abstain from deciding them simply because they are controversial. We need not and do not answer the broader question in this case, however, because California had already extended to committed same-sex couples both the incidents of marriage and the official designation of 'marriage,' and Proposition 8's only effect was to take away that important and legally significant designation, while leaving in place all of its incidents. This unique and strictly limited effect of Proposition 8

allows us to address the amendment's constitutionality on narrow grounds.

Thus, as a result of our "traditional reluctance to extend constitutional interpretations to situations or facts which are not before the Court, much of the excellent research and detailed argument presented in th[is] case[ ] is unnecessary to [its] disposition." *Id.* Were we unable, however, to resolve the matter on the basis we do, we would not hesitate to proceed to the broader question – the constitutionality of denying same-sex couples the right to marry.

Before considering the constitutional question of the validity of Proposition 8's *elimination* of the rights of same-sex couples to marry, we first decide that the official sponsors of Proposition 8 are entitled to appeal the decision below, which declared the measure unconstitutional and enjoined its enforcement. The California Constitution and Elections Code endow the official sponsors of an initiative measure with the authority to represent the State's interest in establishing the validity of a measure enacted by the voters, when the State's elected leaders refuse to do so. *See Perry v. Brown,* 52 Cal.4th 1116, 134 Cal.Rptr.3d 499, 265 P.3d 1002 (2011). It is for the State of California to decide who may assert its interests in litigation, and we respect its decision by holding that Proposition 8's proponents have standing to bring this appeal on behalf of the State. We therefore conclude that, through the proponents of ballot measures, the People of California must be allowed to defend in federal courts, including on appeal, the

validity of their use of the initiative power. Here, however, their defense fails on the merits. The People may not employ the initiative power to single out a disfavored group for unequal treatment and strip them, without a legitimate justification, of a right as important as the right to marry. Accordingly, we affirm the judgment of the district court.

We also affirm – for substantially the reasons set forth in the district court's opinion – the denial of the motion by the official sponsors of Proposition 8 to vacate the judgment entered by former Chief Judge Walker, on the basis of his purported interest in being allowed to marry his same-sex partner.

I

A

Upon its founding, the State of California recognized the legal institution of civil marriage for its residents. *See, e.g.,* Cal. Const. of 1849, art. XI, §§ 12, 14 (discussing marriage contracts and marital property); Cal. Stats. 1850, ch. 140 ("An Act regulating Marriages"). Marriage in California was understood, at the time and well into the twentieth century, to be limited to relationships between a man and a woman. *See In re Marriage Cases,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 407-09 (2008). In 1977, that much was made explicit by the California Legislature, which amended the marriage statute to read, "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the

consent of the parties capable of making that contract is necessary." Cal. Stats.1977, ch. 339, § 1. The 1977 provision remains codified in California statute. *See* Cal. Fam.Code § 300(a).

Following the enactment of the Defense of Marriage Act of 1996, Pub.L. 104-199, 110 Stat. 2419 (codified in relevant part at 1 U.S.C. § 7), which expressly limited the federal definition of marriage to relationships between one man and one woman, dozens of states enacted similar provisions into state law. *See* Andrew Koppelman, *The Difference the Mini-DOMAs Make,* 38 Loy. U. Chi. L.J. 265, 265-66 (2007). California did so in 2000 by adopting Proposition 22, an initiative statute, which provided, "Only marriage between a man and a woman is valid or recognized in California." Cal. Fam.Code § 308.5. The proposition ensured that same-sex marriages performed in any state that might permit such marriages in the future would not be recognized in California, and it guaranteed that any legislative repeal of the 1977 statute would not allow same-sex couples to marry within the State, because the Legislature may not amend or repeal an initiative statute enacted by the People. *See Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 409-10.

Meanwhile, however, California had created the designation "domestic partnership" for "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." Cal. Stats.1999, ch. 588, § 2 (codified at Cal. Fam.Code § 297(a)). At first, California gave registered domestic

partners only limited rights, such as hospital visitation privileges, *id.* § 4, and health benefits for the domestic partners of certain state employees, *id.* § 3. Over the next several years, however, the State substantially expanded the rights of domestic partners. By 2008, "California statutory provisions generally afford[ed] same-sex couples the opportunity to . . . obtain virtually all of the benefits and responsibilities afforded by California law to married opposite-sex couples." *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 417-18. The 2003 Domestic Partner Act provided broadly: "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." Cal. Stats.2003, ch. 421, § 4 (codified at Cal. Fam.Code § 297.5(a)). It withheld only the official designation of marriage and thus the officially conferred and societally recognized status that accompanies that designation.

B

In 2004, same-sex couples and the City and County of San Francisco filed actions in California state courts alleging that the State's marriage statutes violated the California Constitution. Proposition 22 was among the statutes challenged, because as an initiative statutory enactment, it was equal in dignity

to an enactment by the Legislature and thus subject to the restrictions of the state constitution.[1] The consolidated cases were eventually decided by the California Supreme Court, which held the statutes to be unconstitutional, for two independent reasons.

First, the court held that the fundamental right to marry provided by the California Constitution could not be denied to same-sex couples, who are guaranteed "the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage." *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 433-34. The court began by reaffirming that "the right to marry is an integral component of an individual's interest in personal autonomy protected by the privacy provision of article I, section 1 [of the California Constitution], and of the liberty interest protected by the due process clause of article I,

[1] The California Constitution differentiates between initiative statutes, which require petitions signed by five percent of electors, and initiative constitutional amendments, which require petitions signed by eight percent of electors. Cal. Const. art. 2, § 8(b). An initiative statutory enactment has somewhat greater status than a statute adopted by the Legislature, in that the Legislature may not amend or repeal the initiative statute without submitting the change to approval by the electors (unless the initiative statute provides otherwise). *Id.* § 10(c). Yet, like a statutory enactment by the Legislature, and unlike an initiative constitutional amendment, it is subject to the terms of the state constitution.

section 7." *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 426 (emphasis omitted). It then held "that an individual's homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights." *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 429. The court acknowledged that although such an inclusive understanding of the right to marry was one that had developed only "in recent decades," as the State extended greater recognition to same-sex couples and households, it was "apparent that history alone does not provide a justification for interpreting the constitutional right to marry as protecting only one's ability to enter into an officially recognized family relationship with a person of the opposite sex," because "'[f]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.'" *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 428-30 (quoting *Hernandez v. Robles,* 7 N.Y.3d 338, 381, 821 N.Y.S.2d 770, 855 N.E.2d 1 (2006) (Kaye, C.J., dissenting)).

The court concluded its due process analysis by rejecting the argument that the availability of domestic partnerships satisfied "all of the personal and dignity interests that have traditionally informed the right to marry," because "[t]he current statutes – by drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of

'marriage' exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership – pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry." *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 434-35.

Second, the court held that "[t]he current statutory assignment of different names for the official family relationships of opposite-sex couples on the one hand, and of same-sex couples on the other" violated the equal protection clause in article I, section 7 of the California Constitution. *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 435, 452-53. The court determined that the State had no interest in reserving the name 'marriage' for opposite-sex couples; "the historic and well-established nature of this limitation" could not itself justify the differential treatment, and the court found no reason that restricting the designation of 'marriage' to opposite-sex couples was necessary to preserve the benefits of marriage enjoyed by opposite-sex couples or their children. *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 450-52. The court noted specifically that "the distinction in nomenclature between marriage and domestic partnership cannot be defended on the basis of an asserted difference in the effect on children of being raised by an opposite-sex couple instead of by a same-sex couple," because "the governing California statutes permit same-sex couples to adopt and raise children and additionally draw no distinction between married couples and

domestic partners with regard to the legal rights and responsibilities relating to children raised within each of these family relationships." *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 452 n. 72. Restricting access to the designation of 'marriage' did, however, "work[ ] a real and appreciable harm upon same-sex couples and their children," because "providing only a novel, alternative institution for same-sex couples" constituted "an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples." *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 452. Consequently, the court determined that withholding only the name 'marriage' from same-sex couples violated the California Constitution's guarantee of equal protection.

The court remedied these constitutional violations by striking the language from the marriage statutes "limiting the designation of marriage to a union 'between a man and a woman,'" invalidating Proposition 22, and ordering that the designation of 'marriage' be made available to both opposite-sex and same-sex couples. *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 453. Following the court's decision, California counties issued more than 18,000 marriage licenses to same-sex couples.

C

Five California residents – defendants-intervenors-appellants Dennis Hollingsworth, Gail J. Knight,

Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson (collectively, "Proponents") – collected voter signatures and filed petitions with the state government to place an initiative on the November 4, 2008, ballot. Unlike Proposition 22, this was an initiative constitutional amendment, which would be equal in effect to any other provision of the California Constitution, rather than subordinate to it. The Proponents' measure, designated Proposition 8, proposed to add a new provision to the California Constitution's Declaration of Rights, immediately following the Constitution's due process and equal protection clauses. The provision states, "Only marriage between a man and a woman is valid or recognized in California." According to the official voter information guide, Proposition 8 "[c]hanges the California Constitution to eliminate the right of same-sex couples to marry in California." Official Voter Information Guide, California General Election (Nov. 4, 2008), at 54. Following a contentious campaign, a slim majority of California voters (52.3 percent) approved Proposition 8. Pursuant to the state constitution, Proposition 8 took effect the next day, as article I, section 7.5 of the California Constitution.

Opponents of Proposition 8 then brought an original action for a writ of mandate in the California Supreme Court. They contended that Proposition 8 exceeded the scope of the People's initiative power because it revised, rather than amended, the California Constitution. The opponents did not raise any federal constitutional challenge to Proposition 8 in

the state court. The state officials named as respondents refused to defend the measure's validity, but Proponents were permitted to intervene and do so. Following argument, the court upheld Proposition 8 as a valid initiative but construed the measure as not nullifying the 18,000-plus marriages of same-sex couples that had already been performed in the State. *Strauss v. Horton,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48, 98-110, 119-22 (2009).

The court also explained Proposition 8's precise effect on California law: "[T]he measure carves out a narrow and limited exception to the[ ] state constitutional rights [articulated in the *Marriage Cases*], reserving the official *designation* of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law, but leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws." *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 61; *see also id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 75. In other words, after Proposition 8, "[s]ame-sex couples retain all of the fundamental substantive components encompassed within the constitutional rights of privacy and due process, with the sole (albeit significant) exception of the right to equal access to the designation 'marriage.'" *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 116. Proposition 8 accomplished this result not by "declar[ing] the state of the law as it existed when the *Marriage Cases* decision was rendered, but instead

[by] establish[ing] a new substantive state constitutional rule that became effective once Proposition 8 was approved by the voters." *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 115; *see also id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 63.

II

A

Two same-sex couples – plaintiffs Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey Zarrillo – filed this action under 42 U.S.C. § 1983 in May 2009, after being denied marriage licenses by the County Clerks of Alameda County and Los Angeles County, respectively. Alleging that Proposition 8 violates the Fourteenth Amendment to the United States Constitution, they sought a declaration of its unconstitutionality and an injunction barring its enforcement. The City and County of San Francisco ("San Francisco") was later permitted to intervene as a plaintiff to present evidence of the amendment's effects on its governmental interests. The defendants – the two county clerks and four state officers, including the Governor and Attorney General – filed answers to the complaint but once again refused to argue in favor of Proposition 8's constitutionality. As a result, the district court granted Proponents' motion to intervene as of right under Federal Rule of Civil

Procedure 24(a) to defend the validity of the proposition they had sponsored.[2]

The district court held a twelve-day bench trial, during which it heard testimony from nineteen witnesses and, after giving the parties a full and fair opportunity to present evidence and argument, built an extensive evidentiary record.[3] In a thorough opinion

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[2] The district court subsequently denied the motion to intervene brought by the Campaign for California Families, a public interest organization that supported Proposition 8 but was not the measure's official sponsor. We affirmed that decision in *Perry v. Proposition 8 Official Proponents* (*Perry I*), 587 F.3d 947 (9th Cir.2009). The district court also denied leave to intervene to a coalition of civil rights advocacy organizations. *Id.* at 950 n. 1.

[3] A number of ancillary matters, none of which we need revisit here, were presented to this court immediately prior to and during the trial. First, we granted Proponents' petition for a writ of mandamus to protect their First Amendment interests in campaign communications against intrusion by Plaintiffs' discovery requests. *Perry v. Schwarzenegger* (*Perry II*), 591 F.3d 1147 (9th Cir.2010), *amending and denying reh'g en banc of* 591 F.3d 1126 (9th Cir.2009). Second, we denied a similar mandamus petition brought by three non-party organizations that had campaigned against Proposition 8. *Perry v. Schwarzenegger* (*Perry III*), 602 F.3d 976 (9th Cir.2010). Finally, a motions panel of this court denied Proponents' emergency petition for a writ of mandamus, filed on the eve of trial, to prohibit the district court from broadcasting the trial via streaming video and audio to a few federal courthouses around the country. The Supreme Court then granted Proponents' application for a temporary and eventually permanent stay of the broadcast. *Hollingsworth v. Perry,* ___ U.S. ___, 130 S.Ct. 1132, 175 L.Ed.2d 878 (2010) (mem.); *Hollingsworth v. Perry,* ___ U.S. ___, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010).

in August 2010, the court made eighty findings of fact and adopted the relevant conclusions of law. *Perry v. Schwarzenegger* (*Perry IV*), 704 F.Supp.2d 921 (N.D.Cal.2010).[4] The court held Proposition 8 unconstitutional under the Due Process Clause because no compelling state interest justifies denying same-sex couples the fundamental right to marry. *Id.* at 991-95. The court also determined that Proposition 8 violated the Equal Protection Clause, because there is no rational basis for limiting the designation of 'marriage' to opposite-sex couples. *Id.* at 997-1003. The court therefore entered the following injunction: "Defendants in their official capacities, and all persons

[4] The court found, among other things, that (1) marriage benefits society by organizing individuals into cohesive family units, developing a realm of liberty for intimacy and free decision making, creating stable households, legitimating children, assigning individuals to care for one another, and facilitating property ownership, *id.* at 961; (2) marriage benefits spouses and their children physically, psychologically, and economically, *id.* at 962-63, whether the spouses are of the same or opposite sexes, *id.* at 969-70; (3) domestic partnerships lack the social meaning associated with marriage, *id.* at 970, 973-75; (4) permitting same-sex couples to marry would not affect the number or stability of opposite-sex marriages, *id.* at 972-73; (5) the children of same-sex couples benefit when their parents marry, and they fare just as well as children raised by opposite-sex parents, *id.* at 973, 980-81; (6) Proposition 8 stigmatizes same-sex couples as having relationships inferior to those of opposite-sex couples, *id.* at 973-74, 979-80; (7) Proposition 8 eliminated same-sex couples' right to marry but did not affect any other substantive right they enjoyed, *id.* at 977; and (8) the campaign in favor of Proposition 8 relied upon stereotypes and unfounded fears about gays and lesbians, *id.* at 988-91.

under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution."[5] Doc. 728 (Permanent Injunction), *Perry v. Schwarzenegger,* No. 09-cv-02292 (N.D.Cal. Aug. 12, 2010).[6]

B

Proponents appealed immediately, and a motions panel of this court stayed the district court's injunction pending appeal. The motions panel asked the parties to discuss in their briefs, as a preliminary matter, whether the Proponents had standing to seek review of the district court order. After considering the parties' arguments, we concluded that Proponents' standing to appeal depended on the precise

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[5] Without explanation, the district court failed to enter a separate declaratory judgment as Plaintiffs had requested. The court's opinion made clear its holding "that Proposition 8 is unconstitutional." 704 F.Supp.2d at 1003. But the clerk apparently never issued this declaratory judgment as a separate document, as Fed.R.Civ.P. 58 requires.

[6] Concurrently with its decision on the merits of Plaintiffs' claim, the district court denied a motion to intervene as a defendant brought by Imperial County, its board of supervisors, and one of its Deputy County Clerks. We affirmed the district court's denial of the motion, on alternative grounds, in *Perry v. Schwarzenegger* (*Perry VI*), 630 F.3d 898 (9th Cir.2011). The newly elected County Clerk of Imperial County subsequently moved to intervene in this court in the companion appeal, No. 10-16751. In light of the fact that Proponents have standing to appeal, we deny the motion as untimely but have considered the Clerk's filings as briefs amici curiae.

rights and interests given to official sponsors of an initiative under California law, which had never been clearly defined by the State's highest court. We therefore certified the following question to the California Supreme Court:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

Perry v. Schwarzenegger (*Perry V*), 628 F.3d 1191, 1193 (9th Cir.2011). The state court granted our request for certification in February 2011, and in November 2011 rendered its decision. *See Perry v. Brown* (*Perry VII*), 52 Cal.4th 1116, 134 Cal.Rptr.3d 499, 265 P.3d 1002 (2011). We now resume consideration of this appeal.[7]

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[7] We vacated submission of this case upon ordering that our question be certified to the California Supreme Court. *Perry V,* 628 F.3d at 1200. The case is now ordered resubmitted.

III

We begin, as we must, with the issue that has prolonged our consideration of this case: whether we have jurisdiction over an appeal brought by the defendant-intervenor Proponents, rather than the defendant state and local officers who were directly enjoined by the district court order.[8] In view of Proponents' authority under California law, we conclude that they do have standing to appeal.

For purposes of Article III standing, we start with the premise that "a State has standing to defend the constitutionality of its [laws]." *Diamond v. Charles,* 476 U.S. 54, 62, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). When a state law is ruled unconstitutional, either the state or a state officer charged with the law's enforcement may appeal that determination. Typically, the named defendant in an action challenging the constitutionality of a state law is a state officer, because sovereign immunity protects the state from being sued directly. *See Ex parte Young,* 209 U.S. 123, 157-58, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *L.A. County Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir.1992). In such cases, if a court invalidates the state law and enjoins its enforcement, there is no question that the state officer is entitled to appeal

[8] Although we regret the delay that our need to resolve this issue has caused, we note that this delay was not of our own making. *See Perry V,* 628 F.3d at 1200-02 (Reinhardt, J., concurring). We are grateful to the California Supreme Court for the thoughtful and full consideration it gave our question.

that determination. *See, e.g., Ysursa v. Pocatello Educ. Ass'n,* 555 U.S. 353, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009) (Idaho Secretary of State and Attorney General appealed decision striking down an Idaho law on First Amendment grounds); *Stenberg v. Carhart,* 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (Nebraska Attorney General appealed decision holding unconstitutional a Nebraska abortion law). Moreover, there is no reason that a state itself may not also *choose* to intervene as a defendant, and indeed a state *must* be permitted to intervene if a state officer is not already party to an action in which the constitutionality of a state law is challenged. *See* 28 U.S.C. § 2403(b); Fed.R.Civ.P. 5.1; *cf.* Fed. R.App. P. 44(b). When a state does elect to become a defendant itself, the state may appeal an adverse decision about the constitutionality of one of its laws, just as a state officer may. *See, e.g., Caruso v. Yamhill County ex rel. County Comm'r,* 422 F.3d 848, 852-53 & n. 2 (9th Cir.2005) (sole appellant was the State of Oregon, which had intervened as a defendant in the district court). In other words, in a suit for an injunction against enforcement of an allegedly unconstitutional state law, it makes no practical difference whether the formal party before the court is the state itself or a state officer in his official capacity. *Cf. Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 114 n. 25, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (discussing the "fiction" of *Ex parte Young*); *see also Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 269-70, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (same).

Whether the defendant is the state or a state officer, the decision to assert the state's own interest in the constitutionality of its laws is most commonly made by the state's executive branch – the part of state government that is usually charged with enforcing and defending state law. *See, e.g., Ysursa,* 555 U.S. at 354, 129 S.Ct. 1093 (Idaho state officers represented by state Attorney General); *Caruso,* 422 F.3d at 851 (State of Oregon represented by Oregon Department of Justice). Some sovereigns vest the authority to assert their interest in litigation *exclusively* in certain executive officers. *See, e.g.,* 28 U.S.C. §§ 516-19; 28 C.F.R. § 0.20.

The states need not follow that approach, however. It is their prerogative, as independent sovereigns, to decide for themselves who may assert their interests and under what circumstances, and to bestow that authority accordingly. In *Karcher v. May,* 484 U.S. 72, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987), for example, the Supreme Court held that the State of New Jersey was properly represented in litigation by the Speaker of the General Assembly and the President of the Senate, appearing on behalf of the Legislature, because "the New Jersey Legislature had authority under state law to represent the State's interests." *Id.* at 82, 108 S.Ct. 388 (citing *In re Forsythe,* 91 N.J. 141, 450 A.2d 499, 500 (1982)).[9] Principles of

[9] See also *Richardson v. Ramirez,* 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), in which a county clerk was not barred from appealing a judgment invalidating California's felon

(Continued on following page)

federalism require that federal courts respect such decisions by the states as to who may speak for them: "there are limits on the Federal Government's power to affect the internal operations of a State." *Va. Office for Protection & Advocacy v. Stewart,* ___ U.S. ___, 131 S.Ct. 1632, 1641, 179 L.Ed.2d 675 (2011). It is not for a federal court to tell a state who may appear on its behalf any more than it is for Congress to direct state law-enforcement officers to administer a federal regulatory scheme, *see Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), to command a state to take ownership of waste generated within its borders, *see New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), or to dictate where a state shall locate its capital, *see Coyle v. Smith,* 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 (1911). Who may speak for the state is, necessarily, a question of state law. All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm.

Proponents claim to assert the interest of the People of California in the constitutionality of Proposition 8, which the People themselves enacted. When

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disenfranchisement law, even though the only state officer who had been sued, then-California Secretary of State Edmund G. Brown, Jr., refused to pursue the appeal. *Id.* at 26 n. 1, 36-38, 94 S.Ct. 2655.

faced with a case arising in a similar posture, in which an Arizona initiative constitutional amendment was defended only by its sponsors, the Supreme Court expressed "grave doubts" about the sponsors' standing given that the Court was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Arizonans for Official English v. Arizona* (*Arizonans*), 520 U.S. 43, 65-66, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). Absent some conferral of authority by state law, akin to the authority that the New Jersey legislators in *Karcher* had as "elected representatives," the Court suggested that proponents of a ballot measure would not be able to appeal a decision striking down the initiative they sponsored. *Id.* at 65, 117 S.Ct. 1055.

Here, unlike in *Arizonans*, we *do* know that California law confers on "initiative sponsors" the authority "to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." The California Supreme Court has told us, in a published opinion containing an exhaustive review of the California Constitution and statutes, that it does. In answering our certified question, the court held

> that when the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so, under article II, section 8 of the California Constitution and the relevant provisions of the Elections Code, the official proponents

> of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative.

Perry VII, 134 Cal.Rptr.3d at 536-37, 265 P.3d 1002. "[T]he role played by the proponents in such litigation," the court explained, "is comparable to the role ordinarily played by the Attorney General or other public officials in vigorously defending a duly enacted state law and raising all arguable legal theories upon which a challenged provision may be sustained." *Id.* at 525, 265 P.3d 1002. The State's highest court thus held that California law provides precisely what the *Arizonans* Court found lacking in Arizona law: it confers on the official proponents of an initiative the authority to assert the State's interests in defending the constitutionality of that initiative, where the state officials who would ordinarily assume that responsibility choose not to do so.

We are bound to accept the California court's determination. Although other states may act differently, California's conferral upon proponents of the authority to represent the People's interest in the initiative measure they sponsored is consistent with that state's unparalleled commitment to the authority of the electorate: "No other state in the nation carries the concept of initiatives as 'written in stone' to such lengths as" does California. *People v. Kelly,* 47 Cal.4th 1008, 103 Cal.Rptr.3d 733, 222 P.3d 186, 200 (2010)

(internal quotation marks omitted). Indeed, California defines the initiative power as "one of the most precious rights of our democratic process," and considers "the sovereign people's initiative power" to be a "fundamental right" under the state constitution. *Assoc. Home Builders v. City of Livermore,* 18 Cal.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473, 477 (1976); *Brosnahan v. Brown,* 32 Cal.3d 236, 186 Cal.Rptr. 30, 651 P.2d 274, 277 (1982); *Costa v.Super. Ct.,* 37 Cal.4th 986, 39 Cal.Rptr.3d 470, 128 P.3d 675, 686 (2006). As the California Supreme Court explained in answering our certified question, "[t]he initiative power would be significantly impaired if there were no one to assert the state's interest in the validity of the measure when elected officials decline to defend it in court or to appeal a judgment invalidating the measure." *Perry VII,* 134 Cal.Rptr.3d at 523, 265 P.3d 1002. The authority of official proponents to "assert[ ] the state's interest in the validity of an initiative measure" thus "serves to safeguard the unique elements and integrity of the initiative process." *Id.* at 533., 265 P.3d 1002

It matters not whether federal courts think it wise or desirable for California to afford proponents this authority to speak for the State, just as it makes no difference whether federal courts think it a good idea that California allows its constitution to be amended by a majority vote through a ballot measure in the first place. *Cf. Pac. States Tel. & Tel. Co. v. Oregon,* 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912) (holding nonjusticiable a Guaranty Clause

challenge to Oregon's initiative system). The People of California are largely free to structure their system of governance as they choose, and we respect their choice. All that matters, for federal standing purposes, is that the People have an interest in the validity of Proposition 8 and that, under California law, Proponents are authorized to represent the People's interest. That is the case here.

In their supplemental brief on the issue of standing, Plaintiffs argue for the first time that Proponents must satisfy the requirements of third-party standing in order to assert the interests of the State of California in this litigation. Litigants who wish "to bring actions on behalf of third parties" must satisfy three requirements. *Powers v. Ohio,* 499 U.S. 400, 410-11, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). First, they "must have suffered an 'injury in fact,' thus giving [them] a 'sufficiently concrete interest' in the outcome of the issue in dispute." *Id.* at 411, 111 S.Ct. 1364. Second, they "must have a close relation to the third party." *Id.* Third, "there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* Plaintiffs contend that Proponents cannot satisfy these requirements with respect to the State of California as a third party.

The requirements of third-party standing, however, are beside the point: the State of California is no more a "third party" relative to Proponents than it is to the executive officers of the State who ordinarily assert the State's interest in litigation. As the California Supreme Court has explained, "the role played

by the proponents" in litigation "regarding the validity or proper interpretation of a voter-approved initiative measure . . . is comparable to the role ordinarily played by the Attorney General or other public officials in vigorously defending a duly enacted state law." *Perry VII,* 134 Cal.Rptr.3d at 525, 265 P.3d 1002. When the Attorney General of California appears in federal court to defend the validity of a state statute, she obviously need not satisfy the requirements of third-party standing; she stands in the shoes of the State to assert its interests in litigation. For the purposes of the litigation, she speaks to the court *as* the State, not as a third party. The same is true of Proponents here, just as it was true of the presiding legislative officers in *Karcher,* 484 U.S. at 82, 108 S.Ct. 388. The requirements of third-party standing are therefore not relevant.

Nor is it relevant whether Proponents have suffered a *personal* injury, in their capacities as private individuals. Although we asked the California Supreme Court whether "the official proponents of an initiative measure possess either a *particularized interest* in the initiative's validity or the authority to assert the *State's interest* in the initiative's validity," *Perry V,* 628 F.3d at 1193 (emphasis added), the Court chose to address only the latter type of interest. *Perry VII,* 134 Cal.Rptr.3d at 515, 265 P.3d 1002 ("Because [our] conclusion [that proponents are authorized to assert the State's interest] is sufficient to support an affirmative response to the question posed by the Ninth Circuit, we need not decide whether, under

California law, the official proponents also possess a particularized interest in a voter-approved initiative's validity."). The exclusive basis of our holding that Proponents possess Article III standing is their authority to assert the interests of the State of California, rather than any authority that they might have to assert particularized interests of their *own*. Just as the Attorney General of California need not satisfy the requirements of third-party standing when she appears in federal court to defend the validity of a state statute, she obviously need not show that she would suffer any *personal* injury as a result of the statute's invalidity. The injury of which she complains is the State's, not her own. The same is true here. Because "a State has standing to defend the constitutionality of its [laws]," *Diamond,* 476 U.S. at 62, 106 S.Ct. 1697, Proponents need not show that they would suffer any personal injury from the invalidation of Proposition 8. That the *State* would suffer an injury, *id.,* is enough for Proponents to have Article III standing when state law authorizes them to assert the State's interests.

To be clear, we do not suggest that state law has any "power directly to enlarge or contract federal jurisdiction." *Duchek v. Jacobi,* 646 F.2d 415, 419 (9th Cir.1981). "Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's . . . standing in state court." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 804, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). State courts may afford litigants standing to appear where federal courts

would not,[10] but whether they do so has no bearing on the parties' Article III standing in federal court.

State law does have the power, however, to answer questions antecedent to determining federal standing, such as the one here: who is authorized to assert the People's interest in the constitutionality of an initiative measure? Because the State of California has Article III standing to defend the constitutionality of Proposition 8, and because both the California Constitution and California law authorize "the official proponents of [an] initiative . . . to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so," *Perry VII,* 134 Cal.Rptr.3d at 505, 265 P.3d 1002, we conclude that Proponents are proper appellants here. They possess Article III standing to prosecute this appeal from the district court's judgment invalidating Proposition 8.

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[10] *Cf. City of Los Angeles v. Lyons,* 461 U.S. 95, 113, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) ("[T]he state courts need not impose the same standing or remedial requirements that govern federal-court proceedings. The individual States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis. But this is not the role of a federal court. . . .").

IV

We review the district court's decision to grant a permanent injunction for abuse of discretion, but we review the determinations underlying that decision by the standard that applies to each determination. Accordingly, we review the court's conclusions of law de novo and its findings of fact for clear error. *See Ting v. AT&T,* 319 F.3d 1126, 1134-35 (9th Cir.2003); Fed.R.Civ.P. 52(a).

Plaintiffs and Proponents dispute whether the district court's findings of fact concern the types of "facts" – so-called "adjudicative facts" – that are capable of being "found" by a court through the clash of proofs presented in adjudication, as opposed to "legislative facts," which are generally not capable of being found in that fashion. "Adjudicative facts are facts about the parties and their activities . . . , usually answering the questions of who did what, where, when, how, why, with what motive or intent" – the types of "facts that go to a jury in a jury case," or to the factfinder in a bench trial. *Marshall v. Sawyer,* 365 F.2d 105, 111 (9th Cir.1966) (quoting Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing,* 70 Harv. L.Rev. 193, 199 (1956)) (internal quotation marks omitted). "Legislative facts," by contrast, "do not usually concern [only] the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." *Id.*

It is debatable whether some of the district court's findings of fact concerning matters of history

or social science are more appropriately characterized as "legislative facts" or as "adjudicative facts." We need not resolve what standard of review should apply to any such findings, however, because the only findings to which we give any deferential weight – those concerning the messages in support of Proposition 8 that Proponents communicated to the voters to encourage their approval of the measure, *Perry IV,* 704 F.Supp.2d at 990-91 – are clearly "adjudicative facts" concerning the parties and "'who did what, where, when, how, why, with what motive or intent.'" *Marshall,* 365 F.2d at 111. Aside from these findings, the only fact found by the district court that matters to our analysis is that "[d]omestic partnerships lack the social meaning associated with marriage" – that the difference between the designation of 'marriage' and the designation of 'domestic partnership' is meaningful. *Perry IV,* 704 F.Supp.2d at 970. This fact was conceded by Proponents during discovery. Defendant-Intervenors' Response to Plaintiffs' First Set of Requests for Admission, Exhibit No. PX 0707, at 2 ("Proponents admit that the word 'marriage' has a unique meaning."); *id.* at 11 (Proponents "[a]dmit that there is a significant symbolic disparity between domestic partnership and marriage"). Our analysis therefore does not hinge on what standard we use to review the district court's findings of fact. *Cf. Lockhart v. McCree,* 476 U.S. 162, 168 n. 3, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) ("Because we do not ultimately base our decision today on the [validity or] invalidity of the lower courts' 'factual' findings, we need not decide the 'standard of review' issue" – whether

"the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative' facts at issue here.").

V

We now turn to the merits of Proposition 8's constitutionality.

A

The district court held Proposition 8 unconstitutional for two reasons: first, it deprives same-sex couples of the fundamental right to marry, which is guaranteed by the Due Process Clause, *see Perry IV,* 704 F.Supp.2d at 991-95; and second, it excludes same-sex couples from state-sponsored marriage while allowing opposite-sex couples access to that honored status, in violation of the Equal Protection Clause, *see id.* at 997-1003. Plaintiffs elaborate upon those arguments on appeal.

Plaintiffs and Plaintiff-Intervenor San Francisco also offer a third argument: Proposition 8 singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason. *Romer,* 517 U.S. at 634-35, 116 S.Ct. 1620. Because this third argument applies to the specific history of same-sex marriage in California, it is the narrowest ground for

adjudicating the constitutional questions before us, while the first two theories, if correct, would apply on a broader basis. Because courts generally decide constitutional questions on the narrowest ground available, we consider the third argument first. *See Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 217, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) (citing *Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)).

B

Proposition 8 worked a singular and limited change to the California Constitution: it stripped same-sex couples of the right to have their committed relationships recognized by the State with the designation of 'marriage,' which the state constitution had previously guaranteed them, while leaving in place all of their other rights and responsibilities as partners – rights and responsibilities that are identical to those of married spouses and form an integral part of the marriage relationship. In determining that the law had this effect, "[w]e rely not upon our own interpretation of the amendment but upon the authoritative construction of [California's] Supreme Court." *Romer,* 517 U.S. at 626, 116 S.Ct. 1620. The state high court held in *Strauss* that "Proposition 8 reasonably must be interpreted in a limited fashion as eliminating only the right of same-sex couples to equal access to the designation of marriage, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family

relationship," which California calls a 'domestic partnership.' 93 Cal.Rptr.3d 591, 207 P.3d at 76. Proposition 8 "leaves intact all of the other very significant constitutional protections afforded same-sex couples," including "the constitutional right to enter into an officially recognized and protected family relationship with the person of one's choice and to raise children in that family if the couple so chooses." *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 102. Thus, the extent of the amendment's effect was to "establish[ ] a new substantive state constitutional rule," *id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 63, which "carves out a narrow and limited exception to these state constitutional rights," by "reserving the official designation of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law," *id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 61.[11]

Both before and after Proposition 8, same-sex partners could enter into an official, state-recognized relationship that affords them "the same rights, protections, and benefits" as an opposite-sex union and

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[11] In rejecting the argument that Proposition 8 had impermissibly revised, rather than amended, the state constitution, *Strauss* explained that it "drastically overstates the effect of Proposition 8 on the fundamental state constitutional rights of same-sex couples" to suggest that the proposition "'eliminat[ed]' or 'stripp[ed]' same-sex couples of a fundamental constitutional right," because the *substantive* protections of the state equal protection clause and due process and privacy provisions remained intact – with the "sole, albeit significant, exception" of the right to use the designation of 'marriage,' which *was* eliminated for same-sex couples. 93 Cal.Rptr.3d 591, 207 P.3d at 102.

subjects them "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." Cal. Fam.Code § 297.5(a). Now as before, same-sex partners may:

- Raise children together, and have the same rights and obligations as to their children as spouses have, *see* Cal. Fam.Code § 297.5(d);

- Enjoy the presumption of parentage as to a child born to either partner, *see Elisa B. v. Super. Ct.* [37 Cal.4th 108, 33 Cal.Rptr.3d 46], 117 P.3d 660, 670 (Cal.2005); *Kristine M. v. David P.,* 135 Cal.App.4th 783 [37 Cal.Rptr.3d 748] (2006); or adopted by one partner and raised jointly by both, *S.Y. v. S.B.,* 201 Cal.App.4th 1023 [134 Cal.Rptr.3d 1] (2011);

- Adopt each other's children, *see* Cal. Fam.Code § 9000(g);

- Become foster parents, *see* Cal. Welf. & Inst.Code § 16013(a);

- Share community property, *see* Cal. Fam.Code § 297.5(k);

- File state taxes jointly, *see* Cal. Rev. & Tax.Code § 18521(d);

- Participate in a partner's group health insurance policy on the same terms as a spouse, *see* Cal. Ins.Code § 10121.7;
- Enjoy hospital visitation privileges, *see* Cal. Health & Safety Code § 1261;
- Make medical decisions on behalf of an incapacitated partner, *see* Cal. Prob.Code § 4716;
- Be treated in a manner equal to that of a widow or widower with respect to a deceased partner, *see* Cal. Fam.Code § 297.5(c);
- Serve as the conservator of a partner's estate, *see* Cal. Prob.Code §§ 1811-1813.1; and
- Sue for the wrongful death of a partner, *see* Cal.Civ.Proc.Code § 377.60 – among many other things.

Proposition 8 did not affect these rights or any of the other "'constitutionally based incidents of marriage'" guaranteed to same-sex couples and their families. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61 (quoting *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 434). In adopting the amendment, the People simply took the designation of 'marriage' away from lifelong same-sex partnerships, and with it the State's authorization of that official status and the societal approval that comes with it.

By emphasizing Proposition 8's limited effect, we do not mean to minimize the harm that this change in the law caused to same-sex couples and their

families. To the contrary, we emphasize the extraordinary significance of the official designation of 'marriage.' That designation is important because 'marriage' is the name that society gives to the relationship that matters most between two adults. A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not. The word 'marriage' is singular in connoting "a harmony in living," "a bilateral loyalty," and "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut,* 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). As Proponents have admitted, "the word 'marriage' has a unique meaning," and "there is a significant symbolic disparity between domestic partnership and marriage." It is the designation of 'marriage' itself that expresses validation, by the state and the community, and that serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important. *See id.* at 971.

We need consider only the many ways in which we encounter the word 'marriage' in our daily lives and understand it, consciously or not, to convey a sense of significance. We are regularly given forms to complete that ask us whether we are "single" or "married." Newspapers run announcements of births, deaths, and marriages. We are excited to see someone ask, "Will you marry me?", whether on bended knee in a restaurant or in text splashed across a stadium

Jumbotron. Certainly it would not have the same effect to see "Will you enter into a registered domestic partnership with me?". Groucho Marx's one-liner, "Marriage is a wonderful institution . . . but who wants to live in an institution?" would lack its punch if the word 'marriage' were replaced with the alternative phrase. So too with Shakespeare's "A young man married is a man that's marr'd," Lincoln's "Marriage is neither heaven nor hell, it is simply purgatory," and Sinatra's "A man doesn't know what happiness is until he's married. By then it's too late." We see tropes like "marrying for love" versus "marrying for money" played out again and again in our films and literature because of the recognized importance and permanence of the marriage relationship. Had Marilyn Monroe's film been called *How to Register a Domestic Partnership with a Millionaire,* it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different. The *name* 'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships. *See Knight v.Super. Ct.,* 128 Cal.App.4th 14, 31, 26 Cal.Rptr.3d 687 (2005) ("[M]arriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership."); *cf. Griswold,* 381 U.S. at 486.

The official, cherished status of 'marriage' is distinct from the incidents of marriage, such as those listed in the California Family Code. The incidents are both elements of the institution and manifestations of

the recognition that the State affords to those who are in stable and committed lifelong relationships. We allow spouses but not siblings or roommates to file taxes jointly, for example, because we acknowledge the financial interdependence of those who have entered into an "enduring" relationship. The incidents of marriage, standing alone, do not, however, convey the same governmental and societal recognition as does the designation of 'marriage' itself. We do not celebrate when two people merge their bank accounts; we celebrate when a couple marries. The designation of 'marriage' is the status that we recognize. It is the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it.[12]

We set this forth because we must evaluate Proposition 8's constitutionality in light of its actual and specific effects on committed same-sex couples desiring to enter into an officially recognized lifelong relationship. Before Proposition 8, California guaranteed

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[12] *Cf. Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 434-35 ("[D]rawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and . . . reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership[,] pose[s] a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.").

gays and lesbians both the incidents and the status and dignity of marriage. Proposition 8 left the incidents but took away the status and the dignity. It did so by superseding the *Marriage Cases* and thus endorsing the "official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples." *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 452. The question we therefore consider is this: did the People of California have legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples the right to have their lifelong relationships dignified by the official status of 'marriage,' and to compel the State and its officials and all others authorized to perform marriage ceremonies to substitute the label of 'domestic partnership' for their relationships?

Proponents resist this framing of the question. They deem it irrelevant to our inquiry that the California Constitution, as interpreted by the *Marriage Cases,* had previously guaranteed same-sex couples the right to use the designation of 'marriage,' because *In re Marriage Cases* was a "short-lived decision," and same-sex couples were allowed to marry only during a "143-day hiatus" between the effective date of the *Marriage Cases* decision and the enactment of Proposition 8. Proponents' Reply Br. 75, 79-80. According to Proponents, a decision to "restore" the "traditional definition of marriage" is indistinguishable from a decision to "adhere" to that definition in the first place.

Id. at 79-80. We are bound, however, by the California Supreme Court's authoritative interpretation of Proposition 8's effect on California law, *see Romer,* 517 U.S. at 626, 116 S.Ct. 1620: Proposition 8 "eliminat[ed] . . . the right of same-sex couples to equal access to the designation of marriage" by "carv[ing] out a narrow and limited exception to these state constitutional rights" that had previously guaranteed the designation of 'marriage' to all couples, opposite-sex and same-sex alike. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61, 76.

Even were we not bound by the state court's explanation, we would be obligated to consider Proposition 8 in light of its actual effect, which was, as the voters were told, to "*eliminate* the right of same-sex couples to marry in California." Voter Information Guide at 54. The context matters. Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade. The action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is. As the California Supreme Court held, "Proposition 8 [did] not 'readjudicate' the issue that was litigated and resolved in the *Marriage Cases.*" *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 63. Rather than "declar[ing] the state of the law as it existed under the California Constitution at the time of the *Marriage Cases,*" Proposition 8 "establishe[d] a *new* substantive state constitutional

rule that took effect upon" its adoption by the electorate. *Id.* (emphasis added). Whether or not it is a historical accident, as Proponents argue, that Proposition 8 postdated the *Marriage Cases* rather than predating and thus preempting that decision, the relative timing of the two events is a fact, and we must decide this case on its facts.

C

1

This is not the first time the voters of a state have enacted an initiative constitutional amendment that reduces the rights of gays and lesbians under state law. In 1992, Colorado adopted Amendment 2 to its state constitution, which prohibited the state and its political subdivisions from providing any protection against discrimination on the basis of sexual orientation. *See* Colo. Const. art. II, § 30b. Amendment 2 was proposed in response to a number of local ordinances that had banned sexual-orientation discrimination in such areas as housing, employment, education, public accommodations, and health and welfare services. The effect of Amendment 2 was "to repeal" those local laws and "to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future." *Evans v. Romer,* 854 P.2d 1270, 1284-85 (Colo.1993). The law thus "withdr[ew] from homosexuals, but no others, specific legal protection . . . ,

and it forb[ade] reinstatement of these laws and policies." *Romer,* 517 U.S. at 627, 116 S.Ct. 1620.

The Supreme Court held that Amendment 2 violated the Equal Protection Clause because "[i]t is not within our constitutional tradition to enact laws of this sort" – laws that "singl[e] out a certain class of citizens for disfavored legal status," which "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 633-34, 116 S.Ct. 1620. The Court considered possible justifications for Amendment 2 that might have overcome the "inference" of animus, but it found them all lacking. It therefore concluded that the law "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id.* at 635, 116 S.Ct. 1620.[13]

Proposition 8 is remarkably similar to Amendment 2. Like Amendment 2, Proposition 8 "single[s]

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[13] *Romer* did not apply heightened scrutiny to Amendment 2, even though the amendment targeted gays and lesbians. Instead, *Romer* found that Amendment 2 "fail[ed], indeed defie[d], even [the] conventional inquiry" for non-suspect classes, concerning whether a "legislative classification . . . bears a rational relation to some legitimate end." *Romer,* 517 U.S. at 631-32, 116 S.Ct. 1620. Amendment 2 amounted to "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 635, 116 S.Ct. 1620. We follow this approach and reach the same conclusion as to Proposition 8. *See also High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 574 (9th Cir.1990) (declining to apply heightened scrutiny).

out a certain class of citizens for disfavored legal status. . . . " *Id.* at 633, 116 S.Ct. 1620. Like Amendment 2, Proposition 8 has the "peculiar property," *id.* at 632, 116 S.Ct. 1620, of "withdraw[ing] from homosexuals, but no others," an existing legal right – here, access to the official designation of 'marriage' – that had been broadly available, notwithstanding the fact that the Constitution did not compel the state to confer it in the first place. *Id.* at 627, 116 S.Ct. 1620. Like Amendment 2, Proposition 8 denies "equal protection of the laws in the most literal sense," *id.* at 633, 116 S.Ct. 1620, because it "carves out" an "exception" to California's equal protection clause, by removing equal access to marriage, which gays and lesbians had previously enjoyed, from the scope of that constitutional guarantee. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61. Like Amendment 2, Proposition 8 "by state decree . . . put[s] [homosexuals] in a solitary class with respect to" an important aspect of human relations, and accordingly "imposes a special disability upon [homosexuals] alone." *Romer,* 517 U.S. at 627, 631, 116 S.Ct. 1620. And like Amendment 2, Proposition 8 constitutionalizes that disability, meaning that gays and lesbians may overcome it "only by enlisting the citizenry of [the state] to amend the State Constitution" for a second time. *Id.* at 631, 116 S.Ct. 1620. As we explain below, *Romer* compels that we affirm the judgment of the district court.

To be sure, there are some differences between Amendment 2 and Proposition 8. Amendment 2 "impos[ed] a broad and undifferentiated disability on a

single named group" by "identif[ying] persons by a single trait and then den[ying] them protection across the board." *Romer,* 517 U.S. at 632-33, 116 S.Ct. 1620. Proposition 8, by contrast, excises with surgical precision one specific right: the right to use the designation of 'marriage' to describe a couple's officially recognized relationship. Proponents argue that Proposition 8 thus merely "restor[es] the traditional definition of marriage while otherwise leaving undisturbed the manifold rights and protections California law provides gays and lesbians," making it unlike Amendment 2, which eliminated various substantive rights. Proponents' Reply Br. 77.

These differences, however, do not render *Romer* less applicable. It is no doubt true that the "special disability" that Proposition 8 "imposes upon" gays and lesbians has a less sweeping effect on their public and private transactions than did Amendment 2. Nevertheless, Proposition 8 works a meaningful harm to gays and lesbians, by denying to their committed lifelong relationships the societal status conveyed by the designation of 'marriage,' and this harm must be justified by some legitimate state interest. *Romer,* 517 U.S. at 631, 116 S.Ct. 1620. Proposition 8 is no less problematic than Amendment 2 merely because its effect is narrower; to the contrary, the surgical precision with which it excises a right belonging to gay and lesbian couples makes it even more suspect. A law that has no practical effect except to strip one group of the right to use a state-authorized and socially meaningful designation is all the more

"unprecedented" and "unusual" than a law that imposes broader changes, and raises an even stronger "inference that the disadvantage imposed is born of animosity toward the class of persons affected," *id.* at 633-34, 116 S.Ct. 1620. In short, *Romer* governs our analysis notwithstanding the differences between Amendment 2 and Proposition 8.

There is one further important similarity between this case and *Romer.* Neither case requires that the voters have stripped the state's gay and lesbian citizens of any federal constitutional right. In *Romer,* Amendment 2 deprived gays and lesbians of statutory protections against discrimination; here, Proposition 8 deprived same-sex partners of the right to use the designation of 'marriage.' There is no necessity in either case that the privilege, benefit, or protection at issue be a constitutional right. We therefore need not and do not consider whether same-sex couples have a fundamental right to marry, or whether states that fail to afford the right to marry to gays and lesbians must do so. Further, we express no view on those questions.[14]

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[14] Because we do not address the question of the constitutionality of a state's ban on same-sex marriage, the Supreme Court's summary dismissal of *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972) (mem.), is not pertinent here.

In *Baker,* the Court "dismissed for want of a substantial federal question" an appeal from the Minnesota Supreme Court's decision to uphold a state statute that did not permit marriage between two people of the same sex. *Id.* Such dismissals "prevent lower courts from coming to opposite conclusions

(Continued on following page)

Ordinarily, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer,* 517 U.S. at 631, 116 S.Ct. 1620. Such was the case in *Romer,* and it is the case here as well. The end must be one that is legitimate for the *government* to pursue, not just one that would be legitimate for a private actor. *See id.* at 632, 635, 116 S.Ct. 1620. The question here, then, is whether California had any more legitimate justification for withdrawing from gays and lesbians its constitutional protection with

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on the precise issues presented and necessarily decided by" them, *Mandel v. Bradley,* 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977) (per curiam), "'except when doctrinal developments indicate otherwise,'" *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (quoting *Port Authority Bondholders Protective Committee v. Port of New York Authority,* 387 F.2d 259, 263 n. 3 (2d Cir.1967)). "[N]o more may be read into" them, however, "than was essential to sustain th[e] judgment. Questions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred." *Ill. State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 183, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) (citations omitted).

Whether or not the constitutionality of any ban on same-sex marriage was "presented and necessarily decided" in *Baker,* and whether or not *Baker* would govern that question in light of subsequent "doctrinal developments," we address no such question here. We address a wholly different question: whether the people of a state may by plebiscite strip a group of a right or benefit, constitutional or otherwise, that they had previously enjoyed on terms of equality with all others in the state. That question was not present in *Baker* and is squarely controlled by *Romer,* which postdates *Baker* by more than two decades.

respect to the official designation of 'marriage' than Colorado did for withdrawing from that group all protection against discrimination generally.

Proposition 8, like Amendment 2, enacts a "'[d]iscrimination[ ] of an unusual character,'" which requires "'careful consideration to determine whether [it] [is] obnoxious to the'" Constitution. *Id.* at 633, 116 S.Ct. 1620 (quoting *Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37-38, 48 S.Ct. 423, 72 L.Ed. 770 (1928)). As in *Romer,* therefore, we must consider whether any *legitimate* state interest constitutes a rational basis for Proposition 8; otherwise, we must infer that it was enacted with only the constitutionally illegitimate basis of "animus toward the class it affects." *Romer,* 517 U.S. at 632, 116 S.Ct. 1620.

2

Before doing so, we briefly consider one other objection that Proponents raise to this analysis: the argument that because the Constitution "is not simply a one-way ratchet that forever binds a State to laws and policies that go beyond what the Fourteenth Amendment would otherwise require," the State of California – "'having gone beyond the requirements of the Federal Constitution'" in extending the right to marry to same-sex couples – "'was free to return . . . to the standard prevailing generally throughout the United States.'" Proponents' Reply Br. 76 (quoting *Crawford v. Bd. of Educ.,* 458 U.S. 527, 542, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982)). Proponents appear to

suggest that unless the Fourteenth Amendment actually requires that the designation of 'marriage' be given to same-sex couples in the first place, there can be no constitutional infirmity in taking the designation away from that group of citizens, whatever the People's reason for doing so.

Romer forecloses this argument. The rights that were repealed by Amendment 2 included protections against discrimination on the basis of sexual orientation in the private sphere. Those protections, like any protections against private discrimination, were not compelled by the Fourteenth Amendment.[15] Rather, "[s]tates ha[d] *chosen* to counter discrimination by enacting detailed statutory schemes" prohibiting disrimination in employment and public accommodations, among other contexts, and certain Colorado jurisdictions had chosen to extend those protections to gays and lesbians. *Romer,* 517 U.S. at 628, 116 S.Ct. 1620 (emphasis added). It was these elective protections

[15] Indeed, as the Court observed, not only does the Fourteenth Amendment not prohibit private discrimination; it does not even "give Congress a general *power* to prohibit discrimination in public accommodations" by statute. *Romer,* 517 U.S. at 628, 116 S.Ct. 1620 (emphasis added) (citing *Civil Rights Cases,* 109 U.S. 3, 25, 3 S.Ct. 18, 27 L.Ed. 835 (1883)). Congress has passed antidiscrimination laws regulating private conduct only under its Article I powers. *See, e.g., Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (upholding the Civil Rights Act of 1964 under the Commerce Clause).

that Amendment 2 withdrew and forbade.[16] The relevant inquiry in *Romer* was not whether the *state of the law* after Amendment 2 was constitutional; there was no doubt that the Fourteenth Amendment did not require antidiscrimination protections to be afforded to gays and lesbians. The question, instead, was whether the *change in the law* that Amendment 2 effected could be justified by some legitimate purpose.

The Supreme Court's answer was "no" – there was no legitimate reason to take away broad legal protections from gays and lesbians alone, and to inscribe that deprivation of equality into the state constitution, once those protections had already been provided. We therefore need not decide whether a state may decline to provide the right to marry to same-sex couples. To determine the validity of Proposition 8, we must consider only whether the *change* in the law that it effected – eliminating by constitutional amendment the right of same-sex couples to have the official designation and status of 'marriage' bestowed upon their relationships, while maintaining that right for opposite-sex couples – was justified by a legitimate reason.

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[16] The protections at issue in *Romer* were not of substantially more distant provenance than the protection at issue here. While Aspen and Boulder had enacted their ordinances somewhat earlier, Denver's ordinance – which covered a far greater population – had taken effect only the year before Colorado voters adopted Amendment 2. *Evans,* 854 P.2d at 1284.

This does not mean that the Constitution is a "one-way ratchet," as Proponents suggest. It means only that the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit *from one group but not others,* whether or not it was required to confer that right or benefit in the first place. Thus, when Congress, having chosen to provide food stamps to the poor in the Food Stamp Act of 1964, amended the Act to exclude households of unrelated individuals, such as "hippies" living in "hippie communes," the Supreme Court held the amendment unconstitutional because "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). In both *Romer* and *Moreno,* the constitutional violation that the Supreme Court identified was not the failure to confer a right or benefit in the first place; Congress was no more obligated to provide food stamps than Colorado was to enact antidiscrimination laws. Rather, what the Supreme Court forbade in each case was the targeted exclusion of a group of citizens from a right or benefit that they had enjoyed on equal terms with all other citizens. The constitutional injury that *Romer* and *Moreno* identified – and that serves as a basis of our decision to strike down Proposition 8 – has little to do with the substance of the right or benefit from which a group is excluded, and much to do with the act of exclusion itself. Proponents' reliance on *Crawford v. Board of Education,* 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982),

is therefore misplaced. In *Crawford,* the Court affirmed Proposition 1, a California initiative constitutional amendment that barred state courts from ordering school busing or pupil-assignment plans except when necessary to remedy a federal constitutional violation. *Id.* at 531-32, 102 S.Ct. 3211. Like Proposition 8, Proposition 1 was adopted in response to a decision of the California Supreme Court under the state constitution, which had held that state schools were obligated to take "reasonably feasible steps," including busing and pupil-assignment plans, "to alleviate school segregation." *Crawford v. Bd. of Educ.,* 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28, 45 (1976). The Supreme Court "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede."[17] *Crawford,* 458 U.S. at 535, 102 S.Ct. 3211.

[17] Additionally, the Court stated that it "would not interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Crawford,* 458 U.S. at 540, 102 S.Ct. 3211. In enacting Proposition 8, the People did not "declare the state of the law as it existed when the *Marriage Cases* decision was rendered, but instead establishe[d] a new substantive state constitutional rule" that amended the charter's text to supersede the previous California Declaration of Rights. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 115. The People thus acted as Congress does when it disapproves of a statutory interpretation by a federal court and enacts a new statute to produce its preferred result. *See, e.g.,* Religious Freedom Restoration Act of 1993, Pub.L. No. 103-141 (enacted in response to the Supreme Court's decision in *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). Of course, *Crawford* did not suggest that it

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That conclusion was consistent with the principle that states should be free "to experiment" with social policy, without fear of being locked in to "legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place." *Id.* at 535, 539-40, 102 S.Ct. 3211.

Critically, however, the Court noted that Proposition 1 did not itself draw any classification; "[i]t simply forb[ade] state courts" from ordering specific *remedies* under state law "in the absence of a Fourteenth Amendment violation," while maintaining the state constitution's more robust "*right* to desegregation than exists under the Federal Constitution." *Id.* at 537, 542, 102 S.Ct. 3211 (emphasis added); *see also id.* at 544, 102 S.Ct. 3211 (noting that other remedies remained available). Most important, the proposition's purported benefit, "neighborhood schooling," was "made available regardless of race." *Id.* There was no evidence that the "purpose of [the] repealing

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ends the inquiry to note that the Fourteenth Amendment *generally* allows the People to exercise their state constitutional right to supersede a decision of the state supreme court by an initiative constitutional amendment. A federal court must still determine whether the constitutional amendment enacted by the People is otherwise valid under the Federal Constitution; sometimes laws passed because of disagreement with judicial decisions are not. *Cf. City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (holding the Religious Freedom Restoration Act unconstitutional in part). Proposition 1 was valid because, in superseding a decision of the California Supreme Court, it did not draw an improper classification among groups. Proposition 8 is invalid because it does.

legislation [was] to disadvantage a racial minority," which would have made the proposition unconstitutional. *Id.* at 539 n. 21, 543-45, 102 S.Ct. 3211 (citing *Reitman v. Mulkey,* 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967)). Because Proposition 1 did not establish any classification, and because it was supported by permissible policy preferences against specific court remedies, the Supreme Court held that it was valid. On the same day, by contrast, the Court struck down a similar Washington initiative, because it had been "drawn for racial purposes" in a manner that "impose[d] substantial and unique burdens on racial minorities" and accordingly violated the Fourteenth Amendment. *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457, 470-71, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982).

Romer, not *Crawford,* controls where a privilege or protection is withdrawn without a legitimate reason from a class of disfavored individuals, even if that right may not have been required by the Constitution in the first place. Although Colorado presented before the Supreme Court an argument regarding *Crawford* identical to the one that Proponents present here, that argument did not persuade the Court.[18] Neither

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[18] *See* Petitioners' Br. 32-33, 48, *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (No. 94-1039) ("*Crawford* controls this case. Through Amendment 2, Colorado has simply defined the package of civil rights available to homosexuals and bisexuals under the Colorado Constitution as no larger than that provided by the Constitution and laws of the United States. . . . While a state or local government can grant

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Proposition 8 nor Amendment 2 was a law of general applicability that merely curtailed state courts' remedial powers, as opposed to a single group's rights. Rather, both Proposition 8 and Amendment 2 "carve[d] out" rights from gays and lesbians alone. Unlike the measure in *Crawford,* Proposition 8 is a "discrimination of an unusual character" that requires "careful consideration" of its purposes and effects, whether or not the Fourteenth Amendment required the right to be provided *ab initio.* Following *Romer,* we must therefore decide whether a legitimate interest exists that justifies the People of California's action in taking away from same-sex couples the right to use the official designation and enjoy the status of 'marriage' – a legitimate interest that suffices to overcome the "inevitable inference" of animus to which Proposition 8's discriminatory effects otherwise give rise.

