NO. 10-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.
Defendants.

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

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

DEFENDANT-INTERVENORS-APPELLANTS DENNIS HOLLINGWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM'S EMERGENCY MOTION FOR STAY PENDING APPEAL

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9th Cir. R. 27-3 Certificate

Pursuant to 9th Cir. R. 27-3, Appellants respectfully certify that their motion for a stay pending appeal is an emergency motion requiring "relief … in less than 21 days" to "avoid irreparable harm."

Appellants are official Proponents of Proposition 8 and the official Yes on 8 campaign (collectively, "Proponents"), who were permitted to intervene in this case to defend that California ballot initiative. On August 4, 2010, the district court ruled that Prop 8 is unconstitutional and ordered its enforcement permanently enjoined. The district court temporarily stayed entry of its judgment to consider Proponents' motion for stay pending appeal. On August 12, the district court denied Proponents' stay motion, lifted the temporary stay on the entry of judgment, and entered judgment. *See* Doc. No. 727, Doc. No. 728. At the same time, the district court ordered another limited stay, this time until "August 18, 2010 at 5 PM PDT" in order to "permit the court of appeals to consider the issue [of a stay pending appeal] in an orderly manner." Doc. No. 727 at 2, 11. It is thus imperative that a stay pending appeal be entered on or before August 18, 2010 at 5 p.m. to avoid the confusion and irreparable injury that would flow from the creation of a class of purported same-sex marriages. *See, e.g., Advisory: If Judge Walker Says It's OK to Get Married*, GLTNN.com, Aug. 11, 2010, *available at* http://gltnewsnow.com/2010/08/11/advisory-if-judge-walker-says-it's-ok-to-get-

married/ (reporting that West Hollywood stands ready to marry gay couples "[a]s soon as the federal judge lifts the stay," and that Los Angeles County "is prepared to take immediate action to implement the court's orders if the stay is lifted") (quotation marks omitted).

Before filing their motion, Proponents notified counsel for the other parties by email and also emailed them a service copy of the motion.

Pursuant to 9th Cir. R. 27-3(a)(3)(i), the telephone numbers, email addresses, and office addresses of the attorneys for the parties are as follows:

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Pursuant to Fed. R. App. P. 8(a)(2), Appellants respectfully seek a stay of the district court's judgment invalidating Proposition 8 pending resolution of their appeal.

INTRODUCTION

Proposition 8, a voter-initiated amendment to the California Constitution, reaffirms that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. This is the same understanding of marriage that prevailed in every State of the Union until just six years ago and still prevails in all but five states and the District of Columbia. Indeed, until quite recently "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (plurality). The district court nevertheless held that the age-old, all-but-universal opposite-sex definition of marriage embraced by Proposition 8 violates the fundamental due process right to marry rooted in "the history, tradition and practice of marriage in the United States." Doc. No. 708, Ex. A at 111.[1] It also concluded that "strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation," *id*. at 122, but that "Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause," because the traditional

[1] Citations to Exhibit A, the district court's ruling, reference the ruling's internal pagination.

definition of marriage "is simply not rationally related to a legitimate state interest," *id*. at 123.

Given that the district court did not cite a single case that had addressed these issues, one might think the court was deciding issues of first impression on a blank slate. Nothing could be further from the truth. Indeed, though the district court held that the venerable definition of marriage as the union of a man and a woman violates the Due Process and Equal Protection Clauses of the Federal Constitution, every state or federal appellate court to address the issue—including the Supreme Court in *Baker v. Nelson*, 409 U.S. 810 (1972), and this Court in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982)—has consistently rejected this conclusion. *See infra* Part II.A. The district court's conclusion that strict scrutiny applies to classifications based on sexual orientation likewise stands in stark conflict with binding authority from this Court and the unanimous conclusion of ten other federal circuit courts (all that have addressed the question) that such classifications are subject only to rational basis review. *See infra* Part II.C. And again, contrary to the district court's conclusion below, this Court, and the overwhelming majority of other courts, both state and federal, to address the issue have concluded that the opposite-sex definition of marriage rationally serves society's interest in regulating sexual relationships between men and women so that the unique procreative capacity of those relationships benefits rather than harms society, by increasing the like-

lihood that children will be born and raised in stable family units by the mothers and fathers who brought them into this world. *See infra* Part II.D.

The district court did not confront the Supreme Court's holding in *Baker*, binding authority from this Court, or any of the well established lines of authority opposed to its conclusions. It did not distinguish them. It did not explain why it believed they were wrongly decided. It did not even acknowledge their existence. It simply ignored them.

Similarly, to read the district court's confident, though often startling, factual pronouncements, one would think that reasonable minds simply cannot differ on the key legislative facts implicated by this case. Again, however, the district court simply ignored virtually everything—judicial authority, the works of eminent scholars past and present in all relevant academic fields, extensive documentary and historical evidence, and even simple common sense—opposed to its conclusions. Indeed, even though this case implicates quintessential *legislative facts*—*i.e.*, "general facts which help the tribunal decide questions of law and policy and discretion," *Langevin v. Chenango Court, Inc*., 447 F.2d 296, 300 (2d Cir. 1971) (Friendly, J.)—the district court focused almost exclusively on the oral testimony presented at trial. *See Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999) (Boudin, J.) (legislative facts "usually are not proved through trial evidence but rather by material set forth in the briefs");

Indiana H. B. R.R. Co. v. American Cyanamid Co., 916 F.2d 1174, 1182 (7th Cir. 1990) (Posner, J.) (legislative facts "more often are facts reported in books and other documents not prepared specially for litigation"). The district court's treatment of the trial testimony, moreover, was likewise egregiously selective and one-sided. The district court eagerly and uncritically embraced the highly tendentious opinions offered by Plaintiffs' experts and simply ignored important concessions by those witnesses that undermined Plaintiffs' claims. And it just as consistently refused to credit (or even qualify) the two experts offered by Proponents—the only defense experts who were willing to appear at trial after the district court's extraordinary attempts to video record and broadcast the trial proceedings. *See Hollingsworth v. Perry*, 130 S. Ct. 705 (2010).

The district court, for example, entertained no doubt whatsoever:

- that the virtually universal requirement that marriage be between persons of the opposite sexes was "never part of the historical core of the institution of marriage," Ex. A at 113, despite the extensive historical and documentary evidence, not to mention common knowledge, demonstrating exactly the opposite, *see infra* Part II.B;
- that "[t]he evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples," Ex. A at 130, despite the undeniable biological

fact that only a man and a woman can produce offspring, whether intentionally or as the unintended result of casual sexual behavior;

- that the traditional opposite-sex definition of marriage is "nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life," Ex. A at 124, despite the extensive judicial authority, scholarship, and historical evidence demonstrating that traditional opposite-sex marriage is ubiquitous, sweeping across all cultures and all times, regardless of the relative social roles of men and women, and clearly reflects marriage's abiding concern with the unique procreative potential of opposite-sex relationships, *see infra* Part II.B;
- that the "evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes," Ex. A at 127, and, moreover, that the genetic bond between a child and its mother and father "is not related to a child's adjustment outcomes," Ex. A at 96, even though other courts considering the same evidence have recognized that it is contested, inconclusive, and far from sufficient to render *irrational* the virtually universal and deeply ingrained common-sense belief that, all else being equal, children do best when raised by their own mother and father, *see infra* Part II.D.

The district court also purported to know, with certainty, the unknowable, couching predictions about the long-term future as indisputable facts. According to the district court, "the evidence shows *beyond debate*" that allowing same-sex marriage "will have no adverse effects on society or the institution of marriage." Ex. A at 125-26 (emphasis added). The evidence relied upon by the district court was the testimony of a single expert witness who expressed "great confidence" that legalizing same-sex marriage would cause no harm to the marital institution or to society, *see* Trial Tr. 657-59,[2] and who found it "informative," but nothing more, that marriage and divorce rates in Massachusetts had remained relatively stable during the four year periods before and after same-sex marriage was judicially imposed in that State. *See* Trial Tr. 654-56. Even assuming that sufficient evidence could ever be marshaled to predict with "beyond debate" certainty the long-term societal consequences of a seismic change in a venerable social institution, this scanty evidence does not begin to do so. Nor did the district court take account of any contrary evidence, including that the Plaintiffs' other expert on this subject acknowledged the obvious: that adoption of same-sex marriage is a "watershed" and "turning point" in the history of the institution that will change "the social meaning of marriage," and therefore will "unquestionably [have] real world consequences," Tr. 311-13, but that "the consequences of same-sex marriage" are

[2] Excerpts from trial transcript attached as Exhibit B.

impossible to know, because "no one predicts the future that accurately." Tr. 254. *See infra* Part II.D. Given these simple realities, California voters could reasonably decide to study further the still novel and unfolding experiment with same-sex marriage in a handful of other states before embarking on it themselves. The district court dismissed this consideration, too, as *irrational*, even though it reflects the very purpose of our federalist system.

Finally, the district court judge, ignoring this Court's directive that "the question of [voter] motivation" is not "an appropriate one for judicial inquiry," *Southern Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970), even purported to read the minds of the seven million Californians who voted for Proposition 8, and he found them filled with nothing but animosity and condescension toward gays and lesbians. "The evidence shows conclusively," according to the district court, "that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples," Ex. A at 135, and that Proposition 8's supporters were motivated by "nothing more" than "a fear or unarticulated dislike of same-sex couples" and "the belief that same-sex couples simply are not as good as opposite-sex couples." *Id.* at 132. This charge is false and unfair on its face, and leveling it against the people of California is especially cruel, for they have enacted into law some of the Nation's most sweeping and progressive protections of gays and lesbians, including a domestic partnership

law that gives same-sex couples all of the same substantive benefits and protections as marriage. And it defames not only seven million California voters, but everyone else in this Country, and elsewhere, who believes that the traditional opposite-sex definition of marriage continues to meaningfully serve the legitimate interests of society—from the current President of the United States, to a large majority of legislators throughout the Nation, both in statehouses and in the United States Congress, and even to most of the scores of state and federal judges who have addressed the issue. The truth is that a majority of Californians have simply decided not to experiment, at least for now, with the fundamental meaning of an age-old and still vital social institution. *See infra* Part II.D.

This Court need not tarry over the district court's purported fact findings, however, for its legal errors alone are palpable and destined for reversal. Further, appellate review of legislative facts such as those at issue here is "plenary," *Free v. Peters*, 12 F.3d 700, 706 (7th Cir. 1993) (Posner, J.), and it is unrestricted by the testimony and evidence considered below, for plainly "[t]here are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial," *see Dunagin v. Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality). *Cf. Lockhart v. McCree*, 476 U.S. 162, 170 n.3 (1986). Nor need this Court attempt to predict how it would resolve these disputed issues of legislative fact: where, as here, the standard of review is rational basis,

"the very admission that the facts are arguable . . . immunizes from constitutional attack the [legislative] judgment represented by" Proposition 8. *Vance v. Bradley*, 440 U.S. 93, 112 (1979). Indeed, the "legislative choice" reflected by Proposition 8 "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509 U.S. 312, 320 (1993).

For all of these reasons, as well as others elaborated more fully below, the district court's decision will almost certainly be reversed by this Court. It is thus imperative that a stay pending appeal be entered on or before August 18, 2010 at 5 p.m. Pacific Time (the time the district court's judgment is set to go into effect, *see* Doc. No. 727 at 11), to avoid the confusion and irreparable injury that would surely flow from the creation of a class of purported same-sex marriages entered in reliance on the district court's decision but in direct contravention of a lawful provision of the California Constitution and the manifest will of the people of that State.

STATEMENT

"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 an initiative statute (Proposition 22) reaffirming that understanding. *See* CAL. FAM. CODE § 308.5. In 2008, the California Supreme Court nevertheless

struck down Proposition 22 and interpreted the State constitution to require that marriage be redefined to include same-sex couples. *See In re Marriage Cases*, 183 P.3d 384. At the next opportunity, just five months later, the people of California adopted Proposition 8, restoring the venerable definition of marriage and overruling their Supreme Court.

On May 22, 2009, Plaintiffs-Appellees ("Plaintiffs"), a gay couple and a lesbian couple, filed this suit in district court, claiming that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. On May 27, Plaintiffs filed a motion for preliminary injunction.

The next day, May 28, Appellants, official proponents of Proposition 8 and the primarily formed ballot measure committee designated by the official proponents as the official Yes on 8 campaign (collectively, "Proponents"), *see* CAL. ELEC. CODE § 342; CAL. GOV. CODE § 82047.5(b), moved to intervene to defend Proposition 8. The Governor, Attorney General, and other government Defendants named in Plaintiffs' complaint refused to defend Proposition 8, and on June 30, the district court granted Proponents' motion.

Also on June 30, the district court tentatively denied Plaintiffs' preliminary injunction motion, preferring instead to hold a trial on Proposition 8's constitution-

ality. *See* Doc. No. 76 at 4.[3] At a July 2 hearing, counsel for Plaintiffs consented to this course of action, stating that "[w]e accept it, and we are prepared to go forward on that basis." July 2, 2009 Tr. of Hr'g, Doc. No. 78 at 12. Plaintiffs did not appeal the denial of their preliminary injunction motion. At the same hearing, Proponents questioned the need for a trial, pointing out that similar challenges to the traditional definition of marriage had been decided by courts without trial, and explaining that the issues at stake concerned legislative rather than adjudicative facts. *Id.* at 24-25.

On July 23, the City and County of San Francisco moved to intervene as a party plaintiff to challenge Proposition 8. The district court granted San Francisco's motion on August 19, reasoning that " [t]o the extent San Francisco claims a government interest in the controversy about the constitutionality of Proposition 8, it may represent that interest." Aug. 19, 2009 Tr. of Hearing, Doc. No. 162 at 56. The district court further directed that it would be "appropriate" for "the Attorney General and San Francisco [to] work together in presenting facts pertaining to the affected government interests." *Id.*

Also on August 19, the district court held a case management conference to

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[3] Citations to "Doc. No.__" refer to the corresponding district court docket entry and, when specified, page numbers in such citations refer to the district court's ECF pagination. Also, trial exhibits marked with an asterisk (*) are available at https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html, a website established by the district court.

schedule further proceedings in the case. In advance of the conference, the parties submitted case management statements, with Proponents explaining at length their view that a trial was unnecessary. *See* Doc. No. 139 at 9-16. The district court set the case on an expedited schedule, culminating in a January 11, 2010 trial date. *See* Doc. No. 160.

On September 9, Proponents moved for summary judgment. *See* Doc. No. 172-1. The district court heard argument on the motion on October 14, and denied it from the bench. *See* Oct. 14, 2009 Minute Entry, Doc. No. 226. Also in October, Proponents moved to realign the Attorney General as a party plaintiff in light of his joinder in Plaintiffs' opposition to Proponents' motion for summary judgment and his embrace of Plaintiffs' constitutional claims. *See* Doc. No. 216. On December 23, the district court denied the motion. *See* Doc. No. 319.

Meanwhile discovery commenced and, over Proponents' First Amendment and relevancy objections, the district court authorized sweeping discovery of "communications by and among proponents and their agents … concerning campaign strategy" and "communications by and among proponents and their agents concerning messages to be conveyed to voters, … without regard to whether the messages were actually disseminated." Doc. No. 214 at 17. In the district court's view, the First Amendment simply offered no protection against "the disclosure of campaign communications" beyond "the identities of rank-and-file volunteers and

similarly situated individuals." Doc. No. 252 at 3. This Court responded by granting Proponents' petition for a writ of mandamus, holding that "[t]he freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment," and that the discovery authorized by the district court "would have the practical effect of discouraging the exercise of First Amendment associational rights." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2009) (as amended Jan. 4, 2010).[4]

On December 15, Imperial County, its Board of Supervisors, and Deputy County Clerk Isabel Vargas (collectively, "Imperial County"), moved to intervene as defendants. Imperial County issues marriage licenses and performs marriages, and thus would be directly affected by a ruling against Proposition 8 if "the state officials bound by that ruling seek to compel statewide compliance with it (as there is every reason to expect that they would.)." Doc. No. 311 at 9. Imperial County thus sought to intervene to protect its "interests as a local government agency and ensure the possibility of appellate review of the important questions presented in this case, regardless of its outcome in" district court. *Id.* at 10. Imperial County's

[4] *See also id.* at 1158 ("The district court applied an unduly narrow conception of First Amendment privilege. Under that interpretation, associations that support or oppose initiatives face the risk that they will be compelled to disclose their internal campaign communications in civil discovery. This risk applies not only to the official proponents of initiatives and referendums, but also to the myriad social, economic, religious and political organizations that publicly support or oppose ballot measures. The potential chilling effect on political participation and debate is therefore substantial.").

motion was argued and submitted on January 6, 2010. The district court, however, did not rule on that motion until August 4, concurrent with issuing its ruling on the merits. The district court denied intervention, reasoning that "Imperial County's status as a local government does not provide it with an interest in the constitutionality of Proposition 8." Doc. No. 709 at 18.

Before trial, the district court also arranged for the trial to be publicly broadcast. At the district court's request, Chief Judge Kozinski of this Court approved the case for inclusion in a purported pilot program for recording and broadcasting district court trial proceedings, specifically providing for real-time streaming to several federal courthouses across the country and acknowledging the potential for posting the recording on the internet. *See Hollingsworth*, 130 S. Ct. at 708-09. On January 11, in response to a stay application from Proponents, the Supreme Court entered a temporary stay of any real-time streaming or broadcast of the proceedings beyond "the confines of the courthouse in which the trial is to be held." *Hollingsworth v. Perry*, 130 S. Ct. 1132 (2010). Shortly before commencement of trial, on the morning of January 11, with public broadcast of the trial still a possibility, Proponents withdrew four of their expert witnesses. *See* Doc. No. 398. On January 13, after full consideration of Proponents' application, the Supreme Court stayed broadcast of the trial, pending disposition of a timely filed petition for certiorari or mandamus. *Hollingsworth*, 130 S. Ct. at 714-15. The district court then

withdrew the case from the Ninth Circuit pilot program. *See* Trial Tr. 674.[5]

The case was tried from January 11 through January 27, and closing arguments were held on June 16. On August 3, the district court announced that it would release its ruling the next day. Proponents filed a motion asking the district court to stay its judgment pending appeal in the event the court invalidated Proposition 8. *See* Doc. No. 705.[6] On August 4, the district court issued its Findings of Fact and Conclusions of Law. *See* Ex. A. The district court held that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution because it "unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation." *See* Ex. A at 109.

In holding that the fundamental right to marry protected by the Due Process Clause includes the right to marry a person of the same sex, the district court rea-

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[5] The district court continued videotaping the proceedings on the assurance that it was solely for the court's use in chambers as an aid to the preparation of its findings of fact. *See* Trial Tr. at 754. On May 31, 2010, the district court nevertheless notified the parties that they could obtain a copy of the trial recording for potential use "during closing arguments," subject to the requirement that it be kept confidential. Doc. No. 672 at 2. Plaintiffs and San Francisco requested copies of the recordings. *See* Doc. Nos. 674, 675. Following closing arguments, Proponents asked the district court to order those copies returned, but the court permitted Plaintiffs and San Francisco to retain them, and made the recording part of the record. *See* Ex. A at 4.

[6] Proponents submitted to the district court the grounds advanced here, although Proponents' stay application in the district court necessarily did not specifically address the district court's opinion.

soned that there simply is not "any historical purpose for excluding same-sex couples from marriage," but rather that "the exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage." *Id*. at 113. The district court then asserted that Proposition 8 could not "survive the strict scrutiny required by plaintiffs' due process claim," *id*. at 117, because, as it would later explain, "Proposition 8 cannot withstand any level of scrutiny," *id*. at 123.

Addressing Plaintiffs' Equal Protection claim, the district court first held that Proposition 8 discriminates on the basis of both sex and sexual orientation, and indeed that Plaintiffs' claim of discrimination on the basis of sexual orientation "is equivalent to a claim of discrimination based on sex." *Id*. at 121. The district court next determined that gays and lesbians constitute a suspect class, reasoning that "gays and lesbians are the type of minority strict scrutiny was designed to protect." *Id*. In reaching this conclusion, the district court recognized that same-sex couples, unlike opposite-sex couples, "are incapable through sexual intercourse of producing offspring biologically related to both parties," but determined that there is no reason "why the government may need to take into account fertility when legislating." *Id*. at 122.

The district court nonetheless did not apply strict scrutiny under the Equal Protection Clause. Instead, it determined that "Proposition 8 fails to survive even

rational basis review" because "excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest." *Id*. at 122-23. As an "example of a legitimate state interest in not issuing marriage licenses to a particular group," the court identified "a scarcity of marriage licenses or county officials to issue them," but concluded that "marriage licenses in California are not a limited commodity." *Id*. at 123.

The court next turned to evaluating the legitimate interests Proponents identified for Proposition 8. The district court placed those interests into six categories, and proceeded to find each of them wanting. For example, the district court concluded that "[n]one of the interests put forth by proponents relating to parents and children is advanced by Proposition 8," reasoning that "parents' genders are irrelevant to children's developmental outcomes" and that "[s]ame-sex couples can have (or adopt) and raise children." *Id*. at 127-29. The district court also found it "beyond debate" that adoption of same-sex marriage will have no adverse societal consequences and concluded, accordingly, that California has no legitimate interest in waiting for the experience of other states with same-sex marriage to develop further before itself redefining marriage to include same-sex couples. *Id* at 125-26. And at any rate, the district court concluded that redefining marriage to include same-sex couples would not "amount[] to sweeping social change." *Id*. at 125. After deeming Proposition 8 lacking in any rational justification, the court con-

cluded that "what remains of proponents' case is an inference" that "Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples." *Id*. at 132.

As a remedy, the district court "order[ed] entry of judgment permanently enjoining [Proposition 8's] 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." *Id*. at 136. The district court also temporarily stayed entry of judgment, directing the other parties "to submit their responses on or before August 6, 2010," and further directing that at that time Proponents' stay motion would "stand submitted." *See* Doc. No. 710 at 2.

On August 12, the district court denied Proponents' stay motion, lifted the temporary stay on the entry of judgment, and entered judgment. *See* Doc. No. 727, Doc. No. 728. According to the district court, not a single stay factor weighs in Proponents' favor. *See* Doc. No. 727 at 10. At the same time, the district court ordered another limited stay, this time until "August 18, 2010 at 5 PM PDT" in order to "permit the court of appeals to consider the issue [of a stay pending appeal] in an orderly manner." *Id*. at 2, 11.

ARGUMENT

In deciding whether to issue a stay pending appeal, this Court considers: (1)

appellant's likelihood of success on the merits; (2) the likelihood of irreparable harm absent a stay; (3) the likelihood of substantial injury to other parties if a stay is issued; and (4) the public interest. *See, e.g.*, *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). As demonstrated below, each of these factors favors a stay of the district court judgment at issue here.

I. PROPONENTS HAVE STANDING TO APPEAL

Contrary to the district court's suggestion, *see* Doc. No. 727 at 3-6, Proponents' standing to appeal is no obstacle to staying the district court's judgment. Proponents have standing to appeal the district court's judgment because they have "authority under state law," *Karcher v. May*, 484 U.S. 72, 82 (1987), to defend the constitutionality of an initiative they have successfully sponsored "as agents of the people of [California] . . . in lieu of public officials" who refuse to do so, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997). In *Karcher*, the Supreme Court held that the President of the New Jersey Senate and the Speaker of the New Jersey General Assembly had standing to defend the constitutionality of a state statute when "neither the Attorney General nor the named defendants would defend the statute," 484 U.S. at 75, because New Jersey law authorized them to do so. In particular, in other cases the "New Jersey Supreme Court ha[d] 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." *Id.* at 82. Here also, the California Supreme Court has granted the application of initiative proponents to defend initiatives they have sponsored but the State Attorney General and other public officials refuse to defend—indeed it has done so with respect to these Proponents and Proposition 8. *See Strauss v. Horton*, 207 P.3d 48, 69 (Cal. 2009); Order of Nov. 19, 2008, *Strauss*, Nos. S168047, S168066, S168078 (Cal.) (Doc. No. 8-10). California law thus allows proponents to defend initiatives they have sponsored when government officials "might not do so with vigor" in order "to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." *Building Indus. Ass'n v. City of Camarillo*, 718 P.2d 68, 75 (Cal. 1986). Thus, Proponents may directly assert the State's interest in defending the constitutionality of its laws, an interest that is indisputably sufficient to confer appellate standing. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986); *Diamond v. Charles,* 476 U.S. 54, 62 (1986).[7]

California law thus distinguishes this case from *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). In that case, the Ninth Circuit held that proponents of an Arizona initiative had standing to appeal a decision striking down the

[7] Because California law thus makes clear that California does grant Proponents the authority to *defend* Proposition 8, it does not matter whether California "California grant[s] proponents the authority or the responsibility to *enforce* Proposition 8." Doc. No. 727 at 4 (emphasis added).

measure. *Id.* at 58. In dicta, the Supreme Court expressed "grave doubts" about proponents' standing. *Id*. at 66; *see also id.* ("we need not definitively resolve the issue"). Citing *Karcher*, the Court acknowledged that it had "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," but explained that it 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." *Id*. at 65. Here, by contrast, settled principles of California law, including but not limited to the very same type of legal authority relied upon by *Karcher*—a State Supreme Court decision permitting intervention—establishes Proponents' authority "as agents of the people of Arizona to defend, in lieu of public officials," the constitutionality of Proposition 8.

Proponents also have standing to appeal because of their own particularized interest in defending an initiative they have successfully sponsored, an interest that is created and secured by California law. *See, e.g*., *Diamond v. Charles*, 476 U.S. at 54, 65 n.17 (1986) (state law may "create new interests, the invasion of which may confer standing"). Under California law, the right to "propose . . . constitutional changes through the initiative process" is a "fundamental right," *Costa v. Superior Court*, 128 P.3d 675, 686 (Cal. 2006), that affords proponents a "special interest" and "particular right to be protected over and above the interest held in

common with the public at large," an interest that is "directly affected" when an initiative they have sponsored is challenged in litigation, *Connerly v. State Personnel Bd.*, 129 P.3d 1, 6-7 (Cal. 2006) (quotation marks omitted).

For all of these reasons, California courts have repeatedly allowed proponents to intervene to defend initiatives they have sponsored.[8] Indeed, when the district court permitted Proponents to intervene in this case, it expressly recognized that, "under California law … proponents of initiative measures have the standing to … defend an enactment that is brought into law by the initiative process." July 2, 2009 Tr. of Hr'g, Doc. No. 78 at 8.

In all events, proposed Defendant-Intervenors Imperial County, its Board of Supervisors, and Deputy County Clerk Isabel Vargas, have noticed an appeal from both the order denying intervention and the district court's decision on the merits. *See* Doc. No. 719; *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994) (holding that the district court "erred in denying the gov-

[8] *See, e.g.*, Petition for Extraordinary Relief, *Bennett v. Bowen*, No. S164520 (Cal. June 20, 2008) (Doc. No. 8-7); *Independent Energy Producers Ass'n v. McPherson*, 136 P.3d 178, 180 (Cal. 2006); *Senate of the State of Cal. v. Jones*, 988 P.2d 1089, 1091 (Cal. 1999); *Amwest Sur. Ins. Co. v. Wilson*, 906 P.2d 1112, 1116 (Cal. 1995); *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 581 (Cal. 1994); *Legislature of the State of California v. Eu*, 816 P.2d 1309, 1312 (Cal. 1991); *Legislature v. Deukmejian*, 669 P.2d 17, 19 (1983); *Brosnahan v. Eu*, 641 P.2d 200, 201 (Cal. 1982); *see also Sonoma County Nuclear Free Zone, '86 v. Superior Court*, 189 Cal. App. 3d 167, 173 (Cal. Ct. App. 1987) (holding that initiative proponents should have been named real parties in interest in litigation involving initiative); *Vandeleur v. Jordan*, 82 P.2d 455, 456 (Cal. 1938) (proponent permitted to intervene in pre-election challenge).

ernment's motion to intervene in a limited way for the purpose of appeal" and thus "proceed[ing] with the merits of the case"); *United States ex rel. McGough v. Covington Tech. Co.*, 967 F.2d 1391, 1392 (9th Cir. 1992) (same); 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3902.1 ("If final judgment is entered with or after the denial of intervention, however, the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed."). Under California law, Vargas is a "commissioner of civil marriage," CAL. FAM. CODE § 401(a); CAL. GOV'T CODE § 24100, charged with issuing marriage licenses in compliance with California law, CAL. FAM. CODE §§ 350(a), 352. Because the district court's order purports to control the official duties of Vargas and every other commissioner of civil marriage in the State, *see* Ex. A at 136, Vargas plainly has standing to appeal that order.[9] Ac-

[9] The district court denied Imperial County's motion to intervene on the ground that it would not have standing to appeal an adverse judgment because the County's "ministerial duties surrounding marriage are not affected by the constitutionality of Prop 8." Doc. No. 709 at 17. This assertion is patently incorrect and almost certain to be reversed on appeal. True, Imperial County's duties with respect to marriage are "ministerial," but what that means is that they are directly controlled by operation of California law, including Proposition 8. *See Lockyer v. City and County of San Francisco*, 95 P.3d 459, 472-73 (Cal. 2004). Indeed, if a same-sex couple approaches Deputy Clerk Vargas for a marriage license, the constitutionality of Proposition 8 not only affects, but directly controls Vargas's ministerial duty to grant or withhold the license. And if Vargas objected to Proposition 8's constitutionality, California law vests her with "standing to bring a court action to challenge" it. *Lockyer*, 95 P.3d at 486 n.29 (emphases omitted). It would make little sense to maintain that Vargas has standing only to challenge, but not defend, the laws that govern her official actions. Indeed, a county clerk is not only a prop-

cordingly, this Court need not reach the question of Proponents' standing at this time. *See McConnell v. FEC*, 540 U.S. 93, 233 (2003); *Diamond*, 476 U.S. at 68.

II. PROPONENTS ARE LIKELY TO SUCCEED ON THE MERITS

A. The District Court's Judgment Conflicts with Binding Supreme Court and Ninth Circuit Precedent, as well as the Overwhelming Weight of Authority of Courts Across the Nation

The district court's holding that the United States Constitution requires the people of California to redefine marriage to include same-sex relationships contravenes binding Supreme Court and Ninth Circuit precedent as well as the consistent

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er defendant in this action, but a necessary one. *See Walker v. United States*, No. 08-1314, 2008 U.S. Dist. LEXIS 107664, at *9 (S.D. Cal. Dec. 3, 2008) (dismissing suit challenging California's ban on same-sex marriage that named only the Governor and Attorney General as defendants because "Plaintiff does not allege that either the Governor or the Attorney General were charged with the duty of issuing marriage licenses or directly denied him such a license in violation of the Constitution"); *see also Bishop v. Oklahoma*, 333 Fed. App'x 361, 365 (10th Cir. 2009) (unpublished) (ordering dismissal of claims against Oklahoma Governor and Attorney General because "these claims are simply not connected to the duties of the Attorney General or the Governor. Marriage licenses are issued, fees collected, and the licenses recorded by the district court clerks."); *cf. Perez v. Sharp*, 32 Cal. 2d 711, 712 (1948) ("petitioners seek to compel the County Clerk of Los Angeles County to issue them a … license to marry").

The district court attempts to marshal *Lockyer* and it's discussion of ministerial duties to argue that "[c]ounty clerks have no discretion to disregard a legal directive from the existing state defendants," Doc. No. 709 at 9, but county clerks' legal duties with respect to marriage flow not from the ipse dixit of State officials but directly from California law. *See, e.g.,* CAL. FAM. CODE § 350(a) ("Before entering a marriage … the parties shall first obtain a marriage license from a county clerk."); *id.* § 352 ("No marriage license shall be granted if either of the applicants lacks the capacity to enter into a valid marriage."); *Id.* § 354(b) ("[I]f the clerk deems it necessary, the clerk may examine the applicants for a marriage license on oath at the time of the application.").

and all-but unanimous judgment of courts across the Country. This overwhelming body of precedent confirms that the Federal Constitution simply provides no warrant for striking down the traditional definition of marriage as reaffirmed in Prop 8.

i. The Supreme Court's Decision in *Baker* Mandates Reversal.

In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court unanimously dismissed, "for want of substantial federal question," an appeal from the Minnesota Supreme Court presenting the same questions at issue here: whether a State's refusal to authorize same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.*; *see also Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972) (Doc. No. 36-3 at 6); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The same-sex couple in *Baker* placed primary reliance on *Loving v. Virginia*, 388 U.S. 1 (1967), which had been decided five years earlier. The *Baker* Court's dismissal was a decision on the merits that is binding on lower courts on the issues presented and necessarily decided, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam), and its precedential value "extends beyond the facts of the particular case to all similar cases," *Wright v. Lane County Dist. Court*, 647 F.2d 940, 941 (9th Cir. 1981). Plaintiffs' claims are the same as those rejected in *Baker*, and the district court's decision thus conflicts with a binding Supreme Court authority. *See also Lawrence v. Texas*, 539 U.S. 558,

585 (2003) (O'Connor, J., concurring in judgment) (concluding that "preserving the traditional institution of marriage" is a "legitimate state interest").

ii. This Court's Decision in *Adams* Mandates Reversal.

This Court has likewise rejected claims that the Federal Constitution bars the government from limiting marriage to opposite-sex couples. In *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), this Court interpreted "spouse" in a federal immigration provision to exclude partners in a purported same-sex marriage, and squarely held that "Congress's decision to confer spouse status … only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements." *Id*. at 1042. This binding decision likewise forecloses Plaintiffs' claims.

iii. The District Court's Ruling Is Contrary to the All But Unanimous Conclusion of Other Courts Across the Country.

The district court's decision is also contrary to the overwhelming weight of judicial authority addressing the validity of the traditional opposite-sex definition of marriage under the Federal Constitution, including decisions by the United States Court of Appeals for the Eighth Circuit, two State courts of final resort, two intermediate State courts within this Circuit in decisions that were denied review by the States' supreme courts, and virtually every other court to address the issue. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123,

148 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 453 (Ariz. Ct. App. 2003), *review denied by Standhardt v. MCSC*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. Ct. App. 1995); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App.), *review denied by* 84 Wn.2d 1008 (Wash. 1974); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973); *Baker*, 191 N.W.2d at 187; *but see Massachusetts v. United States Dep't of Health & Human Serv.*, No. 1:09-11156-JLT, 2010 U.S. Dist. LEXIS 67927 (D. Mass. July 8, 2010); *Gill v. Office of Personnel Mgmt.*, No. 09-10309-JLT, 2010 U.S. Dist. LEXIS 67874 (D. Mass. July 8, 2010). The sheer weight of authority opposed to the district court's decision further confirms that that decision will likely be reversed on appeal.

B. <u>There Is No Fundamental Right to Same-Sex Marriage.</u>

Substantive due process "specially protects those fundamental rights and liberties which are," (1) "objectively, deeply rooted in this Nation's history and tradition," and (2) "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation marks and citations omitted). This test is intentionally strict, for "extending constitutional protection to an asserted right or liberty interest, … to a great extent, place[s] the matter outside the arena of public

debate and legislative action." *Id.* at 720; *accord District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2322 (2009). The purported right to marry a person of the same sex plainly fails this test. Indeed, same-sex marriage was unknown in the laws of this Nation before 2004, and same-sex marriages are now performed legally in only five States and the District of Columbia.[10]

The district court nevertheless attempted to redefine the established fundamental right to marry into an abstract right to marry the person of one's choice without regard to gender, asserting that "plaintiffs' relationships are consistent with the core of the history, tradition and practice of marriage in the United States." Ex. A at 113. But history and precedent make clear that the fundamental right to marry recognized by the Supreme Court is the right to enter a legally recognized union only with a person of the opposite sex.

1. With only a handful of very recent exceptions, marriage is, and always has been, understood—in California, in this Country, and indeed in every civilized society—as limited to opposite-sex unions. Indeed, until recently "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d at 8. In the words of highly respected anthro-

[10] The five States are Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire. In three of these States, same-sex marriage was imposed by judicial decree under the relevant State constitution.

pologist Claude Levi-Strauss, "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." THE VIEW FROM AFAR 40-41 (1985) (Trial Exhibit DIX63); *see also* G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988) (DIX79) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring can be found in all societies.").