D

We first consider four possible reasons offered by Proponents or amici to explain why Proposition 8 might have been enacted: (1) furthering California's interest in childrearing and responsible procreation, (2) proceeding with caution before making significant

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more protection than that required by the United States Constitution, a state or local government can also rescind that additional protection – and prohibit its subsequent reextension – without committing a federal constitutional violation. [*Crawford,* 458 U.S. at 538-39, 102 S.Ct. 3211.] Amendment 2 does nothing more.").

changes to marriage, (3) protecting religious freedom, and (4) preventing children from being taught about same-sex marriage in schools. To be credited, these rationales "must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe,* 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). They are, conversely, not to be credited if they "could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley,* 440 U.S. 93, 111, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979).[19] Because Proposition 8 did not further any of these interests, we conclude that they cannot have been rational bases for this measure, whether or not they are legitimate state interests.

1

The primary rationale Proponents offer for Proposition 8 is that it advances California's interest in responsible procreation and childrearing. Proponents' Br. 77-93. This rationale appears to comprise two distinct elements. The first is that children are better off when raised by two biological parents and that society can increase the likelihood of that family structure by allowing only potential biological parents – one man and one woman – to marry. The second is that marriage reduces the threat of "irresponsible

[19] As we have noted, we need not consider whether any form of heightened scrutiny is necessary or appropriate in order to reach the result we do. *See supra* note 13.

procreation" – that is, unintended pregnancies out of wedlock – by providing an incentive for couples engaged in potentially procreative sexual activity to form stable family units. Because same-sex couples are not at risk of "irresponsible procreation" as a matter of biology, Proponents argue, there is simply no need to offer such couples the same incentives. Proposition 8 is not rationally related, however, to either of these purported interests, whether or not the interests would be legitimate under other circumstances.

We need not decide whether there is any merit to the sociological premise of Proponents' first argument – that families headed by two biological parents are the best environments in which to raise children – because even if Proponents are correct, Proposition 8 had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in California. As we have explained, Proposition 8 in no way modified the state's laws governing parentage, which are distinct from its laws governing marriage. *See Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61. Both before and after Proposition 8, committed opposite-sex couples ("spouses") and same-sex couples ("domestic partners") had identical rights with regard to forming families and raising children. *See* Cal. Fam.Code § 297.5(d) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."). Similarly, Proposition 8 did not alter the California adoption or presumed-parentage laws, which continue to apply equally to same-sex

couples. *Cf. Elisa B.,* 33 Cal.Rptr.3d 46, 117 P.3d at 667-71 (applying the presumed parentage statutes to a lesbian couple); *Sharon S. v. Super. Ct.,* 31 Cal.4th 417, 2 Cal.Rptr.3d 699, 73 P.3d 554, 570 (2003) (applying the adoption laws to a lesbian couple). In order to be rationally related to the purpose of funneling more childrearing into families led by two biological parents, Proposition 8 would have had to modify these laws in some way. It did not do so.[20]

Moreover, California's "current policies and conduct . . . recognize that gay individuals are fully capable of . . . responsibly caring for and raising children." *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 428. And California law actually prefers a

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[20] For the reasons explained above, *Citizens for Equal Protection v. Bruning,* 455 F.3d 859 (8th Cir.2006), is not applicable here. As our dissenting colleague states, the fact that Proposition 8 left intact California's laws concerning family formation and childrearing by same-sex couples distinguishes this case from *Citizens. See* Dissent at 1110 ("Unlike the Nebraska constitutional amendment, which prohibited the recognition of both marriages by same-sex couples and other same-sex relationships, Proposition 8 left California's existing domestic partnership laws intact. . . . Thus, it cannot be said that Proposition 8 'confer[s] the inducements of marital . . . benefits on opposite-sex couples . . . , but not on same-sex couples. . . .'" (all but first alteration in original)).

We also note that the Nebraska constitutional amendment at issue in *Citizens* did not *withdraw* an existing right from same-sex couples as did Proposition 8. *Cf.* Dissent at 1105 n. 2. ("[W]hile the withdrawal of a right may not be analytically significant for rational basis review, it may still be factually significant.").

non-biological parent who has a parental relationship with a child to a biological parent who does not; in California, the parentage statutes place a premium on the "social relationship," not the "biological relationship," between a parent and a child. *See, e.g., Susan H. v. Jack S.,* 30 Cal.App.4th 1435, 1442-43, 37 Cal.Rptr.2d 120 (1994). California thus has demonstrated through its laws that Proponents' first rationale cannot "reasonably be conceived to be true by the governmental decisionmaker," *Vance,* 440 U.S. at 111, 99 S.Ct. 939. We will not credit a justification for Proposition 8 that is totally inconsistent with the measure's actual effect and with the operation of California's family laws both before and after its enactment.

Proponents' second argument is that there is no need to hold out the designation of 'marriage' as an encouragement for same-sex couples to engage in responsible procreation, because unlike opposite-sex couples, same-sex couples pose no risk of procreating accidentally. Proponents contend that California need not extend marriage to same-sex couples when the State's interest in responsible procreation would not be advanced by doing so, even if the interest would not be harmed, either. *See Johnson v. Robison,* 415 U.S. 361, 383, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."). But Plaintiffs do not

ask that marriage be *extended* to anyone. As we have by now made clear, the question is whether there is a legitimate governmental interest in *withdrawing* access to marriage from same-sex couples. We therefore need not decide whether, under *Johnson,* California would be justified in not extending the designation of 'marriage' to same-sex couples; that is not what Proposition 8 did. *Johnson* concerns decisions not to *add* to a legislative scheme a group that is unnecessary to the purposes of that scheme, but Proposition 8 *subtracted* a disfavored group from a scheme of which it already was a part.[21]

Under *Romer,* it is no justification for taking something away to say that there was no need to provide it in the first place; instead, there must be some legitimate reason for the act of taking it away, a reason that overcomes the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer,* 517 U.S. at 634, 116 S.Ct. 1620. In order to explain how *rescinding* access to the designation of 'marriage' is rationally related to the State's interest in responsible procreation, Proponents would have had to argue that opposite-sex couples were *more* likely to procreate accidentally or irresponsibly when same-sex couples were allowed

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[21] Moreover, *Johnson* did not involve a dignitary benefit that was withdrawn from one group, such as an official and meaningful state designation that established the societal status of the members of the group; it concerned only a specific form of government assistance.

access to the designation of 'marriage.' We are aware of no basis on which this argument would be even conceivably plausible. There is no rational reason to think that taking away the designation of 'marriage' from same-sex couples would advance the goal of encouraging California's opposite-sex couples to procreate more responsibly. The *Johnson* argument, to put it mildly, does not help Proponents' cause.

Given the realities of California law, and of human nature, both parts of Proponents' primary rationale simply "find [no] footing in the realities of the subject addressed by the legislation," and thus cannot be credited as rational. *Heller,* 509 U.S. at 321, 113 S.Ct. 2637. Whatever sense there may be in preferring biological parents over other couples – and we need not decide whether there is any – California law clearly does not recognize such a preference, and Proposition 8 did nothing to change that circumstance. The same is true for Proponents' argument that it is unnecessary to extend the right to use the designation of 'marriage' to couples who cannot procreate, because the purpose of the designation is to reward couples who procreate responsibly or to encourage couples who wish to procreate to marry first. Whatever merit this argument may have – and again, we need not decide whether it has any – the argument is addressed to a failure to afford the use of the designation of 'marriage' to same-sex couples in the first place; it is irrelevant to a measure *withdrawing* from them, and only them, use of that designation.

The same analysis applies to the arguments of some amici curiae that Proposition 8 not only promotes responsible procreation and childrearing as a general matter but promotes the single best family structure for such activities. *See, e.g.,* Br. Amicus Curiae of High Impact Leadership Coalition, et al. 14 ("Society has a compelling interest in preserving the institution that best advances the social interests in responsible procreation, and that connects procreation to responsible child-rearing."); Br. Amicus Curiae of Am. Coll. of Pediatricians 15 ("[T]he State has a legitimate interest in promoting the family structure that has proven most likely to foster an optimal environment for the rearing of children."). As discussed above, Proposition 8 in no way alters the state laws that govern childrearing and procreation. It makes no change with respect to the laws regarding family structure. As before Proposition 8, those laws apply in the same way to same-sex couples in domestic partnerships and to married couples. Only the designation of 'marriage' is withdrawn and only from one group of individuals.

We in no way mean to suggest that Proposition 8 would be constitutional if only it had gone further – for example, by also repealing same-sex couples' equal parental rights or their rights to share community property or enjoy hospital visitation privileges. Only if Proposition 8 had actually had any effect on childrearing or "responsible procreation" would it be necessary or appropriate for us to *consider* the legitimacy of Proponents' primary rationale

for the measure.[22] Here, given all other pertinent aspects of California law, Proposition 8 simply could not have the effect on procreation or childbearing that Proponents claim it might have been intended to have. Accordingly, an interest in responsible procreation and childbearing cannot provide a rational basis for the measure.

We add one final note. To the extent that it has been argued that withdrawing from same-sex couples access to the designation of 'marriage' – without in

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[22] The difference between what Proposition 8 did take away – only the name 'marriage' – and what it might also have taken away – any of the substantive "incidents of marriage" that same-sex couples still enjoy – influenced the underlying politics of Proposition 8 and shapes the basic issues in this case. The official argument in *favor* of Proposition 8, published in the Voter Information Guide, emphasized this distinction: "Proposition 8 doesn't take away any rights or benefits of gay or lesbian domestic partnerships. Under California law, 'domestic partners shall have the same rights, protections, and benefits' as married spouses. (Family Code § 297.5.) There are NO exceptions. Proposition 8 WILL NOT change this." Voter Information Guide at 56. Moreover, *Strauss* observed "that an alternative, much more sweeping initiative measure – proposing the addition of a new constitutional section that would have provided not only that '[o]nly marriage between one man and one woman is valid or recognized in California,' but also that '[n]either the Legislature nor any court, government institution, government agency, initiative statute, local government, or government official shall . . . bestow statutory rights, incidents, or employee benefits of marriage on unmarried individuals' – was circulated for signature at the same time as Proposition 8, but did not obtain sufficient signatures to qualify for the ballot." 93 Cal.Rptr.3d 591, 207 P.3d at 76 n. 8.

any way altering the substantive laws concerning their rights regarding childrearing or family formation – will encourage heterosexual couples to enter into matrimony, or will strengthen their matrimonial bonds, we believe that the People of California "could not reasonably" have "conceived" such an argument "to be true." *Vance,* 440 U.S. at 111, 99 S.Ct. 939. It is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman. While deferential, the rational-basis standard "is not a toothless one." *Mathews v. Lucas,* 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). "[E]ven the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Heller,* 509 U.S. at 321, 113 S.Ct. 2637. Here, the argument that withdrawing the designation of 'marriage' from same-sex couples could on its own promote the strength or stability of opposite-sex marital relationships lacks any such footing in reality.

2

Proponents offer an alternative justification for Proposition 8: that it advances California's interest in "proceed[ing] with caution" when considering changes to the definition of marriage. Proponents' Br. 93. But this rationale, too, bears no connection to the reality of Proposition 8. The amendment was enacted *after* the State had provided same-sex couples the right to marry and *after* more than 18,000 couples had

married (and remain married even after Proposition 8, *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 122).[23]

Perhaps what Proponents mean is that California had an interest in pausing at 18,000 married same-sex couples to evaluate whether same-sex couples should continue to be allowed to marry, or whether the same-sex marriages that had already occurred were having any adverse impact on society. Even if that were so, there could be no rational connection between the asserted purpose of "*proceeding* with caution" and the enactment of an absolute ban, unlimited in time, on same-sex marriage in the state constitution.[24] To enact a constitutional prohibition is to adopt a fundamental barrier: it means that the legislative process, by which incremental policymaking would normally proceed, is completely foreclosed. *Cf. Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (observing that legislatures may rationally reform policy "one step at a time"). Once Proposition 8 was enacted, any

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[23] The over 18,000 couples that did marry represented more than one-third of all couples that had entered into registered domestic partnerships in California at the time. *See* Gary J. Gates et al., The Williams Institute, *Marriage, Registration and Dissolution by Same-Sex Couples in the U.S.* 5 (July 2008) (noting that there were 48,157 registered domestic partnerships in California as of Spring 2008).

[24] When the Eighteenth Amendment was ratified, the Nation was similarly not interested in "proceeding with caution" in reallocating grain from wartime rations to alcohol production. It meant, instead, to effect a permanent ban on alcohol.

future steps forward, however cautious, would require "enlisting the citizenry of [California] to amend the State Constitution" once again. *Romer,* 517 U.S. at 631, 116 S.Ct. 1620.

Had Proposition 8 imposed not a total ban but a time-specific moratorium on same-sex marriages, during which the Legislature would have been authorized to consider the question in detail or at the end of which the People would have had to vote again to renew the ban, the amendment might plausibly have been designed to "proceed with caution." In that case, we would have had to consider whether the objective of "proceed[ing] with caution" was a legitimate one. But that is not what Proposition 8 did. The amendment superseded the *Marriage Cases* and then went further, by prohibiting the Legislature or even the People (except by constitutional amendment) from choosing to make the designation of 'marriage' available to same-sex couples in the future. Such a permanent ban cannot be rationally related to an interest in proceeding with caution.

In any event, in light of the express purpose of Proposition 8 and the campaign to enact it, it is not credible to suggest that "proceed[ing] with caution" was the reason the voters adopted the measure. The purpose and effect of Proposition 8 was "to *eliminate* the right of same-sex couples to marry in California" – not to "suspend" or "study" that right. Voter Information Guide at 54 (Proposition 8, Official Title and

Summary) (emphasis added).[25] The voters were told that Proposition 8 would "overturn [ ]" the *Marriage Cases* "to RESTORE the meaning of marriage." *Id.* at 56 (Argument in Favor of Proposition 8). The avowed purpose of Proposition 8 was to return with haste to a time when same-sex couples were barred from using the official designation of 'marriage,' not to study the matter further before deciding whether to make the designation more equally available.

3

We briefly consider two other potential rationales for Proposition 8, not raised by Proponents but offered by amici curiae. First is the argument that Proposition 8 advanced the State's interest in protecting religious liberty. *See, e.g.,* Br. Amicus Curiae of the Becket Fund for Religious Liberty (Becket Br.) 2. There is no dispute that even before Proposition 8, "no religion [was] required to change its religious policies or practices with regard to same-sex couples, and no religious officiant [was] required to solemnize a marriage in contravention of his or her religious beliefs." *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 451-52; *see* Becket Br. 4-5 (acknowledging this point). Rather, the religious-liberty interest that

[25] In California, "[b]allot summaries . . . in the 'Voter Information Guide' are recognized sources for determining the voters' intent." *People v. Garrett,* 92 Cal.App.4th 1417, 1426, 112 Cal.Rptr.2d 643 (2001) (citing *Hodges v. Super. Ct.,* 21 Cal.4th 109, 86 Cal.Rptr.2d 884, 980 P.2d 433, 438-39 (1999)).

Proposition 8 supposedly promoted was to decrease the likelihood that religious organizations would be penalized, under California's antidiscrimination laws and other government policies concerning sexual orientation, for refusing to provide services to families headed by same-sex spouses. But Proposition 8 did nothing to affect those laws. To the extent that California's antidiscrimination laws apply to various activities of religious organizations, their protections apply in the same way as before. Amicus's argument is thus more properly read as an appeal to the Legislature, seeking reform of the State's antidiscrimination laws to include greater accommodations for religious organizations. *See, e.g.,* Becket Br. 8 n. 6 ("Unlike many other states, California has no religious exemptions to its statutory bans on gender, marital status, and sexual orientation discrimination in public accommodations."). This argument is in no way addressed by Proposition 8 and could not have been the reason for Proposition 8.

Second is the argument, prominent during the campaign to pass Proposition 8, that it would "protect[ ] our children from being taught in public schools that 'same-sex marriage' is the same as traditional marriage." *Perry IV,* 704 F.Supp.2d at 930, 989-90 (quoting the Voter Information Guide at 56) (emphasis omitted); *see* Br. Amicus Curiae for the Hausvater Project 13-15. Yet again, California law belies the premise of this justification. Both before and after Proposition 8, schools have not been required to teach anything about same-sex marriage. They "may . . .

elect[ ] to offer comprehensive sexual health education"; only then might they be required to "teach respect for marriage and committed relationships." Cal. Educ.Code § 51933(a)-(b), (b)(7). Both before and after Proposition 8, schools have retained control over the content of such lessons. And both before and after Proposition 8, schools and individual teachers have been prohibited from giving any instruction that discriminates on the basis of sexual orientation; now as before, students could not be taught the superiority or inferiority of either same- or opposite-sex marriage or other "committed relationships." Cal. Educ.Code §§ 51500, 51933(b)(4). The *Marriage Cases* therefore did not weaken, and Proposition 8 did not strengthen, the rights of schools to control their curricula and of parents to control their children's education.

There is a limited sense in which the extension of the designation 'marriage' to same-sex partnerships might alter the content of the lessons that schools choose to teach. Schools teach about the world as it is; when the world changes, lessons change. A shift in the State's marriage law may therefore affect the content of classroom instruction just as would the election of a new governor, the discovery of a new chemical element, or the adoption of a new law permitting no-fault divorce: students learn about these as empirical facts of the world around them. But to protest the teaching of these facts is little different from protesting their very existence; it is like opposing the election of a particular governor on the

ground that students would learn about his holding office, or opposing the legitimation of no-fault divorce because a teacher might allude to that fact if a course in societal structure were taught to graduating seniors. The prospect of children learning about the laws of the State and society's assessment of the legal rights of its members does not provide an *independent* reason for stripping members of a disfavored group of those rights they presently enjoy.

4

Proposition 8's only effect, we have explained, was to withdraw from gays and lesbians the right to employ the designation of 'marriage' to describe their committed relationships and thus to deprive them of a societal status that affords dignity to those relationships. Proposition 8 could not have reasonably been enacted to promote childrearing by biological parents, to encourage responsible procreation, to proceed with caution in social change, to protect religious liberty, or to control the education of schoolchildren. Simply taking away the designation of 'marriage,' while leaving in place all the substantive rights and responsibilities of same-sex partners, did not do any of the things its Proponents now suggest were its purposes. Proposition 8 "is so far removed from these particular justifications that we find it impossible to credit them." *Romer,* 517 U.S. at 635, 116 S.Ct. 1620. We therefore need not, and do not, decide whether any of these purported rationales for the law would be "legitimate," *id.* at 632, 116 S.Ct. 1620, or would

suffice to justify Proposition 8 if the amendment actually served to further them.

E

1

We are left to consider why else the People of California might have enacted a constitutional amendment that takes away from gays and lesbians the right to use the designation of 'marriage.' One explanation is the desire to revert to the way things were prior to the *Marriage Cases,* when 'marriage' was available only to opposite-sex couples, as had been the case since the founding of the State and in other jurisdictions long before that. This purpose is one that Proposition 8 actually did accomplish: it "restore[d] the traditional definition of marriage as referring to a union between a man and a woman." *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 76. But tradition alone is not a justification for *taking away* a right that had already been granted, even though that grant was in derogation of tradition. In *Romer,* it did not matter that at common law, gays and lesbians were afforded no protection from discrimination in the private sphere; Amendment 2 could not be justified on the basis that it simply repealed positive law and restored the "traditional" state of affairs. 517 U.S. at 627-29, 116 S.Ct. 1620. Precisely the same is true here.

Laws may be repealed and new rights taken away if they have had unintended consequences or if

there is some conceivable affirmative good that revocation would produce, *cf. Crawford,* 458 U.S. at 539-40, 102 S.Ct. 3211, but new rights may not be stripped away solely *because* they are new. Tradition is a legitimate consideration in policymaking, of course, but it cannot be an end unto itself. *Cf. Williams v. Illinois,* 399 U.S. 235, 239-40, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence v. Texas,* 539 U.S. 558, 577-78, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *see Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (noting the historical pedigree of bans on interracial marriage but not even considering tradition as a possible justification for Virginia's law). If tradition alone is insufficient to justify *maintaining* a prohibition with a discriminatory effect, then it is necessarily insufficient to justify *changing* the law to revert to a previous state. A preference for the way things were before same-sex couples were allowed to marry, without any identifiable good that a return to the past would produce, amounts to an impermissible preference against same-sex couples themselves, as well as their families.

Absent any legitimate purpose for Proposition 8, we are left with "the inevitable inference that the disadvantage imposed is born of animosity toward,"

or, as is more likely with respect to Californians who voted for the Proposition, mere disapproval of, "the class of persons affected." *Romer,* 517 U.S. at 634, 116 S.Ct. 1620. We do not mean to suggest that Proposition 8 is the result of ill will on the part of the voters of California. "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone." *Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 374, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (Kennedy, J., concurring). Disapproval may also be the product of longstanding, sincerely held private beliefs. Still, while "[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). Ultimately, the "inevitable inference" we must draw in this circumstance is not one of ill will, but rather one of disapproval of gays and lesbians as a class. "[L]aws singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Romer,* 517 U.S. at 633, 116 S.Ct. 1620. Under *Romer,* we must infer from Proposition 8's effect on California law that the People took away from gays and lesbians the right to use the official designation of 'marriage' – and the societal status that accompanies it – because they disapproved of these individuals *as a class* and did not wish them to receive the same official recognition and societal approval of their committed relationships that the State makes available to opposite-sex couples.

It will not do to say that Proposition 8 was intended only to disapprove of same-sex marriage, rather than to pass judgment on same-sex couples as people. Just as the criminalization of "homosexual conduct . . . is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres," *Lawrence,* 539 U.S. at 575, 123 S.Ct. 2472, so too does the elimination of the right to use the official designation of 'marriage' for the relationships of committed same-sex couples send a message that gays and lesbians are of lesser worth as a class – that they enjoy a lesser societal status. Indeed, because laws affecting gays and lesbians' rights often regulate individual conduct – what sexual activity people may undertake in the privacy of their own homes, or who is permitted to marry whom – as much as they regulate status, the Supreme Court has "declined to distinguish between status and conduct in [the] context" of sexual orientation. *Christian Legal Soc'y v. Martinez,* ___ U.S. ___, 130 S.Ct. 2971, 2990, 177 L.Ed.2d 838 (2010). By withdrawing the availability of the recognized designation of 'marriage,' Proposition 8 enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class.

Just as a "desire to harm . . . cannot constitute a *legitimate* governmental interest," *Moreno,* 413 U.S. at 534, 93 S.Ct. 2821, neither can a more basic disapproval of a class of people. *Romer,* 517 U.S. at 633-35, 116 S.Ct. 1620. "The issue is whether the majority may use the power of the State to enforce these views

on the whole society" through a law that abridges minority individuals' rights. *Lawrence,* 539 U.S. at 571, 123 S.Ct. 2472. It may not. Without more, "[m]oral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* at 582, 123 S.Ct. 2472 (O'Connor, J., concurring). Society does sometimes draw classifications that likely are rooted partially in disapproval, such as a law that grants educational benefits to veterans but denies them to conscientious objectors who engaged in alternative civilian service. *See Johnson,* 415 U.S. at 362-64, 94 S.Ct. 1160. Those classifications will not be invalidated so long as they can be justified by reference to some *independent* purpose they serve; in *Johnson,* they could provide an incentive for military service and direct assistance to those who needed the most help in readjusting to post-war life, *see id.* at 376-83, 94 S.Ct. 1160. Enacting a rule into law based solely on the disapproval of a group, however, "is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer,* 517 U.S. at 635, 116 S.Ct. 1620. Like Amendment 2, Proposition 8 is a classification of gays and lesbians undertaken for its own sake.

2

The "inference" that Proposition 8 was born of disapproval of gays and lesbians is heightened by evidence of the context in which the measure was

passed.[26] The district court found that "[t]he campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships." *Perry IV,* 704 F.Supp.2d at 990. Television and print advertisements "focused on . . . the concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage" and "conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships." *Id.* These messages were not crafted accidentally. The strategists responsible for the campaign in favor of Proposition 8 later explained their approach: "'[T]here were limits to the degree of tolerance Californians would afford the gay community. They would entertain allowing gay marriage, but not if doing so had significant implications for the rest of society,'" such as what children would be taught in school. *Id.* at 988 (quoting Frank Schubert & Jeff Flint, *Passing Prop 8,* Politics, Feb. 2009, at 45-47). Nor were these messages new; for decades,

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[26] A contextual evaluation is both useful and appropriate as part of the "careful consideration" in which courts must engage when faced with "[d]iscriminations of an unusual character." *Romer,* 517 U.S. at 633, 116 S.Ct. 1620 (internal quotation marks omitted); *see Moreno,* 413 U.S. at 533-38, 93 S.Ct. 2821. When a law is enacted by ballot initiative, we look to objective indicators of the voters' motivations, such as campaign materials, to shed light on the "historical context." *S. Alameda Spanish Speaking Org. v. Union City,* 424 F.2d 291, 295 (9th Cir.1970); *see, e.g., Washington,* 458 U.S. at 463, 102 S.Ct. 3187.

ballot measures regarding homosexuality have been presented to voters in terms designed to appeal to stereotypes of gays and lesbians as predators, threats to children, and practitioners of a deviant "lifestyle." *See* Br. Amicus Curiae of Constitutional Law Professors at 2-8. The messages presented here mimic those presented to Colorado voters in support of Amendment 2, such as, "Homosexual indoctrination in the schools? IT'S HAPPENING IN COLORADO!" Colorado for Family Values, *Equal Rights – Not Special Rights,* at 2 (1992), *reprinted in* Robert Nagel, *Playing Defense,* 6 Wm. & Mary Bill Rts. J. 167, 193 (1997).

When directly enacted legislation "singl[es] out a certain class of citizens for disfavored legal status," we must "insist on knowing the relation between the classification adopted and the object to be attained," so that we may ensure that the law exists "to further a proper legislative end" rather than "to make the[ ] [class] unequal to everyone else." *Romer,* 517 U.S. at 632-33, 635, 116 S.Ct. 1620. Proposition 8 fails this test. Its sole purpose and effect is "to eliminate the right of same-sex couples to marry in California" – to dishonor a disfavored group by taking away the official designation of approval of their committed relationships and the accompanying societal status, and nothing more. Voter Information Guide at 54. "It is at once too narrow and too broad," for it changes the law far too little to have any of the effects it purportedly was intended to yield, yet it dramatically reduces the societal standing of gays and lesbians and

diminishes their dignity. *Romer,* 517 U.S. at 633, 116 S.Ct. 1620. Proposition 8 did not result from a legitimate "Kulturkampf" concerning the structure of families in California, because it had no effect on family structure, but in order to strike it down, we need not go so far as to find that it was enacted in "a fit of spite." *Id.* at 636, 116 S.Ct. 1620 (Scalia, J., dissenting). It is enough to say that Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships, by taking away from them the official designation of 'marriage,' with its societally recognized status. Proposition 8 therefore violates the Equal Protection Clause.

VI

Finally, we address Proponents' motion to vacate the district court's judgment. On April 6, 2011, after resigning from the bench, former Chief Judge Walker disclosed that he was gay and that he had for the past ten years been in a relationship with another man. Proponents moved shortly thereafter to vacate the judgment on the basis that 28 U.S.C. § 455(b)(4) obligated Chief Judge Walker to recuse himself, because he had an "interest that could be substantially affected by the outcome of the proceeding," and that 28 U.S.C. § 455(a) obligated him either to recuse himself or to disclose his potential conflict, because "his impartiality might reasonably be questioned." Chief Judge Ware, to whom this case was assigned

after Chief Judge Walker's retirement, denied the motion after receiving briefs and hearing argument.

The district court properly held that it had jurisdiction to hear and deny the motion under Fed.R.Civ.P. 62.1(a), that the motion was timely, and that Chief Judge Walker had no obligation to recuse himself under either § 455(b)(4) or § 455(a) or to disclose any potential conflict. As Chief Judge Ware explained, the fact that a judge "could be affected by the outcome of a proceeding[,] in the same way that other members of the general public would be affected, is not a basis for either recusal or disqualification under Section 455(b)(4)." *Perry v. Schwarzenegger,* 790 F.Supp.2d 1119, 1122 (N.D.Cal.2011); *see In re City of Houston,* 745 F.2d 925, 929-30 (5th Cir.1984) ("We recognize that 'an interest which a judge has in common with many others in a public matter is not sufficient to disqualify him.' "). Nor could it possibly be "reasonable to presume," for the purposes of § 455(a), "that a judge is incapable of making an impartial decision about the constitutionality of a law, solely because, as a citizen, the judge could be affected by the proceeding." 790 F.Supp.2d at 1122; *see United States v. Alabama,* 828 F.2d 1532, 1541-42 (11th Cir.1987). To hold otherwise would demonstrate a lack of respect for the integrity of our federal courts.

The denial of the motion to vacate was premised on Chief Judge Ware's finding that Chief Judge Walker was not obligated to recuse himself. "We review the district court's denial of a motion to vacate the judgment for an abuse of discretion." *Jeff D. v.*

Kempthorne, 365 F.3d 844, 850 (9th Cir.2004). Our standard for abuse of discretion requires us to (1) "look to whether the trial court identified and applied the correct legal rule to the relief requested"; and, if the trial court applied the correct legal rule, to (2) "look to whether the trial court's resolution . . . resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson,* 585 F.3d 1247, 1263 (9th Cir.2009) (en banc). Here, Chief Judge Ware did not incorrectly apply the law. He identified and applied § 455(b)(4) and § 455(a), the correct legal rules, as well as the relevant precedents. His application of the law, determining whether Chief Judge Walker was obligated to recuse himself, was discretionary. *See United States v. Johnson,* 610 F.3d 1138, 1147-48 (9th Cir.2010). His resolution of the issue on the basis of the facts was not illogical, implausible, or without support in inferences that may be drawn from the facts in the record. Thus, we affirm Chief Judge Ware's decision not to grant the motion to vacate.

VII

By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause. We hold Proposition 8 to be unconstitutional on this ground. We do not doubt the importance of the more general questions presented to us concerning the

rights of same-sex couples to marry, nor do we doubt that these questions will likely be resolved in other states, and for the nation as a whole, by other courts. For now, it suffices to conclude that the People of California may not, consistent with the Federal Constitution, add to their state constitution a provision that has no more practical effect than to strip gays and lesbians of their right to use the official designation that the State and society give to committed relationships, thereby adversely affecting the status and dignity of the members of a disfavored class. The judgment of the district court is

AFFIRMED.[27]

N.R. SMITH, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority's analysis and decisions in parts III and VI of its opinion, determining that (1) the Proponents have standing to bring this appeal; and (2) the Motion to Vacate the Judgment should be denied. Because I do not agree with the majority's analysis of other topics regarding the constitutionality of Proposition 8, I have chosen to write separately. Ultimately, I am not convinced that Proposition 8 is not rationally related to a legitimate governmental interest. I must therefore respectfully dissent.

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[27] The stay pending appeal issued by this court on August 16, 2010 remains in effect pending issuance of the mandate.

Before addressing the issues now presented before our panel, I want to emphasize a distinguishing point in my analysis from what may be anticipated by the reader. Similar to the California Supreme Court in its prior opinion concerning Proposition 8, our panel was not tasked with determining whether this constitutional amendment "is wise or sound *as a matter of policy* or whether we, as individuals, believe it *should* be a part of the California Constitution." *Strauss v. Horton,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48, 59 (2009). Our personal views regarding the political and sociological debate on marriage equality are irrelevant to our task. Instead, we are only asked to consider the constitutional validity of Proposition 8 under the federal Constitution. The California Supreme Court has already interpreted and applied "the principles and rules embodied in the California Constitution" to Proposition 8 and found it valid. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d 48.

I.

Proponents and their supporting amici (hereinafter Proponents) argue that the United States Supreme Court's summary dismissal in *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972) (mem.), "mandates reversal of the district court's ruling." According to Proponents, the claims raised here are the same as those rejected in *Baker,* and the claims are therefore foreclosed by that decision. The majority dispenses with *Baker* in a footnote. However, other federal courts have indicated that *Baker,* if it is

not controlling, at least stands for exercising "restraint" when it comes to addressing due process and equal protection challenges against laws prohibiting marriage by same-sex couples. *Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 870 (8th Cir.2006); *see also Wilson v. Ake,* 354 F.Supp.2d 1298, 1305 (M.D.Fla.2005) ("*Baker v. Nelson* is binding precedent upon this Court. . . ."). *But see In re Kandu,* 315 B.R. 123, 138 (Bankr.W.D.Wash.2004) (concluding that "*Baker* is not binding precedent on the issues presented" because the case centered on federal Defense of Marriage Act and because "doctrinal developments" indicated *Baker* was no longer binding). Because *Baker* is binding United States Supreme Court precedent and may foreclose Plaintiffs' claims, one must follow it or distinguish it.

A.

In *Baker v. Nelson,* two men were denied a marriage license by a Minnesota county clerk. 291 Minn. 310, 191 N.W.2d 185, 185 (1971). Because they were denied the license, the two men filed suit asking that the court force the clerk to grant the license. *Id.* In Minnesota Statutes c. 517, the Minnesota state legislature had codified that the state "d[id] not authorize marriage between persons of the same sex. . . ." *Id.* at 186. On appeal, the Minnesota Supreme Court addressed several issues, including whether the Minnesota statutes prohibiting marriage by same-sex couples denied the petitioners "the equal protection of the laws" as guaranteed by the Fourteenth Amendment.

Id. The Minnesota Supreme Court held that "[t]he equal protection clause of the Fourteenth Amendment . . . is not offended by the state's classification of persons authorized to marry." *Id.* at 187. On appeal to the United States Supreme Court, the Court summarily dismissed the appeal "for want of a substantial federal question." *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37.

Though not stated in the summary dismissal in *Baker,* the Supreme Court decision has long standing precedent supporting it. Throughout our nation's history, the States have had "the absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be credited. . . ." *Pennoyer v. Neff,* 95 U.S. 714, 734-35, 24 L.Ed. 565 (1878), *reaffirmed in Sosna v. Iowa,* 419 U.S. 393, 404, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

Maynard v. Hill, 125 U.S. 190, 205, 8 S.Ct. 723, 31 L.Ed. 654 (1888).

As Justice Stewart opined in his concurrence in *Zablocki v. Redhail,* a State

> may in many circumstances absolutely prohibit [marriage]. Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife.

434 U.S. 374, 392, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (Stewart, J., concurring).

The summary dismissal of an appeal for want of a substantial federal question is a decision on the merits. *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). "[U]nless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise. . . ." *Id.* (internal quotation marks omitted). "[L]ower courts are bound by summary decisions by [the Supreme] Court until such time as the Court informs (them) that (they) are not." *Id.* at 344-45, 95 S.Ct. 2281 (internal quotation marks omitted). "Summary . . . dismissals for want of a substantial federal question . . . reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily

decided by those actions." *Mandel v. Bradley,* 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977) (per curiam). Thus, "[a] summary disposition affirms only the judgment of the court below, and no more may be read into [the] action than was essential to sustain that judgment." *Ill. State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 182-83, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) (citation omitted). "Questions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred." *Id.* at 183, 99 S.Ct. 983 (citation omitted).

The jurisdictional statements presented to the United States Supreme Court in *Baker v. Nelson* were as follows:

> 1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
>
> 2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
>
> 3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

See In re Kandu, 315 B.R. at 137.

B.

Here, we must address whether the question before us involves "the precise issues presented and necessarily decided by" *Baker v. Nelson,* such that the Supreme Court's summary dismissal would have precedential effect here. Alternatively, the question before us could be one that "merely lurk[ed] in the record" of *Baker,* and the present case would not be resolved by the Supreme Court's summary dismissal.

In this case, the following issues were presented for review:

> 1. Whether [Proponents] have standing to appeal the district court's judgment.
>
> 2. Whether Proposition 8 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
>
> 3. Whether Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Plaintiff-Intervenor City and County of San Francisco (hereinafter San Francisco) presented the following additional issue for review:

> 1. Whether Proposition 8, a constitutional amendment adopted after a plebiscite campaign that played on fears and prejudices about lesbians and gay men, violates the Equal Protection Clause of the federal Constitution where its effect is to remove the honored title "marriage" but not the incidents of marriage from same-sex couples,

> and its purpose is to remove the taint that its supporters believed the inclusion of lesbian and gay couples worked on the institution of marriage.

The equal protection question raised in this case seems to be distinguishable from the precise issues presented and necessarily decided in *Baker,* especially when the equal protection issue is framed as San Francisco advocates.[1] The equal protection issue decided in *Baker* rested on whether Minnesota's "refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage . . . violates their rights

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[1] Whether prohibiting marriage by same-sex couples violates due process was an issue presented and decided in *Baker v. Nelson.* In this case, the district court determined that "plaintiffs seek to exercise their fundamental right to marry under the Due Process Clause," *Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 993 (N.D.Cal.2010), and that Proposition 8 violated the Due Process Clause, because it denied Plaintiffs this fundamental right and did not withstand strict scrutiny. *Id.* at 994-95. But in *Baker,* the Minnesota Supreme Court determined that prohibiting marriage by same-sex couples did not offend the Due Process Clause. 191 N.W.2d at 186-87. Because the United States Supreme Court "branded [that] question as unsubstantial" in its summary dismissal, the due process issue "remains so except when doctrinal developments indicate otherwise." *Hicks v. Miranda,* 422 U.S. at 344, 95 S.Ct. 2281 (internal quotation marks omitted). The United States Supreme Court cases following *Baker* do not suggest any such doctrinal developments have occurred. *See, e.g., Lawrence v. Texas,* 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("[This case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." (internal quotation marks omitted)).

under the equal protection clause. . . ." *In re Kandu,* 315 B.R. at 137. Here, San Francisco presents the issue of whether Proposition 8's effect of "remov[ing] the honored title 'marriage' but not the incident of marriage from same-sex couples" violates equal protection. This Proposition 8 issue may have "merely lurk[ed] in the record" of *Baker.* Unlike Minnesota, California granted same-sex couples rights to both the designation and the incidents of marriage, before withdrawing the right of access to the designation through Proposition 8. Therefore, the constitutionality of withdrawing from same-sex couples the right of access to the designation of marriage does not seem to be among the "specific challenges" raised in *Baker.* If so, though the precedential effect of *Baker v. Nelson* is not challenged by this decision, such precedent is distinguishable from the decision of the district court here.

II.

In deciding this case, one should be mindful that generally state governance over marriage is not challenged easily. However, while "marriage is a social relation subject to the State's police power," this does not mean that the State's "powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment." *Loving v. Virginia,* 388 U.S. 1, 7, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). A marriage regulation "containing racial classifications," such as the one at issue in *Loving,* is subject to "the very heavy burden of justification which the

Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9, 87 S.Ct. 1817. However, not "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." *Zablocki,* 434 U.S. at 386, 98 S.Ct. 673 (majority opinion). Proposition 8 does not involve such a suspect classification and therefore should not be analyzed under any heightened scrutiny, but we must still ask "whether there is any rational foundation for the discrimination[ ]. . . ." *See Loving,* 388 U.S. at 9, 87 S.Ct. 1817.

A.

The Plaintiffs, San Francisco, and their supporting amici (hereinafter Plaintiffs) challenge Proposition 8 under the Equal Protection Clause of the Fourteenth Amendment. However, because Proposition 8 is "a classification neither involving fundamental rights nor proceeding along suspect lines," *Heller v. Doe,* 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993), I do not address the application of strict scrutiny review to Proposition 8. Under strict scrutiny review, the government would need to establish that the classification is necessary to achieve a compelling governmental interest, and there must not be a less onerous available alternative. The United States Supreme Court has not recognized that the fundamental right to marry includes a fundamental right to gay marriage. *See Lawrence,* 539 U.S. at 578, 123 S.Ct. 2472. Gays and lesbians are not a suspect

or quasi-suspect class. *High Tech Gays v. Def. Indus. Sec. Clearance Office,* 895 F.2d 563, 573 (9th Cir.1990).

I also do not address intermediate scrutiny because Supreme Court precedent thus far has never held that sexual orientation is a "quasi-suspect classification." *See City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 441-42, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Under that standard of review, generally applied in illegitimacy and gender cases, the government would need to establish that the classification is substantially related to an important governmental interest. *See id.* at 441, 105 S.Ct. 3249.

Thus, Proposition 8 is subject to rational basis review rather than to any heightened scrutiny. *See id.* at 440-42, 105 S.Ct. 3249.

B.

"The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans,* 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Thus, when assessing the constitutionality of most government measures, we use rational basis review in an attempt "to reconcile the principle with the reality." *Id.* Under rational basis review, "we will uphold the legislative

classification so long as it bears a rational relation to some legitimate end." *Id.*

In equal protection analysis, rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller,* 509 U.S. at 319, 113 S.Ct. 2637 (internal quotation marks omitted). A classification "neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Id.* "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320, 113 S.Ct. 2637. The government is not required to "actually articulate at any time the purpose or rationale supporting its classification"; rather, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (internal quotation marks omitted).

Additionally, the government "has no obligation to provide evidence to sustain the rationality of a statutory classification." *Id.* The measure at issue "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* (internal quotation marks omitted). "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. . . ." *Id.* (internal quotation marks omitted). Further, a legislature's generalizations may pass rational basis review "even

when there is an imperfect fit between means and ends." *Id.* at 321, 113 S.Ct. 2637. In sum, the measure need only have "arguable" assumptions underlying its "plausible rationales" to survive constitutional challenge. *Id.* at 333, 113 S.Ct. 2637.

However, "even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Id.* at 321, 113 S.Ct. 2637. Also, some interests are not legitimate governmental interests. *E.g., Romer,* 517 U.S. at 634, 116 S.Ct. 1620 (stating that "animosity toward the class of persons affected" is not a legitimate governmental interest); *Cleburne,* 473 U.S. at 448, 105 S.Ct. 3249 (stating that "mere negative attitudes, or fear" are not legitimate governmental interests); *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973) (stating that a "bare . . . desire to harm a politically unpopular group" is not a legitimate governmental interest).

As a general rule, states may use their police power to regulate the "morals" of their population. *See, e.g., Berman v. Parker,* 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954). In his dissent in *Lawrence,* 539 U.S. at 589-91, 123 S.Ct. 2472 (Scalia, J., dissenting), Justice Scalia argued that "[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation." *Id.* at 589, 123 S.Ct. 2472. He then suggested that the Supreme Court has relied on morality as the

basis for its decision making and states, "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of validation of laws based on moral choices." *Id.* at 590, 123 S.Ct. 2472.

However, Justice O'Connor articulated a different perspective in determining whether moral disapproval may serve as a rational basis for equal protection. She outlined that moral disapproval is not a legitimate state interest to justify, *by itself,* a statute that bans homosexual conduct. She stated that "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* at 582, 123 S.Ct. 2472 (O'Connor, J., concurring). She continued: "Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.* The *Lawrence* majority opinion seems to have implicitly agreed with Justice O'Connor, when it stated that a court's "obligation is to define the liberty of all, not to mandate its own moral code." *Id.* at 559, 123 S.Ct. 2472 (majority opinion) (internal quotation mark omitted).

Therefore, such interests (*e.g.,* animus, negative attitudes, fear, a bare desire to harm, and moral disapproval) alone will not support the constitutionality of a measure, because the Equal Protection Clause

does not permit a "status-based enactment divorced from any factual context from which [the courts] could discern a relationship to legitimate state interests," or a "classification of persons undertaken for its own sake. . . ." *Romer,* 517 U.S. at 635, 116 S.Ct. 1620.

III.

The majority concludes that "*Romer* governs our analysis notwithstanding the differences between Amendment 2 and Proposition 8," because of the similarities between the measures at issue in *Romer* and in the present case. However, the differences between Amendment 2 and Proposition 8 indicate that *Romer* does not directly control our analysis of the constitutionality of Proposition 8.

Before comparing Amendment 2 to Proposition 8, I want to attempt to clarify the extent of the Plaintiffs' interest asserted here. One must understand the unique manner in which California defines this interest. Because the California Supreme Court defined and clarified that interest in its *Strauss v. Horton* opinion, I quote liberally from it.

Proposition 8 "properly must be understood as having a considerably narrower scope and more limited effect" than what might be the case in other states. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61. "Proposition 8 does not *entirely repeal or abrogate* the aspect of a same-sex couple's state constitutional right to . . . choose one's life partner and enter with that person into a committed, officially recognized,

and protected family relationship that enjoys all of the constitutionally based incidents of marriage." *Id.* (internal quotation marks omitted).

> Nor does Proposition 8 *fundamentally alter* the meaning and substance of state constitutional equal protection principles. . . . Instead, the measure carves out a narrow and limited exception to these state constitutional rights, reserving the official *designation* of the term "marriage" for the union of opposite-sex couples as a matter of state constitutional law, but leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws.

Id.

Further, the California Supreme Court continued, "as a qualitative matter, the act of limiting access to the designation of marriage to opposite-sex couples [through Proposition 8] does not have a substantial or, indeed, even a minimal effect on the *governmental plan or framework of California* that existed prior to the amendment." *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 62.

However, the California Supreme Court was also quick to point out that this differentiation did not diminish or minimize "the significance of the official designation of 'marriage,'" which they characterized

as "a vital factor" in their prior decision holding that failing to provide access to this designation to same-sex couples "impinged upon the privacy and due process rights of same-sex couples and violated those couples' right to the equal protection of the laws guaranteed by the California Constitution." *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 59, 61.

Therefore, "Proposition 8 reasonably must be interpreted in a limited fashion as eliminating only the right of same-sex couples to equal access to the designation of marriage, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family relationship." *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 76.

> Accordingly, although Proposition 8 eliminates the ability of same-sex couples to enter into an official relationship designated "marriage," in all other respects those couples continue to possess, under the state constitutional privacy and due process clauses, "the core set of basic *substantive* legal rights and attributes traditionally associated with marriage," including, "most fundamentally, the opportunity of an individual to establish – with the person with whom the individual has chose to share his or her life – an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage." Like opposite-sex couples, same-sex couples enjoy this protection not as a matter

> of legislative grace, but of constitutional right.

Id., 93 Cal.Rptr.3d 591, 207 P.3d at 77 (citation omitted).

A.

In *Romer,* Colorado voters adopted Amendment 2 to the State Constitution, which "prohibits all legislative, executive, or judicial action at any level of state or local government designed to protect . . . gays and lesbians." 517 U.S. at 624, 116 S.Ct. 1620. Amendment 2 was passed in response to municipal ordinances enacted in various Colorado cities that protected "persons discriminated against by reason of their sexual orientation." *Id.* The Supreme Court examined Amendment 2 under rational basis review, where "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* at 631, 116 S.Ct. 1620. The Supreme Court held that Amendment 2 failed rational basis review for two reasons. *Id.* at 632, 116 S.Ct. 1620. "First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation." *Id.* "Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class if affects; it

lacks a rational relationship to legitimate state interests." *Id.*

B.

There are several ways to distinguish *Romer* from the present case. First, in *Romer,* the Supreme Court stated that "[t]he change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws." *Id.* at 627, 116 S.Ct. 1620. Here, "Proposition 8 reasonably must be interpreted in a limited fashion as eliminating only the right of same-sex couples to equal access to the designation of marriage, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family relationship." *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 76. Thus, *Romer* is inapposite, because Proposition 8 eliminates the right of access to the designation of marriage from same-sex couples, rather than working a far reaching change in their legal status.

Second, 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." *Romer,* 517 U.S. at 632, 116 S.Ct. 1620. Again, Proposition 8 "carves out a narrow and limited exception to [the] state constitutional rights" of privacy and due process. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61. Proposition 8

therefore lacks the "sheer breadth" that prompted the Supreme Court to raise the inference of animus in *Romer*.

The effect of animus is also unclear. In *Romer,* the Supreme Court stated that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity towards the class of persons affected." 517 U.S. at 634, 116 S.Ct. 1620. The Supreme Court indicated that Amendment 2 was constitutionally invalid, because its only purpose was animus; Amendment 2 was not "directed to any identifiable legitimate purpose or discrete objective." *Id.* at 635, 116 S.Ct. 1620. In short, *Romer* was a case where the only basis for the measure at issue was animus. However, in a case where the measure at issue was prompted both by animus and by some independent legitimate purpose, the measure may still be constitutionally valid. The Supreme Court has stated that while "negative attitudes," "fear" or other biases "may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make." *Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 367, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (discussing *Cleburne,* 473 U.S. at 448, 105 S.Ct. 3249). If "animus" is one such bias, its presence alone may not make Proposition 8 invalid if the measure also rationally relates to a legitimate governmental interest.

Finally, gays and lesbians were burdened by Amendment 2, because it "operate[d] to repeal and forbid all laws or policies providing specific protection

for gays or lesbians from discrimination by every level of Colorado government." *Romer,* 517 U.S. at 629, 116 S.Ct. 1620. In contrast, "although Proposition 8 eliminates the ability of same-sex couples to enter into an official relationship designated 'marriage,' in all other respects those couples continue to possess, under the state constitutional privacy and due process clauses, the core set of basic *substantive* legal rights and attributes traditionally associated with marriage. . . ." *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 77 (internal quotation marks omitted). Put otherwise, Proposition 8 does not burden gays and lesbians to the same extent Amendment 2 burdened gays and lesbians in Colorado.

C.

Proponents argue that the fact that Proposition 8 withdrew from same-sex couples the existing right of access to the designation of marriage should be significant in our constitutional analysis. However, Supreme Court equal protection cases involving challenges to measures withdrawing an existing right do not indicate that the withdrawal should affect our analysis. Instead, it seems that the court has upheld legislation that withdraws, rather than reserves, some legal right. *E.g., U.S. R.R. Ret. Bd. v. Fritz,* 449 U.S. 166, 176-77, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) (applying "traditional" principles of rational basis review to Congress's determination "that some of those who in the past received full windfall benefits would not continue to do so"); *City of New Orleans v.*

Dukes, 427 U.S. 297, 303-05, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (per curiam) (concluding that city's elimination of rights of some pushcart food vendors, but not others, was "not constitutionally impermissible"). In fact, in its decision in *Romer,* the Supreme Court does not base its decision on this contention. Rather, it mentioned withdrawing specific legal protections from gays and lesbians only in the context of referring to the irrational targeting of that group when compared to the sweeping change Amendment 2 created in the law.[2] *Romer,* 517 U.S. at 627, 116 S.Ct. 1620.

D.

The above differences between Amendment 2 and Proposition 8 indicate that *Romer* does not directly

[2] However, while the withdrawal of a right may not be analytically significant for rational basis review, it may still be factually significant. For example, the fact that Proposition 8 involves the withdrawal of an existing right and not the extension of a previously reserved right suggests that *Johnson v. Robison,* 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), is inapposite to the present case. In *Johnson,* the Supreme Court declared that "[w]hen . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." *Id.* at 383, 94 S.Ct. 1160. As the majority argues, the rule from *Johnson* appears to be inapplicable here, because Proposition 8 involves the withdrawal from same-sex couples of the existing right to access the designation of marriage, and not the addition of same-sex couples to the group previously reserved the right.

control here. In *Romer,* the Supreme Court found that animus alone was the purpose behind Amendment 2. Here, the majority backs into its inference of animus, first determining that all other bases for Proposition 8 are constitutionally invalid. Assuming animus or moral disapproval were one of the purposes of Proposition 8, the measure would still survive rational basis review if there were also a valid rational basis behind Proposition 8. Only if there were no other basis would Proposition 8 fail rational basis review. Thus, our task is to determine whether Proposition 8 rationally relates to *any* independent legitimate governmental interest.

IV.

In our case, Proponents argue that Proposition 8, defining marriage as the union of one man and one woman, is rationally related to a legitimate governmental interest for several reasons. Some of those reasons have already been discussed in the majority opinion and need no further discussion here. However, two of those reasons deserve more discussion, because they have been credited by other courts: (1) a responsible procreation theory, justifying the inducement of marital recognition only for opposite-sex couples, because it "steers procreation into marriage" because opposite-sex couples are the only couples who can procreate children accidentally or irresponsibly; and (2) an optimal parenting theory, justifying the inducement of marital recognition only for opposite-sex couples, because the family structure of two

committed biological parents – one man and one woman – is the optimal partnership for raising children. *See, e.g., Citizens for Equal Protection,* 455 F.3d at 867-68.

A.

Proponents argue that Proposition 8, defining marriage as the union of one man and one woman, preserves the fundamental and historical purposes of marriage. They argue that, if the definition of marriage between a man and a woman is changed, it would fundamentally redefine the term from its original and historical procreative purpose. This shift in purpose would weaken society's perception of the importance of entering into marriage to have children, which would increase the likelihood that couples would choose to cohabitate rather than to get married. They also argue that irresponsible procreation, by accident or willfully in a cohabitation relationship, will result in less stable circumstances for children and that same-sex couples do not present this threat of irresponsible procreation. They argue that, in the case of unintended pregnancies, the question is not whether the child will be raised by two opposite-sex parents, but rather whether it will be raised, on the one hand by two parents, or on the other hand by its mother alone (often with the assistance of the state). "Proposition 8 seeks to channel potentially procreative conduct into relationships where that conduct is likely to further, rather than harm, society's interest in responsible procreation and childrearing."

Proponents also argue the "optimal parenting" rationale serves as a rational basis for Proposition 8. The optimal parenting rationale posits that Proposition 8 promotes the optimal setting for the responsible raising and care of children-by their biological parents in a stable marriage relationship. Proponents offer many judicial decisions and secondary authorities supporting both rationales.

In sum, Proponents argue that Proposition 8 is rationally related to legitimate governmental interests.

B.

The first requirement of rational basis review is that there must be some conceivable legitimate governmental interest for the measure at issue.[3]

1.

The California Supreme Court indicated that responsible procreation is a legitimate governmental interest:

> Whether or not the state's interest in encouraging responsible procreation properly can be viewed as a reasonably conceivable justification for the statutory limitation of

[3] This requirement is easily met, because "[v]irtually any goal that is not forbidden by the Constitution will be deemed sufficient to meet the rational basis test." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 698 (4th ed.2011).

> marriage to a man and a woman for purposes of the rational basis equal protection standard, this interest clearly does not provide an appropriate basis for defining or limiting the scope of the constitutional right to marry. . . . *[A]lthough the state undeniably has a legitimate interest in promoting "responsible procreation,"* that interest cannot be viewed as a valid basis for defining or limiting the class of persons who may claim the protection of the fundamental constitutional right to marry.

In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 432 (2008) (emphasis added), *superseded by constitutional amendment as stated in Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d 48.

2.

With regard to the optimal parenting rationale, the California Supreme Court stated the following about "the state's interest in fostering a favorable environment for the procreation and raising of children":

> [A]lthough promoting and facilitating a stable environment for the procreation and raising of children is unquestionably one of the vitally important purposes underlying the institution of marriage and the constitutional right to marry, past cases make clear that this right is not confined to, or restrictively defined by, that purpose alone. As noted above, our past cases have recognized

> that the right to marry is the right to enter into a relationship that is the center of the personal affections that ennoble and enrich human life – a relationship that is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime. The personal enrichment afforded by the right to marry may be obtained by a couple whether or not they choose to have children, and the right to marry never has been limited to those who plan or desire to have children. . . . [T]he state constitutional right to marry . . . cannot properly be defined by or limited to the state's interest in fostering a favorable environment for the procreation and raising of children.

Marriage Cases, 76 Cal.Rptr.3d 683, 183 P.3d at 432 (citations and internal quotation marks omitted). Thus, the California Supreme Court discussed "the state's interest in fostering a favorable environment for the protection and raising of children" without using the "legitimate interest" and "for the purposes of the rational basis equal protection standard" language used to discuss "responsible procreation." *See id.*

a.

Plaintiffs argue that the optimal parenting rationale cannot be a legitimate governmental interest because same-sex couples in domestic partnerships have all the substantive parenting rights opposite-sex

couples in marriages enjoy. Additionally, California family law does not give any official preferences to opposite-sex parents.[4] Proposition 8 did not change this factual situation, because it "leav[es] undisturbed . . . a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws." *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61. "This state's current policies and conduct regarding homosexuality . . . recognize that gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children." *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 428.

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[4] For example, "[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses." Cal. Fam.Code § 297.5(d). Also, "[i]t is the policy of this state that all persons engaged in providing care and services to foster children . . . shall not be subjected to discrimination or harassment on the basis of their clients' or their own actual or perceived . . . sexual orientation. . . ." Cal. Welf. & Inst.Code § 16013(a). Further, "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Cal. Fam.Code § 7602. This legal structure is reinforced by the equal status of gays and lesbians in other areas of California's laws, such as in antidiscrimination protections regarding business establishments. *E.g.,* Cal. Civ.Code § 51(b) ("All persons within the jurisdiction of this state are free and equal, and no matter what their . . . sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.").

The parties argue about whether this analysis subjects Proposition 8 to heightened scrutiny rather than rational basis review. In my view, while Plaintiffs may give a correct accounting of California law, it does not necessarily follow that the optimal parenting rationale is an *illegitimate* governmental interest, because it contradicts existing laws on parenting and the family. For example, a posited reason offered by one lawmaking body after being rejected by another lawmaking body can "provide[ ] a conceivable basis" for a measure. *FCC v. Beach Comm'ns, Inc.,* 508 U.S. 307, 318, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). In *Beach Communications,* the Supreme Court accepted a posited reason for a federal agency regulation, even though Congress had previously rejected that purpose and the regulation presented a conflict in the statutory scheme.[5] *Id.* Thus, even if California's legislature previously rejected the optimal parenting rationale in its parenting laws (and Proposition 8 is inconsistent with its statutory scheme), that does not prevent the people of California from adopting Proposition 8 under that rationale.