The opposite-sex character of marriage has always been understood to be a central and defining feature of this institution, as uniformly reflected in dictionaries throughout the ages. Samuel Johnson, for example, defined marriage as the "act of uniting a man and woman for life." A DICTIONARY OF THE ENGLISH LANGUAGE (1755). Subsequent dictionaries have consistently defined marriage in the same way, including the first edition of Noah Webster's, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), and prominent dictionaries from the time of the framing and ratification of the Fourteenth Amendment, *see, e.g.*, NOAH WEBSTER, ETYMOLOGICAL DICTIONARY 130 (1st ed. 1869); JOSEPH E. WORCESTER, A PRIMARY DICTIONARY OF THE ENGLISH LANGUAGE (1871). A leading legal dictionary from the time of the framing and ratification of the Fourteenth Amendment, for example, defined marriage as "[a] contract, made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and

to discharge towards each other the duties imposed by law on the relation of husband and wife." JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES 105 (1868). Modern dictionaries continue to reflect the same understanding. The NEW OXFORD AMERICAN DICTIONARY (2001), for example, defines marriage as "the formal union of a man and a woman, typically recognized by law, by which they become husband and wife."[11]

Nor can this understanding plausibly be dismissed, as the court below did, as nothing more than an "artifact of a time when the genders were seen as having distinct roles in society and in marriage." Ex. A at 113. Rather, it reflects the undeniable biological reality that opposite-sex unions—and only such unions—can produce children. Marriage, thus, is "a social institution with a biological foundation." Levi-Strauss, *"Introduction," in Andre Burguiere, et al. (eds.)*, 1 A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (1996). Indeed, an overriding purpose of marriage in every society is, and has always been, to approve and regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In

[11] To be sure, some recent dictionaries, while retaining the traditional opposite-sex definition of marriage as their principle definition, also acknowledge the novel phenomenon of same-sex marriage. *See, e.g.,* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). The recent vintage of such discussions only underscores the lack of any grounding for the district court's newly minted definition of marriage in the history, legal traditions, and practices of our Country.

particular, through the institution of marriage, societies have sought to increase the likelihood that children will be born and raised in stable and enduring family units by the mothers and fathers who brought them into this world.

This understanding of the central purposes of marriage is well expressed by William Blackstone, who, speaking of the "great relations in private life," describes the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." 1 WILLIAM BLACKSTONE, COMMENTARIES *410. Blackstone then immediately turns to the relationship of "parent and child," which he describes as "consequential to that of marriage, being its principal end and design: it is by virtue of this relation that infants are protected, maintained, and educated." *Id.*; *see also id*. *35 ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children"). John Locke likewise writes that marriage "is made by a voluntary compact between man and woman," SECOND TREATISE OF CIVIL GOVERNMENT § 78 (1690), and then provides essentially the same explanation of its purposes:

> For the end of conjunction between male and female, being not barely procreation, but the continuation of the species, this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones, who are to be sustained by those that got them, till they are able to shift and provide for themselves.

SECOND TREATISE OF CIVIL GOVERNMENT § 79 (1690).

Throughout history, other leading linguists, philosophers, historians, and social scientists have likewise consistently recognized the essential connection between marriage and responsible procreation and childrearing. *See, e.g.*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (marriage "was instituted … for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children"); BERTRAND RUSSELL, MARRIAGE AND MORALS 156 (1929) ("But for children, there would be no need for any institution connected with sex. . . . [for] it is through children alone that sexual relations become of importance to society"); QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 ("Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2003) ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."). In the words of the eminent sociologist Kingsley Davis, "[t]he genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents … the social system powerfully motivates individuals to settle into a sexual union and

take care of the ensuing offspring." *The Meaning & Significance of Marriage in Contemporary Society* 7-8, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION (Kingsley Davis, ed. 1985) (DIX50).

This understanding of marriage and its purposes has also prevailed in California, just as it has everywhere else. Indeed, aside from the California Supreme Court's swiftly corrected decision in the *Marriage Cases*, California courts have repeatedly embraced this understanding, expressly recognizing that "the institution of marriage" serves "the public interest" because it "channels biological drives that might otherwise become socially destructive" and "it ensures the care and education of children in a stable environment, " *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952); that "the first purpose of matrimony, by the laws of nature and society, is procreation," *Baker v. Baker*, 13 Cal. 87, 103 (1859); and thus that "the sexual, procreative, [and] child-rearing aspects of marriage" go "to the very essence of the marriage relation," *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 184-85 (Cal. Ct. App. 2008).

In short, the understanding of marriage as a union of man and woman, uniquely involving procreation and the rearing of children by those who brought them into the world, is age-old, universal, and enduring. Indeed, this oft-expressed understanding of the origins and defining purposes of marriage was essentially undisputed prior to the very recent advent of the movement for redefining that institu-

tion to include same-sex relationships. The United States Congress, in defining marriage for all federal-law purposes as the "legal union between one man and one woman as husband and wife," 1 U.S.C. § 7, thus stood on firm historical ground when it expressly found that, "[a]t bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child rearing. Simply put, government has an interest in marriage because it has an interest in children." Committee on the Judiciary Report on DOMA, H. Rep. 104-664 at 48.

The district court brushed aside the abiding connection between marriage and "responsible procreation and child rearing," blithely asserting that "states have never required spouses to have an ability or willingness to procreate in order to marry." Ex. A at 113. The district court did not even acknowledge the wealth of precedent squarely and repeatedly holding that the animating procreative purposes of marriage are in no way belied by the fact that societies have not *conditioned* marriage on procreation or otherwise "inquired into procreative capacity or intent" on a case-by-case basis "before issuing a marriage license." Ex. A at 111. *See Standhardt*, 77 P.3d at 462; *Adams*, 486 F. Supp. at 1124-25; *In re Kandu*, 315 B.R. at 146-47; *Conaway v. Deane*, 932 A.2d 571, 633 (Md. Ct. App. 2007) (applying state constitution); *Hernandez*, 855 N.E.2d at 11 (same); *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (plurality) (same); *Morrison v. Sadler*,

821 N.E.2d 15, 27 (Ind. Ct. App. 2005) (same).[12]

Not only would such an inquiry be administratively burdensome and intolerably intrusive, it would also be unreliable. Most obviously, many opposite-sex couples who do not plan to have children may experience "accidents" or "change their minds," *Morrison*, 821 N.E.2d at 24-25, and at least some couples who do not believe they can have children may find out otherwise, given the "scientific (i.e., medical) difficulty or impossibility of securing evidence of [procreative] capacities," Monte Neil Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y 313, 345 (2008) (DIX1028). And even where infertility is clear, usually only one spouse is infertile. In such cases marriage still furthers society's interest in responsible procreation by decreasing the likelihood that the fertile spouse will engage in sexual activity with a third party, for that interest is served not only by *increasing* the likelihood that procreation occurs *within* stable family units, but also by *decreasing* the likelihood that it occurs *outside* of such units.[13] It is thus neither surprising nor

[12] *Cf. Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 475 (1981) (plurality) (rejecting as "ludicrous" argument that California's law criminalizing statutory rape for the purpose of preventing teenage pregnancies was "impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females who are, by definition, incapable of becoming pregnant"); *id.* at 480 n.10 (Stewart, J., concurring) (rejecting argument that the statute was "overinclusive because it does not allow a defense that contraceptives were used, or that procreation was for some other reason impossible").

[13] Infertile marriages also advance the institution's central procreative purposes by reinforcing social norms that heterosexual intercourse—which in most cases can produce offspring—should take place only within marriage.

significant that States have chosen to forego an Orwellian and ultimately futile attempt to police fertility and childbearing intentions and have relied instead on the common-sense presumption that opposite-sex couples are, in general, capable of procreation. *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53, 69 (2001) (Congress could properly enact "an easily administered scheme" to avoid "the subjectivity, intrusiveness, and difficulties of proof" of "an inquiry into any particular bond or tie.").[14] Again, the district court did not address any of these points, or even acknowledge the many cases embracing them.

Nor, contrary to the district court's assertion, *see* Ex. A at 112, does the elimination of the antimiscegenation laws that once blighted many States' legal landscape somehow support the district court's startling and patently inaccurate claim that "gender restrictions . . . were never part of the historical core of the institution of marriage." Ex. A at 113. As demonstrated above, with only a handful of very recent exceptions, the opposite-sex definition of marriage has for millennia been understood to be a defining characteristic of marriage in this Country and indeed in virtually every society. The same cannot be said for racial restrictions on marriage. Even in this Country, interracial marriages were legal at common law, in six

[14] California relies on a similar presumption in other areas of the law. Prior to 1990, California embraced, for purposes of its law of trusts and estates, "a conclusive presumption that a woman is capable of bearing children as long as she lives." *Fletcher v. Los Angeles Trust & Sav. Bank*, 187 P. 425, 426 (Cal. 1920). Even today, California maintains "the presumption of fertility," though the presumption is now "rebuttable." CAL. PROB. CODE ANN. § 15406.

of the thirteen original States at the time the Constitution was adopted, and in many States that at no point ever enacted antimiscegenation laws. *See, e.g.*, Irving G. Tragen, *Statutory Prohibitions Against Interracial Marriage*, 32 CAL. L. REV. 269, 269 & n.2 (1944) ("[A]t common law there was no ban on interracial marriage."); Lynn Wardle and Lincoln C. Oliphant, *In Praise of Loving: Reflections on the 'Loving Analogy' for Same-Sex Marriage*, 51 HOW. L.J. 117, 180-81 (2007) (state-by-state description of historical antimiscegenation statutes); PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 31, 253-54 (2002). And such laws have certainly never been universally understood to be a *defining* characteristic of marriage, throughout history and across civilizations. Furthermore, while the opposite-sex definition of marriage is inescapably connected with that institution's central procreative purposes, antimiscegenation laws were affirmatively *at war* with those purposes, for by prohibiting interracial marriages, they substantially *decreased* the likelihood that children of mixed-race couples would be born to and raised by their parents in stable and enduring family units. It is thus not surprising either that the Supreme Court held that such laws violated the fundamental right to marry in *Loving*, 388 U.S. at 12, or that, a scant five years later, the Supreme Court in *Baker* unanimously and summarily rejected on the merits precisely the same constitutional claims asserted by Plaintiffs here.

The elimination of the doctrine of coverture likewise provides no support for the district court's gender-blind view of the fundamental right to marry. Much like antimiscegenation laws, coverture was never universally understood to be a defining characteristic of marriage. Nor has any society's understanding of marriage as the union of a man and a woman ever turned on whether that society embraced coverture. Indeed, coverture was never part of the civil law and thus did not apply in civil law countries or even outside the common law courts in England or this Country. *See* BLACKSTONE, 1 COMMENTARIES at * 432 ("in the civil law the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries: and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband"). Nor was it ever fully established in States such as California that were originally colonized by civil law countries. *See, e.g.*, JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS 182 (1905) ("From the civil, rather than the common law, are derived those property rights of married women which are recognized in Louisiana, California, and others of the Southwestern States, originally colonized by the Spanish and French."); CAL. CONST. art. XI, § 14 (1849) (providing that property owned by a wife before marriage and acquired after marriage by gift, by will, and by inheritance "shall be her separate property" and adopting community property system for other property acquired during the marriage). Yet all of these countries and States, of course, have

historically adhered to the definition of marriage as the union of a man and a woman, and nearly all continue to do so today. And even where coverture did exist, its elimination was not accompanied by any change in the traditional opposite-sex definition of marriage. The district court's assertion that the traditional definition of marriage simply reflects "gender roles mandated through coverture," Ex. A at 112, is thus manifestly incorrect. Further, unlike antimiscegenation laws, coverture was never held to violate the fundamental right to marry. *Cf. United States v. Yazell*, 382 US 341, 352-53 (1966) ("We have no federal law relating to the protection of the separate property of married women. We should not here invent one and impose it upon the States, despite our personal distaste for coverture provisions such as those involved in this case."). Coverture was abolished gradually on a state-by-state basis, primarily by legislative rather than judicial action, and this precedent thus provides no support whatsoever for the district court's precipitate attempt to abolish once and for all the traditional definition of marriage by judicial decree.

In short, in finding that the fundamental right to marry is unqualified by gender, the district court wholly failed even to acknowledge—let alone confront—the wealth of historical, scholarly, and other support for the traditional opposite-sex understanding of marriage and its essential procreative purposes. The district court thus ignored a central and defining feature of our "Nation's history, legal traditions, and practices" with respect to marriage, disregarded the requirement of a

"careful description" of asserted fundamental rights, and abandoned "crucial guideposts for responsible decision making" under the Due Process Clause. *Glucksberg*, 521 U.S. at 721(quotation marks omitted). Indeed, as the district court's decision well illustrates, the abstract right found by the district court is not only unmoored from, but palpably at war with, what centuries of history, legal tradition, and practice have always understood marriage to be.

2. The Supreme Court's cases recognizing the fundamental right to marry likewise provide no support for the ahistorical right found by the district court. All arise in the context of marriage defined as the union of a man and a woman and plainly acknowledge the abiding connection between marriage and the procreative potential of opposite-sex relationships. *See, e.g.*, *Loving*, 388 U.S. at 12 ("Marriage is fundamental to our very existence and survival."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (The right to "marry, establish a home and bring up children … [is] essential to the orderly pursuit of happiness by free men."); *cf. Bowers v. Hardwick*, 478 U.S. 186, 215 (1986) (Stevens, J., dissenting) (describing marriage as a "license to cohabit and to produce legitimate offspring").

The Supreme Court's understanding of this fundamental right is well illustrated by *Zablocki v. Redhail*, 434 U.S. 374 (1978), a decision trumpeted by Plain-

tiffs throughout this litigation. There, the Court struck down a Wisconsin statute barring residents with child support obligations from marrying absent proof that the supported child was not and would not become a public charge. The Court reiterated the close connection between marriage and procreation, *id.* at 383 (quoting *Loving* and *Skinner*); further framed the right to marry as a right to bear and raise children "in a traditional family setting," *id.* at 386; and reasoned that the challenged law would frustrate the purposes of marriage by leading, as a "net result," to "simply more illegitimate children," *id*. at 390.

Further, when the Supreme Court decided *Baker* in 1972, it had long been well established that the right to marry is fundamental, and the historical changes in the law of marriage relied on by the district court were already largely complete. *Baker* thus necessarily establishes that the fundamental right to marry does not include the right to marry a person of the same sex.

C. Proposition 8 Is Not Subject to Heightened Equal Protection Scrutiny.

When "individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement … the Equal Protection Clause requires only a rational means to serve a legitimate end." *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985). Because only opposite-sex relationships are potentially naturally procreative and same-sex relationships categorically are not, couples in same-sex relationships are undeniably

not similarly situated to those in opposite-sex relationships with respect to the central purposes of marriage. This distinction is not only "relevant to interests the State has authority to implement," but, as demonstrated above, it forms the very foundation of what marriage has always, and everywhere, been understood to be.

The district court nevertheless concluded that Proposition 8 classifies individuals based on sexual orientation and that "strict scrutiny is the appropriate standard of review to apply to classifications based on sexual orientation." Ex. A at 122. The district court failed to acknowledge, however, that this Court's binding precedent establishes that classifications based on sexual orientation are subject only to rational basis review. *See e.g.*, *Witt v. Department of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990). Ten other federal circuit courts—all that have addressed the issue—agree. *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Bruning*, 455 F.3d at 866-67 (8th Cir. 2006); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United*

States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (applying "conventional" rational basis scrutiny to classification based on sexual orientation).

The unanimity of these decisions is no accident, for the question whether gays and lesbians satisfy the requirements for suspect-class status is not a close one. As an initial matter, homosexuality is a complex and amorphous phenomenon that defies consistent and uniform definition. As well-respected researchers have concluded, "there is currently no scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual." Lisa M. Diamond & Ritch C. Savin-Williams, *Gender and Sexual Identity*, *in* HANDBOOK OF APPLIED DEVELOPMENTAL SCIENCE 101, 102 (Richard M. Lerner et al., eds. 2003) (DIX934). In this respect, the proposed class of gays and lesbians clearly differs from other classifications—race, sex, alienage, national origin, and illegitimacy—that the Supreme Court has singled out for heightened protection.[15]

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[15] Even Plaintiffs' experts candidly acknowledge the subjective, uncertain, multifaceted definitions of the gay and lesbian population. As Professor Badgett explains, "[s]exual orientation is not an observable characteristic of an individual as sex and race usually are." M.V. LEE BADGETT, MONEY, MYTHS, & CHANGE: THE ECONOMIC LIVES OF LESBIANS & GAY MEN 47 (2001) (DIX950). Thus, she admits, one "complication is defining what one means by sexual orientation, or being gay, lesbian, bisexual, or heterosexual. Sexuality encompasses several potentially distinct dimensions of human behavior, attraction, and personal identity, as decades of research on human sexuality have shown." M.V. Lee Badgett, *Dis-*

Further, as this Court's precedent establishes, gays and lesbians also fail two essential requirements for receiving heightened scrutiny under the Equal Protection Clause: They are neither politically powerless nor are they defined by an immutable characteristic. *See High Tech Gays*, 895 F.2d at 573-74. Heightened scrutiny is reserved for groups that are "politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *Cleburne*, 473 U.S. at 445. This Court held that gays and lesbians failed this test 20 years ago, *see High Tech Gays*, 895 F.2d at 574; *see also Ben-Shalom v. Marsh*, 881 F.2d at 465-66 (same), and since that time their political power has grown exponentially.[16] Heightened scrutiny is also reserved for groups defined by "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). But according to the American Psychiatric Association, "there

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crimination Based on Sexual Orientation: A Review of the Literature in Economics and Beyond, *in* SEXUAL ORIENTATION DISCRIMINATION: AN INTERNATIONAL PERSPECTIVE 19, 21 (M.V. Lee Badgett & Jefferson Frank, eds. 2007) (DIX2654). *See also* Letitia Anne Peplau & Linda D. Garnets, *A New Paradigm for Understanding Women's Sexuality & Sexual Orientation*, 56 J. SOC. ISSUES 329, 342 (2000) (DIX1235); Laura Dean, Ilan H. Meyer, et al., *Lesbian, Gay Bisexual, and Transgender Health: Findings and Concerns*, 4 J. GAY & LESBIAN MEDICAL ASS'N 102, 135 (2000) (DIX1248).

[16] This is especially true in California. As Equality California (a leading gay and lesbian rights organization) acknowledges, since the late 1990s California has moved "from a state with extremely limited legal protections for lesbian, gay, bisexual and transgender (LGBT) individuals to a state with some of the most comprehensive civil rights protections in the nation." About Equality California, *available at* http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4025493 (last visited August 4, 2010).

are no replicated scientific studies supporting any specific biological etiology for homosexuality." American Psychiatric Association, *Sexual Orientation* (2010), *available at* http://www.healthyminds.org/ More-Info-For/GayLesbianBisexuals.aspx (last visited August 4, 2010).[17]

Despite all this, the district court flatly asserted that "gays and lesbians are the type of minority strict scrutiny was designed to protect" and that "strict scrutiny is the appropriate standard of review to apply to . . . classifications based on sexual orientation." Ex. A. at 121-22. The court below simply *ignored*—did not even mention—this Court's contrary precedent, the considered judgment of every other circuit court that has addressed the matter, and the well-established requirements for suspect classification.[18]

[17] Even Plaintiffs' experts have not suggested otherwise. Professor Herek admits that "we don't really understand the origins of sexual orientation in men or in women." Trial Tr. 2285. Professor Peplau writes that "[a]vailable evidence indicates that biological contributions to the development of sexual orientation in women are minimal." Letitia Anne Peplau, et al., *The Development of Sexual Orientation in Women*, 10 ANNUAL REV. SEX RESEARCH 70, 81 (1999) (DIX1239). Professor Peplau also acknowledges that women's sexual orientation is "fluid, malleable, shaped by life experiences, and capable of change over time." Linda D. Garnets & Letitia Anne Peplau, *A New Look at Women's Sexuality & Sexual Orientation*, in CSW UPDATE, NEWSLETTER OF THE UCLA CENTER FOR THE STUDY OF WOMEN at 5 (Dec. 2006) (DIX1010). *See* LETITIA ANNE PEPLAU, ET AL., THE DEVELOPMENT OF SEXUAL ORIENTATION IN WOMEN at 93; Trial Tr. at 2212 (Herek) (conceding that "we certainly know that people report that they have experienced a change in their sexual orientation at various points in their life").

[18] The district court's suggestion that Proposition 8 discriminates on the basis of sex, *see* Ex. A at 120-21, is also erroneous. Every other court to address this question under the Federal Constitution, and every state high court addressing this

The district court did not, however, actually apply heightened scrutiny, erroneously concluding instead that Proposition 8 could not survive even rational basis review.

D. Proposition 8 Satisfies Rational Basis Review.

Because Proposition 8 neither infringes a fundamental right nor discriminates against a protected class, it is subject to rational basis review. *See Glucksberg*, 521 U.S. at 728; *Heller v. Doe*, 509 U.S. at 319-20. Under this "paradigm of judicial restraint," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993), Proposition 8 must be "accorded a strong presumption of validity," and it "cannot run afoul of the [Fourteenth Amendment] if there is a rational relationship between [its] disparity of treatment" of same-sex and opposite-sex couples "and some legitimate government purpose." *Heller*, 509 U.S. at 320. That rational relationship "is not subject to courtroom factfinding and may be based on rational speculation

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question under a state constitution—with one superseded exception—has rejected the claim that the traditional definition of marriage discriminates on the basis of sex. *See Baker*, 409 U.S. at 810; *Wilson*, 354 F. Supp. 2d at 1307-08; *In re Kandu*, 315 B.R. at 143; *Singer*, 522 P.2d at 1192; *Marriage Cases*, 183 P.3d at 436; *Hernandez v. Robles*, 855 N.E.2d at 6; *Andersen v. King County*, 138 P.3d 963, 988-90 (Wash. 2006) (plurality); *Baker v. Vermont*, 744 A.2d at 880 n.13; *but see Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993), superseded by constitutional amendment, HAW. CONST. art. I, § 23. Simply put, defining marriage as the union of a man and a woman "does not discriminate on the basis of sex because it treats women and men equally." *Wilson*, 354 F. Supp. 2d at 1307-08. The traditional definition of marriage thus "plainly does not constitute discrimination on the basis of sex as that concept is commonly understood." *In re Marriage Cases*, 183 P.3d at 436. Again, the district court did not even acknowledge the existence of this overwhelming body of precedent, let alone address it.

unsupported by evidence or empirical data." *Id.* (quotation marks omitted). Further, "courts are compelled under rational-basis-review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* at 320-21 (quotation marks omitted). In short, Proposition 8 "must be upheld … if there is any reasonably conceivable state of facts that could provide a rational basis" for it, and Plaintiffs thus bear the burden of negating "every conceivable basis which might support it." *Id*. at 320 (quotation marks omitted). The district court's contrary conclusions notwithstanding, Plaintiffs have not come close to carrying this heavy burden.

1. As this Court recognized in *Adams*, limiting marriage to opposite-sex couples satisfies rational basis review, because same-sex relationships, unlike opposite-sex relationships, "never produce offspring." 673 F.2d at 1042-43. Contrary to the district court's naked assertions, one need not embrace particular "moral and religious views," Ex. A at 130, or "antiquated and discredited notions of gender," *id*. at 124, to grasp this distinction. It is a simple and undeniable matter of biological fact. *See Nguyen v. INS*, 533 U.S. at 73 ("to fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it"); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. at 471 (plurality) ("We need not be medical doctors to discern that . . . [o]nly women may become pregnant."). And while there are numerous

rational bases supporting Proposition 8, this simple distinction goes to the heart of the matter. Because only the relationship of a man and a woman can "produce offspring," such relationships uniquely implicate the vital societal interest in increasing the likelihood that children will be born to and raised by both their natural parents in stable, enduring family units.

While it is true that "[s]ame-sex couples can have (or adopt) and raise children," Ex. A at 128, they cannot "have" them in the same way opposite-sex couples do—as the often unintended result of even casual sexual behavior. Thus, as even Plaintiffs' counsel acknowledged, same-sex couples "don't present a threat of irresponsible procreation .... On the other hand, heterosexual couples who practice sexual behavior outside their marriage are a big threat to irresponsible procreation." Trial Tr. 3107; *see also* Doc. No. 202 at 25 (Plaintiffs' Opp. S.J.) (acknowledging that " 'responsible procreation' may provide a rational basis for the State's recognition of marriages by individuals of the opposite-sex"). And as courts have repeatedly explained, it is this unique aspect of heterosexual relationships—and the very real threat it can pose to the interests of society and to the welfare of the children born in such circumstances—that the institution of marriage has always sought to address. *See, e.g.*, *Hernandez*, 855 N.E.2d at 7; *Morrison*, 821 N.E. 2d at

24-25.[19] The district court's caricature of the State's procreative interest as "promoting opposite-sex parenting over same-sex parenting," *see* Ex. A at 127, is thus wide of the mark.[20] Likewise, the fact that California permits same-sex couples to

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[19] The threats to society from "irresponsible procreation" are plain. When parents, and particularly fathers, do not take responsibility for their children, society is forced to step in to assist, through social welfare programs and by other means. Indeed, in light of this threat, the State of California has established a grant program targeted at "reduc[ing] the number of … unwed pregnancies," recognizing that such pregnancies "affect community health and success." CAL. WELF. & INST. CODE §§ 18993, 18993.1(g). The program thus aims to "reduce the number of children growing up in homes without fathers as a result of [unwed] pregnancies" and to "[p]romote responsible parenting and the involvement of the father in the economic, social, and emotional support of his children." *Id.* § 18993.2(b). More than simply draining State resources, fatherlessness harms society by leading to increased criminal and other anti-social behavior. *See id.* § 18993.1(e) ("Boys without a father in the home are more likely to become incarcerated, unemployed, or uninvolved with their own children when they become fathers."). President Obama has emphasized these concerns: "We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison." Barack Obama, Statement at the Apostolic Church of God (June 15, 2008) (*quoted at* Trial Tr. 62), *available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html. Even Plaintiffs' expert Professor Lamb agrees "[t]hat the increase in father's absence is particularly troubling because it is consistently associated with poor school achievement, diminished involvement in the labor force, early child bearing, and heightened levels of risk-taking behavior." Trial Tr. at 1073.

[20] At any rate, the district court's startling conclusion that a child does not benefit from being raised by its own married mother and father, and that indeed it is *irrational* to believe otherwise, is plainly unwarranted. The law "historically … has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. at 602; *see also Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child."); *cf.* United Nations Convention on the Rights of the Child, Art. 7, Nov. 20, 1989, 28 I.L.M. 1456, 1460 ("as far as possible, [a child has the right] to know and be cared for by his or her par-

adopt does nothing to undermine the State's interest in increasing the likelihood that children will be born to and raised by both of their natural parents in stable, enduring family units. Adoption is society's provision for caring for children who, for whatever reason, *will not* be raised in this optimal environment. And California addresses this issue by enlarging the pool of potential adoptive parents to include not only same-sex couples but "any otherwise qualified single adult or two adults,

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ents"). Indeed, "[a]lthough social theorists . . . have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model." *Lofton v. Secretary of the Dep't of Children and Family Servs.*, 358 F.3d at 820. Courts have thus repeatedly upheld as rational the "commonsense" notion that "children will do best with a mother and father in the home." *Hernandez*, 855 N.E.2d at 8; *see also id*. at 4; *Lofton*, 358 F.3d 804, 825-26; *cf. Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) ("the optimal situation for the child is to have both an involved mother and an involved father") (quotation marks and brackets omitted).

This widely shared and deeply engrained view is backed up by social science. *See, e.g.*, Kristin Anderson Moore, et al., *Marriage From a Child's Perspective*, CHILD TRENDS RESEARCH BRIEF at 6 (June 2002) (*DIX26) ("Research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage."); *id.* at 1-2 ("[I]t is not simply the presence of two parents, … but the presence of *two biological parents* that seems to support children's development."); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, & Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 890 (2003) (DIX21) ("The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents."); *see also* Affidavit of Professor Steven Lowell Nock, *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ont. Sup. Ct. Justice 2001) (DIX131, attached as Exhibit C) (detailing flaws in same-sex parenting scholarship and studies). In light of all of this evidence, the district court's conclusions that "the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes," Ex. A at 127, and that the biological bond between a child and its mother and father "is not related to a child's adjustment outcomes," Ex. A at 96, are simply unsupportable.

married or not." *Sharon S. v. Superior Court*, 73 P.3d 554, 570 (Cal. 2003). It is simply implausible that by recognizing and providing for the practical reality that the ideal will not be achieved in all cases, a State somehow abandons its interests in promoting and increasing the likelihood of that ideal.

In sum, same-sex relationships neither advance nor threaten the State's interest in responsible procreation in the way that opposite-sex relations do. And when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, [courts] cannot say that the statute's classification … is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974); *see also Board of Trustees v. Garrett*, 531 U.S. 356, 366-67 (2001) ("where a group possesses distinguishing characteristics relevant to interests the State has authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation") (quotation marks omitted); *Vance*, 440 U.S. at 109 (law may "dr[aw] a line around those groups ... thought most generally pertinent to its objective"). Not surprisingly, "a host of judicial decisions" have relied on the unique procreative capacity of opposite-sex relationships in concluding that "the many laws defining marriage as the union of one man and one woman … are rationally related to the government interest in 'steering procreation into marriage.' " *Bruning*, 455 F.3d at 867-68; *see also Wilson*, 354 F. Supp. 2d at 1309; *In re Kandu*, 315 B.R. at 146-47; *Adams*, 486 F.

Supp. at 1124-25; *Baker*, 191 N.W.2d at 186; *Standhardt*, 77 P.3d at 462-64; *Singer*, 522 P.2d at 263-64. This is true not only of virtually every court to consider this issue under the Federal Constitution, but the majority of State courts interpreting their own constitutions as well. *See Conaway v. Deane*, 932 A.2d at 630-31; *Hernandez*, 855 N.E.2d at 7 (N.Y. 2006); *Andersen v. King County*, 138 P.3d at 982-83 (plurality); *Morrison v. Sadler*, 821 N.E.2d at 25. The district court does not even cite, let alone address, any of these decisions. Rather, the district court dismisses out of hand the notion that procreation and childrearing has anything to do with the traditional opposite-sex definition of marriage, and thus condemns as *irrational* all those who disagree, including scores of federal and state court judges, not to mention *this* Court.

2. Proposition 8 also allows California to proceed with caution when considering fundamental changes to a vitally important social institution. In the famous words of Edmund Burke, "it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages to common purposes of society or on building it up again, without having models and patterns of approved utility before his eyes." REFLECTIONS ON THE REVOLUTION IN FRANCE 90 (1790). And, contrary to the district court's conclusion that "California need not restructure any institution to allow same-sex couples to marry," Ex. A at 126, Plaintiffs' own expert Professor Nancy Cott of Harvard and oth-

er prominent supporters of same-sex marriage admit that redefining marriage to include same-sex couples would profoundly alter that institution. *See* Trial Tr. 268 (Cott). Indeed, when Massachusetts legalized same-sex marriage, Professor Cott stated publicly that "[o]ne could point to earlier watersheds [in the history of marriage], but perhaps none quite so explicit as this particular turning point." *Id.* And, as Yale Law School Professor William Eskridge, a prominent gay rights activist, explains, "enlarging the concept [of marriage] to embrace same-sex couples would necessarily transform it into something new." WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 19 (2006) (PX2342).

As an initial matter, redefining marriage in this manner would eliminate California's ability to provide special recognition and support to those relationships that uniquely further the vital interests marriage has always served. *See* BARACK OBAMA, THE AUDACITY OF HOPE 222 (2006) ("I believe that American society can choose to carve out a special place for the union of a man and a woman as the unit of child rearing most common to every culture."). Plaintiffs surely have not met their burden of proving that the voters could not have entertained any rational concern that this profound change could harm those interests. *See, e.g., Vance*, 440 U.S. at 111 ("[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not

reasonably be conceived to be true by the governmental decisionmaker.").

As Plaintiffs' own expert Professor Cott conceded, redefining marriage in this manner would also change the public meaning of marriage, and changing the public meaning of marriage will "unquestionably [have] real world consequences." Tr. 311-13 (Cott). Professor Cott also admits the self-evident truth that it is impossible to predict with confidence the long-term social consequences of same-sex marriage. Tr. 254.[21] But there is plainly a rational basis for concern that officially embracing an understanding of marriage as nothing more than a loving, committed relationship between consenting adults, unconnected to its traditional procreative purposes, would necessarily entail a significant risk of negative consequences over time to the institution of marriage and the interests it has always served. Indeed, some gay rights advocates favor same-sex marriage *because* of these likely adverse effects. They forcefully argue that "[s]ame-sex marriage is a breathtakingly subversive idea," E.J. Graff, *Retying the Knot*, THE NATION, June 24, 1996 at 12 (DIX1445), that "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart," Ellen

[21] Other prominent advocates of same-sex marriage agree that it is impossible to predict the long-term societal consequences that will flow from same-sex marriage: "Gay marriage may bring both harms and benefits. Because it has never been tried in the United States, Americans have no way to know just what would happen." JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, & GOOD FOR AMERICA 172 (2004) (DIX81). *See also id.* at 84 ("How the numbers will shake out is impossible to say.").

Willis, contribution to *"Can Marriage be Saved? A Forum,"* THE NATION, July 5, 2004 at 16-17, and that "[i]f same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers," *see* Graff, *Retying the Knot* at 12. And Professor Andrew Cherlin of Johns Hopkins University, a same-sex marriage supporter, identifies same-sex marriage as "the most recent development in the deinstitutionalization of marriage," which he defines as the "weakening of the social norms that define people's behavior in … marriage." Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 848, 850 (2004) (*DIX49). He explains that the deinstitutionalization of marriage is associated with "high levels of non-marital childbearing, cohabitation, and divorce." *Id.* at 858; *see also* Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 SOC'Y 25, 26 (2004) (*DIX60); Trial Tr. 2774-77 (Blankenhorn).

The pivotal finding of the district court that led it to reject this state interest was its unequivocal prediction that "[p]ermitting 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." Ex. A at 83-84 (Finding 55). Indeed, the district court flatly asserted that it is "beyond debate" that allowing same-sex marriage "will have no adverse effects on society or the institution of marriage." Ex. A at 125-26. The court relied on the

testimony of a lone psychologist who looked only at marriage and divorce rates in Massachusetts during the four-year periods before and after judicial imposition of same-sex marriage in that state in 2004. *See* Finding 55. Leaving aside the obvious fact that it is far too soon to draw any meaningful empirical conclusions based on the scant experience with this novel experiment, the data that is available provides little comfort to those who are concerned with preserving, let alone *renewing*, the strength of marriage as an institution. In Massachusetts, both the divorce rate and the marriage rate changed for the worse from 2004 to 2007. *See, e.g.,* CDC, Divorce Rates By State, *available at* http://www.cdc.gov/nchs/data/nvss/Divorce%20Rates%2090%2095%20and%2099-07.pdf (PX1309) *and* CDC, National Marriage and Divorce Rate Trends, *available at* http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (PX2345) (divorce rate in Massachusetts *increased* 4.5 percent while national average *decreased* by 2.7 percent). To be sure, as the district court acknowledged, divorce and marriage rates are affected by a myriad of factors, including race, employment status, and education, but this complexity only underscores the court's error in relying on statistics that do not attempt to control for any of these variables. *See* Finding 55.

In forecasting the future, the district court also turned a blind eye to the experience of the Netherlands, which instituted same-sex marriage in 2001. Data

submitted at trial demonstrated that a pre-existing downward trend in marriage rates and a pre-existing upward trend in single parent and cohabiting families with children were all exacerbated in the aftermath of redefining marriage. *See, e.g.*, Statistics Netherlands, Marriages 1950-2008, *available at* http://statline.cbs.nl/StatWeb/publication/?DM=SLEN&PA=37772ENG&D1=0-4&D2=a&LA=EN&VW=T (DIX1887); Statistics Netherlands, Unmarried Couples With Children 1995-2009, *available at* http://statline.cbs.nl/StatWeb/publication/?DM=SLEN&PA=37312ENG&D1=35,38-40&D2=a&LA=EN&HDR=G1&STB=T&VW=T (DIX2639); Statistics Netherlands, Total Single Parent Households, 1995-2009), *available at* http://statline.cbs.nl/StatWeb/publication/?DM=SLEN&PA=37312ENG&D1=31,46&D2=a&LA=EN&HDR=G1&STB=T&VW=T (DIX2426). That is not to say that same-sex marriage necessarily caused the acceleration of these negative trends, but the data at a minimum underscore the tenuous, *and debatable*, basis of the district court's predictions. Certainly, it is plainly not irrational for an informed observer acquainted with this data to have pause over the potential adverse consequences of this fundamental change to a vital social institution. To the contrary, the possibility of adverse societal consequences from adoption of same-sex marriage is not only debatable, but is being hotly debated by reasonable people of good will on both sides, in California and throughout the country.