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[5] *See also City of Dallas v. Stanglin,* 490 U.S. 19, 26-28, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989) (stating that a city could rationally impose an age and time restriction on dance halls, even if it had not imposed similar restrictions on other premises where teenagers and adults congregated together; arguments focusing on the inconsistency between the classification and the "interests and objectives" of the city "misapprehend[ed] the nature of rational-basis scrutiny").

b.

In *Heller,* the Supreme Court stated that "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." 509 U.S. at 320, 113 S.Ct. 2637 (citations omitted). However, the Supreme Court went on to state that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Id.* at 321, 113 S.Ct. 2637.

Under rational basis review, the challenger has the burden to "negative every conceivable basis which might support" the measure. *Id.* at 320, 113 S.Ct. 2637. In light of this burden, Plaintiffs have offered many secondary authorities to support their argument that the optimal parenting rationale cannot be a legitimate governmental interest. "Against [a] background of more than 100 peer-reviewed studies, the State of California could not reasonably accept as a true – or even debatable – statement of fact Proponents' view that only opposite-sex couples can create an 'ideal' childrearing environment." Thus, "[i]t is not an end that the State rationally could adopt as its own and therefore cannot sustain Proposition 8."

Although Proponents were not required to put on any evidence under rational basis review, they also produced evidence. They argue that their evidence shows that married biological parents are the optimal parenting structure. Further, they argue "Plaintiffs fail to cite to a single study comparing outcomes for

the children of married biological parents and those of same-sex parents. Thus, Plaintiffs have failed to undermine, let alone remove 'from debate,' the studies showing that married biological parents provide the best structure for raising children."

After review, both sides offer evidence in support of their views on whether the optimal parenting rationale is a legitimate governmental interest. Both sides also offer evidence to undermine the evidence presented by their opponents. However, the standard only requires that the optimal parenting rationale be based on "rational speculation" about married biological parents being the best for children. *Heller,* 509 U.S. at 320, 113 S.Ct. 2637. Considering "the question is at least debatable," *id.* at 326, 113 S.Ct. 2637 (internal quotation marks omitted), the optimal parenting rationale could conceivably be a legitimate governmental interest.[6]

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[6] In *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, Justice O'Connor relied on the Fourteenth Amendment's Equal Protection Clause to invalidate a state law criminalizing homosexual sodomy. In her concurring opinion, she stated:

> That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of

(Continued on following page)

C.

Having a conceivable legitimate governmental interest is, alone, not sufficient for rational basis review. To survive rational basis review, a measure must also have a rational relationship to the posited legitimate governmental interest. In determining whether there is a rational relationship, one should bear in mind "the nature of rational-basis scrutiny, which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause."[7] *Dallas,* 490 U.S. at 26, 109 S.Ct. 1591.

1.

The Eighth Circuit credited the responsible procreation and optimal parenting rationales in *Citizens for Equal Protection,* where Nebraska had enacted a constitutional amendment prohibiting recognition of marriages by same-sex couples and other official same-sex relationships:

> The State argues that the many laws defining marriage as the union of one man and

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> marriage beyond mere moral disapproval of an excluded group.

Id. at 585, 123 S.Ct. 2472 (O'Connor, J., concurring).

[7] As explained above, this requirement is not a high bar. Indeed, "the classification at issue need not be correlated in fact, even in relation to an assumed purpose for which there need not be any evidence." Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships,* 86 Wash. L.Rev. 281, 290 (2011).

> one woman and extending a variety of benefits to married couples are rationally related to the government interest in "steering procreation into marriage." By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws "encourage procreation to take place within the socially recognized unit that is best situated for raising children." . . . The argument is based in part on the traditional notion that two committed heterosexuals are the optimal partnership for raising children, which modern-day homosexual parents understandably decry. But it is also based on a "responsible procreation" theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot. Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification "lacks a rational relationship to legitimate state interests."

455 F.3d at 867-68 (citations omitted).

The factual context in California is distinguishable from the one the Eighth Circuit faced in Nebraska. Unlike the Nebraska constitutional amendment, which prohibited the recognition of both marriages by same-sex couples and other same-sex relationships, Proposition 8 left California's existing domestic partnership laws intact. In California, same-sex couples in domestic partnerships still enjoy the same substantive

rights and benefits as opposite-sex couples in marriages. Thus, it cannot be said that Proposition 8 "confer [s] the inducements of marital . . . benefits on opposite-sex couples . . . , but not on same-sex couples. . . ." *See id.* at 867. However, this distinction may not be dispositive, because the Eighth Circuit was considering both the substantive legal benefits as well as the designation of marriage.

2.

That leaves the question of whether withdrawing from same-sex couples the right to access the designation of marriage, alone, rationally relates to the responsible procreation and optimal parenting rationales.

a.

Regarding the responsible procreation rationale, Plaintiffs argue that Proponents suggest no reason to believe prohibiting same-sex couples from entering relationships designated "marriage" will make it more likely that opposite-sex couples in California will marry. Put differently, Plaintiffs argue that, because Proposition 8 does not bestow an honor on opposite-sex couples but instead withdraws an honor from same-sex couples, the responsible procreation rationale could be credited only if it is rational to believe that opposite-sex couples will be less likely to raise children in a marital family if the stature of marriage is also available to same-sex couples.

Further, Plaintiffs argue that Proponents' failure to describe how Proposition 8 rationally relates to the responsible procreation rationale indicates that the rationale lacks the required "footing in the realities of the subject addressed by the legislation." *Heller,* 509 U.S. at 321, 113 S.Ct. 2637.

In response, Proponents argue that, "[b]ecause only sexual relationships between men and woman can produce children, such relationships have the potential to further – or harm – this interest in a way that other types of relationships do not." Thus, "it follows that the commonsense distinction that our law has always drawn between opposite-sex couples, on the one hand, and all other types of relationships – including same-sex couples – on the other hand, plainly bears a rational relationship to the government interest in steering procreation into marriage."

However, Proposition 8 is not a "distinction that [California] law has always drawn," because it "establishes a new substantive state constitutional rule that became effective once Proposition 8 was approved by the voters." *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 115. Also,

> [n]one of the past cases discussing the right to marry – and identifying this right as one of the fundamental elements of personal autonomy and liberty protected by our Constitution – contains any suggestion that the constitutional right to marry is possessed only by individuals who are at risk of producing children accidentally, or implies that this

> constitutional right is not equally important for and guaranteed to responsible individuals who can be counted upon to take appropriate precautions in planning for parenthood.

Marriage Cases, 76 Cal.Rptr.3d 683, 183 P.3d at 432. In this particular context, the fact that Proposition 8 established a new rule, instead of continuing a "distinction that [California] law has always drawn," weakens Proponents' argument that Proposition 8 "plainly bears a rational relationship" to the responsible procreation rationale.

b.

Regarding the optimal parenting rationale, Plaintiffs argue that, because Proposition 8 does not change California's substantive laws governing child-raising, procreation, or the family structure, Proposition 8 cannot be rationally related to the optimal parenting rationale. To channel more childrearing into families led by married biological parents, they argue that Proposition 8 would have had to change those laws somehow. Rather, Proposition 8 only singles out gays and lesbians, as a group, as inferior.

Proponents contend that this argument subjects Proposition 8 to heightened scrutiny review, and that the standard for rational basis review does not require the classification be substantially related to an important governmental interest. Instead, for rational basis review, the classification must only (1) serve some conceivable governmental interest; (2) have a

plausible reason for the enactment; (3) remain debatable; and (4) not be totally arbitrary. Their argument continues that, in California's unique context, Proposition 8 only deals with the designation of the term "marriage" but leaves undisturbed all of the other significant substantive aspects of recognized and protected family relationships. Proponents' theory only increases the likelihood that children are born and raised in a family structure of biological parents by encouraging such parents to marry; the designation of marriage for only that union would make it more likely that opposite-sex couples will want to enter into marriage and then subsequently raise their own biological offspring, rather than implying that any other union could not be good parents. Proponents claim this interest does not depend on any judgment about the relative parenting capabilities of opposite-sex and same-sex couples; it only confirms the instinctive, commonsense belief that married biological parents provide the optimal environment for raising children. Lastly, they argue there can be no requirement of narrow tailoring where there would be a perfect fit with the governmental interest and the law. If the state denied same-sex couples significant benefits under the law, the law would be more likely to fail equal protection by denying important government rights, thus increasing the burden of the test.

3.

"[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller,* 509 U.S. at 321, 113 S.Ct. 2637. Here, the people of California might have believed that withdrawing from same-sex couples the right to access the designation of marriage would, arguably, further the interests in promoting responsible procreation and optimal parenting. "The assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the congressional choice from constitutional challenge." *Beach Commc'ns,* 508 U.S. at 320, 113 S.Ct. 2096 (alteration in original).

Plaintiffs argue that Proposition 8 could only advance the offered rationales through encouraging opposite-sex couples to marry, who otherwise would not marry because they disapprove of same-sex couples having the right of access to the designation of marriage and the stature that comes with the designation. Therefore, Proposition 8 impermissibly gives effect to those "private biases." *See Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). However, Supreme Court precedent does not suggest that a measure is invalid under rational basis review simply because the *means* by which its

purpose is accomplished rest on such biases.[8] Rather, precedent indicates that such biases invalidate a measure if they are the only conceivable *ends* for the measure. *See, e.g., Romer,* 517 U.S. at 635, 116 S.Ct. 1620. Again, in determining whether there is a rational relationship, one must bear in mind that rational basis review "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas,* 490 U.S. at 26, 109 S.Ct. 1591. Thus, I cannot conclude that Proposition 8 is "wholly irrelevant" to any legitimate governmental interests. *Heller,* 509 U.S. at 324, 113 S.Ct. 2637 (internal quotation marks omitted).

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[8] In *Palmore,* the Supreme Court stated that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 466 U.S. at 433, 104 S.Ct. 1879. Even if *Palmore* indicates that giving effect to private biases through *means* is illegitimate, it is a case where "acknowledged racial prejudice [was] invoked to justify [a] racial classification[ ]." *Id.* Thus, the classification came under strict scrutiny. *Id.* at 432-33, 104 S.Ct. 1879; *see also City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 520, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (Scalia, J., concurring in the judgment) ("The benign purpose of compensating for social disadvantages . . . can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected.").

While the Supreme Court quoted *Palmore* in *Cleburne,* it did so in the context of rejecting "mere negative attitudes" or "fear" as *ends.* 473 U.S. at 448, 105 S.Ct. 3249.

V.

Given the presumption of validity accorded Proposition 8 for rational basis review, I am not convinced that Proposition 8 lacks a rational relationship to legitimate state interests. Precedent evidences extreme judicial restraint in applying rational basis review to equal protection cases.

> Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function. . . . [R]estraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing. Defining the class of persons subject . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Beach Commc'ns, 508 U.S. at 315-16, 113 S.Ct. 2096 (alteration, citations, and internal quotation marks omitted). Thus, the judiciary faces a conspicuous limit on our judicial role in applying equal protection to legislative enactments, because

> [t]he Court has held that the Fourteenth Amendment permits States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only

> if classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). A law must be upheld unless the government's judgment "is 'clearly wrong, a display of arbitrary power, [or] not an exercise of judgment.'" *Mathews v. DeCastro,* 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976).

Applying rational basis review in these circumstances also requires such restraint. As the Eighth Circuit said, in *Citizens for Equal Protection,* 455 F.3d at 870:

> In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution. Indeed, in *Baker v. Nelson,* . . . when faced with a Fourteenth Amendment challenge to a decision by the Supreme Court of Minnesota denying a marriage license to a same-sex couple, the United States Supreme Court

dismissed "for want of a *substantial* federal question." There is good reason for this restraint.

704 F.Supp.2d 921

United States District Court, N.D. California.

Kristin M. PERRY, Sandra B. Stier,
Paul T. Katami and Jeffrey J. Zarrillo, Plaintiffs,
City and County of San Francisco,
Plaintiff-Intervenor,
v.
Arnold SCHWARZENEGGER, in his official capacity as Governor of California; Edmund G. Brown Jr., in his official capacity as Attorney General of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as Clerk-Recorder of the County of Alameda; and Dean C. Logan, in his official capacity as Registrar-Recorder/ County Clerk for the County of Los Angeles,
Defendants,
Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, Mark A Jansson And Protectmarriage.Com – Yes On 8, A Project of California Renewal, as official proponents of Proposition 8,
Defendant-Intervenors.

No. C 09-2292 VRW. | Aug. 4, 2010.

David Boies, Rosanne C. Baxter, Boies Schiller & Flexner LLP, Armonk, NY, Theodore B. Olson, Amir Cameron Tayrani, Christopher Dean Dusseault, Enrique Antonio Monagas, Matthew Dempsey McGill, Gibson Dunn & Crutcher LLP, Washington, DC, Ethan

D. Dettmer, Theane Evangelis Kapur, Theodore J. Boutrous, Jr., Gibson Dunn & Crutcher LLP, Jennifer Carol Pizer, Jon Warren Davidson, Tara Lynn Borelli, Lambda Legal Defense and Education Fund, Inc., Los Angeles, CA, Jeremy Michael Goldman, Theodore Hideyuki Uno, Boies, Schiller & Flexner LLP, Oakland, CA, Sarah Elizabeth Piepmeier, Gibson, Dunn & Crutcher LLP, Alan Lawrence Schlosser, James Dixon Esseks, Matthew Albert Coles, ACLU Foundation of Northern California, Inc., Christopher Francis Stoll, Ilona Margaret Turner, Shannon Minter, National Ctr for Lesbian Rights, San Francisco, CA, Charles Salvatore Limandri, Law Offices Of Charles S. Limandri, Rancho Santa Fe, CA, for Plaintiffs.

Kenneth C. Mennemeier, Andrew Walter Stroud, Mennemeier Glassman & Stroud LLP, Gordon Bruce Burns, Attorney Generals Office, Dept. of Justice, Sacramento, CA, Daniel J. Powell, Department of Justice, Attorney General's Office, Tamar Pachter, Office of the California Attorney General, San Francisco, CA, Claude Franklin Kolm, Manuel Francisco Martinez, Office of the County Counsel, Oakland, CA, Judy Whitehurst, Office of County Counsel, Los Angeles, CA, for Defendants.

David E. Bunim, Haas & Najarian, San Francisco, CA, Charles J. Cooper, David H. Thompson, Howard C. Nielson, Jr., Jesse Michael Panuccio, Michael W. Kirk, Peter A. Patterson, Cooper & Kirk PLLC, Austin R. Nimocks, Jordan W. Lorence, Alliance Defense Fund, Washington, DC, Brian W. Raum, Alliance Defense Fund, James A. Campbell, Scottsdale, AZ,

Jennifer Lynn Monk, Robert Henry Tyler, Advocates for Faith and Freedom, Murrieta, CA, for Defendant-Intervenors.

Opinion

PRETRIAL PROCEEDINGS AND TRIAL EVIDENCE

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Plaintiffs challenge a November 2008 voter-enacted amendment to the California Constitution ("Proposition 8" or "Prop 8"). Cal. Const. Art. I, § 7.5. In its entirety, Proposition 8 provides: "Only marriage between a man and a woman is valid or recognized in California." Plaintiffs allege that Proposition 8 deprives them of due process and of equal protection of the laws contrary to the Fourteenth Amendment and that its enforcement by state officials violates 42 USC § 1983.

Plaintiffs are two couples. Kristin Perry and Sandra Stier reside in Berkeley, California and raise four children together. Jeffrey Zarrillo and Paul Katami reside in Burbank, California. Plaintiffs seek to marry their partners and have been denied marriage licenses by their respective county authorities on the basis of Proposition 8. No party contended, and no evidence at trial suggested, that the county authorities had any ground to deny marriage licenses to plaintiffs other than Proposition 8.

Having considered the trial evidence and the arguments of counsel, the court pursuant to FRCP 52(a) finds that Proposition 8 is unconstitutional and that its enforcement must be enjoined.

BACKGROUND TO PROPOSITION 8

In November 2000, the voters of California adopted Proposition 22 through the state's initiative process. Entitled the California Defense of Marriage Act, Proposition 22 amended the state's Family Code by adding the following language: "Only marriage between a man and a woman is valid or recognized in California." Cal. Family Code § 308.5. This amendment further codified the existing definition of marriage as "a relationship between a man and a woman." *In re Marriage Cases,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 407 (2008).

In February 2004, the mayor of San Francisco instructed county officials to issue marriage licenses to same-sex couples. The following month, the California

Supreme Court ordered San Francisco to stop issuing such licenses and later nullified the marriage licenses that same-sex couples had received. See *Lockyer v. City & County of San Francisco,* 33 Cal.4th 1055, 17 Cal.Rptr.3d 225, 95 P.3d 459 (2004). The court expressly avoided addressing whether Proposition 22 violated the California Constitution.

Shortly thereafter, San Francisco and various other parties filed state court actions challenging or defending California's exclusion of same-sex couples from marriage under the state constitution. These actions were consolidated in San Francisco superior court; the presiding judge determined that, as a matter of law, California's bar against marriage by same-sex couples violated the equal protection guarantee of Article I Section 7 of the California Constitution. *In re Coordination Proceeding, Special Title [Rule 1550 (c)],* 2005 WL 583129 (March 14, 2005). The court of appeal reversed, and the California Supreme Court granted review. In May 2008, the California Supreme Court invalidated Proposition 22 and held that all California counties were required to issue marriage licenses to same-sex couples. See *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d 384. From June 17, 2008 until the passage of Proposition 8 in November of that year, San Francisco and other California counties issued approximately 18,000 marriage licenses to same-sex couples.

After the November 2008 election, opponents of Proposition 8 challenged the initiative through an original writ of mandate in the California Supreme

Court as violating the rules for amending the California Constitution and on other grounds; the California Supreme Court upheld Proposition 8 against those challenges. *Strauss v. Horton,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (2009). *Strauss* leaves undisturbed the 18,000 marriages of same-sex couples performed in the four and a half months between the decision in *In re Marriage Cases* and the passage of Proposition 8. Since Proposition 8 passed, no same-sex couple has been permitted to marry in California.

PROCEDURAL HISTORY OF THIS ACTION

Plaintiffs challenge the constitutionality of Proposition 8 under the Fourteenth Amendment, an issue not raised during any prior state court proceeding. Plaintiffs filed their complaint on May 22, 2009, naming as defendants in their official capacities California's Governor, Attorney General and Director and Deputy Director of Public Health and the Alameda County Clerk-Recorder and the Los Angeles County Registrar-Recorder/County Clerk (collectively "the government defendants"). Doc. # 1. With the exception of the Attorney General, who concedes that Proposition 8 is unconstitutional, Doc. # 39, the government defendants refused to take a position on the merits of plaintiffs' claims and declined to defend Proposition 8. Doc. # 42 (Alameda County), Doc. # 41 (Los Angeles County), Doc. # 46 (Governor and Department of Public Health officials).

Defendant-intervenors, the official proponents of Proposition 8 under California election law ("proponents"), were granted leave in July 2009 to intervene to defend the constitutionality of Proposition 8. Doc. # 76. On January 8, 2010, Hak-Shing William Tam, an official proponent and defendant-intervenor, moved to withdraw as a defendant, Doc. # 369; Tam's motion is denied for the reasons stated in a separate order filed herewith. Plaintiff-intervenor City and County of San Francisco ("CCSF" or "San Francisco") was granted leave to intervene in August 2009. Doc. # 160 (minute entry).

The court denied plaintiffs' motion for a preliminary injunction on July 2, 2009, Doc. # 77 (minute entry), and denied proponents' motion for summary judgment on October 14, 2009, Doc. # 226 (minute entry). Proponents moved to realign the Attorney General as a plaintiff; the motion was denied on December 23, 2009, Doc. # 319. Imperial County, a political subdivision of California, sought to intervene as a party defendant on December 15, 2009, Doc. # 311; the motion is denied for the reasons addressed in a separate order filed herewith.

The parties disputed the factual premises underlying plaintiffs' claims and the court set the matter for trial. The action was tried to the court January 11-27, 2010. The trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law; the clerk is now DIRECTED to file the trial recording under seal as part of the record. The parties may retain their copies of the trial

recording pursuant to the terms of the protective order herein, see Doc. # 672. Proponents' motion to order the copies' return, Doc. # 698, is accordingly DENIED.

PLAINTIFFS' CASE AGAINST PROPOSITION 8

The Due Process Clause provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." US Const. Amend. XIV, § 1. Plaintiffs contend that the freedom to marry the person of one's choice is a fundamental right protected by the Due Process Clause and that Proposition 8 violates this fundamental right because:

> 1. It prevents each plaintiff from marrying the person of his or her choice;
>
> 2. The choice of a marriage partner is sheltered by the Fourteenth Amendment from the state's unwarranted usurpation of that choice; and
>
> 3. California's provision of a domestic partnership – a status giving same-sex couples the rights and responsibilities of marriage without providing marriage – does not afford plaintiffs an adequate substitute for marriage and, by disabling plaintiffs from marrying the person of their choice, invidiously discriminates, without justification, against plaintiffs and others who seek to marry a person of the same sex.

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." US Const. Amend.

XIV, § 1. According to plaintiffs, Proposition 8 violates the Equal Protection Clause because it:

> 1. Discriminates against gay men and lesbians by denying them a right to marry the person of their choice whereas heterosexual men and women may do so freely; and
>
> 2. Disadvantages a suspect class in preventing only gay men and lesbians, not heterosexuals, from marrying.

Plaintiffs argue that Proposition 8 should be subjected to heightened scrutiny under the Equal Protection Clause because gays and lesbians constitute a suspect class. Plaintiffs further contend that Proposition 8 is irrational because it singles out gays and lesbians for unequal treatment, as they and they alone may not marry the person of their choice. Plaintiffs argue that Proposition 8 discriminates against gays and lesbians on the basis of both sexual orientation and sex.

Plaintiffs conclude that because Proposition 8 is enforced by state officials acting under color of state law and because it has the effects plaintiffs assert, Proposition 8 is actionable under 42 USC § 1983. Plaintiffs seek a declaration that Proposition 8 is invalid and an injunction against its enforcement.

PROPONENTS' DEFENSE OF PROPOSITION 8

Proponents organized the official campaign to pass Proposition 8, known as ProtectMarriage.com – Yes on 8, a Project of California Renewal ("Protect

Marriage"). Proponents formed and managed the Protect Marriage campaign and ensured its efforts to pass Proposition 8 complied with California election law. See FF 13-17 below. After orchestrating the successful Proposition 8 campaign, proponents intervened in this lawsuit and provided a vigorous defense of the constitutionality of Proposition 8.

The ballot argument submitted to the voters summarizes proponents' arguments in favor of Proposition 8 during the 2008 campaign. The argument states:

> Proposition 8 is simple and straightforward. * * * Proposition 8 is about preserving marriage; *it's not an attack on the gay lifestyle.* * * * *It protects our children* from being taught in public schools that "same-sex marriage" is the same as traditional marriage. * * * While death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father. * * * If the gay marriage ruling [of the California Supreme Court] is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is *no difference* between gay marriage and traditional marriage.
>
> We should not accept a court decision that may result in public schools teaching our own kids that gay marriage is ok. * * * [W]hile gays have the right to their private lives, *they do not have the right to redefine marriage* for everyone else.

PX0001[1] California Voter Information Guide, California General Election, Tuesday, November 4, 2008 at PM 003365 (emphasis in original).

In addition to the ballot arguments, the Proposition 8 campaign presented to the voters of California a multitude of television, radio and internet-based advertisements and messages. The advertisements conveyed to voters that same-sex relationships are inferior to opposite-sex relationships and dangerous to children. See FF 79-80 below. The key premises on which Proposition 8 was presented to the voters thus appear to be the following:

1. Denial of marriage to same-sex couples preserves marriage;

2. Denial of marriage to same-sex couples allows gays and lesbians to live privately without requiring others, including (perhaps especially) children, to recognize or acknowledge the existence of same-sex couples;

3. Denial of marriage to same-sex couples protects children;

4. The ideal child-rearing environment requires one male parent and one female parent;

[1] All cited evidence is available at http://ecf.cand.uscourts.gov/cand/09cv2292.

5. Marriage is different in nature depending on the sex of the spouses, and an opposite-sex couple's marriage is superior to a same-sex couple's marriage; and

6. Same-sex couples' marriages redefine opposite-sex couples' marriages.

A state's interest in an enactment must of course be secular in nature. The state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose. See *Lawrence v. Texas,* 539 U.S. 558, 571, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); see also *Everson v. Board of Education of Ewing Township,* 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

Perhaps recognizing that Proposition 8 must advance a secular purpose to be constitutional, proponents abandoned previous arguments from the campaign that had asserted the moral superiority of opposite-sex couples. Instead, in this litigation, proponents asserted that Proposition 8:

1. Maintains California's definition of marriage as excluding same-sex couples;

2. Affirms the will of California citizens to exclude same-sex couples from marriage;

3. Promotes stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children; and

4. Promotes "statistically optimal" child-rearing households; that is, households in

> which children are raised by a man and a woman married to each other.

Doc. # 8 at 17-18.

While proponents vigorously defended the constitutionality of Proposition 8, they did so based on legal conclusions and cross-examinations of some of plaintiffs' witnesses, eschewing all but a rather limited factual presentation.

Proponents argued that Proposition 8 should be evaluated solely by considering its language and its consistency with the "central purpose of marriage, in California and everywhere else, * * * to promote naturally procreative sexual relationships and to channel them into stable, enduring unions for the sake of producing and raising the next generation." Doc. # 172-1 at 21. Proponents asserted that marriage for same-sex couples is not implicit in the concept of ordered liberty and thus its denial does not deprive persons seeking such unions of due process. See generally Doc. # 172-1. Nor, proponents continued, does the exclusion of same-sex couples in California from marriage deny them equal protection because, among other reasons, California affords such couples a separate parallel institution under its domestic partnership statutes. Doc. # 172-1 at 75 et seq.

At oral argument on proponents' motion for summary judgment, the court posed to proponents' counsel the assumption that "the state's interest in marriage is procreative" and inquired how permitting same-sex marriage impairs or adversely affects that interest.

Doc. # 228 at 21. Counsel replied that the inquiry was "not the legally relevant question," id, but when pressed for an answer, counsel replied: "Your honor, my answer is: I don't know. I don't know." Id at 23.

Despite this response, proponents in their trial brief promised to "demonstrate that redefining marriage to encompass same-sex relationships" would effect some twenty-three specific harmful consequences. Doc. # 295 at 13-14. At trial, however, proponents presented only one witness, David Blankenhorn, to address the government interest in marriage. Blankenhorn's testimony is addressed at length hereafter; suffice it to say that he provided no credible evidence to support any of the claimed adverse effects proponents promised to demonstrate. During closing arguments, proponents again focused on the contention that "responsible procreation is really at the heart of society's interest in regulating marriage." Tr.3038:7-8. When asked to identify the evidence at trial that supported this contention, proponents' counsel replied, "you don't have to have evidence of this point." Tr. 3037:25-3040:4.

Proponents' procreation argument, distilled to its essence, is as follows: the state has an interest in encouraging sexual activity between people of the opposite sex to occur in stable marriages because such sexual activity may lead to pregnancy and children, and the state has an interest in encouraging parents to raise children in stable households. Tr. 3050:17-3051:10. The state therefore, the argument goes, has an interest in encouraging all opposite-sex sexual

activity, whether responsible or irresponsible, procreative or otherwise, to occur within a stable marriage, as this encourages the development of a social norm that opposite-sex sexual activity should occur within marriage. Tr. 3053:10-24. Entrenchment of this norm increases the probability that procreation will occur within a marital union. Because same-sex couples' sexual activity does not lead to procreation, according to proponents the state has no interest in encouraging their sexual activity to occur within a stable marriage. Thus, according to proponents, the state's only interest is in opposite-sex sexual activity.

TRIAL PROCEEDINGS AND SUMMARY OF TESTIMONY

The parties' positions on the constitutionality of Proposition 8 raised significant disputed factual questions, and for the reasons the court explained in denying proponents' motion for summary judgment, Doc. # 228 at 72-91, the court set the matter for trial.

The parties were given a full opportunity to present evidence in support of their positions. They engaged in significant discovery, including third-party discovery, to build an evidentiary record. Both before and after trial, both in this court and in the court of appeals, the parties and third parties disputed the appropriate boundaries of discovery in an action challenging a voter-enacted initiative. See, for example, Doc. # # 187, 214, 237, 259, 372, 513.

Plaintiffs presented eight lay witnesses, including the four plaintiffs, and nine expert witnesses. Proponents' evidentiary presentation was dwarfed by that of plaintiffs. Proponents presented two expert witnesses and conducted lengthy and thorough cross-examinations of plaintiffs' expert witnesses but failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest.

Although the evidence covered a range of issues, the direct and cross-examinations focused on the following broad questions:

> WHETHER ANY EVIDENCE SUPPORTS CALIFORNIA'S REFUSAL TO RECOGNIZE MARRIAGE BETWEEN TWO PEOPLE BECAUSE OF THEIR SEX;
>
> WHETHER ANY EVIDENCE SHOWS CALIFORNIA HAS AN INTEREST IN DIFFERENTIATING BETWEEN SAME-SEX AND OPPOSITE-SEX UNIONS; and
>
> WHETHER THE EVIDENCE SHOWS PROPOSITION 8 ENACTED A PRIVATE MORAL VIEW WITHOUT ADVANCING A LEGITIMATE GOVERNMENT INTEREST.

Framed by these three questions and before detailing the court's credibility determinations and findings of fact, the court abridges the testimony at trial:

WHETHER ANY EVIDENCE SUPPORTS CALIFORNIA'S REFUSAL TO RECOGNIZE MARRIAGE BETWEEN TWO PEOPLE BECAUSE OF THEIR SEX

All four plaintiffs testified that they wished to marry their partners, and all four gave similar reasons. Zarrillo wishes to marry Katami because marriage has a "special meaning" that would alter their relationships with family and others. Zarrillo described daily struggles that arise because he is unable to marry Katami or refer to Katami as his husband. Tr. 84:1-17. Zarrillo described an instance when he and Katami went to a bank to open a joint account, and "it was certainly an awkward situation walking to the bank and saying, 'My partner and I want to open a joint bank account,' and hearing, you know, 'Is it a business account? A partnership?' It would just be a lot easier to describe the situation – might not make it less awkward for those individuals, but it would make it – crystalize it more by being able to say * * * 'My husband and I are here to open a bank account.'" Id. To Katami, marriage to Zarrillo would solidify their relationship and provide them the foundation they seek to raise a family together, explaining that for them, "the timeline has always been marriage first, before family." Tr. 89:17-18.

Perry testified that marriage would provide her what she wants most in life: a stable relationship with Stier, the woman she loves and with whom she has built a life and a family. To Perry, marriage would provide access to the language to describe her

relationship with Stier: "I'm a 45-year-old woman. I have been in love with a woman for 10 years and I don't have a word to tell anybody about that." Tr. 154:20-23. Stier explained that marrying Perry would make them feel included "in the social fabric." Tr. 175:22. Marriage would be a way to tell "our friends, our family, our society, our community, our parents * * * and each other that this is a lifetime commitment * * * we are not girlfriends. We are not partners. We are married." Tr. 172:8-12.

Plaintiffs and proponents presented expert testimony on the meaning of marriage. Historian Nancy Cott testified about the public institution of marriage and the state's interest in recognizing and regulating marriages. Tr. 185:9-13. She explained that marriage is "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 their agreement to join in an economic partnership and support one another in terms of the material needs of life." Tr. 201:9-14. The state's primary purpose in regulating marriage is to create stable households. Tr. 222:13-17.

Think tank founder David Blankenhorn testified that marriage is "a socially-approved sexual relationship between a man and a woman" with a primary purpose to "regulate filiation." Tr. 2742:9-10, 18. Blankenhorn testified that others hold to an alternative and, to Blankenhorn, conflicting definition of marriage: "a private adult commitment" that focuses on "the tender feelings that the spouses have for one

another." Tr. 2755:25-2756:1; 2756:10-2757:17; 2761:5-6. To Blankenhorn, marriage is either a socially approved sexual relationship between a man and a woman for the purpose of bearing and raising children who are biologically related to both spouses or a private relationship between two consenting adults.

Cott explained that marriage as a social institution encompasses a socially approved sexual union and an affective relationship and, for the state, forms the basis of stable households and private support obligations.

Both Cott and Blankenhorn addressed marriage as a historical institution. Cott pointed to consistent historical features of marriage, including that civil law, as opposed to religious custom, has always been supreme in regulating and defining marriage in the United States, Tr. 195:9-15, and that one's ability to consent to marriage is a basic civil right, Tr. 202:2-5. Blankenhorn identified three rules of marriage (discussed further in the credibility determinations, section I below), which he testified have been consistent across cultures and times: (1) the rule of opposites (the "man/woman" rule); (2) the rule of two; and (3) the rule of sex. Tr. 2879:17-25.

Cott identified historical changes in the institution of marriage, including the removal of race restrictions through court decisions and the elimination of coverture and other gender-based distinctions. Blankenhorn identified changes that to him signify the deinstitutionalization of marriage, including an

increase in births outside of marriage and an increasing divorce rate.

Both Cott and Blankenhorn testified that California stands to benefit if it were to resume issuing marriage licenses to same-sex couples. Blankenhorn noted that marriage would benefit same-sex couples and their children, would reduce discrimination against gays and lesbians and would be "a victory for the worthy ideas of tolerance and inclusion." Tr. 2850:12-13. Despite the multitude of benefits identified by Blankenhorn that would flow to the state, to gays and lesbians and to American ideals were California to recognize same-sex marriage, Blankenhorn testified that the state should not recognize same-sex marriage. Blankenhorn reasoned that the benefits of same-sex marriage are not valuable enough because same-sex marriage could conceivably weaken marriage as an institution. Cott testified that the state would benefit from recognizing same-sex marriage because such marriages would provide "another resource for stability and social order." Tr. 252:19-23.

Psychologist Letitia Anne Peplau testified that couples benefit both physically and economically when they are married. Peplau testified that those benefits would accrue to same-sex as well as opposite-sex married couples. To Peplau, the desire of same-sex couples to marry illustrates the health of the institution of marriage and not, as Blankenhorn testified, the weakening of marriage. Economist Lee Badgett provided evidence that same-sex couples would benefit economically if they were able to marry and that

same-sex marriage would have no adverse effect on the institution of marriage or on opposite-sex couples.

As explained in the credibility determinations, section I below, the court finds the testimony of Cott, Peplau and Badgett to support findings on the definition and purpose of civil marriage; the testimony of Blankenhorn is unreliable. The trial evidence provides no basis for establishing that California has an interest in refusing to recognize marriage between two people because of their sex.

WHETHER ANY EVIDENCE SHOWS CALIFORNIA HAS AN INTEREST IN DIFFERENTIATING BETWEEN SAME-SEX AND OPPOSITE-SEX UNIONS

Plaintiffs' experts testified that no meaningful differences exist between same-sex couples and opposite-sex couples. Blankenhorn identified one difference: some opposite-sex couples are capable of creating biological offspring of both spouses while same-sex couples are not.

Psychologist Gregory Herek defined sexual orientation as "an enduring sexual, romantic, or intensely affectional attraction to men, to women, or to both men and women. It's also used to refer to an identity or a sense of self that is based on one's enduring patterns of attraction. And it's also sometimes used to describe an enduring pattern of behavior." Tr. 2025:5-11. Herek explained that homosexuality is a normal expression of human sexuality; the vast majority of

gays and lesbians have little or no choice in their sexual orientation; and therapeutic efforts to change an individual's sexual orientation have not been shown to be effective and instead pose a risk of harm to the individual. Proponents did not present testimony to contradict Herek but instead questioned him on data showing that some individuals report fluidity in their sexual orientation. Herek responded that the data proponents presented does nothing to contradict his conclusion that the vast majority of people are consistent in their sexual orientation.

Peplau pointed to research showing that, despite stereotypes suggesting gays and lesbians are unable to form stable relationships, same-sex couples are in fact indistinguishable from opposite-sex couples in terms of relationship quality and stability. Badgett testified that same-sex and opposite-sex couples are very similar in most economic and demographic respects. Peplau testified that the ability of same-sex couples to marry will have no bearing on whether opposite-sex couples choose to marry or divorce.

Social epidemiologist Ilan Meyer testified about the harm gays and lesbians have experienced because of Proposition 8. Meyer explained that Proposition 8 stigmatizes gays and lesbians because it informs gays and lesbians that the State of California rejects their relationships as less valuable than opposite-sex relationships. Proposition 8 also provides state endorsement of private discrimination. According to Meyer, Proposition 8 increases the likelihood of negative

mental and physical health outcomes for gays and lesbians.

Psychologist Michael Lamb testified that all available evidence shows that children raised by gay or lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents and that the gender of a parent is immaterial to whether an adult is a good parent. When proponents challenged Lamb with studies purporting to show that married parents provide the ideal child-rearing environment, Lamb countered that studies on child-rearing typically compare married opposite-sex parents to single parents or step-families and have no bearing on families headed by same-sex couples. Lamb testified that the relevant comparison is between families headed by same-sex couples and families headed by opposite-sex couples and that studies comparing these two family types show conclusively that having parents of different genders is irrelevant to child outcomes.

Lamb and Blankenhorn disagreed on the importance of a biological link between parents and children. Blankenhorn emphasized the importance of biological parents, relying on studies comparing children raised by married, biological parents with children raised by single parents, unmarried mothers, step families and cohabiting parents. Tr. 2769:14-24 (referring to DIX0026 Kristin Anderson Moore, Susan M Jekielek, and Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It,* Child Trends (June 2002));

Tr. 2771:1-13 (referring to DIX0124 Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Harvard 1994)). As explained in the credibility determinations, section I below, none of the studies Blankenhorn relied on isolates the genetic relationship between a parent and a child as a variable to be tested. Lamb testified about studies showing that adopted children or children conceived using sperm or egg donors are just as likely to be well-adjusted as children raised by their biological parents. Tr. 1041:8-17. Blankenhorn agreed with Lamb that adoptive parents "actually on some outcomes outstrip biological parents in terms of providing protective care for their children." Tr. 2795:3-5.

Several experts testified that the State of California and California's gay and lesbian population suffer because domestic partnerships are not equivalent to marriage. Badgett explained that gays and lesbians are less likely to enter domestic partnerships than to marry, meaning fewer gays and lesbians have the protection of a state-recognized relationship. Both Badgett and San Francisco economist Edmund Egan testified that states receive greater economic benefits from marriage than from domestic partnerships. Meyer testified that domestic partnerships actually stigmatize gays and lesbians even when enacted for the purpose of providing rights and benefits to same-sex couples. Cott explained that domestic partnerships cannot substitute for marriage because domestic partnerships do not have the same social and historical meaning as marriage and that much of the

value of marriage comes from its social meaning. Peplau testified that little of the cultural esteem surrounding marriage adheres to domestic partnerships.

To illustrate his opinion that domestic partnerships are viewed by society as different from marriage, Herek pointed to a letter sent by the California Secretary of State to registered domestic partners in 2004 informing them of upcoming changes to the law and suggesting dissolution of their partnership to avoid any unwanted financial effects. Tr. 2047:15-2048:5, PX2265 (Letter from Kevin Shelley, California Secretary of State, to Registered Domestic Partners). Herek concluded that a similar letter to married couples would not have suggested divorce. Tr. 2048:6-13.

The experts' testimony on domestic partnerships is consistent with the testimony of plaintiffs, who explained that domestic partnerships do not satisfy their desire to marry. Stier, who has a registered domestic partnership with Perry, explained that "there is certainly nothing about domestic partnership * * * that indicates the love and commitment that are inherent in marriage." Tr. 171:8-11. Proponents did not challenge plaintiffs' experts on the point that marriage is a socially superior status to domestic partnership; indeed, proponents stipulated that "[t]here is a significant symbolic disparity between domestic partnership and marriage." Doc. # 159-2 at 6.

Proponents' cross-examinations of several experts challenged whether people can be categorized based

on their sexual orientation. Herek, Meyer and Badgett responded that sexual orientation encompasses behavior, identity and attraction and that most people are able to answer questions about their sexual orientation without formal training. According to the experts, researchers may focus on one element of sexual orientation depending on the purpose of the research and sexual orientation is not a difficult concept for researchers to apply.

As explained in the credibility determinations, section I below, and the findings of fact, section II below, the testimony shows that California has no interest in differentiating between same-sex and opposite-sex unions.

WHETHER THE EVIDENCE SHOWS PROPOSITION 8 ENACTED A PRIVATE MORAL VIEW WITHOUT ADVANCING A LEGITIMATE GOVERNMENT INTEREST

The testimony of several witnesses disclosed that a primary purpose of Proposition 8 was to ensure that California confer a policy preference for opposite-sex couples over same-sex couples based on a belief that same-sex pairings are immoral and should not be encouraged in California.

Historian George Chauncey testified about a direct relationship between the Proposition 8 campaign and initiative campaigns from the 1970s targeting gays and lesbians; like earlier campaigns, the Proposition 8 campaign emphasized the importance

of protecting children and relied on stereotypical images of gays and lesbians, despite the lack of any evidence showing that gays and lesbians pose a danger to children. Chauncey concluded that the Proposition 8 campaign did not need to explain what children were to be protected from; the advertisements relied on a cultural understanding that gays and lesbians are dangerous to children.

This understanding, Chauncey observed, is an artifact of the discrimination gays and lesbians faced in the United States in the twentieth century. Chauncey testified that because homosexual conduct was criminalized, gays and lesbians were seen as criminals; the stereotype of gay people as criminals therefore became pervasive. Chauncey noted that stereotypes of gays and lesbians as predators or child molesters were reinforced in the mid-twentieth century and remain part of current public discourse. Lamb explained that this stereotype is not at all credible, as gays and lesbians are no more likely than heterosexuals to pose a threat to children.

Political scientist Gary Segura provided many examples of ways in which private discrimination against gays and lesbians is manifested in laws and policies. Segura testified that negative stereotypes about gays and lesbians inhibit political compromise with other groups: "It's very difficult to engage in the give-and-take of the legislative process when I think you are an inherently bad person. That's just not the basis for compromise and negotiation in the political process." Tr. 1561:6-9. Segura identified religion as

the chief obstacle to gay and lesbian political advances. Political scientist Kenneth Miller disagreed with Segura's conclusion that gays and lesbians lack political power, Tr. 2482:4-8, pointing to some successes on the state and national level and increased public support for gays and lesbians, but agreed that popular initiatives can easily tap into a strain of antiminority sentiment and that at least some voters supported Proposition 8 because of anti-gay sentiment.

Proponent Hak-Shing William Tam testified about his role in the Proposition 8 campaign. Tam spent substantial time, effort and resources campaigning for Proposition 8. As of July 2007, Tam was working with Protect Marriage to put Proposition 8 on the November 2008 ballot. Tr. 1900:13-18. Tam testified that he is the secretary of the America Return to God Prayer Movement, which operates the website "1man1woman.net." Tr. 1916:3-24. 1man1woman.net encouraged voters to support Proposition 8 on grounds that homosexuals are twelve times more likely to molest children, Tr. 1919:3-1922:21, and because Proposition 8 will cause states one-by-one to fall into Satan's hands, Tr. 1928:6-13. Tam identified NARTH (the National Association for Research and Therapy of Homosexuality) as the source of information about homosexuality, because he "believe[s] in what they say." Tr. 1939:1-9. Tam identified "the internet" as the source of information connecting same-sex marriage to polygamy and incest. Tr. 1957:2-12. Protect Marriage relied on Tam and, through Tam, used the website 1man 1woman.net as part of the Protect Marriage Asian/

Pacific Islander outreach. Tr. 1976:10-15; PX2599 (Email from Sarah Pollo, Account Executive, Schubert Flint Public Affairs (Aug 22, 2008) attaching meeting minutes). Tam signed a Statement of Unity with Protect Marriage, PX2633, in which he agreed not to put forward "independent strategies for public messaging." Tr. 1966:16-1967:16.

Katami and Stier testified about the effect Proposition 8 campaign advertisements had on their well-being. Katami explained that he was angry and upset at the idea that children needed to be protected from him. After watching a Proposition 8 campaign message, PX0401 (Video, Tony Perkins, Miles McPherson, and Ron Prentice Asking for Support of Proposition 8), Katami stated that "it just demeans you. It just makes you feel like people are putting efforts into discriminating against you." Tr. 108:14-16. Stier, as the mother of four children, was especially disturbed at the message that Proposition 8 had something to do with protecting children. She felt the campaign messages were "used to sort of try to educate people or convince people that there was a great evil to be feared and that evil must be stopped and that evil is us, I guess. * * * And the very notion that I could be part of what others need to protect their children from was just – it was more than upsetting. It was sickening, truly. I felt sickened by that campaign." Tr. 177:9-18.

Egan and Badgett testified that Proposition 8 harms the State of California and its local governments economically. Egan testified that San

Francisco faces direct and indirect economic harms as a consequence of Proposition 8. Egan explained that San Francisco lost and continues to lose money because Proposition 8 slashed the number of weddings performed in San Francisco. Egan explained that Proposition 8 decreases the number of married couples in San Francisco, who tend to be wealthier than single people because of their ability to specialize their labor, pool resources and access state and employer-provided benefits. Proposition 8 also increases the costs associated with discrimination against gays and lesbians. Proponents challenged only the magnitude and not the existence of the harms Egan identified. Badgett explained that municipalities throughout California and the state government face economic disadvantages similar to those Egan identified for San Francisco.

For the reasons stated in the sections that follow, the evidence presented at trial fatally undermines the premises underlying proponents' proffered rationales for Proposition 8. An initiative measure adopted by the voters deserves great respect. The considered views and opinions of even the most highly qualified scholars and experts seldom outweigh the determinations of the voters. When challenged, however, the voters' determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority

that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives.

I

CREDIBILITY DETERMINATIONS

PLAINTIFFS' WITNESSES

Plaintiffs presented the testimony of the four plaintiffs, four lay witnesses and nine expert witnesses. Proponents did not challenge the credibility of the lay witnesses or the qualifications of the expert witnesses to offer opinion testimony.

Having observed and considered the testimony presented, the court concludes that plaintiffs' lay witnesses provided credible testimony:

1. Jeffrey Zarrillo, a plaintiff, testified about coming out as a gay man. (Tr. 77:12-15: "Coming out is a very personal and internal process. * * * You have to get to the point where you're comfortable with yourself, with your own identity and who you are.") Zarrillo described his nine-year relationship with Katami. (Tr. 79:20-21: "He's the love of my life. I love him probably more than I love myself.")

2. Paul Katami, a plaintiff, testified about his reasons for wanting to marry Zarrillo.

(Tr. 89:1-3: "Being able to call him my husband is so definitive, it changes our relationship." Tr. 90:24-91:2: "I can safely say that if I were married to Jeff, that I know that the struggle that we have validating ourselves to other people would be diminished and potentially eradicated.") Katami explained why it was difficult for him to tell others about his sexual orientation even though he has been gay for "as long as [he] can remember." (Tr. 91:17-92:2: "I struggled with it quite a bit. Being surrounded by what seemed everything heterosexual * * * you tend to try and want to fit into that.") Katami described how the Proposition 8 campaign messages affected him. (Tr. 97:1-11: "[P]rotect the children is a big part of the [Proposition 8] campaign. And when I think of protecting your children, you protect them from people who will perpetrate crimes against them, people who might get them hooked on a drug, a pedophile, or some person that you need protecting from. You don't protect yourself from an amicable person or a good person. You protect yourself from things that can harm you physically, emotionally. And so insulting, even the insinuation that I would be part of that category.")

3. Kristin Perry, a plaintiff, testified about her relationship with Stier. (Tr. 139:16-17; 140:13-14: Stier is "maybe the sparkliest person I ever met. * * * [T]he happiest I feel is in my relationship with [Stier.]") Perry described why she wishes to marry. (Tr. 141:22-142:1: "I want to have a stable and

secure relationship with her that then we can include our children in. And I want the discrimination we are feeling with Proposition 8 to end and for a more positive, joyful part of our lives to * * * begin.") Perry described the reason she and Stier registered as domestic partners. (Tr. 153:16-17: "[W]e are registered domestic partners based on just legal advice that we received for creating an estate plan.")

4. Sandra Stier, a plaintiff, testified about her relationship with Perry, with whom she raises their four children. (Tr. 167:3-5: "I have fallen in love one time and it's with [Perry]."). Stier explained why she wants to marry Perry despite their domestic partnership. (Tr. 171:8-13: "[T]here is certainly nothing about domestic partnership as an institution – not even as an institution, but as a legal agreement that indicates the love and commitment that are inherent in marriage, and [domestic partnership] doesn't have anything to do for us with the nature of our relationship and the type of enduring relationship we want it to be.")

5. Helen Zia, a lay witness, testified regarding her experiences with discrimination and about how her life changed when she married her wife in 2008. (Tr. 1235:10-13: "I'm beginning to understand what I've always read – marriage is the joining of two families.")

6. Jerry Sanders, the mayor of San Diego and a lay witness, testified regarding how he

came to believe that domestic partnerships are discriminatory. (Tr. 1273:10-17: On a last-minute decision not to veto a San Diego resolution supporting same-sex marriage: "I was saying that one group of people did not deserve the same dignity and respect, did not deserve the same symbolism about marriage.")

7. Ryan Kendall, a lay witness, testified about his experience as a teenager whose parents placed him in therapy to change his sexual orientation from homosexual to heterosexual. (Tr. 1521:20: "I knew I was gay. I knew that could not be changed.") Kendall described the mental anguish he endured because of his family's disapproval of his sexual orientation. (Tr. 1508:9-10, 1511:2-16: "I remember my mother looking at me and telling me that I was going to burn in hell. * * * [M]y mother would tell me that she hated me, or that I was disgusting, or that I was repulsive. Once she told me that she wished she had had an abortion instead of a gay son.")

8. Hak-Shing William Tam, an official proponent of Proposition 8 and an intervening defendant, was called as an adverse witness and testified about messages he disseminated during the Proposition 8 campaign. (Tr. 1889:23-25: "Q: Did you invest substantial time, effort, and personal resources in campaigning for Proposition 8? A: Yes.")

Plaintiffs called nine expert witnesses. As the education and experience of each expert show, plaintiffs' experts were amply qualified to offer opinion testimony on the subjects identified. Moreover, the experts' demeanor and responsiveness showed their comfort with the subjects of their expertise. For those reasons, the court finds that each of plaintiffs' proffered experts offered credible opinion testimony on the subjects identified.

1. Nancy Cott, a historian, testified as an expert in the history of marriage in the United States. Cott testified that marriage has always been a secular institution in the United States, that regulation of marriage eased the state's burden to govern an amorphous populace and that marriage in the United States has undergone a series of transformations since the country was founded.

a. PX2323 Cott CV: Cott is a professor of American history at Harvard University and the director of the Schlesinger Library on the History of Women in America;

b. PX2323: In 1974, Cott received a PhD from Brandeis University in the history of American civilization;

c. PX2323: Cott has published eight books, including *Public Vows: A History of Marriage and the Nation* (2000), and has published numerous articles and essays;

d. Tr. 186:5-14: Cott devoted a semester in 1998 to researching and teaching a course at

Yale University in the history of marriage in the United States;

e. Tr. 185:9-13; 188:6-189:10: Cott's marriage scholarship focuses on marriage as a public institution and as a structure regulated by government for social benefit.

2. George Chauncey, a historian, was qualified to offer testimony on social history, especially as it relates to gays and lesbians. Chauncey testified about the widespread private and public discrimination faced by gays and lesbians in the twentieth century and the ways in which the Proposition 8 campaign echoed that discrimination and relied on stereotypes against gays and lesbians that had developed in the twentieth century.

a. PX2322 Chauncey CV: Chauncey is a professor of history and American studies at Yale University; from 1991-2006, Chauncey was a professor of history at the University of Chicago;

b. Tr. 357:15-17: Chauncey received a PhD in history from Yale University in 1989;

c. PX2322: Chauncey has authored or edited books on the subject of gay and lesbian history, including *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) and *Hidden from History: Reclaiming the Gay and Lesbian Past* (1989, ed);

d. Tr. 359:17-360:11: Chauncey relies on government records, interviews, diaries, films

and advertisements along with studies by other historians and scholars in conducting his research;

e. Tr. 360:12-21: Chauncey teaches courses in twentieth century United States history, including courses on lesbian and gay history.

3. Lee Badgett, an economist, testified as an expert on demographic information concerning gays and lesbians, same-sex couples and children raised by gays and lesbians, the effects of the exclusion of same-sex couples from the institution of marriage and the effect of permitting same-sex couples to marry on heterosexual society and the institution of marriage. Badgett offered four opinions: (1) Proposition 8 has inflicted substantial economic harm on same-sex couples and their children; (2) allowing same-sex couples to marry would not have any adverse effect on the institution of marriage or on opposite-sex couples; (3) same-sex couples are very similar to opposite-sex couples in most economic and demographic respects; and (4) Proposition 8 has imposed economic losses on the State of California and on California counties and municipalities. Tr. 1330:9-1331:5.

a. PX2321 Badgett CV: Badgett is a professor of economics at UMass Amherst and the director of the Williams Institute at UCLA School of Law;

b. PX2321: Badgett received her PhD in economics from UC Berkeley in 1990;

c. Tr. 1325:2-17; PX2321: Badgett has written two books on gay and lesbian relationships and same-sex marriage: *Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men* (2001) and *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* (2009); Badgett has also published several articles on the same subjects;

d. Tr. 1326:4-13: Badgett co-authored two reports (PX1268 Brad Sears and M V Lee Badgett, *The Impact of Extending Marriage to Same-Sex Couples on the California Budget,* The Williams Institute (June 2008) and PX1283 M V Lee Badgett and R Bradley Sears, *Putting a Price on Equality? The Impact of Same-Sex Marriage on California's Budget,* 16 Stan L & Pol Rev. 197 (2005)) analyzing the fiscal impact of allowing same-sex couples to marry in California;

e. Tr. 1326:18-1328:4: Badgett has been invited to speak at many universities and at the American Psychological Association convention on the economics of same-sex relationships;

f. Tr. 1329:6-22: Badgett has testified before federal and state government bodies about domestic partner benefits and antidiscrimination laws.

4. Edmund A Egan, the chief economist in the San Francisco Controller's Office, testified for CCSF as an expert in urban and regional economic policy.

Egan conducted an economic study of the prohibition of same-sex marriage on San Francisco's economy and concluded that the prohibition negatively affects San Francisco's economy in many ways. Tr. 683:19-684:19.

a. Tr. 678:1-7: As the chief economist for CCSF, Egan directs the Office of Economic Analysis and prepares economic impact analysis reports for pending legislation;

b. Tr. 681:16-682:25: In preparing economic impact reports, Egan relies on government data and reports, private reports and independent research to determine whether legislation has "real regulatory power" and the effects of the legislation on private behavior;

c. PX2324 Egan CV: Egan received a PhD in city and regional planning from UC Berkeley in 1997;

d. Tr. 679:1-14: Egan is an adjunct faculty member at UC Berkeley and teaches graduate students on regional and urban economics and regional and city planning.

5. Letitia Anne Peplau, a psychologist, was qualified as an expert on couple relationships within the field of psychology. Peplau offered four opinions: (1) for adults who choose to enter marriage, that marriage is often associated with many important benefits; (2) research has shown remarkable similarities between same-sex and opposite-sex couples; (3) if same-sex couples are permitted to marry, they will likely experience the same benefits from marriage as opposite-sex couples; and (4) permitting same-sex

marriage will not harm opposite-sex marriage. Tr. 574:6-19.

a. PX2329 Peplau CV: Peplau is a professor of psychology and vice chair of graduate studies in psychology at UCLA;

b. Tr. 569:10-12: Peplau's research focuses on social psychology, which is a branch of psychology that focuses on human relationships and social influence; specifically, Peplau studies close personal relationships, sexual orientation and gender;

c. Tr. 571:13: Peplau began studying same-sex relationships in the 1970s;

d. Tr. 571:19-572:13; PX2329: Peplau has published or edited about ten books, authored about 120 peer-reviewed articles and published literature reviews on psychology, relationships and sexuality.

6. Ilan Meyer, a social epidemiologist, testified as an expert in public health with a focus on social psychology and psychiatric epidemiology. Meyer offered three opinions: (1) gays and lesbians experience stigma, and Proposition 8 is an example of stigma; (2) social stressors affect gays and lesbians; and (3) social stressors negatively affect the mental health of gays and lesbians. Tr. 817:10-19.

a. PX2328 Meyer CV: Meyer is an associate professor of sociomedical sciences at Columbia University's Mailman School of Public Health;

b. PX2328; Tr. 807:20-808:7: Meyer received a PhD in sociomedical sciences from Columbia University in 1993;

c. Tr. 810:19-811:16: Meyer studies the relationship between social issues and structures and patterns of mental health outcomes with a specific focus on lesbian, gay and bisexual populations;

d. Tr. 812:9-814:22: Meyer has published about forty peer-reviewed articles, teaches a course on gay and lesbian issues in public health, has received numerous awards for his professional work and has edited and reviewed journals and books.

7. Gregory Herek, a psychologist, testified as an expert in social psychology with a focus on sexual orientation and stigma. Herek offered opinions concerning: (1) the nature of sexual orientation and how sexual orientation is understood in the fields of psychology and psychiatry; (2) the amenability of sexual orientation to change through intervention; and (3) the nature of stigma and prejudice as they relate to sexual orientation and Proposition 8. Tr. 2023:8-14.

a. PX2326 Herek CV: Herek is a professor of psychology at UC Davis;

b. PX2326: Herek received a PhD in personality and social psychology from UC Davis in 1983;

c. Tr. 2018:5-13: Social psychology is the intersection of psychology and sociology in that it focuses on human behavior within a social

context; Herek's dissertation focused on heterosexuals' attitudes towards lesbians and gay men;

d. Tr. 2020:1-5: Herek regularly teaches a course on sexual orientation and prejudice;

e. PX2326; Tr. 2021:12-25; Tr. 2022:11-14: Herek serves on editorial boards of peer-reviewed journals and has published over 100 articles and chapters on sexual orientation, stigma and prejudice.

8. Michael Lamb, a psychologist, testified as an expert on the developmental psychology of children, including the developmental psychology of children raised by gay and lesbian parents. Lamb offered two opinions: (1) children raised by gays and lesbians are just as likely to be well-adjusted as children raised by heterosexual parents; and (2) children of gay and lesbian parents would benefit if their parents were able to marry. Tr. 1009:23-1010:4.

a. PX2327 Lamb CV: Lamb is a professor and head of the Department of Social and Developmental Psychology at the University of Cambridge in England;

b. Tr. 1003:24-1004:6; PX2327: Lamb was the head of the section on social and emotional development of the National Institute of Child Health and Human Development in Washington DC for seventeen years;

c. Tr. 1007:2-1008:8; PX2327: Lamb has published approximately 500 articles, many about child adjustment, has edited 40 books

in developmental psychology, reviews about 100 articles a year and serves on editorial boards on several academic journals;

d. PX2327: Lamb received a PhD from Yale University in 1976.

9. Gary Segura, a political scientist, testified as an expert on the political power or powerlessness of minority groups in the United States, and of gays and lesbians in particular. Segura offered three opinions: (1) gays and lesbians do not possess a meaningful degree of political power; (2) gays and lesbians possess less power than groups granted judicial protection; and (3) the conclusions drawn by proponents' expert Miller are troubling and unpersuasive. Tr. 1535:3-18.

a. PX2330 Segura CV: Segura is a professor of political science at Stanford University and received a PhD in political science from the University of Illinois in 1992;

b. Tr. 1525:1-10: Segura and a colleague, through the Stanford Center for Democracy, operate the American National Elections Studies, which provides political scientists with data about the American electorate's views about politics;

c. Tr. 1525:11-19: Segura serves on the editorial boards of major political science journals;

d. Tr. 1525:22-1526:24: Segura's work focuses on political representation and whether elected officials respond to the voting public;

within the field of political representation, Segura focuses on minorities;

e. PX2330; Tr. 1527:25-1528:14: Segura has published about twenty-five peer-reviewed articles, authored about fifteen chapters in edited volumes and has presented at between twenty and forty conferences in the past ten years;

f. PX2330; Tr. 1528:21-24: Segura has published three pieces specific to gay and lesbian politics and political issues;

g. Tr. 1532:11-1533:17: Segura identified the methods he used and materials he relied on to form his opinions in this case. Relying on his background as a political scientist, Segura read literature on gay and lesbian politics, examined the statutory status of gays and lesbians and public attitudes about gays and lesbians, determined the presence or absence of gays and lesbians in political office and considered ballot initiatives about gay and lesbian issues.

PROPONENTS' WITNESSES

Proponents elected not to call the majority of their designated witnesses to testify at trial and called not a single official proponent of Proposition 8 to explain the discrepancies between the arguments in favor of Proposition 8 presented to voters and the arguments presented in court. Proponents informed the court on the first day of trial, January 11, 2010,

that they were withdrawing Loren Marks, Paul Nathanson, Daniel N Robinson and Katherine Young as witnesses. Doc. # 398 at 3. Proponents' counsel stated in court on Friday, January 15, 2010, that their witnesses "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever." Tr. 1094:21-23.

The timeline shows, however, that proponents failed to make any effort to call their witnesses after the potential for public broadcast in the case had been eliminated. The Supreme Court issued a temporary stay of transmission on January 11, 2010 and a permanent stay on January 13, 2010. See *Hollingsworth v. Perry,* ___ U.S. ___, 130 S.Ct. 1132, ___ L.Ed.2d ___ (2010); *Hollingsworth v. Perry,* ___ U.S. ___, 130 S.Ct. 705, ___ L.Ed.2d ___ (2010). The court withdrew the case from the Ninth Circuit's pilot program on broadcasting on January 15, 2010. Doc. # 463. Proponents affirmed the withdrawal of their witnesses that same day. Tr. 1094:21-23. Proponents did not call their first witness until January 25, 2010. The record does not reveal the reason behind proponents' failure to call their expert witnesses.

Plaintiffs entered into evidence the deposition testimony of two of proponents' withdrawn witnesses, as their testimony supported plaintiffs' claims. Katherine Young was to testify on comparative religion and the universal definition of marriage. Doc. # 292 at 4 (proponents' December 7 witness list) Doc. # 286-4 at 2 (expert report). Paul Nathanson was to testify on religious attitudes towards Proposition 8. Doc.

292 at 4 (proponents' December 7 witness list); Doc. # 280-4 at 2 (expert report).

Young has been a professor of religious studies at McGill University since 1978. PX2335 Young CV. She received her PhD in history of religions and comparative religions from McGill in 1978. Id. Young testified at her deposition that homosexuality is a normal variant of human sexuality and that same-sex couples possess the same desire for love and commitment as opposite-sex couples. PX2545 (dep. tr.); PX2544 (video of same). Young also explained that several cultures around the world and across centuries have had variations of marital relationships for same-sex couples. Id.

Nathanson has a PhD in religious studies from McGill University and is a researcher at McGill's Faculty for Religious Studies. PX2334 Nathanson CV. Nathanson is also a frequent lecturer on consequences of marriage for same-sex couples and on gender and parenting. Id. Nathanson testified at his deposition that religion lies at the heart of the hostility and violence directed at gays and lesbians and that there is no evidence that children raised by same-sex couples fare worse than children raised by opposite-sex couples. PX2547 (dep. tr.); PX2546 (video of same).

Proponents made no effort to call Young or Nathanson to explain the deposition testimony that plaintiffs had entered into the record or to call any of the withdrawn witnesses after potential for contemporaneous broadcast of the trial proceedings had been eliminated. Proponents called two witnesses:

1. David Blankenhorn, founder and president of the Institute for American Values, testified on marriage, fatherhood and family structure. Plaintiffs objected to Blankenhorn's qualification as an expert. For the reasons explained hereafter, Blankenhorn lacks the qualifications to offer opinion testimony and, in any event, failed to provide cogent testimony in support of proponents' factual assertions.

2. Kenneth P Miller, a professor of government at Claremont McKenna College, testified as an expert in American and California politics. Plaintiffs objected that Miller lacked sufficient expertise specific to gays and lesbians. Miller's testimony sought to rebut only a limited aspect of plaintiffs' equal protection claim relating to political power.

David Blankenhorn

Proponents called David Blankenhorn as an expert on marriage, fatherhood and family structure. Blankenhorn received a BA in social studies from Harvard College and an MA in comparative social history from the University of Warwick in England. Tr. 2717:24-2718:3; DIX2693 (Blankenhorn CV). After Blankenhorn completed his education, he served as a community organizer in low-income communities, where he developed an interest in community and family institutions after "seeing the weakened state" of those institutions firsthand, "especially how children were living without their fathers." Tr.

2719:3-18. This experience led Blankenhorn in 1987 to found the Institute for American Values, which he describes as "a nonpartisan think tank" that focuses primarily on "issues of marriage, family, and child well-being." Tr. 2719:20-25. The Institute commissions research and releases reports on issues relating to "fatherhood, marriage, family structure [and] child well-being." Tr. 2720:6-19. The Institute also produces an annual report "on the state of marriage in America." Tr. 2720:24-25.

Blankenhorn has published two books on the subjects of marriage, fatherhood and family structure: *Fatherless America: Confronting Our Most Urgent Social Problem* (HarperCollins 1995), DIX0108, and *The Future of Marriage* (Encounter Books 2006), DIX0956. Tr. 2722:2-12. Blankenhorn has edited four books about family structure and marriage, Tr. 2728:13-22, and has co-edited or co-authored several publications about marriage. Doc. # 302 at 21.

Plaintiffs challenge Blankenhorn's qualifications as an expert because none of his relevant publications has been subject to a traditional peer-review process, Tr. 2733:2-2735:4, he has no degree in sociology, psychology or anthropology despite the importance of those fields to the subjects of marriage, fatherhood and family structure, Tr. 2735:15-2736:9, and his study of the effects of same-sex marriage involved "read[ing] articles and ha[ving] conversations with people, and tr[ying] to be an informed person about it," Tr. 2736:13-2740:3. See also Doc. # 285 (plaintiffs' motion in limine). Plaintiffs argue that Blankenhorn's

conclusions are not based on "objective data or discernible methodology," Doc. # 285 at 25, and that Blankenhorn's conclusions are instead based on his interpretation of selected quotations from articles and reports, id at 26.

The court permitted Blankenhorn to testify but reserved the question of the appropriate weight to give to Blankenhorn's opinions. Tr. 2741:24-2742:3. The court now determines that Blankenhorn's testimony constitutes inadmissible opinion testimony that should be given essentially no weight.

Federal Rule of Evidence 702 provides that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education." The testimony may only be admitted if it "is based upon sufficient facts or data" and "is the product of reliable principles and methods." Id. Expert testimony must be both relevant and reliable, with a "basis in the knowledge and experience of [the relevant] discipline." *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147, 149, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (citing *Daubert v. Merrell Dow Pharm.,* 509 U.S. 579, 589, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

While proponents correctly assert that formal training in the relevant disciplines and peer-reviewed publications are not dispositive of expertise, education is nevertheless important to ensure that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the

practice of an expert in the relevant field." *Kumho Tire,* 526 U.S. at 152, 119 S.Ct. 1167. Formal training shows that a proposed expert adheres to the intellectual rigor that characterizes the field, while peer-reviewed publications demonstrate an acceptance by the field that the work of the proposed expert displays "at least the minimal criteria" of intellectual rigor required in that field. *Daubert v. Merrell Dow Pharm.,* 43 F.3d 1311, 1318 (9th Cir.1995) (on remand) ("*Daubert II*").

The methodologies on which expert testimony may be based are "not limited to what is generally accepted," *Daubert II,* at 1319 n. 11, but "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). The party proffering the evidence "must explain the expert's methodology and demonstrate in some objectively verifiable way that the expert has both chosen a reliable * * * method and followed it faithfully." *Daubert II,* 43 F.3d at 1319 n. 11.

Several factors are relevant to an expert's reliability: (1) "whether [a method] can be (and has been) tested"; (2) "whether the [method] has been subjected to peer review and publication"; (3) "the known or potential rate of error"; (4) "the existence and maintenance of standards controlling the [method's] operation"; (5) "a * * * degree of acceptance" of the method within "a relevant * * * community," *Daubert,* 509

U.S. at 593-94, 113 S.Ct. 2786; (6) whether the expert is "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation," *Daubert II,* 43 F.3d at 1317; (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, see *Joiner,* 522 U.S. at 145-146, 118 S.Ct. 512; (8) whether the expert has adequately accounted for obvious alternative explanations, see generally *Claar v. Burlington Northern RR Co,* 29 F.3d 499 (9th Cir.1994); (9) whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *Kumho Tire,* 526 U.S. at 152, 119 S.Ct. 1167; and (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give, see *id.* at 151, 119 S.Ct. 1167.

Blankenhorn offered opinions on the definition of marriage, the ideal family structure and potential consequences of state recognition of marriage for same-sex couples. None of Blankenhorn's opinions is reliable.

Blankenhorn's first opinion is that marriage is "a socially-approved sexual relationship between a man and a woman." Tr. 2742:9-10. According to Blankenhorn, the primary purpose of marriage is to "regulate filiation." Tr. 2742:18. Blankenhorn testified that the alternative and contradictory definition of marriage is that "marriage is fundamentally a private adult commitment." Tr. 2755:25-2756:1; Tr. 2756:4-2757:17

(DIX0093 Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (2001)). He described this definition as focused on "the tender feelings that spouses have for one another," Tr. 2761:5-6. Blankenhorn agrees this "affective dimension" of marriage exists but asserts that marriage developed independently of affection. Tr. 2761:9-2762:3.

Blankenhorn thus sets up a dichotomy for the definition of marriage: either marriage is defined as a socially approved sexual relationship between a man and a woman for the purpose of bearing and raising children biologically related to both spouses, or marriage is a private relationship between two consenting adults. Blankenhorn did not address the definition of marriage proposed by plaintiffs' expert Cott, which subsumes Blankenhorn's dichotomy. Cott testified that marriage is "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 their agreement to join in an economic partnership and support one another in terms of the material needs of life." Tr. 201:9-14. There is nothing in Cott's definition that limits marriage to its "affective dimension" as defined by Blankenhorn, and yet Cott's definition does not emphasize the biological relationship linking dependents to both spouses.

Blankenhorn relied on the quotations of others to define marriage and provided no explanation of the meaning of the passages he cited or their sources. Tr. 2744:4-2755:16. Blankenhorn's mere recitation of text

in evidence does not assist the court in understanding the evidence because reading, as much as hearing, "is within the ability and experience of the trier of fact." *Beech Aircraft Corp. v. United States,* 51 F.3d 834, 842 (9th Cir.1995).

Blankenhorn testified that his research has led him to conclude there are three universal rules that govern marriage: (1) the rule of opposites (the "man/woman" rule); (2) the rule of two; and (3) the rule of sex. Tr. 2879:17-25. Blankenhorn explained that there are "no or almost no exceptions" to the rule of opposites, Tr. 2882:14, despite some instances of ritualized same-sex relationships in some cultures, Tr. 2884:25-2888:16. Blankenhorn explained that despite the widespread practice of polygamy across many cultures, the rule of two is rarely violated, because even within a polygamous marriage, "each marriage is separate." Tr. 2892:1-3; Tr. 2899:16-2900:4 ("Q: Is it your view that that man who has married one wife, and then another wife, and then another wife, and then another wife, and then another wife, and now has five wives, and they are all his wives at the same time, that that marriage is consistent with your rule of two? * * * A: I concur with Bronislaw Malinowski, and others, who say that that is consistent with the two rule of marriage."). Finally, Blankenhorn could only hypothesize instances in which the rule of sex would be violated, including where "[h]e's in prison for life, he's married, and he is not in a system in which any conjugal visitation is allowed." Tr. 2907:13-19.

Blankenhorn's interest and study on the subjects of marriage, fatherhood and family structure are evident from the record, but nothing in the record other than the "bald assurance" of Blankenhorn, *Daubert II,* 43 F.3d at 1316, suggests that Blankenhorn's investigation into marriage has been conducted to the "same level of intellectual rigor" characterizing the practice of anthropologists, sociologists or psychologists. See *Kumho Tire,* 526 U.S. at 152, 119 S.Ct. 1167. Blankenhorn gave no explanation of the methodology that led him to his definition of marriage other than his review of others' work. The court concludes that Blankenhorn's proposed definition of marriage is "connected to existing data only by the *ipse dixit*" of Blankenhorn and accordingly rejects it. See *Joiner,* 522 U.S. at 146, 118 S.Ct. 512.

Blankenhorn's second opinion is that a body of evidence supports the conclusion that children raised by their married, biological parents do better on average than children raised in other environments. Tr. 2767:11-2771:11. The evidence Blankenhorn relied on to support his conclusion compares children raised by married, biological parents with children raised by single parents, unmarried mothers, step families and cohabiting parents. Tr. 2769:14-24 (referring to DIX0026 Kristin Anderson Moore, Susan M Jekielek, and Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It,* Child Trends (June 2002)); Tr. 2771:1-11 (referring to DIX0124 Sara McLanahan

and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Harvard 1994)).

Blankenhorn's conclusion that married biological parents provide a better family form than married non-biological parents is not supported by the evidence on which he relied because the evidence does not, and does not claim to, compare biological to non-biological parents. Blankenhorn did not in his testimony consider any study comparing children raised by their married biological parents to children raised by their married adoptive parents. Blankenhorn did not testify about a study comparing children raised by their married biological parents to children raised by their married parents who conceived using an egg or sperm donor. The studies Blankenhorn relied on compare various family structures and do not emphasize biology. Tr. 2768:9-2772:6. The studies may well support a conclusion that parents' marital status may affect child outcomes. The studies do not, however, support a conclusion that the biological connection between a parent and his or her child is a significant variable for child outcomes. The court concludes that "there is simply too great an analytical gap between the data and the opinion proffered." *Joiner,* 522 U.S. at 146, 118 S.Ct. 512. Blankenhorn's reliance on biology is unsupported by evidence, and the court therefore rejects his conclusion that a biological link between parents and children influences children's outcomes.

Blankenhorn's third opinion is that recognizing same-sex marriage will lead to the deinstitutionalization of marriage. Tr. 2772:21-2775:23. Blankenhorn

described deinstitutionalization as a process through which previously stable patterns and rules forming an institution (like marriage) slowly erode or change. Tr. 2773:4-24. Blankenhorn identified several manifestations of deinstitutionalization: out-of-wedlock childbearing, rising divorce rates, the rise of non-marital cohabitation, increasing use of assistive reproductive technologies and marriage for same-sex couples. Tr. 2774:20-2775:23. To the extent Blankenhorn believes that same-sex marriage is both a cause and a symptom of deinstitutionalization, his opinion is tautological. Moreover, no credible evidence supports Blankenhorn's conclusion that same-sex marriage could lead to the other manifestations of deinstitutionalization.

Blankenhorn relied on sociologist Andrew Cherlin (DIX0049 *The Deinstitutionalization of American Marriage,* 66 J Marriage & Family 848 (Nov. 2004)) and sociologist Norval Glen (DIX0060 The *Struggle for Same-Sex Marriage,* 41 Society 25 (Sept/Oct.2004)) to support his opinion that same-sex marriage may speed the deinstitutionalization of marriage. Neither of these sources supports Blankenhorn's conclusion that same-sex marriage will further deinstitutionalize marriage, as neither source claims same-sex marriage as a cause of divorce or single parenthood. Nevertheless, Blankenhorn testified that "the further deinstitutionalization of marriage caused by the legalization of same-sex marriage," Tr. 2782:3-5, would likely manifest itself in "all of the consequences [already discussed]." Tr. 2782:15-16.

Blankenhorn's book, *The Future of Marriage,* DIX0956, lists numerous consequences of permitting same-sex couples to marry, some of which are the manifestations of deinstitutionalization listed above. Blankenhorn explained that the list of consequences arose from a group thought experiment in which an idea was written down if someone suggested it. Tr. 2844:1-12; DIX0956 at 202. Blankenhorn's group thought experiment began with the untested assumption that "gay marriage, like almost any major social change, would be likely to generate a diverse range of consequences." DIX0956 at 202. The group failed to consider that recognizing the marriage of same-sex couples might lead only to minimal, if any, social consequences.

During trial, Blankenhorn was presented with a study that posed an empirical question whether permitting marriage or civil unions for same-sex couples would lead to the manifestations Blankenhorn described as indicative of deinstitutionalization. After reviewing and analyzing available evidence, the study concludes that "laws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women." PX2898 (Laura Langbein & Mark A Yost, Jr, *Same-Sex Marriage and Negative Externalities,* 90 Soc Sci Q 2 (June 2009) at 305-306). Blankenhorn had not seen the study before trial and was thus unfamiliar with its methods and conclusions. Nevertheless, Blankenhorn dismissed the

study and its results, reasoning that its authors "think that [the conclusion is] so self-evident that anybody who has an opposing point of view is not a rational person." Tr. 2918:19-21.

Blankenhorn's concern that same-sex marriage poses a threat to the institution of marriage is further undermined by his testimony that same-sex marriage and opposite-sex marriage operate almost identically. During cross-examination, Blankenhorn was shown a report produced by his Institute in 2000 explaining the six dimensions of marriage: (1) legal contract; (2) financial partnership; (3) sacred promise; (4) sexual union; (5) personal bond; and (6) family-making bond. PX2879 (Coalition for Marriage, Family and Couples Education, et al, *The Marriage Movement: A Statement of Principles* (Institute for American Values 2000)). Blankenhorn agreed that same-sex marriages and opposite-sex marriages would be identical across these six dimensions. Tr. 2913:8-2916:18. When referring to the sixth dimension, a family-making bond, Blankenhorn agreed that same-sex couples could "raise" children. Tr. 2916:17.

Blankenhorn gave absolutely no explanation why manifestations of the deinstitutionalization of marriage would be exacerbated (and not, for example, ameliorated) by the presence of marriage for same-sex couples. His opinion lacks reliability, as there is simply too great an analytical gap between the data and the opinion Blankenhorn proffered. See *Joiner,* 522 U.S. at 146, 118 S.Ct. 512.

Blankenhorn was unwilling to answer many questions directly on cross-examination and was defensive in his answers. Moreover, much of his testimony contradicted his opinions. Blankenhorn testified on cross-examination that studies show children of adoptive parents do as well or better than children of biological parents. Tr. 2794:12-2795:5. Blankenhorn agreed that children raised by same-sex couples would benefit if their parents were permitted to marry. Tr. 2803:6-15. Blankenhorn also testified he wrote and agrees with the statement "I believe that today the principle of equal human dignity must apply to gay and lesbian persons. In that sense, insofar as we are a nation founded on this principle, we would be more American on the day we permitted same-sex marriage than we were the day before." DIX0956 at 2; Tr. 2805:6-2806:1.

Blankenhorn stated he opposes marriage for same-sex couples because it will weaken the institution of marriage, despite his recognition that at least thirteen positive consequences would flow from state recognition of marriage for same-sex couples, including: (1) by increasing the number of married couples who might be interested in adoption and foster care, same-sex marriage might well lead to fewer children growing up in state institutions and more children growing up in loving adoptive and foster families; and (2) same-sex marriage would signify greater social acceptance of homosexual love and the worth and validity of same-sex intimate relationships. Tr. 2839:16-2842:25; 2847:1-2848:3; DIX0956 at 203-205.

Blankenhorn's opinions are not supported by reliable evidence or methodology and Blankenhorn failed to consider evidence contrary to his view in presenting his testimony. The court therefore finds the opinions of Blankenhorn to be unreliable and entitled to essentially no weight.

Kenneth P. Miller

Proponents called Kenneth P Miller, a professor of government at Claremont McKenna College, as an expert in American and California politics. Tr. 2427:10-12. Plaintiffs conducted voir dire to examine whether Miller had sufficient expertise to testify authoritatively on the subject of the political power of gays and lesbians. Tr. 2428:3-10. Plaintiffs objected to Miller's qualification as an expert in the areas of discrimination against gays and lesbians and gay and lesbian political power but did not object to his qualification as an expert on initiatives. Tr. 2435:21-2436:4.

Miller received a PhD from the University of California (Berkeley) in 2002 in political science and is a professor of government at Claremont McKenna College. Doc. # 280-6 at 39-44 (Miller CV). Plaintiffs contend that Miller lacks sufficient expertise to offer an opinion on the relative political power of gay men and lesbians. Having considered Miller's background, experience and testimony, the court concludes that, while Miller has significant experience with politics generally, he is not sufficiently familiar with gay and

lesbian politics specifically to offer opinions on gay and lesbian political power.

Miller testified that factors determining a group's political power include money, access to lawmakers, the size and cohesion of a group, the ability to attract allies and form coalitions and the ability to persuade. Tr. 2437:7-14. Miller explained why, in his opinion, these factors favor a conclusion that gays and lesbians have political power. Tr. 2442-2461.

Miller described religious, political and corporate support for gay and lesbian rights. Miller pointed to failed initiatives in California relating to whether public school teachers should be fired for publicly supporting homosexuality and whether HIV-positive individuals should be quarantined or reported as examples of political successes for gays and lesbians. Tr. 2475:21-2477:16. Miller testified that political powerlessness is the inability to attract the attention of lawmakers. Tr. 2487:1-2. Using that test, Miller concluded that gays and lesbians have political power both nationally and in California. Tr. 2487:10-21.

Plaintiffs cross-examined Miller about his knowledge of the relevant scholarship and data underlying his opinions. Miller admitted that proponents' counsel provided him with most of the "materials considered" in his expert report. Tr. 2497:13-2498:22; PX0794A (annotated index of materials considered). See also Doc. # 280 at 23-35 (Appendix to plaintiffs' motion in limine listing 158 sources that appear on both Miller's list of materials considered and the list of

proponents' withdrawn expert, Paul Nathanson, including twenty-eight websites listing the same "last visited" date). Miller stated that he did not know at the time of his deposition the status of antidiscrimination provisions to protect gays and lesbians at the state and local level, Tr. 2506:3-2507:1, could only identify Don't Ask, Don't Tell and the federal Defense of Marriage Act as examples of official discrimination against gays and lesbians, Tr. 2524:4-2525:2, and that he has read no or few books or articles by George Chauncey, Miriam Smith, Shane Phelan, Ellen Riggle, Barry Tadlock, William Eskridge, Mark Blasius, Urvashi Vaid, Andrew Sullivan and John D'Emilio, Tr. 2518:15-2522:25.

Miller admitted he had not investigated the scope of private employment discrimination against gays and lesbians and had no reason to dispute the data on discrimination presented in PX0604 (The Employment Non-Discrimination Act of 2009, Hearings on HR 3017 before the House Committee on Education and Labor, 111 Cong, 1st Sess (Sept. 23, 2009) (testimony of R Bradley Sears, Executive Director of the Williams Institute)). Tr. 2529:15-2530:24. Miller did not know whether gays and lesbians have more or less political power than African Americans, either in California or nationally, because he had not researched the question. Tr. 2535:9-2539:13.

Plaintiffs questioned Miller on his earlier scholarship criticizing the California initiative process because initiatives eschew compromise and foster polarization, undermine the authority and flexibility

of representative government and violate norms of openness, accountability, competence and fairness. Tr. 2544:10-2547:7. In 2001 Miller wrote that he was especially concerned that initiative constitutional amendments undermine representative democracy. Tr. 2546:14-2548:15.

Plaintiffs questioned Miller on data showing 84 percent of those who attend church weekly voted yes on Proposition 8, 54 percent of those who attend church occasionally voted no on Proposition 8 and 83 percent of those who never attend church voted no on Proposition 8. Tr. 2590:10-2591:7; PX2853 at 9 *Proposition 8 Local Exit Polls – Election Center 2008,* CNN). Plaintiffs also asked about polling data showing 56 percent of those with a union member in the household voted yes on Proposition 8. Tr. 2591:25-2592:6; PX2853 at 13. Miller stated he had no reason to doubt the accuracy of the polling data. Tr. 2592:7-8. Miller did not explain how the data in PX2853 are consistent with his conclusion that many religious groups and labor unions are allies of gays and lesbians.

Miller testified that he did not investigate the extent of anti-gay harassment in workplaces or schools. Tr. 2600:7-17, 2603:9-24. Miller stated he had not investigated the ways in which anti-gay stereotypes may have influenced Proposition 8 voters. Tr. 2608:19-2609:1. Miller agreed that a principle of political science holds that it is undesirable for a religious majority to impose its religious views on a minority. Tr. 2692:16-2693:7.

Miller explained on redirect that he had reviewed "most" of the materials listed in his expert report and that he "tried to review all of them." Tr. 2697:11-16. Miller testified that he believes initiatives relating to marriage for same-sex couples arise as a check on the courts and do not therefore implicate a fear of the majority imposing its will on the minority. Tr. 2706:17-2707:6. Miller explained that prohibiting same-sex couples from marriage "wasn't necessarily invidious discrimination against" gays and lesbians. Tr. 2707:20-24.

The credibility of Miller's opinions relating to gay and lesbian political power is undermined by his admissions that he: (1) has not focused on lesbian and gay issues in his research or study; (2) has not read many of the sources that would be relevant to forming an opinion regarding the political power of gays and lesbians; (3) has no basis to compare the political power of gays and lesbians to the power of other groups, including African-Americans and women; and (4) could not confirm that he personally identified the vast majority of the sources that he cited in his expert report, see PX0794A. Furthermore, Miller undermined the credibility of his opinions by conceding that gays and lesbians currently face discrimination and that current discrimination is relevant to a group's political power.

Miller's credibility was further undermined because the opinions he offered at trial were inconsistent with the opinions he expressed before he was retained as an expert. Specifically, Miller previously

wrote that gays and lesbians, like other minorities, are vulnerable and powerless in the initiative process, see PX1869 (Kenneth Miller, *Constraining Populism: The Real Challenge of Initiative Reform,* 41 Santa Clara L Rev 1037 (2001)), contradicting his trial testimony that gays and lesbians are not politically vulnerable with respect to the initiative process. Miller admitted that at least some voters supported Proposition 8 based on anti-gay sentiment. Tr. 2606:11-2608:18.

For the foregoing reasons, the court finds that Miller's opinions on gay and lesbian political power are entitled to little weight and only to the extent they are amply supported by reliable evidence.

II

FINDINGS OF FACT[2]

Having considered the evidence presented at trial, the credibility of the witnesses and the legal arguments presented by counsel, the court now makes the following findings of fact pursuant to FRCP 52(a). The court relies primarily on the testimony and exhibits cited herein, although uncited cumulative documentary evidence in the record and considered by the court also supports the findings.

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[2] To the extent any of the findings of fact should more properly be considered conclusions of law, they shall be deemed as such.

THE PARTIES

Plaintiffs

1. Kristin Perry and Sandra Stier reside together in Alameda County, California and are raising four children. They are lesbians in a committed relationship who seek to marry.

2. On May 21, 2009, Perry and Stier applied for a marriage license from defendant O'Connell, the Alameda County Clerk-Recorder, who denied them a license due to Proposition 8 because they are of the same sex.

3. Paul Katami and Jeffrey Zarrillo reside together in Los Angeles County, California. They are gay men in a committed relationship who seek to marry.

4. On May 20, 2009, Katami and Zarrillo applied for a marriage license from defendant Logan, the Los Angeles County Clerk, who denied them a license due to Proposition 8 because they are of the same sex.

Plaintiff-Intervenor

5. San Francisco is a charter city and county under the California Constitution and laws of the State of California. Cal. Const. Art. XI, § 5(a); SF Charter Preamble.

6. San Francisco is responsible for issuing marriage licenses, performing civil marriage ceremonies and maintaining vital records of marriages. Cal. Fam. Code §§ 350(a), 401(a), 400(b).

Defendants

7. Arnold Schwarzenegger is the Governor of California.

8. Edmund G Brown, Jr is the Attorney General of California.

9. Mark B Horton is the Director of the California Department of Public Health and the State Registrar of Vital Statistics of the State of California. In his official capacity, Horton is responsible for prescribing and furnishing the forms for marriage license applications, the certificate of registry of marriage, including the license to marry, and the marriage 26 certificate. See Doc. # 46 ¶ 15 (admitting Doc. # 1 ¶ 15).

10. Linette Scott is the Deputy Director of Health Information & Strategic Planning for the California Department of Public Health. Scott reports to Horton and is the official responsible for prescribing and furnishing the forms for marriage license applications, the certificate of registry of marriage, including the license to marry, and the marriage certificate. See Doc. # 46 ¶ 16 (admitting Doc. # 1 ¶ 16).

11. Patrick O'Connell is the Alameda County Clerk-Registrar and is responsible for maintaining vital records of marriages, issuing marriage licenses and performing civil marriage ceremonies. See Doc. # 42 ¶ 17 (admitting Doc. # 1 ¶ 17).

12. Dean C Logan is the Los Angeles County Registrar-Recorder/County Clerk and is responsible for maintaining vital records of marriages, issuing marriage

licenses and performing civil marriage ceremonies. Doc. # 41 ¶ 13 (admitting Doc. # 1 ¶ 18).

Defendant-Intevenors (Proponents)

13. Dennis Hollingsworth, Gail J Knight, Martin F Gutierrez, Hak-Shing William Tam and Mark A Jansson are the "official proponents" of Proposition 8 under California law.

a. Doc. # 8-6 at ¶ 19 (Decl. of David Bauer);

b. Doc. # 8 at 14 (Proponents' motion to intervene: "Proponents complied with a myriad of legal requirements to procure Proposition 8's enactment, such as (1) filing forms prompting the State to prepare Proposition 8's Title and Summary, (2) paying the initiative filing fee, (3) drafting legally compliant signature petitions, (4) overseeing the collection of more than 1.2 million signatures, (5) instructing signature-collectors on state-law guidelines, and (6) obtaining certifications from supervising signature-gatherers.").

14. Proponents dedicated substantial time, effort, reputation and personal resources in campaigning for Proposition 8.

a. Tr. 1889:23-1893:15: Tam spent the majority of his hours in 2008 working to pass Proposition 8;

b. Doc. # 8-1 at ¶ 27 (Decl. of Dennis Hollingsworth);

c. Doc. # 8-2 at ¶ 27 (Decl. of Gail J Knight);

d. Doc. # 8-3 (Decl. of Martin F Gutierrez: describing activities to pass and enforce Proposition 8);

e. Doc. # 8-4 at ¶ 27 (Decl. of Hak-Shing William Tam);

f. Doc. # 8-5 at ¶ 27 (Decl. of Mark A Jansson).

15. Proponents established ProtectMarriage.com – Yes on 8, a Project of California Renewal ("Protect Marriage") as a "primarily formed ballot measure committee" under California law.

a. Doc. # 8-1 at ¶ 13 (Decl. of Dennis Hollingsworth);

b. Doc. # 8-2 at ¶ 13 (Decl. of Gail J Knight);

c. Doc. # 8-3 at ¶ 13 (Decl. of Martin F Gutierrez);

d. Doc. # 8-4 at ¶ 13 (Decl. of Hak-Shing William Tam);

e. Doc. # 8-5 at ¶ 13 (Decl. of Mark A Jansson).

16. The Protect Marriage Executive Committee includes Ron Prentice, Edward Dolejsi, Mark A Jansson and Doug Swardstrom. Andrew Pugno acts as General Counsel. David Bauer is the Treasurer and officer of record for Protect Marriage.

a. Doc. # 372 at 4 (identifying the above individuals based on the declaration of Ron Prentice, submitted under seal on November 6, 2009);

b. PX0209 Letter from Protect Marriage to Jim Abbott (Oct. 20, 2008): Letter to a business that

donated money to a group opposing Proposition 8 demanding "a donation of a like amount" to Protect Marriage. The letter is signed by: Ron Prentice, Protect Marriage Chairman; Andrew Pugno, Protect Marriage General Counsel; Edward Dolejsi, Executive Director, California Catholic Conference; and Mark Jansson, a Protect Marriage Executive Committee Member.

17. Protect Marriage was responsible for all aspects of the campaign to qualify Proposition 8 for the ballot and enact it into law.

a. Doc. # 8-6 at ¶¶ 4, 6, 10, 11 (Decl. of David Bauer);

b. PX2403 Email from Kenyn Cureton, Vice-President, Family Research Council, to Prentice at 1 (Aug 25, 2008): Cureton attaches a kit to be distributed to Christian voters through churches to help them promote Proposition 8. Cureton explains to Prentice that Family Research Council ("FRC") found out from Pugno that FRC "need[s] to take FRC logos off of the CA version of the videos (legal issues) and just put ProtectMarriage.com on everything" and FRC is "making those changes.";

c. PX2640 Email from Pugno to Tam (Feb. 5, 2008) at 2: "I do not think it is likely, but in the event you are contacted by the media or anyone else regarding the Marriage Amendment [Proposition 8], I would encourage you to please refer all calls to the campaign phone number. * * * It is crucial that our public message be very specific.";

d. PX2640 Email from Pugno to Tam (Feb. 5, 2008) at 2: Pugno explains that Tam is "an exception" to Protect Marriage's press strategy and should speak on behalf of the campaign directly to the Chinese press. See Tr. 1906:9-12;

e. Tr. 1892:9-12 (Tam: In October 2007, Tam was waiting for instructions from Protect Marriage regarding when he should start collecting signatures to place Proposition 8 on the ballot.);

f. Tr. 1904:3-5 (Tam: Tam participated in a debate because Protect Marriage told him to do so.);

g. Tr. 1998:23-1999:11 (Tam: Protect Marriage reimbursed individuals who ran print and television ads in support of Proposition 8.);

h. Tr. 1965:15-1966:4 (Tam: Tam signed a "Statement of Unity with respect to the Proposition 8 campaign" both "[o]n behalf of [him]self and on behalf of the Traditional Family Coalition.");

i. PX2476 Email from Tam to list of supporters (Oct. 22, 2007): "I'm still waiting for ProtectMarriage.com for instructions of when we would start the signature collection for [Proposition 8]."

18. 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."

WHETHER ANY EVIDENCE SUPPORTS CALIFORNIA'S REFUSAL TO RECOGNIZE MARRIAGE BETWEEN TWO PEOPLE BECAUSE OF THEIR SEX

19. Marriage in the United States has always been a civil matter. Civil authorities may permit religious leaders to solemnize marriages but not to determine who may enter or leave a civil marriage. Religious leaders may determine independently whether to recognize a civil marriage or divorce but that recognition or lack thereof has no effect on the relationship under state law.

a. Tr. 195:13-196:21 (Cott: "[C]ivil law has always been supreme in defining and regulating marriage. * * * [Religious practices and ceremonies] have no particular bearing on the validity of marriages. Any clerics, ministers, rabbis, et cetera, that were accustomed to * * * performing

marriages, only do so because the state has given them authority to do that.");

b. Cal. Fam. Code §§ 400, 420.

20. A person may not marry unless he or she has the legal capacity to consent to marriage.

a. Tr. 202:2-15 (Cott: Marriage "is a basic civil right. It expresses the right of a person to have the liberty to be able to consent validly.");

b. Cal. Fam. Code §§ 300, 301.

21. California, like every other state, has never required that individuals entering a marriage be willing or able to procreate.

a. Cal. Fam. Code § 300 et seq.;

b. *In re Marriage Cases*, [43 Cal.4th 757, 76 Cal.Rptr.3d 683] 183 P.3d 384, 431 (Cal.2008) ("This contention [that marriage is limited to opposite-sex couples because only a man and a woman can produce children biologically related to both] is fundamentally flawed[.]");

c. *Lawrence v. Texas,* 539 U.S. 558, 604-05 [123 S.Ct. 2472, 156 L.Ed.2d 508] (2003) (Scalia, J, dissenting) ("If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct * * * what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.");

d. Tr. 222:22-223:22 (Cott: "There has never been a requirement that a couple produce children in order to have a valid marriage. Of course, people beyond procreative age have always been allowed to marry. * * * [P]rocreative ability has never been a qualification for marriage.").

22. When California became a state in 1850, marriage was understood to require a husband and a wife. See Cal. Const., Art. XI § 14 (1849); *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 407.

23. The states have always required the parties to give their free consent to a marriage. Because slaves were considered property of others at the time, they lacked the legal capacity to consent and were thus unable to marry. After emancipation, former slaves viewed their ability to marry as one of the most important new rights they had gained. Tr. 202:2-203:12 (Cott).

24. Many states, including California, had laws restricting the race of marital partners so that whites and non-whites could not marry each other.

a. Tr. 228:9-231:3 (Cott: In "[a]s many as 41 states and territories," laws placed restrictions on "marriage between a white person and a person of color.");

b. Tr. 236:17-238:23 (Cott: Racially restrictive marriage laws "prevented individuals from having complete choice on whom they married, in a way that designated some groups as less worthy than other groups[.]" Defenders of race restrictions argued the laws were "naturally-based and

God's plan just being put into positive law, the efforts to undo them met extreme alarm among those who thought these laws were correct. * * * [P]eople who supported [racially restrictive marriage laws] saw these as very important definitional features of who could and should marry, and who could not and should not.");

c. Tr. 440:9-13 (Chauncey: Jerry Falwell criticized *Brown v. Board of Education,* because school integration could "lead to interracial marriage, which was then sort of the ultimate sign of black and white equality.");

d. PX2547 (Nathanson Nov. 12, 2009 Dep. Tr. 108:12-23: Defenders of race restrictions in marriage argued that such discrimination was protective of the family); PX2546 (video of same);

e. *Pace v. Alabama,* 106 U.S. 583, 585 [1 S.Ct. 637, 27 L.Ed. 207] (1883) (holding that anti-miscegenation laws did not violate the Constitution because they treated African-Americans and whites the same);

f. PX0710 at RFA No 11: Attorney General admits that California banned interracial marriage until the California Supreme Court invalidated the prohibition in *Perez v. Sharp,* [32 Cal.2d 711] 198 P.2d 17 (Cal.1948);

g. PX0707 at RFA No 11: Proponents admit that California banned certain interracial marriages from early in its history as a state until the California Supreme Court invalidated those restrictions in *Perez,* 198 P.2d 17.

25. Racial restrictions on an individual's choice of marriage partner were deemed unconstitutional under the California Constitution in 1948 and under the United States Constitution in 1967. An individual's exercise of his or her right to marry no longer depends on his or her race nor on the race of his or her chosen partner.

a. *Loving v. Virginia,* 388 U.S. 1 [87 S.Ct. 1817, 18 L.Ed.2d 1010] (1967);

b. *Perez v. Sharp*, [32 Cal.2d 711] 198 P.2d 17 (Cal.1948).

26. Under coverture, a woman's legal and economic identity was subsumed by her husband's upon marriage. The husband was the legal head of household. Coverture is no longer part of the marital bargain.

a. PX0710 at RFA No 12: Attorney General admits that the doctrine of coverture, under which women, once married, lost their independent legal identity and became the property of their husbands, was once viewed as a central component of the civil institution of marriage;

b. Tr. 240:11-240:15 (Cott: Under coverture, "the wife was covered, in effect, by her husband's legal and economic identity. And she – she lost her independent legal and economic individuality.");

c. Tr. 240:22-241:6 (Cott: Coverture "was the marital bargain to which both spouses consented. And it was a reciprocal bargain in which the husband had certain very important * * * obligations that were enforced by the state. His obligation

was to support his wife, provide her with the basic material goods of life, and to do so for their dependents. And her part of the bargain was to serve and obey him, and to lend to him all of her property, and also enable him to take all of her earnings, and represent her in court or in any sort of legal or economic transaction.");

d. Tr. 241:7-11 (Cott: Coverture "was a highly-asymmetrical bargain that, to us today, appears to enforce inequality. * * * But I do want to stress it was not simply domination and submission. It was a mutual bargain, a reciprocal bargain joined by consent.");

e. Tr. 243:5-244:10 (Cott: The sexual division of roles of spouses began to shift in the late nineteenth century and came fully to an end under the law in the 1970s. Currently, the state's assignment of marital roles is gender-neutral. "[B]oth spouses are obligated to support one another, but they are not obligated to one another with a specific emphasis on one spouse being the provider and the other being the dependent.");

f. *Follansbee v. Benzenberg,* 122 Cal.App.2d 466, 476 [265 P.2d 183] (2d Dist. 1954) ("The legal status of a wife has changed. Her legal personality is no longer merged in that of her husband.").

27. Marriage between a man and a woman was traditionally organized based on presumptions of a division of labor along gender lines. Men were seen as suited for certain types of work and women for others. Women were seen as suited to raise children and men were seen as suited to provide for the family.

a. Tr. 239:25-245:8, 307:14-308:9, 340:14-342:12 (Cott: Marriage laws historically have been used to dictate the roles of spouses. Under coverture, a wife's legal and economic identity was merged into that of her husband's. The coverture system was based on assumptions of what was then considered a natural division of labor between men and women.);

b. Tr. 241:19-23 (Cott: "[A]ssumptions were, at the time, that men were suited to be providers * * * whereas, women, the weaker sex, were suited to be dependent.");

c. PX1245 Letitia Anne Peplau and Adam W Fingerhut, The *Close Relationships of Lesbians and Gay Men,* 58 Annual Rev. Pschol. 405, 408 (2007): "Traditional heterosexual marriage is organized around two basic principles: a division of labor based on gender and a norm of greater male power and decision-making authority.";

d. PX2547 (Nathanson Nov. 12, 2009 Dep. Tr. 108:24-109:9: Defenders of prejudice or stereotypes against women argued that such discrimination was meant to be protective of the family. (PX2546 video of same); see also PX2545 (Young Nov. 13, 2009 Dep. Tr. 214:19-215:13: same, PX2544 video of same);

e. PX1319 Hendrik Hartog, Lecture, *Marital Exits and Marital Expectations in Nineteenth Century America,* 80 Georgetown L. J. 95, 101, 128-129 (1991): "Even in equity, a wife could not usually sue under her own name." And "the most important feature of marriage was the public assumption of a relationship of rights and duties,

of men acting as husbands and women acting as wives.";

f. PX1328 Note, *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services,* 29 Va. L. Rev. 857, 858 (1943): "Marriage deprived [the wife] of her legal capacity in most matters affecting property."

28. The development of no-fault divorce laws made it simpler for spouses to end marriages and allowed spouses to define their own roles within a marriage.

a. Tr. 338:5-14 (Cott: No-fault divorce "was an indication of the shift * * * [that] spousal roles used to be dictated by the state. Now they are dictated by the couple themselves. There's no requirement that they do X or Y if they are one spouse or the other.");

b. Tr. 339:10-14 (Cott: The move to no-fault divorce underlines the fact that marriage no longer requires specific performance of one marital role or another based on gender.);

c. PX1319 Hendrik Hartog, Lecture, *Marital Exits and Marital Expectations in Nineteenth Century America,* 80 Georgetown L J 95, 97, 121 (1991): In nineteenth century America, marriage was permanent, spousal roles were non-negotiable and divorce "punished the guilty for criminal conduct" and "provided a form of public punishment for a spouse who had knowingly and criminally violated his or her public vows of marriage.";

d. PX1308 Betsey Stevenson and Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces,* Institute for the Study of Labor at 2-3, Fig 1 (Feb. 2007): Current divorce rates are consistent with trends that developed before states adopted no-fault divorce.

29. In 1971, California amended Cal. Civ. Code § 4101, which had previously set the age of consent to marriage at twenty-one years for males and eighteen years for females, to read "[a]ny unmarried person of the age of 18 years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage." Cal. Civ. Code § 4101 (1971); *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 408.

30. In the 1970s, several same-sex couples sought marriage licenses in California, relying on the amended language in Cal. Civ. Code § 4101. *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 409. In response, the legislature in 1977 amended the marriage statute, former Cal. Civ. Code § 4100, to read "[m]arriage is a personal relation arising out of a civil contract between a man and a woman * * * ." *Id.* That provision became Cal. Fam. Code § 300. The legislative history of the enactment supports a conclusion that unique roles of a man and a woman in marriage motivated legislators to enact the amendment. See *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 409.

31. In 2008, the California Supreme Court held that certain provisions of the Family Code violated the California Constitution to the extent the statutes

reserve the designation of marriage to opposite-sex couples. *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 452. The language "between a man and a woman" was stricken from section 300, and section 308.5 (Proposition 22) was stricken in its entirety. *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 453.

32. California has eliminated marital obligations based on the gender of the spouse. Regardless of their sex or gender, marital partners share the same obligations to one another and to their dependants. As a result of Proposition 8, California nevertheless requires that a marriage consist of one man and one woman.

a. Cal. Const. Art., I § 7.5 (Proposition 8);

b. Cal. Fam. Code § 720.

33. Eliminating gender and race restrictions in marriage has not deprived the institution of marriage of its vitality.

a. PX0707 at RFA No 13: Proponents admit that eliminating the doctrine of coverture has not deprived marriage of its vitality and importance as a social institution;

b. PX0710 at RFA No 13: Attorney General admits that gender-based reforms in civil marriage law have not deprived marriage of its vitality and importance as a social institution;

c. Tr. 245:9-247:3 (Cott: "[T]he primacy of the husband as the legal and economic representative of the couple, and the protector and provider

for his wife, was seen as absolutely essential to what marriage was" in the nineteenth century. Gender restrictions were slowly removed from marriage, but "because there were such alarms about it and such resistance to change in this what had been seen as quite an essential characteristic of marriage, it took a very very long time before this trajectory of the removal of the state from prescribing these rigid spousal roles was complete." The removal of gender inequality in marriage is now complete "to no apparent damage to the institution. And, in fact, I think to the benefit of the institution.");

d. PX0707 at RFA No 13: Proponents admit that eliminating racial restrictions on marriage has not deprived marriage of its vitality and importance as a social institution;

e. PX0710 at RFA No 13: Attorney General admits that race-based reforms in civil marriage law have not deprived marriage of its vitality and importance as a social institution;

f. Tr. 237:9-239:24 (Cott: When racial restrictions on marriage across color lines were abolished, there was alarm and many people worried that the institution of marriage would be degraded and devalued. But "there has been no evidence that the institution of marriage has become less popular because * * * people can marry whoever they want.").

34. 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. Tr. 187:11-16; 188:16-189:2; 201:9-14 (Cott).

35. The state has many purposes in licensing and fostering marriage. Some of the state's purposes benefit the persons married while some benefit the state:

a. Facilitating governance and public order by organizing individuals into cohesive family units. Tr. 222:13-17 (Cott: "[T]he purpose of the state in licensing and incentivizing marriage is to create stable households in which the adults who reside there and are committed to one another by their own consents will support one another as well as their dependents.");

b. Developing a realm of liberty, intimacy and free decision-making by spouses, Tr. 189:7-15 (Cott: "[T]he realm created by marriage, that private realm has been repeatedly reiterated as a – as a realm of liberty for intimacy and free decision making by the parties[.]");

c. Creating stable households. Tr. 226:8-15 (Cott: The government's aim is "to create stable and enduring unions between couples.");

d. Legitimating children. Tr. 225:16-227:4 (Cott: Historically, legitimating children was a very important function of marriage, especially among propertied families. Today, legitimation is less important, although unmarried couples' children still have to show "that they deserve these

inheritance rights and other benefits of their parents.");

e. Assigning individuals to care for one another and thus limiting the public's liability to care for the vulnerable. Tr. 226:8-227:4 (Cott: Marriage gives private actors responsibility over dependents.); Tr. 222:18-20 ("The institution of marriage has always been at least as much about supporting adults as it has been about supporting minors.");

f. Facilitating property ownership. Tr. 188:20-22 (Marriage is "the foundation of the private realm of * * * property transmission.").

36. States and the federal government channel benefits, rights and responsibilities through marital status. Marital status affects immigration and citizenship, tax policy, property and inheritance rules and social benefit programs.

a. Tr. 1341:2-16 (Badgett: Specific tangible economic harms flow from being unable to marry, including lack of access to health insurance and other employment benefits, higher income taxes and taxes on domestic partner benefits.);

b. Tr. 235:24-236:16 (Cott: The government has historically channeled many benefits through marriage; as an example, the Social Security Act had "a very distinct marital advantage for those who were married couples as compared to either single individuals or unmarried couples.");

c. PX1397 U.S. General Accounting Office Report at 1, Jan 23, 2004: Research identified "a

total of 1138 federal statutory provisions classified in the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.".

37. Marriage creates economic support obligations between consenting adults and for their dependents.

a. Tr. 222:13-17 (Cott: "[T]he purpose of the state in licensing and incentivizing marriage is to create stable households in which the adults who reside there and are committed to one another by their own consents will support one another as well as their dependents.");

b. Cal. Fam. Code § 720.

38. Marriage benefits both spouses by promoting physical and psychological health. Married individuals are less likely to engage in behaviors detrimental to health, like smoking or drinking heavily. Married individuals live longer on average than unmarried individuals.

a. Tr. 578:11-579:9 (Peplau: A recent, large-scale study by the Centers for Disease Control found that married individuals, on average, fare better on "virtually every measure" of health compared to non-married individuals.);

b. PX0708 at RFA No 84: Proponents admit that opposite-sex couples who are married experience, on average, less anxiety and depression and greater happiness and satisfaction with life than do non-married opposite-sex couples or persons not involved in an intimate relationship;

c. Tr. 578:2-10 (Peplau: "[T]he very consistent findings from [a very large body of research on the impact of marriage on health] are that, on average, married individuals fare better. They are physically healthier. They tend to live longer. They engage in fewer risky behaviors. They look better on measures of psychological well-being.");

d. Tr. 688:10-12 (Egan: "[M]arried individuals are healthier, on average, and, in particular, behave themselves in healthier ways than single individuals.");

e. PX1043 Charlotte A Schoenborn, *Marital Status and Health: United States, 1999-2002,* U.S. Department of Health and Human Services at 1 (Dec. 15, 2004): "Regardless of population subgroup (age, sex, race, Hispanic origin, education, income, or nativity) or health indicator (fair or poor health, limitations in activities, low back pain, headaches, serious psychological distress, smoking, or leisure-time physical inactivity), married adults were generally found to be healthier than adults in other marital status categories.";

f. PX0803 California Health Interview Survey (2009): Married individuals are less likely to have psychological distress than individuals who are single and never married, divorced, separated, widowed or living with their partner;

g. PX0807 Press Release, Agency for Healthcare Research and Quality, *Marriage Encourages Healthy Behaviors among the Elderly, Especially Men* (Oct. 26, 1998): Marriage encourages healthy behaviors among the elderly.

39. Material benefits, legal protections and social support resulting from marriage can increase wealth and improve psychological well-being for married spouses.

a. PX0809 Joseph Lupton and James P Smith, *Marriage, Assets, and Savings,* RAND (Nov. 1999): Marriage is correlated with wealth accumulation;

b. Tr. 1332:19-1337:2 (Badgett: Marriage confers numerous economic benefits, including greater specialization of labor and economies of scale, reduced transactions costs, health and insurance benefits, stronger statement of commitment, greater validation and social acceptance of the relationship and more positive workplace outcomes. Some benefits are not quantifiable but are nevertheless substantial.);

c. PX0708 at RFA No 85: Proponents admit that societal support is central to the institution of marriage and that marital relationships are typically entered in the presence of family members, friends and civil or religious authorities;

d. PX0708 at RFA No 87: Proponents admit that marriage between a man and a woman can be a source of relationship stability and commitment, including by creating barriers and constraints on dissolving the relationship.

40. The long-term nature of marriage allows spouses to specialize their labor and encourages spouses to increase household efficiency by dividing labor to increase productivity.

a. Tr. 1331:15-1332:9; 1332:25-1334:17 (Badgett);

b. PX0708 at RFA No 88: Proponents admit that marriage between a man and a woman encourages spouses to increase household efficiency, including by dividing their labor in ways that increase the family's productivity in producing goods and services for family members.

41. The tangible and intangible benefits of marriage flow to a married couple's children.

a. Tr. 1042:20-1043:8 (Lamb: explaining that when a couple marries, that marriage can improve the outcomes of the couple's child because of "the that accrue to marriage.");

b. PX0886 Position Statement, American Psychiatric Association, *Support of Legal Recognition of Same-Sex Civil Marriage* (July 2005): Marriage benefits children of that couple.

WHETHER ANY EVIDENCE SHOWS CALIFORNIA HAS AN INTEREST IN DIFFERENTIATING BETWEEN SAME-SEX AND OPPOSITE-SEX UNIONS

42. Same-sex love and intimacy are well-documented in human history. The concept of an identity based on object desire; that is, whether an individual desires a relationship with someone of the opposite sex (heterosexual), same sex (homosexual) or either sex (bisexual), developed in the late nineteenth century.

a. Tr. 531:25-533:24 (Chauncey: The categories of heterosexual and homosexual emerged in the late nineteenth century, although there were people at all time periods in American history

whose primary erotic and emotional attractions were to people of the same sex.);

b. Tr. 2078:10-12 (Herek: "[H]eterosexual and homosexual behaviors alike have been common throughout human history[.]");

c. Tr. 2064:22-23 (Herek: In practice, we generally refer to three groups: homosexuals, heterosexuals and bisexuals.);

d. Tr. 2027:4-9 (Herek: "[S]exual orientation is at its heart a relational construct, because it is all about a relationship of some sort between one individual and another, and a relationship that is defined by the sex of the two persons involved[.]").

43. Sexual orientation refers to an enduring pattern of sexual, affectional or romantic desires for and attractions to men, women or both sexes. An individual's sexual orientation can be expressed through self-identification, behavior or attraction. The vast majority of people are consistent in self-identification, behavior and attraction throughout their adult lives.

a. Tr. 2025:3-12 (Herek: "Sexual orientation is a term that we use to describe an enduring sexual, romantic, or intensely affectional attraction to men, to women, or to both men and women. It's also used to refer to an identity or a sense of self that is based on one's enduring patterns of attraction. And it's also sometimes used to describe an enduring pattern of behavior.");

b. Tr. 2060:7-11 (Herek: Most social science and behavioral research has assessed sexual

orientation in terms of attraction, behavior or identity, or some combination thereof.);

c. Tr. 2072:19-2073:4 (Herek: "[T]he vast majority of people are consistent in their behavior, their identity, and their attractions.");

d. Tr. 2086:13-21 (Herek: The Laumann study (PX0943 Edward O Laumann, et al, *The Social Organization of Sexuality: Sexual Practices in the United States* (Chicago 1994)) shows that 90 percent of people in Laumann's sample were consistently heterosexual in their behavior, identity and attraction, and a core group of one to two percent of the sample was consistently lesbian, gay or bisexual in their behavior, identity and attraction.);

e. Tr. 2211:8-10 (Herek: "[I]f I were a betting person, I would say that you would do well to bet that [a person's] future sexual behavior will correspond to [his or her] current identity.").

44. Sexual orientation is commonly discussed as a characteristic of the individual. Sexual orientation is fundamental to a person's identity and is a distinguishing characteristic that defines gays and lesbians as a discrete group. Proponents' assertion that sexual orientation cannot be defined is contrary to the weight of the evidence.

a. Tr. 2026:7-24 (Herek: In his own research, Herek has asked ordinary people if they are heterosexual, straight, gay, lesbian or bisexual, and that is a question people generally are able to answer.);

b. Tr. 858:24-859:5 (Meyer: Sexual orientation is perceived as "a core thing about who you are." People say: "This is who I am. * * * [I]t is a central identity that is important.");

c. Tr. 2027:14-18 (Herek: These sorts of relationships, that need for intimacy and attachment is a very core part of the human experience and a very fundamental need that people have.);

d. Tr. 2324:8-13 (Herek: If two women wish to marry each other, it is reasonable to assume that they are lesbians. And if two men want to marry each other, it is reasonable to assume that they are gay.);

e. Tr. 2304:9-2309:1 (Herek: Researchers may define sexual orientation based on behavior, identity or attraction based on the purpose of a study, so that an individual studying sexually transmitted infections may focus on behavior while a researcher studying child development may focus on identity. Researchers studying racial and ethnic minorities similarly focus their definition of the population to be studied based on the purpose of the study. Most people are nevertheless consistent in their behavior, identity and attraction.);

f. Tr. 2176:23-2177:14 (Herek, responding to cross-examination that sexual orientation is a socially constructed classification and not a "valid concept": "[Social constructionists] are talking about the construction of [sexual orientation] at the cultural level, in the same way that we have cultural constructions of race and ethnicity and social class. * * * But to say that there's no such

thing as class or race or ethnicity or sexual orientation is to, I think, minimize the importance of that construction.);

g. Tr. 1372:10-1374:7 (Badgett: DIX1108 The Williams Institute, *Best Practices for Asking Questions about Sexual Orientation on Surveys* (Nov. 2009), includes a discussion about methods for conducting surveys; it does not conflict with the substantial evidence demonstrating that sexual orientation is a distinguishing characteristic that defines gay and lesbian individuals as a discrete group.).