The United States Constitution does not require California summarily to embrace changes that may weaken the vital institution of marriage or its ability to further the important interests it has traditionally served. To the contrary, our system of federalism is designed to permit "novel social … experiments" like the redefinition of marriage to be undertaken in individual States, thus minimizing the "risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As same-sex marriage advocate Jonathan Rauch recognizes, there is wisdom in "find[ing] out how gay marriage works in a few states" while "let[ting] the other states hold back." Pew Forum on Religion & Public Life, *An Argument for Same-Sex Marriage: An Interview With Jonathan Rauch*, April 24, 2008, *available at* http://pewforum.org/Gay-Marriage-and-Homosexuality/An-Argument-For-Same-Sex-Marriage-An-Interview-with-Jonathan-Rauch.aspx (DIX1035). Indeed, Plaintiffs' own expert Professor Badgett believes "that social change with respect to same-sex marriage in this country is taking place at a sensible pace at this time with more liberal states taking the lead and providing examples that other states might some day follow." Trial Tr. 1456-57. The district court's ruling improperly short-circuits this process and the "earnest and profound debate about the morality, legality, and practicality" of redefining marriage that is currently taking place in California and around the Nation. *Glucksberg*, 521 U.S. at 735; *cf. Schalk and Kopf v. Austria*, App. No. 30141/04 ¶¶

58, 61-62 (June 24, 2010) (European Court of Human Rights) (declining to "rush to substitute its own judgment in place of that of the national authorities" and holding that the right to marry secured by Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not require Council of Europe member nations to recognize same-sex relationships as marriages in the absence of a "European consensus regarding same-sex marriage").

3. Because "there are plausible reasons"—indeed compelling reasons—for California's adherence to the traditional definition of marriage, judicial "inquiry is at an end." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Proposition 8 simply "*cannot* run afoul" of the Fourteenth Amendment, *Heller*, 509 U.S. at 320 (emphasis added), for "it is a familiar practice of constitutional law that [a] court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," *Michael M.*, 450 U.S. at 472 (internal quotation marks omitted); *see also Romer*, 517 U.S. at 634-45 (drawing "inference" of animus only because the challenged law was not "directed to any identifiable legitimate purpose or discrete objective"). The district court thus erred as a matter of law in drawing the "inference" that Proposition 8 was motivated solely by an irrational and bigoted "fear or unarticulated dislike of same-sex couples" or by the "belief that same-sex couples simply are not as good as opposite-sex couples." Ex. A at 132.

At any rate, the inference of anti-gay hostility drawn by the district court is manifestly false. It defames more than seven million California voters as homophobic, a cruelly ironic charge given that California has enacted some of the Nation's most progressive and sweeping gay-rights protections, including creation of a parallel institution, domestic partnerships, affording same-sex couples all the benefits and obligations of marriage. Nor can the court's inference be limited to California, for it necessarily attributes anti-gay animus to *all* who affirm that marriage, in its age-old form as the union of a man and a woman, continues to rationally serve society's interests, including the citizens and lawmakers of the 45 States that have maintained that definition, the Congress and President that overwhelmingly passed and signed into law the federal Defense of Marriage Act, a large majority of the federal and state court judges who have addressed same-sex marriage, and the current President of the United States.[22] Even some leading advocates for same-sex marriage reject the extreme view embraced by the district court, recognizing instead that most traditional marriage supporters are "motivated by a sincere desire to do what's best for their marriages, their children, their society." RAUCH,

[22] *See* Senator Barack Obama, 2008 Human Rights Campaign Presidential Questionnaire at 3, *available at* http://www.lgbtforobama.com/pdf/Obama_HRC_questionaire.pdf ("I do not support gay marriage. Marriage has religious and social connotations, and I consider marriage to be between a man and a woman.").

GAY MARRIAGE at 7 (2004). Indeed, Plaintiffs' own witnesses acknowledged that voters had a variety of legitimate reasons for supporting Proposition 8.[23]

In all events, the district court's "inference" regarding the subjective motivations of seven million Californians is based on a tendentious description of no more than a handful of the cacophony of messages, for and against Proposition 8, that were before the electorate during the hard fought and often heated initiative campaign. Not only has this Court decreed such an inquiry off-limits, *see Southern*

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[23] Plaintiffs' witnesses acknowledged, for example, that possible motivations for supporting Proposition 8 included: "avoiding "undermin[ing] the purposes of ensuring that, insofar as possible, children would be raised by the man and woman whose sexual union brought them into the world," Trial Tr. 1302 (Sanders); a "feeling that marriage is tied to procreation," Trial Tr. 1304 (Sanders); "preserv[ing] the historical tradition of marriage in this country," Trial Tr. 1303 (Sanders); "a sincere desire to do what's best for their marriages, their children, their society," Trial Tr. 509-10 (Chauncey); and a "negative reaction to … activist judges," Trial Tr. 1772-73 (Segura). Indeed, Plaintiffs' experts have found that a sizeable proportion of gays and lesbian themselves oppose legalizing same-sex marriage. *See* Ken Cimino & Gary M. Segura, *From Radical to Conservative: Same-Sex Marriage, and the Structure of Public Attitudes* at 28, Table 5, Annual Meeting of the American Political Science Association, Washington, D.C., Aug. 31-Sept. 4, 2005, *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/4/1/5/4/p41545_index.html#get_document (DIX2649) (26.5% of self-identified LGBT individuals polled opposed legalizing same-sex marriage); Gregory M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample* at 19, SEX. RES. & SOC. POLICY (2010); *published online at* http://www.springerlink.com/content/k186244647272924/fulltext.pdf (prepublication draft *PX930) (22.1% of self-identified LGB individuals polled opposed legalizing same-sex marriage).

Alameda Spanish Speaking Org. v. Union City, 424 F.2d at 295 (explaining that the question of voter motivation is simply "not … an appropriate one for judicial inquiry."), but even if the subjective motivations of the millions of Californians who voted for Proposition 8 could somehow be discerned from the campaign advertisements that so concerned the district court, those advertisements still would provide no warrant whatsoever for impugning the good faith of the California electorate.

Thus, though the district court faulted supporters of Proposition 8 for focusing on "protecting children," Ex. A at 134, there is nothing surprising or sinister about this concern. After all, as demonstrated above, a central and abiding purpose of marriage has always been to promote responsible procreation and thereby increase the likelihood that children will be born and raised in an enduring and stable family environment by the men and women who brought them into the world. "Simply put, government has an interest in marriage because it has an interest in children." Committee on the Judiciary Report on DOMA, H. Rep. 104-664 at 48. If there were any doubt about how or why Proposition 8 would protect children, it was surely dispelled by the official ballot materials, which clearly set forth this traditional justification: "Proposition 8 protects marriage as an essential institution of society. 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." Argument

in Favor of Proposition 8, California General Election Official Voter Information Guide at 56 (Nov. 2008) (*PX1).

It is likewise unremarkable that those who strongly support the traditional understanding of marriage and its core procreative purposes—whether for secular, moral, or religious reasons—would be opposed to a different understanding being taught to their young school children in public elementary schools. The official ballot materials, again, put the point simply: same-sex marriage "is an issue for parents to discuss with their children according to their own values and beliefs." *Id*. Indeed, even parents without strong views about the purposes and definition of marriage might well reasonably fear that discussions of same-sex marriage would inevitably entail matters relating to procreation and sexuality that should be post-poned until children have reached a certain level of maturity. *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 958 (7th Cir. 2002) (Posner, J., concurring) (crediting school's "fear that if it explains sexual phenomena, including homo-sexuality, to school children … it will make children prematurely preoccupied with issues of sexuality"). The district court's dark insinuations to the contrary notwith-standing, Ex. A at 134, there is nothing coded or subliminal about these legitimate concerns.

Nor does the fact that the traditional definition of marriage finds support in religious doctrine and moral precept, no less than in its traditional secular justifica-

tions, render that definition constitutionally suspect. The district court's insistence that neither "ethical and moral principles" nor "religious beliefs" can have any legitimate role in the ongoing political debate regarding the redefinition of marriage in this Country, Ex A at 8, 133, is simply contrary to this Nation's enduring political traditions. As the Supreme Court has long recognized, marriage has "more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). And from the dawn of the American Revolution, which was preached from the pulpits, to the abolitionist preachers who rallied the anti-slavery cause, to the religious leaders who inspired the civil rights movement, religion and morality have always played a prominent and entirely proper role in American political life. *See Glucksberg*, 521 U.S. at 735 (noting that "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the *morality*, legality, and practicality of physician-assisted suicide," and permitting "this debate to continue, as it should in a democratic society") (emphasis added).

Nor can the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), be understood to have brought this long tradition to a grinding halt and to have effectively expelled from the political process Americans whose views on issues of profound social and cultural importance are entwined with their faith or

moral values.[24] *Lawrence* held only that moral disapproval of homosexual relationships could not justify a law *criminalizing* "the most private human conduct, sexual behavior, in the most private of places, the home," *id*. at 567, *see also id.* at 571, and *Lawrence* specifically said that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter, *id*. at 578. It by no means follows from *Lawrence*'s protection for privacy within the home that California may not provide official recognition and support for those relationships that uniquely further the interests that marriage has always been understood to serve. *See, e.g*., *Christian Legal Soc'y v. Martinez*, No. 08-1371, slip op. at 21 n.17 (U.S. June 28, 2010) (emphasizing "the distinction between state *prohibition* and state *support*"); *Maher v. Roe*, 432 U.S. 464, 477 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternate activity consonant with legislative policy."). The majority of Californians, like the vast majority of Americans, have made clear that they support the traditional definition of marriage. That this support may be based on a variety of grounds—religious and moral, as well as secular—does not prevent the State of California from supporting this traditional

[24] *See* Barack Obama, Civil Forum on the Presidency at 20 (August 16, 2008), transcript *available at* http://www.rickwarrennews.com/docs/Certified_Final_Transcript.pdf ("I believe that marriage is the union between a man and a woman. … [F]or me as a Christian, it's also a sacred union.")

definition with its laws.

III. IRREPARABLE HARM IS CERTAIN IN THE ABSENCE OF A STAY.

"[I]t is clear that a state suffers irreparable injury whenever an enactment of its people … is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).[25] Further, absent a stay pending appeal, same-sex couples will be permitted to marry in the counties of Alameda and Los Angeles—and possibly throughout the California. *See* Jean Elle and Jessica Greene, *Here Come the Brides?*, NBC BAY AREA, Aug. 6, 2010, *available at* http://www.nbcbayarea.com/news/ politics/Here-Come-the-Brides-100114279.html (reporting that if stay is lifted San Francisco is "preparing to perform hundreds of same-sex marriages starting today and running through the weekend" and will extend hours and keep offices "open all weekend"); Kim Lamb Gregory, *County Prepared for Ceremonies if Proposi-*

[25] In denying a stay, the district court faulted Proponents for focusing on harms its ruling would inflict on the State of California and its People. *See* Doc. No. 727 at 7. But as we have explained, the interests of the State and its People are the very interests California law authorizes Proponents to represent in this litigation, especially where as here they are not represented "with vigor" by the Attorney General and other public officials. *See supra* Part I. In addition, California grants Proponents a direct interest in the validity of Proposition 8 which would unquestionably be harmed if a stay is not entered. *See id*. Further, the district court ignored the harm that will flow absent a stay to Proposed Intervenor Imperial County, a governmental entity that will be affected by the district court's ruling and which has also appealed that ruling.

tion. 8 Stay Is Lifted, VENTURA COUNTY STAR, August 5, 2010, *available at* http://www.vcstar.com/news/2010/aug/05/county-prepared-for-ceremonies-if-prop-8-stay-is/ (reporting that "[i]f a window opens that allows same-sex couples to be married in California, the Ventura County Clerk and Recorder's Office is prepared to issue marriage licenses immediately"). Such same-sex marriages will be licensed under a cloud of uncertainty and, should Proponents succeed on appeal, will be invalid *ab initio*. Indeed, in 2004, the City and County of San Francisco precipitately issued marriage licenses to same-sex couples, resulting in approximately 4,000 purported same-sex marriages in about one month's time. *See Lockyer v. City and County of San Francisco*, 95 P.3d at 465, 467. The California Supreme Court held that San Francisco lacked authority for its actions, and ordered that "all same-sex marriages authorized, solemnized, or registered by the city officials must be considered void and of no legal effect from their inception." *Id*. at 495. Specifically, the Court ordered San Francisco to:

> (1) identify all same-sex couples to whom the officials issued marriage licenses, solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that this court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity, and that these officials have been directed to correct their records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples an opportunity to demonstrate that their marriages are not same-sex marriages and thus that the official records of their marriage licenses and marriages should not be revised, (4) offer to refund, upon request, all marriage-related fees paid by or on behalf of same-sex couples, and (5) make appropriate corrections to all relevant records.

Lockyer, 95 P.3d at 498.

Repeating that experience on a state-wide scale would inflict harm on the affected couples, place administrative burdens on the State, and create general chaos, confusion, and uncertainty. Indeed, in interpreting Proposition 8 not to apply retroactively, the California Supreme Court deemed it imperative to avoid "disrupt[ing] thousands of actions taken in reliance on the *Marriage Cases* by these same-sex couples, their employers, their creditors, and many others, throwing property rights into disarray, destroying the legal interests and expectations of thousands of couples and their families, and potentially undermining the ability of citizens to plan their lives." *Strauss*, 207 P.3d at 122.

Given the broad repercussions of invalidating purported same-sex marriages—including the effects on employers, creditors, and others, as well as same-sex couples—the district court plainly erred in focusing narrowly on harms to persons who "seek to wed a same-sex spouse." *See* Doc. No. 727 at 7.[26] Indeed, for precisely these reasons, the Attorney General (who has sided with Plaintiffs on the merits), opposed Plaintiffs' unsuccessful motion for a preliminary injunction because of "the potential harm to a *broad section of the general public* from subse-

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[26] Further, because this is not a class action, Plaintiffs are certainly not entitled to disclaim the harms to other same-sex couples that would flow from the invalidation of their marriages, despite the district court's suggestion to the contrary. See Doc. No. 727 at 7-8.

quent invalidation of possibly thousands of marriages, as well as the ongoing uncertainty about their validity that would undoubtedly persist until a *final determination by an appellate court*." Doc. No. 34 at 13 (emphasis added). While the Attorney General now opposes Proponents' request for a stay, his initial assessment of the risks of prematurely authorizing same-sex marriages is plainly correct.

Further, contrary to the district court's assertions, *see* Doc. No. 727 at 8, *Strauss* does not establish that same-sex marriages performed pursuant its injunction will be deemed valid regardless of the outcome of this case on appeal. In *Strauss*, to be sure, the California Supreme Court held that Proposition 8 did not retroactively invalidate same-sex marriages entered between that Court's decision in *In re Marriage Cases* and Proposition 8's enactment. 207 P.3d at 119-22. Those marriages, however, were upheld on the basis of the California Supreme Court's substantive interpretation of Proposition 8, not a subsequently reversed trial court decision addressing the validity of that provision. Further, if the district court is correct that marriages entered during the pendency of the appeal would remain valid even if Proposition 8 is ultimately upheld on appeal, this would only *underscore* the urgency of a stay, for Plaintiffs would otherwise have the option of mooting this case simply by marrying while the appeal is pending.

IV. OTHER PARTIES WILL NOT BE SUBSTANTIALLY INJURED BY A STAY.

In contrast, a stay will at most subject Plaintiffs to a period of additional delay pending a final determination of whether they may enter a legally recognized marriage relationship. During this time, Plaintiffs will have access to the rights and responsibilities of marriage through domestic partnership, *see* CAL. FAM. CODE § 297.5—a status Plaintiffs Stier and Perry already have, *see* Trial Tr. 153:4-6.[27]

It is not even clear that Plaintiffs would opt to marry if given the choice while appeal of this case is pending. Both Perry and Stier and Katami and Zarrillo could have gotten married before Proposition 8 was enacted in 2008, but both couples chose not to. *See* Trial Tr. 80:2-3 (Zarrillo) (He and Katami have been in a relationship for nine years.); Trial Tr. 169:16-170:11 (Stier) (explaining why she and Perry did not get married in 2008). Indeed, Plaintiff Stier admitted that she did not get married in 2008 because she did not "want any possibility of [marriage] be-

[27] The district court dismissed the availability of domestic partnerships as a means of minimizing the harms Plaintiffs might experience while this case is on appeal. *See* Doc. No. 727 at 9. Yet Plaintiffs' own experts readily acknowledged the lack of any empirical evidence that redefining marriage to include same-sex couples would provide same-sex couples and their children benefits or protection from harms above and beyond those benefits and protections already available through domestic partnerships. *See, e.g.*, Trial Tr. 608 (Peplau) (acknowledging that there are no empirical studies comparing same-sex spouses and domestic partners); Trial Tr. 961-963, 969 (Meyer) (acknowledging lack of empirical support for proposition that gays and lesbians have worse mental health outcomes in California than in any jurisdiction that recognizes same-sex marriage); Trial Tr. 1184 (Lamb) (acknowledging lack of empirical studies comparing children of married same-sex spouses with children of California same-sex domestic partners); Trial Tr. 2302 (Herek) (acknowledging lack of empirical support for link between traditional definition of marriage and hate crimes against gays and lesbians).

ing taken away from us" and thus told Perry to "wait until we know for sure that we can be permanently married." Trial Tr. 170:4-6. Such certainty, of course, will not be available in this case until all avenues for appeal have been exhausted. Further confirming their lack of urgency, Plaintiffs did not appeal the district court's denial of their preliminary injunction motion, and now more than a year has gone by while the parties conducted discovery, participated in trial, and waited for the district court's decision. And even now, Plaintiffs have not represented that they even desire to marry immediately. Indeed, in opposing Proponents' request for a stay, they have taken the position that "[w]hether Plaintiffs marry immediately or at a time of their choosing could not be less relevant." Doc. No. 718 at 10.[28]

V. THE PUBLIC INTEREST WEIGHS IN FAVOR OF A STAY.

"The State of California and its citizens have already confronted the uncertainty that results when marriage licenses are issued in a gender-neutral manner prior to the issuance of a final, judicial determination of legal and constitutional issues. The State and its citizens have a profound interest in not having to confront that uncertainty again." Administration's Opposition to Plaintiffs' Motion for Preliminary Injunction, Doc. No. 33 at 2. While the Governor now contends that the

[28] The district court also purported to factor into its harms analysis the impact of Proposition 8 on "gays and lesbians in California" other than Plaintiffs. Doc. No. 727 at 9. Yet, as noted above, Plaintiffs have not brought this case as a class action, and they therefore do not represent the interests of anyone other than themselves.

district court's yet-to-be-reviewed decision resolves this uncertainty, he is plainly wrong.

Further, by enacting Proposition 22 in 2000 and Proposition 8 in 2008, the people of California have declared clearly and consistently that the public interest lies with preserving the definition of marriage as the union of a man and a woman. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("[T]he district court should give due weight to the serious consideration of the public interest in this case that has already been undertaken by the responsible state officials in Washington, who unanimously passed the rules that are the subject of this appeal."); *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d at 1126-27 ("[O]ur consideration of the public interest is constrained in this case, for the responsible public officials in San Francisco have already considered that interest. Their conclusion is manifested in the Ordinance that is the subject of this appeal."). And while it is always "in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy," *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (quotation marks omitted), such considerations are particularly weighty here, as "it is difficult to imagine an area more fraught with sensitive social policy considerations than" regulation of marriage, *Smelt v. County of Orange, California*, 447 F.3d 673, 681 (9th Cir. 2006). The people of California

have expressed their "concerns and beliefs about this sensitive area" and "have defined what marriage is": "a consensual, contractual, personal relationship between a man and a woman, which is solemnized." *Id*. at 680 (quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court should stay the district court's judgment pending appeal.

Dated: August 12, 2010

Respectfully submitted,

s/ Charles J. Cooper
Charles J. Cooper
Attorney for Appellants

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 10-16696

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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Signature of Attorney or Unrepresented Litigant: s/Charles J. Cooper

("s/" plus typed name is acceptable for electronically-filed documents)

Date: August 12, 2010

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

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Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF 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

PRETRIAL PROCEEDINGS AND TRIAL EVIDENCE

CREDIBILITY DETERMINATIONS

FINDINGS OF FACT

CONCLUSIONS OF LAW

ORDER

United States District Court
For the Northern District of California

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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

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1 between a man and a woman." In re Marriage Cases, 183 P3d 384, 407
2 (Cal 2008).
3 In February 2004, the mayor of San Francisco instructed
4 county officials to issue marriage licenses to same-sex couples.
5 The following month, the California Supreme Court ordered San
6 Francisco to stop issuing such licenses and later nullified the
7 marriage licenses that same-sex couples had received. See Lockyer
8 v City & County of San Francisco, 95 P3d 459 (Cal 2004). The court
9 expressly avoided addressing whether Proposition 22 violated the
10 California Constitution.
11 Shortly thereafter, San Francisco and various other
12 parties filed state court actions challenging or defending
13 California's exclusion of same-sex couples from marriage under the
14 state constitution. These actions were consolidated in San
15 Francisco superior court; the presiding judge determined that, as a
16 matter of law, California's bar against marriage by same-sex
17 couples violated the equal protection guarantee of Article I
18 Section 7 of the California Constitution. In re Coordination
19 Proceeding, Special Title [Rule 1550(c)], 2005 WL 583129 (March 14,
20 2005). The court of appeal reversed, and the California Supreme
21 Court granted review. In May 2008, the California Supreme Court
22 invalidated Proposition 22 and held that all California counties
23 were required to issue marriage licenses to same-sex couples. See
24 In re Marriage Cases, 189 P3d 384. From June 17, 2008 until the
25 passage of Proposition 8 in November of that year, San Francisco
26 and other California counties issued approximately 18,000 marriage
27 licenses to same-sex couples.
28 \\

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1 After the November 2008 election, opponents of
2 Proposition 8 challenged the initiative through an original writ of
3 mandate in the California Supreme Court as violating the rules for
4 amending the California Constitution and on other grounds; the
5 California Supreme Court upheld Proposition 8 against those
6 challenges. Strauss v Horton, 207 P3d 48 (Cal 2009). Strauss
7 leaves undisturbed the 18,000 marriages of same-sex couples
8 performed in the four and a half months between the decision in In
9 re Marriage Cases and the passage of Proposition 8. Since
10 Proposition 8 passed, no same-sex couple has been permitted to
11 marry in California.
12
13 PROCEDURAL HISTORY OF THIS ACTION
14 Plaintiffs challenge the constitutionality of Proposition
15 8 under the Fourteenth Amendment, an issue not raised during any
16 prior state court proceeding. Plaintiffs filed their complaint on
17 May 22, 2009, naming as defendants in their official capacities
18 California's Governor, Attorney General and Director and Deputy
19 Director of Public Health and the Alameda County Clerk-Recorder and
20 the Los Angeles County Registrar-Recorder/County Clerk
21 (collectively "the government defendants"). Doc #1. With the
22 exception of the Attorney General, who concedes that Proposition 8
23 is unconstitutional, Doc #39, the government defendants refused to
24 take a position on the merits of plaintiffs' claims and declined to
25 defend Proposition 8. Doc #42 (Alameda County), Doc #41 (Los
26 Angeles County), Doc #46 (Governor and Department of Public Health
27 officials).
28 \\

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1 Defendant-intervenors, the official proponents of
2 Proposition 8 under California election law ("proponents"), were
3 granted leave in July 2009 to intervene to defend the
4 constitutionality of Proposition 8. Doc #76. On January 8, 2010,
5 Hak-Shing William Tam, an official proponent and defendant-
6 intervenor, moved to withdraw as a defendant, Doc #369; Tam's
7 motion is denied for the reasons stated in a separate order filed
8 herewith. Plaintiff-intervenor City and County of San Francisco
9 ("CCSF" or "San Francisco") was granted leave to intervene in
10 August 2009. Doc #160 (minute entry).
11 The court denied plaintiffs' motion for a preliminary
12 injunction on July 2, 2009, Doc #77 (minute entry), and denied
13 proponents' motion for summary judgment on October 14, 2009, Doc
14 #226 (minute entry). Proponents moved to realign the Attorney
15 General as a plaintiff; the motion was denied on December 23, 2009,
16 Doc #319. Imperial County, a political subdivision of California,
17 sought to intervene as a party defendant on December 15, 2009, Doc
18 #311; the motion is denied for the reasons addressed in a separate
19 order filed herewith.
20 The parties disputed the factual premises underlying
21 plaintiffs' claims and the court set the matter for trial. The
22 action was tried to the court January 11-27, 2010. The trial
23 proceedings were recorded and used by the court in preparing the
24 findings of fact and conclusions of law; the clerk is now DIRECTED
25 to file the trial recording under seal as part of the record. The
26 parties may retain their copies of the trial recording pursuant to
27 the terms of the protective order herein, see Doc #672.
28 \\

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1 Proponents' motion to order the copies' return, Doc #698, is
2 accordingly DENIED.
3
4 PLAINTIFFS' CASE AGAINST PROPOSITION 8
5 The Due Process Clause provides that no "State [shall]
6 deprive any person of life, liberty, or property, without due
7 process of law." US Const Amend XIV, § 1. Plaintiffs contend that
8 the freedom to marry the person of one's choice is a fundamental
9 right protected by the Due Process Clause and that Proposition 8
10 violates this fundamental right because:
11 1. It prevents each plaintiff from marrying the person of his or her choice;
12
13 2. The choice of a marriage partner is sheltered by the Fourteenth Amendment from the state's unwarranted usurpation of that choice; and
14
15 3. California's provision of a domestic partnership — a status giving same-sex couples the rights and
16 responsibilities of marriage without providing marriage — does not afford plaintiffs an adequate substitute for
17 marriage and, by disabling plaintiffs from marrying the person of their choice, invidiously discriminates,
18 without justification, against plaintiffs and others who seek to marry a person of the same sex.
19 The Equal Protection Clause provides that no state shall
20 "deny to any person within its jurisdiction the equal protection of
21 the laws." US Const Amend XIV, § 1. According to plaintiffs,
22 Proposition 8 violates the Equal Protection Clause because it:
23 1. Discriminates against gay men and lesbians by denying
24 them a right to marry the person of their choice whereas heterosexual men and women may do so freely; and
25 2. Disadvantages a suspect class in preventing only gay men
26 and lesbians, not heterosexuals, from marrying.
27 Plaintiffs argue that Proposition 8 should be subjected to
28 heightened scrutiny under the Equal Protection Clause because gays

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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; <u>it's not an attack on the gay lifestyle</u>. * * * <u>It protects our children</u> 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;
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.

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

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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 US 558, 571 (2003); see also Everson v Board of Education of Ewing Township, 330 US 1, 15 (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

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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

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1 interest in regulating marriage." Tr 3038:7-8. When asked to
2 identify the evidence at trial that supported this contention,
3 proponents' counsel replied, "you don't have to have evidence of
4 this point." Tr 3037:25-3040:4.

5 Proponents' procreation argument, distilled to its
6 essence, is as follows: the state has an interest in encouraging
7 sexual activity between people of the opposite sex to occur in
8 stable marriages because such sexual activity may lead to pregnancy
9 and children, and the state has an interest in encouraging parents
10 to raise children in stable households. Tr 3050:17-3051:10. The
11 state therefore, the argument goes, has an interest in encouraging
12 all opposite-sex sexual activity, whether responsible or
13 irresponsible, procreative or otherwise, to occur within a stable
14 marriage, as this encourages the development of a social norm that
15 opposite-sex sexual activity should occur within marriage. Tr
16 3053:10-24. Entrenchment of this norm increases the probability
17 that procreation will occur within a marital union. Because same-
18 sex couples' sexual activity does not lead to procreation,
19 according to proponents the state has no interest in encouraging
20 their sexual activity to occur within a stable marriage. Thus,
21 according to proponents, the state's only interest is in opposite-
22 sex sexual activity.
23

24 TRIAL PROCEEDINGS AND SUMMARY OF TESTIMONY

25 The parties' positions on the constitutionality of
26 Proposition 8 raised significant disputed factual questions, and
27 for the reasons the court explained in denying proponents' motion
28 //

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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:

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

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

21 Perry testified that marriage would provide her what she
22 wants most in life: a stable relationship with Stier, the woman she
23 loves and with whom she has built a life and a family. To Perry,
24 marriage would provide access to the language to describe her
25 relationship with Stier: "I'm a 45-year-old woman. I have been in
26 love with a woman for 10 years and I don't have a word to tell
27 anybody about that." Tr 154:20-23. Stier explained that marrying
28 Perry would make them feel included "in the social fabric." Tr

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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.

\\

1 Cott explained that marriage as a social institution
2 encompasses a socially approved sexual union and an affective
3 relationship and, for the state, forms the basis of stable
4 households and private support obligations.
5 Both Cott and Blankenhorn addressed marriage as a
6 historical institution. Cott pointed to consistent historical
7 features of marriage, including that civil law, as opposed to
8 religious custom, has always been supreme in regulating and
9 defining marriage in the United States, Tr 195:9-15, and that one's
10 ability to consent to marriage is a basic civil right, Tr 202:2-5.
11 Blankenhorn identified three rules of marriage (discussed further
12 in the credibility determinations, section I below), which he
13 testified have been consistent across cultures and times: (1) the
14 rule of opposites (the "man/woman" rule); (2) the rule of two; and
15 (3) the rule of sex. Tr 2879:17-25.
16 Cott identified historical changes in the institution of
17 marriage, including the removal of race restrictions through court
18 decisions and the elimination of coverture and other gender-based
19 distinctions. Blankenhorn identified changes that to him signify
20 the deinstitutionalization of marriage, including an increase in
21 births outside of marriage and an increasing divorce rate.
22 Both Cott and Blankenhorn testified that California
23 stands to benefit if it were to resume issuing marriage licenses to
24 same-sex couples. Blankenhorn noted that marriage would benefit
25 same-sex couples and their children, would reduce discrimination
26 against gays and lesbians and would be "a victory for the worthy
27 ideas of tolerance and inclusion." Tr 2850:12-13. Despite the
28 multitude of benefits identified by Blankenhorn that would flow to

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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.

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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.

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1 Lamb and Blankenhorn disagreed on the importance of a
2 biological link between parents and children. Blankenhorn
3 emphasized the importance of biological parents, relying on studies
4 comparing children raised by married, biological parents with
5 children raised by single parents, unmarried mothers, step families
6 and cohabiting parents. Tr 2769:14-24 (referring to DIX0026
7 Kristin Anderson Moore, Susan M Jekielek, and Carol Emig, Marriage
8 from a Child's Perspective: How Does Family Structure Affect
9 Children, and What Can We Do about It, Child Trends (June 2002));
10 Tr 2771:1-13 (referring to DIX0124 Sara McLanahan and Gary
11 Sandefur, Growing Up with a Single Parent: What Hurts, What Helps
12 (Harvard 1994)). As explained in the credibility determinations,
13 section I below, none of the studies Blankenhorn relied on isolates
14 the genetic relationship between a parent and a child as a variable
15 to be tested. Lamb testified about studies showing that adopted
16 children or children conceived using sperm or egg donors are just
17 as likely to be well-adjusted as children raised by their
18 biological parents. Tr 1041:8-17. Blankenhorn agreed with Lamb
19 that adoptive parents "actually on some outcomes outstrip
20 biological parents in terms of providing protective care for their
21 children." Tr 2795:3-5.

22 Several experts testified that the State of California
23 and California's gay and lesbian population suffer because domestic
24 partnerships are not equivalent to marriage. Badgett explained
25 that gays and lesbians are less likely to enter domestic
26 partnerships than to marry, meaning fewer gays and lesbians have
27 the protection of a state-recognized relationship. Both Badgett
28 and San Francisco economist Edmund Egan testified that states

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1 receive greater economic benefits from marriage than from domestic
2 partnerships. Meyer testified that domestic partnerships actually
3 stigmatize gays and lesbians even when enacted for the purpose of
4 providing rights and benefits to same-sex couples. Cott explained
5 that domestic partnerships cannot substitute for marriage because
6 domestic partnerships do not have the same social and historical
7 meaning as marriage and that much of the value of marriage comes
8 from its social meaning. Peplau testified that little of the
9 cultural esteem surrounding marriage adheres to domestic
10 partnerships.

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

20 The experts' testimony on domestic partnerships is
21 consistent with the testimony of plaintiffs, who explained that
22 domestic partnerships do not satisfy their desire to marry. Stier,
23 who has a registered domestic partnership with Perry, explained
24 that "there is certainly nothing about domestic partnership * * *
25 that indicates the love and commitment that are inherent in
26 marriage." Tr 171:8-11. Proponents did not challenge plaintiffs'
27 experts on the point that marriage is a socially superior status to
28 domestic partnership; indeed, proponents stipulated that "[t]here

1 is a significant symbolic disparity between domestic partnership
2 and marriage." Doc #159-2 at 6.
3 Proponents' cross-examinations of several experts
4 challenged whether people can be categorized based on their sexual
5 orientation. Herek, Meyer and Badgett responded that sexual
6 orientation encompasses behavior, identity and attraction and that
7 most people are able to answer questions about their sexual
8 orientation without formal training. According to the experts,
9 researchers may focus on one element of sexual orientation
10 depending on the purpose of the research and sexual orientation is
11 not a difficult concept for researchers to apply.
12 As explained in the credibility determinations, section I
13 below, and the findings of fact, section II below, the testimony
14 shows that California has no interest in differentiating between
15 same-sex and opposite-sex unions.
16
17
18 WHETHER THE EVIDENCE SHOWS PROPOSITION 8 ENACTED A PRIVATE MORAL VIEW WITHOUT ADVANCING A LEGITIMATE GOVERNMENT INTEREST
19 The testimony of several witnesses disclosed that a
20 primary purpose of Proposition 8 was to ensure that California
21 confer a policy preference for opposite-sex couples over same-sex
22 couples based on a belief that same-sex pairings are immoral and
23 should not be encouraged in California.
24 Historian George Chauncey testified about a direct
25 relationship between the Proposition 8 campaign and initiative
26 campaigns from the 1970s targeting gays and lesbians; like earlier
27 campaigns, the Proposition 8 campaign emphasized the importance of
28 protecting children and relied on stereotypical images of gays and

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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 1man1woman.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.
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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.

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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

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1 been gay for "as long as [he] can remember." (Tr 91:17-92:2:
2 "I struggled with it quite a bit. Being surrounded by what
3 seemed everything heterosexual * * * you tend to try and want
4 to fit into that.") Katami described how the Proposition 8
5 campaign messages affected him. (Tr 97:1-11: "[P]rotect the
6 children is a big part of the [Proposition 8] campaign. And
7 when I think of protecting your children, you protect them
8 from people who will perpetrate crimes against them, people
9 who might get them hooked on a drug, a pedophile, or some
10 person that you need protecting from. You don't protect
11 yourself from an amicable person or a good person. You
12 protect yourself from things that can harm you physically,
13 emotionally. And so insulting, even the insinuation that I
14 would be part of that category.")
15
16 3. Kristin Perry, a plaintiff, testified about her relationship
17 with Stier. (Tr 139:16-17; 140:13-14: Stier is "maybe the
18 sparkliest person I ever met. * * * [T]he happiest I feel is
19 in my relationship with [Stier.]") Perry described why she
20 wishes to marry. (Tr 141:22-142:1: "I want to have a stable
21 and secure relationship with her that then we can include our
22 children in. And I want the discrimination we are feeling
23 with Proposition 8 to end and for a more positive, joyful part
24 of our lives to * * * begin.") Perry described the reason she
25 and Stier registered as domestic partners. (Tr 153:16-17:
26 "[W]e are registered domestic partners based on just legal
27 advice that we received for creating an estate plan.")
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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

1 sexual orientation from homosexual to heterosexual. (Tr
2 1521:20: "I knew I was gay. I knew that could not be
3 changed.") Kendall described the mental anguish he endured
4 because of his family's disapproval of his sexual orientation.
5 (Tr 1508:9-10, 1511:2-16: "I remember my mother looking at me
6 and telling me that I was going to burn in hell. * * * [M]y
7 mother would tell me that she hated me, or that I was
8 disgusting, or that I was repulsive. Once she told me that
9 she wished she had had an abortion instead of a gay son.")
10
11 8. Hak-Shing William Tam, an official proponent of Proposition 8
12 and an intervening defendant, was called as an adverse witness
13 and testified about messages he disseminated during the
14 Proposition 8 campaign. (Tr 1889:23-25: "Q: Did you invest
15 substantial time, effort, and personal resources in
16 campaigning for Proposition 8? A: Yes.")
17
18 Plaintiffs called nine expert witnesses. As the
19 education and experience of each expert show, plaintiffs' experts
20 were amply qualified to offer opinion testimony on the subjects
21 identified. Moreover, the experts' demeanor and responsiveness
22 showed their comfort with the subjects of their expertise. For
23 those reasons, the court finds that each of plaintiffs' proffered
24 experts offered credible opinion testimony on the subjects
25 identified.
26
27 1. Nancy Cott, a historian, testified as an expert in the history
28 of marriage in the Untied States. Cott testified that

1 marriage has always been a secular institution in the United
2 States, that regulation of marriage eased the state's burden
3 to govern an amorphous populace and that marriage in the
4 United States has undergone a series of transformations since
5 the country was founded.

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

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

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

12 d. Tr 186:5-14: Cott devoted a semester in 1998 to researching and teaching a course at Yale University in
13 the history of marriage in the United States;

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

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

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

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

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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;

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

3 5. Letitia Anne Peplau, a psychologist, was qualified as an
4 expert on couple relationships within the field of psychology.
5 Peplau offered four opinions: (1) for adults who choose to
6 enter marriage, that marriage is often associated with many
7 important benefits; (2) research has shown remarkable
8 similarities between same-sex and opposite-sex couples; (3) if
9 same-sex couples are permitted to marry, they will likely
10 experience the same benefits from marriage as opposite-sex
11 couples; and (4) permitting same-sex marriage will not harm
12 opposite-sex marriage. Tr 574:6-19.