45. Proponents' campaign for Proposition 8 assumed voters understood the existence of homosexuals as individuals distinct from heterosexuals.

a. PX0480A Video supporting Proposition 8: Supporters of Proposition 8 identified "homosexuals and those sympathetic to their demands" as supporters of marriage for same-sex couples;

b. PX2153 Advertisement, *Honest Answers to Questions Many Californians Are Asking About Proposition 8,* Protect Marriage (2008): "The 98% of Californians who are not gay should not have their religious freedoms and freedom of expression be compromised to afford special legal rights for the 2% of Californians who are gay.";

c. PX2156 Protect Marriage, *Myths and Facts About Proposition 8:* "Proposition 8 does not interfere with gays living the lifestyle they choose. However, while gays can live as they want, they should not have the right to redefine marriage for the rest of society.";

d. PX0021 Leaflet, California Family Council, The California Marriage Protection Act ("San Diego County's 'Tipping Point'") at 2: The leaflet asserts that "homosexuals" do not want to marry; instead, the goal of the "homosexual community" is to annihilate marriage;

e. PX0577 Frank Schubert and Jeff Flint, *Passing Prop 8,* Politics at 45 (Feb. 2009): The Proposition 8 campaign was organized in light of the fact that many Californians are "tolerant" of gays;

f. PX0001 California Voter Information Guide, California General Election, Tuesday, November 4, 2008 at PM 3365: "[W]hile gays have the right to their private lives, *they do not have the right to redefine marriage* for everyone else" (emphasis in original).

46. Individuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.

a. Tr. 2032:15-22 (Herek: Herek has conducted research in which he has found that the vast majority of lesbians and gay men, and most bisexuals as well, when asked how much choice they have about their sexual orientation say that they have "no choice" or "very little choice" about it.);

b. Tr. 2054:12-2055:24 (Herek: PX0928 at 39 contains a table that reports data on approximately 2,200 people who responded to questions about how much choice they had about being

lesbian, gay or bisexual. Among gay men, 87 percent said that they experienced no or little choice about their sexual orientation. Among lesbians, 70 percent said that they had no or very little choice about their sexual orientation.); Tr. 2056:4-25 (Herek: PX0930 demonstrates that 88 percent of gay men reported that they had "no choice at all" about their sexual orientation, and 68 percent of lesbians said they had "no choice at all," and another 15 percent reported a small amount of choice.);

c. Tr. 2252:1-10 (Herek: "It is certainly the case that there have been many people who, most likely because of societal stigma, wanted very much to change their sexual orientation and were not able to do so.");

d. Tr. 2314:3-17 (Herek: Herek agrees with Peplau's statement that "[c]laims about the potential erotic plasticity of women do not mean that most women will actually exhibit change over time. At a young age, many women adopt patterns of heterosexuality that are stable across their lifetime. Some women adopt enduring patterns of same-sex attractions and relationships.");

e. Tr. 2202:8-22 (Herek: "[M]ost people are brought up in society assuming that they will be heterosexual. Little boys are taught that they will grow up and marry a girl. Little girls are taught they will grow up and marry a boy. And growing up with those expectations, it is not uncommon for people to engage in sexual behavior with someone of the other sex, possibly before

they have developed their real sense of who they are, of what their sexual orientation is. And I think that's one of the reasons why * * * [gay men and lesbians have] experience[d] heterosexual intercourse. * * * [I]t is not part of their identity. It's not part of who they are, and not indicative of their current attractions.");

f. Tr. 2033:6-2034:20 (Herek: Therapies designed to change an individual's sexual orientation have not been found to be effective in that they have not been shown to consistently produce the desired outcome without causing harm to the individuals involved.); Tr. 2039:1-3 (Herek: Herek is not aware of any major mental health organizations that have endorsed the use of such therapies.);

g. Tr. 140:6, 141:14-19 (Perry: Perry is a lesbian and feels that she was born with her sexual orientation. At 45 years old, she does not think that it might somehow change.);

h. Tr. 166:24-167:9 (Stier: Stier is 47 years old and has fallen in love one time in her life – with Perry.);

i. Tr. 77:4-5 (Zarrillo: Zarrillo has been gay "as long as [he] can remember.");

j. Tr. 91:15-17 (Katami: Katami has been a "natural-born gay" "as long as he can remember.");

k. Tr. 1506:2-11 (Kendall: "When I was a little kid, I knew I liked other boys. But I didn't realize that meant I was gay until I was, probably, 11 or 12 years old. * * * I ended up looking up the word 'homosexual' in the dictionary. And I remember

reading the definition[.] * * * And it slowly dawned on me that that's what I was.");

l. Tr. 1510:6-8 (Kendall: "I knew I was gay just like I knew I'm short and I'm half Hispanic. And I just never thought that those facts would change.").

47. California has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California.

a. PX0707 at RFA No 21: Proponents admit that same-sex sexual orientation does not result in any impairment in judgment or general social and vocational capabilities;

b. PX0710 at RFA No 19: Attorney General admits that sexual orientation bears no relation to a person's ability to perform in or contribute to society;

c. PX0710 at RFA No 22: Attorney General admits that the laws of California recognize no relationship between a person's sexual orientation and his or her ability to raise children; to his or her capacity to enter into a relationship that is analogous to marriage; or to his or her ability to participate fully in all economic and social institutions, with the exception of civil marriage;

d. Tr. 1032:6-12 (Lamb: Gay and lesbian sexual orientations are "normal variation[s] and are considered to be aspects of well-adjusted behavior.");

e. Tr. 2027:19-2028:2 (Herek: Homosexuality is not considered a mental disorder. The American

Psychiatric Association, the American Psychological Association and other major professional mental health associations have all gone on record affirming that homosexuality is a normal expression of sexuality and that it is not in any way a form of pathology.);

f. Tr. 2530:25-2532:25 (Miller: Miller agrees that "[c]ourts and legal scholars have concluded that sexual orientation is not related to an individual's ability to contribute to society or perform in the workplace.").

48. Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions. Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite-sex.

a. PX0707 at RFA No 65: Proponents admit that gay and lesbian individuals, including plaintiffs, have formed lasting, committed and caring relationships with persons of the same sex and same-sex couples share their lives and participate in their communities together;

b. PX0707 at RFA No 58: Proponents admit that many gay men and lesbians have established loving and committed relationships;

c. PX0710 at RFA No 65: Attorney General admits that gay men and lesbians have formed

lasting, committed and caring same-sex relationships and that same-sex couples share their lives and participate in their communities together;

d. PX0710 at RFA No 58: Attorney General admits that California law implicitly recognizes an individual's capacity to establish a loving and long-term committed relationship with another person that does not depend on the individual's sexual orientation;

e. Tr. 583:12-585:21 (Peplau: Research that has compared the quality of same-sex and opposite-sex relationships and the processes that affect those relationships consistently shows "great similarity across couples, both same-sex and heterosexual.");

f. Tr. 586:22-587:1 (Peplau: Reliable research shows that "a substantial proportion of lesbians and gay men are in relationships, that many of those relationships are long-term.");

g. PX2545 (Young Nov. 13 2009 Dep. Tr. 122:17-123:1: Young agrees with the American Psychoanalytic Association's statement that "gay men and lesbians possess the same potential and desire for sustained loving and lasting relationships as heterosexuals."); PX2544 at 12:40-14:15 (video of same);

h. PX2545 (Young Nov. 13, 2009 Dep. Tr. 100:17-101:5: Young agrees that love and commitment are reasons both gay people and heterosexuals have for wanting to marry.); PX2544 at 10:35-10:55 (video of same);

i. Tr. 1362:17-21 (Badgett: Same-sex couples wish to marry for many of the same reasons that opposite-sex couples marry.);

j. Tr. 1362:5-10 (Badgett: Same-sex couples have more similarities than differences with opposite-sex couples, and any differences are marginal.);

k. PX2096 Adam Romero, et al, *Census Snapshot: California,* The Williams Institute at 1 (Aug 2008): "In many ways, the more than 107,000 same-sex couples living in California are similar to married couples. According to Census 2000, they live throughout the state, are racially and ethnically diverse, have partners who depend upon one another financially, and actively participate in California's economy. Census data also show that 18% of same-sex couples in California are raising children."

49. California law permits and encourages gays and lesbians to become parents through adoption, foster parenting or assistive reproductive technology. Approximately eighteen percent of same-sex couples in California are raising children.

a. PX0707 at RFA No 66: Proponents admit that gay and lesbian individuals raise children together;

b. PX0710 at RFA No 22: Attorney General admits that the laws of California recognize no relationship between a person's sexual orientation and his or her ability to raise children;

c. PX0709 at RFA No 22: Governor admits that California law does not prohibit individuals from

raising children on the basis of sexual orientation;

d. PX0710 at RFA No 57: Attorney General admits that California law protects the right of gay men and lesbians in same-sex relationships to be foster parents and to adopt children by forbidding discrimination on the basis of sexual orientation;

e. Cal. Welf. & Inst. Code § 16013(a): "It is the policy of this state that all persons engaged in providing care and services to foster children * * * shall not be subjected to discrimination or harassment on the basis of their clients' or their own actual or perceived * * * sexual orientation.";

f. Cal. Fam. Code § 297.5(d): "The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses.";

g. *Elisa B v. Superior Court,* [37 Cal.4th 108, 33 Cal.Rptr.3d 46] 117 P.3d 660, 670 (Cal.2005) (holding that under the Uniform Parentage Act, a parent may have two parents of the same sex);

h. PX2096 Adam Romero, et al, *Census Snapshot: California,* The Williams Institute at 2 (Aug 2008): "18% of same-sex couples in California are raising children under the age of 18.";

i. Tr. 1348:23-1350:2 (Badgett: Same-sex couples in California are raising 37,300 children under the age of 18.).

50. Same-sex couples receive the same tangible and intangible benefits from marriage that opposite-sex couples receive.

a. Tr. 594:17-20 (Peplau: "My opinion, based on the great similarities that have been documented between same-sex couples and heterosexual couples, is th [at] if same-sex couples were permitted to marry, that they also would enjoy the same benefits [from marriage].");

b. Tr. 598:1-599:19 (Peplau: Married same-sex couples in Massachusetts have reported various benefits from marriage including greater commitment to the relationship, more acceptance from extended family, less worry over legal problems, greater access to health benefits and benefits for their children.);

c. PX0787 Position Statement, American Psychiatric Association, *Support of Legal Recognition of Same-Sex Civil Marriage* at 1 (July 2005): "In the interest of maintaining and promoting mental health, the American Psychiatric Association supports the legal recognition of same-sex civil marriage with all rights, benefits, and responsibilities conferred by civil marriage, and opposes restrictions to those same rights, benefits, and responsibilities."

51. Marrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals.

a. PX0707 at RFA No 9: Proponents admit that for many gay and lesbian individuals, marriage to an individual of the opposite sex is not a meaningful alternative;

b. PX0710 at RFA No 9: Attorney General admits that for gay men and lesbians, opposite-sex marriage may not be a meaningful alternative to same-sex marriage to the extent that it would compel them to negate their sexual orientation and identity;

c. Tr. 85:9-21 (Zarrillo: "I have no attraction, desire, to be with a member of the opposite sex.");

d. Tr. 2042:14-25 (Herek: While gay men and lesbians in California are permitted to marry, they are only permitted to marry a member of the opposite sex. For the vast majority of gay men and lesbians, that is not a realistic option. This is true because sexual orientation is about the relationships people form – it defines the universe of people with whom one is able to form the sort of intimate, committed relationship that would be the basis for marriage.);

e. Tr. 2043:1-2044:10 (Herek: Some gay men and lesbians have married members of the opposite sex, but many of those marriages dissolve, and some of them experience considerable problems simply because one of the partners is gay or lesbian. A gay or lesbian person marrying a person of the opposite sex is likely to create a great deal of conflict and tension in the relationship.).

52. Domestic partnerships lack the social meaning associated with marriage, and marriage is widely regarded as the definitive expression of love and commitment in the United States.

a. PX0707 at RFA No 38: Proponents admit that there is a significant symbolic disparity between domestic partnership and marriage;

b. PX0707 at RFA No 4: Proponents admit that the word "marriage" has a unique meaning;

c. Tr. 207:9-208:6 (Cott, describing the social meaning of marriage in our culture: Marriage has been the "happy ending to the romance." Marriage "is the principal happy ending in all of our romantic tales"; the "cultural polish on marriage" is "as a destination to be gained by any couple who love one another.");

d. Tr. 208:9-17 (Cott: "Q. Let me ask you this. How does the cultural value and the meaning, social meaning of marriage, in your view, compare with the social meaning of domestic partnerships and civil unions? A. I appreciate the fact that several states have extended – maybe it's many states now, have extended most of the material rights and benefits of marriage to people who have civil unions or domestic partnerships. But there really is no comparison, in my historical view, because there is nothing that is like marriage except marriage.");

e. Tr. 611:1-7 (Peplau: "I have great confidence that some of the things that come from marriage, believing that you are part of the first class kind of relationship in this country, that you are * * * in the status of relationships that this society most values, most esteems, considers the most legitimate and the most appropriate, undoubtedly has benefits that are not part of domestic partnerships.");

f. Tr. 1342:14-1343:12 (Badgett: Some same-sex couples who might marry would not register as domestic partners because they see domestic partnership as a second class status.);

g. Tr. 1471:1-1472:8 (Badgett: Same-sex couples value the social recognition of marriage and believe that the alternative status conveys a message of inferiority.);

h. Tr. 1963:3-8 (Tam: "If 'domestic partner' is defined as it is now, then we can explain to our children that, yeah, there are some same-sex person wants to have a lifetime together as committed partners, and that is called 'domestic partner,' but it is not 'marriage.'" (as stated)).

53. Domestic partners are not married under California law. California domestic partnerships may not be recognized in other states and are not recognized by the federal government.

a. Cal. Fam. Code §§ 297-299.6 (establishing domestic partnership as separate from marriage);

b. Compare Doc. # 686 at 39 with Doc. # 687 at 47: The court asked the parties to identify which states recognize California domestic partnerships. No party could identify with certainty the states that recognize them. Plaintiffs and proponents agree only that Connecticut, New Jersey and Washington recognize California domestic partnerships. See also # 688 at 2: "To the best of the Administrative Defendants' knowledge," Connecticut, Washington DC, Washington, Nevada, New Hampshire and New Jersey recognize California domestic partnerships;

c. *Gill v. Office of Personnel Management et al,* No. 09-10309-JLT at Doc. # 70 [699 F.Supp.2d 374] ([D.Mass.] July 8, 2010) (holding the federal Defense of Marriage Act ("DOMA") unconstitutional as applied to plaintiffs who are married under state law. (Domestic partnerships are not available in Massachusetts and thus the court did not address whether a person in a domestic partnership would have standing to challenge DOMA.)); see also *In re Karen Golinski,* 587 F.3d 901, 902 (9th Cir.2009) (finding that Golinski could obtain coverage for her wife under the Federal Employees Health Benefits Act without needing to consider whether the result would be the same for a federal employee's domestic partner).

54. The availability of domestic partnership does not provide gays and lesbians with a status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships.

a. Tr. 613:23-614:12 (Peplau: There is a significant symbolic disparity between marriage and domestic partnerships; a domestic partnership is "not something that is necessarily understood or recognized by other people in your environment.");

b. Tr. 659:8-15 (Peplau: As a result of the different social meanings of a marriage and a domestic partnership, there is a greater degree of an enforceable trust in a marriage than a domestic partnership.);

c. Tr. 2044:20-2045:22 (Herek: The difference between domestic partnerships and marriage is much more than simply a word. "[J]ust the fact that we're here today suggests that this is more than just a word * * * clearly, [there is] a great deal of strong feeling and emotion about the difference between marriage and domestic partnerships.");

d. Tr. 964:1-3 (Meyer: Domestic partnerships reduce the value of same-sex relationships.);

e. PX0710 at RFA No 37: Attorney General admits that establishing a separate legal institution for state recognition and support of lesbian and gay families, even if well-intentioned, marginalizes and stigmatizes gay families;

f. Tr. 142:2-13 (Perry: When you are married, "you are honored and respected by your family. Your children know what your relationship is. And when you leave your home and you go to work or you go out in the world, people know what your relationship means.");

g. Tr. 153:4-155:5 (Perry: Stier and Perry completed documents to register as domestic partners and mailed them in to the state. Perry views domestic partnership as an agreement; it is not the same as marriage, which symbolizes "maybe the most important decision you make as an adult, who you choose [as your spouse].");

h. Tr. 170:12-171:14 (Stier: To Stier, domestic partnership feels like a legal agreement between two parties that spells out responsibilities and duties. Nothing about domestic partnership

indicates the love and commitment that are inherent in marriage, and for Stier and Perry, "it doesn't have anything to do * * * with the nature of our relationship and the type of enduring relationship we want it to be. It's just a legal document.");

i. Tr. 172:6-21 (Stier: Marriage is about making a public commitment to the world and to your spouse, to your family, parents, society and community. It is the way to tell them and each other that this is a lifetime commitment. "And I have to say, having been married for 12 years and been in a domestic partnership for 10 years, it's different. It's not the same. I want – I don't want to have to explain myself.");

j. Tr. 82:9-83:1 (Zarrillo: "Domestic partnership would relegate me to a level of second class citizenship. * * * It's giving me part of the pie, but not the whole thing * * * [I]t doesn't give due respect to the relationship that we have had for almost nine years.");

k. Tr. 115:3-116:1 (Katami: Domestic partnerships "make[ ] you into a second, third, and * * * fourth class citizen now that we actually recognize marriages from other states. * * * None of our friends have ever said, 'Hey, this is my domestic partner.' ").

55. Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages.

a. Tr. 596:13-597:3 (Peplau: Data from Massachusetts on the "annual rates for marriage and for divorce" for "the four years prior to same-sex marriage being legal and the four years after" show "that the rates of marriage and divorce are no different after [same-sex] marriage was permitted than they were before.");

b. Tr. 605:18-25 (Peplau: Massachusetts data are "very consistent" with the argument that permitting same-sex couples to marry will not have an adverse effect on the institution of marriage.);

c. Tr. 600:12-602:15 (Peplau: Allowing same-sex couples to marry will have "no impact" on the stability of marriage.);

d. PX1145 Matthew D Bramlett and William D Mosher, *First Marriage Dissolution, Divorce, and Remarriage: United States,* U.S. Department of Health and Human Services at 2 (May 31, 2001): Race, employment status, education, age at marriage and other similar factors affect rates of marriage and divorce;

e. PX1195 Matthew D Bramlett and William D Mosher, *Cohabitation, Marriage, Divorce, and Remarriage in the United States,* Vital and Health Statistics 23:22, U.S. Department of Health and Human Services at 12 (July 2002): Race and socioeconomic status, among other factors, are correlated with rates of marital stability;

f. PX0754 American Anthropological Association, *Statement on Marriage and the Family:* The viability of civilization or social order does not

depend upon marriage as an exclusively heterosexual institution.

56. The children of same-sex couples benefit when their parents can marry.

a. Tr. 1332:19-1337:25 (Badgett: Same-sex couples and their children are denied all of the economic benefits of marriage that are available to married couples.);

b. PX0787 Position Statement, American Psychiatric Association, *Support of Legal Recognition of Same-Sex Civil Marriage* at 1 (July 2005): "The children of unmarried gay and lesbian parents do not have the same protection that civil marriage affords the children of heterosexual couples.";

c. Tr. 1964:17-1965:2 (Tam: It is important to children of same-sex couples that their parents be able to marry.);

d. Tr. 599:12-19 (Peplau: A survey of same-sex couples who married in Massachusetts shows that 95 percent of same-sex couples raising children reported that their children had benefitted from the fact that their parents were able to marry.).

WHETHER THE EVIDENCE SHOWS THAT PROPOSITION 8 ENACTED A PRIVATE MORAL VIEW WITHOUT ADVANCING A LEGITIMATE GOVERNMENT INTEREST

57. Under Proposition 8, whether a couple can obtain a marriage license and enter into marriage

depends on the genders of the two parties relative to one another. A man is permitted to marry a woman but not another man. A woman is permitted to marry a man but not another woman. Proposition 8 bars state and county officials from issuing marriage licenses to same-sex couples. It has no other legal effect.

a. Cal. Const. Art. I, § 7.5 (Proposition 8);

b. PX0001 California Voter Information Guide, California General Election, Tuesday, November 4, 2008: Proposition 8 "eliminates right of same-sex couples to marry."

58. Proposition 8 places the force of law behind stigmas against gays and lesbians, including: gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society.

a. Tr. 611:13-19 (Peplau: "[B]eing prevented by the government from being married is no different than other kinds of stigma and discrimination that have been studied, in terms of their impact on relationships.");

b. Tr. 529:21-530:23 (Chauncey: The campaign for Proposition 8 presented marriage for same-sex couples as an adult issue, although children are frequently exposed to romantic fairy tales or weddings featuring opposite-sex couples.);

c. Tr. 854:5-14 (Meyer: "Proposition 8, in its social meaning, sends a message that gay relationships

are not to be respected; that they are of secondary value, if of any value at all; that they are certainly not equal to those of heterosexuals.");

d. Tr. 2047:13-2048:13 (Herek: In 2004, California enacted legislation that increased the benefits and responsibilities associated with domestic partnership, which became effective in 2005. In the second half of 2004, the California Secretary of State mailed a letter to all registered domestic partners advising them of the changes and telling recipients to consider whether to dissolve their partnership. Herek "find[s] it difficult to imagine that if there were changes in tax laws that were going to affect married couples, that you would have the state government sending letters to people suggesting that they consider whether or not they want to get divorced before this new law goes into effect. I think that – that letter just illustrates the way in which domestic partnerships are viewed differently than marriage.");

e. PX2265 Letter from Kevin Shelley, California Secretary of State, to Registered Domestic Partners: Shelley explains domestic partnership law will change on January 1, 2005 and suggests that domestic partners dissolve their partnership if they do not wish to be bound by the new structure of domestic partnership;

f. Tr. 972:14-17 (Meyer: "Laws are perhaps the strongest of social structures that uphold and enforce stigma.");

g. Tr. 2053:8-18 (Herek: Structural stigma provides the context and identifies which members

of society are devalued. It also gives a level of permission to denigrate or attack particular groups, or those who are perceived to be members of certain groups in society.);

h. Tr. 2054:7-11 (Herek: Proposition 8 is an instance of structural stigma.).

59. Proposition 8 requires California to treat same-sex couples differently from opposite-sex couples.

a. See PX0710 at RFA No 41: Attorney General admits that because two types of relationships – one for same-sex couples and one for opposite-sex couples – exist in California, a gay or lesbian individual may be forced to disclose his or her sexual orientation when responding to a question about his or her marital status;

b. Compare Cal. Fam. Code §§ 300-536 (marriage) with Cal. Fam. Code §§ 297-299.6 (registered domestic partnerships).

60. Proposition 8 reserves the most socially valued form of relationship (marriage) for opposite-sex couples.

a. Tr. 576:15-577:14 (Peplau: Study by Gary Gates, Lee Badgett and Deborah Ho suggests that same-sex couples are "three times more likely to get married than to enter into" domestic partnerships or civil unions.);

b. PX1273 M V Lee Badgett, *When Gay People Get Married* at 58, 59, 60 (N.Y.U 2009): "Many Dutch couples saw marriage as better because it had an additional social meaning that registered partnership, as a recent political invention,

lacked." "In some places, the cultural and political trappings of statuses that are not marriage send a very clear message of difference and inferiority to gay and lesbian couples." "[W]hen compared to marriage, domestic partnerships may become a mark of second-class citizenship and are less understood socially. In practice, these legal alternatives to marriage are limited because they do not map onto a well-developed social institution that gives the act of marrying its social and cultural meaning.";

c. Tr. 2044:20-2045:22 (Herek: The difference between domestic partnerships and marriage is more than simply a word. If we look at public opinion data, for example, there is a sizable proportion of the public, both in California and the United States, who say that they are willing to let same-sex couples have domestic partnerships or civil unions, but not marriage. This suggests a distinction in the minds of a large number of Americans – it is not simply a word. In addition, looking at the recent history of California, when it became possible for same-sex couples to marry, thousands of them did. And many of those were domestic partners. So, clearly, they thought there was something different about being married.);

d. PX0504B Video, Satellite Simulcast in Defense of Marriage, Excerpt at 0:38-0:56: Speaker warns that if Proposition 8 does not pass, children will be taught "that gay marriage is not just a different type of a marriage, they're going to be taught that it's a good thing."

61. Proposition 8 amends the California Constitution to codify distinct and unique roles for men and women in marriage.

a. Tr. 1087:5-18 (Lamb: The "traditional family" refers to a family with a married mother and father who are both biologically related to their children where the mother stays at home and the father is the bread winner.);

b. PX0506 Protect Marriage, The Fine Line Transcript (Oct. 1, 2008) at 13: "Children need a loving family and yes they need a mother and father. Now going on what Sean was saying here about the consequences of this, if Prop 8 doesn't pass then it will be illegal to distinguish between heterosexual and same sex couples when it comes to adoption. Um Yvette just mentioned some statistics about growing up in families without a mother and father at home. How important it is to have that kind of thing. I'm not a sociologist. I'm not a psychologist. I'm just a human being but you don't need to be wearing a white coat to know that kids need a mom and dad. I'm a dad and I know that I provide something different than my wife does in our family and my wife provides something entirely different than I do in our family and both are vital.";

c. PX0506 Protect Marriage, The Fine Line Transcript at 6 (Oct. 1, 2008): "When moms are in the park taking care of their kids they always know where those kids are. They have like a, like a radar around them. They know where those kids are and there's just a, there's a bond between a mom and a kid different from a dad.

I'm not saying dads don't have that bond but they don't. It's just different. You know middle of the night mom will wake up. Dad will just sleep you know if there's a little noise in the room. And, and when kids get scared they run to mommy. Why? They spent 9 months in mommy. They go back to where they came.";

d. PX390 Video, Ron Prentice Addressing Supporters of Proposition 8, Part I at 5:25-6:04: Prentice tells people at a religious rally that marriage is not about love but instead about women civilizing men: "Again, because it's not about two people in love, it's about men becoming civilized frankly, and I can tell you this from personal experience and every man in this audience can do the same if they've chosen to marry, because when you do find the woman that you love you are compelled to listen to her, and when the woman that I love prior to my marrying her told me that my table manners were less than adequate I became more civilized; when she told me that my rust colored corduroy were never again to be worn, I became more civilized.";

e. PX0506 Protect Marriage, The Fine Line Transcript (Oct. 1, 2008) at 15: "Skin color is morally trivial as you pointed out but sex is fundamental to everything. There is no difference between a white or a black human being but there's a big difference between a man and a woman.";

f. PX1867 Transcript, ABC Protecting Marriage at 27:6-9: Dr. Jennifer Roback Morse states that "[t]he function of marriage is to attach mothers

and fathers to one another and mothers and fathers to their children, especially fathers to children.";

g. PX0480A Video supporting Proposition 8 at 2:00-2:24: Prentice states that "[c]hildren need the chance to have both mother love and father love. And that moms and dads, male and female, complement each other. They don't bring to a marriage and to a family the same natural set of skills and talents and abilities. They bring to children the blessing of both masculinity and femininity.";

h. PX2403 Email from Kenyn Cureton, Vice-President, Family Research Council, to Prentice at 3 (Aug 25, 2008): Attached to the email is a kit to be distributed to Christian voters through churches to help them promote Proposition 8 which states: "Thank God for the difference between men and women. In fact, the two genders were meant to complete each other physically, emotionally, and in every other way. Also, both genders are needed for a healthy home. As Dr. James Dobson notes, 'More than ten thousand studies have concluded that kids do best when they are raised by mothers and fathers.' ";

i. PX1868 Transcript, *Love, Power, Mind* (CCN simulcast Sept. 25, 2008) at 43:19-24: "Same sex marriage, it will unravel that in a significant way and say that really male and female, mother and father, husband and wife are just really optional for the family, not necessary. And that is a radically anti-human thing to say.";

j. PX1867 Transcript, ABC Protecting Marriage at 28:18-23: "And we know that fatherlessness has caused significant problems for a whole generation of children and same-sex marriage would send us more in that direction of intentionally fatherless homes.";

k. PX0506 Protect Marriage, The Fine Line Transcript at 5 (Oct. 1, 2008): Miles McPherson states that it is a truth "that God created the woman bride as the groom's compatible marriage companion."

62. Proposition 8 does not affect the First Amendment rights of those opposed to marriage for same-sex couples. Prior to Proposition 8, no religious group was required to recognize marriage for same-sex couples.

a. *In re Marriage Cases,* [76 Cal.Rptr.3d 683] 189 [183] P.3d at 451-452 ("[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.") (Citing Cal. Const. Art. I, § 4);

b. Tr. 194:24-196:21 (Cott: Civil law, not religious custom, is supreme in defining and regulating marriage in the United States.);

c. Cal. Fam. Code §§ 400, 420.

63. Proposition 8 eliminates the right to marry for gays and lesbians but does not affect any other substantive right under the California Constitution. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 102 ("Proposition 8 does not eliminate the substantial substantive [constitutional] protections afforded to same-sex couples[.]") (emphasis in original).

64. Proposition 8 has had a negative fiscal impact on California and local governments.

a. Tr. 1330:23-25 (Badgett: "Proposition 8 has imposed some economic losses on the State of California and on counties and municipalities.");

b. Tr. 1364:16-1369:4 (Badgett: Denying same-sex couples the right to marry imposes costs on local governments such as loss of tax revenue, higher usage of means-tested programs, higher costs for healthcare of uninsured same-sex partners and loss of skilled workers.);

c. Tr. 720:1-12 (Egan: "What we're really talking about in the nonquantifiable impacts are the long-term advantages of marriage as an institution, and the long-term costs of discrimination as a way that weakens people's productivity and integration into the labor force. Whether it's weakening their education because they're discriminated against at school, or leading them to excessive reliance on behavioral and other health services, these are impacts that are hard to quantify, but they can wind up being extremely powerful. How much healthier you are over your lifetime. How much wealth you generate because you are in a partnership.");

d. Tr. 1367:5-1368:1 (Badgett: Denying same-sex couples the right to marry tends to reduce same-sex couples' income, which "will make them more likely to need and be eligible for those means-tested programs that are paid for by the state." Similarly, to the extent that same-sex couples cannot obtain health insurance for their partners and children, there will be more people who might need to sign up for the state's sponsored health programs.).

65. CCSF would benefit economically if Proposition 8 were not in effect.

a. CCSF would benefit immediately from increased wedding revenue and associated expenditures and an increased number of county residents with health insurance. Tr. 691:24-692:3; Tr. 708:16-20 (Egan);

b. CCSF would benefit economically from decreased discrimination against gays and lesbians, resulting in decreased absenteeism at work and in schools, lower mental health costs and greater wealth accumulation. Tr. 685:10-14; Tr. 689:4-10; Tr. 692:12-19; Tr. 720:1-12 (Egan);

c. CCSF enacted the Equal Benefits Ordinance to mandate that city contractors and vendors provide same-sex partners of employees with benefits equal to those provided to opposite-sex spouses of employees. CCSF bears the cost of enforcing the ordinance and defending it against legal challenges. Tr. 714:15-715:10 (Egan).

66. Proposition 8 increases costs and decreases wealth for same-sex couples because of increased tax

burdens, decreased availability of health insurance and higher transactions costs to secure rights and obligations typically associated with marriage. Domestic partnership reduces but does not eliminate these costs.

a. Tr. 1330:14-16 (Badgett: Proposition 8 has "inflicted substantial economic harm on same-sex couples and their children who live here in California.");

b. Tr. 1331:12-1337:25 (Badgett: Marriage confers economic benefits including greater specialization of labor, reduced transactions costs, health and insurance benefits and more positive workplace outcomes.);

c. Tr. 1341:2-1342:13 (Badgett: Couples that would marry but would not enter into a domestic partnership suffer tangible economic harm such as higher taxes and limited access to health insurance.);

d. PX1259 MV Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits,* The Williams Institute at 1 (Dec. 2007): "[W]orkers who have an unmarried domestic partner are doubly burdened: Their employers typically do not provide coverage for domestic partners; and even when partners are covered, the partner's coverage is taxed as income to the employee.";

e. PX2898 Laura Langbein and Mark A Yost, *Same-Sex Marriage and Negative Externalities,* 490 Soc. Sci Q 293, 307 (2009): "For example, the ban on gay marriage induces failures in insurance and financial markets. Because spousal

benefits do not transfer (in most cases) to domestic partners, there are large portions of the population that should be insured, but instead receive inequitable treatment and are not insured properly. * * * This is equally true in the treatment of estates on the death of individuals. In married relationships, it is clear to whom an estate reverts, but in the cases of homosexual couples, there is no clear right of ownership, resulting in higher transactions costs, widely regarded as socially inefficient.";

f. PX0188 Report of the Council on Science and Public Health, Health Care Disparities in Same-Sex Households, C Alvin Head (presenter) at 9: "Survey data confirm that same-sex households have less access to health insurance. If they have health insurance, they pay more than married heterosexual workers, and also lack other financial protections. * * * [C]hildren in same-sex households lack the same protections afforded children in heterosexual households.";

g. PX0189 American Medical Association Policy: Health Care Disparities in Same-Sex Partner Households, Policy D160.979 at 1: "[E]xclusion from civil marriage contributes to health care disparities affecting same-sex households.";

h. PX1261 California Employer Health Benefits Survey, California HealthCare Foundation at 7 (Dec. 2008): Only 56 percent of California firms offered health insurance to unmarried same-sex couples in 2008;

i. PX1266 National Center for Lesbian Rights and Equality California, *The California Domestic*

Partnership Law: What it Means for You and Your Family at 13 (2009): Domestic partnerships create more transactions costs than exist in marriage. "Despite * * * automatic legal protection for children born to registered domestic partners, [the National Center for Lesbian Rights] is strongly recommending that all couples obtain a court judgment declaring both partners to be their child's legal parents, either an adoption or a parentage judgment.";

j. PX1269 Michael Steinberger, *Federal Estate Tax Disadvantages for Same-Sex Couples,* The Williams Institute at 1 (July 2009): "Using data from several government data sources, this report estimates the dollar value of the estate tax disadvantage faced by same-sex couples. In 2009, the differential treatment of same-sex and married couples in the estate tax code will affect an estimated 73 same-sex couples, costing each of them, on average, more than $3.3 million."

67. Proposition 8 singles out gays and lesbians and legitimates their unequal treatment. Proposition 8 perpetuates the stereotype that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents.

a. Tr. 2054:7-11 (Herek: In "a definitional sense," Proposition 8 is an instance of structural stigma against gays and lesbians.);

b. Tr. 826:21-828:4 (Meyer: Domestic partnership does not eliminate the structural stigma of Proposition 8 because it does not provide the symbolic or social meaning of marriage.);

c. Tr. 820:23-822:5 (Meyer: One of the stereotypes that is part of the stigma surrounding gay men and lesbians is that gay men and lesbians are incapable of, uninterested in and not successful at having intimate relationships.);

d. Tr. 407:8-408:4 (Chauncey: The fear of homosexuals as child molesters or as recruiters continues to play a role in debates over gay rights, and with particular attention to gay teachers, parents and married couples – people who might have close contact with children.);

e. PX0001 California Voter Information Guide, California General Election, Tuesday, November 4, 2008 at PM 3365: "TEACHERS COULD BE REQUIRED to teach young children that there is *no difference* between gay marriage and traditional marriage." (emphasis in original);

f. Tr. 854:5-22 (Meyer: Proposition 8 "sends a message that gay relationships are not to be respected; that they are of secondary value, if of any value at all; that they are certainly not equal to those of heterosexuals. * * * [So] in addition to achieving the literal aims of not allowing gay people to marry, it also sends a strong message about the values of the state; in this case, the Constitution itself. And it sends a message that would, in [Meyer's] mind, encourage or at least is consistent with holding prejudicial attitudes. So that doesn't add up to a very welcoming environment.").

68. Proposition 8 results in frequent reminders for gays and lesbians in committed long-term relationships

that their relationships are not as highly valued as opposite-sex relationships.

a. Tr. 846:22-847:12 (Meyer: When gay men and lesbians have to explain why they are not married, they "have to explain, I'm really not seen as equal. I'm – my status is – is not respected by my state or by my country, by my fellow citizens.");

b. Tr. 1471:1-1472:8 (Badgett: Badgett's interviews with same-sex couples indicate that couples value the social recognition of marriage and believe that the alternative status conveys a message of inferiority.);

c. Tr. 151:20-24 (Perry: A passenger on a plane once assumed that she could take the seat that Perry had been saving for Stier because Perry referred to Stier as her "partner.");

d. Tr. 174:3-175:4 (Stier: It has been difficult to explain to others her relationship with Perry because they are not married.);

e. Tr. 175:5-17 (Stier: It is challenging to fill out forms in doctor's offices that ask whether she is single, married or divorced because "I have to find myself, you know, scratching something out, putting a line through it and saying 'domestic partner' and making sure I explain to folks what that is to make sure that our transaction can go smoothly.");

f. Tr. 841:17-844:11; 845:7-10 (Meyer: For lesbians and gay men, filling out a form requiring them to designate their marital status can be significant because the form-filler has no box to

check. While correcting a form is a minor event, it is significant for the gay or lesbian person because the form evokes something much larger for the person – a social disapproval and rejection. "It's about, I'm gay and I'm not accepted here.").

69. The factors that affect whether a child is well-adjusted are: (1) the quality of a child's relationship with his or her parents; (2) the quality of the relationship between a child's parents or significant adults in the child's life; and (3) the availability of economic and social resources. Tr. 1010:13-1011:13 (Lamb).

70. The gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.

a. Tr. 1025:4-23 (Lamb: Studies have demonstrated "very conclusively that children who are raised by gay and lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents." These results are "completely consistent with our broader understanding of the factors that affect children's adjustment.");

b. PX2565 American Psychological Association, *Answers to Your Questions: For a Better Understanding of Sexual Orientation and Homosexuality* at 5 (2008): "[S]ocial science has shown that the

concerns often raised about children of lesbian and gay parents – concerns that are generally grounded in prejudice against and stereotypes about gay people – are unfounded.";

c. PX2547 (Nathanson Nov. 12, 2009 Dep. Tr. 49:05-49:19: Sociological and psychological peer-reviewed studies conclude that permitting gay and lesbian individuals to marry does not cause any problems for children); PX2546 at 2:20-3:10 (video of same).

71. Children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted. Tr. 1014:25-1015:19; 1038:23-1040:17 (Lamb).

72. The genetic relationship between a parent and a child is not related to a child's adjustment outcomes. Tr. 1040:22-1042:10 (Lamb).

73. Studies comparing outcomes for children raised by married opposite-sex parents to children raised by single or divorced parents do not inform conclusions about outcomes for children raised by same-sex parents in stable, long-term relationships. Tr. 1187:13-1189:6 (Lamb).

74. Gays and lesbians have been victims of a long history of discrimination.

a. Tr. 3080:9-11 (Proponents' counsel: "We have never disputed and we have offered to stipulate that gays and lesbians have been the victims of a long and shameful history of discrimination.");

b. Tr. 361:11-15 (Chauncey: Gays and lesbians "have experienced widespread and acute discrimination from both public and private authorities over the course of the twentieth century. And that has continuing legacies and effects."); see also Tr. 361-390 (Chauncey: discussing details of discrimination against gays and lesbians);

c. PX2566 Letter from John W Macy, Chairman, Civil Service Commission, to the Mattachine Society of Washington (Feb. 25, 1966) at 2-4: The Commission rejected the Mattachine Society's request to rescind the policy banning active homosexuals from federal employment. "Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of the common toilet, shower and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.";

d. PX2581 Letter from E D Coleman, Exempt Organizations Branch, IRS, to the Pride Foundation at 1, 4-5 (Oct. 8, 1974): The Pride Foundation is not entitled to an exemption under

> Internal Revenue Code § 501(c)(3) because the organization's goal of "advanc[ing] the welfare of the homosexual community" was "perverted or deviate behavior" "contrary to public policy and [is] therefore, not 'charitable.' "

75. Public and private discrimination against gays and lesbians occurs in California and in the United States.

> a. PX0707 at RFA No 29: Proponents admit that gays and lesbians continue to experience instances of discrimination;
>
> b. PX0711 at RFA Nos 3, 8, 13, 18, 23: Attorney General admits 263 hate crime events based on sexual orientation bias occurred in California in 2004, 255 occurred in 2005, 246 occurred in 2006, 263 occurred in 2007 and 283 occurred in 2008;
>
> c. PX0672 at 18; PX0673 at 20; PX0674 at 20; PX0675 at 3; PX0676 at 1 (California Dept of Justice, *Hate Crime in California,* 2004-2008): From 2004 to 2008, between 17 and 20 percent of all hate crime offenses in California were motivated by sexual orientation bias;
>
> d. PX0672 at 26; PX0673 at 28; PX0674 at 28; PX0675 at 26; PX0676 at 20 (California Dept of Justice, *Hate Crime in California,* 2004-2008): From 2004 to 2008, between 246 and 283 hate crime events motivated by sexual orientation bias occurred each year in California;
>
> e. Tr. 548:23 (Chauncey: There is still significant discrimination against lesbians and gay men in the United States.);

f. Tr. 1569:11-1571:5 (Segura: "[O]ver the last five years, there has actually been an increase in violence directed toward gay men and lesbians"; "gays and lesbians are representing a larger and larger portion of the number of acts of bias motivated violence" and "are far more likely to experience violence"; "73 percent of all the hate crimes committed against gays and lesbians also include an act of violence * * * we are talking about the most extreme forms of hate based violence"; the hate crimes accounted for "71 percent of all hate-motivated murders" and "[f]ifty-five percent of all hate-motivated rapes" in 2008; "There is simply no other person in society who endures the likelihood of being harmed as a consequence of their identity than a gay man or lesbian.");

g. PX0605 The Williams Institute, et al, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* at 1 (Sept. 2009): "There is a widespread and persistent pattern of unconstitutional discrimination on the basis of sexual orientation and gender identity against [California] government employees" and the pattern of discrimination is similar for private sector employees in California;

h. PX0619 The Williams Institute, *Chapter 14: Other Indicia of Animus against LGBT People by State and Local Officials, 1980-Present* at 14-8 (2009): Statements made by legislators, judges, governors and other officials in all fifty states show hostility towards gays and lesbians, including a 1999 statement by California State Senator Richard Mountjoy that "being gay 'is a sickness

* * * an uncontrolled passion similar to that which would cause someone to rape.' ";

i. Tr. 2510:23-2535:7 (Miller: Miller agrees that "there has been severe prejudice and discrimination against gays and lesbians" and "widespread and persistent" discrimination against gays and lesbians and that "there is ongoing discrimination in the United States" against gays and lesbians.);

j. Tr. 2572:11-16 (Miller: Gays and lesbians are still the "object of prejudice and stereotype.");

k. Tr. 2599:17-2604:7 (Miller: Miller agrees that "there are some gays and lesbians who are fired from their jobs, refused work, paid less, and otherwise discriminated against in the workplace because of their sexual orientation.").

76. Well-known stereotypes about gay men and lesbians include a belief that gays and lesbians are affluent, self-absorbed and incapable of forming long-term intimate relationships. Other stereotypes imagine gay men and lesbians as disease vectors or as child molesters who recruit young children into homosexuality. No evidence supports these stereotypes.

a. DIX1162 Randy Albelda, et al, *Poverty in the Lesbian, Gay, and Bisexual Community,* The Williams Institute at 1 (Mar 2009): "A popular stereotype paints lesbians and gay men as an affluent elite * * * . [T]he misleading myth of affluence steers policymakers, community organizations service providers, and the media away from fully understanding poverty among LGBT people.";

b. Tr. 474:12-19 (Chauncey: Medical pronouncements that were hostile to gays and lesbians provided a powerful source of legitimation to anti-homosexual sentiment and were themselves a manifestation of discrimination against gays and lesbians.);

c. Tr. 820:23-822:5 (Meyer: One of the stereotypes that is part of the stigma surrounding gay men and lesbians is that gay men and lesbians are incapable of, uninterested in and not successful at having intimate relationships. Gay men and lesbians have been described as social isolates, as unconnected to society and people who do not participate in society the way everyone else does – as "a pariah, so to speak.");

d. PX1011 David Reuben, *Everything You Always Wanted to Know About Sex (But Were Afraid to Ask)* 129-151 at 143 (Van Rees 1969): "What about all of the homosexuals who live together happily for years? What about them? They are mighty rare birds among the homosexual flock. Moreover, the 'happy' part remains to be seen. The bitterest argument between husband and wife is a passionate love sonnet by comparison with a dialogue between a butch and his queen. Live together? Yes. Happily? Hardly.";

e. Tr. 361:23-363:9 (Chauncey: Even though not all sodomy laws solely penalized homosexual conduct, over the course of the twentieth century, sodomy laws came to symbolize the criminalization of homosexual sex in particular. This was most striking in *Bowers v. Hardwick,* which reads as though the law at issue simply bears on

homosexual sex when in fact the Georgia law at issue criminalized both homosexual and heterosexual sodomy.);

f. Tr. 484:24-485:5 (Chauncey: The federal government was slow to respond to the AIDS crisis, and this was in part because of the association of AIDS with a "despised group.");

g. Tr. 585:22-586:8 (Peplau: There is no empirical support for the negative stereotypes that gay men and lesbians have trouble forming stable relationships or that those relationships are inferior to heterosexual relationships.);

h. PX2337 Employment of Homosexuals and Other Sex Perverts in Government, S Rep No 81-241, 81st Congress, 2d Sess (1950) at 4: "Most of the authorities agree and our investigation has shown that the presence of a sex pervert in a Government agency tends to have a corrosive influence on his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. Government officials have the responsibility of keeping this type of corrosive influence out of the agencies under their control. It is particularly important that the thousands of young men and women who are brought into Federal jobs not be subjected to that type of influence while in the service of the Government. One homosexual can pollute a Government office.";

i. Tr. 395:6-25 (Chauncey: Like most outsider groups, there have been stereotypes associated with gay people; indeed, a range of groups, including medical professionals and religious groups, have worked in a coordinated way to develop stereotypical images of gay people.);

j. Tr. 397:2-6; Tr. 397:25-398:5 (Chauncey: "[I]n some ways, the most dangerous stereotypes for homosexuals really developed between the 1930s and '50s, when there were a series of press and police campaigns that identified homosexuals as child molesters." These press campaigns against assaults on children focused on sex perverts or sex deviants. Through these campaigns, the homosexual emerged as a sex deviant.);

k. PX2281 George Chauncey, *The Postwar Sex Crime Panic,* in William Graebner, ed, *True Stories from the Past* 160, 171 (McGraw-Hill 1993): Contains excerpts from wide-circulation *Coronet Magazine,* Fall 1950: "Once a man assumes the role of homosexual, he often throws off all moral restraints. * * * Some male sex deviants do not stop with infecting their often-innocent partners: they descended through perversions to other forms of depravity, such as drug addiction, burglary, sadism, and even murder.";

l. Tr. 400:18-401:8 (Chauncey: This excerpt from *Coronet Magazine,* PX2281 at 171, depicts homosexuals as subjects of moral decay. In addition, there is a sense of homosexuality as a disease in which the carriers infect other people. And the term "innocent" pretty clearly indicates that the authors are talking about children.);

m. PX2281 Chauncey, *The Postwar Sex Crime Panic,* at 170-171: Contains a statement made by a Special Assistant Attorney General of California in 1949: "The sex pervert, in his more innocuous form, is too frequently regarded as merely a 'queer' individual who never hurts anyone but himself. * * * All too often we lose sight of the fact that the homosexual is an inveterate seducer of the young of both sexes * * * and is ever seeking for younger victims.";

n. Tr. 402:21-24 (Chauncey: These articles (in PX2281) were mostly addressed to adults who were understandably concerned about the safety of their children, and who "were being taught to believe that homosexuals posed a threat to their children.");

o. Tr. 407:8-408:4 (Chauncey: One of the most enduring legacies of the emergence of these stereotypes is the creation and then reenforcement of a series of demonic images of homosexuals that stay with us today. This fear of homosexuals as child molesters or as recruiters continues to play a role in debates over gay rights, and with particular attention to gay teachers, parents and married couples – people who might have close contact with children.);

p. Tr. 1035:13-1036:19 (Lamb: Social science studies have disproven the hypothesis that gays and lesbians are more likely to abuse children.).

77. 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 these children"; and "legal recognition of homosexual unions * * * would mean * * * the approval of deviant behavior.";

k. PX0168 Southern Baptist Convention, SBC Resolution, On *Same-Sex Marriage* at 1 (June 2003): "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.";

l. PX0771 Southern Baptist Convention, *Resolution on President Clinton's Gay and Lesbian Pride Month Proclamation* (June 1999): "The Bible clearly teaches that 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.).

78. Stereotypes and misinformation have resulted in social and legal disadvantages for gays and lesbians.

a. Tr. 413:22-414:6 (Chauncey: The "Save Our Children" campaign in Dade County, Florida in 1977 was led by Anita Bryant, a famous Baptist singer. It sought to overturn an enactment that added sexual orientation to an antidiscrimination law, and it drew on and revived earlier stereotypes of homosexuals as child molesters.);

b. Tr. 1554:14-19 (Segura: Ballot initiatives banning marriage equality have been passed in thirty-three states.);

c. Tr. 2608:16-18 (Miller: "My view is that at least some people voted for Proposition 8 on the basis of anti-gay stereotypes and prejudice.");

d. Tr. 538:15-539:10 (Chauncey: Chauncey is less optimistic now that same-sex marriage will become common in the United States than he was in 2004. Since 2004, when Chauncey wrote *Why Marriage? The History Shaping Today's Debate over Gay Equality,* the majority of states have enacted legislation or constitutional amendments that would prohibit same-sex couples from marrying. Some have been enacted by legislative vote, but a tremendous number of popular referenda have enacted these discriminatory measures.);

e. Tr. 424:18-23 (Chauncey: "[T]he wave of campaigns that we have seen against gay marriage rights in the last decade are, in effect, the latest stage and cycle of anti-gay rights campaigns of a sort that I have been describing; that they continue with a similar intent and use some of the same imagery.");

f. Tr. 412:20-413:1 (Chauncey: The series of initiatives we have seen since the mid-to-late 1970s over gay rights are another example of continuing prejudice and hostility.);

g. Tr. 564:4-16 (Chauncey: The term "the gay agenda" was mobilized particularly effectively 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 that picks up on long-standing stereotypes.);

h. Tr. 1560:22-1561:9 (Segura: "[T]he role of prejudice is profound. * * * [I]f the group is envisioned as being somehow * * * morally inferior, a threat to children, a threat to freedom, if there's these deeply-seated beliefs, then the range of compromise is dramatically limited. It's very difficult to engage in the give-and-take of the legislative process when I think you are an inherently bad person. That's just not the basis for compromise and negotiation in the political process.");

i. Tr. 1563:5-1564:21 (Segura: "[T]he American public is not very fond of gays and lesbians." Warmness scores for gays and lesbians are as much as 16 to 20 points below the average score for religious, racial and ethnic groups; over 65 percent of respondents placed gays and lesbians below the midpoint, below the score of 50, whereas a third to 45 percent did the same for other groups. When "two-thirds of all respondents are giving gays and lesbians a score below 50, that's telling elected officials that they can say bad things about gays and lesbians, and that could be

politically advantageous to them because * * * many parts of the electorate feel the same way." Additionally, "the initiative process could be fertile ground to try to mobilize some of these voters to the polls for that cause.");

j. PX0619 The Williams Institute, *Chapter 14: Other Indicia of Animus against LGBT People by State and Local Officials, 1980-Present* at 9 (2009): The Williams Institute collected negative comments made by politicians about gays and lesbians in all fifty states. An Arizona state representative compared homosexuality to "bestiality, human sacrifice, and cannibalism." A California state senator described homosexuality as "a sickness * * * an uncontrolled passion similar to that which would cause someone to rape.";

k. PX0796 Kenneth P Miller, *The Democratic Coalition's Religious Divide: Why California Voters Supported Obama but Not Same-Sex Marriage,* 119 Revue Française d'Études Américaines 46, 52 (2009): "In the decade between 1998 and 2008, thirty states held statewide elections on state constitutional amendments defining marriage as a union between a man and a woman. * * * Voters approved marriage amendments in all thirty states where they were able to vote on the question, usually by large margins."

79. The Proposition 8 campaign relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian. The reason children need to be protected from same-sex marriage was never articulated in official campaign advertisements. Nevertheless, the advertisements insinuated that

learning about same-sex marriage could make a child gay or lesbian and that parents should dread having a gay or lesbian child.

a. Tr. 424:24-429:6 (Chauncey: Proposition 8 Official Voter Guide evoked fears about and contained stereotypical images of gay people.);

b. PX0710 at RFA No 51: Attorney General admits that some of the advertising in favor of Proposition 8 was based on fear of and prejudice against homosexual men and women;

c. Tr. 2608:16-18 (Miller: "My view is that at least some people voted for Proposition 8 on the basis of anti-gay stereotypes and prejudice.");

d. PX0577 Frank Schubert and Jeff Flint, *Passing Prop 8,* Politics at 45-47 (Feb. 2009): "[P]assing Proposition 8 would depend on our ability to convince voters that same-sex marriage had broader implications for Californians and was not only about the two individuals involved in a committed gay relationship." "We strongly believed that a campaign in favor of traditional marriage would not be enough to prevail." "We probed long and hard in countless focus groups and surveys to explore reactions to a variety of consequences our issue experts identified" and they decided to create campaign messaging focusing on "how this new 'fundamental right' would be inculcated in young children through public schools." "[T]here were limits to the degree of tolerance Californians would afford the gay community. They would entertain allowing gay marriage, but not if doing so had significant

implications for the rest of society." "The Prop 8 victory proves something that readers of *Politics* magazine know very well: campaigns matter.";

e. PX2150 Mailing leaflet, Protect Marriage: "[F]our activist judges on the Supreme Court in San Francisco ignored four million voters and imposed same-sex marriage on California. Their ruling means it is no longer about 'tolerance.' Acceptance of Gay Marriage is Now Mandatory.";

f. PX0015 Video, *Finally the Truth*; PX0016 Video, *Have You Thought About It?*; and PX0091 Video, *Everything to Do With Schools*: Protect Marriage television ads threatening unarticulated consequences to children if Proposition 8 does not pass;

g. PX0513 Letter from Tam to "friends": "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: legalize 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? 3. Gay activists

would target the big churches and request to be married by their pastors. If the church refuse, they would sue the church." (as written);

h. Tr. 553:23-554:14 (Chauncey: Tam's "What If We Lose" letter is consistent in its tone with a much longer history of anti-gay rhetoric. It reproduces many of the major themes of the anti-gay rights campaigns of previous decades and a longer history of anti-gay discrimination.);

i. PX0116 Video, Massachusetts Parents Oppose Same-Sex Marriage: Robb and Robin Wirthlin, Massachusetts parents, warn that redefining marriage has an impact on every level of society, especially on children, and claim that in Massachusetts homosexuality and gay marriage will soon be taught and promoted in every subject, including math, reading, social studies and spelling;

j. Tr. 530:24-531:11 (Chauncey: The Wirthlins' advertisement implies that the very exposure to the idea of homosexuality threatens children and threatens their sexual identity, as if homosexuality were a choice. In addition, it suggests that the fact that gay people are being asked to be recognized and have their relationships recognized is an imposition on other people, as opposed to an extension of fundamental civil rights to gay and lesbian people.);

k. PX0391 Ron Prentice Addressing Supporters of Proposition 8, Part II at 1:25-1:40: "It's all about education, and how it will be completely turned over, not just incrementally now, but whole hog to the other side.";

l. Tr. 1579:5-21 (Segura: "[O]ne of the enduring * * * tropes of anti-gay argumentation has been that gays are a threat to children. * * * [I]n the Prop 8 campaign [there] was a campaign advertisement saying, * * * 'At school today, I was told that I could marry a princess too.' And the underlying message of that is that * * * if Prop 8 failed, the public schools are going to turn my daughter into a lesbian.");

m. PX0015 Video, *Finally the Truth*; PX0099 Video, *It's Already Happened*; PX0116 Video, Massachusetts Parents Oppose Same-Sex Marriage; PX0401 Video, Tony Perkins, Miles McPherson and Ron Prentice Asking for Support of Proposition 8: Proposition 8 campaign videos focused on the need to protect children;

n. PX0079 Asian American Empowerment Council, Asian American Community Newsletter & Voter Guide (Oct./Nov. 2008): Children need to be protected from gays and lesbians;

o. Tr. 1913:17-1914:12 (Tam: Tam supported Proposition 8 because he thinks "it is very important that our children won't grow up to fantasize or think about, Should I marry Jane or John when I grow up? Because this is very important for Asian families, the cultural issues, the stability of the family.");

p. Tr. 558:16-560:12 (Chauncey: Tam's deposition testimony displays the deep fear about the idea that simple exposure to homosexuality or to marriages of gay and lesbian couples would lead children to become gay. And the issue is not just marriage equality itself – it is sympathy to

homosexuality. They oppose the idea that children could be introduced in school to the idea that there are gay people in the world. It is also consistent with the idea that homosexuality is a choice and there is an association between homosexuality and disease.);

q. PX0480A Video supporting Proposition 8 at 0:58-1:12: Prentice states that "[i]f 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."

80. The campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships.

a. Tr. 429:15-430:8, 431:17-432:11, 436:25-437:15, 438:8-439:6, 529:25-531:11; PX0015 Video, *Finally the Truth*; PX0016 Video, *Have You Thought About It?*; PX0029 Video, *Whether You Like It Or Not*; PX0091 Video, *Everything to Do With Schools*; PX0099 Video, *It's Already Happened*; PX1775 Photo leaflet, Protect Marriage (black and white); PX1775A Photo leaflet, Protect Marriage (color); PX1763 Poster with Phone Number, Protect Marriage: (Chauncey: The campaign television and print ads focused on protecting children and the concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage. The campaign conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure

to gay people and their relationships. The most striking image is of the little girl who comes in to tell her mom that she learned that a princess can marry a princess, which strongly echoes the idea that mere exposure to gay people and their relationships is going to lead a generation of young people to become gay, which voters are to understand as undesirable. The campaign conveyed a message used in earlier campaigns that when gay people seek any recognition this is an imposition on other people rather than simply an extension of civil rights to gay people.);

b. Compare above with Tr. 412:23-413:1, 418:11-419:22, 420:3-20; PX1621 Pamphlet, Save Our Children; PX0864 Dudley Clendinen and Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* at 303 (Touchstone 1999): (Chauncey: One of the earliest anti-gay initiative campaigns used overt messaging of content similar to the Proposition 8 campaign.);

c. PX0008 Memorandum, Protect Marriage, New YouTube Video Clarifies Yes on 8 Proponents' Concerns: Education and Protection of Children is [sic] at Risk (Oct. 31, 2008); PX0025 Leaflet, Protect Marriage, Vote YES on Prop 8 (Barack Obama: "I'm not in favor of gay marriage * * * ."); PX1565 News Release, Protect Marriage, First Graders Taken to San Francisco City Hall for Gay Wedding (Oct. 11, 2008): Proposition 8 campaign materials warn that unless Proposition 8 passes, children will be exposed to indoctrination on gay lifestyles. These materials invoke fears about the gay agenda.

III

CONCLUSIONS OF LAW[3]

Plaintiffs challenge Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Each challenge is independently meritorious, as Proposition 8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation.

DUE PROCESS

The Due Process Clause provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." US Const. Amend. XIV, § 1. Due process protects individuals against arbitrary governmental intrusion into life, liberty or property. See *Washington v. Glucksberg,* 521 U.S. 702, 719-720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). When legislation burdens the exercise of a right deemed to be fundamental, the government must show that the intrusion withstands strict scrutiny. *Zablocki v. Redhail,* 434 U.S. 374, 388, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).

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[3] To the extent any of the conclusions of law should more properly be considered findings of fact, they shall be deemed as such.

THE RIGHT TO MARRY PROTECTS AN INDIVIDUAL'S CHOICE OF MARITAL PARTNER REGARDLESS OF GENDER

The freedom to marry is recognized as a fundamental right protected by the Due Process Clause. See, for example, *Turner v. Safley,* 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) ("[T]he decision to marry is a fundamental right" and marriage is an "expression[ ] of emotional support and public commitment."); *Zablocki,* 434 U.S. at 384, 98 S.Ct. 673 (1978) ("The right to marry is of fundamental importance for all individuals."); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-40, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (The "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Griswold v. Connecticut,* 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

The parties do not dispute that the right to marry is fundamental. The question presented here is whether plaintiffs seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new right.

To determine whether a right is fundamental under the Due Process Clause, the court inquires into whether the right is rooted "in our Nation's history, legal traditions, and practices." *Glucksberg,* 521 U.S. at 710, 117 S.Ct. 2258. Here, because the right to marry is fundamental, the court looks to the evidence presented at trial to determine: (1) the history, tradition and practice of marriage in the United States; and (2) whether plaintiffs seek to exercise their right to marry or seek to exercise some other right. *Id.*

Marriage has retained certain characteristics throughout the history of the United States. See FF 19, 34-35. Marriage requires two parties to give their free consent to form a relationship, which then forms the foundation of a household. FF 20, 34. The spouses must consent to support each other and any dependents. FF 34-35, 37. The state regulates marriage because marriage creates stable households, which in turn form the basis of a stable, governable populace. FF 35-37. The state respects an individual's choice to build a family with another and protects the relationship because it is so central a part of an individual's life. See *Bowers v. Hardwick,* 478 U.S. 186, 204-205, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (Blackmun, J, dissenting).

Never has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse. FF 21. "[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Lawrence,* 539 U.S. at 567, 123 S.Ct. 2472. The Supreme Court recognizes that, wholly apart from procreation, choice and privacy play a pivotal role in the marital relationship. See *Griswold,* 381 U.S. at 485-486, 85 S.Ct. 1678.

Race restrictions on marital partners were once common in most states but are now seen as archaic, shameful or even bizarre. FF 23-25. When the Supreme Court invalidated race restrictions in *Loving,* the definition of the right to marry did not change. 388 U.S. at 12, 87 S.Ct. 1817. Instead, the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry. *Id.*

The marital bargain in California (along with other states) traditionally required that a woman's legal and economic identity be subsumed by her husband's upon marriage under the doctrine of coverture; this once-unquestioned aspect of marriage now is regarded as antithetical to the notion of marriage as a union of equals. FF 26-27, 32. As states moved to recognize the equality of the sexes, they eliminated laws and practices like coverture that had made gender a proxy for a spouse's role within a marriage.

FF 26-27, 32. Marriage was thus transformed from a male-dominated institution into an institution recognizing men and women as equals. Id. Yet, individuals retained the right to marry; that right did not become different simply because the institution of marriage became compatible with gender equality.

The evidence at trial shows that marriage in the United States traditionally has not been open to same-sex couples. The evidence suggests many reasons for this tradition of exclusion, including gender roles mandated through coverture, FF 26-27, social disapproval of same-sex relationships, FF 74, and the reality that the vast majority of people are heterosexual and have had no reason to challenge the restriction, FF 43. The evidence shows that the movement of marriage away from a gendered institution and toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than a change in marriage. The evidence did not show any historical purpose for excluding same-sex couples from marriage, as states have never required spouses to have an ability or willingness to procreate in order to marry. FF 21. Rather, the exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed.

The right to marry has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household. FF 19-20, 34-35. Race and gender restrictions shaped marriage during eras of race and gender inequality, but

such restrictions were never part of the historical core of the institution of marriage. FF 33. Today, gender is not relevant to the state in determining spouses' obligations to each other and to their dependents. Relative gender composition aside, same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law. FF 48. Gender no longer forms an essential part of marriage; marriage under law is a union of equals.

Plaintiffs seek to have the state recognize their committed relationships, and plaintiffs' relationships are consistent with the core of the history, tradition and practice of marriage in the United States. Perry and Stier seek to be spouses; they seek the mutual obligation and honor that attend marriage, FF 52. Zarrillo and Katami seek recognition from the state that their union is "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold,* 381 U.S. at 486, 85 S.Ct. 1678. Plaintiffs' unions encompass the historical purpose and form of marriage. Only the plaintiffs' genders relative to one another prevent California from giving their relationships due recognition.

Plaintiffs do not seek recognition of a new right. To characterize plaintiffs' objective as "the right to same-sex marriage" would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy – namely, marriage. Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.

DOMESTIC PARTNERSHIPS DO NOT SATISFY CALIFORNIA'S OBLIGATION TO ALLOW PLAINTIFFS TO MARRY

Having determined that plaintiffs seek to exercise their fundamental right to marry under the Due Process Clause, the court must consider whether the availability of Registered Domestic Partnerships fulfills California's due process obligation to same-sex couples. The evidence shows that domestic partnerships were created as an alternative to marriage that distinguish same-sex from opposite-sex couples. FF 53-54; *In re Marriage Cases,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 434 (2008) (One of the "core elements of th[e] fundamental right [to marry] is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships."); *id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 402, 434, 445 (By "reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership," the state communicates the "official view that [same-sex couples'] committed relationships are of lesser stature than the comparable relationships of opposite-sex couples."). Proponents do not dispute the "significant symbolic disparity between domestic partnership and marriage." Doc. # 159-2 at 6.

California has created two separate and parallel institutions to provide couples with essentially the

same rights and obligations. Cal. Fam. Code § 297.5(a). Domestic partnerships are not open to opposite-sex couples unless one partner is at least sixty-two years old. Cal. Fam. Code § 297(b)(5)(B). Apart from this limited exception – created expressly to benefit those eligible for benefits under the Social Security Act – the sole basis upon which California determines whether a couple receives the designation "married" or the designation "domestic partnership" is the sex of the spouses relative to one another. Compare Cal. Fam. Code §§ 297-299.6 (domestic partnership) with §§ 300-536 (marriage). No further inquiry into the couple or the couple's relationship is required or permitted. Thus, California allows almost all opposite-sex couples only one option – marriage – and all same-sex couples only one option – domestic partnership. See id, FF 53-54.

The evidence shows that domestic partnerships do not fulfill California's due process obligation to plaintiffs for two reasons. First, domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage. FF 53-54. Second, domestic partnerships were created specifically so that California could offer same-sex couples rights and benefits while explicitly withholding marriage from same-sex couples. Id, Cal. Fam. Code § 297 (Gov Davis 2001 signing statement: "In California, a legal marriage is between a man and a woman. * * * This [domestic partnership] legislation does nothing to contradict or undermine the definition of a legal marriage.").

The evidence at trial shows that domestic partnerships exist solely to differentiate same-sex unions from marriages. FF 53-54. A domestic partnership is not a marriage; while domestic partnerships offer same-sex couples almost all of the rights and responsibilities associated with marriage, the evidence shows that the withholding of the designation "marriage" significantly disadvantages plaintiffs. FF 52-54. The record reflects that marriage is a culturally superior status compared to a domestic partnership. FF 52. California does not meet its due process obligation to allow plaintiffs to marry by offering them a substitute and inferior institution that denies marriage to same-sex couples.

PROPOSITION 8 IS UNCONSTITUTIONAL BECAUSE IT DENIES PLAINTIFFS A FUNDAMENTAL RIGHT WITHOUT A LEGITIMATE (MUCH LESS COMPELLING) REASON

Because plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny. *Zablocki,* 434 U.S. at 388, 98 S.Ct. 673. That the majority of California voters supported Proposition 8 is irrelevant, as "fundamental rights may not be submitted to [a] vote; they depend on the outcome of no elections." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Under strict scrutiny, the state bears the burden of producing evidence to show that Proposition 8 is narrowly tailored to a compelling government interest. *Carey v. Population Services*

International, 431 U.S. 678, 686, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). Because the government defendants declined to advance such arguments, proponents seized the role of asserting the existence of a compelling California interest in Proposition 8.

As explained in detail in the equal protection analysis, Proposition 8 cannot withstand rational basis review. Still less can Proposition 8 survive the strict scrutiny required by plaintiffs' due process claim. The minimal evidentiary presentation made by proponents does not meet the heavy burden of production necessary to show that Proposition 8 is narrowly tailored to a compelling government interest. Proposition 8 cannot, therefore, withstand strict scrutiny. Moreover, proponents do not assert that the availability of domestic partnerships satisfies plaintiffs' fundamental right to marry; proponents stipulated that "[t]here is a significant symbolic disparity between domestic partnership and marriage." Doc. # 159-2 at 6. Accordingly, Proposition 8 violates the Due Process Clause of the Fourteenth Amendment.

EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." US Const. Amend. XIV, § 1. Equal protection is "a pledge of the protection of equal laws." *Yick Wo v. Hopkins,* 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The guarantee of equal protection

coexists, of course, with the reality that most legislation must classify for some purpose or another. See *Romer v. Evans,* 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). When a law creates a classification but neither targets a suspect class nor burdens a fundamental right, the court presumes the law is valid and will uphold it as long as it is rationally related to some legitimate government interest. See, for example, *Heller v. Doe,* 509 U.S. 312, 319-320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

The court defers to legislative (or in this case, popular) judgment if there is at least a debatable question whether the underlying basis for the classification is rational. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). Even under the most deferential standard of review, however, the court must "insist on knowing the relation between the classification adopted and the object to be attained." *Romer,* 517 U.S. at 632, 116 S.Ct. 1620; *Heller,* 509 U.S. at 321, 113 S.Ct. 2637 (basis for a classification must "find some footing in the realities of the subject addressed by the legislation"). The court may look to evidence to determine whether the basis for the underlying debate is rational. *Plyler v. Doe,* 457 U.S. 202, 228, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (finding an asserted interest in preserving state resources by prohibiting undocumented children from attending public school to be irrational because "the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax

money to the state fisc"). The search for a rational relationship, while quite deferential, "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer,* 517 U.S. at 633, 116 S.Ct. 1620. The classification itself must be related to the purported interest. *Plyler,* 457 U.S. at 220, 102 S.Ct. 2382 ("It is difficult to conceive of a rational basis for penalizing [undocumented children] for their presence within the United States," despite the state's interest in preserving resources.).

Most laws subject to rational basis easily survive equal protection review, because a legitimate reason can nearly always be found for treating different groups in an unequal manner. See *Romer,* 517 U.S. at 633, 116 S.Ct. 1620. Yet, to survive rational basis review, a law must do more than disadvantage or otherwise harm a particular group. *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973).

SEXUAL ORIENTATION OR SEX DISCRIMINATION

Plaintiffs challenge Proposition 8 as violating the Equal Protection Clause because Proposition 8 discriminates both on the basis of sex and on the basis of sexual orientation. Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a

man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex. But Proposition 8 also operates to restrict Perry's choice of marital partner because of her sexual orientation; her desire to marry another woman arises only because she is a lesbian.

The evidence at trial shows that gays and lesbians experience discrimination based on unfounded stereotypes and prejudices specific to sexual orientation. Gays and lesbians have historically been targeted for discrimination because of their sexual orientation; that discrimination continues to the present. FF 74-76. As the case of Perry and the other plaintiffs illustrates, sex and sexual orientation are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation. See FF 42-43. Sexual orientation discrimination is thus a phenomenon distinct from, but related to, sex discrimination.

Proponents argue that Proposition 8 does not target gays and lesbians because its language does not refer to them. In so arguing, proponents seek to mask their own initiative. FF 57. Those who choose to marry someone of the opposite sex – heterosexuals – do not have their choice of marital partner restricted by Proposition 8. Those who would choose to marry someone of the same sex – homosexuals – have had their right to marry eliminated by an amendment to the state constitution. Homosexual conduct and

identity together define what it means to be gay or lesbian. See FF 42-43. Indeed, homosexual conduct and attraction are constitutionally protected and integral parts of what makes someone gay or lesbian. *Lawrence,* 539 U.S. at 579, 123 S.Ct. 2472; FF 42-43; see also *Christian Legal Society v. Martinez,* 561 U.S. ___, 130 S.Ct. 2971, 2990, 177 L.Ed.2d 838 ("Our decisions have declined to distinguish between status and conduct in [the context of sexual orientation].") (June 28, 2010) (citing *Lawrence,* 539 U.S. at 583, 123 S.Ct. 2472 (O'Connor, J, concurring)).

Proposition 8 targets gays and lesbians in a manner specific to their sexual orientation and, because of their relationship to one another, Proposition 8 targets them specifically due to sex. Having considered the evidence, the relationship between sex and sexual orientation and the fact that Proposition 8 eliminates a right only a gay man or a lesbian would exercise, the court determines that plaintiffs' equal protection claim is based on sexual orientation, but this claim is equivalent to a claim of discrimination based on sex.

STANDARD OF REVIEW

As presently explained in detail, the Equal Protection Clause renders Proposition 8 unconstitutional under any standard of review. Accordingly, the court need not address the question whether laws classifying on the basis of sexual orientation should be subject to a heightened standard of review.

Although Proposition 8 fails to possess even a rational basis, the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (noting that strict scrutiny may be appropriate where a group has experienced a "'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities") (quoting *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973)). See FF 42-43, 46-48, 74-78. Proponents admit that "same-sex sexual orientation does not result in any impairment in judgment or general social and vocational capabilities." PX0707 at RFA No 21.

The court asked the parties to identify a difference between heterosexuals and homosexuals that the government might fairly need to take into account when crafting legislation. Doc. # 677 at 8. Proponents pointed only to a difference between same-sex couples (who are incapable through sexual intercourse of producing offspring biologically related to both parties) and opposite-sex couples (some of whom are capable through sexual intercourse of producing such offspring). Doc. # 687 at 32-34. Proponents did not, however, advance any reason why the government may use sexual orientation as a proxy for fertility or why the government may need to take into account fertility when legislating. Consider, by contrast, *City of*

Cleburne v. Cleburne Living Center, 473 U.S. 432, 444, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Legislation singling out a class for differential treatment hinges upon a demonstration of "real and undeniable differences" between the class and others); see also *United States v. Virginia,* 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) ("Physical differences between men and women * * * are enduring."). No evidence at trial illuminated distinctions among lesbians, gay men and heterosexuals amounting to "real and undeniable differences" that the government might need to take into account in legislating.

The trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation. FF 47. Here, however, strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review.

PROPOSITION 8 DOES NOT SURVIVE RATIONAL BASIS

Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest. One example of a legitimate state interest in not issuing marriage licenses to a particular group might be a scarcity of

marriage licenses or county officials to issue them. But marriage licenses in California are not a limited commodity, and the existence of 18,000 same-sex married couples in California shows that the state has the resources to allow both same-sex and opposite-sex couples to wed. See Background to Proposition 8 above.

Proponents put forth several rationales for Proposition 8, see Doc. # 605 at 12-15, which the court now examines in turn: (1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest.

PURPORTED INTEREST # 1: RESERVING MARRIAGE AS A UNION BETWEEN A MAN AND A WOMAN AND EXCLUDING ANY OTHER RELATIONSHIP

Proponents first argue that Proposition 8 is rational because it preserves: (1) "the traditional institution of marriage as the union of a man and a woman"; (2) "the traditional social and legal purposes, functions, and structure of marriage"; and (3) "the traditional meaning of marriage as it has always been defined in the English language." Doc. # 605 at

12-13. These interests relate to maintaining the definition of marriage as the union of a man and a woman for its own sake.

Tradition alone, however, cannot form a rational basis for a law. *Williams v. Illinois,* 399 U.S. 235, 239, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). The "ancient lineage" of a classification does not make it rational. *Heller,* 509 U.S. at 327, 113 S.Ct. 2637. Rather, the state must have an interest apart from the fact of the tradition itself.

The evidence shows that the tradition of restricting an individual's choice of spouse based on gender does not rationally further a state interest despite its "ancient lineage." Instead, the evidence shows that the tradition of gender restrictions arose when spouses were legally required to adhere to specific gender roles. See FF 26-27. California has eliminated all legally-mandated gender roles except the requirement that a marriage consist of one man and one woman. FF 32. Proposition 8 thus enshrines in the California Constitution a gender restriction that the evidence shows to be nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life.

The tradition of restricting marriage to opposite-sex couples does not further any state interest. Rather, the evidence shows that Proposition 8 harms the state's interest in equality, because it mandates that men and women be treated differently based only on antiquated and discredited notions of gender. See FF 32, 57.

Proponents' argument that tradition prefers opposite-sex couples to same-sex couples equates to the notion that opposite-sex relationships are simply better than same-sex relationships. Tradition alone cannot legitimate this purported interest. Plaintiffs presented evidence showing conclusively that the state has no interest in preferring opposite-sex couples to same-sex couples or in preferring heterosexuality to homosexuality. See FF 48-50. Moreover, the state cannot have an interest in disadvantaging an unpopular minority group simply because the group is unpopular. *Moreno,* 413 U.S. at 534, 93 S.Ct. 2821.

The evidence shows that the state advances nothing when it adheres to the tradition of excluding same-sex couples from marriage. Proponents' asserted state interests in tradition are nothing more than tautologies and do not amount to rational bases for Proposition 8.

PURPORTED INTEREST # 2: PROCEEDING WITH CAUTION WHEN IMPLEMENTING SOCIAL CHANGES

Proponents next argue that Proposition 8 is related to state interests in: (1) "[a]cting incrementally and with caution when considering a radical transformation to the fundamental nature of a bedrock social institution"; (2) "[d]ecreasing the probability of weakening the institution of marriage"; (3) "[d]ecreasing the probability of adverse consequences that could result from weakening the institution of marriage";

and (4) "[d]ecreasing the probability of the potential adverse consequences of same-sex marriage." Doc. # 605 at 13-14.

Plaintiffs presented evidence at trial sufficient to rebut any claim that marriage for same-sex couples amounts to a sweeping social change. See FF 55. Instead, the evidence shows beyond debate that allowing same-sex couples to marry has at least a neutral, if not a positive, effect on the institution of marriage and that same-sex couples' marriages would benefit the state. Id. Moreover, the evidence shows that the rights of those opposed to homosexuality or same-sex couples will remain unaffected if the state ceases to enforce Proposition 8. FF 55, 62.

The contrary evidence proponents presented is not credible. Indeed, proponents presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage. The process of allowing same-sex couples to marry is straightforward, and no evidence suggests that the state needs any significant lead time to integrate same-sex couples into marriage. See Background to Proposition 8 above. Consider, by contrast, *Cooper v. Aaron,* 358 U.S. 1, 7, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958) (recognizing that a school district needed time to implement racial integration but nevertheless finding a delay unconstitutional because the school board's plan did not provide for "the earliest practicable completion of desegregation"). The evidence shows that allowing same-sex couples to marry will be simple for California to implement

because it has already done so; no change need be phased in. California need not restructure any institution to allow same-sex couples to marry. See FF 55.

Because the evidence shows same-sex marriage has and will have no adverse effects on society or the institution of marriage, California has no interest in waiting and no practical need to wait to grant marriage licenses to same-sex couples. Proposition 8 is thus not rationally related to proponents' purported interests in proceeding with caution when implementing social change.

PURPORTED INTEREST # 3: PROMOTING OPPOSITE-SEX PARENTING OVER SAME-SEX PARENTING

Proponents' largest group of purported state interests relates to opposite-sex parents. Proponents argue Proposition 8:(1) promotes "stability and responsibility in naturally procreative relationships"; (2) promotes "enduring and stable family structures for the responsible raising and care of children by their biological parents"; (3) increases "the probability that natural procreation will occur within stable, enduring, and supporting family structures"; (4) promotes "the natural and mutually beneficial bond between parents and their biological children"; (5) increases "the probability that each child will be raised by both of his or her biological parents"; (6) increases "the probability that each child will be raised by both a father and a mother"; and (7) increases "the

probability that each child will have a legally recognized father and mother." Doc. # 605 at 13-14.

The evidence supports two points which together show Proposition 8 does not advance any of the identified interests: (1) same-sex parents and opposite-sex parents are of equal quality, FF 69-73, and (2) Proposition 8 does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents, FF 43, 46, 51.

The evidence does not support a finding that California has an interest in preferring opposite-sex parents over same-sex parents. Indeed, the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes. FF 70. Moreover, Proposition 8 has nothing to do with children, as Proposition 8 simply prevents same-sex couples from marrying. FF 57. Same-sex couples can have (or adopt) and raise children. When they do, they are treated identically to opposite-sex parents under California law. FF 49. Even if California had an interest in preferring opposite-sex parents to same-sex parents – and the evidence plainly shows that California does not – Proposition 8 is not rationally related to that interest, because Proposition 8 does not affect who can or should become a parent under California law. FF 49, 57.

To the extent California has an interest in encouraging sexual activity to occur within marriage (a debatable proposition in light of *Lawrence,* 539 U.S. at 571, 123 S.Ct. 2472) the evidence shows

Proposition 8 to be detrimental to that interest. Because of Proposition 8, same-sex couples are not permitted to engage in sexual activity within marriage. FF 53. Domestic partnerships, in which sexual activity is apparently expected, are separate from marriage and thus codify California's encouragement of non-marital sexual activity. Cal. Fam. Code §§ 297-299.6. To the extent proponents seek to encourage a norm that sexual activity occur within marriage to ensure that reproduction occur within stable households, Proposition 8 discourages that norm because it requires some sexual activity and child-bearing and child-rearing to occur outside marriage.

Proponents argue Proposition 8 advances a state interest in encouraging the formation of stable households. Instead, the evidence shows that Proposition 8 undermines that state interest, because same-sex households have become less stable by the passage of Proposition 8. The inability to marry denies same-sex couples the benefits, including stability, attendant to marriage. FF 50. Proponents failed to put forth any credible evidence that married opposite-sex households are made more stable through Proposition 8. FF 55. The only rational conclusion in light of the evidence is that Proposition 8 makes it less likely that California children will be raised in stable households. See FF 50, 56.

None of the interests put forth by proponents relating to parents and children is advanced by Proposition 8; instead, the evidence shows Proposition 8 disadvantages families and their children.

PURPORTED INTEREST # 4: PROTECTING THE FREEDOM OF THOSE WHO OPPOSE MARRIAGE FOR SAME-SEX COUPLES

Proponents next argue that Proposition 8 protects the First Amendment freedom of those who disagree with allowing marriage for couples of the same sex. Proponents argue that Proposition 8:(1) preserves "the prerogative and responsibility of parents to provide for the ethical and moral development and education of their own children"; and (2) accommodates "the First Amendment rights of individuals and institutions that oppose same-sex marriage on religious or moral grounds." Doc. # 605 at 14.

These purported interests fail as a matter of law. Proposition 8 does not affect any First Amendment right or responsibility of parents to educate their children. See *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 451-452. Californians are prevented from distinguishing between same-sex partners and opposite-sex spouses in public accommodations, as California antidiscrimination law requires identical treatment for same-sex unions and opposite-sex marriages. *Koebke v. Bernardo Heights Country Club,* 36 Cal.4th 824, 31 Cal.Rptr.3d 565, 115 P.3d 1212, 1217-1218 (2005). The evidence shows that Proposition 8 does nothing other than eliminate the right of same-sex couples to marry in California. See FF 57, 62. Proposition 8 is not rationally related to an interest in protecting the rights of those opposed to same-sex couples because, as a matter of law, Proposition 8 does not affect the rights of those opposed to

homosexuality or to marriage for couples of the same sex. FF 62.

To the extent proponents argue that one of the rights of those morally opposed to same-sex unions is the right to prevent same-sex couples from marrying, as explained presently those individuals' moral views are an insufficient basis upon which to enact a legislative classification.

PURPORTED INTEREST # 5: TREATING SAME-SEX COUPLES DIFFERENTLY FROM OPPOSITE-SEX COUPLES

Proponents argue that Proposition 8 advances a state interest in treating same-sex couples differently from opposite-sex couples by: (1) "[u]sing different names for different things"; (2) "[m]aintaining the flexibility to separately address the needs of different types of relationships"; (3) "[e]nsuring that California marriages are recognized in other jurisdictions"; and (4) "[c]onforming California's definition of marriage to federal law." Doc. # 605 at 14.

Here, proponents assume a premise that the evidence thoroughly rebutted: rather than being different, same-sex and opposite-sex unions are, for all purposes relevant to California law, exactly the same. FF 47-50. The 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. See FF 48, 76-80. The evidence fatally undermines any purported state interest in treating

couples differently; thus, these interests do not provide a rational basis supporting Proposition 8.

In addition, proponents appear to claim that Proposition 8 advances a state interest in easing administrative burdens associated with issuing and recognizing marriage licenses. Under precedents such as *Craig v. Boren,* "administrative ease and convenience" are not important government objectives. 429 U.S. 190, 198, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Even assuming the state were to have an interest in administrative convenience, Proposition 8 actually creates an administrative burden on California because California must maintain a parallel institution for same-sex couples to provide the equivalent rights and benefits afforded to married couples. See FF 53. Domestic partnerships create an institutional scheme that must be regulated separately from marriage. Compare Cal. Fam. Code §§ 297-299.6 with Cal. Fam. Code §§ 300-536. California may determine whether to retain domestic partnerships or eliminate them in the absence of Proposition 8; the court presumes, however, that as long as Proposition 8 is in effect, domestic partnerships and the accompanying administrative burden will remain. Proposition 8 thus hinders rather than advances administrative convenience.

PURPORTED INTEREST # 6: THE CATCHALL INTEREST

Finally, proponents assert that Proposition 8 advances "[a]ny other conceivable legitimate interests

identified by the parties, amici, or the court at any stage of the proceedings." Doc. # 605 at 15. But proponents, amici and the court, despite ample opportunity and a full trial, have failed to identify any rational basis Proposition 8 could conceivably advance. Proponents, represented by able and energetic counsel, developed a full trial record in support of Proposition 8. The resulting evidence shows that Proposition 8 simply conflicts with the guarantees of the Fourteenth Amendment.

Many of the purported interests identified by proponents are nothing more than a fear or unarticulated dislike of same-sex couples. Those interests that are legitimate are unrelated to the classification drawn by Proposition 8. The evidence shows that, by every available metric, opposite-sex couples are not better than their same-sex counterparts; instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equal. FF 47-50. Proposition 8 violates the Equal Protection Clause because it does not treat them equally.

A PRIVATE MORAL VIEW THAT SAME-SEX COUPLES ARE INFERIOR TO OPPOSITE-SEX COUPLES IS NOT A PROPER BASIS FOR LEGISLATION

In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply

are not as good as opposite-sex couples. FF 78-80. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate. See *Romer,* 517 U.S. at 633, 116 S.Ct. 1620; *Moreno,* 413 U.S. at 534, 93 S.Ct. 2821; *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) ("[T]he Constitution cannot control [private biases] but neither can it tolerate them.").

The evidence shows that Proposition 8 was a hard-fought campaign and that the majority of California voters supported the initiative. See Background to Proposition 8 above, FF 17-18, 79-80. The arguments surrounding Proposition 8 raise a question similar to that addressed in *Lawrence,* when the Court asked whether a majority of citizens could use the power of the state to enforce "profound and deep convictions accepted as ethical and moral principles" through the criminal code. 539 U.S. at 571, 123 S.Ct. 2472. The question here is whether California voters can enforce those same principles through regulation of marriage licenses. They cannot. California's obligation is to treat its citizens equally, not to "mandate [its] own moral code." *Id.* (citing *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). "[M]oral disapproval, without any other asserted state interest," has never been a rational basis for legislation. *Lawrence,*

539 U.S. at 582, 123 S.Ct. 2472 (O'Connor, J, concurring). Tradition alone cannot support legislation. See *Williams,* 399 U.S. at 239, 90 S.Ct. 2018; *Romer,* 517 U.S. at 635, 116 S.Ct. 1620; *Lawrence,* 539 U.S. at 579, 123 S.Ct. 2472.

Proponents' purported rationales are nothing more than post-hoc justifications. While the Equal Protection Clause does not prohibit post-hoc rationales, they must connect to the classification drawn. Here, the purported state interests fit so poorly with Proposition 8 that they are irrational, as explained above. What is left is evidence that Proposition 8 enacts a moral view that there is something "wrong" with same-sex couples. See FF 78-80.

The evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples. FF 79-80. The campaign relied heavily on negative stereotypes about gays and lesbians and focused on protecting children from inchoate threats vaguely associated with gays and lesbians. FF 79-80; See PX0016 Video, *Have You Thought About It?* (video of a young girl asking whether the viewer has considered the consequences to her of Proposition 8 but not explaining what those consequences might be).

At trial, proponents' counsel attempted through cross-examination to show that the campaign wanted to protect children from learning about same-sex marriage in school. See PX0390A Video, Ron Prentice

Addressing Supporters of Proposition 8, Excerpt; Tr. 132:25-133:3 (proponents' counsel to Katami: "But the fact is that what the Yes on 8 campaign was pointing at, is that kids would be taught about same-sex relationships in first and second grade; isn't that a fact, that that's what they were referring to?"). The evidence shows, however, that Proposition 8 played on a fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are not heterosexual. FF 79; PX0099 Video, *It's Already Happened* (mother's expression of horror upon realizing her daughter now knows she can marry a princess).

The testimony of George Chauncey places the Protect Marriage campaign advertisements in historical context as echoing messages from previous campaigns to enact legal measures to disadvantage gays and lesbians. FF 74, 77-80. The Protect Marriage campaign advertisements ensured California voters had these previous fear-inducing messages in mind. FF 80. The evidence at trial shows those fears to be completely unfounded. FF 47-49, 68-73, 76-80.

Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples. FF 76, 79-80; *Romer,* 517 U.S. at 634, 116 S.Ct. 1620 ("[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.").

Because Proposition 8 disadvantages gays and lesbians without any rational justification, Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.

REMEDIES

Plaintiffs have demonstrated by overwhelming evidence that Proposition 8 violates their due process and equal protection rights and that they will continue to suffer these constitutional violations until state officials cease enforcement of Proposition 8. California is able to issue marriage licenses to same-sex couples, as it has already issued 18,000 marriage licenses to same-sex couples and has not suffered any demonstrated harm as a result, see FF 64-66; moreover, California officials have chosen not to defend Proposition 8 in these proceedings.

Because Proposition 8 is unconstitutional under both the Due Process and Equal Protection Clauses, the court orders entry of judgment permanently enjoining its enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8. The clerk is DIRECTED to enter judgment without bond in favor of plaintiffs and plaintiff-intervenors and against defendants and defendant-intervenors pursuant to FRCP 58.

IT IS SO ORDERED.

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52 Cal.4th 1116
Supreme Court of California

Kristin M. PERRY et al.,
Plaintiffs and Respondents,
v.
Edmund G. BROWN, Jr., as Governor, etc., et al.,
Defendants; City and County of San Francisco,
Intervener and Respondent;
Dennis Hollingsworth et al.,
Interveners and Appellants.

No. S189476. | Nov. 17, 2011.

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Opinion

CANTIL-SAKAUYE, C.J.

At the request of the United States Court of Appeals for the Ninth Circuit, we agreed to decide a question of California law that is relevant to the underlying lawsuit in this matter now pending in that federal appellate court. (*Perry v. Brown* (9th Cir. No. 10-16696); see Cal. Rules of Court, rule 8.548.) As posed by the Ninth Circuit, the question to be decided is "[w]hether under article II, section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so."

In addressing this issue, we emphasize at the outset that although in this case the question posed by the Ninth Circuit happens to arise in litigation challenging the validity, under the United States

Constitution, of the initiative measure (Proposition 8) that added a section to the California Constitution providing that "[o]nly marriage between a man and a woman is valid or recognized in California" (Cal. Const., art. I, § 7.5), the state law issue that has been submitted to this court is totally unrelated to the substantive question of the constitutional validity of Proposition 8. Instead, the question before us involves a fundamental procedural issue that may arise with respect to *any* initiative measure, without regard to its subject matter. The same procedural issue regarding an official initiative proponent's standing to appear as a party in a judicial proceeding to defend the validity of a voter-approved initiative or to appeal a judgment invalidating it when the public officials who ordinarily provide such a defense or file such an appeal decline to do so, could arise with regard to an initiative measure that, for example, (1) limited campaign contributions that may be collected by elected legislative or executive officials, or (2) imposed term limits for legislative and executive offices, or (3) prohibited government officials from accepting employment after leaving office with companies or individuals that have benefited from the officials' discretionary governmental decisions while in office. (Cf., e.g., Prop. 73 (Primary Elec. (June 7, 1988)), invalidated in part in *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 47 Cal.Rptr.2d 108, 905 P.2d 1248 [campaign contribution limits]; Prop. 140 (Gen. Elec.(Nov. 6, 1990)), upheld in *Legislature v. Eu* (1991) 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309 [term limits]; City of Santa Monica's ballot

measure Prop. LL (Consolidated Gen. Mun. Elec. (Nov. 7, 2000)), upheld in *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 24 Cal.Rptr.3d 72 [postgovernment employment limits].) The resolution of this procedural question does not turn on the substance of the particular initiative measure at issue, but rather on the purpose and integrity of the initiative process itself.

As we discuss more fully below, in the past official proponents of initiative measures in California have uniformly been permitted to participate as parties – either as interveners or as real parties in interest – in numerous lawsuits in California courts challenging the validity of the initiative measure the proponents sponsored. Such participation has routinely been permitted (1) without any inquiry into or showing that the proponents' own property, liberty, or other personal legally protected interests would be specially affected by invalidation of the measure, and (2) whether or not the government officials who ordinarily defend a challenged enactment were also defending the measure in the proceeding. This court, however, has not previously had occasion fully to explain the basis upon which an official initiative proponent's ability to participate as a party in such litigation rests.

As we shall explain, because the initiative process is specifically intended to enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure

in question, the voters who have successfully adopted an initiative measure may reasonably harbor a legitimate concern that the public officials who ordinarily defend a challenged state law in court may not, in the case of an initiative measure, always undertake such a defense with vigor or with the objectives and interests of those voters paramount in mind. As a consequence, California courts have routinely permitted the official proponents of an initiative to intervene or appear as real parties in interest to defend a challenged voter-approved initiative measure in order "to guard the people's right to exercise initiative power" (*Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 822, 226 Cal.Rptr. 81, 718 P.2d 68 (*Building Industry Assn.*)) or, in other words, to enable such proponents to assert *the people's,* and hence *the state's,* interest in defending the validity of the initiative measure. Allowing official proponents to assert the state's interest in the validity of the initiative measure in such litigation (along with any public officials who may also be defending the measure) (1) assures voters who supported the measure and enacted it into law that any residual hostility or indifference of current public officials to the substance of the initiative measure will not prevent a full and robust defense of the measure to be mounted in court on the people's behalf, and (2) ensures a court faced with the responsibility of reviewing and resolving a legal challenge to an initiative measure that it is aware of and addresses the full range of legal arguments that reasonably may be proffered in the measure's defense. In this manner, the official

proponents' general ability to appear and defend the state's interest in the validity of the initiative measure and to appeal a lower court judgment invalidating the measure serves to enhance both the fairness of the judicial process and the appearance of fairness of that process.

We have cautioned that in most instances it may well be an abuse of discretion for a court to fail to permit the official proponents of an initiative to intervene in a judicial proceeding to protect the people's right to exercise their initiative power even when one or more government defendants are defending the initiative's validity in the proceeding. (See *Building Industry Assn., supra,* 41 Cal.3d at p. 822, 226 Cal.Rptr. 81, 718 P.2d 68.) Thus, in an instance – like that identified in the question submitted by the Ninth Circuit – in which the public officials have totally declined to defend the initiative's validity at all, we conclude that, in light of the nature and purpose of the initiative process embodied in article II, section 8 of the California Constitution (hereafter article II, section 8) and the unique role of initiative proponents in the constitutional initiative process as recognized by numerous provisions of the Elections Code, it would clearly constitute an abuse of discretion for a court to deny the official proponents of an initiative the opportunity to participate as formal parties in the proceeding, either as interveners or as real parties in interest, in order to assert the people's and hence the state's interest in the validity of the measure and to appeal a judgment invalidating the

measure. In other words, because it is essential to the integrity of the initiative process embodied in article II, section 8 that there be someone to assert the state's interest in an initiative's validity on behalf of the people when the public officials who normally assert that interest decline to do so, and because the official proponents of an initiative (in light of their unique relationship to the initiative measure under art. II, § 8 and the relevant provisions of the Elec. Code) are the most obvious and logical persons to assert the state's interest in the initiative's validity on behalf of the voters who enacted the measure, we conclude that California law authorizes the official proponents, under such circumstances, to appear in the proceeding to assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure. Neither the Governor, the Attorney General, nor any other executive or legislative official has the authority to veto or invalidate an initiative measure that has been approved by the voters. It would exalt form over substance to interpret California law in a manner that would permit these public officials to indirectly achieve such a result by denying the official initiative proponents the authority to step in to assert the state's interest in the validity of the measure or to appeal a lower court judgment invalidating the measure when those public officials decline to assert that interest or to appeal an adverse judgment.

Accordingly, we respond to the question posed by the Ninth Circuit in the affirmative. In a postelection

challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.

I. Factual and Procedural Background

We begin with a brief summary of the factual and procedural background of the current proceeding.

In May 2008, a majority of this court concluded that the California statutes limiting the designation of marriage to opposite-sex couples violated the right of same-sex couples to the equal protection of the laws as guaranteed by the then-governing provisions of the California Constitution. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384.) Thereafter, in the general election held in California in November 2008, a majority of voters approved Proposition 8, an initiative measure that amended the California Constitution by adding a new section – section 7.5 – to article I of the California Constitution. Section 7.5 of article I of the California Constitution provides in full: "Only marriage between a man and a woman is valid or recognized in California."

Proposition 8 was submitted to the Attorney General, circulated for signature, and formally filed with the Secretary of State for submission to the

voters by five California electors – Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak – Shing William Tam, and Mark A. Jansson – who are the official proponents of the initiative measure under California law. (Elec.Code, §§ 342, 9001.) Shortly after commencing the initiative petition process, the proponents established ProtectMarriage.com – Yes on 8, a Project of California Renewal (hereafter ProtectMarriage.com) as a "ballot measure committee" (see Gov.Code, § 84107) to supervise all aspects of the campaign to qualify the measure for the ballot and to seek to obtain its adoption at the ensuing election.

One day after the November 2008 election at which Proposition 8 was approved by a majority of voters, opponents of the measure filed three petitions for an original writ of mandate in this court, challenging the validity of Proposition 8 under the California Constitution. (The three petitions were ultimately consolidated and decided together in *Strauss v. Horton* (2009) 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (*Strauss*).) The petitions contended primarily that Proposition 8 constituted a constitutional *revision,* which under the California Constitution could not properly be adopted through the initiative process, rather than a constitutional *amendment,* which could be adopted by initiative; one petition also contended that Proposition 8 violated the separation of powers doctrine embodied in the California Constitution.

While those petitions were pending, and before this court decided whether to accept the matters for decision, the official proponents of Proposition 8 filed motions to intervene in each of the proceedings, to defend the validity of Proposition 8. Shortly thereafter, this court agreed to hear and decide the petitions and, in the same order, granted the official proponents' motions to intervene in the proceedings.[1]

After briefing and oral argument, this court, on May 26, 2009, handed down its decision in *Strauss, supra,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48, concluding (1) that, under the California Constitution, Proposition 8 was a constitutional amendment, rather than a constitutional revision, and thus could be adopted through the initiative process, and (2) that the measure did not violate the separation of powers doctrine embodied in the California Constitution.

On May 22, 2009, just a few days before the decision in *Strauss, supra,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48, was filed, plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo – two same-sex couples who,

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[1] The order in *Strauss, supra,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48, while granting the motion to intervene filed by the official proponents of Proposition 8, simultaneously denied a motion to intervene that had been filed by a separate pro-Proposition 8 advocacy organization, Campaign for California Families, that was not an official proponent of the challenged initiative measure.

after the adoption of Proposition 8, had sought but had been denied marriage licenses in Alameda County and Los Angeles County respectively – filed the underlying action in the current matter in federal district court in San Francisco. (*Perry v. Schwarzenegger* (N.D.Cal. No. 3:09-cv-02292-VRW).)[2] Plaintiffs' complaint in *Perry* named as defendants in their official capacities the Governor of California, the Attorney General of California, the Director and the Deputy Director of the State Department of Public Health, the Alameda County Clerk – Recorder, and the Los Angeles County Registrar – Recorder/County Clerk. The complaint alleged that Proposition 8 violates the due process and equal protection clauses of the federal Constitution and sought injunctive and declaratory relief.[3]

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[2] The decision rendered by the federal district court after trial was published as *Perry v. Schwarzenegger* (N.D.Cal.2010) 704 F.Supp.2d 921 and, for convenience, will hereafter be referred to in this opinion as *Perry I*. The Ninth Circuit order submitting the question of standing to this court was published as *Perry v. Schwarzenegger* (9th Cir.2011) 628 F.3d 1191, and will hereafter be referred to in this opinion as *Perry II*. After the Ninth Circuit filed its order, a new Governor of California took office and the matter was subsequently retitled *Perry v. Brown,* the current title of the proceeding in this court.

Hereafter, except when specifically referring to either the district court's decision or the Ninth Circuit's order, this opinion will refer to the federal lawsuit simply as the *Perry* action.

[3] In the *Strauss* litigation filed in this court, the petitioners challenged the validity of Proposition 8 only on state constitutional grounds, and did not raise the question of the constitutional validity of the measure under the federal Constitution.

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On May 28, 2009, the proponents of Proposition 8 and ProtectMarriage.com (hereafter Proponents) filed a motion to intervene in the *Perry* proceeding, maintaining that the existing parties in the action would not adequately represent the interests of those who wished to defend the measure.

On June 12, 2009, all named defendants filed answers to the complaint. In their answers, the named defendants other than the Attorney General refused to take a position on the merits of plaintiffs' constitutional challenge and declined to defend the validity of Proposition 8. The answer filed by the Attorney General also declined to defend the initiative, but went further and affirmatively took the position that Proposition 8 is unconstitutional.

On July 2, 2009, the district court held a hearing on a number of matters, including the motion to intervene filed by Proponents. At that hearing, the district court observed that "under California law, as I understand it, proponents of initiative measures have standing to represent proponents and to defend an enactment that is brought into law by the initiative process" and suggested that such intervention by the official initiative proponents was particularly appropriate "where the authorities, the defendants who ordinarily would defend the proposition or the

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(See *Strauss, supra,* 46 Cal.4th at p. 412, fn. 11, 93 Cal.Rptr.3d 591, 207 P.3d 48.) Our opinion in *Strauss* did not address the federal constitutional issue.

enactment that is being challenged here, are taking the position that, in fact, it is constitutionally infirm[ ]." Neither plaintiffs nor any of the named defendants objected to Proponents' motion to intervene and the district court granted the motion.[4]

Thereafter, Proponents participated as interveners in the district court trial in *Perry*. Indeed, Proponents were the only party in the district court to present witnesses and legal argument in defense of the challenged initiative measure.[5]

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[4] The relevant portion of the transcript of the July 2, 2009 hearing reads: "[W]ith respect to the motion to intervene, that basically is unopposed and, it does seem to me, substantially justified in this case, particularly where the authorities, the defendants who ordinarily would defend the proposition or the enactment that is being challenged here, are taking the position that, in fact, it is constitutionally infirm[ ]. And so, it seems to me, both for practical reasons and reasons of proceeding in this case in an orderly and judicial fashion that intervention is appropriate. [¶] Certainly, under California law, as I understand it, proponents of initiative measures have the standing to represent proponents and to defend an enactment that is brought into law by the initiative process. [¶] . . . [A]re there any objections to granting the motion to intervene? (No response.) Hearing none, that motion will be granted."

[5] The district court in *Perry* also granted a motion filed by the City and County of San Francisco (San Francisco) to intervene in the action on behalf of plaintiffs. As an intervener, San Francisco has participated as a party in these proceedings in the district court, in the Ninth Circuit, and in this court. Although plaintiffs and San Francisco have filed separate briefs in this court, the legal arguments raised by these parties largely overlap and for convenience we shall refer to the arguments presented by either of these parties as plaintiffs' arguments.

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At the conclusion of the trial, the district court issued a lengthy opinion, setting forth numerous findings of fact and conclusions of law and determining that Proposition 8 violates both the due process and equal protection clauses of the federal Constitution. (*Perry I, supra,* 704 F.Supp.2d 921.) The district court issued an order enjoining defendants in their official capacities, and all persons under their supervision or control, from applying or enforcing Proposition 8. (704 F.Supp.2d at p. 1003.) The Ninth Circuit subsequently issued an order staying the district

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At a later stage of the district court proceedings, the County of Imperial, the Imperial County Board of Supervisors, and the Imperial County Deputy County Clerk/Recorder moved to intervene in the action to defend the validity of Proposition 8. The district court did not rule on the Imperial County motion to intervene until after the trial was completed and the court had handed down its ruling on the merits. At that point, the district court denied the intervention motion. Thereafter, Imperial County, its board of supervisors and its deputy county clerk/recorder appealed the denial of their motion to intervene to the Ninth Circuit. On the same day the Ninth Circuit filed its order submitting the question of Proponents' standing to this court, the Ninth Circuit issued an opinion affirming the district court's denial of intervention by Imperial County, its board of supervisors and its deputy county clerk/recorder. In affirming the denial of intervention, the Ninth Circuit opinion relied in part on the fact that intervention had been sought by the *deputy* county clerk/recorder rather than the county clerk/recorder herself; the opinion left open the question whether a county clerk/recorder would have standing to intervene. On February 25, 2011, the newly elected County Clerk/Recorder of Imperial County filed a motion in the Ninth Circuit seeking to intervene in the action. That motion is currently pending in the Ninth Circuit.

court's judgment pending appeal, and as a result Proposition 8 remains in effect at the present time.

Proponents, as interveners in the district court, filed in the Ninth Circuit a timely appeal of the district court judgment invalidating Proposition 8.[6] None of the named defendants at whom the district court's injunction was directed appealed from the district court judgment, however, and, in an early order establishing a schedule for considering the appeal, the Ninth Circuit specifically requested the parties to brief the question whether Proponents have standing to appeal the district court's ruling.[7]

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[6] Initially, all five of the individual proponents of Proposition 8 moved to intervene in the *Perry* litigation. In the course of the district court litigation, one of the individual proponents – Hak-Shing William Tam (Tam) – moved to withdraw as a defendant intervener. The district court did not rule on Tam's motion to withdraw until after it issued its decision on the merits, and at that point the district court denied the motion to withdraw as moot.

Tam did not join in the appeal from the district court judgment that was filed in the Ninth Circuit by the other four individual proponents and ProtectMarriage.com. For convenience, further references to "Proponents" refer collectively to the four individual proponents and ProtectMarriage.com who filed the appeal in the Ninth Circuit and have participated in the present proceeding in this court.

[7] Under federal law, a party who has been permitted to intervene in a lower court proceeding is entitled to appeal a judgment in the absence of the party on whose side intervention was permitted only upon a showing that the intervener independently fulfills the case or controversy requirements of article III of the federal Constitution. (See, e.g., *Diamond v. Charles*

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In the briefs filed in the Ninth Circuit on that issue, plaintiffs argued that Proponents lacked standing to appeal and that, as a consequence, the appeal in *Perry* should be dismissed. Proponents vigorously contested plaintiffs' contention, pointing out that they had been permitted to intervene and participate as parties in defense of Proposition 8 both by this court in *Strauss, supra,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48, and by the district court in *Perry,* and asserting that they possessed the requisite standing under both California and federal law.[8]

(1986) 476 U.S. 54, 68, 106 S.Ct. 1697, 90 L.Ed.2d 48.) Under California law, by contrast, a party who has been permitted to intervene in a lower court proceeding to defend an action may appeal from an adverse judgment despite the failure of the original defendant to file an appeal. (See, e.g., *People v. Perris Irrigation District* (1901) 132 Cal. 289, 290-291, 64 P. 399.)

[8] In addition to disagreeing as to whether Proponents have standing to appeal, in their briefs and oral argument before the Ninth Circuit plaintiffs and Proponents disagreed on the consequences that would flow from a determination by the Ninth Circuit that Proponents lack standing to appeal and the dismissal of their appeal. Plaintiffs contended that a dismissal of the appeal would leave the district court judgment in effect and that the district court ruling would be binding on the named state officers and on the two named county clerks. Proponents contended, by contrast, that if the Ninth Circuit determines they lack standing to appeal, that court would be required not only to dismiss the appeal but also to vacate the district court judgment. (See *Perry II, supra,* 628 F.3d at p. 1195 & fn. 2.) Because it submitted the question of Proponents' standing under state law to this court, the Ninth Circuit did not indicate its view as to the effect on the district court judgment of a determination that Proponents lack standing to appeal.

After conducting oral argument, the three-judge panel of the Ninth Circuit assigned to this case issued an order on January 4, 2011, requesting this court to answer the question of California law set forth above; namely, whether, under California law, the official proponents of an initiative measure that has been approved by the voters possess either "a particularized interest in the initiative's validity" or "the authority to assert the State's interest in the initiative's validity" so as to afford the proponents standing to defend the constitutionality of the initiative or to appeal a judgment invalidating the initiative when the public officials who ordinarily would provide such a defense or file such an appeal decline to do so. (*Perry II, supra,* 628 F.3d at p. 1193.) In its order, the Ninth Circuit indicated that the answer to this question of California law may well be determinative of the issue of standing for federal law purposes. (*Id.* at p. 1196.)

In explaining its reason for submitting this question to this court, the Ninth Circuit stated in part: "Although the Governor has chosen not to defend Proposition 8 in these proceedings, it is not clear whether he may, consistent with the California Constitution, achieve through a refusal to litigate what he may not do directly: effectively veto the initiative by refusing to defend it or appeal a judgment invalidating it, if no one else – including the initiative's proponents – is qualified to do so. Proponents argue that such a harsh result is avoided if the balance of power provided in the California

Constitution establishes that proponents of an initiative are authorized to defend that initiative, as agents of the People, in lieu of public officials who refuse to do so. Similarly, under California law, the proponents of an initiative may possess a particularized interest in defending the constitutionality of their initiative upon its enactment; the Constitution's purpose in reserving the initiative power to the People would appear to be ill-served by allowing elected officials to nullify either proponents' efforts to 'propose statutes and amendments to the Constitution' or the People's right 'to adopt or reject' such propositions. Cal. Const., art. II, § 8(a). Rather than rely on our own understanding of this balance of power under the California Constitution, however, we certify the question so that the [California Supreme] Court may provide an authoritative answer as to the rights, interests, and authority under California law of the official proponents of an initiative measure to defend its validity upon its enactment in the case of a challenge to its constitutionality, where the state officials charged with that duty refuse to execute it." (*Perry II, supra,* 628 F.3d at p. 1197.)

On February 16, 2011, we agreed to decide the question of California law as requested by the Ninth Circuit and established an expedited briefing schedule that would permit this court to conduct oral argument in this matter as early as September 2011. All parties and numerous amici curiae timely filed briefs in this matter, and oral argument was held on September 6, 2011.

II. Relevance of State Law to Standing Under Federal Law

Decisions of the United States Supreme Court establish that the determination whether an individual or entity seeking to participate as a party in a federal court proceeding or to appeal from an adverse judgment entered in such a proceeding possesses the requisite standing to satisfy the "case or controversy" provisions of article III of the United States Constitution is ultimately a question of *federal law* upon which the federal courts have the final say. (See, e.g., *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 804, 105 S.Ct. 2965, 86 L.Ed.2d 628.) As a consequence, many readers of this opinion may reasonably be uncertain why the Ninth Circuit has asked this court to advise it whether initiative proponents possess authority *under California law* to defend the validity of an initiative measure in a court proceeding in which the measure is challenged and, if so, the basis of such authority. In light of this potential confusion, we believe that it is useful and appropriate briefly to set forth, at the outset, our understanding of the federal decisions that discuss the role that state law plays in determining whether, under federal law, an individual or entity possesses standing to participate as a party in a federal proceeding. We emphasize that our discussion of federal decisions is not intended to, and does not purport to, decide any issue of federal law, and we fully recognize that the effect that this opinion's clarification of the authority official proponents possess under California law may

have on the question of standing under federal law is a matter that ultimately will be decided by the federal courts.

As the question posed by the Ninth Circuit indicates, in the present case two potential bases for standing are implicated: (1) The official proponents of a successful initiative measure may have authority to appear in court to assert *the state's interest* in defending the validity of a duly enacted state law,[9] or (2) the official proponents may have their own personal "*particularized* " *interest* in the initiative's validity. We briefly discuss the federal decisions that analyze the effect of state law on each of these potential bases for standing in federal court.

A. Standing to Assert the State's Interest in an Initiative's Validity

With respect to the question of who possesses standing to assert the state's interest in defending the validity of a state constitutional provision or statute when the state measure is challenged in a federal proceeding, we believe the United States Supreme Court's decision in *Karcher v. May* (1987)

[9] Decisions of the United States Supreme Court clearly establish that "a State has standing to defend the constitutionality of its statute." (*Diamond v. Charles, supra,* 476 U.S. 54, 62, 106 S.Ct. 1697; see also *Maine v. Taylor* (1986) 477 U.S. 131, 136-137, 106 S.Ct. 2440, 91 L.Ed.2d 110 ["a State clearly has a legitimate interest in the continued enforceability of its own statutes"].)

484 U.S. 72, 108 S.Ct. 388, 98 L.Ed.2d 327 (*Karcher*) strongly indicates that a federal court will look to *state law* to determine whom *the state* has authorized to assert *the state's interest* in the validity of the challenged measure.

In *Karcher,* a lawsuit was filed in federal district court contending that a recently enacted New Jersey statute that required primary and secondary public schools in that state to observe a minute of silence at the start of each school day was unconstitutional as a violation of the establishment clause of the First Amendment of the federal Constitution. When it became apparent at the outset of the litigation that neither the current New Jersey Attorney General nor any of the named government defendants – the New Jersey Department of Education, the department's commissioner, and two local boards of education – would defend the validity of the challenged statute, the then Speaker of the New Jersey General Assembly (Karcher) and the then President of the New Jersey Senate (Orechio) sought and were granted the right to intervene as defendants to defend the challenged statute on behalf of the state legislature. In the proceedings in district court, the legislature, through its presiding officers, carried the entire burden of defending the statute. The district court ultimately concluded that the statute was unconstitutional and entered judgment invalidating the statute.

Karcher and Orechio, acting in their official capacities as Speaker of the New Jersey General Assembly and President of the New Jersey Senate,

appealed the district court judgment to the Court of Appeals for the Third Circuit. The Third Circuit heard the appeal on the merits and ultimately affirmed the district court decision invalidating the statute.

After the Third Circuit handed down its decision, Karcher and Orechio lost their posts as presiding legislative officers and were replaced by other legislators in those legislative posts. Despite this change in status, Karcher and Orechio filed an appeal of the Third Circuit decision in the United States Supreme Court. The new state legislative presiding officers who had replaced Karcher and Orechio notified the United States Supreme Court that they were withdrawing the legislature's appeal, but at the same time informed the court that Karcher wanted to continue his appeal of the Third Circuit decision in the Supreme Court. Karcher confirmed that position.

The United States Supreme Court postponed consideration of the jurisdictional issue pending its hearing of the case, and, after oral argument, the high court issued its decision, concluding that because Karcher and Orechio were no longer the legislative leaders of the respective houses of the New Jersey Legislature, they lacked standing to appeal. The court explained: "Karcher and Orechio intervened in this lawsuit in their official capacities as presiding officers on behalf of the New Jersey Legislature. They do not appeal the judgment in those capacities. Indeed, they could not, for they no longer hold those offices. The authority to pursue the

lawsuit on behalf of the legislature belongs to those who succeeded Karcher and Orechio in office." (*Karcher, supra,* 484 U.S. at p. 77, 108 S.Ct. 388.)