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

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

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

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

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

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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.

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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;

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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

1 "were extremely concerned about their personal safety, and did not
2 want to appear with any recording of any sort, whatsoever." Tr
3 1094:21-23.

4 The timeline shows, however, that proponents failed to
5 make any effort to call their witnesses after the potential for
6 public broadcast in the case had been eliminated. The Supreme
7 Court issued a temporary stay of transmission on January 11, 2010
8 and a permanent stay on January 13, 2010. See Hollingsworth v
9 Perry, 130 SCt 1132 (Jan 11, 2010); Hollingsworth v Perry, 130 SCt
10 705 (Jan 13, 2010). The court withdrew the case from the Ninth
11 Circuit's pilot program on broadcasting on January 15, 2010. Doc
12 #463. Proponents affirmed the withdrawal of their witnesses that
13 same day. Tr 1094:21-23. Proponents did not call their first
14 witness until January 25, 2010. The record does not reveal the
15 reason behind proponents' failure to call their expert witnesses.

16 Plaintiffs entered into evidence the deposition testimony
17 of two of proponents' withdrawn witnesses, as their testimony
18 supported plaintiffs' claims. Katherine Young was to testify on
19 comparative religion and the universal definition of marriage. Doc
20 #292 at 4 (proponents' December 7 witness list) Doc #286-4 at 2
21 (expert report). Paul Nathanson was to testify on religious
22 attitudes towards Proposition 8. Doc #292 at 4 (proponents'
23 December 7 witness list); Doc #280-4 at 2 (expert report).

24 Young has been a professor of religious studies at McGill
25 University since 1978. PX2335 Young CV. She received her PhD in
26 history of religions and comparative religions from McGill in 1978.
27 Id. Young testified at her deposition that homosexuality is a
28 normal variant of human sexuality and that same-sex couples possess

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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.

1 2. Kenneth P Miller, a professor of government at Claremont
2 McKenna College, testified as an expert in American and
3 California politics. Plaintiffs objected that Miller lacked
4 sufficient expertise specific to gays and lesbians. Miller's
5 testimony sought to rebut only a limited aspect of plaintiffs'
6 equal protection claim relating to political power.
7
8 David Blankenhorn
9 Proponents called David Blankenhorn as an expert on
10 marriage, fatherhood and family structure. Blankenhorn received a
11 BA in social studies from Harvard College and an MA in comparative
12 social history from the University of Warwick in England. Tr
13 2717:24-2718:3; DIX2693 (Blankenhorn CV). After Blankenhorn
14 completed his education, he served as a community organizer in low-
15 income communities, where he developed an interest in community and
16 family institutions after "seeing the weakened state" of those
17 institutions firsthand, "especially how children were living
18 without their fathers." Tr 2719:3-18. This experience led
19 Blankenhorn in 1987 to found the Institute for American Values,
20 which he describes as "a nonpartisan think tank" that focuses
21 primarily on "issues of marriage, family, and child well-being."
22 Tr 2719:20-25. The Institute commissions research and releases
23 reports on issues relating to "fatherhood, marriage, family
24 structure [and] child well-being." Tr 2720:6-19. The Institute
25 also produces an annual report "on the state of marriage in
26 America." Tr 2720:24-25.
27 Blankenhorn has published two books on the subjects of
28 marriage, fatherhood and family structure: Fatherless America:

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1 Confronting Our Most Urgent Social Problem (HarperCollins 1995),
2 DIX0108, and The Future of Marriage (Encounter Books 2006),
3 DIX0956. Tr 2722:2-12. Blankenhorn has edited four books about
4 family structure and marriage, Tr 2728:13-22, and has co-edited or
5 co-authored several publications about marriage. Doc #302 at 21.
6 Plaintiffs challenge Blankenhorn's qualifications as an
7 expert because none of his relevant publications has been subject
8 to a traditional peer-review process, Tr 2733:2-2735:4, he has no
9 degree in sociology, psychology or anthropology despite the
10 importance of those fields to the subjects of marriage, fatherhood
11 and family structure, Tr 2735:15-2736:9, and his study of the
12 effects of same-sex marriage involved "read[ing] articles and
13 ha[ving] conversations with people, and tr[ying] to be an informed
14 person about it," Tr 2736:13-2740:3. See also Doc #285
15 (plaintiffs' motion in limine). Plaintiffs argue that
16 Blankenhorn's conclusions are not based on "objective data or
17 discernible methodology," Doc #285 at 25, and that Blankenhorn's
18 conclusions are instead based on his interpretation of selected
19 quotations from articles and reports, id at 26.
20 The court permitted Blankenhorn to testify but reserved
21 the question of the appropriate weight to give to Blankenhorn's
22 opinions. Tr 2741:24-2742:3. The court now determines that
23 Blankenhorn's testimony constitutes inadmissible opinion testimony
24 that should be given essentially no weight.
25 Federal Rule of Evidence 702 provides that a witness may
26 be qualified as an expert "by knowledge, skill, experience,
27 training, or education." The testimony may only be admitted if it
28 "is based upon sufficient facts or data" and "is the product of

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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 US 137, 147, 149 (1999) (citing Daubert v Merrell Dow Pharm, 509 US 579, 589, 592 (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 US at 152. 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 F3d 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 n11, 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 US 136, 146 (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 F3d at 1319 n11.

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1 Several factors are relevant to an expert's reliability:
2 (1) "whether [a method] can be (and has been) tested"; (2) "whether
3 the [method] has been subjected to peer review and publication";
4 (3) "the known or potential rate of error"; (4) "the existence and
5 maintenance of standards controlling the [method's] operation"; (5)
6 "a * * * degree of acceptance" of the method within "a relevant
7 * * * community," Daubert, 509 US at 593-94; (6) whether the expert
8 is "proposing to testify about matters growing naturally and
9 directly out of research they have conducted independent of the
10 litigation," Daubert II, 43 F3d at 1317; (7) whether the expert has
11 unjustifiably extrapolated from an accepted premise to an unfounded
12 conclusion, see Joiner, 522 US at 145-146; (8) whether the expert
13 has adequately accounted for obvious alternative explanations, see
14 generally Claar v Burlington Northern RR Co, 29 F3d 499 (9th Cir
15 1994); (9) whether the expert "employs in the courtroom the same
16 level of intellectual rigor that characterizes the practice of an
17 expert in the relevant field," Kumho Tire, 526 US at 152; and (10)
18 whether the field of expertise claimed by the expert is known to
19 reach reliable results for the type of opinion the expert would
20 give, see id at 151.
21 Blankenhorn offered opinions on the definition of
22 marriage, the ideal family structure and potential consequences of
23 state recognition of marriage for same-sex couples. None of
24 Blankenhorn's opinions is reliable.
25 Blankenhorn's first opinion is that marriage is "a
26 socially-approved sexual relationship between a man and a woman."
27 Tr 2742:9-10. According to Blankenhorn, the primary purpose of
28 marriage is to "regulate filiation." Tr 2742:18. Blankenhorn

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1 testified that the alternative and contradictory definition of
2 marriage is that "marriage is fundamentally a private adult
3 commitment." Tr 2755:25-2756:1; Tr 2756:4-2757:17 (DIX0093 Law
4 Commission of Canada, Beyond Conjugality: Recognizing and
5 Supporting Close Personal Adult Relationships (2001)). He
6 described this definition as focused on "the tender feelings that
7 spouses have for one another," Tr 2761:5-6. Blankenhorn agrees
8 this "affective dimension" of marriage exists but asserts that
9 marriage developed independently of affection. Tr 2761:9-2762:3.
10 Blankenhorn thus sets up a dichotomy for the definition
11 of marriage: either marriage is defined as a socially approved
12 sexual relationship between a man and a woman for the purpose of
13 bearing and raising children biologically related to both spouses,
14 or marriage is a private relationship between two consenting
15 adults. Blankenhorn did not address the definition of marriage
16 proposed by plaintiffs' expert Cott, which subsumes Blankenhorn's
17 dichotomy. Cott testified that marriage is "a couple's choice to
18 live with each other, to remain committed to one another, and to
19 form a household based on their own feelings about one another, and
20 their agreement to join in an economic partnership and support one
21 another in terms of the material needs of life." Tr 201:9-14.
22 There is nothing in Cott's definition that limits marriage to its
23 "affective dimension" as defined by Blankenhorn, and yet Cott's
24 definition does not emphasize the biological relationship linking
25 dependents to both spouses.
26 Blankenhorn relied on the quotations of others to define
27 marriage and provided no explanation of the meaning of the passages
28 he cited or their sources. Tr 2744:4-2755:16. Blankenhorn's mere

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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 F3d 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"

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of Blankenhorn, Daubert II, 43 F3d 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 US at 152. 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 US at 146.

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

1 consider any study comparing children raised by their married
2 biological parents to children raised by their married adoptive
3 parents. Blankenhorn did not testify about a study comparing
4 children raised by their married biological parents to children
5 raised by their married parents who conceived using an egg or sperm
6 donor. The studies Blankenhorn relied on compare various family
7 structures and do not emphasize biology. Tr 2768:9-2772:6. The
8 studies may well support a conclusion that parents' marital status
9 may affect child outcomes. The studies do not, however, support a
10 conclusion that the biological connection between a parent and his
11 or her child is a significant variable for child outcomes. The
12 court concludes that "there is simply too great an analytical gap
13 between the data and the opinion proffered." Joiner, 522 US at
14 146. Blankenhorn's reliance on biology is unsupported by evidence,
15 and the court therefore rejects his conclusion that a biological
16 link between parents and children influences children's outcomes.

17 Blankenhorn's third opinion is that recognizing same-sex
18 marriage will lead to the deinstitutionalization of marriage. Tr
19 2772:21-2775:23. Blankenhorn described deinstitutionalization as a
20 process through which previously stable patterns and rules forming
21 an institution (like marriage) slowly erode or change. Tr 2773:4-
22 24. Blankenhorn identified several manifestations of
23 deinstitutionalization: out-of-wedlock childbearing, rising divorce
24 rates, the rise of non-marital cohabitation, increasing use of
25 assistive reproductive technologies and marriage for same-sex
26 couples. Tr 2774:20-2775:23. To the extent Blankenhorn believes
27 that same-sex marriage is both a cause and a symptom of
28 deinstitutionalization, his opinion is tautological. Moreover, no

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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.

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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

1 2913:8-2916:18. When referring to the sixth dimension, a family-
2 making bond, Blankenhorn agreed that same-sex couples could "raise"
3 children. Tr 2916:17.

4 Blankenhorn gave absolutely no explanation why
5 manifestations of the deinstitutionalization of marriage would be
6 exacerbated (and not, for example, ameliorated) by the presence of
7 marriage for same-sex couples. His opinion lacks reliability, as
8 there is simply too great an analytical gap between the data and
9 the opinion Blankenhorn proffered. See Joiner, 522 US at 146.

10 Blankenhorn was unwilling to answer many questions
11 directly on cross-examination and was defensive in his answers.
12 Moreover, much of his testimony contradicted his opinions.
13 Blankenhorn testified on cross-examination that studies show
14 children of adoptive parents do as well or better than children of
15 biological parents. Tr 2794:12-2795:5. Blankenhorn agreed that
16 children raised by same-sex couples would benefit if their parents
17 were permitted to marry. Tr 2803:6-15. Blankenhorn also testified
18 he wrote and agrees with the statement "I believe that today the
19 principle of equal human dignity must apply to gay and lesbian
20 persons. In that sense, insofar as we are a nation founded on this
21 principle, we would be more American on the day we permitted same-
22 sex marriage than we were the day before." DIX0956 at 2; Tr
23 2805:6-2806:1.

24 Blankenhorn stated he opposes marriage for same-sex
25 couples because it will weaken the institution of marriage, despite
26 his recognition that at least thirteen positive consequences would
27 flow from state recognition of marriage for same-sex couples,
28 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

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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

1 sources that appear on both Miller's list of materials considered
2 and the list of proponents' withdrawn expert, Paul Nathanson,
3 including twenty-eight websites listing the same "last visited"
4 date). Miller stated that he did not know at the time of his
5 deposition the status of antidiscrimination provisions to protect
6 gays and lesbians at the state and local level, Tr 2506:3-2507:1,
7 could only identify Don't Ask, Don't Tell and the federal Defense
8 of Marriage Act as examples of official discrimination against gays
9 and lesbians, Tr 2524:4-2525:2, and that he has read no or few
10 books or articles by George Chauncey, Miriam Smith, Shane Phelan,
11 Ellen Riggle, Barry Tadlock, William Eskridge, Mark Blasius,
12 Urvashi Vaid, Andrew Sullivan and John D'Emilio, Tr 2518:15-
13 2522:25.

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

24 Plaintiffs questioned Miller on his earlier scholarship
25 criticizing the California initiative process because initiatives
26 eschew compromise and foster polarization, undermine the authority
27 and flexibility of representative government and violate norms of
28 openness, accountability, competence and fairness. Tr 2544:10-

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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

1 2706:17-2707:6. Miller explained that prohibiting same-sex couples
2 from marriage "wasn't necessarily invidious discrimination against"
3 gays and lesbians. Tr 2707:20-24.
4 The credibility of Miller's opinions relating to gay and
5 lesbian political power is undermined by his admissions that he:
6 (1) has not focused on lesbian and gay issues in his research or
7 study; (2) has not read many of the sources that would be relevant
8 to forming an opinion regarding the political power of gays and
9 lesbians; (3) has no basis to compare the political power of gays
10 and lesbians to the power of other groups, including
11 African-Americans and women; and (4) could not confirm that he
12 personally identified the vast majority of the sources that he
13 cited in his expert report, see PX0794A. Furthermore, Miller
14 undermined the credibility of his opinions by conceding that gays
15 and lesbians currently face discrimination and that current
16 discrimination is relevant to a group's political power.
17 Miller's credibility was further undermined because the
18 opinions he offered at trial were inconsistent with the opinions he
19 expressed before he was retained as an expert. Specifically,
20 Miller previously wrote that gays and lesbians, like other
21 minorities, are vulnerable and powerless in the initiative process,
22 see PX1869 (Kenneth Miller, Constraining Populism: The Real
23 Challenge of Initiative Reform, 41 Santa Clara L Rev 1037 (2001)),
24 contradicting his trial testimony that gays and lesbians are not
25 politically vulnerable with respect to the initiative process.
26 Miller admitted that at least some voters supported Proposition 8
27 based on anti-gay sentiment. Tr 2606:11-2608:18.
28 \\

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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.

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.

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

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1 3. Paul Katami and Jeffrey Zarrillo reside together in Los
2 Angeles County, California. They are gay men in a committed
3 relationship who seek to marry.
4 4. On May 20, 2009, Katami and Zarrillo applied for a marriage
5 license from defendant Logan, the Los Angeles County Clerk,
6 who denied them a license due to Proposition 8 because they
7 are of the same sex.
8
9 Plaintiff-Intervenor
10 5. San Francisco is a charter city and county under the
11 California Constitution and laws of the State of California.
12 Cal Const Art XI, § 5(a); SF Charter Preamble.
13 6. San Francisco is responsible for issuing marriage licenses,
14 performing civil marriage ceremonies and maintaining vital
15 records of marriages. Cal Fam Code §§ 350(a), 401(a), 400(b).
16
17 Defendants
18 7. Arnold Schwarzenegger is the Governor of California.
19 8. Edmund G Brown, Jr is the Attorney General of California.
20 9. Mark B Horton is the Director of the California Department of
21 Public Health and the State Registrar of Vital Statistics of
22 the State of California. In his official capacity, Horton is
23 responsible for prescribing and furnishing the forms for
24 marriage license applications, the certificate of registry of
25 marriage, including the license to marry, and the marriage
26 certificate. See Doc #46 ¶ 15 (admitting Doc #1 ¶ 15).
27 10. Linette Scott is the Deputy Director of Health Information &
28 Strategic Planning for the California Department of Public

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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.").

1 14. Proponents dedicated substantial time, effort, reputation and
2 personal resources in campaigning for Proposition 8.
3 a. Tr 1889:23-1893:15: Tam spent the majority of his hours in 2008 working to pass Proposition 8;
4 b. Doc #8-1 at ¶ 27 (Decl of Dennis Hollingsworth);
5 c. Doc #8-2 at ¶ 27 (Decl of Gail J Knight);
6 d. Doc #8-3 (Decl of Martin F Gutierrez: describing activities to pass and enforce Proposition 8);
7 e. Doc #8-4 at ¶ 27 (Decl of Hak-Shing William Tam);
8 f. Doc #8-5 at ¶ 27 (Decl of Mark A Jansson).
9
10 15. Proponents established ProtectMarriage.com –– Yes on 8, a
11 Project of California Renewal ("Protect Marriage") as a
12 "primarily formed ballot measure committee" under California
13 law.
14 a. Doc #8-1 at ¶ 13 (Decl of Dennis Hollingsworth);
15 b. Doc #8-2 at ¶ 13 (Decl of Gail J Knight);
16 c. Doc #8-3 at ¶ 13 (Decl of Martin F Gutierrez);
17 d. Doc #8-4 at ¶ 13 (Decl of Hak-Shing William Tam);
18 e. Doc #8-5 at ¶ 13 (Decl of Mark A Jansson).
19 16. The Protect Marriage Executive Committee includes Ron
20 Prentice, Edward Dolejsi, Mark A Jansson and Doug Swardstrom.
21 Andrew Pugno acts as General Counsel. David Bauer is the
22 Treasurer and officer of record for Protect Marriage.
23 a. Doc #372 at 4 (identifying the above individuals based on the declaration of Ron Prentice, submitted under seal on
24 November 6, 2009);
25 b. PX0209 Letter from Protect Marriage to Jim Abbott (Oct
26 20, 2008): Letter to a business that donated money to a group opposing Proposition 8 demanding "a donation of a
27 like amount" to Protect Marriage. The letter is signed by: Ron Prentice, Protect Marriage Chairman; Andrew
28 Pugno, Protect Marriage General Counsel; Edward Dolejsi, Executive Director, California Catholic Conference; and

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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

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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. <u>In re Marriage Cases</u>, 183 P3d 384, 431 (Cal 2008) ("This contention [that marriage is limited to opposite-sex couples because only a man and a woman can produce

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children biologically related to both] is fundamentally flawed[.]");

c. Lawrence v Texas, 539 US 558, 604-05 (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, 183 P3d 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

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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 US 583, 585 (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, 198 P2d 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 P2d 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 US 1 (1967);

b. Perez v Sharp, 198 P2d 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.

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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. <u>Follansbee v Benzenberg</u>, 122 Cal App 2d 466, 476 (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

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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, 183 P3d 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, 183 P3d 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, 183 P3d 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, 183 P3d 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 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

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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 US 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

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1 committed to one another by their own consents will support one another as well as their dependents.”);
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b. Cal Fam Code § 720.
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4 38. Marriage benefits both spouses by promoting physical and
5 psychological health. Married individuals are less likely to
6 engage in behaviors detrimental to health, like smoking or
7 drinking heavily. Married individuals live longer on average
8 than unmarried individuals.

9 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.);
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12 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;
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15 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.”);
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19 d. Tr 688:10-12 (Egan: “[M]arried individuals are healthier, on average, and, in particular, behave themselves in healthier ways than single individuals.”);
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21 e. PX1043 Charlotte A Schoenborn, Marital Status and Health: United States, 1999-2002, US 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.”;
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26 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;
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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.

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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 cohabiting couple marries, that marriage can improve the adjustment outcomes of the couple's child because of "the advantages 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

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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, <u>Best Practices for Asking Questions about Sexual Orientation on Surveys</u> (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.

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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

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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.");

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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);

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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

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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, 117 P3d 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

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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. <u>Gill v Office of Personnel Management et al</u>, No 09-10309-JLT at Doc #70 (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 F3d 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.");

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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, US 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, US 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.).

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1
WHETHER THE EVIDENCE SHOWS THAT PROPOSITION 8 ENACTED A PRIVATE
MORAL VIEW WITHOUT ADVANCING A LEGITIMATE GOVERNMENT INTEREST
2

3 57. Under Proposition 8, whether a couple can obtain a marriage
4 license and enter into marriage depends on the genders of the
5 two parties relative to one another. A man is permitted to
6 marry a woman but not another man. A woman is permitted to
7 marry a man but not another woman. Proposition 8 bars state
8 and county officials from issuing marriage licenses to same-
9 sex couples. It has no other legal effect.
10 a. Cal Const Art I, § 7.5 (Proposition 8);
11 b. PX0001 California Voter Information Guide, California General Election, Tuesday, November 4, 2008: Proposition
12 8 "eliminates right of same-sex couples to marry."
13 58. Proposition 8 places the force of law behind stigmas against
14 gays and lesbians, including: gays and lesbians do not have
15 intimate relationships similar to heterosexual couples; gays
16 and lesbians are not as good as heterosexuals; and gay and
17 lesbian relationships do not deserve the full recognition of
18 society.
19 a. Tr 611:13-19 (Peplau: "[B]eing prevented by the
20 government from being married is no different than other kinds of stigma and discrimination that have been
21 studied, in terms of their impact on relationships.");
22 b. Tr 529:21-530:23 (Chauncey: The campaign for Proposition 8 presented marriage for same-sex couples as an adult
23 issue, although children are frequently exposed to romantic fairy tales or weddings featuring opposite-sex
24 couples.);
25 c. Tr 854:5-14 (Meyer: "Proposition 8, in its social meaning, sends a message that gay relationships are not
26 to be respected; that they are of secondary value, if of any value at all; that they are certainly not equal to
27 those of heterosexuals.");
28 d. Tr 2047:13-2048:13 (Herek: In 2004, California enacted legislation that increased the benefits and

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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 (NYU 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

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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, 189 P3d 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, 207 P3d 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.).

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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, <u>Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits</u>, 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

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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 D-160.979 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.").

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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

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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).

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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

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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.";

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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

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1 have the responsibility of keeping this type of corrosive influence out of the agencies under their control. It is
2 particularly important that the thousands of young men and women who are brought into Federal jobs not be
3 subjected to that type of influence while in the service of the Government. One homosexual can pollute a
4 Government office.";

5 i. Tr 395:6-25 (Chauncey: Like most outsider groups, there have been stereotypes associated with gay people; indeed,
6 a range of groups, including medical professionals and religious groups, have worked in a coordinated way to
7 develop stereotypical images of gay people.);

8 j. Tr 397:2-6; Tr 397:25-398:5 (Chauncey: "[I]n some ways, the most dangerous stereotypes for homosexuals really
9 developed between the 1930s and '50s, when there were a series of press and police campaigns that identified
10 homosexuals as child molesters." These press campaigns against assaults on children focused on sex perverts or
11 sex deviants. Through these campaigns, the homosexual emerged as a sex deviant.);

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13 k. PX2281 George Chauncey, The Postwar Sex Crime Panic, in William Graebner, ed, True Stories from the Past 160, 171
14 (McGraw-Hill 1993): Contains excerpts from wide-circulation Coronet Magazine, Fall 1950: "Once a man
15 assumes the role of homosexual, he often throws off all moral restraints. * * * Some male sex deviants do not
16 stop with infecting their often-innocent partners: they descended through perversions to other forms of
17 depravity, such as drug addiction, burglary, sadism, and even murder.";

18 l. Tr 400:18-401:8 (Chauncey: This excerpt from Coronet Magazine, PX2281 at 171, depicts homosexuals as subjects
19 of moral decay. In addition, there is a sense of
20 homosexuality as a disease in which the carriers infect other people. And the term "innocent" pretty clearly
21 indicates that the authors are talking about children.);

22 m. PX2281 Chauncey, The Postwar Sex Crime Panic, at 170-171: Contains a statement made by a Special Assistant Attorney
23 General of California in 1949: "The sex pervert, in his more innocuous form, is too frequently regarded as merely
24 a 'queer' individual who never hurts anyone but himself. * * * All too often we lose sight of the fact that the
25 homosexual is an inveterate seducer of the young of both sexes * * * and is ever seeking for younger victims.";

26 n. Tr 402:21-24 (Chauncey: These articles (in PX2281) were
27 mostly addressed to adults who were understandably concerned about the safety of their children, and who
28 "were being taught to believe that homosexuals posed a threat to their children.");

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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.);

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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.);

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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

1 to them because * * * many parts of the electorate feel the same way." Additionally, "the initiative process
2 could be fertile ground to try to mobilize some of these voters to the polls for that cause.");
3
4 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.";
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9 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."
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14 79. The Proposition 8 campaign relied on fears that children
15 exposed to the concept of same-sex marriage may become gay or
16 lesbian. The reason children need to be protected from same-
17 sex marriage was never articulated in official campaign
18 advertisements. Nevertheless, the advertisements insinuated
19 that learning about same-sex marriage could make a child gay
20 or lesbian and that parents should dread having a gay or
21 lesbian child.
22 a. Tr 424:24-429:6 (Chauncey: Proposition 8 Official Voter Guide evoked fears about and contained stereotypical images of gay people.);
23
24 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;
25
26 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.");
27
28

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1 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

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1 history of anti-gay rhetoric. It reproduces many of the major themes of the anti-gay rights campaigns of previous
2 decades and a longer history of anti-gay discrimination.);
3
4 i. PX0116 Video, Massachusetts Parents Oppose Same-Sex Marriage: Robb and Robin Wirthlin, Massachusetts parents, warn that redefining marriage has an impact on every
5 level of society, especially on children, and claim that in Massachusetts homosexuality and gay marriage will soon
6 be taught and promoted in every subject, including math, reading, social studies and spelling;
7
8 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
9 sexual identity, as if homosexuality were a choice. In addition, it suggests that the fact that gay people are
10 being asked to be recognized and have their relationships recognized is an imposition on other people, as opposed
11 to an extension of fundamental civil rights to gay and lesbian people.);
12
13 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
14 incrementally now, but whole hog to the other side.";
15
16 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
17 campaign advertisement saying, * * * 'At school today, I was told that I could marry a princess too.' And the
18 underlying message of that is that * * * if Prop 8 failed, the public schools are going to turn my daughter
19 into a lesbian.");
20
21 m. PX0015 Video, Finally the Truth; PX0099 Video, It's Already Happened; PX0116 Video, Massachusetts Parents Oppose Same-Sex Marriage; PX0401 Video, Tony Perkins,
22 Miles McPherson and Ron Prentice Asking for Support of Proposition 8: Proposition 8 campaign videos focused on the need to protect children;
23
24 n. PX0079 Asian American Empowerment Council, Asian American Community Newsletter & Voter Guide (Oct/Nov 2008): Children need to be protected from gays and lesbians;
25
26 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
27 Jane or John when I grow up? Because this is very important for Asian families, the cultural issues, the
28 stability of the family.");

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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 US 702, 719-720 (1997). When legislation burdens the exercise of a right deemed to be fundamental, the government must show that the

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

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1 intrusion withstands strict scrutiny. Zablocki v Redhail, 434 US
2 374, 388 (1978).
3
4 THE RIGHT TO MARRY PROTECTS AN INDIVIDUAL'S CHOICE OF MARITAL PARTNER REGARDLESS OF GENDER
5 The freedom to marry is recognized as a fundamental right
6 protected by the Due Process Clause. See, for example, Turner v
7 Safely, 482 US 78, 95 (1987) ("[T]he decision to marry is a
8 fundamental right" and marriage is an "expression[ ] of emotional
9 support and public commitment."); Zablocki, 434 US at 384 (1978)
10 ("The right to marry is of fundamental importance for all
11 individuals."); Cleveland Board of Education v LaFleur, 414 US 632,
12 639-40 (1974) ("This Court has long recognized that freedom of
13 personal choice in matters of marriage and family life is one of
14 the liberties protected by the Due Process Clause of the Fourteenth
15 Amendment."); Loving v Virginia, 388 US 1, 12 (1967) (The "freedom
16 to marry has long been recognized as one of the vital personal
17 rights essential to the orderly pursuit of happiness by free
18 men."); Griswold v Connecticut, 381 US 479, 486 (1965) ("Marriage
19 is a coming together for better or for worse, hopefully enduring,
20 and intimate to the degree of being sacred. It is an association
21 that promotes a way of life, not causes; a harmony in living, not
22 political faiths; a bilateral loyalty, not commercial or social
23 projects. Yet it is an association for as noble a purpose as any
24 involved in our prior decisions.").
25 The parties do not dispute that the right to marry is
26 fundamental. The question presented here is whether plaintiffs
27 seek to exercise the fundamental right to marry; or, because they
28

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1 are couples of the same sex, whether they seek recognition of a new
2 right.

3 To determine whether a right is fundamental under the Due
4 Process Clause, the court inquires into whether the right is rooted
5 "in our Nation's history, legal traditions, and practices."
6 Glucksberg, 521 US at 710. Here, because the right to marry is
7 fundamental, the court looks to the evidence presented at trial to
8 determine: (1) the history, tradition and practice of marriage in
9 the United States; and (2) whether plaintiffs seek to exercise
10 their right to marry or seek to exercise some other right. Id.

11 Marriage has retained certain characteristics throughout
12 the history of the United States. See FF 19, 34-35. Marriage
13 requires two parties to give their free consent to form a
14 relationship, which then forms the foundation of a household. FF
15 20, 34. The spouses must consent to support each other and any
16 dependents. FF 34-35, 37. The state regulates marriage because
17 marriage creates stable households, which in turn form the basis of
18 a stable, governable populace. FF 35-37. The state respects an
19 individual's choice to build a family with another and protects the
20 relationship because it is so central a part of an individual's
21 life. See Bowers v Hardwick, 478 US 186, 204-205 (1986) (Blackmun,
22 J, dissenting).

23 Never has the state inquired into procreative capacity or
24 intent before issuing a marriage license; indeed, a marriage
25 license is more than a license to have procreative sexual
26 intercourse. FF 21. "[I]t would demean a married couple were it
27 to be said marriage is simply about the right to have sexual
28 intercourse." Lawrence, 539 US at 567. The Supreme Court

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1 recognizes that, wholly apart from procreation, choice and privacy
2 play a pivotal role in the marital relationship. See Griswold, 381
3 US at 485-486.
4 Race restrictions on marital partners were once common in
5 most states but are now seen as archaic, shameful or even bizarre.
6 FF 23-25. When the Supreme Court invalidated race restrictions in
7 Loving, the definition of the right to marry did not change. 388
8 US at 12. Instead, the Court recognized that race restrictions,
9 despite their historical prevalence, stood in stark contrast to the
10 concepts of liberty and choice inherent in the right to marry. Id.
11 The marital bargain in California (along with other
12 states) traditionally required that a woman's legal and economic
13 identity be subsumed by her husband's upon marriage under the
14 doctrine of coverture; this once-unquestioned aspect of marriage
15 now is regarded as antithetical to the notion of marriage as a
16 union of equals. FF 26-27, 32. As states moved to recognize the
17 equality of the sexes, they eliminated laws and practices like
18 coverture that had made gender a proxy for a spouse's role within a
19 marriage. FF 26-27, 32. Marriage was thus transformed from a
20 male-dominated institution into an institution recognizing men and
21 women as equals. Id. Yet, individuals retained the right to
22 marry; that right did not become different simply because the
23 institution of marriage became compatible with gender equality.
24 The evidence at trial shows that marriage in the United
25 States traditionally has not been open to same-sex couples. The
26 evidence suggests many reasons for this tradition of exclusion,
27 including gender roles mandated through coverture, FF 26-27, social
28 disapproval of same-sex relationships, FF 74, and the reality that

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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;

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1 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 US at 486. 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, 183 P3d 384, 434 (Cal 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 at 402, 434, 445 (By "reserving the

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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.

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1 Second, domestic partnerships were created specifically so that
2 California could offer same-sex couples rights and benefits while
3 explicitly withholding marriage from same-sex couples. Id, Cal Fam
4 Code § 297 (Gov Davis 2001 signing statement: "In California, a
5 legal marriage is between a man and a woman. * * * This [domestic
6 partnership] legislation does nothing to contradict or undermine
7 the definition of a legal marriage.").

8 The evidence at trial shows that domestic partnerships
9 exist solely to differentiate same-sex unions from marriages. FF
10 53-54. A domestic partnership is not a marriage; while domestic
11 partnerships offer same-sex couples almost all of the rights and
12 responsibilities associated with marriage, the evidence shows that
13 the withholding of the designation "marriage" significantly
14 disadvantages plaintiffs. FF 52-54. The record reflects that
15 marriage is a culturally superior status compared to a domestic
16 partnership. FF 52. California does not meet its due process
17 obligation to allow plaintiffs to marry by offering them a
18 substitute and inferior institution that denies marriage to same-
19 sex couples.

20

21 PROPOSITION 8 IS UNCONSTITUTIONAL BECAUSE IT DENIES PLAINTIFFS A
22 FUNDAMENTAL RIGHT WITHOUT A LEGITIMATE (MUCH LESS COMPELLING) REASON

23 Because plaintiffs seek to exercise their fundamental
24 right to marry, their claim is subject to strict scrutiny.
25 Zablocki, 434 US at 388. That the majority of California voters
26 supported Proposition 8 is irrelevant, as "fundamental rights may
27 not be submitted to [a] vote; they depend on the outcome of no
28 elections." West Virginia State Board of Education v Barnette, 319

US 624, 638 (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 US 678, 686 (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 US 356, 369 (1886). The guarantee

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of equal protection coexists, of course, with the reality that most legislation must classify for some purpose or another. See Romer v Evans, 517 US 620, 631 (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 US 312, 319-320 (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 US 456, 464 (1980). 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 US at 632; Heller, 509 US at 321 (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 US 202, 228 (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 US at 633. The classification itself must be related to the purported

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1 interest. Plyler, 457 US at 220 ("It is difficult to conceive of a
2 rational basis for penalizing [undocumented children] for their
3 presence within the United States," despite the state's interest in
4 preserving resources.).

5 Most laws subject to rational basis easily survive equal
6 protection review, because a legitimate reason can nearly always be
7 found for treating different groups in an unequal manner. See
8 Romer, 517 US at 633. Yet, to survive rational basis review, a law
9 must do more than disadvantage or otherwise harm a particular
10 group. United States Department of Agriculture v Moreno, 413 US
11 528, 534 (1973).

12

13 SEXUAL ORIENTATION OR SEX DISCRIMINATION

14 Plaintiffs challenge Proposition 8 as violating the Equal
15 Protection Clause because Proposition 8 discriminates both on the
16 basis of sex and on the basis of sexual orientation. Sexual
17 orientation discrimination can take the form of sex discrimination.
18 Here, for example, Perry is prohibited from marrying Stier, a
19 woman, because Perry is a woman. If Perry were a man, Proposition
20 8 would not prohibit the marriage. Thus, Proposition 8 operates to
21 restrict Perry's choice of marital partner because of her sex. But
22 Proposition 8 also operates to restrict Perry's choice of marital
23 partner because of her sexual orientation; her desire to marry
24 another woman arises only because she is a lesbian.

25 The evidence at trial shows that gays and lesbians
26 experience discrimination based on unfounded stereotypes and
27 prejudices specific to sexual orientation. Gays and lesbians have
28 historically been targeted for discrimination because of their

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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 US at 579; FF 42-43; see also Christian Legal Society v Martinez, 561 US __, 130 SCt 2971, No 08-1371 Slip Op at 23 ("Our decisions have declined to distinguish between status and conduct in [the context of sexual orientation].") (June 28, 2010) (citing Lawrence, 539 US at 583 (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

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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 US 307, 313 (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 School District v Rodriguez, 411 US 1, 28 (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 US 432, 444 (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 US 515, 533 (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.

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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

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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 US 235, 239 (1970). The "ancient lineage" of a classification does not make it rational. Heller, 509 US at 327. 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

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1 relationships are simply better than same-sex relationships.
2 Tradition alone cannot legitimate this purported interest.
3 Plaintiffs presented evidence showing conclusively that the state
4 has no interest in preferring opposite-sex couples to same-sex
5 couples or in preferring heterosexuality to homosexuality. See FF
6 48-50. Moreover, the state cannot have an interest in
7 disadvantaging an unpopular minority group simply because the group
8 is unpopular. Moreno, 413 US at 534.

9 The evidence shows that the state advances nothing when
10 it adheres to the tradition of excluding same-sex couples from
11 marriage. Proponents' asserted state interests in tradition are
12 nothing more than tautologies and do not amount to rational bases
13 for Proposition 8.

14

15 PURPORTED INTEREST #2: PROCEEDING WITH CAUTION WHEN IMPLEMENTING SOCIAL CHANGES

16 Proponents next argue that Proposition 8 is related to
17 state interests in: (1) "[a]cting incrementally and with caution
18 when considering a radical transformation to the fundamental nature
19 of a bedrock social institution"; (2) "[d]ecreasing the probability
20 of weakening the institution of marriage"; (3) "[d]ecreasing the
21 probability of adverse consequences that could result from
22 weakening the institution of marriage"; and (4) "[d]ecreasing the
23 probability of the potential adverse consequences of same-sex
24 marriage." Doc #605 at 13-14.