Karcher and Orechio further argued that if, as the high court concluded, their appeal was to be dismissed for want of jurisdiction, the court should also vacate the judgments of the district court and the Third Circuit that had invalidated the statute at issue. In rejecting this claim, the Supreme Court relied explicitly on the fact that New Jersey law permitted the current presiding legislative officers, acting on behalf of the state legislature, to represent the state's interest in defending a challenged state law. The court observed: "The New Jersey Supreme Court has granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment. *In re Forsythe,* 91 N.J. 141, 144, 450 A.2d 499, 500 (1982). *Since the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant.*" (*Karcher, supra,* 484 U.S. at p. 82, 108 S.Ct. 388, italics added.)[10]

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[10] In *In re Forsythe* (1982) 91 N.J. 141, 450 A.2d 499 – the decision of the New Jersey Supreme Court that was cited and relied upon in *Karcher* for the proposition that under New Jersey law the legislature, through the Speaker of the General Assembly and the President of the Senate, had authority to

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As the foregoing emphasized passage demonstrates, in *Karcher* the Supreme Court looked to state law to determine whether a prospective litigant had authority to assert the state's interest in defending a challenged state measure in federal court. Upon reflection this result is not surprising, inasmuch as logic suggests that a state should have the power to determine who is authorized to assert *the state's own interest* in defending a challenged state law.

As plaintiffs accurately point out, *Karcher, supra,* 484 U.S. 72, 108 S.Ct. 388, did not involve a challenge to an initiative measure and did not address the question whether the official proponents of an initiative could properly assert the state's interest in defending the validity of such an initiative. Plaintiffs

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represent the state's interests in defending a challenged state law – the New Jersey Supreme Court very briefly explained the participation of the Speaker of the General Assembly and the President of the Senate in that litigation, stating: "The initial adversary parties in the case were the petitioners and the Attorney General. In addition, the Court granted the applications of the Speaker of the General Assembly and the General Assembly, and the President of the Senate and the Senate to intervene as parties-respondent, all of whom, with the Attorney General, defend the validity of the enactment." (450 A.2d at p. 500.)

Thus, in *Forsythe,* the parties who the United States Supreme Court in *Karcher* subsequently concluded had authority under state law to represent the state's interest in defending a challenged statute were permitted to intervene in a New Jersey Supreme Court case to defend the validity of a challenged statute alongside the New Jersey Attorney General who was also defending the statute.

also note that in its subsequent decision in *Arizonans for Off. Eng. v. Arizona* (1997) 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (*Arizonans for Official English*), which did involve the question of official initiative proponents' standing under federal law to appeal a judgment invalidating an initiative measure, the United States Supreme Court expressed "grave doubts" (*id.* at p. 66, 117 S.Ct. 1055) whether the initiative proponents in that case possessed the requisite standing and distinguished its earlier decision in *Karcher.* A close review of the relevant portion of the opinion in *Arizonans for Official English,* however, indicates that the doubts expressed by the high court in that case apparently arose out of the court's uncertainty concerning the authority of official initiative proponents to defend the validity of a challenged initiative *under Arizona law.* The relevant passage does not suggest that if a state's law does authorize the official proponents of an initiative to assert the state's interest in the initiative measure's validity when public officials have declined to defend the measure, the proponents would lack standing to assert that interest in a federal proceeding.

In addressing the standing issue in *Arizonans for Official English, supra,* 520 U.S. 43, 117 S.Ct. 1055, the high court stated in relevant part: "Petitioners argue primarily that, as initiative proponents, they have a quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored. [The initiative proponents] stress the funds and effort they expended to achieve adoption of

[the initiative]. We have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests. See *Karcher v. May,* 484 U.S. 72, 82 [108 S.Ct. 388, 98 L.Ed.2d 327] (1987). [The initiative proponents], however, are not elected representatives, *and we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.* Nor has this Court ever identified initiative proponents as Article – III – qualified defenders of the measures they advocated. Cf. *Don't Bankrupt Washington Committee v. Continental Ill. Nat. Bank & Trust Co. of Chicago,* 460 U.S. 1077 [103 S.Ct. 1762, 76 L.Ed.2d 338] (1983) (summarily dismissing for lack of standing appeal by an initiative proponent from a decision holding the initiative unconstitutional)." (520 U.S. at p. 65, 117 S.Ct. 1055, italics added, fn. omitted.)

Although for the foregoing reasons the court expressed "grave doubts" whether the initiative proponents in question had standing under article III to pursue appellate review (*Arizonans for Official English, supra,* 520 U.S. at p. 66, 117 S.Ct. 1055), the court went on conclude that "we need not definitely resolve the issue" of the initiative proponents' standing (*ibid.*) because it concluded that, in any event, a change in the status of the plaintiff in that case rendered the litigation moot and justified vacating the lower federal court rulings that had invalidated

the initiative measure. (See *id.* at pp. 67-80, 117 S.Ct. 1055.)

As the emphasized portion of the passage from *Arizonans for Official English* quoted above indicates, the high court's doubts as to the official initiative proponents' standing in that case were based, at least in substantial part, on the fact that the court was not aware of any "Arizona law appointing initiative sponsors as agents of the people of Arizona to defend . . . the constitutionality of initiatives made law of the State." (*Arizonans for Official English, supra,* 520 U.S. at p. 65, 117 S.Ct. 1055.) In our view, nothing in that decision indicates that if a state's law does authorize the official proponents of an initiative to assert the state's interest in the validity of a challenged state initiative when the public officials who ordinarily assert that interest have declined to do so, the proponents would not have standing to assert the state's interest in the initiative's validity in a federal lawsuit in which state officials have declined to provide such a defense.[11]

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[11] We note that unlike in *Karcher, supra,* 484 U.S. 72, 108 S.Ct. 388, in *Arizonans for Official English* the government officials named as defendants in the federal lawsuit did defend the constitutional validity of the challenged state provision in the district court proceedings. (*Arizonans for Official English, supra,* 520 U.S. at pp. 51-53, 117 S.Ct. 1055.) And, again unlike in *Karcher,* in *Arizonans for Official English* the official initiative proponents did not seek to intervene in the litigation until after the district court already had issued its judgment striking

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We note in this regard that in its order submitting the present question to this court, the Ninth Circuit stated explicitly that, in its view, if the official proponents of an initiative have authority under California law to assert the state's interest in the initiative measure's validity in such a case, then, under federal law, the proponents would have standing in a federal proceeding to assert the state's interest in defending the challenged initiative and to appeal a judgment invalidating the initiative. (*Perry II, supra,* 628 F.3d at p. 1196.) Furthermore, although the parties before us emphatically disagree as to whether California law authorizes the official proponents of an initiative to assert the state's interest in the validity of a voter-approved initiative measure, in

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down the initiative measure on constitutional grounds. (520 U.S. at p. 56, 117 S.Ct. 1055.)

As the passage from *Arizonans for Official English* quoted above (*ante,* 134 Cal.Rptr.3d at p. 514-515, 265 P.3d at p. 1015) indicates, the high court in that case also cited *Don't Bankrupt Washington Committee v. Continental Ill. Nat. Bank & Trust Co. of Chicago, supra,* 460 U.S. 1077, 103 S.Ct. 1762, a summary order that dismissed an appeal from a Ninth Circuit decision for lack of standing. As in *Arizonans for Official English,* in *Don't Bankrupt Washington Committee* the named government defendants defended the challenged initiative on behalf of the state in the lower courts (see *Continental Ill. Nat. Bank, etc. v. State of Wash.* (9th Cir.1983) 696 F.2d 692, 697-702), and there is no indication that the official initiative proponents in that matter established that, under the applicable state law (there, the law of the State of Washington), an initiative measure's official proponents have standing to defend the measure when the named state defendants in the litigation have undertaken such a defense.

the briefs filed both in the Ninth Circuit and in this court all parties agree with the Ninth Circuit's statement that if the official proponents do have authority under California law to assert the state's interest in such a case, then under federal law the proponents would have standing in a federal proceeding to defend the initiative and to appeal a judgment invalidating it.

B. Standing Based on "Particularized Interest"

Under the controlling federal authorities, the role that state law plays in determining whether an official proponent of a successful initiative measure has a sufficient personal "particularized interest" in the validity of the measure to support the proponent's standing under federal law appears to be more complex than the role played by state law when the official proponent is authorized by state law to assert the state's interest in the validity of the initiative.

Under the particularized interest standard, federal decisions establish that a federal court considers whether a prospective party is able to demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" (*Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351.) In *Lujan,* the high court further explained that "[b]y particularized, we mean that the injury must affect the plaintiff

in a personal and individual way." (*Id.* at p. 560, fn. 1, 112 S.Ct. 2130.) Although the United States Supreme Court has recognized that a state "has the power to create new interests, the invasion of which may confer standing" under federal law (*Diamond v. Charles, supra,* 476 U.S. 54, 65, fn. 17, 106 S.Ct. 1697), not every interest that state law recognizes as conferring standing on an individual or entity to institute or to defend a particular kind of lawsuit in state court will be sufficient to establish that the individual or entity has a particularized interest to bring or defend an analogous lawsuit in federal court. (Compare Code Civ. Proc., § 526a [state law recognizing standing of taxpayer to challenge illegal expenditure of public funds in state court] with *DaimlerChrysler Corp. v. Cuno* (2006) 547 U.S. 332, 342-346, 126 S.Ct. 1854, 164 L.Ed.2d 589 [state taxpayer lacks standing to challenge the constitutionality of state tax credit in federal court].) Under the governing federal cases, whether a right created by state law is sufficient to support federal standing under the particularized interest test necessarily depends upon the nature of the right conferred by the state and the nature of the injury that may be suffered by the would-be litigant. (Cf. *Warth v. Seldin* (1975) 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343.)

In the present case, the parties disagree as to whether an official initiative proponent possesses a special or distinct interest in the validity of an initiative measure the proponent has sponsored once the

initiative has been approved by the voters and adopted as state law, and, even if so, whether the nature of that interest and of the injury the proponent would suffer if the initiative measure is invalidated are sufficient to accord the proponent standing for federal law purposes under the particularized interest standard.

Proponents maintain that because they possess a fundamental right under the California Constitution to propose statutory or constitutional changes through the initiative process (see, e.g., *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1007, 39 Cal.Rptr.3d 470, 128 P.3d 675), they possess a personal, particularized interest in the validity of an initiative measure that they have proposed and that has been approved by the voters, an interest that would go undefended if they are not permitted to provide such a defense when the public officials who ordinarily defend a challenged state law decline to do so. Proponents argue that their personal, fundamental right guaranteed by the initiative provision would be nullified if a voter-approved measure they have sponsored is improperly and incorrectly invalidated because public officials who are hostile to the measure have failed to mount a defense or to appeal a lower court judgment striking down the initiative.

Plaintiffs, by contrast, assert that although the official proponents of an initiative may possess a personal, particularized interest under the California Constitution and the applicable statutory provisions

in having an initiative measure they have proposed submitted to the voters, once an initiative measure has been approved by the voters the official proponents have no greater personal legally protected interest in the measure's validity than any other member of the public. Accordingly, plaintiffs argue that once an initiative measure has been enacted into law, its official proponents do not possess a distinct, particularized interest in the initiative's validity.

As we explain, we need not decide whether the official proponents of an initiative measure possess a particularized interest in the initiative's validity once the measure has been approved by the voters. For the reasons discussed below, we conclude that when public officials decline to defend a voter-approved initiative or assert the state's interest in the initiative's validity, under California law the official proponents of an initiative measure are authorized to assert the state's interest in the validity of the initiative and to appeal a judgment invalidating the measure. Because that conclusion is sufficient to support an affirmative response to the question posed by the Ninth Circuit, we need not decide whether, under California law, the official proponents also possess a particularized interest in a voter-approved initiative's validity.

III. Analysis of Initiative Proponents' Standing Under California Law

A. Basis of Initiative Proponents' Standing

Article II, section 1 of the California Constitution proclaims: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." As this court noted in *Strauss, supra,* 46 Cal.4th 364, 412-413, 93 Cal.Rptr.3d 591, 207 P.3d 48: "This provision originated in one of the initial sections of the Declaration of Rights contained in California's first Constitution (Cal. Const. of 1849, art. I, § 2), and reflects a basic precept of our governmental system: that the people have the constitutional right to alter or reform their government." (Fn. omitted.)

Although California's original 1849 Constitution declared that "[a]ll political power is inherent in the people," it was not until 60 years later – in 1911 – that the California Constitution was amended to afford the voters of California the authority to *directly* propose and adopt state constitutional amendments and statutory provisions through the initiative power. In *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, 135 Cal.Rptr. 41, 557 P.2d 473 (*Associated Home Builders*), we briefly described the history, significance, and consistent judicial interpretation of the constitutionally based initiative power in California: "The amendment of the California Constitution in 1911 to provide for

the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' . . . , the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process. . . .' '[*I*]*t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.*' " (Italics added, citations & fns. omitted.)

As a number of our past decisions have explained, the progressive movement in California that introduced the initiative power into our state Constitution grew out of dissatisfaction with the then-governing public officials and a widespread belief that the people had lost control of the political process. (See, e.g., *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1041-1043, 44 Cal.Rptr.3d 644, 136 P.3d 178; *Strauss, supra,* 46 Cal.4th 364, 420-421, 93 Cal.Rptr.3d 591, 207 P.3d 48.) In this setting, "[t]he initiative was viewed as one means of restoring the people's rightful control over their government, by providing a method that would permit the people to propose and adopt statutory

provisions and constitutional amendments." (*Strauss, supra,* at p. 421, 93 Cal.Rptr.3d 591, 207 P.3d 48.) The primary purpose of the initiative was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt. The 1911 ballot pamphlet argument in favor of the measure described the initiative as "that safeguard which the people should retain for themselves, to supplement the work of the legislature by initiating those measures *which the legislature either viciously or negligently fails or refuses to enact. . . .*" (Sect. of State, Proposed Amends. to Const. with Legis. Reasons, Gen. Elec. (Oct. 10, 1911) Reasons why Sen. Const. Amend. No. 22 should be adopted, italics added.)

The California constitutional provisions setting forth the initiative power do not explicitly refer to or fully prescribe the authority or responsibilities of the official proponents of an initiative measure,[12] but the

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[12] The constitutional provisions relating to the initiative power are currently set forth in article II, sections 8 and 10, article IV, section 1, and article XVIII, sections 3 and 4 of the California Constitution.

Article II, section 8, provides in relevant part: "(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

"(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an

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Legislature, in adopting statutes to formalize and facilitate the initiative process, has enacted a number of provisions that explicitly identify who the official

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amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

"(c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure."

Article II, section 10 provides in relevant part: "(a) An initiative statute . . . approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. [¶] . . . [¶]

"(c) The Legislature . . . may amend or repeal an initiative statute by another statute that become effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

"(d) Prior to circulation of an initiative . . . petition for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law.

"(e) The Legislature shall provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors."

Article IV, section 1 provides in full: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

Article XVIII, section 3 provides in full: "The electors may amend the Constitution by initiative."

Article XVIII, section 4 provides in relevant part: "A proposed amendment . . . shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise."

proponents of an initiative measure are and describe their authority and duties.

Elections Code section 342 defines the proponent of an initiative measure as "the elector or electors who submit the text of a proposed initiative or referendum to the Attorney General with a request that he or she prepare a circulating title and summary of the chief purpose and points of the proposed measure. . . ." Similarly, Elections Code section 9001 states that "[t]he electors presenting the request [to the Attorney General] shall be known as the 'proponents'" and requires that prior to the circulation of an initiative petition for signature the text of the proposed measure must be submitted to the Attorney General with a request that "a circulating title and summary of the chief purpose and points of the proposed measure be prepared."[13] Elections Code sections 9607, 9608, and 9609 place an obligation upon the official proponents of an initiative measure to manage and supervise the process by which signatures for the initiative petition are obtained, and Elections Code section 9032 specifies that, after signatures have been collected, "[t]he right to file the petition [with the designated election officials] *shall be reserved to its proponents,* and any section thereof presented for

[13] Elections Code section 9001 also requires the proponents of an initiative measure, in submitting their request for a title and summary, to pay a fee which is to be refunded to the proponents if the measure qualifies for the ballot within two years from the date the summary is furnished to the proponents.

filing by any person or persons other than the proponents of a measure or by persons duly authorized in writing by one or more of the proponents shall be disregarded by the elections official." (Italics added.)

Once an initiative measure has qualified for the ballot, several provisions of the Elections Code vest proponents with the power to control the arguments in favor of an initiative measure. Although any voter can file with the Secretary of State an argument for or against the initiative (Elec.Code, § 9064), a ballot argument shall not be accepted unless it has been "authorized by the proponent" (Elec.Code, § 9065, subd. (d)). If more than one argument is filed, Elections Code section 9067 provides that in preparing the ballot pamphlet "preference and priority" shall be given to the ballot argument submitted by the official proponents of the initiative measure. Proponents similarly control the rebuttal arguments in favor of an initiative. (See Elec.Code, § 9069.) Moreover, proponents retain the power to withdraw a ballot argument at any time before the deadline for filing arguments. (See Elec.Code, § 9601.)

Under these and related statutory provisions (see, e.g., Elec.Code, §§ 9002, 9004, 9604), the official proponents of an initiative measure are recognized as having a distinct role – involving both authority and responsibilities that differ from other supporters of the measure – with regard to the initiative measure the proponents have sponsored.

Neither the state constitutional provisions relating to the initiative power, nor the statutory provisions relating to the official proponents of an initiative measure, expressly address the question whether, or in what circumstances, the official proponents are authorized to appear in court to defend the validity of an initiative measure the proponents have sponsored. Nonetheless, since the adoption of the initiative power a century ago, decisions of both this court and the Courts of Appeal have repeatedly and uniformly permitted the official proponents of initiative measures to participate as parties – either as interveners or as real parties in interest – in both preelection and postelection litigation challenging the initiative measure they have sponsored. Furthermore, the participation by official initiative proponents as formal parties in such litigation has routinely been permitted whether or not the Attorney General or other public officials were also defending the challenged initiative measure in the judicial proceeding in question.

The decisions in which official initiative proponents (or organizations that have been directly involved in drafting and sponsoring the initiative measure) have been permitted to participate as parties in California proceedings involving challenges to an initiative measure are legion. (See, e.g., *Strauss, supra,* 46 Cal.4th 364, 399, 93 Cal.Rptr.3d 591, 207 P.3d 48 [postelection challenge]; *Independent Energy Producers Assn. v. McPherson, supra,* 38 Cal.4th 1020, 44 Cal.Rptr.3d 644, 136 P.3d 178 (*Independent*

Energy Producers) [preelection challenge]; *Costa v. Superior Court, supra,* 37 Cal.4th 986, 1001, 39 Cal.Rptr.3d 470, 128 P.3d 675 (*Costa*) [preelection challenge]; *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1146, 90 Cal.Rptr.2d 810, 988 P.2d 1089 [preelection challenge]; *Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 590, 88 Cal.Rptr.2d 56, 981 P.2d 990 (*Hotel Employees Union*) [postelection challenge]; *Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250, 48 Cal.Rptr.2d 12, 906 P.2d 1112 (*Amwest*) [postelection challenge]; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241, 32 Cal.Rptr.2d 807, 878 P.2d 566 (*20th Century Ins. Co.*) [postelection challenge]; *Legislature v. Eu, supra,* 54 Cal.3d 492, 500, 286 Cal.Rptr. 283, 816 P.2d 1309 [postelection challenge]; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812, 258 Cal.Rptr. 161, 771 P.2d 1247 [postelection challenge]; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 480 & fn. 1, 204 Cal.Rptr. 897, 683 P.2d 1150 [postelection challenge]; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 663, 194 Cal.Rptr. 781, 669 P.2d 17 [preelection challenge]; *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 3, 181 Cal.Rptr. 100, 641 P.2d 200 [preelection challenge]; *City of Santa Monica v. Stewart, supra,* 126 Cal.App.4th 43, 53, 24 Cal.Rptr.3d 72 [postelection challenge]; *Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1316 & fn. 2, 115 Cal.Rptr.2d 90 [postelection challenge]; *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 626, 251

Cal.Rptr. 511 [postelection challenge]; *Community Health Assn. v. Board of Supervisors* (1983) 146 Cal.App.3d 990, 992, 194 Cal.Rptr. 557 [postelection challenge]; *Simac Design Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153, 154 Cal.Rptr. 676 [postelection challenge]; see also *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 644-645, 180 Cal.Rptr. 297, 639 P.2d 939 [referendum proponent permitted to participate as real party in interest in preelection challenge to a proposed referendum].)[14] Moreover, the cases have not

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[14] Past decisions have frequently drawn a distinction, for purposes of intervention, between, on the one hand, the official proponents of an initiative measure or organizations that were directly involved in drafting and sponsoring the measure, and, on the other hand, other advocacy groups that ideologically support the measure.

As noted above (*ante,* 134 Cal.Rptr.3d at p. 505, fn. 1, 265 P.3d at p. 1007, fn. 1), in the *Strauss* litigation our court granted the motion filed by the official proponents of Proposition 8 to intervene as formal parties in defending the initiative measure, but at the same time denied a motion to intervene that had been filed by another pro-Proposition 8 advocacy group. (See also *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1178-1179, 39 Cal.Rptr.3d 788, 129 P.3d 1 [contrasting the status of an amicus curiae advocacy group with that of official proponents of a ballot measure in concluding that the amicus curiae could not properly be held liable for attorney fees awarded under Code Civ. Proc., § 1021.5].)

In light of this distinction, plaintiffs' reliance upon the Court of Appeal decision in *City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 27 Cal.Rptr.3d 722 lacks merit. In that case, the Court of Appeal affirmed a trial court order denying a motion filed by an advocacy organization – the Proposition 22 Legal Defense and Education Fund – seeking to intervene in an action challenging the validity of

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only permitted official initiative proponents to appear as formal parties but have also permitted the proponents to appeal from an adverse judgment. (See, e.g., *Amwest, supra,* 11 Cal.4th at p. 1250, 48 Cal.Rptr.2d 12, 906 P.2d 1112; *20th Century Ins. Co., supra,* 8 Cal.4th at p. 269, 32 Cal.Rptr.2d 807, 878 P.2d 566; *People ex rel. Deukmejian v. County of Mendocino, supra,* 36 Cal.3d at p. 480, 204 Cal.Rptr. 897, 683 P.2d 1150; *Simac Design, supra,* 92 Cal.App.3d at p. 153, 154 Cal.Rptr. 676.)

Proposition 22. In upholding the trial court order denying intervention, however, the Court of Appeal explicitly stated that "the Fund itself played no role in sponsoring Proposition 22 because the organization was not even created until one year *after* voters passed the initiative" (128 Cal.App.4th at p. 1038, 27 Cal.Rptr.3d 722), and explained that "this case does not present the question of whether an official proponent of an initiative (Elec.Code, § 342) has a sufficiently direct and immediate interest to permit intervention in litigation challenging the validity of the law enacted" (128 Cal.App.4th at p. 1038, 27 Cal.Rptr.3d 722). Thus, contrary to plaintiffs' contention, that decision is not inconsistent with the numerous decisions both of this court and the Courts of Appeal that have permitted the official proponents of an initiative measure to intervene in actions challenging the validity of the initiative measure. For the same reason, this court's subsequent determination in *In re Marriage Cases, supra,* 43 Cal.4th 757, 789-791, 76 Cal.Rptr.3d 683, 183 P.3d 384, that the same advocacy group – the Proposition 22 Legal Defense and Education Fund – lacked standing to maintain a lawsuit to obtain a declaratory judgment upholding the validity of Proposition 22 does not support plaintiffs' claims regarding the nature and scope of the authority possessed by the official proponents of an initiative measure.

Although in most of these cases the official initiative proponent's participation as a formal party – either as an intervener or as a real party in interest – was not challenged and, as a consequence, this court's prior decisions (with the exception of the *Building Industry Assn.* decision discussed below) have not had occasion to analyze the question of the official proponent's authority to so participate, the prevalence and uniformity of this court's practice of permitting official proponents to appear as formal parties to defend the initiative measure they have sponsored nonetheless is significant. As Chief Justice Marshall explained in an early decision of the United States Supreme Court, the existence of numerous decisions that have permitted a judicial procedure without explicitly discussing the procedure's validity are properly viewed to "have much weight, as they show that [the asserted flaw in the procedure] neither occurred to the bar or the bench." (*Bank of the United States v. Deveaux* (1809) 9 U.S. (5 Cranch) 61, 88, 3 L.Ed. 38; see also *Brown Shoe Co. v. United States* (1962) 370 U.S. 294, 307, 82 S.Ct. 1502, 8 L.Ed.2d 510.)

Plaintiffs acknowledge that California trial and appellate courts have repeatedly and consistently permitted the official proponents of an initiative to appear as formal parties to defend the initiative measure they have sponsored. Plaintiffs maintain, however, that in all of the prior cases the official proponents were permitted to intervene or to appear as real parties in interest only by virtue of a liberal

exercise of judicial discretion and then only to represent the proponents' own personal interest rather than to assert the state's interest in the validity of the measure.

Plaintiffs' characterization of the precedents, however, is not based on the text of those decisions. As already noted, in all but one of this court's prior decisions we have not been called upon to address the basis of our uniform practice of permitting official initiative proponents to intervene or to appear as real parties in interest in such litigation, and, in particular, to explain whether the proponents' participation was to assert the state's interest in the validity of the measure or to defend the proponents' own particularized personal interest in the validity of the measure (or perhaps in both capacities).[15] The

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[15] Neither the statutory provision relating to intervention nor the provision pertaining to the status of a real party in interest addresses the question whether a would-be party's proposed participation is to assert its own interest or to assert the state's interest.

Code of Civil Procedure section 387 – the intervention statute – provides in relevant part: "(a) Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. . . . [¶] (b) If any provision of law confers an unconditional right to intervene or if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately

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present proceeding affords us the opportunity to address this point.[16]

In analyzing the legal basis upon which an official initiative proponent's authority to participate in such litigation rests, we believe it is useful to draw a distinction between legal challenges to an initiative

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represented by existing parties, the court shall, upon timely application, permit that person to intervene."

Code of Civil Procedure section 367 – the real party in interest statute – provides simply: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."

[16] Although past California decisions have generally not had occasion to explicitly address the rationale or basis underlying the authority of official initiative proponents to participate as interveners or real parties in interest, the Ninth Circuit's question to this court demonstrates that the underlying basis for proponents' participation under California law is potentially determinative of the question whether the proponents have standing under federal law to appeal a lower federal court judgment invalidating a California voter-approved initiative when the public officials who ordinarily would pursue such an appeal have declined to do so. Because, as we have seen, it is well established that California courts have an obligation to liberally construe the provisions of the California Constitution relating to the initiative power to assure that the initiative process is not directly or indirectly annulled (see *Associated Home Builders, supra,* 18 Cal.3d at p. 591, 135 Cal.Rptr. 41, 557 P.2d 473), and because the California initiative process may be undermined if a California initiative goes undefended in a federal proceeding because federal courts lack a proper understanding of the basis of the authority possessed by an initiative measure's official proponents under California law, it is entirely appropriate that we resolve the issue posed by the Ninth Circuit.

measure that precede the voters' approval of an initiative measure and legal challenges to an initiative measure that are brought after the initiative has been approved by the voters and adopted into law. (For convenience, we refer to the former category as "preelection" cases and the latter category as "postelection" cases.)

Prior to an election, litigation involving an initiative measure may arise with regard to a wide variety of issues, including, for example, (1) whether the proposed measure may not be submitted to the voters through the initiative process in light of its subject matter (see *Independent Energy Producers, supra,* 38 Cal.4th 1020, 44 Cal.Rptr.3d 644, 136 P.3d 178) or because it embodies more than one subject (see *Senate of the State of Cal. v. Jones, supra,* 21 Cal.4th 1142, 90 Cal.Rptr.2d 810, 988 P.2d 1089), (2) whether there have been prejudicial procedural irregularities in the process of submitting the matter to the Attorney General or gathering signatures on the initiative petition (see *Costa, supra,* 37 Cal.4th 986, 39 Cal.Rptr.3d 470, 128 P.3d 675), or (3) whether a sufficient number of valid signatures has been obtained to qualify the matter for the ballot (see *Brosnahan v. Eu, supra,* 31 Cal.3d 1, 181 Cal.Rptr. 100, 641 P.2d 200). In the preelection setting, when a proposed initiative measure has not yet been adopted as state law, the official proponents of an initiative measure who intervene or appear as real parties in interest are properly viewed as asserting their own personal right and interest – under article II, section

8 of the California Constitution and the California statutes relating to initiative proponents – to propose an initiative measure and have the measure submitted to the voters for approval or rejection. In preelection cases, the official initiative proponents possess a distinct interest in defending the proposed initiative because they are acting to vindicate their own right under the relevant California constitutional and statutory provisions to have their proposed measure – a measure they have submitted to the Attorney General, have circulated for signature, and have the exclusive right to submit to the Secretary of State after signatures have been collected – put to a vote of the people. Because in the preelection context the initiative measure has not been approved and enacted into law, the state's interest in defending the validity of an enacted state law does not come into play.[17]

Once an initiative measure has been approved by the requisite vote of electors in an election, however, the measure becomes a duly enacted constitutional amendment or statute. At that point, in the absence of a showing that the particular initiative in question will differentially affect the official proponents' own

[17] This does not mean that state officials cannot participate in such litigation and take a position on whether the preelection challenge has merit. (See, e.g., *Schmitz v. Younger* (1978) 21 Cal.3d 90, 93, 145 Cal.Rptr. 517, 577 P.2d 652.) Because the measure has not yet been adopted, however, public officials would not be representing the state's interest in defending a duly enacted law.

property, liberty or other individually possessed legal right or legally protected interest, it is arguably less clear that the official proponents possess a personal legally protected stake in the initiative's validity that differs from that of each individual who voted for the measure or, indeed, from that of the people of the state as a whole. Although the matter is subject to reasonable debate, one may question whether the official proponents of a successful initiative measure, any more than legislators who have introduced and successfully shepherded a bill through the legislative process, can properly claim any distinct or personal legally protected stake in the measure once it is enacted into law. Nonetheless, as we have seen, the decisions of this court and the Courts of Appeal in postelection challenges to voter-approved initiative measures have uniformly permitted the official proponents of an initiative measure to intervene, or to appear as real parties in interest, to defend the validity of the challenged initiative measure. In the postelection setting, the ability of official initiative proponents to intervene or to appear as a real parties in interest has never been contingent upon the proponents' demonstration that their own personal property, liberty, reputation, or other individually possessed, legally protected interests would be adversely or differentially affected by a judicial decision invalidating the initiative measure. (See, e.g., *Brosnahan v. Eu, supra,* 31 Cal.3d 1, 181 Cal.Rptr. 100, 641 P.2d 200 [initiative measure imposing legislative term limits and limiting legislative budget]; *City of Santa Monica v. Stewart, supra,* 126

Cal.App.4th 43, 24 Cal.Rptr.3d 72 [initiative measure limiting employment by public officials after leaving public service].) Plaintiffs have not cited, and our research has not disclosed, any decision in which the official proponents of an initiative measure were precluded from intervening or appearing as real parties in interest in a postelection case challenging the measure's validity, even when they did not have the type of distinct personal, legally protected interest in the subject matter of the initiative measure that would ordinarily support intervention or real party in interest status on a particularized interest basis. Instead, they have been permitted to participate as parties in such litigation simply by virtue of their status as official proponents of the challenged measure.

As already noted, although most of our prior cases have not had occasion to discuss or analyze the source of the authority possessed by the official proponents of an initiative to intervene in a postelection challenge to defend the initiative measure the proponents have sponsored, one case – *Building Industry Assn., supra,* 41 Cal.3d 810, 226 Cal.Rptr. 81, 718 P.2d 68 – does illuminate this court's uniform practice of permitting official initiative proponents to participate as parties in such postelection cases.

In *Building Industry Assn., supra,* 41 Cal.3d 810, 226 Cal.Rptr. 81, 718 P.2d 68, the issue before the court concerned the validity and proper interpretation of a then recently enacted statutory provision – Evidence Code section 669.5 – that, among other

things, placed the burden of proof on any city, county, or city and county that adopted an ordinance limiting future residential development to show, in any proceeding challenging the validity of the ordinance, that the ordinance "is necessary for the protection of the [municipality's] public health, safety, or welfare" (Evid.Code, § 669.5, subd. (b)). The specific question before the court was whether the new provision – shifting to the municipality the burden of proof on this issue – applied to a growth control ordinance that had been adopted through the initiative process or whether the new provision applied only to ordinances enacted by the local legislative body.

In the course of its opinion, the court in *Building Industry Assn., supra,* 41 Cal.3d 810, 226 Cal.Rptr. 81, 718 P.2d 68, addressed a legal argument advanced by an amicus curiae to support the position that the statute could not properly be interpreted to apply to an ordinance adopted through the initiative process. The court stated: "Amicus [curiae] . . . argues that section 669.5 substantially impairs the ability of the people to exercise initiative power because the proponents of the initiative would not have an effective way to defend it. Despite the fact that the city or county would have a duty to defend the ordinance, a city or county might not do so with vigor if it has underlying opposition to the ordinance. Furthermore, the proponents of the initiative have no guarantee of being permitted to intervene in the action, a matter which is discretionary with the trial court. (See Code Civ. Proc., § 387.) This argument would have merit if

intervention was unavailable. But when a city or county is required to defend an initiative ordinance and, because of Evidence Code section 669.5, must shoulder the burden of proving reasonable relationship to public health, safety or welfare, we believe the trial court in most instances should allow intervention by proponents of the initiative. To fail to do so may well be an abuse of discretion. Permitting intervention by the initiative proponents under these circumstances would serve to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." (41 Cal.3d at p. 822, 226 Cal.Rptr. 81, 718 P.2d 68.)

Although this passage in *Building Industry Assn., supra,* 41 Cal.3d 810, 226 Cal.Rptr. 81, 718 P.2d 68, was directed at the specific context at issue in that case – involving the burden-shifting provision of Evidence Code section 669.5 – in our view the passage is properly understood as more broadly instructive in a number of respects.

First, the passage recognizes that although public officials ordinarily have the responsibility of defending a challenged law, in instances in which the challenged law has been adopted through the initiative process there is a realistic risk that the public officials may not defend the approved initiative measure "with vigor." (*Building Industry Assn., supra,* 41 Cal.3d at p. 822, 226 Cal.Rptr. 81, 718 P.2d 68.) This enhanced risk is attributable to the unique nature and purpose of the initiative power, which gives the people the right to adopt into law measures

that their elected officials have not adopted and may often oppose.

Second, the passage explains that because of the risk that public officials may not defend an initiative's validity with vigor, a court should ordinarily permit the official proponents of an initiative measure to intervene in an action challenging the validity of the measure in order "to guard the people's right to exercise initiative power." (*Building Industry Assn., supra,* 41 Cal.3d at p. 822, 226 Cal.Rptr. 81, 718 P.2d 68.) Because official initiative proponents are permitted to intervene in order to supplement the efforts of public officials who may not defend the measure with vigor, it is appropriate to view the proponents as acting in an analogous and complementary capacity to those public officials, namely as asserting the people's interest (or, in other words, the state's interest) in the validity of a duly enacted law. And because the passage clearly states that "[p]ermitting intervention by the initiative proponents . . . would serve to guard *the people's right to exercise initiative power*" (*ibid.,* italics added), it is apparent that the official proponents of the initiative are participating on behalf of the people's interest, and not solely on behalf of the proponents' own personal interest.

Third, contrary to plaintiffs' contention that the numerous decisions permitting initiative proponents to intervene or to appear as real parties in interest in postelection litigation challenging an initiative measure simply reflect unfettered discretionary judgments in favor of the proponents' participation, the passage

in *Building Industry Assn., supra,* 41 Cal.3d 810, 226 Cal.Rptr. 81, 718 P.2d 68, states that even when public officials are defending a challenged initiative in pending litigation, "the trial court in most instances should allow intervention by proponents of the initiative" (*id.* at p. 822, 226 Cal.Rptr. 81, 718 P.2d 68), and that "[t]o fail to do so may well be an abuse of discretion." (*Ibid.*) Because *Building Industry Assn.* indicates that in most instances it would be an abuse of discretion for a court to preclude intervention by the official initiative proponents even in instances in which the named government defendants are defending the measure, in our view there can be no question but that it would be an abuse of discretion for a court to preclude the official proponents from intervening to defend a challenged initiative measure when the named government defendants have declined to defend the initiative measure. In the latter setting, the official proponents' ability to intervene indisputably is necessary "to guard the people's right to exercise initiative power." (*Ibid.*)

Plaintiffs argue that the passage in *Building Industry Assn., supra,* 41 Cal.3d 810, 226 Cal.Rptr. 81, 718 P.2d 68, we have been analyzing should properly be considered dictum and should not be followed. Plaintiffs apparently rely on the fact there is no indication in the *Building Industry Assn.* decision that the official proponents who had sponsored the initiative ordinance at issue in that case had sought and been denied the right to intervene in the underlying action challenging the ordinance. Proponents take

issue with plaintiffs' characterization of this passage as dictum, pointing out that the passage explicitly states that the argument advanced by the amicus curiae – that is, that Evidence Code section 669.5 could not constitutionally be interpreted to apply to ordinances enacted through the initiative process because such application would substantially impair the initiative process – "would have merit if intervention was unavailable." (41 Cal.3d at p. 822, 226 Cal.Rptr. 81, 718 P.2d 68.) Proponents maintain that this statement demonstrates that the discussion of the ability of official initiative proponents to intervene in such actions was essential to the court's conclusion that the statute could constitutionally be applied to ordinances enacted through the initiative process.

In our view, there is no need to decide whether the passage in *Building Industry Assn.* is properly considered a holding or dictum, because in any event we believe that the passage accurately describes at least one fundamental basis of this court's uniform practice of permitting the official proponents of an initiative to intervene or to appear as real parties in interest in cases challenging the validity of a voter-approved initiative measure. The statement in *Building Industry Assn.* that permitting intervention by such proponents serves to guard the people's right to exercise the initiative power finds support in numerous cases in which official initiative proponents advanced many of the most substantial legal theories that were raised in support of the challenged measure

and were discussed in this court's opinion. (See, e.g., *Strauss, supra,* 46 Cal.4th 364, 465-469, 93 Cal.Rptr.3d 591, 207 P.3d 48; *Hotel Employees Union, supra,* 21 Cal.4th 585, 605-612, 88 Cal.Rptr.2d 56, 981 P.2d 990; *Amwest, supra,* 11 Cal.4th 1243, 1256-1265, 48 Cal.Rptr.2d 12, 906 P.2d 1112; *Calfarm Ins. Co. v. Deukmejian, supra,* 48 Cal.3d 805, 819-821, 258 Cal.Rptr. 161, 771 P.2d 1247; see also *Citizens for Jobs & the Economy v. County of Orange, supra,* 94 Cal.App.4th 1311, 1316-1323, 115 Cal.Rptr.2d 90; *Community Health Assn. v. Board of Supervisors, supra,* 146 Cal.App.3d 990, 991-993, 194 Cal.Rptr. 557.) These decisions highlight the different perspectives regarding the validity or proper interpretation of a voter-approved initiative measure often held by the official proponents of the initiative measure and by the voters who enacted the measure into law, as contrasted with those held by the elected officials who ordinarily defend challenged state laws, and demonstrate that the role played by the proponents in such litigation is comparable to the role ordinarily played by the Attorney General or other public officials in vigorously defending a duly enacted state law and raising all arguable legal theories upon which a challenged provision may be sustained.

The experience of California courts in reviewing challenges to voter-approved initiative measures over many years thus teaches that permitting the official proponents of an initiative to participate as parties in postelection cases, even when public officials are also defending the initiative measure, often is essential to

ensure that the interests and perspective of the voters who approved the measure are not consciously or unconsciously subordinated to other public interests that may be championed by elected officials, and that all viable legal arguments in favor of the initiative's validity are brought to the court's attention. Although the legal arguments advanced by the official proponents of an initiative are not always the strongest or most persuasive arguments regarding the validity or proper interpretation of the initiative measure that are brought to a court's attention, past decisions demonstrate the importance of affording such proponents the opportunity to participate, along with elected officials, in asserting the state's interest in the validity of a challenged initiative measure. Such participation by the official initiative proponents enhances both the substantive fairness and completeness of the judicial evaluation of the initiative's validity and the appearance of procedural fairness that is essential if a court decision adjudicating the validity of a voter-approved initiative measure is to be perceived as legitimate by the initiative's supporters.

Moreover, although our past decisions have not had occasion to discuss or identify the specific source of the authority possessed by the official proponents of an initiative measure to assert the state's interest in the initiative's validity, we conclude that at least in those circumstances in which the government officials who ordinarily defend a challenged statute or constitutional amendment have declined to provide

such a defense or to appeal a lower court decision striking down the measure, the authority of the official proponents of the initiative to assert the state's interest in the validity of the initiative is properly understood as arising out of article II, section 8 of the California Constitution and the provisions of the Elections Code relating to the role of initiative proponents. The initiative power would be significantly impaired if there were no one to assert the state's interest in the validity of the measure when elected officials decline to defend it in court or to appeal a judgment invalidating the measure.[18] Under article II, section 8 and the Elections Code, the official proponents of an initiative measure have a unique relationship to the voter-approved measure that makes them especially likely to be reliable and

[18] Plaintiffs point out that the invalidation of Proposition 8 in the underlying federal litigation did not result from any action or inaction by the Governor or Attorney General but from a decision by the federal district court after a contested trial. Ordinarily, however, public officials who are defending a state law against a constitutional challenge can be expected to appeal an adverse trial court judgment to an appellate court. Indeed, from the outset of the federal district court proceedings in the underlying case, the district court itself emphasized its expectation that its decision would constitute only the first stage of proceedings that would lead to an appellate court determination of the significant constitutional question at issue in the proceeding. The inability of the official proponents of an initiative measure to appeal a trial court judgment invalidating the measure, when the public officials who ordinarily would file such an appeal decline to do so, would significantly undermine the initiative power.

vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative's enactment into law. As we have seen, the Legislature has recognized the unique role played by official proponents in the initiative process embodied in article II, section 8, by enacting numerous provisions placing upon the proponents the direct responsibility to manage and control the ballot-qualifying and petition-filing process, as well as authorizing proponents to control the arguments in favor of the initiative that appear in the official voter information guide published by the Secretary of State. (See, e.g., Elec.Code, §§ 9607, 9608, 9609, 9032, 9064, 9065, subd. (d), 9069, 9601.) Thus, regardless of the initiative's effect on their personal and particularized legally protected interests, the official proponents are the most logical and appropriate choice to assert the state's interest in the validity of the initiative measure on behalf of the electors who voted in favor of the measure.[19]

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[19] Because the Ninth Circuit has asked us to determine only whether the official proponents of an initiative measure have authority under California law to assert the state's interest in the validity of an initiative when the public officials who ordinarily defend the measure decline to do so, we have no occasion to address the hypothetical question whether in a case in which public officials have declined to defend the measure and the official initiative proponents are not available or do not seek to assert the state's interest in the validity of the measure, other individuals or entities would be entitled to intervene in the proceeding to assert the state's interest in the validity of the initiative. We express no opinion on that question.

Accordingly, we conclude that when the public officials who ordinarily defend a challenged measure decline to do so, article II, section 8 of the California Constitution and the applicable provisions of the Elections Code authorize the official proponents of an initiative measure to intervene or to participate as real parties in interest in a judicial proceeding to assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure.

B. Plaintiffs' Objections to Official Initiative Proponents' Authority to Assert the State's Interest in the Validity of a Voter-approved Initiative

Plaintiffs advance a number of objections to a determination that the official proponents of an initiative are authorized to assert the state's interest in the validity of a voter-approved initiative when the public officials who ordinarily defend a challenged state law decline to do so. For the reasons discussed below, we conclude that none of the objections has merit.

1.

Plaintiffs initially rely upon the provisions of the California Constitution setting forth the authority and obligation of the Governor and the Attorney General with regard to the enforcement of the law

(Cal. Const., art. V, §§ 1, 13),[20] and upon the California statutory provisions designating the Attorney General's role in court actions against the state. (Gov.Code, §§ 12511, 12512; Code Civ. Proc., § 902.1.)[21] Plaintiffs maintain that these constitutional and statutory provisions mean that the Attorney General is the only person who can assert the state's interest in defending a challenged law and preclude initiative proponents from asserting the state's interest in the validity of a challenged law. Plaintiffs insist that when the Attorney General declines to provide such a defense, the sole remedy of those who object to the Attorney General's action is "at the ballot box."

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[20] Article V, section 1 of the California Constitution provides in full: "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed."

Article V, section 13 of the California Constitution provides in relevant part: "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced."

[21] Government Code section 12511 provides in relevant part: "The Attorney General has charge, as attorney, of all legal matters in which the State is interested. . . ."

Government Code, section 12512 provides: "The Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity."

Code of Civil Procedure, section 902.1 authorizes the Attorney General to intervene and participate in any appeal in any proceeding in which a state statute or regulation has been declared unconstitutional by a court.

The constitutional and statutory provisions to which plaintiffs point establish that in a judicial proceeding in which the validity of a state law is challenged, the state's interest in the validity of the law is ordinarily asserted by the state Attorney General. These constitutional and statutory provisions, however, have never been interpreted to mean that the Attorney General is the *only* person or entity that may assert the state's interest in the validity of a state law in a proceeding in which the law's validity is at issue.

The State of California, of course, is composed of three branches of government, a great number of elected and appointed public officials, and myriad state and local agencies, boards, and public entities. In many instances the interests of two or more public officials or entities may conflict and give rise to differing official views as to the validity or proper interpretation of a challenged state law. In such instances, it is not uncommon for different officials or entities to appear in a judicial proceeding as distinct parties and to be represented by separate counsel, each official or entity presenting its own perspective of the state's interest with regard to the constitutional challenge or proposed interpretation at issue in the case.

The case of *Amwest, supra,* 11 Cal.4th 1243, 48 Cal.Rptr.2d 12, 906 P.2d 1112, provides an apt illustration. In *Amwest,* shortly after the voters approved Proposition 103 – a broad insurance reform initiative measure that, among other things, required

a rollback of insurance rates – the plaintiff insurer filed a petition for writ of mandate in superior court, alleging that application of the rate rollback provisions of Proposition 103 to surety insurers would violate the constitutional rights of such insurers. The petition named the Governor, the Attorney General, the State Board of Equalization, and the Insurance Commissioner as defendants. While the proceeding was pending in superior court, the Legislature enacted a statute – Insurance Code section 1861.135 – that purported to exempt surety insurers from the rate rollback provisions of Proposition 103. The validity of the new statute was called into question in the *Amwest* proceeding, because there was a dispute whether the statute was a constitutionally impermissible attempt to revise Proposition 103 without submitting the revision to a vote of the people (see Cal. Const., art. II, § 10, subd. (c)) or instead whether the statute furthered the purpose of Proposition 103 and thus was permissible under the explicit terms of Proposition 103 itself. (See *Amwest, supra,* at p. 1247, 48 Cal.Rptr.2d 12, 906 P.2d 1112.)

Although *Amwest* is one of the many California cases, cited above, in which an initiative proponent was permitted to intervene as a formal party and to appeal an adverse decision (see *ante,* 134 Cal.Rptr.3d at pp. 522-524, 265 P.3d at pp. 1021-1023), *Amwest* is also a case in which the named government defendants themselves took conflicting positions regarding the validity of the new statute. In that case, the Governor, the Attorney General, and the

State Board of Equalization – all represented by the Attorney General – maintained that the new statute was constitutionally valid. By contrast, the Insurance Commissioner – represented by separate counsel – took the position that the new statute did not further the purpose of Proposition 103 and was invalid. (See *Amwest, supra,* 11 Cal.4th at p. 1251, fn. 8, 48 Cal.Rptr.2d 12, 906 P.2d 1112.) Although some of the government defendants in *Amwest* (the Governor, the Attorney General and the State Board of Equalization) were defending the validity of the new statutory measure adopted by the Legislature whereas the remaining government defendant (the Insurance Commissioner) was defending the integrity of the voter-approved initiative measure, each government defendant could accurately be described as asserting the state's interest in the validity and proper application and interpretation of a duly enacted state law. In that proceeding, the Attorney General was not the sole or exclusive representative of the state's interest in the validity and proper interpretation of a duly enacted state statute.

As *Amwest* illustrates, it is hardly uncommon for public officials or entities to take different legal positions with regard to the validity or proper interpretation of a challenged state law. (See, e.g., *In re Marriage Cases, supra,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 [Prop. 22]; *Legislature v. Eu, supra,* 54 Cal.3d 492, 500, 286 Cal.Rptr. 283, 816 P.2d 1309 [Prop. 140]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22

Cal.3d 208, 149 Cal.Rptr. 239, 583 P.2d 1281 [Prop. 13].)

Moreover, even when there is neither a conflict of interest nor a difference of opinion among the government officials or entities named in the litigation, in those instances in which the Attorney General or another public official declines to defend a state statute or constitutional provision in a court proceeding because of that official's view that the challenged provision is unconstitutional, other public officials or entities, represented by separate counsel, have been permitted to assert the state's interest in defending the challenged law. (See, e.g., *Connerly v. State Personnel Bd., supra,* 37 Cal.4th 1169, 1174, 39 Cal.Rptr.3d 788, 129 P.3d 1.) Permitting other officials to present legal arguments in defense of a challenged state law when the Attorney General has declined to do so does not mean that the Attorney General has violated his or her duty or acted improperly in declining to defend the law. Even when the Attorney General has discretion to decline to defend a challenged law or to appeal a lower court ruling invalidating the law, the Attorney General's decision to exercise discretion in that fashion does not preclude other officials or entities from defending the challenged law or appealing an adverse judgment. Although the Attorney General's legal judgment may appropriately guide that official's own discretionary actions, the validity or proper interpretation of a challenged state constitutional provision or statute is, of course, ultimately a matter to be determined by the

courts, not the Attorney General. (Cf., e.g., *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 17 Cal.Rptr.3d 225, 95 P.3d 459.) We are aware of no case that has held or suggested that the Attorney General may preclude others from defending a challenged state law or from appealing a judgment invalidating the law when the Attorney General has declined to provide such a defense or take an appeal.[22]

Thus, the constitutional and statutory provisions relating to the Attorney General's authority and responsibilities do not preclude others from asserting the state's interest in the validity of a challenged law.

2.

Plaintiffs next argue that appearing in court to assert the state's interest in the validity of a challenged law or to appeal a judgment invalidating the law is exclusively an executive branch function. Because the authority to propose and adopt state

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[22] Plaintiffs' reliance on the Court of Appeal's ruling in *Beckley v. Schwarzenegger* (Sept. 1, 2010, No. C065920), summarily denying a petition for writ of mandate that sought to compel the Governor and the Attorney General to file notices of appeal from the federal district court's decision in *Perry,* is misplaced. The question whether the Governor or the Attorney General has discretion to decline to defend a challenged law or to appeal a lower court ruling invalidating the law is totally distinct from the issue whether some other official or individual has standing to do so, and thus the order in *Beckley* has no bearing on the determination whether the official proponents of an initiative have standing to file such an appeal.

constitutional amendments or statutes embodied in the initiative provisions of the California Constitution is essentially a legislative authority (see, e.g., *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1038, 56 Cal.Rptr.3d 814, 155 P.3d 226; *AFL-CIO v. Eu* (1984) 36 Cal.3d 687, 715, 206 Cal.Rptr. 89, 686 P.2d 609), plaintiffs maintain that it would violate the separation of powers doctrine to permit the official proponents of an initiative to assert the state's interest in defending a challenged measure.

Past authority, however, does not support plaintiffs' claim that appearing as a party in court to assert the state's interest in the validity of a challenged law is exclusively an executive function. In *INS v. Chadha* (1983) 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (*Chadha*), for example, the United States Supreme Court stated emphatically: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[23] (*Chadha,* at p. 940, 103 S.Ct.

[23] In *Chadha,* a federal statutory provision that authorized either house of Congress, by resolution of that house alone, to invalidate a decision by the Immigration and Naturalization Service (INS) to allow a particular deportable alien to remain in the United States was challenged as a violation of the separation of powers doctrine. In that proceeding, the INS – represented by the United States Attorney General – agreed with the petitioner alien's claim that the one-house veto provision was

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2764.) And, as discussed earlier in this opinion, the United States Supreme Court held in *Karcher, supra,* 484 U.S. 72, 108 S.Ct. 388, that, when authorized by state law, leaders of a state's legislative branch are permitted to appear as parties to assert the state's interest in the validity of a challenged statute when the state's executive officials decline to do so.[24]

Although we are not aware of any California case in which the Legislature has appeared as a formal party to defend a challenged state law when the

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unconstitutional, and Congress was permitted to intervene in the Court of Appeals to defend the challenged statute. When the case reached the Supreme Court, the high court explicitly held that "Congress is both a proper party to defend the constitutionality of [the challenged statute] and a proper petitioner under 28 U.S.C. § 1254(1)." (*Chadha, supra,* 462 U.S. at p. 939, 103 S.Ct. 2764.)

[24] The propriety of congressional or legislative participation in court proceedings in defense of a challenged statute is also illustrated by the circumstances surrounding the United States Attorney General's recent decision to cease defending the validity of a provision of the federal Defense of Marriage Act (1 U.S.C. § 7) in court actions challenging that statute. At the same time the Attorney General announced that he would no longer defend the statute in question because he and the President of the United States had concluded that the measure was unconstitutional, the Attorney General stated: "I have informed Members of Congress of this decision, so Members who wish to defend the statute may pursue that option. The Department will also work closely with the courts to ensure that Congress has a full and fair opportunity to participate in pending litigation." (Statement of the Atty. Gen. on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> [as of Nov. 17, 2011].)

Attorney General or other public officials have declined to do so, plaintiffs have cited no case that supports the claim that it would violate the separation of powers doctrine embodied in the California Constitution for the Legislature to provide such a defense when other public officials decline to do so. In a number of California cases, the Legislature or one of its constituent houses has appeared as a party in litigation challenging the validity of a proposed or adopted initiative or referendum measure (see, e.g., *Senate of the State of Cal. v. Jones, supra,* 21 Cal.4th 1142, 1156, fn. 9, 90 Cal.Rptr.2d 810, 988 P.2d 1089; *Legislature v. Eu, supra,* 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309; *Legislature v. Deukmejian, supra,* 34 Cal.3d 658, 194 Cal.Rptr. 781, 669 P.2d 17; *Assembly v. Deukmejian, supra,* 30 Cal.3d 638, 180 Cal.Rptr. 297, 639 P.2d 939) – often in instances in which the Attorney General or other executive officials took a position contrary to the Legislature's regarding the validity of the measure (see, e.g., *Legislature v. Eu, supra,* 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309; *Legislature v. Deukmejian, supra,* 34 Cal.3d 658, 194 Cal.Rptr. 781, 669 P.2d 17; *Assembly v. Deukmejian, supra,* 30 Cal.3d 638, 180 Cal.Rptr. 297, 639 P.2d 939). These cases belie any suggestion that such action by the Legislature in any way usurped or interfered with the executive officials' performance of their executive function. (See also *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 43 Cal.Rptr.3d 315, 134 P.3d 299 [Legislature, represented by separate counsel, appeared as real party in interest to defend validity

of voter-approved constitutional amendments submitted to electorate by Legislature]; *Kopp v. Fair Pol. Practices Com., supra,* 11 Cal.4th 607, 614, 47 Cal.Rptr.2d 108, 905 P.2d 1248 [Legislature permitted to intervene to defend the validity of the defendant commission's actions when the commission itself took a neutral position with respect to the challenge to its actions].)

Accordingly, we find no merit in plaintiffs' claim that appearing in court to assert the state's interest in the validity of a challenged law is exclusively an executive function or that it would violate the separation of powers doctrine to permit the official proponents of an initiative to assert the state's interest in the validity of the initiative in a judicial proceeding in which the validity of the measure is challenged. Furthermore, because there is no reason to doubt that the California Legislature, like the United States Congress in *Chadha, supra,* 462 U.S. 919, 103 S.Ct. 2764, or the New Jersey Legislature in *Karcher, supra,* 484 U.S. 72, 108 S.Ct. 388, would have authority to step in to assert the state's interest in the validity of a statute enacted by the Legislature if the state's executive officials have declined to defend the statute's validity in a court proceeding, we conclude that the people are no less entitled to have the state's interest in the validity of a voter-approved initiative asserted on their behalf when public officials decline to defend the measure.

3.

Plaintiffs also raise another, somewhat related, separation of powers claim, contending that permitting an initiative proponent to assert the state's interest in the validity of a challenged initiative measure will interfere with the Attorney General's exercise of the powers of his or her office in representing the state's interest. Our recognition that official initiative proponents are authorized to assert the state's interest in an initiative's validity when public officials have declined to defend the measure, however, does not mean, as plaintiffs suggest, that the proponents are authorized to "override" the Attorney General's or other public officials' authority to make their own decisions regarding the defense of the measure. As we have discussed, in many past cases initiative proponents have been permitted to participate as formal parties defending an initiative measure along with the public officials named as defendants, and in those instances each party has been permitted to proffer its own arguments and control its own actions in defense of the initiative.

Similarly, the ability of official initiative proponents to defend a challenged initiative measure on behalf of the state is not inconsistent with the discretion the Attorney General may possess to decline to defend a challenged measure or to decline to appeal from an adverse judgment when the Attorney General is of the view that a challenged initiative measure is unconstitutional. (Cf. *State of California v. Superior Court* (1986) 184 Cal.App.3d 394, 229

Cal.Rptr. 74.) As already discussed, even when the Attorney General has discretion to decline to defend a state constitutional provision or statute in a court proceeding challenging the measure, the Attorney General does not have authority to prevent others from mounting a defense on behalf of the state's interest in the validity of the measure. For example, in the underlying proceedings in the *Perry* litigation, had any of the other public officials who were named as defendants chosen to present a substantive defense of the challenged measure or to appeal the adverse judgment entered by the trial court, the Attorney General could not have prevented that public official from presenting a defense or filing an appeal and could not persuasively maintain that the presentation of such a defense or the filing of such an appeal by another defendant would constitute an improper interference with the Attorney General's exercise of his or her official authority. By the same token, the authority of official initiative proponents to participate as a formal party to defend a challenged initiative, and to appeal a judgment invalidating the measure, does not improperly interfere with the Attorney General's authority and does not violate the separation of powers doctrine.

4.