25 Plaintiffs presented evidence at trial sufficient to
26 rebut any claim that marriage for same-sex couples amounts to a
27 sweeping social change. See FF 55. Instead, the evidence shows
28 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 US 1, 7 (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.

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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

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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 US at 571) 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.

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1 Proponents failed to put forth any credible evidence that married
2 opposite-sex households are made more stable through Proposition 8.
3 FF 55. The only rational conclusion in light of the evidence is
4 that Proposition 8 makes it less likely that California children
5 will be raised in stable households. See FF 50, 56.

6 None of the interests put forth by proponents relating to
7 parents and children is advanced by Proposition 8; instead, the
8 evidence shows Proposition 8 disadvantages families and their
9 children.

10

11 PURPORTED INTEREST #4: PROTECTING THE FREEDOM OF THOSE WHO OPPOSE MARRIAGE FOR SAME-SEX COUPLES

12 Proponents next argue that Proposition 8 protects the
13 First Amendment freedom of those who disagree with allowing
14 marriage for couples of the same sex. Proponents argue that
15 Proposition 8: (1) preserves "the prerogative and responsibility of
16 parents to provide for the ethical and moral development and
17 education of their own children"; and (2) accommodates "the First
18 Amendment rights of individuals and institutions that oppose same-
19 sex marriage on religious or moral grounds." Doc #605 at 14.

20 These purported interests fail as a matter of law.
21 Proposition 8 does not affect any First Amendment right or
22 responsibility of parents to educate their children. See In re
23 Marriage Cases, 183 P3d at 451-452. Californians are prevented
24 from distinguishing between same-sex partners and opposite-sex
25 spouses in public accommodations, as California antidiscrimination
26 law requires identical treatment for same-sex unions and opposite-
27 sex marriages. Koebke v Bernardo Heights Country Club, 115 P3d
28 1212, 1217-1218 (Cal 2005). The evidence shows that Proposition 8

1 does nothing other than eliminate the right of same-sex couples to
2 marry in California. See FF 57, 62. Proposition 8 is not
3 rationally related to an interest in protecting the rights of those
4 opposed to same-sex couples because, as a matter of law,
5 Proposition 8 does not affect the rights of those opposed to
6 homosexuality or to marriage for couples of the same sex. FF 62.
7 To the extent proponents argue that one of the rights of
8 those morally opposed to same-sex unions is the right to prevent
9 same-sex couples from marrying, as explained presently those
10 individuals' moral views are an insufficient basis upon which to
11 enact a legislative classification.
12
13 PURPORTED INTEREST #5: TREATING SAME-SEX COUPLES DIFFERENTLY FROM OPPOSITE-SEX COUPLES
14 Proponents argue that Proposition 8 advances a state
15 interest in treating same-sex couples differently from opposite-sex
16 couples by: (1) "[u]sing different names for different things"; (2)
17 "[m]aintaining the flexibility to separately address the needs of
18 different types of relationships"; (3) "[e]nsuring that California
19 marriages are recognized in other jurisdictions"; and (4)
20 "[c]onforming California's definition of marriage to federal law."
21 Doc #605 at 14.
22 Here, proponents assume a premise that the evidence
23 thoroughly rebutted: rather than being different, same-sex and
24 opposite-sex unions are, for all purposes relevant to California
25 law, exactly the same. FF 47-50. The evidence shows conclusively
26 that moral and religious views form the only basis for a belief
27 that same-sex couples are different from opposite-sex couples. See
28 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 US 190, 198 (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 US at 633; Moreno, 413 US at 534; Palmore v Sidoti, 466 US 429, 433 (1984) ("[T]he Constitution cannot control [private biases] but neither can it tolerate them.").

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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 US at 571. 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 US 833, 850, (1992)). "[M]oral disapproval, without any other asserted state interest," has never been a rational basis for legislation. Lawrence, 539 US at 582 (O'Connor, J, concurring). Tradition alone cannot support legislation. See Williams, 399 US at 239; Romer, 517 US at 635; Lawrence, 539 US at 579.

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:

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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

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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 US at 634 ("[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.

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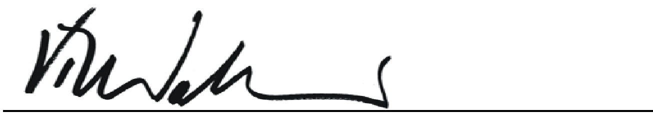
REMEDIES

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.



VAUGHN R WALKER
United States District Chief Judge

Exhibit B

1 mother and its father. It's good for the mother, who is less
2 likely to have -- to raise the child by herself, and it's good
3 for the father because it establishes and it fixes his rights
4 in and obligations to his child.
5 But perhaps most importantly, your Honor, from the
6 state's perspective, channeling naturally procreative
7 relationships into enduring committed marital unions decreases
8 the likelihood that the state itself will have to help provide
9 for the child's upbringing and that society will suffer the
10 social ills that are often associated with children who are not
11 raised in intact families.
12 President Obama recently noted this reality when he
13 said this:
14 "We know the statistics; that children who
15 grow up without a father are five times more
16 likely to live in poverty and commit crime,
17 nine times more likely to drop out of
18 schools, and 20 times more likely to end up
19 in prison."
20 **THE COURT:** How does permitting same-sex couples to
21 marry in any way diminish the procreative aspect or function of
22 marriage or denigrate the institution of marriage for
23 heterosexuals?
24 **MR. COOPER:** Your Honor, because it will change the
25 institution. As you -- as you noted in a question, or at least

1 him.

2 **Q.** How long have you been in this relationship?

3 **A.** March will be nine years.

4 **Q.** When you said you wanted nothing more than to marry him,

5 why?

6 **A.** The word "marriage" has a special meaning. It's why we're

7 here today. If it wasn't so important, we wouldn't be here

8 today.

9 I want to be able to share the joy and the happiness

10 that my parents felt, my brother felt, my friends, my

11 co-workers, my neighbors, of having the opportunity to be

12 married.

13 It's the logical next step for us.

14 **Q.** Do you believe that if you are married, that that would

15 change the relationship that you have, at all?

16 **A.** Absolutely. I think -- I think one's capacity to love can

17 absolutely grow. I think one's capacity to be committed to

18 another individual can absolutely expand. And I'm confident

19 that that would happen with us.

20 **Q.** Do you believe that if you were able to be married, that

21 would affect your relationships with your family and your

22 community?

23 **A.** Absolutely.

24 **Q.** How so?

25 **A.** It's that I would be able to partake in family gatherings,

1 it's different, probably, if you were living as a heterosexual
2 person, but for me might have always been their mom and in
3 their entire lives I have been out, so...
4 **Q.** Have you and Sandy entered into a registered domestic
5 partnership in California?
6 **A.** Yes.
7 **Q.** Tell us when you did that?
8 **A.** That was in August of 2004.
9 **Q.** Was that easy to do? Does California make it simple?
10 **A.** Yeah. It was a -- I think it was a form.
11 **Q.** That you submit to the state?
12 **A.** That we -- we completed it. I think we had to have it
13 notarized and then we mailed it in.
14 **Q.** What does domestic partnership mean to you compared to
15 marriage?
16 **A.** Well, we are registered domestic partners based on just
17 legal advice that we received for creating an estate plan. So
18 we saw a lawyer who works with couples on those things and we
19 completed a number of forms; a durable power of attorney, last
20 will and testament, and she recommended we also do the domestic
21 partnership agreement at the same time. So there were just a
22 number of those kinds of documents that we completed.
23 **Q.** You regard it as something of a property transaction or
24 estate planning transaction?
25 **A.** It was -- well, that's when -- we did ours during that

1 beautiful as our marriage.
2 **Q.** The Supreme Court subsequently in May of 2008 said you had
3 a constitutional right to get married. How did you feel about
4 that?
5 **A.** I felt great, that the Court thought we had -- felt we had
6 a constitutional right to get married. That was exciting.
7 It was also cloaked, though, in this dissension that
8 felt very familiar.
9 **Q.** What do you mean "dissension"?
10 **A.** Well, the dissension that was sort of the political
11 brewing of some activist groups that disagreed with gay
12 marriage, wanting to put something together to invalidate that
13 court decision.
14 **Q.** You mean, you were aware of that at the time?
15 **A.** I was aware reading in the paper about -- about that.
16 **Q.** Well, did you consider, well, the California Supreme Court
17 has said that we can get married. We want to get married. We
18 tried it once before. Now we are told we have a constitutional
19 right to do it. Let's do it?
20 **A.** We thought about it and discussed it. And I really felt
21 very strongly that at my age I don't want to be humiliated any
22 more. It's not okay.
23 We did get married. In fact, we got married twice
24 and we could get married a third time and it could get taken
25 away, and then we get married a fourth time. And, for me, it

1 felt like it made a circus out of our lives and I don't want to
2 be party to that.
3 I told Kris I want to marry you in the worst way, but
4 I want it to be permanent and I don't want any possibility of
5 it being taken away from us. So let's wait until we know for
6 sure that we can be permanently married.
7 We didn't want to do it for any -- for any other
8 reason. And we did have friends that had gotten married and we
9 were proud for them and thrilled for them and, also, worried
10 for them, that they would have the same experience that we had
11 had.
12 **Q.** Tell me all the ways that -- let me withdraw that for a
13 moment and ask you about domestic partnership.
14 You and Kris entered into a domestic partnership.
15 Explain to the Court in your words why you did that and what
16 that relationship means to you compared to what you are seeking
17 here today?
18 **A.** Okay. First of all, for me, there is -- domestic
19 partnership doesn't indicate anything about a relationship. So
20 it's hard for me to put it in those terms.
21 It feels like it's a legal agreement between two
22 parties that spell out responsibilities and duties, like
23 fidiciary duties that you have towards each other, and those
24 duties are -- mirrored some of those similar types of duties
25 that are, of course, found in marriage.

1 **Q.** Well, let's look at what you said in your deposition in
2 the Iowa case. And that's tab 2 of your witness binder. And I
3 would like to direct your attention to page 55, lines 12
4 through 14.
5 **A.** Page 55 is under tab 2; is that right?
6 **Q.** Yes.
7 **A.** I see. Oh, I need my reading glasses for this. Which
8 page?
9 **Q.** 55. It's in the upper right-hand corner.
10 **A.** Uh-huh.
11 **Q.** And in line 12 you were asked:
12 "Are you familiar with the institution of
13 marriage in the most populated countries on
14 the planet, China and India?"
15 And you answered:
16 "No, not really. I mean, no."
17 The consequences of same-sex marriage is an
18 impossible question to answer. Yes or no?
19 **A.** You're asking me to say yes or no?
20 **Q.** I am.
21 **A.** Right. I believe no one predicts the future that
22 accurately.
23 **Q.** And you're not an expert on marriage practices in ancient
24 Greece, correct?
25 **A.** I am not an expert on that. I am somewhat familiar with

1 **Q.** Okay. And do you agree with the statement you made there,
2 which is, "One could point to earlier watersheds, but perhaps
3 none quite so explicit as this particular turning point"? Do
4 you agree with that statement?
5 **A.** As I said there, perhaps -- and that was how I responded
6 to you -- that one could argue about this. But it's arguably a
7 highly-distinctive turning point.
8 **Q.** As a historian, you do not assume that progress is the
9 rule of history, correct?
10 **A.** That's correct.
11 **Q.** Marriage is a very complex institution, correct?
12 **A.** Indeed.
13 **Q.** There is a long, ongoing series of arguments among
14 historians, competing theories about how we find the causes of
15 any major phenomenon, correct?
16 **A.** Yes.
17 **Q.** Some historians prefer to weight ideas, correct?
18 **A.** True.
19 **Q.** Others prefer to weight economic factors, correct?
20 **A.** Yes.
21 **Q.** Some weigh pure contingency of how things occur, correct?
22 **A.** Give it more weight, yes.
23 **Q.** But to you, the most reasonable historical explanation
24 gives some weight to all of these factors, so that none of them
25 operates solely on its own, correct?

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1 people be in love to get married, correct?
2 **A.** Not at all.
3 **Q.** Marriage, in your opinion, is a status which implies one's
4 having grown up, is that correct?
5 **A.** I think that is part of the social meaning, that it is
6 seen as a mark of adulthood, settling down.
7 **Q.** Another social meaning of marriage has been that it is the
8 way to found a household, a living unit that is an economic
9 partnership and that involves a commitment to one's partner,
10 correct?
11 **A.** Yes.
12 **Q.** Marriage also has a whole set of romantic meanings for
13 people, correct?
14 **A.** Yes.
15 **Q.** And this is broadcast to us all the time in our public
16 culture, correct?
17 **A.** Yes.
18 **Q.** So the public culture has an impact on the social meaning
19 of marriage, correct?
20 **A.** Yes, it does.
21 **Q.** The social meaning of marriage unquestionably has real
22 world consequences, correct?
23 **A.** Social meaning exists in the real world, yes.
24 **Q.** And just so the record is clear, the social meaning of
25 marriage unquestionably has real world consequences? "Yes" or

1 "no."
2 **A.** Yes.
3 **Q.** That it is far easier to say that the social meaning of
4 marriage has consequences than to measure the consequences,
5 correct?
6 **A.** I'm going to say, yes.
7 **Q.** For the generality of people, the social meanings of
8 marriage are highly influential in their own personal views of
9 the institution, correct?
10 **A.** Yes.
11 **Q.** One way the social meaning of marriage changes is through
12 actual social practices, correct?
13 **A.** Yes.
14 **Q.** Another way the social meaning of marriage changes is
15 through economic transformations, correct?
16 **A.** Economic transformations have a great impact on the social
17 meaning of marriage, yes.
18 **Q.** Another way the social meaning of marriage changes is
19 through ideas and ideology, correct?
20 **A.** These things are all bound up together, yes.
21 **Q.** So that's a yes?
22 **A.** Yes.
23 **Q.** There are also technological reasons why the social
24 meaning of marriage changes, correct?
25 **A.** Yes, specifically with -- with respect to the technology

1 of birth control and other reproductive technologies.
2 **Q.** And the law very definitely has an impact on the social
3 meaning of marriage, correct?
4 **A.** Yes.
5 **Q.** How a given person thinks about gay marriage, their own or
6 others, it's usually quite affected by quite small scale
7 factors; how they were brought up, who their friends are, what
8 their religion is, what they have observed and their own
9 personal experience, correct?
10 **A.** Yes.
11 **Q.** Now, let me ask you some questions about the state of
12 marriage today.
13 In your opinion, morality has been uncoupled from
14 marriage, correct?
15 **A.** If -- if you are quoting my work there, that was a
16 statement made in a context in which I made the point that
17 whereas in the past adultery and fornication were crimes that
18 were punished by the state; that the state enforced those
19 morally disapproved actions that -- in support of marriage, and
20 in support of making marriage the only licensed legitimate
21 place where sex could take place.
22 And I think what I was describing in making that
23 claim about morality being uncoupled was that we have a much
24 broader and more flexible set of social mores about sex,
25 marriage and morality in the past couple of generations.

1 **MR. THOMPSON:** Your Honor, we would ask the Court to
2 take judicial notice of DIX81.
3 **THE COURT:** Very well.
4 **BY MR. THOMPSON:**
5 **Q.** And, Professor, I would like to direct your attention to
6 page 7 of this book. And on the right-hand column, third
7 sentence from the bottom, Mr. Rauch -- and Mr. Rauch is an
8 advocate for same-sex marriage, correct?
9 **A.** Yes.
10 **Q.** And he's openly gay; is that correct?
11 **A.** Yes.
12 **Q.** Okay. And he says:
13 "Some gay marriage opponents may be bigoted
14 or homophobic, or otherwise out to get gay
15 people. But most of them are motivated by a
16 sincere desire to do what's best for their
17 marriages, their children, their society."
18 Isn't it true that there are some people among the
19 7 million Californians who voted for Prop 8 who fall into
20 precisely this category?
21 **A.** You know, it's difficult for me to know the variety of
22 reasons in which people -- which people opposed marriage.
23 It's easier for me to comment on the sort of
24 arguments that were made against marriage equality by the
25 Prop 8 advocates, than to assess the various reasons that

1 people might have opposed this.
2 **Q.** So you just don't know why people opposed Prop 8 -- I
3 mean, supported Prop 8?
4 **A.** Well, I assume that there were a range of reasons that
5 people supported Prop 8. But that the -- an underlying premise
6 of them was that gay relationships were unequal.
7 **Q.** But were some of the people within that range -- and I
8 understand it's a range and that there are all sorts of
9 reasons -- but would some of the people in California, some of
10 the 7 million who voted for Proposition 8, fall into the
11 category that Mr. Rauch indicates here?
12 **A.** Yes. But we have to ask why people believe that opposing
13 marriage equality is best for their marriages, their children,
14 and society.
15 **MR. THOMPSON:** Okay. Your Honor, I would like
16 permission to play a very short video, which is DIX 2553.
17 **THE COURT:** DIX, again?
18 **MR. THOMPSON:** 2553, Your Honor.
19 **THE COURT:** Thank you, sir.
20 **MS. STEWART:** Your Honor, before we play it, might we
21 have a description of it so I know whether to object or not?
22 **MR. THOMPSON:** Yes. This is a video of Carrie --
23 it's a very short video, which has the excerpt of
24 Carrie Prejean's statements, and then Mayor Gavin Newsom's
25 reaction as to her motivation for having the religious

1 research on heterosexual couples, which I believe is relevant.
2 It's based on research on same-sex couples showing similarity.
3 So it's really based both on that evidence, that
4 empirical research, and theories and explanations about why
5 those patterns exist.
6 So it's based on those. And then it's also informed
7 by this one piece of information that you referred to.
8 **Q.** And that is the only empirical study or survey in this
9 case that has been done on whether there are physical or
10 psychological benefits from same-sex marriage, correct?
11 **A.** As far as I know, that's correct.
12 **Q.** And, similarly, as far as you're aware, there have not
13 been any studies, empirical studies, done on domestic --
14 comparing whether there are physical and psychological benefits
15 from domestic partnerships, as compared to same-sex marriage;
16 isn't that right?
17 **A.** Studies comparing individuals in -- in same-sex domestic
18 partnerships and in same-sex marriages.
19 **Q.** To see if there would be a difference between the two. We
20 don't know that either, do we?
21 **A.** I think we have many reasons to estimate what we would
22 find. But, no, there have not been studies of that.
23 **Q.** And you would agree, as a researcher with 35 years of
24 experience, that it would be important for us to study same-sex
25 marriage and whether there are, in fact, the physical and

1 it's not enough for a married partner to treat you well and be
2 kind and thoughtful, but you have to also be able to develop a
3 relationship in which you find your soulmate and which -- so
4 the suggestion has been that shifting American values about
5 individualism may have been one of many factors that
6 contribute.
7 And the reason I talked about these factors was
8 because none of these factors is linked or is due to the gay
9 civil rights moment. That was really the point I was -- one of
10 the points I was trying to make, was that the increase in the
11 divorce rate was independent of the push for marriage equality
12 for same-sex couples.
13 **Q.** Now, looking at -- turning to page 13 of your expert
14 report where you have a chart that, I think, lists or sets
15 forth the divorce statistics in Massachusetts that you were --
16 that you spoke of on direct, you have four years worth of data
17 listed, is that right?
18 **A.** The four years before same-sex marriage and then the four
19 years starting with --
20 **Q.** And the four years after?
21 **A.** Yeah.
22 **Q.** And you would agree that this is not a tremendously large
23 amount of data from which to draw conclusions; isn't that
24 right?
25 **A.** It's a total of eight years of data. You know, I don't

1 know what large or small would mean in this capacity.
2 It's only four years since marriage began because
3 that's -- those are the most recent government statistics
4 available.
5 **Q.** And as we look at them in Massachusetts, we see that in
6 2004 -- of all of the years listed, in 2004 there was the
7 highest marriage rate, correct?
8 **A.** Correct.
9 **Q.** 6.5 percent?
10 **A.** Correct.
11 **Q.** And it went down in 2005 to 6.2 percent?
12 **A.** Yes.
13 **Q.** And it went down to 5.9 percent in 2006. Stayed at 5.9
14 percent for 2007, and we don't know 2008 and 2009 based on the
15 evidence that you have put in; isn't that right?
16 **A.** What I would -- your reading of these numbers is quite
17 correct. What I would comment about is that if you look at
18 these kinds of data -- not just in Massachusetts, but in other
19 states -- what you see is that there are always year-to-year
20 minor fluctuations.
21 And so that's why when I looked at these data, my
22 interpretation of them is really an interpretation of no
23 change, because the fact that the rate goes up two percent --
24 .2 percent one year or down, you know, a small fraction of a
25 percent the next, I think is kind of haphazard variation in the

1 data, and I don't take those as necessarily serious indicators
2 of anything.
3 To me, these -- what stands out to me is aside from
4 what looks like the impact of gay people getting married the
5 first year, increasing that number, the numbers just kind of
6 look the same to me.
7 **Q.** Have you undertaken a comprehensive analysis of the
8 marriage and divorce rates in the neighboring states to
9 Massachusetts?
10 **A.** No, I have not.
11 **Q.** How about nationally? You have not done a comprehensive
12 analysis of what the divorce rates during this time frame were
13 nationally either, have you?
14 **A.** No. The only point I was trying to make here was that
15 Massachusetts is a state that permits civil same-sex marriage,
16 and that it would be informative to look at in that state what
17 the patterns were leading up to -- prior to same-sex marriage
18 and following. I don't make any claims beyond that about what
19 these data show.
20 **Q.** And looking just for a moment at the divorce rate starting
21 in 2004, the year that same-sex marriage was allowed in
22 Massachusetts, the data, as you present it, 2.2 percent in
23 2004, 2.2 percent in 2005, 2.3 in 2006 and 2.3 in 2007. So
24 going up slightly in 2006 and 2007, correct?
25 **A.** And still winding up lower than they had been in the four

1 years preceding the introduction of same-sex marriage.
2 So, I mean, I -- we can try to make something out of
3 a difference between .3 -- you know, 2.3 and 2.4. But I think
4 given the fact that these numbers bounce around a little bit in
5 all states across years, that I was certainly not claiming that
6 the divorce rate went down as a result of same-sex marriage.
7 But if we want to look at minor variations in
8 divorce, the average divorce rate is lower after same-sex
9 marriage than before, but I interpret it as really the same.
10 **Q.** And, again, I don't know if it shows a pattern or not
11 either. We have four years and you would agree you have got
12 four years, including the year when same-sex marriage was
13 allowed in Massachusetts, and we have that year through 2007
14 and that's the data that we have?
15 **A.** Correct.
16 **Q.** And you would agree that it would be helpful to have
17 several more additional years worth of data to be able to draw
18 conclusions one way or the other, wouldn't you?
19 **A.** I'm sure we will have those data soon.
20 **Q.** I'm sure we will.
21 And just to finish up, Dr. Peplau, as to whether
22 same-sex marriage will have any effect on public attitudes
23 towards individualism or commitments over time, you can only
24 speculate about that issue because you have not actually done
25 any study of it, isn't that right?

1 **A.** Well, the issue is, do I think that -- I'm sorry. It may
2 be late in the day. Could you repeat the question?
3 **Q.** Sure. Whether same-sex marriage will have any effect on
4 public attitudes towards individualism or commitment over time
5 is something you can only speculate about because you have not
6 studied it and know of no studies, isn't that right?
7 **A.** So the question is, do I think that permitting same-sex
8 marriage might over time lead Americans to become more or less
9 individualistic, or do I think it might lead them to value
10 commitment more or less over time? Is that the question?
11 **Q.** Well, really, have you studied that issue so -- where you
12 can offer an expert opinion on it?
13 **A.** My general opinion, my overarching opinion that same-sex
14 marriage will not cause harm, is based on my consideration of a
15 lot of research on marriage, on same-sex couples, our
16 understanding of theories and so on.
17 And all of the evidence and the theories I know and
18 can think of are on the side of saying no harm.
19 And then on the side of what theory might there be
20 about why there would be harm or what data might there be to
21 suggest harm, there is nothing. So it's kind of like this
22 (indicating).
23 And so I have great confidence in that conclusion,
24 but it is the case that that -- that that opinion of mine is
25 not based on my having done an empirical study over time of

1 same-sex marriage will or won't influence the public's
2 attitudes about individualism or commitment.
3 **MS. MOSS:** Thank you. One moment.
4 **THE COURT:** Very well. Any redirect, Mr. Dusseault?
5 **MR. DUSSEAULT:** Yes, your Honor. Very briefly.
6 **REDIRECT EXAMINATION**
7 **BY MR. DUSSEAULT:**
8 **Q.** Dr. Peplau, Ms. Moss asked you some questions at the
9 beginning of cross-examination about enforceable trust and
10 whether there was enforceable trust in a domestic partnership;
11 do you recall that?
12 **A.** Yes, I do.
13 **Q.** Do you have a view as to whether there is a greater degree
14 of enforceable trust in a marriage than a domestic partnership?
15 **A.** I think it would be greater in marriage.
16 **Q.** Ms. Moss also asked you about barriers to exit and whether
17 there were barriers to exit in domestic partnership; do you
18 recall that?
19 **A.** Yes, I do.
20 **Q.** Do you have an opinion as to whether there are greater
21 barriers to exit from marriage than from domestic partnerships?
22 **A.** I believe there are greater barriers in marriage.
23 **Q.** Ms. Moss asked you about a piece of work from 1985 that's
24 at Tab 4 of your binder, Exhibit 1233, talking about
25 exclusivity. Do you recall that?

1 P R O C E E D I N G S

2 JANUARY 14, 2010 8:42 A.M.

3

4 **THE COURT:** Very well. Good morning, Counsel.

5 (Counsel greet the Court.)

6 **THE COURT:** Let's see. First order of business, I

7 have communicated to judge -- Chief Judge Kozinski, in light of

8 the Supreme Court's decision yesterday, that I'm requesting

9 that this case be withdrawn from the Ninth Circuit pilot

10 project. And he indicated that he would approve that request.

11 And so that should take care of the broadcasting matter.

12 And we have motions that have been filed on behalf of

13 Mr. Garlow and Mr. McPherson. And the clerk informs me counsel

14 for those parties are here present.

15 **MR. MCCARTHY:** Correct, Your Honor.

16 **THE COURT:** All right. Fine.

17 **MR. MCCARTHY:** Vincent McCarthy, Your Honor. I was

18 admitted pro hac vice into this court very recently.

19 **THE COURT:** Yes. I believe I signed that yesterday,

20 or the day before.

21 **MR. MCCARTHY:** I understand.

22 **THE COURT:** Well, welcome.

23 **MR. MCCARTHY:** Thank you.

24 **THE COURT:** You've got quite a lineup of lawyers

25 here.

1 **MR. COOPER:** As the Court knows, I'm sure, we have
2 put in a letter to the Court asking that the recording of the
3 proceedings be halted.
4 I do believe that in the light of the stay, that the
5 court's local rule would prohibit continued tape recording of
6 the proceedings.
7 **THE COURT:** I don't believe so. I read your letter.
8 It does not quote the local rule.
9 The local rule permits remote -- perhaps if we get
10 the local rule --
11 **MR. BOUTROUS:** Your Honor, I have a copy.
12 **THE COURT:** Oh, there we go.
13 (Whereupon, document was tendered
14 to the Court.)
15 **THE COURT:** The local rule permits the recording for
16 purposes the -- of taking the recording for purposes of use in
17 chambers and that is customarily done when we have these remote
18 courtrooms or the overflow courtrooms. And I think it would be
19 quite helpful to me in preparing the findings of fact to have
20 that recording.
21 So that's the purpose for which the recording is
22 going to be made going forward. But it's not going to be for
23 purposes of public broadcasting or televising.
24 And you will notice the local rules states that:
25 "The taking of photographs, public

1 that -- minority stress doesn't affect of single person in the
2 same way. It is a potential.
3 **Q.** Thank you for that clarification.
4 Are you aware that same-sex marriage has been legal
5 since 2004 in Massachusetts?
6 **A.** Yes.
7 **Q.** Do LGB individuals suffer from a lower prevalence of
8 mental health disorders in Massachusetts than in California?
9 **A.** Well, the first answer is I don't really know, but that's
10 now how I -- I wouldn't expect it exactly in that way that you
11 are suggesting; that that would be the test of that, because
12 Massachusetts is not, you know, an isolate in the United States
13 and, you know, it would be more complicated for me to assess.
14 So that alone would not change everything. So it's
15 just one aspect of it. And, certainly, I would think that
16 people in Massachusetts who are gay would feel more supported
17 and welcome, so to speak. So in that sense, it would reduce
18 the stress that they have somewhat.
19 **Q.** But your answer is you don't know, correct?
20 **A.** Well, I don't -- I don't have the data on that.
21 **Q.** You don't have data?
22 **A.** Right.
23 **Q.** Okay. Thank you.
24 Do LGB individuals suffer from a lower prevalence of
25 mood, anxiety and substance use problems that do not meet the

1 criteria for formal psychiatric disorders in Massachusetts and
2 in California?
3 **A.** Again, the study wasn't done in the way that you are
4 describing it, although a study was done looking at states
5 where there's greater rights for gay and lesbian people, and it
6 did show those things that you are alluding to.
7 So it wasn't exactly done in the way that you are
8 saying. It wasn't Massachusetts versus California. But in
9 general in the United States states that offer more
10 protections, gay and lesbian populations there fare better than
11 in states that do not offer such protections.
12 So to the extent that you can use that as a
13 suggestion that it does have this effect that you are alluding
14 to, but I don't know of a study that compared California to
15 Massachusetts on any of those outcomes.
16 **Q.** Okay. And I was planning to ask you about the other
17 outcomes, but the answer would be the same?
18 **A.** Right. I don't know of a study that tested it either way.
19 **Q.** Thank you.
20 Are you aware that same-sex marriage has been legal
21 since 2001 in the Netherlands?
22 **A.** I am going to believe you on that. I'm aware that it's
23 legal.
24 **Q.** I will represent to you that it was.
25 **A.** Okay.

1 **Q.** Do LGB individuals suffer from a lower prevalence of
2 mental disorders in the Netherlands than in California?
3 **A.** I -- I actually don't know the answer to that, although
4 there are studies that -- I don't know the answer to that.
5 **Q.** Would your answer be the same if I asked about the other
6 outcomes you identified?
7 **A.** Right. I don't -- I don't know the comparison. Honestly,
8 I don't know that I can tell you the rates of all the disorders
9 specifically to California, so I couldn't compare them.
10 Most of the studies that I relied on were national
11 studies that were not separated by state.
12 **Q.** Okay. Thank you.
13 Now, you are aware that California allows same-sex
14 couples to register as domestic partners, correct?
15 **A.** Yes, I've learned that.
16 **Q.** And you believe that, quote, domestic partnership has
17 almost no meaning, and, to some extent, it's incomprehensible
18 to people as a social institution, correct?
19 **A.** Yes.
20 **Q.** And I apologize, I said "quote." That's -- that was from
21 your deposition?
22 **A.** Correct.
23 **Q.** And for opposing counsel's benefit, I'll identify that as
24 the transcript at page 80, 9 to 11.
25 **A.** I believe I talked about it today, as well.

1 Have you done any research to determine whether,
2 since it adopted AB205 -- and that's this bill we were just
3 talking about -- LGB individuals in California suffer from
4 worse mental health outcomes than LGB individuals in any
5 jurisdiction that recognizes same-sex relationships as
6 marriages?
7 **A.** No.
8 **Q.** Okay. Now, at your deposition -- I would like you to turn
9 to -- you made a statement, and I want to confirm that it was,
10 in fact, a statement that you made. And it's -- turn to tab 7,
11 if you would. That's a transcript of your deposition. And
12 look at page 149. And the pages are a little confusing.
13 There's four on each page.
14 **A.** That's okay.
15 **Q.** And it's actually page 38 in the continuous pagination at
16 the bottom, if that's helpful.
17 **A.** I got it.
18 **MR. DUSSEAULT:** Your Honor, I'd object if it's not
19 being offered to impeach anything.
20 **THE COURT:** Why are you offering it?
21 **MR. NIELSON:** I was going to ask him whether he
22 agreed with it. Perhaps I should ask him whether he agreed
23 with it, first. And then if he doesn't --
24 **THE COURT:** Why don't you ask him the statement --
25 **MR. NIELSON:** Yes, exactly.

1 a grandmother, and that we needed to look more broadly at the
2 environment in which children were raised.
3 And I absolutely still believe that that's the case.
4 And I think that's entirely consistent, with what I've been
5 saying.
6 **Q.** The increase in father's absence is particularly troubling
7 because it is consistently associated with poor school
8 achievement, diminished involvement in the labor force, early
9 child bearing, and heightened levels of risk-taking behavior,
10 correct?
11 **A.** Again, this is something that we talked about earlier.
12 That is correct. There are those associations.
13 The interesting question is: Why do those
14 associations come about and how can we understand those
15 associations?
16 **Q.** And boys growing up without fathers seem especially prone
17 to exhibit problems in the areas of sex role and gender
18 identity development, school performance, psychosocial
19 adjustment, and self-control, correct?
20 **A.** And I think some of those findings have held up, and some
21 of those conclusions have not been substantiated by a lot of
22 the recent research.
23 **Q.** Well, let's look at -- just to make sure we're getting on
24 the right page on the time frame, if you look at tab 15 in your
25 binder, this is an article from 2000.

1 heterosexual.

2 But none of the studies that are reviewed here are
3 themselves studies that focus on adjustment of children. I
4 think that's the case. Yes.

5 **Q.** You are not aware of any study that looks at the specific
6 benefits flowing to children whose parents are together under
7 domestic partnership law in California, correct?

8 **A.** I'm not aware of any study of that, no.

9 **Q.** And we don't have any studies that look at the behavioral
10 outcomes for children with married same-sex parents, correct?

11 **A.** That's correct.

12 **Q.** And on aggregate, the children being raised by gays and
13 lesbians are comparable in their outcomes to those being raised
14 by heterosexual parents, correct?

15 **A.** Sorry. Could you repeat that?

16 **Q.** On aggregate, the children being raised by gays and
17 lesbians are comparable in their outcomes to those being raised
18 by heterosexual parents, correct?

19 **A.** That's correct.

20 **Q.** And that's true even though none of those gay and lesbian
21 couples were married, correct?

22 **A.** That's correct.

23 **Q.** Thank you.

24 **MR. THOMPSON:** No further questions, your Honor.

25 **THE COURT:** Very well. Mr. McGill, redirect?

1 **A.** I was asked some questions. I don't know that I read it
2 thoroughly. It was presented to me, and then I was asked
3 questions.
4 **Q.** Okay. Now, I represent to you that Mr. Blankenhorn, who
5 is the author of this article, argues that redefining marriage
6 to include same-sex couples would undermine the purposes of
7 ensuring that, insofar as possible, children would be raised by
8 the man and woman whose sexual union brought them into the
9 world.
10 Do you recall that being the subject of this article?
11 **A.** Generally, yes.
12 **Q.** Okay. And would you agree that it's possible that people
13 voted for Proposition 8 based on the reasons that are
14 articulated in this particular article?
15 **A.** I believe that some people could say that. Once again, I
16 believe that their feelings would be grounded in prejudice and,
17 obviously, misinformation.
18 **Q.** Because you disagree with the premise that's put forward
19 in this particular article?
20 **A.** Well, it's not the premise. It's what we see in reality.
21 Many children are not raised by biological parents. They are
22 raised by one parent or another, or they are foster children.
23 So, I mean, this is supposing that everybody had had
24 a marriage, where both partners were there throughout the
25 upbringing of their children, all through the children's life.

1 **Q.** Well, this article puts forth the idea that, all things
2 being equal, that the best-case-scenario for kids is to be
3 raised with their biological mother and father.
4 You disagree with that premise?
5 **A.** You know, I think all things equal. But I also was a cop
6 for 26 years, and I know there are a lot of children who did
7 not benefit from child abuse, from child neglect, by biological
8 parents. So I don't know that we can say "all things being
9 equal."
10 **Q.** Okay. So you disagree with the premise that's being put
11 forth by Mr. Blankenhorn?
12 **A.** I do.
13 **THE COURT:** Is DIX1475 in?
14 **MR. RAUM:** This is --
15 **THE COURT:** Is it in evidence?
16 **MR. RAUM:** Yes, it is, Your Honor. It was admitted
17 into evidence on Thursday, in connection with Dr. Cott.
18 **THE COURT:** Very well.
19 **MR. RAUM:** Professor Cott, I should say.
20 **BY MR. RAUM:**
21 **Q.** Would you also agree that some people who voted in favor
22 of Proposition 8 did so simply to preserve the historical
23 tradition of marriage in this country?
24 **A.** I would believe that some people possibly voted that way.
25 I don't really know.

1 But, once again, if they did, I would think that
2 would be grounded in prejudice.
3 **Q.** And some people may have voted for Proposition 8 because
4 they feel that marriage is tied to procreation. Would you
5 agree with that?
6 **A.** I would agree that some people could say that. I don't
7 really know their reasoning behind that.
8 **Q.** And you agree that there are many reasons why people voted
9 for and against Proposition 8?
10 **A.** I do.
11 **Q.** And among these many reasons are reasons that are grounded
12 in good faith beliefs in marriage between a man and a woman?
13 **A.** I believe that good faith beliefs don't negate the fact
14 that they are grounded in prejudice, which means that one group
15 of people are being treated entirely differently simply because
16 of their sexual orientation.
17 Whether you have a grounded belief or not, I don't
18 think negates that.
19 **Q.** And I understand that's your position. But, nonetheless,
20 you believe that certain people, in good faith, could disagree
21 with that position that you've just articulated?
22 **A.** I believe that some people could. But I can't interpret
23 what they do.
24 **Q.** In fact, you shared that sentiment at one time; did you
25 not?

1 California, as further examples of
2 undemocratic judicial activism foisted on an
3 unwilling public."
4 Now, I don't suppose you agree with that comment, do
5 you?
6 **A.** No. As I discuss in the book, I think that the pace of
7 change has been quite measured.
8 **Q.** And, finally:
9 "Some in the gay community argue that change
10 is happening too fast to avoid political
11 backlash and that creating alternatives to
12 marriage, both for same-sex couples and for
13 other family forums, might be a better way
14 go."
15 Now, you obviously don't agree with that, right?
16 **A.** No, I don't agree with that either.
17 **Q.** But you believe that that view is a reasonable one to
18 hold?
19 **A.** It's one that people offer and that we talk about. And my
20 goal in the book was to take each of these questions that I
21 posed in this introduction and to, you know, look at them from
22 the perspective of data and reason.
23 **Q.** But you think, don't you, Professor Badgett, that social
24 change with respect to same-sex marriage in this country is
25 taking place at a sensible pace at this time with more liberal

1 states taking the lead and providing examples that other states
2 might some day follow, isn't that correct?
3 **A.** That's the conclusion that I draw from my look at the data
4 on which states have made these changes, yes.
5 **MR. COOPER:** Your Honor, one moment, please.
6 **THE COURT:** Certainly.
7 (Discussion held off the record
8 amongst defense counsel.)
9 **MR. COOPER:** I have no further questions, your Honor.
10 Thank you, Dr. Badgett.
11 **THE COURT:** Very well. Mr. Boise, redirect?
12 **MR. BOIES:** Thank you, your Honor.
13 **REDIRECT EXAMINATION**
14 **BY MR. BOIES:**
15 **Q.** Good afternoon, Professor Badgett.
16 You were asked earlier whether there were some
17 difficulties in the categorization of gays and lesbians; do you
18 recall that?
19 **A.** Yes.
20 **Q.** Are there difficulties in categorization of people based
21 on race and religion as well?
22 **A.** Umm, like with sexual orientation, I wouldn't think of
23 them as "difficulties." I think that there are challenges and
24 that's why we see some changes from time to time in terms of
25 how we measure those characteristics on surveys.

1 question yesterday, a single election result is -- or a single
2 piece of legislation should not be considered to be the basis
3 for a conclusion. It's a piece of evidence.
4 **Q.** All right. And one of the obstacles that gays and
5 lesbians face in California to realizing same-sex marriage
6 rights is religiously-inspired opposition, correct?
7 **A.** I would think that that's a national issue. That the
8 religions -- quoting the document that you submitted into
9 evidence, that gay and lesbian advocacy organizations think
10 they have a religion problem.
11 **Q.** Right. And there are some individuals who voted for
12 Proposition 8 because of Old Testament Biblical prohibitions
13 against same sex sexual contact, correct?
14 **A.** I think that that's a fair assumption.
15 **Q.** And there are some numbers of individuals who might have
16 voted for Proposition 8 because they believe their churches
17 were going to be compelled to bless same-sex marriages,
18 correct?
19 **A.** I believe that they had been led to believe that. So I
20 think that there is some evidence that that could be true, yes.
21 **Q.** And it's possible, in your opinion, that some people voted
22 in favor of Proposition 8 because of the negative reaction to
23 the perception of activist judges, correct?
24 **A.** I would think that that's possible, but less likely.
25 So, scholars of American public opinion regularly

1 bemoan the low levels of information that many voters have.
2 It is certainly an argument that has been used by one
3 side of the political spectrum to decry what they see as a form
4 of judicial activism and to make the judiciary a scapegoat for
5 their views.
6 I'm not sure the degree to which that penetrates into
7 the general public. I think many Americans don't fully
8 understand the judicial process or even the judicial
9 appointment process.
10 I am sure that it is the case that somewhere in
11 California someone probably voted on the basis of not liking
12 those darn judges. But I can't really speak to what percentage
13 that might be.
14 **Q.** All right. Now in your rebuttal report that you put in in
15 this case, you talked about the role of religion and how it may
16 or may not inform views on same-sex marriage, correct?
17 **A.** I did. I was responding to the expert report that had
18 been put in by --
19 **Q.** And we have decades of research on abortion opinion,
20 social welfare, death penalty, to suggest that people's
21 religious convictions shape their views of public policy,
22 correct?
23 **A.** I think that's a fair conclusion.
24 **Q.** Various measures of religion are a fairly robust predictor
25 of lots of forms of political behavior, correct?

1 27 is just the page at the bottom.
2 **BY MR. NIELSON:**
3 **Q.** All right. Now, have you had a chance to look at those
4 lines?
5 **A.** Yes.
6 **Q.** Did you give that testimony at your deposition?
7 **A.** Yes.
8 **MR. NIELSON:** Okay. And I'd like to read that, Your
9 Honor. He said:
10 "Now, that said, if you are trying to predict
11 for any specific individual whether their
12 identity will predict their sexual behavior
13 in the future, especially, that can be
14 problematic."
15 **BY MR. NIELSON:**
16 **Q.** All right. Thank you.
17 And we certainly know that people report that they
18 have experienced a change in their sexual orientation at
19 various points in their life, correct?
20 **A.** I'm sorry. Could you say the question one more time.
21 **Q.** Sorry. We certainly know that people report that they
22 have experienced a change in their sexual orientation at
23 various points in their life, correct?
24 **A.** Some people do report that, yes.
25 **Q.** Okay. Thank you.

1 As I have said before, we don't really understand the
2 origins of sexual orientation in men or in women. There are
3 many different competing theories, some biologically based,
4 others based more on culture and individual experience.
5 So I would say that what she is suggesting is that
6 the available evidence doesn't support the idea of there being
7 a strong biological factor that explains the development of
8 sexual orientation in women.
9 **Q.** Do you agree with that?
10 **A.** Yes. I would agree that that is the case.
11 And I would also say that I don't -- I believe that
12 it's the case that we simply don't understand the origins of
13 sexual orientation in either men or women.
14 **Q.** Okay. Please turn to page 87 of the same document.
15 (Witness complied.)
16 **Q.** And under "An Alternative Perspective," that heading, do
17 you see that towards the bottom of the page on page 87?
18 **A.** Yes.
19 **Q.** She writes:
20 "A comprehensive analysis of women's sexual
21 orientation should begin with empirically
22 grounded generalizations about women's
23 experiences. The cumulative record of
24 research on women's sexual orientation
25 supports three broad conclusions.

1 **A.** For tangible benefits, I would not be able to name them.
2 **Q.** Okay. Thank you.
3 And you talked a little bit about hate crimes. Are
4 hate crimes illegal in California?
5 **A.** I think crime is illegal in California.
6 (Laughter.)
7 **Q.** Correct. And are crimes -- and are crimes committed on
8 the basis of sexual orientation illegal in California?
9 **A.** Yes, they are illegal in California. And, in fact, they
10 still continue to occur.
11 **Q.** And do you believe there is a link between denying -- or
12 between defining marriage as a union of a man and a woman in
13 hate crimes?
14 **A.** Well, I think that it's -- as I said earlier, when we look
15 at structural stigma related to sexual orientation, it provides
16 a context in which all sorts of things happen, all sorts of
17 behaviors toward people in the stigmatized group.
18 And so I would say that a direct relationship between
19 those two is not empirically established, to my knowledge, but
20 that structural stigma, as basically creating the atmosphere in
21 which individual enactments of stigma occur, that there is
22 potentially a relationship there, yes.
23 **MR. NIELSON:** And, your Honor, I believe I'm
24 concluded, but I just want to quickly consult, if I may, for
25 just a moment?

1 institution or the possible participants in the institution
2 become over time less loyal to it, less -- they understand it
3 less. They -- they -- some of them -- they increasingly -- the
4 institution loses esteem in the society. It loses respect. It
5 loses its sense of being held in high regard. And the
6 institution becomes less and less able to carry out its
7 contributions to the society.
8 This concept of deinstitutionalization is, I think,
9 a -- a critical one for people who are studying the status and
10 future of any institution.
11 But, in particular, it has been of great value to
12 scholars looking at -- at recent trends in marriage, because in
13 the United States, particularly in recent decades, the last
14 three, four, five decades, there has been a marked process of
15 deinstitutionalization of marriage, with very numerous and
16 serious consequences for children and for society as a whole.
17 So it's an absolutely pivotal concept, if we want to
18 understand where the institution is going and what
19 opportunities we may have to -- to come to its aid.
20 **Q.** I think you did, just now, testify that the institution of
21 marriage is -- has been weakened, I think, to paraphrase your
22 testimony, by deinstitutionalization already.
23 What are some of the manifestations of that process?
24 **A.** Well, if you look, for example, at rates of out-of-wedlock
25 childbearing, you know, five or six decades ago only a small

1 fraction of U.S. children were born to unmarried parents.
2 Whereas, the most latest data tell us that today about
3 38 percent of children in the U.S. are born to unmarried
4 parents.
5 So that over, say, a five-decade period, if you go
6 back to 1960, that would be a very dramatic example. That rate
7 of growth over a five-decade period, I think, constitutes a
8 very dramatic example of the weakening of the marriage
9 institution.
10 You also would need to look at rates of divorce. The
11 United States has probably the highest divorce rate in the
12 world.
13 And so, as a result, people are -- the weakening of
14 the ideal of marital permanence suggests a lessening loyalty to
15 the institution, and the rise of nonmarital cohabitation; the
16 increasing mainstreaming of third-party participation in
17 procreation and artificial assisted reproductive technologies
18 that disturb the bond between the -- disturb the biological
19 bond between the genitor and the child; and, last, but for our
20 purposes certainly not least, the -- the spread of the idea and
21 reality of same-sex marriage in the view of -- I think, the
22 view of leading scholars, is another aspect or manifestation of
23 this current trend of deinstitutionalization.
24 And I meant to say just for our purposes today, you
25 know, heterosexuals, you know, did the deinstitutionalizing. I

1 mean, you know, if we go back and look at the trends I
2 described, it's very clear that this -- this was not --
3 deinstitutionalization is not something that just cropped up a
4 few years ago whenever we began discussing the possibility of
5 extending equal marriage rights to gay and lesbian people. It
6 predates all that.
7 But what I am saying is that the scholars are telling
8 us that the process of deinstitutionalization would be
9 furthered and accelerated significantly by adopting same-sex
10 marriage.
11 **Q.** Well, what impact, in your opinion, would redefining
12 marriage to include same-sex couples have on marriage, in this
13 deinstitutionalization process?
14 **A.** It's hard to know because you're in some important ways,
15 you know, predicting what will happen in the future.
16 My best judgment is that if we move toward a
17 widespread adoption of same-sex marriage, I believe the effect
18 will be to significantly further and in some respects culminate
19 the process of deinstitutionalization of marriage.
20 If -- if you take an institution that for all of its
21 long history has been understood to have defined public
22 purposes, and through changing its definition you transfer it
23 from the public -- you transfer it from a child-centered public
24 institution to an adult-centered private institution, a
25 question of private ordering among couples, you have in some

1 ways, you know, completed -- that's a culminating trend toward
2 the erasure of marriage's public defined contribution to
3 society.
4 And I think that it's likely that, you know, that --
5 as I say, this did not trigger the trend of
6 deinstitutionalization. Deinstitutionalization has been with
7 us now for a while. But it's a live issue, and there are many
8 people who would like to reverse the trend.
9 But I think the evidence is quite compelling that if
10 we move to a widespread adoption of same-sex marriage, we will
11 very significantly accelerate the process of
12 deinstitutionalization.
13 And the consequence of that will be to weaken the
14 role of marriage, generally, in society. And the consequences
15 of that will be felt by everyone in the society.
16 **Q.** You mentioned earlier other scholars who have recognized
17 the relationship between same-sex marriage or the prospect of
18 it and deinstitutionalization. I want you to turn, now, to the
19 document behind tab 17 of your binder.
20 **A.** Yes.
21 **Q.** And what is that, please?
22 **A.** This is an article by Andrew Cherlin, who's a prominent
23 family sociologist. He teaches at Johns Hopkins. He is a
24 proponent of same-sex marriage. And this article is entitled,
25 "The Deinstitutionalization of American Marriage."

1 Martin Luther King saying, you know, "You ought to ease up.
2 The people aren't ready for these kind of changes. There's
3 going to be a backlash."
4 And his letter from a Birmingham jail explaining why
5 he could not wait to press the civil rights of his fellow
6 citizens is as compelling a statement on that subject that's
7 ever been written.
8 Now, we talked a little bit about -- oh, Mr. Cooper
9 came up with something that I hadn't really heard about until
10 the closing argument in this case. I really don't remember the
11 evidence. "The threat of irresponsible procreation."
12 I tried to figure out what that means, because the
13 clients I represent don't present a threat of irresponsible
14 procreation. They are interested in getting married to someone
15 of the same sex. Mr. Cooper acknowledged they are not a threat
16 of irresponsible procreation.
17 On the other hand, heterosexual couples who practice
18 sexual behavior outside their marriage are a big threat to
19 irresponsible procreation, if that's what it's all about. So
20 if --
21 **THE COURT:** Heterosexuals that have led to the
22 deinstitutionalization of marriage, and heterosexuals ...
23 (Simultaneous colloquy.)
24 **MR. OLSON:** ... that's right. And people will run
25 out, and, yeah, "Well, that's it. That's it."

Exhibit C

Court File No. 684/00

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

HEDY HALPERN and COLEEN ROG
MICHAEL LESHNER and MICHAEL S
MICHELLE BRADSHAW and REBEKAH
ALOYSIUS PITTMAN and THOMAS ALI
DAWN ONISHENKO and JULIE ERBI
CAROLYN ROWE and CAROLYN MO
BARBARA McDOWALL and GAIL DON
ALISON KEMPER and JOYCE BAR

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF
CALIFORNIA

Case number: 09-2292

PLTF/DEFT EXHIBIT NO. DIX131

Date admitted: ________________

By: ____________________________

-and-

THE ATTORNEY GENERAL OF CANADA, et al

Respondents

and

EGALE CANADA INC. et al

Intervenors

-AND-

Court File No. 39/2001

BETWEEN:

METROPOLITAN COMMUNITY CHURCH OF TORONTO

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA, et al

Respondents

and

HEDY HALPERN, et al

Intervenors

AFFIDAVIT OF STEVEN LOWELL NOCK

Court File No. 684/00

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

HEDY HALPERN and COLEEN ROGERS,
MICHAEL LESHNER and MICHAEL STARK,
MICHELLE BRADSHAW and REBEKAH ROONEY,
ALOYSIUS PITTMAN and THOMAS ALLWORTH,
DAWN ONISHENKO and JULIE ERBLAND,
CAROLYN ROWE and CAROLYN MOFFATT,
BARBARA McDOWALL and GAIL DONNELLY,
ALISON KEMPER and JOYCE BARNETT

Applicants

-and-

THE ATTORNEY GENERAL OF CANADA, et al

Respondents

and

EGALE CANADA INC. et al

Intervenors

-AND-

Court File No. 39/2001

BETWEEN:

METROPOLITAN COMMUNITY CHURCH OF TORONTO

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA, et al

Respondents

and

HEDY HALPERN, et al

Intervenors

AFFIDAVIT OF STEVEN LOWELL NOCK

I, Steven Lowell Nock, of the City of Charlottesville, in the State of Virginia, in the United States of America, make oath and say as follows:

1. I have been asked by the Attorney General of Canada to apply my expertise in research methodology and evaluate the scientific literature concerning the effect of legal recognition of the marriages of gay and lesbian couples on their children, cited in the affidavit of Professor Jerry Bigner, sworn November 11, 2000, and filed on behalf of the Applicants in this case. The articles upon which Professor Bigner's opinion rests are contained in his Exhibit "B" and were previously relied on in the Brief to the court in Vermont, in the case of *Baker v. Vermont*. I have read and evaluated each of those articles.

2. My affidavit is divided into two main segments. In the first, I explain the principles of sound social science research methodology. I describe the characteristics of good research design and highlight the pitfalls that result from the failure to apply proper design techniques. Clearly, where the design of research is substandard, it is dangerous to rely on the conclusions reached if they are intended as truths.

3. In the second segment of this affidavit I analyze the studies presented by Professor Bigner for their value and reliability in supporting the assertions that Professor Bigner says they support. I do this analysis with reference to the accepted methodological techniques and terms described in the first segment of this affidavit. Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to general accepted standards of scientific research.

4. The task I undertook was to evaluate the relevant studies simply from the standpoint of whether or not they provide reliable answers to the questions or hypotheses their authors intended to address. As a result, my analysis is made solely from the perspective of a research methodologist. I do not make any claim regarding the inherent

truth or falsity of any of the hypotheses proposed to be tested in the studies, or of any converse hypotheses. It is the policy maker who depends on the truth value alleged in the results and conclusions reached through social science. With this in mind, only objective and sound methodological analysis can fulfill the need.

I. Qualifications

5. I am currently a Professor of Sociology at the University of Virginia where I have taught since 1978. I teach both undergraduate and graduate courses. At the undergraduate level, I teach Research Methods, The Family, and Family Policy. At the graduate level, I teach Research Design, Intermediate Graduate Statistics, and Family Research.

6. I am co-founder of the Center for Children, Families, and the Law at the University of Virginia, a multi-disciplinary center to foster collaborative research and teaching on issues involving children and families.

7. My research focuses primarily on households and families. I am concerned with the causes and consequences of changes in family organization and structure. Thus, I have investigated marriage, divorce, and cohabitation by focusing on the factors that lead individuals into these statuses and the consequences of entering them. I am the author of six books and over 50 articles and chapters that are detailed in my *curriculum vitae*, attached as Exhibit "1" to this affidavit. Almost everything I have published relies on quantitative analysis of large, nationally representative samples of adults. My most recent book (*Marriage in Men's Lives*) was based on a statistical analysis of 6,000 men interviewed annually from 1979 through 1993. The book was the recipient of the 1999 American Sociological Association William J. Goode Book Award for the most outstanding contribution to family scholarship.

8. I am also Director of the Marriage Matters Project which is a five-year research effort supported by the National Science Foundation and the Smith Richardson Foundation. This research investigates the legal innovation known as Covenant Marriage in Louisiana. It is a quantitative effort involving approximately 1,200 individuals interviewed repeatedly over the course of five years.

9. I currently serve as Associate Editor for *Journal of Marriage and the Family* and *Social Science Research.*

II. Relevant Issues Of Research Design

a. Introduction

10. Before evaluating the specific claims made by Professor Bigner in his affidavit, I first want to outline the strategies that would produce scientifically acceptable research results concerning the effect of legal recognition of the marriages of gay and lesbian couples for the children in such unions. These strategies are the basis of my evaluation of the articles contained in Professor Bigner's brief as they conform to accepted standards for scientific research.

11. Let me begin by noting that the central question, that is, what effect does gay and lesbian marriage have on children in such unions, cannot be answered at the moment. With the exception of the extremely recent change in the Netherlands, no jurisdiction has yet to recognize the unions of gays and lesbians as marriages. As a result, it is clearly impossible to evaluate how such a change has affected the children involved.

12. Since it is not possible to consider this research question (i.e., would the legal recognition of the marriages of gay and lesbian couples affect the children in such unions), we are left to consider a related question. As I see the issue, there are actually two such questions, only one of which can be answered. First, and most importantly, does a homosexual union of adults cause the children to develop differently than they

would have if they had heterosexual parents (or some other arrangement)? This is a researchable question that can, in principle, be answered. However, the simple fact is, to date, this question has not been answered. Second, does marriage change the behavior of gay or lesbian parents toward their children or toward each other (i.e., does marriage cause relationships to be more stable, cause parents to treat children differently etc.)? While this second question has been addressed with respect to heterosexuals, it cannot be answered with respect to homosexual parents because there has never been a legal marriage of homosexuals. Any answer to this question in regard to homosexual marriage is purely hypothetical.

13. In the comments that follow, I have assumed that the following statement, found in the affidavit of Dr. Jerry Bigner, guides the research: Is it true that "The children of gay and lesbian parents are as healthy and well adjusted as those of their heterosexual counterparts?" (Bigner affidavit, page 6)

b. Correlation and Causation

14. Before discussing how we might address such a question, I want to distinguish between "correlation" and "causation." When two things are correlated, we can show that they tend to vary together. That is, different levels of one tend to be associated with different levels of the other. A well-known example of correlation is the relationship between educational attainment and income. Those with higher levels of educational attainment have higher average incomes. Another well-known example of a correlation is the relationship between divorce and children's educational attainment. Children who experience their parent's divorce before age 16 complete fewer years of schooling, on average. Both of these correlations are well known, and have been replicated enough times to confirm their existence.

15. Correlation, of course, does not necessarily imply causation. That is, in trying to understand what relationship one factor has to the other, it is very unsound to assert that the correlation between educational attainment and income reflects a causal path between the first and the second. Nor is it sound to assert that the correlation

between divorce and educational attainment means that divorce is the cause of children completing fewer years of schooling. From the perspective of a research methodologist, it would be foolish – and, indeed, unsound – to make such causal assertions without more evidence than a simple correlation.

16. To determine that a causal connection exists between any two factors X and Y requires three things:

- X and Y must be correlated;
- X must precede Y temporally; and
- No third factor Z can explain the relationship between X and Y.

17. In the case of educational attainment and income, for example, there is no question that the two are correlated. Nor is there much question that educational attainment typically precedes the earning of income. But what about the existence of a possible third factor? What if high intelligence is the true cause of both higher educational attainment *and* higher income? If so, then the correlation between education and income is spurious. It exists only because the two items share a common cause. We can apply the same logic to the divorce-education example. If poverty is a primary cause of divorce and of poor educational attainment, the correlation between divorce and education is spurious.

18. The primary question that has been asked in the research referred to in the case at hand is, in my opinion, causal in nature. "Does having gay or lesbian parents cause children to differ (from others) in consistent ways. I address how we might answer this and related questions in a way that produces reliable results from the perspective of sound research methodology.

19. To show that having gay/lesbian parents *causes* children to differ, we would need to do three things. First, we would need to show that there is a correlation between living with gay/lesbian parents and some outcome in the lives of children. Second, we would need to show that exposure to gay/lesbian parents happened before the

outcome did. And finally, we would need to show that there is no other factor that is a common cause of both.

20. In a related way, how would we show that there is *no* causal relationship between gay/lesbian parents and children's well being? This requires somewhat less evidence. To establish the validity of such a claim would require only that no correlation be found between the sexual orientation of parents and the child's well being once all other factors have been controlled. If a valid and scientifically adequate study were to show that there is no correlation between having gay or lesbian parents and a child's well being, based on a comparison of representative groups of each type of parent, and differing only on sexual orientation, then most scientists would accept that there is no causal link between the two.

III. The Design Of The Study

a. Introduction

21. In the following section, I discuss the relevant issues required to conduct a study to answer the question being asked in this case. Several methodological issues must be satisfied before one may attempt to investigate the relationship being discussed. In the following sections, I summarize and explain these issues as they pertain to the case at hand. Once I have done that, I turn to the evidence included in Professor Bigner's affidavit. I evaluate that evidence on the various design and sampling criteria I discuss below.

b. Sampling.

22. First and foremost, the ability of any social-science evidence to apply to a larger group depends on the way the sample of cases was obtained. A "probability sample" is one in which every member of a *definable population* has a known probability

of being included in the study. A probability sample is always necessary in order to generalize one's results. The simplest form of probability sampling is known as "simple random sampling" (SRS). In SRS, a researcher first defines some population to which she or he wishes to generalize the results of the study. This may be a population as large as all voting adults in Canada, all adults in Canada, all children in primary grades, or as small as all patients with newly diagnosed breast cancer. Regardless of the population of interest, the researcher must be able to define it. Once defined, every member of the population must have an equal chance of being selected for participation in the study. If, for example, the population was defined as the 480,000 (1996) residents age 25 and older in the geographic limits of the city of Toronto (at that time), then every single one of these 480,000 residents must have the same chance of being selected into the sample. Simple random sampling guarantees that the chances of selection (from the defined population) are equal for all cases. A detailed explanation of how simple random sampling is achieved is contained in the paragraphs I have written in Appendix I to this affidavit.

23. As indicated, a probability sample is required whenever a researcher wishes to make claims about the larger population from which the sample was drawn. If the goal is to make general claims about same-sex parental relationships and the children who might be affected by them, then we must have a probability sample drawn from the larger population of homosexual parents and children.

24. A probability sample does not guarantee that the results will fairly and accurately describe the larger population. Indeed, it is possible for such a sample to err in large and important ways. For example, imagine drawing a simple random sample of 1,000 from all employed persons aged 15 and older with reported incomes in the Toronto metropolitan area. We know that the average (annual, 1995) income reported by Statistics Canada for this group of Toronto residents is $28,980 [1]. But is it possible that our

[1] http://CEPS.statcan.ca/english/profil/Details/details1inc.cfm?PSGC=35&SGC=53500&A=&LANG=E&Province=All&PlaceName=toronto&CSDNAME=Toronto&CMA=535&DataType=1&TypeNameE=Census%20Metropolitan%20Area&ID=605

random sample could produce an average of $38,980, an average that is $10,000 higher than the actual value at that time? It is quite possible. Since the sample was drawn randomly, it is possible that an unrepresentative group of 1,000 people was selected. But it is not *probable*. In fact, such a result would be extraordinarily unlikely. And that is the important point about probability samples; we are able to calculate how unlikely such a result would be.

c. Probability Theory

25. In practice, we cannot know if our particular probability sample is a fair and representative reflection of the population from which it was drawn. As a consequence, we apply probability theory to the results obtained from such samples. Rather than claim that our results do, in fact, reflect the true situation in the population, we attach a probability of error to any such claims. This is what is meant by "statistical significance." The statistical significance of any sample result refers to the probability that the true (but unknown) value in the population differs from that result.

26. There is no alternative to the use of probability theory when the goal is to generalize from a sample to a larger population. And there is no alternative to a probability sample when one applies probability theory. Without a probability sample, a researcher cannot use statistics that are designed to generalize from samples to populations (i.e., inferential statistics). Though this is sometimes done, the researcher who does so has violated the most basic premise of inferential statistics.

d. Variations in Sample Quality

27. The quality of samples varies enormously in social science research. Deviations from pure random sampling are not uncommon. But the quality of the sample is directly related to the intended use of the information obtained from it. At one extreme there is exploratory data gathering that is merely intended to generate ideas and hypotheses for more systematic analysis at a later stage. Examples of such samples

include undergraduate students taking a course from a professor, or "mall-intercept' interviews (where a researcher recruits people as they walk by in a shopping mall). At the other extreme are large-scale continuing studies that are used to supply information for policy decisions of the federal government. A good example is the Current Population Survey (CPS) conducted by the U.S. Bureau of the Census for the Bureau of Labor Statistics every month. The CPS has been conducted for 50 years, and provides information about consumer behavior, income trends, and related economic indicators.

28. Particularly relevant to the current issue are instances where a population is difficult to define or identify. Such rare populations present problems since no lists are available to identify them. Locating these populations then requires a search for a probability sample of the general population (i.e., a screening of the general population to identify the members of the rare population). Appropriate techniques exist for such problematic cases, and typically require screening. For example, if a researcher is interested in obtaining a sample of individuals who smoke pipes, a large general population sample would be contacted, and each respondent asked whether he or she smokes a pipe. Sometimes, such screening is made more efficient when the researcher is able to identify geographic clusters (regions) that have higher rates of the rare cases. It is also more efficient if the researcher is able to identify those clusters with no rare cases.

e. Sampling Issues for Research in this Case

29. We do not have a precise estimate of the prevalence of homosexuality in the general population. And sampling is complicated by the stigma associated with the issue. Still, no published estimate that I know of has placed the prevalence above 10%. The most-cited source for the 10% estimate of "more or less exclusively homosexual males" is the work of Kinsey and associates from the late 1940s.[2] Unfortunately, Kinsey's research did not use a probability sample. Moreover, we do not have an agreed-upon definition of homosexuality. Is a homosexual a person whose erotic interests are

focused on those of the same sex? Is a homosexual a person who sometimes engages in sexual acts with a member of the same sex? Is a homosexual a person who thinks of himself or herself as a homosexual? Does a single sexual act with a person of the same sex define a person as a homosexual? Also important in the case is how to define "bisexual?" Are bisexuals to be treated as homosexuals, heterosexuals, or both? And how does one decide? Is homosexuality "learned" (i.e., socially constructed), or is it transmitted genetically? Finally, is male homosexuality the same phenomenon as female homosexuality? Answers to such questions have direct and important consequences for how one investigates the topics in this case.

30. Unless the researcher is able clearly to define what "homosexual" means, he or she is forced to let subjects define the terms as they wish. In the research relied on by Professor 7Bigner, which I reviewed for my opinion on its validity and reliability, this is what was done. Researchers allowed subjects to define themselves as homosexual or heterosexual without further specifications. Quite simply, by relying on volunteers (rather than a sample defined by some specific definition), the researchers cannot know what is being studied. More critically, the use of volunteers means that it will never be possible to replicate the findings of the research. Should another researcher conduct a similar study but find different results, it will be impossible to know why.

31. Depending on how one defines the term homosexual (or gay, or lesbian), different estimates of the prevalence are obtained. The work of Laumann, Gagnon, Michael, and Michaels (1994)[3] was based on personal (face-to-face) interviews with a probability sample of 3,432 adults and is probably the best source of information currently available on the prevalence of homosexuality in the United States. The population to which this sample may be generalized includes all English-speaking adults between the ages of 18 and 59 who resided in households (i.e., not institutions) at the time of the study. Using various definitions of homosexuality, these researchers found

[2] Sexual behavior in the human male by Alfred C. Kinsey, Wardell B. Pomeroy and Clyde E. Martin. (1948); Sexual behavior in the human female, by the staff of the Institute for Sex Research, Indiana University: Alfred C. Kinsey and others (1953).

that rates varied somewhat by sex when the question pertained to sexual behavior with a person of the same sex, as seen below:

1. Any same sex partners in the past 12 months? 1.3% women, 2.7% men
2. Any same sex partner since puberty? 3.8% women, 7.1% men

32. When the researchers asked about attraction to members of the same sex, or sexual desire for members of the same sex (alternative definitions of homosexuality), somewhat different values were obtained, with higher rates of "desire" and "attraction" than observed for behavior. And when asked about sexual identity (how one thinks of oneself), rates were different yet, with 1.4% of women, and 2.8% of men identifying with a label denoting same-sex sexuality.

33. Recently published research based on several large, nationally representative probability samples of all English-Speaking non-institutionalized adults age 18 and over[4] produced comparable rates of prevalence. Most of the data in this study were obtained with anonymous, self-administered questionnaires rather than face-to-face interviews. By combining years of the General Social Survey from 1988-1991, 1993, 1994, and 1996, as well as evidence from the Laumann, et. al. study just described, these authors report that 3.6% of women, and 4.7% of men have had at least one same-sex partner since age 18. Only 1.5% of women and 2.6% of men had exclusively same-sex partners in the last 5 years.

34. I was unable to locate any probability samples of Canadian homosexuals and will, therefore, use U.S. estimates in this section.[5] How rare is the homosexual population in the United States? If we take the studies just mentioned as the best evidence, we would conclude that somewhere between 1% and 4% percent of adult

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[3] E.O. Laumann, J.H. Gagnon, R.T. Michael, and S. Michaels. The Social Organization of Sexuality: Sexual Practices in the United States. 1994. Chicago: University of Chicago Press. Chapter 8.
[4] D. Black, G. Gates, S. Sanders, and L. Taylor. "Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources." Demography, 37 (No. 2) 2000: pp139-154.
[5] However, based on my understanding that, to a large degree, the populations of the United States and Canada share common roots and cultural, at present I have no reason to believe that the results would be radically different.

American women, and between 3% and 7% of adult American men are homosexual by at least one definition of that term. Surely this is a relatively rare population, yet one sufficiently large to allow researchers to rely on probability samples for analysis. Still, even when large, nationally representative samples are used, the proportion of homosexuals who might be parents will be smaller, clearly, than these low figures. In sum, the population of homosexual adults is small. An adequate probability sample of such a population, would requires a large amount of screening to produce as many as 500 homosexual parents.

35. If we take a midpoint estimate as the best guess of prevalence, then we would expect approximately 2.5% (halfway between 1% and 4%) of female and 5% of male (halfway between 3% and 7%) subjects to be identified as homosexuals by at least one definition of the term. If a researcher screened 20,000 individuals for study, hoping to generate a probability sample of homosexuals, we would expect to obtain approximately 500 female and 1,000 male subjects for analysis. Of these, only a fraction would be parents. As a very crude estimate of that fraction, we might consider the fraction of couples living in common-law relationships in Canada who live with children, or the fraction of married couples in Canada that live with children. (I use these two groups on the assumption that, at this point in time, the vast majority of homosexual parents bore their children in marriages or common-law heterosexual unions.) The 1996 Canadian Census found that 47% of Common-law Couples, and 61% of Married Couples have children at home. Therefore, I would expect that homosexual adults would fall midway between these two values. Assuming that 54% of homosexuals are, at present, parents, this means that about half of any sample of homosexuals would initially qualify for our study. Of the 1,500 homosexuals identified by our screening methods, we would expect 810 currently to be parents. Further qualifications would likely reduce this number further, because not all of these homosexual parents would be living, or have lived, with their children. I have no evidence that would allow me to estimate that fraction. For the sake of illustration, however, let us assume that the fraction of homosexual adults who currently live with their children is 50%. Now our sample has been cut to only 405.

36. With current statistical methods, such samples would be adequate for preliminary research. Samples of twice this size would be adequate for almost any statistical purposes. If our goal is to produce a nationally representative sample of homosexuals sufficient to support most multivariate statistical techniques of the type needed to answer the questions at hand, we would probably need to screen about 40,000 individuals. This is not a particularly large screening task, however. For example, the Current Population Survey (U.S. Bureau of the Census) interviews (not simply screens) approximately 50,000 individuals every month. Still, the sampling task is challenging, and very expensive. But most importantly, in relation to the issues at hand, no one has done this to date.

37. To put the sampling problem in perspective, 2.8% of Canadians are members of an Aboriginal group, 2.5% of Canadians are Baptists, and 5.6% of Canadians are at least 75 years old[6] The sampling task that would be involved in a study of gay and lesbian adults (of which some fraction would be parents) is comparable to the challenge faced by any researcher hoping to study one of these populations in Canada and obtain conclusive results that may be relied on to make very important, or potentially irreversible, policy decisions.

38. Sampling rare populations is a challenge that researchers face all the time.[7] Homosexuals are probably no more difficult to locate and interview than homeless individuals, those who have been the victim of crimes in the past year (without reporting the incident to the police), or those who have had abortions. All have been the subject of scientific investigation. The crucial point is, however, that without a sample of the type just described, it is impossible to make scientifically valid claims about the population of homosexuals and their children.

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[6] http://www.statcan.ca/english/Pgdb/People/popula.htm#oth
[7] My ongoing research about the legal innovation known as "covenant marriage" in Louisiana, focuses on a very rare population. Fewer than 5% of all new marriages in the state are celebrated as covenant marriages. Newly married people, moreover, are a small fraction of all people in the state. Still, I have been able to assemble a probability sample of approximately 600 individuals who have entered covenant marriages within the past 12 months with response rates ranging from 65% to 75% (depending on the month). It is, indeed, difficult to locate and interview people who are in rare populations.

f. 'Convenience' Methods of Sampling

39. Before concluding, a brief note should be added about obtaining samples when probability methods are not used. All such strategies depend on various types of 'convenience' methods. Sometimes researchers will recruit subjects into a study by placing advertisements in various outlets. Sometimes researchers will resort to "snowball" sampling, where a subject mentions another, who mentions another and so on. And, sometimes researchers will use an existing group (e.g., students in a class, members of an organization). No such method is permitted by sound scientific methodology when the goal is to generalize to a population, because all such samples are biased in unknown ways. Particularly problematic with rare samples is the snowball strategy. The reason this strategy is so bad is because individuals who are well-known are more likely to be mentioned than those who are not well-known. And well-known individuals in rare populations often differ in important ways from those who are less well known. A well-known lesbian (if the individual's decision to be known as lesbian is a well-considered decision) is likely to be a different type of lesbian than is her less well-known counterpart.