Plaintiffs also contend that because the official proponents of an initiative measure are private individuals who have not been elected to public office, take no oath to uphold the California Constitution or

laws, cannot be recalled or impeached, and are not subject to the conflict of interest rules or other ethical standards that apply to public officials, they cannot properly assert the state's interest in the validity of a challenged initiative measure.

Our determination that the official proponents of an initiative are authorized to assert the state's interest in the validity of the initiative measure when public officials have declined to defend the measure, however, does not mean that the proponents become de facto public officials or possess any official authority to enact laws or regulations or even to directly enforce the initiative measure in question. Rather, the authority the proponents possess in this context is simply the authority to participate as a party in a court action and to assert legal arguments in defense of the state's interest in the validity of the initiative measure when the public officials who ordinarily would assert the state's interest in the validity of the measure have not done so. This authority is extremely narrow and limited and does not imply any authority to act on behalf of the state in other respects. Because of the limited nature of the proponents' authority, they are properly subject to the same ethical constraints that apply to all other parties in a legal proceeding.

As discussed above, we recognized in *Building Industry Assn., supra,* 41 Cal.3d at page 822, 226 Cal.Rptr. 81, 718 P.2d 68, that because of the fundamental purpose and unique nature of the initiative process – a process designed to give the people of

California the authority to directly adopt constitutional amendments or statutes that their elected officials have refused or declined to adopt and may often oppose – there is an increased risk, even when public officials are defending a challenged initiative measure, that the public officials may fail to defend the measure with vigor. As a consequence, we indicated in *Building Industry Assn.* that even in such circumstances a court generally should permit the official proponents of an initiative to intervene in the proceeding "to guard the people's exercise of initiative power." (*Ibid.*) When public officials *totally decline* to defend a challenged initiative measure, the state's interest in the initiative's validity would go completely undefended, and the voters who enacted the initiative measure into law would be entirely deprived of having the state's interest in the initiative's validity asserted on their behalf, unless some private individual or entity is permitted to assert that interest on the voters', that is to say, the people's, behalf. Because of their special relationship to the initiative measure, the official proponents of the measure are the most obvious and logical private individuals to ably and vigorously defend the validity of the challenged measure on behalf of the interests of the voters who adopted the initiative into law, and thus to assert the state's interest in the initiative's validity when public officials have declined to do so.

Moreover, even outside the initiative context it is neither unprecedented nor particularly unusual under California law for persons other than public

officials to be permitted to participate as formal parties in a court action to assert the public's or the state's interest in upholding or enforcing a duly enacted law. For example, under the so-called "public interest" exception in mandate actions, private citizens have long been authorized to bring a mandate action to enforce a public duty involving the protection of a public right in order to ensure that no government body impairs or defeats the purpose of legislation establishing such a right. (See, e.g., *Green v. Obledo* (1981) 29 Cal.3d 126, 144-145, 172 Cal.Rptr. 206, 624 P.2d 256; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439, 261 Cal.Rptr. 574, 777 P.2d 610; see generally 8 Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, § 84, pp. 970-973.) Similarly, under the well-established private attorney general doctrine, private individuals are permitted to act in support of the public interest by bringing lawsuits to enforce state constitutional or statutory provisions in circumstances in which enforcement by public officials may not be sufficient. (See, e.g., *Serrano v. Priest* (1977) 20 Cal.3d 25, 42-47, 141 Cal.Rptr. 315, 569 P.2d 1303; *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933, 941-942, 154 Cal.Rptr. 503, 593 P.2d 200.)[25]

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[25] We note that in both the public interest and private attorney general contexts, the authority of private individuals to act on behalf of the public interest under California law was initially recognized by judicial decision notwithstanding the absence of any specific constitutional or statutory provision *expressly* granting such authority. (See, e.g., *Green v. Obledo,*

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Indeed, the authority of the official proponents of an initiative to assert the state's interest in the present context is a more modest authority than the authority exercised by private individuals under either the public-interest mandate exception or the private attorney general doctrine, because under those doctrines private individuals are authorized to act affirmatively on behalf of the public and institute proceedings to enforce a public right, whereas the authority possessed by the official initiative proponents in the present context is simply a passive, defensive authority to step in to assert the state's interest in the validity of a challenged measure when the initiative has been challenged by others in a judicial proceedings and public officials have declined to defend the measure.

In sum, even though the official proponents of an initiative measure are not public officials the role they play in asserting the state's interest in the validity of an initiative measure in this judicial setting does not threaten the democratic process or the proper governance of the state, but, on the contrary, serves to safeguard the unique elements and integrity of the initiative process.

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supra, 29 Cal.3d at pp. 144-145, 172 Cal.Rptr. 206, 624 P.2d 256, and cases cited; *Serrano v. Priest, supra,* 20 Cal.3d at pp. 45-47, 141 Cal.Rptr. 315, 569 P.2d 1303.)

5.

Finally, plaintiffs suggest that a determination that the official proponents of an initiative are authorized to assert the state's interest in the validity of a challenged initiative in a court proceeding will result in untoward consequences in other contexts.

For example, plaintiffs contend that if official initiative proponents are permitted to assert the state's interest in an initiative's validity and to appeal an adverse judgment when the Attorney General and other public officials have declined to do so, the proponents' action in filing an appeal may subject the state to substantial monetary liability for attorney fees should the proponents' efforts in support of the challenged measure prove unsuccessful. The question of who should bear responsibility for any attorney fee award in such circumstances, however, is entirely distinct from the question whether the official proponents of an initiative are authorized to assert the state's interest in the validity of a challenged initiative measure and is not before us in this proceeding. Our conclusion that official initiative proponents are authorized to assert the state's interest in the validity of a challenged initiative measure when public officials decline to do so does not mean that any monetary liability incurred as a result of the proponents' actions should or must be borne by the state. The attorney fee issue can properly be addressed if and when the question arises in the future. (Cf. *Connerly v. State Personnel Bd., supra,* 37 Cal.4th at pp. 1178-1179, 39 Cal.Rptr.3d 788, 129 P.3d 1 [distinguishing

status of intervener initiative proponents from that of amicus curiae in concluding that amicus curiae could not properly be held liable for private-attorney-general attorney fee award].)

Similarly, we have no occasion in this case to address other legal questions that may arise in future cases if there is a conflict between the positions taken by initiative proponents and by other defendants who are appearing on behalf of the state. The issue before us is limited to the question whether official initiative proponents are authorized to appear as parties to assert the state's interest in the validity of an initiative measure when the public officials who ordinarily provide such a defense have declined to do so. The numerous cases discussed above in which initiative proponents, Congress, or state legislative leaders have been permitted to intervene to present legal arguments regarding the validity and proper interpretation of a challenged law refute the claim that permitting an initiative's official proponents to participate on this basis is unworkable or will inevitably result in detrimental consequences.

C. Out-of-state Decisions

As the foregoing discussion indicates, in reaching the conclusion that the official proponents of an initiative are authorized under California law to defend a challenged initiative measure and to appeal from a judgment invalidating the measure when public officials decline to defend the initiative, we

have relied upon the history and purpose of the initiative provisions of the California Constitution and upon the numerous California decisions that have uniformly permitted the official proponents of initiative measures to appear as parties and defend the validity of the measures they have sponsored.

In addition, we note that in recent years each of the two other state supreme courts that has addressed the question whether the official proponents of an initiative measure have standing under state law to intervene in an action challenging the validity of the initiative measure has concluded that, under each state's respective law, initiative proponents generally are authorized to intervene *as of right* in such an action in state court.

1.

In *Alaskans for a Common Language v. Kritz* (Alaska 2000) 3 P.3d 906 (*Alaskans for a Common Language*), the issue of standing arose in an action challenging the validity of a voter-approved initiative measure that – like the Arizona initiative involved in *Arizonans for Official English, supra,* 520 U.S. 43, 117 S.Ct. 1055 (see *ante,* 134 Cal.Rptr.3d at pp. 514-515, 265 P.3d at pp. 1014-1016) – provided that English shall be used by all public agencies in all government functions and actions and in the preparation of all official public documents and records. Two organizations – the first, the official proponents of the initiative measure in Alaska, and the second, a

national organization (U.S. English) that supported the Alaska measure – sought to intervene as formal parties in the trial court proceedings, but the trial court denied both requests on the ground that the interests of the would-be interveners were adequately represented by the government defendants who were defending the initiative measure in the proceeding. Both organizations appealed the trial court's ruling denying intervention. On appeal, the Alaska Supreme Court reversed the trial court's ruling insofar as it denied intervention by the official proponents of the measure but affirmed the lower court ruling insofar as it denied intervention by the other organization.

In analyzing the question of the official proponents' right to intervene, the Alaska Supreme Court noted that prior to the vote on the initiative measure at issue in that case, the Attorney General's Office had raised potential questions regarding the constitutionality of the measure and the Governor had personally opposed the measure during the election campaign. (*Alaskans for a Common Language, supra,* 3 P.3d at pp. 909-910.) Nonetheless, observing that courts generally "recognize a presumption of adequate representation when government entities are parties to a lawsuit because those entities are charged by law with representing the interests of the people" (*id.* at p. 913), the Alaska Supreme Court stated that "[b]ased on the presumption of adequate government representation, we presume the Attorney General's Office would not fail to defend the constitutionality of the initiative energetically and capably.

Based on that same presumption, we also presume that the governor would not interfere." (*Id.* at p. 914.)

The court in *Alaskans for a Common Language, supra,* 3 P.3d 906, went on to explain, however, that despite the court's presumption that the government defendants would energetically and capably defend the challenged measure, inasmuch as the initiative proponents had "used the process of direct legislation to enact a law that the executive branch questioned and opposed[,] [t]hey cannot be faulted for wanting to guarantee that the initiative is defended zealously or for trying to ensure that the credibility of institutional arguments in favor of the initiative is not diminished by the previous comments from the executive branch. To them, and to the public in sympathy with the initiative, the governor's opposition and the Attorney General Office's questions . . . during the campaign, could create an appearance of adversity. Every strategic decision made by the Attorney General's Office in defending the legislation might be publicly questioned and second-guessed by the initiative's sympathizers. That this suspicion may be unfounded does not make it less inevitable." (3 P.3d at p. 914.)

The Alaska Supreme Court went on to conclude: "Here, because of the nature of direct legislation through the initiative process, the possible appearance of adversity of interest is sufficient to overcome the presumption of adequate representation. *Indeed, we believe that an [initiative] sponsor's direct interest in legislation enacted through the initiative process*

and the concomitant need to avoid the appearance of adversity will ordinarily preclude courts from denying intervention as of right to a sponsoring group." (*Alaskans for a Common Language, supra,* 3 P.3d at p. 914, italics added.)[26] Accordingly, the court held that the trial court erred in denying intervention by the official proponents of the initiative measure and reversed that portion of the trial court's ruling.

The Alaska Supreme Court reached a contrary conclusion, however, with respect to the other organization that had sought intervention in the trial court. Pointing out that "[t]he record fails to show, and U.S. English has not asserted, that its directors, officers, or incorporators were sponsors of the initiative in Alaska or were members of the initiative committee" (*Alaskans for a Common Language, supra,* 3 P.3d at p. 916), the court found that "U.S. English has not established that its interest is any greater than a generalized interest of a political nature" (*ibid.*). It

[26] The court added a narrow qualification to its broad holding that initiative proponents are entitled to intervene in such litigation as a matter of right, explaining that "Alaska courts should retain discretion to deny intervention in exceptional cases, because [the relevant Alaska statute relating to initiative sponsors] places no limit on the number of initiative sponsors and therefore potentially opens the door to an unlimited number of motions for intervention. As an alternative to limiting intervention in those cases, courts may instead choose to reduce duplication by requiring those sponsors with substantially similar interests to consolidate their briefing and to participate through lead counsel." (*Alaskans for a Common Language, supra,* 3 P.3d at p. 914.)

held that the organization did not qualify for intervention as a matter of right and that the trial court did not abuse its discretion in denying permissive intervention. (*Ibid.*)

2.

In *Sportsmen for I-143 v. Fifteenth Jud. Court* (2002) 308 Mont. 189, 40 P.3d 400 (*Sportsmen for I-143*), the Montana Supreme Court similarly addressed the general issue "whether the primary proponent of a ballot initiative has a legally protectable interest sufficient to allow it to intervene in a case challenging the resulting statute." (*Id.* at p. 402.) As in *Alaskans for a Common Language, supra,* 3 P.3d 906, in *Sportsmen for I-143* the trial court had denied a motion to intervene by the sponsors of the challenged initiative measure on the ground that the government defendant named in the proceeding – there, the Montana Department of Fish, Wildlife, and Parks – could adequately defend the measure. Although in that instance there was little reason to suspect that the named government defendant would not vigorously defend the initiative measure and the resulting legislation the initiative had engendered, the Montana Supreme Court nonetheless observed that the initiative proponents "who actively drafted and supported I-143 may be in the best position to defend their interpretation of the resulting legislation" (40 P.3d at p. 403) and held that, as a general matter, initiative proponents "are entitled to intervene *as a matter of right* " in an action challenging

the validity of the measure they have sponsored. (*Ibid.,* italics added.)[27]

IV. Conclusion

In response to the question submitted by the Ninth Circuit, we conclude, for the reasons discussed above, that when the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so, under article II, section 8 of the California Constitution and the relevant provisions of the Elections Code, the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative.

WE CONCUR: KENNARD, BAXTER, WERDEGAR, CHIN, CORRIGAN, and LIU, JJ.

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[27] We note that both *Alaskans for a Common Language, supra,* 3 P.3d 906, and *Sportsmen for I-143, supra,* 308 Mont. 189, 40 P.3d 400, were decided after the United States Supreme Court's decision in *Arizonans for Official English, supra,* 520 U.S. 43, 117 S.Ct. 1055. Those decisions confirm that the federal high court's decision in *Arizonans for Official English* imposes no impediment to a state court's determination that, under state law, an initiative proponent has the authority to intervene as of right in an action in state court challenging the validity of an initiative measure.

Concurring Opinion by KENNARD, J.

While joining fully in the court's unanimous opinion authored by the Chief Justice, I write separately to highlight the historical and legal events that have led to today's decision and to explain why I concur in that decision.

I

This case marks the fourth time in recent years that this court has addressed issues related to the ongoing political and legal struggle about whether same-sex marriages should be recognized as valid in California. In 2004, this court held that San Francisco public officials exceeded their authority when they issued marriage licenses to same-sex couples without a prior judicial determination of the constitutionality of a California statute restricting marriage to heterosexual couples. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 17 Cal.Rptr.3d 225, 95 P.3d 459 (*Lockyer*).) Agreeing with the majority that, within our state government, determining the constitutional validity of state statutes is a task reserved to the judicial branch, I joined in that decision, except insofar as it declared void some 4,000 same-sex marriages performed in reliance on licenses issued in San Francisco. (*Id.* at p. 1125, 17 Cal.Rptr.3d 225, 95 P.3d 459 (conc. & dis. opn. of Kennard, J.).) My separate opinion in *Lockyer* explained that because the persons whose marriages were at issue were not before this court, and because judicial proceedings to determine the constitutionality

of California laws barring same-sex marriage were then pending in other California courts, I would have refrained from determining the validity of those marriages. (*Ibid.*)

Thereafter, in May 2008, this court held that California's statutory law denying same-sex couples the right to marry violated the privacy, due process, and equal protection provisions of our state Constitution as it then read. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (*Marriage Cases*).) In addition to signing the majority opinion there, I wrote separately to explain in my own words why I rejected the argument that whether same-sex couples should be allowed to marry presented essentially "a social or political issue inappropriate for judicial consideration." (*Id.* at p. 859, 76 Cal.Rptr.3d 683, 183 P.3d 384 (conc. opn. of Kennard, J.).) I wrote that "courts alone must decide whether excluding individuals from marriage because of sexual orientation can be reconciled with our state Constitution's equal protection guarantee." (*Id.* at p. 860, 76 Cal.Rptr.3d 683, 183 P.3d 384.)

Six months later, in November 2008, California's voters approved Proposition 8, an initiative that amended California's Constitution by adding a new provision expressly limiting marriage to heterosexual couples. (Cal. Const., art. I, § 7.5.) In May 2009, this court rejected state constitutional challenges to Proposition 8, determining that it had been validly enacted by the procedures prescribed for constitutional amendments, rather than the more rigorous procedures prescribed for constitutional revisions,

and determining also that Proposition 8 did not violate the separation of powers doctrine. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (*Strauss*).) This court in that case also decided that Proposition 8 did not invalidate any marriages performed before its effective date. (*Strauss,* at p. 474, 93 Cal.Rptr.3d 591, 207 P.3d 48.) I signed the court's opinion and wrote a concurring opinion in which I explained that although interpreting existing state constitutional provisions is a judicial responsibility, the voters retain legislative authority to alter the California Constitution's language and thereby to "enlarge or reduce the personal rights that the state Constitution as so amended will thereafter guarantee and protect." (*Id.* at p. 476, 93 Cal.Rptr.3d 591, 207 P.3d 48 (conc. opn. of Kennard, J.).)

In May 2009, shortly before this court issued its opinion rejecting the state-law challenges to Proposition 8 (*Strauss, supra,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48), four individuals brought an action in federal district court challenging Proposition 8 on federal constitutional grounds. Named as defendants were the Governor, California's Attorney General, and California's Director of Public Health. None of those state public officials, however, litigated in defense of Proposition 8. The Governor and the Director of Public Health declined to take any position on the merits, while the Attorney General took the position that Proposition 8 violates the United States Constitution. The federal district court permitted Proposition 8's official proponents to intervene, and it was they, and they alone, who defended the measure

during the ensuing nonjury trial. (See maj. opn., *ante,* 134 Cal.Rptr.3d at pp. 505-509, 265 P.3d at pp. 1007-1010.)

After the trial, the federal district court issued an opinion concluding that Proposition 8 violates both the due process and the equal protection clauses of the federal Constitution. Only the initiative proponents appealed, to the United States Court of Appeals for the Ninth Circuit, which issued an order asking this court to decide, as a matter of state law, whether proponents of an initiative that the voters approved have either a "particularized interest" in the initiative's validity or the authority to "assert the state's interest" in defending the initiative. (See maj. opn., *ante,* 134 Cal.Rptr.3d at pp. 508-511, 265 P.3d at pp. 1010-1012.) Without deciding whether initiative proponents have a "particularized interest" in the initiative's validity, this court's unanimous opinion holds that under California law the official proponents of a voter-approved initiative have authority to "assert the state's interest" in the validity of that initiative, and to appeal a judgment invalidating the initiative, when state officials have declined to do so. (Maj. opn., *ante,* at pp. 504, 502, 265 P.3d at pp. 1006, 1004.)

II

I agree with today's holding and with the reasoning of the court's unanimous opinion. I briefly explain why.

As the majority opinion in *Strauss* pointed out, this court's decisions in the three earlier same-sex marriage cases illustrate the proper roles of, and the limitations imposed upon, each branch of California's government – the executive, the legislative, and the judicial – under our state Constitution. (*Strauss, supra,* 46 Cal.4th 364, 385, 93 Cal.Rptr.3d 591, 207 P.3d 48.) *Lockyer* shows that the role of California's executive branch officials is to enforce statutory laws, which they must treat as valid, regardless of their personal views, unless and until the judiciary has determined otherwise. (*Lockyer, supra,* 33 Cal.4th 1055, 1068, 17 Cal.Rptr.3d 225, 95 P.3d 459.) *Marriage Cases* shows that the role of California's legislative branch is to enact statutes that are consistent with California's Constitution, which among other things guarantees the rights to privacy, due process, and equal protection of the laws. (*Marriage Cases, supra,* 43 Cal.4th 757, 779-785, 855-856, 76 Cal.Rptr.3d 683, 183 P.3d 384.) *Strauss* shows that the role of California's judicial branch is to interpret existing state statutory and constitutional provisions, a power and responsibility that is subject to the limitation that the electorate, through the power of the initiative, can amend the state Constitution to override, from that time forward, the court's ruling. (*Strauss, supra,* at pp. 385, 391-392, 93 Cal.Rptr.3d 591, 207 P.3d 48.)

This case raises an issue of similar importance to a proper understanding of our state governmental structure under California's Constitution: When the

voters, through the exercise of their constitutionally guaranteed initiative power, have enacted a new statute or have amended the state Constitution, and the validity of that initiative is challenged in a judicial proceeding, who may appear in court to defend the initiative?

California's state trial and appellate courts have routinely permitted initiative proponents to defend an initiative's validity, and to appeal from a judgment holding an initiative invalid, particularly when state officials have declined to do so. (See maj. opn., *ante,* 134 Cal.Rptr.3d at pp. 522-524, 265 P.3d at pp. 1021-1023.) The two main reasons for this standard practice are easily stated.

First, the validity of a duly enacted state initiative measure (particularly one that amends the state Constitution, as Proposition 8 does) is a matter of great public importance that can be determined only through judicial proceedings. Such proceedings are most likely to produce a result that will be reliable, and that the public will find acceptable, if the issues are thoroughly and vigorously litigated. As the court's opinion notes (maj. opn., *ante,* 134 Cal.Rptr.3d at pp. 530-532, 265 P.3d at pp. 1027-1029), initiative proponents generally have the motivation and the resources to litigate thoroughly and vigorously in defense of initiative measures they have sponsored (particularly when state officials have declined to do so), and thereby to assist the courts in a way that is vital to the integrity of the entire process.

Second, the initiative power was added to the state Constitution in 1911 (Cal. Const., art. II, §§ 8, 10) because of the view, widely held among California's voters, that the Legislature and state officials had become so dependent on special interests that they were unable or unwilling to take actions that the public interest required. To give those same state officials sole authority to decide whether or not a duly enacted initiative will be defended in court would be inconsistent with the purpose and rationale of the initiative power, because it would allow public officials, through inaction, effectively to annul initiatives that they dislike.[28] (See *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 822, 226 Cal.Rptr. 81, 718 P.2d 68.)

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[28] At this point a note of caution is in order. When the named defendant in a lawsuit brought in a California state court declines to present a defense, and no party intervenes to assert a defense to the plaintiff's claim, two different and opposite results are possible, depending on the particular circumstances. The plaintiff may win by default, resulting in entry of a default judgment or stipulated judgment granting the requested relief. (See, e.g., Code Civ. Proc., §§ 585 et seq., 664.6.) But the trial court may decide instead that without a genuine dispute between the parties, judicial action is unnecessary and inappropriate, resulting in a dismissal of the action without entry of any judgment. (See *id.,* § 1061; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439, 261 Cal.Rptr. 574, 777 P.2d 610; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170-171, 188 Cal.Rptr. 104, 655 P.2d 306.) Because the present matter concerns only the narrowly framed question posed by the Ninth Circuit, which of these two approaches should apply in any particular case is an issue not before this court here.

Is this explanation sufficient to answer the question that the Ninth Circuit posed to this court, which is whether proponents of an initiative that the voters approved have either a "particularized interest" in the initiative's validity or the authority to "assert the state's interest" in defending the initiative? More specifically, does it show, as this court's opinion holds, that initiative proponents have authority to "assert the state's interest" in the initiative's validity? The answer is "Yes."

The word "authority" implies that initiative proponents have a *right* to defend an initiative in court. Although California's state courts generally have discretion to grant or deny intervention, it would be an abuse of discretion for a court to deny an initiative proponent's motion to intervene when the validity of the initiative measure is being challenged and California state officials are not actively defending it. (See maj. opn., *ante,* 134 Cal.Rptr.3d at p. 529, 265 P.3d at p. 1027.) In that situation at least, it is accurate to state that initiative proponents have authority to intervene so that the integrity of the initiative process may be preserved and the validity of the initiative measure may be reliably determined through vigorous litigation at both the trial and appellate levels of California's judicial system.

III

The authority possessed by the official proponents of an initiative measure to assert the state's

interest in that initiative's validity complements the judiciary's authority to make the final decision on whether the initiative is valid. As I have stressed in my separate opinions in the earlier same-sex marriages cases, interpreting state statutes and state constitutional provisions, and determining their validity, are the responsibility of the government's judicial branch. (*Strauss, supra,* 46 Cal.4th 364, 476, 93 Cal.Rptr.3d 591, 207 P.3d 48 (conc. opn. of Kennard, J.); *Marriage Cases, supra,* 43 Cal.4th 757, 860, 76 Cal.Rptr.3d 683, 183 P.3d 384 (conc. opn. of Kennard, J.); *Lockyer, supra,* 33 Cal.4th 1055, 1125, 17 Cal.Rptr.3d 225, 95 P.3d 459 (conc. & dis. opn. of Kennard, J.).)

The judicial system is designed to operate through public proceedings in which adversaries litigate factual and legal issues thoroughly and vigorously. When an initiative measure is challenged in court, the integrity and effectiveness of the judicial process require that a competent and spirited defense be presented. If public officials refuse to provide that defense, the ability of the initiative proponents to intervene in the pending litigation, and to appeal an adverse judgment, is inherent in, and essential to the effective exercise of, the constitutional initiative power. To hold otherwise not only would undermine that constitutional power, it also would allow state executive branch officials to effectively annul voter-approved initiatives simply by declining to defend them, thereby permitting those officials to exceed

their proper role in our state government's constitutional structure.

For these reasons, I agree that, when state officials refuse to defend a voter-approved initiative measure in court, or to appeal a judgment invalidating that initiative, its official proponents have authority, as a matter of state law, to assert the state's interest in the initiative's validity.

628 F.3d 1191
United States Court of Appeals,
Ninth Circuit.

Kristin M. PERRY; Sandra B. Stier; Paul T. Katami; Jeffrey J. Zarrillo, Plaintiffs-Appellees,
City and County of San Francisco,
Plaintiff-Intervenor-Appellee,
v.
Arnold SCHWARZENEGGER, in his official capacity as Governor of California; Edmund G. Brown, Jr., in his official capacity as Attorney General of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as Clerk-Recorder for the County of Alameda; Dean C. Logan, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants,
and
Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Hak-Shing William Tam; Mark A. Jansson; ProtectMarriage.com – Yes On 8, a Project of California Renewal, as official proponents of Proposition 8, Defendants-Intervenors-Appellants.

No. 10-16696. | Jan. 4, 2011.

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D.C. No. 3:09-cv-02292-VRW.

Before: STEPHEN REINHARDT, MICHAEL DALY HAWKINS, and N. RANDY SMITH, Circuit Judges.

Opinion

ORDER CERTIFYING A QUESTION TO THE SUPREME COURT OF CALIFORNIA

Before this panel of the United States Court of Appeals for the Ninth Circuit is an appeal concerning the constitutionality under the United States Constitution of Article I, § 7.5 of the California Constitution ("Proposition 8"). Because we cannot consider this important constitutional question unless the appellants before us have standing to raise it, and in light of *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) ("*Arizonans*"), it is critical that we be advised of the rights under California law of the official proponents of an initiative measure to defend the constitutionality of that measure upon its adoption by the People when the state officers charged with the laws' enforcement, including the Attorney General, refuse to provide such a defense or appeal a judgment declaring the measure unconstitutional. As we are aware of no controlling state precedent on this precise question, we respectfully ask the Supreme Court of California to exercise its discretion to accept and decide the certified question below.

I. Question Certified

Pursuant to Rule 8.548 of the California Rules of Court, we request that the Court answer the following question:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

We understand that the Court may reformulate our question, and we agree to accept and follow the Court's decision. Cal. R. Ct. 8.548(b)(2), (f)(5).

II. Background

A

This appeal concerns a subject that is familiar to the Supreme Court of California: the constitutionality of excluding same-sex couples from the institution of marriage in California. In May 2008, the Court declared that California statutes limiting marriage to opposite-sex couples were unconstitutional under the equal protection clause of the California Constitution. The Court then invalidated those statutes and prohibited their enforcement. *In re Marriage Cases,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 452-453 (2008). In the months that followed, California issued approximately 18,000 marriage licenses to same-sex couples.

Then, in November 2008, the People of the State of California voted to adopt Proposition 8, an initiative constitutional amendment that "added a new section – section 7.5 – to article I of the California Constitution, providing: 'Only marriage between a man and a woman is valid or recognized in California.'" *Strauss v. Horton,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48, 59 (2009). Proposition 8 had been placed on the ballot by five Californians, Defendants-Intervenors-Appellants Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson, whom California law recognizes as the official "proponents" of the measure.[1] Cal. Elec.Code § 342.

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[1] As the official "proponents," the intervenors were responsible for paying the initiative filing fee (Cal. Elec.Code § 9001), requesting that the Attorney General prepare a "circulating title and summary" of the initiative for the intervenors to present to electors when circulating a petition to qualify the initiative for the ballot (Cal. Elec.Code § 9001), preparing petition forms to collect signatures to qualify the initiative for the ballot (Cal. Elec.Code §§ 9001, 9012, 9014), managing signature gatherers (Cal. Elec.Code §§ 9607, 9609), filing the petitions for signature verification (Cal. Elec.Code § 9032), and designating arguments in favor of the initiative for the voter information guide (Cal. Elec.Code § 9067, 9600). Proponents also established "ProtectMarriage.com – Yes on 8, a Project of California Renewal," also a defendant-intervenor-appellant here, as a "ballot measure committee" to support Proposition 8 under Cal. Gov't Code section 84107. ProtectMarriage.com was responsible for all aspects of the campaign to qualify Proposition 8 for the ballot, including the collection of 1.2 million signatures. The committee spent $37 million to qualify Proposition 8 for the ballot and to

(Continued on following page)

After Proposition 8 was enacted, opponents of the measure brought an original action for a writ of mandate in the Supreme Court of California, seeking invalidation of Proposition 8 as an improper attempt by the People to revise, rather than amend, the California Constitution through exercise of the initiative power. The three named respondents in that proceeding, Mark D. Horton, Linette Scott, and Edmund G. Brown, Jr. – also defendants here – refused to defend the measure's constitutionality under state law, but remained parties to the proceeding; Proponents were permitted to intervene and defended Proposition 8 as a lawful initiative constitutional amendment. The Court then upheld Proposition 8 against the opponents' challenge, but preserved the 18,000 marriages of same-sex couples that had already been performed. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 114, 119, 122.

B

Days before *Strauss* was decided, plaintiffs-appellees filed this action in the United States District Court for the Northern District of California, alleging that Proposition 8 violates the Fourteenth Amendment to the United States Constitution and seeking declaratory and injunctive relief. The named defendants – the three officers who were respondents

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campaign in its favor in order to ensure its adoption. *See Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 954-955 (N.D.Cal.2010).

in *Strauss,* plus the Governor and the County Clerks of Alameda and Los Angeles Counties – filed answers to the complaint but declined to defend the measure's constitutionality. Proponents were then permitted to intervene to do so. After a twelve-day bench trial, the district court made findings of fact, and "conclude[d] that Proposition 8 is unconstitutional" under both the Due Process Clause and the Equal Protection Clause. *Perry v. Schwarzenegger,* 704 F.Supp.2d. 921, 1003 (N.D.Cal.2010). The court then entered the following injunction:

> Defendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution.

This court stayed the injunction pending appeal; Proposition 8 remains in effect in California pending our final decision. Plaintiffs and Proponents disagree as to the legal status of Proposition 8 should it be determined that we are without jurisdiction to hear this appeal.[2]

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[2] Plaintiffs argue that Proponents have no standing and therefore ask us to simply dismiss this appeal. At oral argument, Plaintiffs contended that were we to do so, the district court decision would be binding on the named state officers and on the county clerks in two counties only, Los Angeles and Alameda, and that further litigation in the state courts would be necessary to clarify the legal status of Proposition 8 in the remaining fifty-six counties. Alternatively, they suggested that the Governor, Attorney General, or State Registrar would be required to issue

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Proponents appealed the district court order, but the named official defendants did not. We asked the parties to brief, as a preliminary matter, the Proponents' standing to seek review of the district court order, in light of *Arizonans* and earlier decisions of the United States Supreme Court. Having considered the parties' briefs and arguments, we are now convinced that Proponents' claim to standing depends on Proponents' particularized interests created by state law or their authority under state law to defend the constitutionality of the initiative, which rights it appears to us have not yet been clearly defined by the Court. We therefore request clarification in order to determine whether we have jurisdiction to decide this case.

III. Explanation of Certification

This court is obligated to ensure that it has jurisdiction over this appeal before proceeding to the important constitutional questions it presents, and we must dismiss the appeal if we lack jurisdiction.

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a "legal directive" to the county clerks to cease enforcing Proposition 8.

Proponents argue that if they lack standing to appeal, then we are required not only to dismiss the appeal but also to vacate the district court judgment. In any event, we are required to resolve, *nostra sponte,* the issue of standing before proceeding further with this matter.

The certified question therefore is dispositive of our very ability to hear this case.[3]

A

"The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans,* 520 U.S. at 64, 117 S.Ct. 1055. Having been granted intervention in the district court is not enough to establish standing to appeal; "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles,* 476 U.S. 54, 68, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). Where a plaintiff in federal district court must demonstrate "an 'injury in fact' – an invasion of a legally protected interest" by the defendant, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) – so too must an appellant prove his standing by establishing "a concrete injury related to the judgment" he seeks to appeal. *W. Watersheds Project v. Kraayenbrink,* 620 F.3d 1187,

[3] In a separate published opinion filed concurrently with this order, we dismiss for lack of standing the appeal on the merits in a companion case, number 10-16751, that was filed by the County of Imperial, its Board of Supervisors, and a Deputy Clerk of the County. Therefore, we may reach the merits of the constitutional questions presented only if Proponents have standing to appeal.

1196 (9th Cir.2010). States, however, "ha[ve] the power to create new interests, the invasion of which may confer standing." *Diamond,* 476 U.S. at 65 n. 17, 106 S.Ct. 1697. "In such a case, the requirements of Article III may be met." *Id.*

Proponents contend that they possess such an "interest that is created and secured by California law" – an interest in the validity of the voter-approved initiative they sponsored, which interest is "inva[ded]" by the judgment declaring Proposition 8 unconstitutional. Proponents' Br. 22. They argue that their interest as the official proponents of the initiative is different in kind than that of the citizens of California generally. If Proponents do possess such a particularized interest, they would have standing to appeal the judgment below.

Proponents also claim an alternative and independent additional basis for standing: The State of California itself has an undisputed interest in the validity of its laws, and Proponents argue that "they may directly assert the State's interest in defending the constitutionality of its laws." Proponents' Br. 19. Proponents allege they are able to represent the State's interest because they "have 'authority under state law' to defend the constitutionality of an initiative they have successfully sponsored . . . acting 'as agents of the people' of California 'in lieu of public officials' who refuse to do so." *Id.* (quoting *Karcher v. May,* 484 U.S. 72, 82, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987) and *Arizonans,* 520 U.S. at 65, 117 S.Ct. 1055). If California does grant the official proponents of an

initiative the authority to represent the State's interest in defending a voter-approved initiative when public officials have declined to do so or to appeal a judgment invalidating the initiative, then Proponents would also have standing to appeal on behalf of the State.

B

The parties agree that "Proponents' standing" – and therefore our ability to decide this appeal – "'rises or falls' on whether California law" affords them the interest or authority described in the previous section. Proponents' Reply Br. at 8 (quoting Plaintiffs' Br. 30-31). It is not sufficiently clear to us, however, whether California law does so. In the absence of controlling authority from the highest court of California on these important questions of an initiative proponent's rights and interests in the particular circumstances before us, we believe we are compelled to seek such an authoritative statement of California law. *Cf. Arizonans,* 520 U.S. at 65, 117 S.Ct. 1055 ("*[W]e are aware of no Arizona law* appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.") (emphasis added).

We are aware that in California, "All political power is inherent in the people," Cal. Const. art. II, § 1, and that to that end, Article II, section 8(a) of the California Constitution provides, "The initiative is

the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." We are also aware that the Supreme Court of California has described the initiative power as "one of the most precious rights of our democratic process," and indeed, that "the sovereign people's initiative power" is considered to be a "fundamental right." *Assoc. Home Builders v. City of Livermore,* 18 Cal.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473, 477 (1976); *Brosnahan v. Brown,* 32 Cal.3d 236, 186 Cal.Rptr. 30, 651 P.2d 274, 277 (1982); *Costa v. Super. Ct.,* 37 Cal.4th 986, 39 Cal.Rptr.3d 470, 128 P.3d 675, 686 (2006). Finally, we are aware of California law that the courts have a "solemn duty to jealously guard" that right, *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization,* 22 Cal.3d 208, 149 Cal.Rptr. 239, 583 P.2d 1281, 1302 (1978) (internal quotation marks omitted), "and to prevent any action which would improperly annul that right," *Martin v. Smith,* 176 Cal.App.2d 115, 117, 1 Cal.Rptr. 307 (1959).

The power of the citizen initiative has, since its inception, enjoyed a highly protected status in California. For example, the Legislature may not amend or repeal an initiative statute unless the People have approved of its doing so. Cal. Const. art. II, § 10(c).[4]

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[4] *See People v. Kelly,* 47 Cal.4th 1008, 103 Cal.Rptr.3d 733, 222 P.3d 186, 200 (2010) ("California's bar on legislative amendment of initiative statutes stands in stark contrast to the analogous constitutional provisions of other states. No other

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Most relevant here, "the Governor has no veto power over initiatives," *Kennedy Wholesale, Inc. v. State Bd. of Equalization,* 53 Cal.3d 245, 279 Cal.Rptr. 325, 806 P.2d 1360, 1364 n. 5 (1991), and the Attorney General possesses no veto power at all.

Although the Governor has chosen not to defend Proposition 8 in these proceedings, it is not clear whether he may, consistent with the California Constitution, achieve through a refusal to litigate what he may not do directly: effectively veto the initiative by refusing to defend it or appeal a judgment invalidating it, if no one else – including the initiative's proponents – is qualified to do so.[5] Proponents argue that such a harsh result is avoided if the balance of power provided in the California Constitution establishes that proponents of an initiative are authorized to defend that initiative, as agents of the People, in lieu of public officials who refuse to do so. Similarly, under California law, the proponents of an initiative may possess a particularized interest in defending the constitutionality of their initiative upon its enactment; the Constitution's purpose in reserving the initiative power to the People would appear to be

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state in the nation carries the concept of initiatives as 'written in stone' to such lengths as to forbid their legislatures from updating or amending initiative legislation.") (internal quotation marks and citations omitted).

[5] Here, of course, the Attorney General was also a defendant and refused to defend the initiative along with the Governor.

ill-served by allowing elected officials to nullify either proponents' efforts to "propose statutes and amendments to the Constitution" or the People's right "to adopt or reject" such propositions. Cal. Const. art. II, § 8(a). Rather than rely on our own understanding of this balance of power under the California Constitution, however, we certify the question so that the Court may provide an authoritative answer as to the rights, interests, and authority under California law of the official proponents of an initiative measure to defend its validity upon its enactment in the case of a challenge to its constitutionality, where the state officials charged with that duty refuse to execute it.

Proponents and an *amicus,* the Center for Constitutional Jurisprudence, have referred us to numerous cases in which proponents of an initiative defended against pre-election challenges to their initiatives,[6] defended against post-election challenges

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[6] *See Indep. Energy Producers Ass'n v. McPherson,* 38 Cal.4th 1020, 44 Cal.Rptr.3d 644, 136 P.3d 178 (2006) (proponents defended against challenge that subject matter of initiative was improper under the state constitution); *Legislature v. Deukmejian,* 34 Cal.3d 658, 194 Cal.Rptr. 781, 669 P.2d 17 (1983) (same); *see also Costa v.Super. Ct.,* 37 Cal.4th 986, 39 Cal.Rptr.3d 470, 128 P.3d 675 (2006) (challenge based on differences between the versions of the measure (1) submitted to the Attorney General prior to the circulation of the initiative petition, and (2) printed on the petition that was circulated for signature); *Senate v. Jones,* 21 Cal.4th 1142, 90 Cal.Rptr.2d 810, 988 P.2d 1089 (1999) (challenge based on single-subject rule for initiatives); *Brosnahan v. Eu,* 31 Cal.3d 1, 181 Cal.Rptr. 100, 641 P.2d 200 (1982) (challenge to signatures qualifying measure for

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concerning the validity of their exercise of the initiative power,[7] and proponents of an initiative were permitted to intervene to defend, alongside government defendants, the validity of their initiatives.[8] None of those cases explained, however, whether or why proponents have the right to defend the validity of their initiative upon enactment when the state officials charged with the law's enforcement refuse to

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the ballot); *Vandeleur v. Jordan,* 12 Cal.2d 71, 82 P.2d 455 (1938) (challenge based on format and content of initiative petition).

[7] *See Strauss v. Horton,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (2009) (Proponents permitted to intervene to defend Proposition 8 as a valid exercise of the initiative power to amend, rather than revise, the California Constitution); *City of Westminster v. County of Orange,* 204 Cal.App.3d 623, 251 Cal.Rptr. 511 (1988) (proponents intervened to defend against challenge that subject matter of initiative – tax levies – was improper under the state constitution); *Community Health Ass'n v. Bd. of Supervisors,* 146 Cal.App.3d 990, 194 Cal.Rptr. 557 (1983) (same).

[8] *See Amwest Surety Ins. Co. v. Wilson,* 11 Cal.4th 1243, 48 Cal.Rptr.2d 12, 906 P.2d 1112 (1995) (proponents intervened in state official's challenge to an act of the Legislature that amended, without voter approval, an initiative); *20th Century Ins. Co. v. Garamendi,* 8 Cal.4th 216, 32 Cal.Rptr.2d 807, 878 P.2d 566 (1994) (proponents intervened to defend, alongside state official, the implementation of state initiative); *Calfarm Ins. Co. v. Deukmejian,* 48 Cal.3d 805, 258 Cal.Rptr. 161, 771 P.2d 1247 (1989) (proponents intervened as "real parties in interest" to defend, alongside state officials, challenge that state initiative was unconstitutional); *People ex rel. Deukmejian v. County of Mendocino,* 36 Cal.3d 476, 204 Cal.Rptr. 897, 683 P.2d 1150 (1984) (proponents intervened to assist county officials in defending against challenge that county initiative ordinance was preempted by state law).

do so, either because proponents have a particularized state-law interest in doing so or because they are authorized to represent the State's interest in defending the initiative adopted by the People. In particular, Proponents rely on *Strauss v. Horton* as evidence that "California law authorizes Proponents to defend Proposition 8 on behalf of the State," because the Supreme Court of California "permitted *these very Proponents* to defend *this very Proposition* when the Attorney General would not do so." Proponents' Br. 20. But the Court did not explain in *Strauss* why Proponents were permitted to intervene, and under *Arizonans* we cannot simply infer from the fact that they were allowed to do so that they have either the particularized state-created interest or the authority under the state constitution or other state law to act as agents of the People that they would need to be proper sole appellants here.

We are aware of only one case presenting circumstances similar to those here (a post-enactment substantive challenge to an initiative) that provides any discussion of official proponents' rights to appeal a lower court decision regarding a ballot initiative in the absence of the government officials charged with its enforcement: *Simac Design, Inc. v. Alciati,* 92 Cal.App.3d 146, 154 Cal.Rptr. 676 (1979). We recognize that the issues in that case were in some regard dissimilar, however, and it was decided by only an intermediate court and has not been discussed in subsequent decisions of the Supreme Court of California. We therefore believe that we are required

under *Arizonans* to request a more definitive statement from the State's highest court rather than treat that decision as controlling.[9]

We do not find *Building Industry Ass'n v. City of Camarillo,* 41 Cal.3d 810, 226 Cal.Rptr. 81, 718 P.2d 68 (1986), to be controlling authority for the question certified here either. That case explained, in dicta, that if government officials failed to defend an initiative-enacted law "with vigor," then "[p]ermitting intervention by the initiative proponents . . . would serve to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." *Id.*, 226 Cal.Rptr. 81, 718 P.2d at 75. While the statement may accurately express the intent of the California Constitution, it was not a holding, and thus would not appear to satisfy the requirements of *Arizonans.*[10] In addition, because it addresses possible

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[9] We recognize that the discussion of proponents' standing in *Arizonans* is *obiter dictum. See* 520 U.S. at 65-66, 117 S.Ct. 1055. Nevertheless it is a forceful statement in a decision by a unanimous Court and we believe we would be unwise to disregard it.

[10] That the statement in *Building Industry Ass'n* is *dictum* was recognized in *City & County of San Francisco v. State,* 128 Cal.App.4th 1030, 1042 n. 9, 27 Cal.Rptr.3d 722 (2005). That case did not hold to the contrary, however. The Court of Appeal rejected as insufficient the interest in defending Proposition 22 claimed by a group formed one year after its adoption, but noted that "this case does not present the question of whether an *official* proponent of an initiative (Elec.Code, § 342) has a sufficiently direct and immediate interest to permit intervention in litigation challenging the validity of the law enacted." *Id.* at 1038, 27 Cal.Rptr.3d 722 (emphasis added). The Court's

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intervention, it does not directly address the authority or interest of initiative proponents. Consequently, although all the cases cited underscore the significant interest initiative proponents have in defending their measures in the courts, we lack an authoritative statement of California law that would establish proponents' rights to defend the validity of their initiatives, whether because they have a particularized state-created interest in doing so or because under California law they are authorized to assert the State's interest, on behalf of the People, in defending the constitutionality of an initiative measure or appealing a judgment invalidating that measure, when the state officials charged with that responsibility refuse to do so. We believe that we require such an authoritative determination by the Court before we can determine whether Proponents have standing to maintain this appeal.

C

The question we certify affects the "fundamental right" under the California Constitution of the State's electors to participate directly in the governance of their State. The answer to that question will also affect our ability to consider the fundamental rights

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subsequent decision in *In re Marriage Cases* did not answer that question either, and it described the Proposition 22 Legal Defense Fund as an "advocacy group" rather than the official proponents of the initiative. 76 Cal.Rptr.3d 683, 183 P.3d at 405-406.

under the United States Constitution asserted by Plaintiffs. We therefore pray the Court to accept our request for certification.

IV. Administrative Information

The names and addresses of lead counsel for the parties and intervenors are listed in the appendix at the end of this order. Cal. R. Ct. 8.548(b)(1). A complete listing of all counsel for parties, intervenors, and *amici curiae* is provided in the unpublished memorandum filed concurrently herewith. If the Supreme Court of California accepts this request, the Defendants-Intervenors-Appellants (Proponents) should be deemed the petitioners.

The Clerk is hereby directed to transmit forthwith to the Court the original and ten copies of this order and accompanying memorandum, as well as a certificate of service on the parties. Cal. R. Ct. 8.548(d). The clerk shall also transmit the following along with this request: ten copies of the district court Findings of Fact/Conclusions of Law/Order (704 F.Supp.2d. 921 (N.D.Cal.2010)); ten copies of the Permanent Injunction issued by the district court (docket entry 728 in No. C 09-2292-VRW (N.D.Cal. Aug. 12, 2010)); a copy of the video recording of the oral argument heard in these appeals on December 6, 2010; the briefs of the parties and intervenors in this appeal; and the briefs *amicus curiae* filed by (1) the Center for Constitutional Jurisprudence and (2) Equality California in No. 10-16696. The Clerk shall

provide additional record materials if so requested by the Supreme Court of California. Cal. R. Ct. 8.548(c).

The case is withdrawn from submission, and further proceedings in this court are stayed pending final action by the Supreme Court of California. The parties shall notify the Clerk of this Court within three days after the Court accepts or rejects certification, and again within three days if the Court renders an opinion. The panel retains jurisdiction over further proceedings.

IT IS SO ORDERED.

CONCURRENCE TO THE CERTIFICATION ORDER

REINHARDT, Circuit Judge, concurring.

Today we file two orders in the appeals regarding the constitutionality of California's Proposition 8, which provides, "Only marriage between a man and a woman is valid or recognized in California." Put differently, the proposition prohibits same-sex marriage. Marriage between individuals of the same sex is a matter that is highly controversial in this country and in which the American people have a substantial interest. Accordingly, these appeals present a question under the Fourteenth Amendment of the United States Constitution that is of importance to the entire public. Oral argument before this court was viewed on television and the Internet by more people than

have ever watched an appellate court proceeding in the history of the Nation,[1] and by innumerable law students across the country.[2]

Today's two orders involve a procedural question known as "standing." The public may wonder why that issue is of such great importance, and what the significance of our standing decisions is. For that reason, while I agree entirely with our two dispositions, both of which are filed in the names of all three of us who are considering the appeals and both of which represent our unanimous views, I believe it desirable to set forth a few explanatory remarks of my own.

The standing problem arises out of a trend in our judicial system over the past few decades. It is a trend that emphasizes technical rules over deciding cases on the merits, and indeed over the merits themselves. Our system now increasingly raises obstacles such as standing, mootness, ripeness, abstention, and other procedural bars that preclude courts from deciding cases on the merits, and as a result increasingly limits the access of individuals to

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[1] *See, e.g.,* Tim Rutten, *Monday's Must-See TV,* L.A. TIMES (Dec. 7, 2010); Ashby Jones, *On the Prop. 8 Arguments and the Cameras-in-the-Court Debate,* WALL STREET J. LAW BLOG (Dec. 7, 2010); Lisa Leff, *Televised Gay Marriage Hearing Draws Wide Audience,* ASSOCIATED PRESS (Dec. 6, 2010).

[2] *See, e.g.,* Public Information Office, U.S. Court of Appeals for the Ninth Circuit, Proposition 8 Arguments: Coming to a Law School Near You (Dec. 1, 2010), *available at* http://www.ca9.uscourts.gov/datastore/general/2010/12/01/Prop8_LawSchools.pdf.

the courts. Members of the public familiar with cases such as *Brown v. Board of Education* and *Roe v. Wade* might have thought that the constitutionality of Proposition 8 could readily be decided when a legal challenge was made to it in federal court. However, in these times, before we are free to decide such important questions the parties must often overcome difficult procedural barriers. Why Congress and the Supreme Court have required them to do so is a subject for another day, although I have made my views on the subject clear elsewhere.[3] Here the question is simply whether there is standing.

The standing problem, under current Supreme Court doctrine, affects this case in several ways, all relating to the question of whether there is an intervenor opposed to the district court's decision that has the right to appeal it. Should it be held ultimately that there is no such intervenor, the consequences are unclear, other than that we would be unable to review the district court decision on the merits; what would follow thereafter could conceivably be a matter for future decision by this court. All I can say now is that

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[3] *See, e.g.,* Stephen Reinhardt, *Life to Death: Our Constitution and How It Grows,* 44 U.C. DAVIS L.REV. 391 (2010); Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. Process,* 74 N.Y.U.L.REV. 313 (1999); Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case,* 102 YALE L.J. 205 (1992); Stephen Reinhardt, *Limiting Access to the Federal Courts: Round Up the Usual Victims,* 6 WHITTIER L.REV. 967 (1984).

the issues concerning standing were wholly avoidable in this case.

There can be little doubt that when the Plaintiffs filed this action their purpose was to establish that there was a constitutional right to gay marriage, and to do so by obtaining a decision of the Supreme Court to that effect.[4] Yet, according to what their counsel represented to us at oral argument, the complaint they filed and the injunction they obtained determines only that Proposition 8 may not be enforced in two of California's fifty-eight counties. They next contend that the injunction may not be appealed but that it may be extended to the remaining fifty-six counties, upon the filing of a subsequent lawsuit by the Attorney General in state court against the other County Clerks. Whether Plaintiffs are correct or not, it is clear that all of this would have been unnecessary and Plaintiffs could have obtained a statewide injunction had they filed an action against a broader

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[4] *See, e.g.,* Margaret Talbot, *A Risky Proposal: Is It Too Soon to Petition the Supreme Court on Gay Marriage,* THE NEW YORKER, Jan. 18, 2010, at 40; Jo Becker, *A Conservative's Road to Same-Sex Marriage Advocacy,* N.Y. TIMES, Aug. 18, 2009, at A1 ("[B]inders stuffed with briefs, case law and notes . . . are filled with arguments Mr. Olson hopes will lead to a Supreme Court decision with the potential to reshape the legal and social landscape along the lines of cases like Brown v. Board of Education and Roe v. Wade: the legalization of same-sex marriage nationwide."); Jesse McKinley, *Bush v. Gore Foes Join to Fight Gay Marriage Ban,* N.Y. TIMES, May 27, 2009, at A1 ("In the end, the two lawyers suggested, the case might take them, again, to the United States Supreme Court.").

set of defendants, a simple matter of pleading. Why preeminent counsel and the major law firms of which they are a part failed to do that is a matter on which I will not speculate.

Next, the problem of standing would have been eliminated had the Governor or the Attorney General defended the initiative, as is ordinarily their obligation. Because they believed Proposition 8 to be unconstitutional, they did not do so here. Whether their decision not to defend the initiative was proper is a matter of some debate, although I sympathize with their view that in extraordinary circumstances they possess that right. Once again, however, I express no ultimate view on the question.

In any event, had Plaintiffs sued a broader class of defendants, there clearly would have been parties who would have had standing to appeal the district court's decision, and who likely would have done so. Even had they not, it might not have been difficult for those interested in defending the proposition to find an intervenor with standing. Imperial County, one of the counties that voted in favor of Proposition 8, sought to intervene, but for some unknown reason attempted to do so through a deputy clerk who asserted her own rights instead of through the Clerk who might have asserted hers. Again, this was a most puzzling legal decision. While we have not ruled as to whether the Clerk would have had standing, we have held that a deputy clerk does not. There are forty-two counties that voted in favor of Proposition 8. Surely had those seeking an intervenor contacted other of

those counties instead of relying on Imperial County they could have found a Clerk who would have presented the issue whether a *Clerk* rather than a deputy has standing.

None of this means that ultimately there is no standing in this case. Because of a United States Supreme Court ruling regarding the availability of standing to proponents of initiatives, *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997), we have certified to the Supreme Court of California the question of an initiative proponent's authority and interests under California law. Although that matter must be decided by the Supreme Court of California, Proponents advance a strong argument on this point. Thus, in the end, there may well be standing to maintain this appeal, and the important constitutional question before us may, after all, be decided by an appellate court – ours, the Supreme Court, or both – and may apply to California as a whole, instead of by being finally decided by a trial court, or by default, in only two counties or in none. As a result, the technical barriers and the inexplicable manner in which the parties have conducted this litigation may in the end not preclude an orderly review by the federal courts of the critical constitutional question that is of interest to all Americans, and particularly to the millions of Californians who voted for Proposition 8 and the tens of thousands of same-sex couples who wish to marry in that state. In the meantime, while we await further word from the Supreme Court of California, I

hope that the American public will have a better understanding of where we stand today in this case, if not why.

APPENDIX

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681 F.3d 1065
United States Court of Appeals,
Ninth Circuit.

Kristin M. PERRY; Sandra B. Stier; Paul T. Katami; Jeffrey J. Zarrillo, Plaintiffs-Appellees,
City and County of San Francisco,
Intervenor-Plaintiff-Appellee,
v.
Edmund G. BROWN, Jr., in his official capacity as Governor of California; Kamala D. Harris, in her official capacity as Attorney General of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as Clerk-Recorder for the County of Alameda; Dean C. Logan, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants,
Hak-Shing William Tam, Intervenor-Defendant,
and
Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Mark A. Jansson; ProtectMarriage.com – Yes on 8, A Project of California Renewal, as official proponents of Proposition 8,
Intervenor-Defendants-Appellants.
Kristin M. Perry; Sandra B. Stier; Paul T. Katami; Jeffrey J. Zarrillo, Plaintiffs-Appellees,
City and County of San Francisco,
Intervenor-Plaintiff-Appellee,
v.

Edmund G. Brown, Jr., in his official capacity as Governor of California; Kamala D. Harris, in her official capacity as Attorney General of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as Clerk-Recorder for the County of Alameda; Dean C. Logan, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants,
Hak-Shing William Tam, Intervenor-Defendant,
and
Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Mark A. Jansson; ProtectMarriage.com – Yes on 8, A Project of California Renewal, as official proponents of Proposition 8, Intervenor-Defendants-Appellants.

Nos. 10-16696, 11-16577. | June 5, 2012.

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Before: STEPHEN REINHARDT, MICHAEL DALY HAWKINS, and N. RANDY SMITH, Circuit Judges.

Opinion

Order; Concurrence by Judge REINHARDT; Dissent by Judge O'SCANNLAIN.

ORDER

A majority of the panel has voted to deny the petition for rehearing en banc. Judge N.R. Smith would grant the petition.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R.App. P. 35. The petition for rehearing en banc is DENIED.

The mandate is stayed for ninety days pending the filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, the stay shall continue until final disposition by the Supreme Court.

REINHARDT and HAWKINS, Circuit Judges, concurring in the denial of rehearing en banc:

We are puzzled by our dissenting colleagues' unusual reliance on the President's views regarding the Constitution, especially as the President did not discuss the narrow issue that we decided in our opinion. We held only that under the particular circumstances relating to California's Proposition 8, that measure was invalid. In line with the rules governing judicial resolution of constitutional issues, we did not resolve the fundamental question that both sides asked us to: whether the Constitution prohibits the states from banning same-sex marriage. That question may be decided in the near future, but if so, it should be in some other case, at some other time.

O'SCANNLAIN, Circuit Judge, joined by BYBEE and BEA, Circuit Judges, dissenting from the order denying rehearing en banc:

A few weeks ago, subsequent to oral argument in this case, the President of the United States ignited a media firestorm by announcing that he supports same-sex marriage as a policy matter. Drawing less attention, however, were his comments that the Constitution left this matter to the States and that "one of the things that [he]'d like to see is – that [the] conversation continue in a respectful way."[1]

Today our court has silenced any such respectful conversation. Based on a two-judge majority's gross misapplication of *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), we have now declared that animus must have been the only *conceivable* motivation for a sovereign State to have remained committed to a definition of marriage that has existed for millennia, *Perry v. Brown,* 671 F.3d 1052, 1082 (9th Cir.2012). Even worse, we have overruled the will of seven million California Proposition 8 voters based on a reading of *Romer* that would be unrecognizable to the Justices who joined it, to those who dissented from it, and to the judges from sister circuits who have since interpreted it. We should not have so roundly trumped California's

[1] Interview by Robin Roberts, ABC News, with Barack Obama, President of the United States, in Washington, D.C. (May 9, 2012).

democratic process without at least discussing this unparalleled decision as an en banc court.

For many of the same reasons discussed in Judge N.R. Smith's excellent dissenting opinion in this momentous case, I respectfully dissent from the failure to grant the petition for rehearing en banc.