40. The simplest way to understand why a sample might be biased is to consider a convenience sample recruited from an organization devoted to seeking equal rights for gays and lesbians. Suppose that the homosexual participants in this group have higher levels of education than comparable homosexuals who are not members of this group. If this group were used for research purposes, then anything that is correlated with educational attainment would be biased. For example, we know that higher education is associated with better health. If we extrapolated (generalized) about the health of homosexuals from this sample, we would be making claims about a population based on a group that does not represent it. The reported health of this particular group would probably be better than would a representative sample.

g. Cross-sectional vs. Longitudinal Studies

41. The conclusion must be that a scientific study of how parents' homosexuality affects children must begin with a probability sample of a well-defined population. However, once the population has been defined, and before the execution of the actual sampling, one additional issue must be resolved.

42. Depending on the topic being studied, the researcher must decide whether to conduct the study only once, or conduct it repeatedly over time. The former is typically known as a cross-sectional study and the latter as a longitudinal study. When the only goal is to estimate percentages, rates, and such descriptive information about a population, then a cross-sectional study is often adequate. However, when the goal is to produce evidence about cause, as in the present case, cross-sectional studies are considered especially weak. Longitudinal studies are always preferred when the issue is one of cause-effect.

43. In a cross-sectional study, a group of individuals is contacted once (or several times in quick succession -- for example, several interviews in the course of a day). Information obtained in this way is limited in its ability to produce evidence of change. Without evidence of change, there is very little one can say about cause.

44. The problems of cross-sectional studies are particularly severe when the temporal ordering of the phenomena in question is unclear, that is, where the cause and effect of the two correlated factors may go either way. For example, repeated studies have found that politically conservative individuals have higher incomes. If one were attempting to draw causal conclusions about this correlation, it would be impossible to conclude that higher incomes cause people to become more conservative, because, just as likely, is that holding conservative political positions causes people (for whatever reason) to earn more money. And, of course, as discussed at the outset, there may be absolutely no causal connection between political conservatism and income simply because the two factors are correlated.

45. The second requirement for establishing causation (noted above) is that the cause must *precede* the effect in time. While this is often impossible to determine with absolute certainty, the scientific plausibility of this claim is enhanced significantly when the researcher is able to observe the same individuals repeatedly, over time.

46. Longitudinal studies of the same individuals are known as panel studies. A panel is a group of individuals who are observed, or who answer questions repeatedly over a specified period of time. Well-known examples of large panel studies include the Panel Study of Income Dynamics (PSID), the National Survey of Families and Households (NSFH), the U.S. Census Bureau's Survey of Income and Program Participation (SIPP), and the National Longitudinal Survey of Youth (NLSY). Each of these panel studies includes at least 5,000 individuals who were studied at least twice.

47. When interest focuses on developmental issues (phenomena that emerge over time) a panel study is particularly important. Some processes may require years to become obvious, while others may become immediately apparent. To the extent that the process being investigated develops slowly over the course of several years, then a panel study of long duration is needed to capture this event. If, for example, a researcher studied the transmission of homosexuality from parent to child, what could be learned by a study of 8-year old children? Perhaps a great deal. But more likely, such a study would need to follow these children for several years to investigate the possibility of change over time. A longitudinal study would need to be started when children are young (perhaps 2 or 3), and would need to follow children throughout a significant period of their lives to measure any possible changes.

48. If a researcher is able to show that whenever an individual changes (over time) on one dimension, he or she also changes in predictable ways on another dimension, this is strong (though not incontrovertible) evidence of a causal connection. Thus for example, in my research on marriage in which I relied on a panel study of 6,000 men interviewed annually for 13 years, I was able to show that when men got married (i.e., changed from being single to being married), their incomes also changed by a

predictable amount and direction. I also found that a change in marital status was accompanied by a change in men's propensity to give help to others. These and similar patterns led me to suggest that the relationship was causal. Simply put, I argued that marriage causes men to change in the ways I observed. The reason I made such assertions, it is important to note, is because I had clearly satisfied two of the three logical requirements for establishing a causal connection. I had clearly established a correlation between marriage and several other phenomena. And I had clearly established a temporal order in which the change in marriage routinely came before the change in the other phenomena. The third requirement for establishing cause (no other factor responsible for the presumed cause and the presumed effect) was handled with multivariate statistical techniques. These are an approximation of an experiment[8], and cannot completely eliminate the problem. As a result, the evidence I presented in *Marriage in Men's Lives* can never be asserted to be proof of causation. It is, however, as close as we can get without conducting an experiment.

IV. Translating Concepts Into Measures

a. Introduction

49. Before gathering a single datum from a sample, one must first translate the concepts of interest into indicators that can be measured. This is a central part of the entire process of designing the data-gathering procedure. Sometimes, the project calls for a questionnaire survey. Typically, in such cases, the concepts to be investigated are translated into specific questions on a questionnaire. In other cases, the research project calls for direct observations of individuals. When this is the method to be used, concepts are typically translated into observable behaviors that can be counted, coded, or otherwise recorded.

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[8] An experiment is the intentional manipulation of a group of subjects. No naturally occurring phenomenon can be considered to be an experiment. (See Appendix II for further explanation.)

50. For example, suppose a researcher is interested in the concept of generosity. Before it will be possible to investigate this concept, the researcher must arrive at some way to measure generosity that, in fact, can be measured. Strictly speaking, the concepts that are most often studied by social and behavioral scientists are not immediately apprehended. That is, there is no way to apply the five empirical senses (hear see, touch, taste, or feel) to determine their existence. One cannot see, touch, taste, hear, or feel generosity. Rather, generosity is an abstract concept that must be translated into indicators that may be discerned empirically. For example, the researcher might decide that any gift of money without direct compensation is an act of generosity. Now it becomes possible to empirically measure generosity. The researcher might ask individuals about their gifts of money in the past month, and whether there was any direct compensation. If the researcher is willing to believe the answers given to such questions, then he or she is able to measure such things as how many times an individual gave money, and how much money he/she gave. In this fashion, the researcher might make claims about the measured generosity of individuals, noting clearly how that term was defined. Regardless of whether others accept this definition of generosity as valid, the researcher has conformed to accepted scientific practice by clearly and specifically defining his concept. The simplest way to determine whether a concept has been defined is to ask if another researcher could replicate the study using the same empirical measures.

51. Scientific evidence accumulates and gains credibility only through replication. The precise definition of all concepts to be used is crucial to the capability to replicate studies.

b. Operational Definitions

52. In social science literature, the process of translating a concept into one or more empirical indicators is known as developing an operational definition of a concept. An operational definition of a concept is comparable to a recipe for a favorite dish. If one follows the recipe exactly without deviating from it, one will reproduce the desired

outcome. The dish can be replicated because there is a recipe for it. In social science research, the concepts used frequently come to have conventional operational definitions. Researchers using accepted operational definitions are able to replicate others' research, and build upon it. In this fashion, social science advances, as any science might.

53. A good example is the (seemingly) simple concept of education. By convention, most social scientists accept "years of schooling completed" (or the highest degree earned) as an operational definition of education. Two people who differ in the number of years of completed schooling do not necessarily have different amounts of education in a more fundamental sense (there are, that is, obvious exceptions to the relationship). But the two people are considered to have completed differing amounts of schooling. The presumed relationship between the concept (education) and the indicator of it (years of schooling) is referred to as the validity of a measure. A valid measure is one that clearly measures the concept of interest. Most social scientists are willing to accept "years of completed schooling" as a valid indicator of the concept "education."

c. Valid Indicators

54. The first requirement for a valid indicator is an operational definition. Technically, it is never possible to prove that an indicator is valid because no abstract concept can ever be measured. However, with repeated usage, and with repeated critiques of empirical indicators, social scientists have agreed on several strategies to gauge the presumptive validity of an indicator. For example, does one's measure of the concept correlate with the factors one would expect it to ('predictive validity')? In the case of education, we would presume that any valid measure of it would correlate with the prestige of one's occupation (i.e., we presume that people with more prestigious occupations also have more education). So the researcher would determine whether "years of completed schooling" correlates with established measures of occupational prestige. In fact, these two factors correlate positively, providing minimal assurance that the operational definition is valid. Researchers typically ask experts in their field to review their measures to check the presumptive validity ('face validity').

55. With regard to the question at hand, we would need operational definitions of "gay", "lesbian", "bisexual, "parent", "child", "child's health", and "child's well being." Some of these present little problem (e.g., Statistics Canada has definitions of "parent" and "child", while psychologists have developed several measures of emotional and psychological health.) The operational definitions of "gay," "bisexual," and "lesbian" would be the most challenging concepts to measure, although several strategies have already been noted.

d. Reliability

56. Once an operational definition exists, a researcher is able to establish the degree to which the measure has another desirable property, that of reliability. A reliable measure is one that consistently reports the same value for the same magnitude of some phenomenon. An unreliable measure is one that fluctuates unpredictably in the values it produces. For example, we might ask if a particular IQ test is a reliable indicator of mental ability. To answer that question, we would need to know whether the same test, applied repeatedly to the same individual, would yield the same IQ score. If it did, then the test is reliable.

57. A common threat to the reliability of any measurement is the use of a single observer to record the measurement. For instance, if a single researcher conducts repeated interviews, recording the warmth of parent-child relationships, for example, there is no way to estimate the observer's subjectivity. If several observers conduct the same types of interviews, however, it should be possible to make some estimates of this possibility (i.e., inter-rater reliability).

58. Reliability is assessed in several ways. Sometimes a researcher will ask the same question, or use the same measurement strategy more than once (in surveys and various tests, slightly different wordings of the same question are typically included to tap this type of reliability). A similar strategy relies on the use of multiple measures of

the same concept. If a researcher is attempting to measure a subtle concept such as generosity, she might include 10 measures of it on a questionnaire. Any five such measures should classify a respondent the same way (i.e., as generous or not) as any other grouping of five measures. But the best and simplest strategy is to rely on established measures. To the extent possible, researchers rely on measures that have been used before, and for which there is general consensus among social scientists about reliability.

59. A good indicator is one that is both valid *and* reliable. Unfortunately, reliability is not necessarily a guarantee of validity. My bathroom scales are very reliable. Every morning last week they weighed me at 76.8 kg. But when I went to my physician yesterday for a routine check-up, her more accurate scales weighed me at 78.2 kg. in exactly the same clothing. Clearly, while reliable, my bathroom scales are probably not valid (assuming that my physician's scales are). Rather, my bathroom scales are biased.

e. Bias

60. Bias is a consistent error of measurement. A biased measure will consistently err in exaggerating or minimizing the magnitude of the issue being considered. Bias is introduced into a study in many ways. Sometimes the question asked is the problem. For example, if we simply ask people to report their age, we often find (in large surveys) that there are disproportionately large numbers of people who report being 20, 30, 40, 50, etc. years old, suggesting that people round their reports of their age to the nearest decade in many cases. The question in this case introduces a bias toward decades of age. It is for this reason that most survey researchers ask people to report their date of birth rather than their age. There does not appear to be bias in the former.

61. Sometimes bias or unreliability is a result of the method used to obtain information. Many people are reluctant to divulge sensitive information. If we ask questions about topics such as masturbation, cheating, adultery, or lying, we know that many people will "under-report" the true incidence. It is for this reason that researchers

invest great effort to design their questions and methods to minimize such biasing tendencies.

62. In questions about sexual behavior, or other very personally sensitive topics, researchers have found that telephone interviewing (where there is no face-to-face contact), the use of self-administered anonymous questionnaires, the use of computer-assisted-personal-interviewing (CAPI)(where the subject completes a series of questions on a lap-top computer with headphones) or very direct and blunt questions work best. Clearly, we should anticipate some problems with any question about a person's sexual orientation. Such questions, used either in screening, or in the actual study, would need to be carefully designed and tested. Studies do exist, that have investigated sexual orientation, while overcoming such problems for both adults and children (e.g., Laumann, et. al., and the Adolescent Health Panel Study).

63. How do researchers know if their methods or questions are likely to be a source of bias? They pre-test questions and methods. Before conducting the actual project, a sound researcher conducts a small test of the procedures. The purpose of this pre-test is to ascertain whether the questions to be asked, or the methods to be used work as the researcher intends. A small (typically 5 to 15) group of individuals drawn from the population of interest is asked to complete the study. The researcher then interviews the participants (individually, or in a group) about the procedures used, and the methods for gathering information. He or she will ask about each question on a questionnaire. Did this question make sense? What did it mean to you? How did you understand the intent of this question? Did you know how to answer this question? What about the length of the task? Did it take too long? Were you tired or bored? Do you have any concerns about this study? Do you understand the purpose of it?

64. Typically, the result of a pre-test is a minor revision of the data-gathering strategy. Some words are found to be confusing. Some questions are found to be threatening. Some projects are found to be too long, or too demanding. The researcher attempts to correct such problems before launching the full project. A pre-test is no

guarantee that the researcher has solved all the problems of potential bias associated with the instrumentation. But generally, it is regarded as necessary.

f. Assembling The Appropriate Comparison Group.

65. There is still one critical design issue to be answered before gathering the data for a project. Recall that if we are attempting to answer the question "Are the children of gay and lesbian parents as healthy and well adjusted as those of their heterosexual counterparts?" we must be able to rule out any third factors that could conceivably mask or cloud the issue. How might this be done?

66. What researchers have tried to do, in the studies reviewed, is determine what effect, if any, there is of having homosexual parents. To do this in a sound methodological manner they must somehow be able to compare children who differ in their circumstances on only this one dimension.

67. Imagine, for example, that we were to compare the children of highly educated and wealthy homosexuals to the children of heterosexual parents in poverty. Imagine further that we compared the two groups of children in terms of their involvement with the juvenile justice system. Without doing this study, we can anticipate what such a project would reveal. Since we know from other research that children living in poverty are more likely to be involved in delinquent acts, the comparison between children with homosexual and heterosexual parents would undoubtedly show that the children of homosexual parents have significantly lower rates of delinquency. So the question is whether such a difference reflects the consequence of having homosexual parents, or of poverty?

68. To make a convincing case about the consequences of having homosexual parents, a researcher would need to compare children living with homosexual and heterosexual parents but who did not differ on any other important dimension. A failure to compare children identical (or almost identical) on all important other dimensions

except the sexual orientation of their parents would be sufficient to invalidate the study. The only way possible to make two groups identical except for one factor is to use the process of a the classic experiment which is detailed in the paragraphs in Appendix II to this affidavit.

69. The problem for most social scientists is that experimentation is neither feasible nor ethical. Quite simply, there is no feasible or ethical way to randomly assign children to living with either heterosexual or homosexual parents. And since we cannot do this, we must resort to various approximations to an experimental design. Every approximation shares the same objectives. All seek to make it possible to compare individuals on only the issue being studied; all seek to remove other factors from the study in one fashion or another.

g. Statistical Control

70. On the matter of comparison groups, there is simply no option. A researcher must either resort to random assignment of cases, or statistical control. The latter refers to a class of statistical techniques that mathematically remove the effect of various confounding factors.

71. For example, suppose we wished to compare a group of homosexual and heterosexual parents obtained in a probability sample of all Canadians for the purpose of investigating whether the children of one group or the other are more likely to skip school. Suppose further, that the homosexual parents were found to have much higher average incomes than the heterosexual parents. (That is, some fraction of the homosexuals has extremely high incomes, and few have very low incomes, while the reverse is true for the heterosexuals.) The researcher is interested in the effect of sexual orientation, and not the effect of income on children's truancy. Even if homosexuals do have higher average incomes than heterosexuals, the researcher will still want to know the effect of sexual orientation because many homosexuals will have incomes

comparable to many heterosexuals. How, then, does the researcher isolate the factor of interest – sexual orientation?

72. To simplify the strategy, one can imagine that it would be possible to determine whether parental income affects truancy. Let us assume that it is found that every $1,000 less in family income is associated with a 1% increase in truancy (i.e., children from families earning $45,000 have 5% more truancy than do children from families earning $50,000.)

73. Finally, assume that the average difference in "family" income between the homosexual and heterosexual parents is $10,000. Since every $1,000 difference in income is associated with a 1% difference in truancy, we would expect the children from the two groups of parents to differ by 10% simply due to their respective family incomes. Before we compared the two groups of children on the issue of their parents' sexual orientatio n, we would "adjust" for the income difference. If family income were the only difference between the two groups (except for sexual orientation), then the two groups of children must differ by more than 10% before we can begin to consider the possibility that homosexuality produces any effect on children's. truancy. Alternatively, should we find that the children of homosexuals do not differ at all from the children of heterosexuals in their truancy rates, we would probably conclude that homosexual's children actually have higher truancy rates than those of heterosexual parents. This is because we would expect an income effect absent any consequence of homosexuality. Failure to find significantly lower rates of truancy among the children of (more affluent, on average) homosexual parents, therefore, is actually evidence of a difference attributable to the sexual orientation of the parents.

74. The example above simply illustrates that if samples that are not equivalent on all factors except one, (here, homosexuality of the parents) then finding no difference between children cannot render a scientific conclusion that the sexual orientation of parents has no consequences for children. (Indeed, such a finding may be evidence that parents' sexual orientation has enormous consequences for children.) The

important point is that the relevant question that must be asked is whether the researcher statistically controlled for all reasonable factors that might influence children other than the parent's sexual orientation. In my opinion, failure to do this invalidates any study of the consequences of a parent's homosexuality. In scientific research, a lack of correlation between two factors is sometimes the result of a failure to control for other relevant factors. This is the problem of a spurious non-correlation (a topic to be discussed later).

V. Gathering the Data.

a. Introduction

75. A researcher with a clearly defined question (which we have in this case), who has a definable population, has developed a sampling strategy that is both feasible and scientifically defensible, who has translated all concepts into valid and reliable indicators, and who has pre-tested all instrumentation is ready to gather data.

b. Gathering Methods and Guidelines

76. The choice of data-gathering methods will depend on many factors, including the resources available to the researcher, the topic, and the purpose of the research. Regardless of the method(s) used, however, there are several basic guidelines. First, to the extent possible, the researcher should do everything possible to minimize his or her role as a stimulus. That is, subjects should respond to the instrument rather than to the researcher. In face-to-face interviewing, for example, the researcher should be a neutral presence to the extent possible. This may require the use of different interviewers for different subjects. Dress and demeanor (including dialect or other speech patterns) are sometimes thought to influence the type of answers subjects provide. Race, similarly, may be an issue for certain topics. Again, to the extent possible, the researcher should be sufficiently familiar with the subjects and with the interview instrument to minimize his or her role in the data-collection.

77. The presumption in social science research is that data gathering involving human subjects should be regarded as a stimulus-response situation. The desired objective is that every subject will respond to the same stimuli. Indeed, this is one of the strengths and weaknesses of self-administered survey questionnaires. Each questionnaire is identical, and the researcher is not present when it is completed. At the same time, the researcher cannot assure that the conditions under which the questionnaire was completed were identical for all subjects. Some may have discussed their answers with others. Some may have been watching TV while completing the questionnaire, and so on. Face-to-face survey interviews, on the other hand, offer the researcher the opportunity to explain issues, to observe the circumstances under which the instrument is completed, and to take notes on issues that might be relevant in the analysis of the results (e.g., the subject appeared to have been under the influence of alcohol).

78. Another general guideline is that the researcher should use multiple methods of gathering data, if at all possible. If a project relies on both self-administered surveys and face-to-face interviews, the researcher gains the ability to compare the results of the different methods. Every method has its known weaknesses. Should two methods produce similar results, the researcher has greater confidence in her results because there has been a replication of sorts.

c. Response Rate

79. Finally, regardless of the method used, the researcher must attend to the very important issue of response rates. Once a probability sample has been drawn, the researcher's goal is to obtain complete information from *every* member of it. To the extent that this is not done, unknown biases are introduced into the study. Consider the typical political poll done before most national elections. These rely on telephone interviews with individuals in a sample of all telephone numbers. Researchers generate random digits as part of the telephone number to insure that unlisted and listed numbers have equal probabilities of selection. Once a desired sample (typically between 800 and 1,200) is drawn, the task is to contact each of these numbers and interview a respondent

(chosen according to various strategies to randomly select one member of multiple-person households). In drawing this sample, telephone interviewers must contend with many problems relating to service (is the phone a residential line?), and eligibility (does the resident qualify for the study?). But many people cannot be easily reached by telephone. The use of answering machines, and various screening technologies (e.g., "caller ID") alert the subject to the origin of the incoming call. Many people simply will not answer calls from unknown sources. Others are unwilling to talk to someone who identifies him or herself as an interviewer, and so on.

80. Telephone interviewers, therefore, face tremendous problems in completing interviews with all members of their original sample. Possibly, there is no great consequence. But possibly, there is enormous consequence. Which of these possibilities is more likely depends on whether the subjects who could not be interviewed resemble those who were in important respects. For example, if wealthier subjects are less likely to be interviewed, then the results of the study no longer generalize to the population from which the sample was drawn.

81. Generally speaking, the issue of response rate pertains to self-selection. Once a random probability sample is drawn, inevitably, some members will not be contacted. To the extent that they do not differ in important ways from those who are contacted, then the scientific integrity of the sample is probably not compromised significantly. But this is not something that is easily determined. Since those who are not contacted are typically unknown, the researcher is often unable to estimate the magnitude of the self-selection bias. In sum, when some sampled subjects agree, while others disagree to participate in a study, this self-selection creates a potential source of bias in the result.

82. If a researcher does not use a probability sampling method, but instead allows subjects to volunteer for any reason they wish (e.g., placing an ad in a newspaper to recruit subjects), then every single member of the study is self-selected. Unless the researcher can know the difference between those who do and do not volunteer, or make

some reasonable assumptions about such differences, the study cannot be treated as scientific evidence.

83. In practice, researchers almost never contact every member of the original probability sample. The fraction that is contacted and completes the instrument defines the response rate. How high should the response rate be to allow conclusions to be drawn from the results? Conventional standards in social science now regard a response rate of 80% to 95% as excellent, of 70% to 80% as very good, and of 60% to 70% as acceptable. Response rates below 60%, however, are reason to believe that the actual sample obtained differs in unknown ways from the sample initially drawn. Obtaining high response rates, in short, is crucial. It is for this reason that survey research often involves repeated attempts to contact members of the original sample (repeated telephone calls, or repeated visits to a residence, often as many as 8 or 10 times before dropping a case).

84. Once the data are obtained, the researcher is obliged to check them to verify that there are no significant and obvious errors. This is a small but important step before the analysis begins.

VI. Analyzing The Results.

a. The Research Hypothesis

85. The researcher is now ready to conduct the actual analysis of the data. Any questions about a correlation or a cause-effect relationship are stated in the form of hypotheses that are tested with statistical techniques. Generally speaking there are two types of hypotheses central to any research project of this sort. An hypothesis is defined as an assumption about the population represented by the probability sample of it.

86. The Research Hypothesis is what the researcher expects and hopes to find. The Research Hypothesis consists of the assumptions about a population that we are

willing to make and believe in. Were we testing a new vaccine against measles, our Research Hypothesis would be that the vaccine does, in fact, reduce the incidence of measles. This hypothesis is not intended to be exposed to a test with statistics. The remaining hypothesis/hypotheses to be tested (the testable hypothesis) is typically referred to as the Null Hypothesis.

b. The Null Hypothesis

87. The Null Hypothesis is what the researcher actually tests. Usually, the Null Hypothesis consists of a statement that a certain population value (e.g., the percent of voters who will vote for candidate X) is equal to some given value. Statistically, this hypothesis is called the null hypothesis since it implies that there is no difference between the actual (true) value in the population, and that which is being hypothesized.

88. Consider the statement that "homosexual and heterosexual parents spend an equal amount of time helping their children with homework." This can be understood as a testable hypothesis stating that the population averages of the two groups are equal. The researcher who has drawn a random probability sample of homosexual and heterosexual parents would compare the average time spent helping children with homework by the two groups. The Research (or Alternative) Hypothesis in this case would be that the two averages are not the same.

89. Note that this Research Hypothesis actually includes several possibilities:

1. Mean for homosexuals > Mean for heterosexuals,
2. Mean for homosexual < Mean for heterosexuals, and more generally,
3. Mean for homosexuals $\neq$ Mean for heterosexuals

90. Since there are several possible Research Hypotheses, the researcher must specify, in advance, which possibility is the more likely result of a rejection of the Null Hypothesis. When there is no specific prediction, a hypothesis such as # 3 (above) is

advanced. When the researcher has a-priori reason to expect one group to have higher (or lower) scores than the other, then hypotheses such as # 1 or # 2 are specified. The implications of such decisions pertain to the strength of evidence needed to reject the Null Hypothesis. It takes more evidence to reject the Null Hypothesis in favor of hypothesis # 3 than either # 1or # 2.

91. Consider the problem facing a researcher who tests a new drug. The clear presumption is that this new drug will do better (produce more cures) than existing drugs or therapies (i.e., Research Hypothesis: New Drug > Old drug). The null hypothesis in this case would be that the new drug does no better (on some measure) than the old strategy. This is the hypothesis that is tested statistically. If the researcher is able to reject this hypothesis (by finding sample evidence in favor of better results from the new drug), then he will conclude that the new drug probably does, in fact, do a better job.

92. This scientific practice resembles the case of an accused criminal in a court of law. The defendant is considered not guilty unless the evidence suggests beyond a reasonable doubt that he is guilty, so long as the trial was conducted fairly. A null hypothesis is considered tenable unless the evidence suggests otherwise, (beyond some reasonable doubt), so long as the test was conducted fairly. What is important to understand is that a failure to reject the Null Hypothesis, however, does not establish the absence of differences between two groups. Rather, it indicates insufficient evidence to render a verdict.

93. Just as a court pronounces a sentence of guilty or not guilty (rather than innocent), so a statistical test of the null hypothesis leads to a verdict of reject, or fail to reject (not accept).

c. Threshold Value

94. Setting up the Research and Null Hypotheses is the first step in dealing with a problem of hypothesis testing. The next step consists of devising a standard by

which a researcher will decide whether the Null Hypothesis is, or is not, to be rejected. Establishing a threshold value to distinguish the two possibilities does this. The researcher will calculate a statistic (e.g., an average) that may theoretically assume a wide range of values. Depending on the value that is obtained, the statistic either falls beyond the threshold for rejecting the Null Hypothesis, or doesn't. If it does, the researcher rejects the Null Hypothesis. If it does not, the researcher fails to reject the Null Hypothesis (note, the researcher never accepts the Null Hypothesis).

95. To establish the threshold, the researcher relies on statistical theory. Based on a probability sample of homosexual and heterosexual parents, the difference in averages between the two may take an infinite number of values. But if the null hypothesis is true, then certain values are more likely than others. Simply put, if the Null Hypothesis is, in fact, true, then the difference of averages is more likely to equal zero than it is to equal any other value. But other values are possible, even if the true difference in the population represented by this one sample is zero. Due to the vagaries of random sampling, it is conceivable that the sample difference in averages would actually be some positive or negative value even if the true population difference is zero. But it would be unlikely to be vastly different than zero if the Null Hypothesis is true.

96. Statisticians determine how unlikely it would be to find a particular result in a sample if the Null Hypothesis is true. This is how the boundary between rejecting and failing to reject the Null Hypothesis is established. If the Null Hypothesis is true, sample statistics are extremely unlikely to fall beyond the boundary and lead to rejecting the Null Hypothesis. By convention, this boundary is established so that the risk of incorrectly rejecting the Null Hypothesis when it is true is less than 5%. In sum, the Null Hypothesis is rejected when the sample evidence is convincing beyond a reasonable doubt of something less than 5% that it is true.

d. Error Types

97. The important point is that the researcher who does, in fact, reject the Null Hypothesis is always doing so at some risk of error. If the boundary is established at 5%, then the probability of rejecting the Null Hypothesis when it is actually true, and should not have been rejected, is .05 (5%). Returning to the example of an accused criminal, making this type of error is comparable to convicting an innocent person. In research, this type of error is known as Type I error.

98. In almost all articles reviewed for this case, the presumed Research Hypothesis is that the two groups do not differ. It is important to note that this is a very different type of test than is typically conducted, where the Null Hypothesis, that is, the two groups do not differ, is tested. Whenever the Research Hypothesis and Null Hypothesis are, essentially, switched as in this case, attention shifts from a Type I error to another type of error.

99. There are actually two types of possible error involved in any testing of research and null hypotheses. Suppose that the statistical evidence from the sample does not fall beyond the boundary established. In this case, the researcher does not reject the Null Hypothesis. Still, we cannot rule out the possibility that the Null Hypothesis is, in fact, false. And there will always be a certain possibility of making this type of error. Were this a criminal trial, such an error would be comparable to finding a guilty person not guilty. In research, this type of error is known as Type II error.
A researcher is able to manipulate the chances of Type I error by the selection of the boundary point. It would be possible, for example, to minimize the chances of making a Type I error (the statistical significance of a test) by establishing the boundary at a point defined by a probability of, say, .001 rather than .05. Where the boundary is set depends on the seriousness of the consequences of making an error. Were we testing a critical medical product, we would probably set a .001probability because the consequences of falsely rejecting the Null Hypothesis could be enormously important, such as putting patients on a treatment regimen that is not superior to existing protocols. But the important point about the two types of error is that by decreasing the probability of one

type of error, we increase the probability of the other type of error. The researcher who establishes a very demanding critical boundary (level of statistical significance) by setting a very low probability of Type I error thereby increases her chances of making a Type II error.

e. The Power of a Test

100. The probability of committing a Type I error is known as the level of significance. The probability of committing a Type II error is related to the "power" of a test. In the language of statistics, the lower the probability of not rejecting the Null Hypothesis when it is false, the more powerful is the test. A powerful test, that is, is less likely to err by failing to reject the hypothesis that the two groups do not differ when, in fact, they do.

101. The power of a statistical test may be compared to the power of a microscope. It reflects the ability of a statistical test to detect from evidence that the true situation differs from a hypothetical one. Just as a high-powered microscope lets us distinguish gaps in an apparently solid material that we would miss with low power or the naked eye, so does a high power test of the Null Hypothesis almost insure us of detecting when it is false. Further, just as any microscope will reveal gaps with more clarity the larger are those gaps, the larger the departure of the Null Hypothesis from the true situation specified by the Alternative Hypothesis, the more powerful is the test of the Null Hypothesis. In the case at hand, the larger the "effect" or the larger the difference between homosexual and heterosexual parents, the more powerful the test will be. If the actual difference is small, the test will be less powerful

102. The power of a statistical test is defined as

[1.0 – (probability of a Type II error)]

103. Type I and Type II errors differ in their implications. In the present case, a failure to reject the Null Hypothesis when it is false (Type II error) would lead to the

erroneous conclusion that the children of homosexual and heterosexual parents are similar when, in fact, they are different. A faulty rejection of the Null Hypothesis when it is true (Type I error), however, would lead to the incorrect conclusion that children of the two types of parents differ when, in fact, they do not. Given that policy might be formulated on the basis of the results in this particular case, it is clearly more important to minimize the chances of Type II errors than Type I errors when the Research Hypothesis, rather than the Null Hypothesis, is that the two groups do not differ.

104. For this reason, the researcher investigating the children of homosexual and heterosexual parents should accept a higher chance of Type I errors than is typically done in social science research. This will lower the chances of a Type II error. Rather than establish the boundary for rejecting the Null Hypothesis by setting .05 as the critical value, in my opinion, it would make more sense to set the level of significance for rejecting the Null Hypothesis at a higher value, perhaps .10.

105. Another way to increase the power of the statistical comparison is to increase the size of the sample. Small samples have lower power than large samples. Given the nature of the problem, that is where the Null Hypothesis of "no difference" is actually the Research Hypothesis, research on this topic requires a large sample, especially to reliably detect small differences between groups.

106. If we design our study in such a way to be powerful enough to detect rather small differences between the averages of two groups, we will need a sample of at least 400 cases to achieve Power of .80. Since Power = [1.0 - probability (Type II error)], our test runs the risk of Type II error of .20. This would mean that the researcher runs a 20% risk of failing to reject the Null Hypothesis when it is, in fact, not true.

107. In sum, given the nature of the problem being considered, in my opinion, reliable research would require an increase in the level of statistical significance required to reject the Null Hypothesis from the conventional .05 to .10. Sound research would also require an increase in the sample to at least 400 cases. And even then, the power of

the test may be inadequate if there are other factors that must be controlled (e.g., income, age, education, etc.). This is why I suggest a sample of 800 gay parents (see my earlier comments on sampling).

108. This brings me to the last point about the analysis. The skilled researcher must do everything possible to control *all* factors that might cloud the findings. The research must statistically control for all important differences between heterosexual and homosexual parents other than their sexual orientation. To do this would require the size sample just mentioned. Preliminary research might identify ten or fifteen possible factors that would need to be statistically controlled before a valid comparison of children in the two groups could be conducted.

109. What other factors must be statistically controlled? The response is *any* factor that is correlated with both the cause and the effect. In the case at hand, this would mean that anything that is related (on average) to being in a same-sex union and is also related (on average) to the health or well being of children must be controlled. Possible candidates for such factors include parents' income, parents' education, parents' emotional and psychological health (e.g., depression), relationship quality (between adult partners), and various residential variables (e.g., neighborhood quality, etc.). Also important would be the relationship history that the child has experienced (how many changes in his/her parent's partners) or whether the children have lived in a heterosexual relationship for varying portions of their lives?

110. An alternative to statistical control is achieved by matching cases. If every homosexual parent could be "matched " by a heterosexual parent on all relevant factors, this would allow the researcher to compare the two groups. Since no study, to date, has been able to do this, statistical control appears to have been the only feasible strategy that would permit a researcher to compare homosexual and heterosexual parents.

111. Before moving to a specific evaluation of the evidence offered in Professor Bigner's brief, I want to conclude this section by noting that statistical control

is particularly important in this case. It is possible for two factors to appear to be uncorrelated due to their relationship to some third factor. If this third factor is positively correlated with sexual orientation, but negatively correlated with children's well being (or vice-versa), then a failure to control it may lead to a spurious non-correlation. In short, it is essential to understand that statistical control is as necessary in the presence of a trivial or zero correlation as it is in the presence of a strong and substantively large correlation.

VII. Examination of Prof. Bigner's Affidavit.

a. Introduction

112. In this section, I set out my conclusions and analysis of my review of all evidence cited by Professor Bigner in his affidavit sworn November 15, 2000. I evaluate only published articles in professional outlets. I omit from my review all unpublished Ph.D. doctoral dissertations and materials that appeared in popular news outlets (e.g., Newsweek magazine). My review focuses solely on the scientific merit of the research. The evaluation that follows concentrates on those issues that I have discussed in the first half of my affidavit, above.

113. Specifically, I evaluate

- The scientific adequacy of the sample. Did the article rely on a probability sample of adequate size? Was there evidence of obvious sample bias?
- The operationalization of key concepts
- The adequacy of the comparison group, and
- The appropriate use of inferential (generalizing) statistics.

114. Professor Bigner's affidavit relies almost entirely on the Vermont brief included as Exhibit "B" to his affidavit. First I examine Professor Bigner's primary assertions, both in his affidavit of November 15, 2000 and in the Vermont brief (seriatim). I then review the evidence for those assertions found in the articles cited.

b. Opinion on Evidence Relied on by Professor Bigner

115. All of the articles I reviewed contained at least one fatal flaw of design or execution. Not a single one was conducted according to generally accepted standards of scientific research.

116. The studies reviewed exhibit the critical defects explained earlier, in the following ways:

- Not one study relied on probability samples of homosexuals and heterosexuals.
- The definition of "homosexual" was typically vague and poorly articulated, often no more than "self designated" or "self identified." There is no way, therefore, to know whether homosexuals who do not openly identify differ from those who do. Nor is there any way to know what "self identified" means with respect to the question at hand.
- In most cases, all data were collected by a single researcher. This makes it impossible to assess the extent of subjective bias that may have been introduced.
- Only one study relied on a longitudinal design.
- Researchers often relied on well-known and established measures, but rarely reported their reliability for the samples studied.
- The potential sources of serious bias are very clear and often acknowledged by the authors:
  - First, is the reliance on self-selected samples. When subjects are allowed to select themselves into a study without any scientific sampling used, the researcher cannot know how his or her subjects compare to those who did not select themselves into the study. This unknown bias makes it impossible to generalize the findings from any such study.
  - Second, is the fact that almost all samples of homosexuals have extremely high levels of education. In all studies reviewed (where such information

was noted), well over half of the homosexuals studied had completed college (only 23% of all adults in America have completed college)[9]

- ➢ Lastly, the researchers failed to incorporate statistical controls to deal with extraneous influences, even when their research revealed notable differences between their samples of homosexual and heterosexual subjects on such dimensions.

- Response rates, where noted, were typically low.
- Sample sizes were almost always too small to provide the statistical power needed to confidently fail to reject the hypothesis of 'no differences' between groups.

117. This last point should be stressed. The researchers typically found "no differences" between their homosexual and heterosexual subjects. The tests that were conducted (even though inappropriate) relied on samples too small to allow the researcher to make this conclusion without risking a very high probability of error. 118. Stated most simply, the articles cited in Professor Bigner's affidavit did not rely on samples of sufficient size to provide the statistical power needed to reach the conclusions they did.

119. My conclusion, based on the analysis that follows, is that we simply do not yet know how the children of homosexual and heterosexual parents compare at this point in time. To know this, we would need to conduct the type of project I outlined in the first half of my comments. Such a study is not a particularly large undertaking. There are many examples of social science projects that are more complex and challenging than this one would be. However, based on the studies reviewed and my own search of the literature, this research has not yet been done. Given the potential consequences of an incorrect conclusion, such research seems warranted before any body, legislatures or courts, come to any conclusion about domestic arrangements with unknown consequences for children.

[9] http://www.census.gov/prod/2/pop/p20/p20-489.pdf

120. The final portion of Professor Bigner's affidavit is aimed at supporting a hypothetical argument about the benefits of legal marriage for children of same-sex couples. I am familiar with this literature and stipulate that, with few exceptions, [10] it conforms to the standards of acceptable scientific research that I established at the outset of my comments.

121. I believe it is true, as Professor Bigner claims in his paragraph 14, that, at least with respect to heterosexual couples:

1) Children benefit from living in a healthy, loving home with both parents in the context of a healthy, happy intact family;
2) civil marriage, and the protections, supports, and obligations that accompany that status, can fortify committed relationships between parents;
3) the community and social supports that accompany civil marriage, including enhancing the strength of relationship between spouses, can promote even better parenting.

122. The problem, in my opinion, is that there is an important, yet unanswered, question about the benefits of marriage. While it is generally true that marriage confers numerous advantages, it is unknown whether those advantages are the result of marriage, per se, or heterosexual marriage. To assume, as Professor Bigner does, that marriage has the same consequences *regardless* of the sexual orientation of the parents is pure speculation. We simply have no basis, at this point, on which to make an assumption that legal recognition of the relationships such as same-sex marriages, would eliminate the social prejudice or stigma associated with homosexuality.

123. Professor Bigner concludes, at paragraph 15, that the evidence reviewed establishes the claim: "where children of gay and lesbian parents may have difficulties, those difficulties stem from the lack of social and legal support for their family structures rather than any intrinsic shortcoming of the family structure itself. To the extent that

[10] Blumstein and Schwartz, 1983; Grissett and Furr,1994; Solomon and Rothblum, 1986; Crockenberg (1982).

some children may experience difficulties as a result of societal reactions to their lesbian mothers or gay fathers, those difficulties could only be alleviated by legal recognition of those family structures."

124. My opinion, based on my own reading of the literature, is that, undoubtedly, teasing, ostracism, or other forms of social prejudice are a large part of the story of the lives of children living with gay or lesbian parents. But equally pertinent are any other factors inherent in the family relationships of same-sex partners, at least to the extent that the evidence is cited by Professor Bigner. Qualitative research referred to by Professor Bigner addresses this point clearly (Blumstein and Schwartz, 1983). Surely, the question that should be asked is whether same-sex partners have different rates of break-ups than opposite sex cohabiting (unmarried) parents.

125. If, for example, gays and/or lesbian relationships exhibited higher rates of break-up than unmarried or married heterosexual relationships, this should be known and investigated, for this factor may have effects on children. The point, however, is that this aspect has not yet been addressed. More generally, to assert that the only difficulties faced by the children of gay and lesbian parents are the result of social forces (prejudice, etc.) and not any factors related to the particular family structure, presumes that we have tested this basic idea. In my view, the accumulated evidence does not speak to this issue. If, indeed, sound scientific research were to confirm the closing assertions made by Professor Bigner, I would be pleased to agree with his opinion. In my own professional opinion, however, such research remains to be conducted and the issues remain unresolved.

c. Analysis

126. Before addressing the issue of how children of gay and lesbian parents compare with those of heterosexual parents, Professor Bigner offers several preliminary assertions that have no proper foundation in the scientific research he relies on. While these claims may very well be true, the issue is simply whether they are supported

scientifically by the studies Professor Bigner relies on to make those claims. In my analysis, I address these claims by examining each of the studies cited by Professor Bigner and describing the crucial weaknesses the studies display.

127. The preliminary assertions made by Professor Bigner are:

1) About one third of lesbians and about 10% of gay men are parents.
2) Increasing numbers of lesbian and gay couples are rearing their own children.
3) The reasons why gay men and lesbian women become parents are no different from those motivations that prompt heterosexual men and women to become parents.
4) Gay and lesbian parents possess parenting skills and abilities comparable to their heterosexual counterparts

128. With respect to the first and second assertions, there are two primary sources cited: Bell (1978) and Patterson (1992). The first of these studies did not attempt to estimate the prevalence of homosexuals and the second relied on the claims of others who make the assertion that it is cited for by Professor Bigner. All of the sources cited from the Vermont Brief on this issue either did not conduct the research to make the claim, or did not claim, that the number of gay and lesbian parents is increasing. My conclusion is that none of the sources cited by Professor Bigner contains evidence about the prevalence of homosexuality, or the change in prevalence. None of the studies makes any claims about such matters (except to quote others who make such claims without evidence). In short, there is absolutely no evidence about how many homosexual parents there are, nor whether their numbers are increasing or decreasing. I have reached this opinion based on my detailed examination of each of the studies, as described in Appendix III to this affidavit

129. The third assertion, regarding the reasons gay and lesbian men and women decide to become parents, is held to be supported by a number of studies authored by Professor Bigner himself, in collaboration with others. The first two studies, Bigner and Jacobsen (1989b; 1989a) suffer from the inappropriate application of statistical

techniques, the failure to control for extraneous factors, poor sample size, and inadequate sample, among other flaws, making it impossible to draw general conclusions from this research. In the third study, Siegenthalor and Bigner, (2000), the authors claim their research found that the reasons heterosexuals and homosexuals become parents are, indeed, different, in direct contrast to the assertion for which this article is cited. In my opinion, none of the studies reported for this assertion is sound enough methodologically to permit the claim to be made. The details of my analysis of the studies referred to is contained in Appendix IV to this affidavit.

130. The last assertion, that gay and lesbian parents have the same parenting skills as heterosexual parents, is another one we might like to assume. However, Professor Bigner's claim is that this assertion is scientifically supported by the studies cited for it. In my opinion, the collection of these sources cited about lesbian mothers is inadequate to permit any conclusions to be drawn. None had a probability sample. All used inappropriate statistics given the samples obtained. All had biased samples. Sample sizes were consistently small, and in almost all cases inadequate to permit the researchers to draw conclusions about their failure to reject the null hypothesis (even when not stated, the presumption in all these studies is that there are no significant differences between the groups). And despite the use of good measures in many cases, there was no way to ascertain how the researchers insured that their samples of "lesbians" satisfied any definition of that term, nor of whether the samples of heterosexuals were, in fact, heterosexuals. There is no way to generalize the results of these studies beyond the peculiar and unusual samples used in them. I do not believe this collection of articles indicates that lesbian and heterosexual mothers are similar.

131. In respect of gay men, the last assertion exhibits the same frailties if, as Bigner claims, the studies cited are considered scientific support for the claim made. In sum, the evidence contained in the Vermont brief, in regards to the parenting behaviors of gay men, rests on three studies that are all based on non-probability samples of a size that is inadequate to provide the power needed to fairly test the hypotheses involved. Other problems noted for the individual studies in Appendix V, also render their conclusions

questionable. I do not believe these articles offer the support claimed for the assertion made about the parenting skills of gay men. In fact, from a scientific perspective, the evidence confirms nothing about the quality of gay parents.

d. Principal Assertions

132. Professor Bigner makes several principal assertions that form the core of his opinion. The first is that the children of gay and lesbian or same-sex parents are as well adjusted as those of their counterparts who have heterosexual or different sex parents. Further, Professor Bigner makes the claim that the evidence also indicates that there are no differences between the children of gay parents and the children of heterosexual parents in terms of gender identity or sexual orientation, based on the studies presented in the Vermont Brief.

133. Professor Bigner says that the first assertion is supported by approximately 50 published studies, including a meta-analysis of 18 studies previously published on the subject of the impact of homosexual and heterosexual parents on children (Allen and Burrell, 1996). Many of the articles included in the meta-analysis are ones that I reviewed for earlier portions of this affidavit.

134. Meta analysis is a statistical method used to combine comparable studies when each, by itself, has inadequate sample sizes to provide needed power. The meta-analysis is able to provide more power by combining the results of many smaller studies (thereby producing a larger sample). The process of selecting appropriate studies and coding their information is fraught with its own biases and pitfalls. When the original cases are properly evaluated for quality, and weighted accordingly, such an analysis is able to correct for small samples so long as the other requirements for inferential statistics were satisfied. In the present meta-analysis, the studies that were combined suffered from the flaws already noted. As such, combining many poorly done studies, each of which has peculiar non-probability samples and unknown biases, cannot and does not provide any greater evidence than the individual studies do, taken separately.

135. In Appendix VI to this affidavit I have set out my comments resulting from my detailed analysis of each study cited in support of Professor Bigner's principal assertions. The conclusion can be summarized very succinctly: all of these studies exhibit flaws that make the conclusions drawn by Professor Bigner unsupportable. However, considering that Professor Bigner's main assertion is made from these studies, I thought it would be helpful to include in the body of this affidavit a detailed analysis of the study that I view as one of the most rigorous studies among all those reviewed: Golombok and Tasker (1996).

136. My view that these authors conducted one of most rigorous studies is because they employed a longitudinal design. A non-probability sample of 27 self-selected lesbian mothers and their 39 children, and a control group of 27 self-selected heterosexual single mothers and their 39 children were first studied in 1976-1977 when the average age of the children was approximately 10 years. Subjects were recruited with advertisements in lesbian and single-parent publications and contacts with lesbian and single parent organizations. "Lesbian" was defined as a women who regarded herself as wholly or predominately lesbian in her sexual orientation. The definition of "heterosexual" was behavioral. Members of the control group had their most recent sexual relationship with a man. Importantly, all children in the study were conceived and born into heterosexual relationships.

137. In 1992-1993 when the children were about 24 years old, they were seen again. Of the original 54 mothers, 51 were traced. This produced an effective pool of 37 of the children of lesbians. Of these, 25 were interviewed (68%). 21 of 39 children of heterosexual mothers (54%) were also interviewed. The two groups were compared and found to be similar in terms of education, age, gender, or ethnicity. The authors investigated the reasons for panel attrition (drop outs between waves). The only notable difference between groups in attrition was that lesbians in relationships high in conflict were less likely to remain in the panel.

138. The instrumentation is described in detail. Reliability of measures, and inter-rater reliability of raters are reported. Although this study is strong, it still suffered from the weakness that no statistical controls were employed to compensate for extraneous factors.

139. Findings indicated that at least one difference existed between the two groups of children, contrary to the assertion that the study is supposed to support. The children raised by lesbians were more likely to have experienced a same-sex sexual relationship than young adults raised by heterosexual mothers (though this appeared most true for sons rather than daughters.). This may or may not be a true difference due to the additional weaknesses identified in the sampling (i.e. non-probability and self-selection).

140. In sum, all the articles offered by Professor Bigner, including the study considered the most rigorous, cannot be taken as establishing the claim that scientific research shows no differences between the children of gay parents and the children of heterosexual parents in terms of gender identity or sexual orientation.

141. Professor Bigner is correct to state that the "weight of published evidence" suggests that this is so. From a sound methodological perspective, the results of these studies can be relied on for one purpose – to indicate that further research regarding his hypothesis is warranted. However, in my opinion, the only acceptable conclusion at this point is that the literature on this topic does not constitute a solid body of scientific evidence.

VIII. Appendices

APPENDIX I

Simple Random Sampling

A simple way to envision simple Random Sampling (SRS) is to imagine writing the names of each member of some population on a card. Suppose there are 500 individuals in the population and we want a sample of 50. There would be 500 cards, each with a name on it. If all 500 cards were placed in a large box and shuffled, we could draw the first card with assurance that it has no greater or lesser chance of being drawn than any other card in the box. The chance of drawing this one name is simply 1/500. Once we draw the first case, we write the name of the person on a sheet, and place the card back into the box. It is essential that the card be returned to the box. If we did not return the card to the box, then the next name drawn would have a 1/499 chance of selection because there would only be 499 cards remaining in the box. Since 1/499 does not equal 1/500, we would have violated the primary assumption of SRS. Following in this manner, we would continue drawing a card, writing the name down, returning the card to the box, and drawing another name until we had our desired 50 cases (returning any name that has already been drawn before). At this point, we would have a pure random sample. Any results based on these 50 cases could be generalized with reasonable assurance to the entire population of 500 using standard statistical techniques.

Researchers do not, of course, use a box of cards to assemble their random samples. Rather, computer software is used to select a random sample of cases, or generate a list of random numbers. Alternatively, samples may be selected by systematically drawing every Nth case from a list (e.g., taking every 10th case from a list of 1,000 to produce a systematic random sample of 100).

In practice, researchers are sometimes unable to assemble an accurate list of all members of the population. This is true, for example, when sampling all adults in the United

States, all children in public schools, or all patients with diagnosed breast cancer. In such cases, alternative strategies are used to approximate a random sample. One common strategy is to randomly sample geographic or organizational units. For example, a researcher might randomly sample 100 U.S. Census tracts. Then, within each randomly selected Census tract, the researcher might randomly select 5 Census blocks. Within each randomly selected Census block, the researcher might randomly select 2 households. Within each randomly selected household, the researcher would interview one randomly selected individual. In all, this strategy would produce 100 X 5 X 2 = 1,000 individuals randomly selected from a total population defined as all households in U.S. Census tracts (approximately 100% of all U.S. households). A sampling statistician would calculate appropriate weights to be applied at each stage of this multi-stage sampling strategy to produce a final sample of 1,000 cases that can be treated as a random sample. A comparable strategy could be used with hospitals, schools, churches, or clubs as the initial sampling units.

APPENDIX II

The Classic Experiment

In a classic experiment, the researcher assembles a representative sample of cases and randomly assigns them to one of two groups. The 'experimental' group and the 'control' group, that is, are determined purely by chance (e.g., flipping a coin). Since there is nothing but random chance to determine which group a case ends up in, there is no logical way for the two groups to differ. Random assignment will place as many rich as poor individuals in each group, as many white or Hispanic individuals into each group, and so on. The researcher administers a test at the outset of the study to verify that the experimental and control groups do not differ. Then the researcher administers some treatment or stimulus to the experimental group that is not administered to the control group. At this point, the two groups differ only with respect to the treatment or stimulus. Logically, the two groups do not differ on any other dimension. The researcher then administers the test again. Any difference that is now found between the two groups may logically be attributed to the treatment or stimulus because it is the only thing that distinguishes the groups. (In actual practice, there are well known problems with experiments that may threaten the similarity of groups on all matters except the treatment/stimulus. These threats are dealt with by more complex experimental designs than the one just outlined)

The classic experiment comes as close as one can come to satisfying all three conditions for establishing a cause-effect relationship. And the reason it does is because it relies on random assignment of cases into the various groups to be compared. Random assignment essentially assures the researcher than all "other factors" that might confound the results are distributed evenly – one group has as many or as few as the other.

APPENDIX III

Detailed analysis of Studies Respecting Claims About Prevalence of Homosexuality and Homosexual Parents

Bell (1978)

This study of homosexuals in San Francisco, CA. is elaborate and well conceived. However, the researchers did not attempt to estimate the prevalence of homosexuality in either San Francisco or the nation. Nor is there any attempt to measure change in the homosexual population over time. The research team recruited (through self-selection) a large sample of homosexuals by distributing recruitment cards in various locations and asking respondents to volunteer to be in the study (paid advertisements, gay bars, personal contacts, gay baths, homophile organizations, private bars, public restrooms, hotels, restaurants, etc.) A heterosexual sample was obtained by probability methods developed and applied by the National Opinion Research Center. Detailed and carefully executed statistical analyses were performed, but the failings regarding prevalence and change are significant.

Patterson (1992)

This study does not make the claim Bigner attributes to its author, nor does the author offer any original research on this issue. Rather, she refers to others' claims. According to Patterson "How many children of gay and/or lesbian parents live in the United States today? No accurate answer to this question is available. … According to large-scale survey studies, about 10% of gay, and about 20% of lesbians are parents" (1992: 1026, and footnote 1).

Evidence from the Vermont Brief:

Patterson (1994).

The researcher studied 27 lesbian couples, 7 single mothers, and 4 separated lesbian mothers. She made no claims, nor conducted any research in support of the assertion that the number of gay or lesbian parents is increasing.

Pies (1990).

The author neither conducted, nor claimed to have conducted any research in support of the assertion that the number of gay or lesbian parents is increasing.

Rafkin (1990).

The author neither conducted, nor claimed to have conducted, any research in support of the assertion that the number of gay or lesbian parents is increasing.

Steckel (1987).

The author neither conducted, nor claimed to have conducted, any research in support of the assertion that the number of gay or lesbian parents is increasing.

Tasker and Golombok (1997).

The authors state in their second paragraph "It is not known how many lesbian mothers there are." (p 1). The researchers conducted a longitudinal study of 27 lesbian and 27 heterosexual single mothers. This research will be discussed in a later section. The authors neither conducted, nor claimed to have conducted, any research in support of the assertion that the number of gay or lesbian parents is increasing.

Supplementary Studies:

Bigner supplements the sources cited in the Vermont Brief with the following:

Faderman (1984)

The author of this article describes the homosexual identity formation process for lesbians. The article is based on a review of existing literature. There is no original research conducted nor reported.

Green and Bozett (1991).

The authors neither conducted, nor claimed to have conducted any original research. The authors state "Because homosexuals are an invisible population, accurate statistics on the number of gay fathers and lesbian mothers are impossible to obtain. However, based on the belief that 10% of the male population is gay, and that 20% of the gay male population has married at least once, and that 25% to 50% of this 20% have had children, the number of gay fathers in this country is likely more than two million. Add to this estimate the 6% to 7% of the female population is lesbian, and that between 1.5 and 3.3 million of them are mothers, the current estimates of children of gay fathers and lesbian mothers range between 5 million and 14 million" (198) (I omit the sources cited by the authors for these figures)

The estimates of gay fathers provided by Green and Bozett work out as follows. The lower bound estimate is 10% X 20% X 25% = 0.5% of adult males are gay fathers. The upper bound estimate is 10% X 20% X 50% = 1.0% of adult males are gay fathers. In 1990, when this article was published, there were approximately 84.5 million U.S. males over the age of 19[11]. Applying the authors' estimates, we arrive at between 422,500 and 845,000 adult gay fathers. Neither figure suggests more than 2 million such parents. (The same U.S. Census showed that there were 92.5 million females over the age of 19.

[11] http://www.census.gov/prod/1/gen/95statab/pop.pdf

If between 1.5 and 3.3 million of them are lesbian mothers, then between 1.6% and 3.6% of all adult females are lesbian mothers, not the 6% to 7% claimed by the author.

Flaks (1995).

The author neither conducted, nor claimed to have conducted any research in support of the assertion that the number of gay or lesbian parents is increasing.

Golombok, Tasker, and Murray (1997).

The researchers conducted an innovative project with some significant strengths. The objective was to investigate family functioning and the psycholo gical development of children raised in fatherless families from their first year of life. The researchers assembled a non-probability sample of 30 self-selected lesbian mothers who "volunteered" for this project. They also assembled a non-probability sample of 42 heterosexual single mother "volunteers." Finally, they draw what appears to have been a probability sample of 42 heterosexual families from maternity records. The groups to be compared differed as one would expect when relying on volunteer subjects. There were significant differences in age of the mother, social class of the mother, and number of children among the groups to be compared. The authors relied on very good measures of family functioning and psychological development. Overall, the execution of the study was good (though it is not known how inter-rater reliabilities were established). There is no definition of "lesbian" or "heterosexual" provided by the researchers. Nor is there any indication of how these terms were applied to the subjects.

The authors statistically controlled for the differences among groups in mother's age, social class, and number of children in the family. Their results showed that single mothers showed greater warmth and interacted more with their child, but also reported more serious disputes. Children being reared without a father were found to be more securely attached to their mother, but perceived themselves to be less cognitively and physically competent than their peers from father-present families. Differences between lesbian and heterosexual single mothers were found only in the amount of interaction

between parent and child. Lesbian mothers interacted more frequently with their child than did heterosexual single mothers.

The sample sizes were too small to provide the statistical power needed to reliably detect no difference among groups given the statistical methods used. The reliance on “volunteer” subjects makes it impossible to estimate the biases that lead some people, but not others to volunteer for research projects. Though the authors discovered (and statistically controlled) for differences in several demographic factors, there is no way to know what other differences may also have existed, but were not discovered for failure to measure them. This is a well-done exploratory study. It’s results cannot, however, be generalized beyond the peculiar samples used in the research. There is no estimate of the number of lesbian couples, nor whether their number is changing.

Hoeffer (1981).

The researcher studied 20 lesbian and 20 heterosexual single mothers who resided in San Francisco I will discuss this research later. The author neither conducted nor claimed to have conducted any research in support of the assertion that the number of gay or lesbian parents is increasing.

Bozett (1981).

The author conducted interviews with 18 homosexual fathers in San Francisco. The author neither conducted nor claimed to have conducted any research in support of the assertion that the number of gay or lesbian parents is increasing.

Moses and Hawkins (1982)

Professor Bigner provides no citation for this reference other than the last names and date of publication. I could not locate the article in question.

Tasker, and Golombok (1995)

The authors report the results of a longitudinal study of 25 adults from lesbian families and 21 adults from heterosexual single mother families. They make no claims about the number of such families, their growth or decline, nor do they conduct or report any research relating to such claims.

Muzio (1996)

The author, a therapist, discussed one case in particular, and several others more generally in her advice to therapists treating lesbian mothers. The author notes: "Because individuals and families often seek therapy when their lived experiences contradict the dominant narrative about them, it is not unusual for lesbians to seek therapy at some point in their family building process (p. 367). This article is intended to provide advice to therapists when this happens. There is no research protocol, analysis, or comparison group involved. This is not a research article. The author makes no claims about the number of same-sex parents, or whether such numbers are changing.

Bailey, Bobrow, Wolfe, and Mikach (1995).

The authors neither conducted nor claimed to have conducted any research in support of the assertion that the number of gay or lesbian parents is increasing

Bigner (1996).

The author reviews the literature to provide guidance to therapists with gay father clients. There is no research conducted nor reported in this article.

Ricketts and Achtenberg (1990).

The case studies offered by these authors are not presented in support of the claim that the number of gay and lesbian parents is increasing.

APPENDIX IV

Gay And Lesbian Parents Have the Same Motives for Becoming Parents

Bigner and Jacobsen (1989b).

The researchers rely on two samples obtained by different methods. Neither is a probability sample according to the authors. The sample of homosexual fathers was obtained from solicitations to a support group for gay fathers in Denver. The comparison group was selected from another project conducted by the senior author. The response rate for the homosexual sample was approximately 50%. There is no reported response rate for the sample of heterosexual fathers. The heterosexual fathers selected for this study were matched on age, martial status, income, ethnic identity, and education. No summary statistics are provided that would allow a comparison of the two groups on such measures. Subjects were mailed a questionnaire in most cases, though some subjects completed their questionnaires at conferences or workshops. The author acknowledges that the two samples were gathered under different conditions.

There is no operational definition of "gay." The comparison (heterosexual) sample is described as "presumed heterosexuals" because of the absence of such a definition. The researchers relied on good measures of parental behavior. The application of interferential statistics is not permitted with such a sample. The results of those statistical comparisons, however, reveal statistically significant differences between the two groups of fathers on several measures of parental behavior (limit setting, responsiveness, and reasoning/guidance).

The authors admit that the samples are biased due to high incomes. The authors also admit that the results cannot be generalized. "The sample of gay fathers is unlikely to be an accurate representation of gay fathers in the general population (p. 184). Other likely

biases are the result of different methods of recruiting the two samples, and different methods of administering the questionnaires.

Bigner and Jacobsen (1989a)

The authors rely on the same sample described above. In this article, the concern is how fathers responded to a measure referred to as the "Value of Children" questionnaire. Details of this questionnaire are not provided. Additionally, the same limitations that were described above apply to this study.

Siegenthalor and Bigner (2000)

Rather than report that there are no differences between the two groups in their motives for becoming children, the authors of this article actually report that lesbian and non-lesbian mothers differ only in their motives for becoming parents. They are not found (in the research reported) to differ in the value they place on parenthood (i.e., the satisfaction, the happiness, social status, or other benefits they derive from parenthood once children arrive) (p 84).

The authors assembled a non-probability sample of 25 self-selected lesbian and 25 self-selected non-lesbian mothers. The researchers recruited lesbians from lesbian support groups. They recruited the non-lesbians from other "parent support groups." Due to restrictions imposed by the IRB (Institutional Review Board for the Protection of Human Subjects), the researchers were unable to inquire about the sexual orientation of their subjects (p 82). As a result, they were unable to develop a definition of "homosexual" or "heterosexual" nor were they able to insure that subjects in each group met any definition of those terms. The two self-selected groups were matched on age, education, and income. Subjects rated the value of children on various dimensions. The scale used for this purpose has good reliability in repeated studies of heterosexual parents. Findings showed that lesbians differ from the non-lesbian parents in why they became parents. Lesbians were reported to be less likely to agree that "Having children gives a person a special incentive to succeed in life," "One of the highest purposes in life is to have

children," and "Having children makes a stronger bond between partners." (p 85). The use of volunteer samples, the inability to impose statistical controls to compensate for extraneous factors, and the very low power of the statistical tests make it impossible to generalize the findings of this research beyond the peculiar samples used.

APPENDIX V

Gay and Lesbian Parents Parenting Skills

Cases cited from the Vermont Brief

Green and Bozett (1991).

This is the source for the claim that "The home environments of lesbian and gay persons have been found to be as moral and as physically and psychologically healthy as those of non gays." (Vermont point 2). The authors of this (admittedly) ideological chapter neither conducted, nor claimed to have conducted, any research in support of the assertion that homosexual parents are as capable and caring as heterosexual parents. The chapter is a review of research by other authors.

Lesbian women as mothers:

Green, Mandel, Hotvedt, Gray, and Smith (1986).

These researchers relied on multiple methods. Mothers completed a self-administered questionnaire, and an interview was conducted with their children. The authors assembled two samples, neither of which is a probability sample. It is not known how many interviewers were involved, or whether inter-rater reliability was established. The first sample consisted of 50 lesbian mothers and their 56 children aged 3 to 11. The lesbian mothers were recruited through national and women's groups and through snowball sampling. The heterosexual sample was recruited through requests "for single-mother subjects" (no further details are provided). No operational definition of the term "lesbian" or "heterosexual" is provided except that lesbians were required to be "self identified" as such. . The authors administered good measures of personality and intelligence. Children were also interviewed about their peer groups, play preferences, and thoughts about life.

Inferential statistics are applied despite the fact that the samples are not probability samples. Both samples are (admittedly) biased. Though no comparison statistics (for each group) are provided, almost all subjects (86%) had completed college. There is no way to estimate the possible bias introduced by such high levels of education, nor of relying on members of women's groups. Nor are such groups described to permit the reader to assess the nature of the groups used for this project. But the authors note that 78% of the lesbians, but only 10% of the heterosexual mothers had partners living in the household. Clearly, even if no other differences existed, this simple and enormous difference invalidates any comparison between the groups without appropriate statistical controls. Such controls were not applied. The authors do not report the statistical results of their multivariate analyses, though they mention them.

Rand, Graham, and Rawlings(1982)

This research relied on a snowball sample of 25 self-selected lesbian mothers. There is no operational definition of lesbian except "self-identified." Of the 25 subjects, all but 9 had completed college, and 5 had graduate degrees. One of the measures used is highly regarded as a reliable indicator of psychological health. The other ("the affectometer") is reported to have very high reliability. The researchers compare their biased sample to national norms obtained from average samples. There was no comparison group. The most likely sources of bias are the extremely high level of education, and the fact that "all but two of the women in the present study had some degree of involvement in a lesbian community" (p 35). The authors acknowledge the bias introduced by using a snowball sample when they state "If more isolated lesbian mothers could have been included in the sample, correlations would probably have been significant." (p 35). I am unwilling to draw an conclusions from this research.

Flaks, Fisher, Masterpasqua, and Joseph (1995)

The authors rely on two non-probability samples. 15 "self identified" self-selected lesbian couples with children aged 3 to 9, and 15 heterosexual self-selected families were obtained by placing ads in lesbian newsletters, women's organizations, gay and lesbian

parenting groups, snowball sampling, and recruiting from a lesbian-mother support group. The heterosexual sample was a snowball sample. The authors used established measures with known reliability. Mothers were interviewed, in person, (it is not reported how many interviewers were involved) and reported about their children. Teachers also provided information about the children. There is no mention of response rates, and no way to calculate them from the information provided. Rather, all subjects were self-selected into the research.

The authors acknowledge the bias in their samples when they report that both groups of children (from "self identified lesbians" and presumed "heterosexual" families) differed significantly from national norms established for some of their measures. In fact, both groups of children scored higher than average on a measure of problem behaviors. As the authors acknowledge "The lesbian and heterosexual parent families studied here did not constitute random samples, and it is impossible to know what biases, if any, may have resulted as a consequence… We defined a precise and limited experimental group (i.e., lesbians)… Although the resulting sample was predominately White, highly educated, and economically privileged…"(p. 113). Indeed, 10 of the 15 lesbian mothers had graduate degrees, as did 9 of the 15 heterosexual mothers. The results of this research may not be taken as evidence in support of the assertion for which it is cited.

Miller, Jacobsen, and Bigner ((1981)

The authors rely on two non-probability samples. The lesbian sample consists of 34 self-selected mothers with custody who fit the operational definition of lesbian, i.e.,. "a woman psychologically, emotionally, and sexually attracted to another woman." (p 30). How this definition was applied is not explained. The authors refer to the sampling strategy as a "convenience sample" recruited through a feminist recreation center. The heterosexual sample was a convenience sample consisted of 47 mothers contacted at several Parent-Teacher Association meetings. Subjects completed a self-administered questionnaire, and responded to a slide show. The author notes that there was 100% inter-rater agreement in evaluating responses to the slides. All but two of the lesbians had completed college (94%). By comparison, 78% of the heterosexual subjects were

college graduates. The authors applied inferential statistics despite the samples. The author admits to no limitations on the data or the inferences drawn from them. To boost the power of the statistical tests, the authors increased the probability of a Type I error to .10 rather than .05. No statistical controls were conducted to compensate for differences between the samples. The very high level of education (especially among the lesbian sample) is one potential source of bias. The sampling methods, of course, are the most obvious problem. The results may not be generalized. This article cannot be taken as scientific evidence in support of the assertion for which it is cited.

Mucklow and Phelan (1979).

The authors describe this research as a pilot study. A purposive self-selected sample of 34 lesbian and 46 traditional mothers was located in the Denver-Fort Collins area. No details are provided on how these individuals were recruited. A lesbian mother is defined as a woman who is "psychologically, emotionally, and sexually attracted and interested in other women and who, from a previous relationship with a man, had conceived a child; or as a partner in a lesbian love relationship shared the parental role to a child" (881). The authors do not report how this definition was applied (i.e., how it was verified that all these criteria were satisfied). Members of the PTA were recruited for the heterosexual sample. No operational definition of "heterosexual" is described. One measure is reported to have high reliability. The other is reported to have low reliability. There is no way to assess the potential magnitude of bias introduced by the sampling strategies. Nor is it possible to compare the two groups on education, income, or any other measure except the two administered by the researchers. In the absence of any information about the sampling strategy, the results of this study are properly considered preliminary (a pilot study) and cannot be generalized beyond the peculiar samples used.

Lewin and Lyons (1982)

The authors assembled two non-probability, convenience samples. The first consisted of 43 self-selected divorced lesbian mothers and 37 self-selected divorced heterosexual mothers. The authors argue that there is no way to obtain representative samples of

lesbians. "obtaining a statistically representative sample of the lesbian mothers is not a realistic goal." (257). The authors recruited subjects through personal and professional referrals (snowball sampling), through publicity carried out in the local media, feminist and women's publications, newsletters published by child care and single-parent organizations, and posters. No statistical (quantitative) analysis is reported or conducted. The sample was quite biased with respect to education. Only 14% of the (combined) samples had educational levels lower than "some college." In-person, depth interviews were conducted. No report is made of the number of interviewers, nor of attempts to estimate inter-rater reliabilities. In the absence of information about the sample, the ratings of interviews, or any quantitative analysis, this study must be regarded as inadequate for purposes of the assertion it is cited to support.

Lyons (1982).

This study uses the same sample and methods described above.

Kweskin and Cook (1982).

These researchers assembled two non-probability samples by "purposive" (i.e., self-selected) means. There is no mention of how the sample of 22 lesbian mothers was recruited. The 22 heterosexual mothers were recruited from Parents Without Partners. The authors used versions of a well-known and reliable measure of gender role preferences (i.e., masculinity/femininity). Subjects completed a self-administered mailed questionnaire. No mention of the response rate is made. Without additional information about how the lesbian sample was recruited, or how the term "lesbian" was defined, it is impossible to determine the magnitude of any sampling bias. Without information about response rates, it is impossible to determine the magnitude of self-selection, even in these purposive samples.

Falk (1989)

The researcher neither conducted, nor claimed to have conducted any research in support of the assertion about lesbian mother.

Harris and Turner (1985/86)

The researchers assembled two non-probability samples. The sample of self-selected gay parents included 10 “self-described gay males, and 13 lesbian females. The sample of self-selected heterosexual parents included 2 heterosexual male single parents, and 14 heterosexual female single parents. Subjects were recruited by posters on campus and in a gay bar, advertisements in local newspapers, and an article in a gay/lesbian newsletter. Subjects were instructed to pick up questionnaires at designated locations. In addition, visits were made to meetings of a campus gay/lesbian organization, a convention of a gay/lesbian church, a Parents without Partners meeting, and several day care centers. No details are provided about the instrumentation, or reliability. It is impossible to establish response rates with samples generated by self-referral. 78% of the homosexual sample, and 87% of the heterosexual sample had college degrees. The authors do not present descriptive statistics for the heterosexual sample though they do for the homosexual sample. The sampling design makes it impossible to determine the magnitude of likely bias, though the very high levels of education are surely problematic. The authors acknowledge that their study is not representative of either gay or heterosexual parents “Thus, all generalizations must be viewed with caution.” (p. 111). The sampling methods and the sample sizes were inadequate for the statistical methods used (p. 112). The results of this study do not support the assertion for which it is cited.

Lott-Whitehead and Tully (1993)

The researchers assembled a snowball sample of self-selected lesbians by using “friendship networks, word-of-mouth referrals, etc.” (p 268). There was no comparison group. 187 questionnaires were distributed, of which 46 were returned (response rate = 25%). The primary method of analysis was qualitative rather than statistical. Of the 46 subjects, only 2 had less than a college education. The authors acknowledge that the research “had inherent in its design methodological flaws consistent with other similar studies…This study does not purport to contain a representative sample, and thus generalizability cannot be assumed” (p 269). In light of the very low response rate, the education bias, the lack of detail about the instrumentation, and the acknowledged flaws

in design, the results of this study cannot be used to assess the assertion for which it is cited.

Gay Men as Fathers:

The following articles are cited in support of the assertion that "Research focusing on parenting skills and attitudes of gay fathers similarly confirms that gay men are suitable, and indeed, admirable parents." (Vermont Brief).

Bozett (1989)

This is a review of the literature. The author neither conducted, nor claimed to have conducted research regarding the role of gay men as fathers.

Bigner and Jacobsen (1992).

The researchers assembled two non-probability samples. The gay sample consisted of 24 self-selected men recruited from a gay father support group. The heterosexual sample consisted of 29 self-selected fathers recruited from members of Parents without Partners. There are no statistical results presented for the substantive comparisons of the two groups. There is no operational definition of "gay" except "self identified. gay". The comparison group, therefore, was "presumed to be non-gay." (p. 103). The instrumentation consisted of slides to which men responded and a series of attitude questions. No evidence on reliability is provided. The sample size is too small to provide the power necessary for the test of the null hypothesis. I could find no evidence that the researchers controlled statistically for extraneous factors. All measurements appear to have been made by a single member of the research team, so inter-rater reliability is irrelevant. The two groups of subjects differed noticeably on educational attainment. Only 10% of the heterosexual sample had college or advanced degrees, compared with 67% of the homosexual sample. The likely sources of bias include the use of a single interviewer without attempts to establish reliability, the obvious differences in the two samples that are not dealt with by introducing statistical controls, and the unknown reliability of the instruments.

Bigner and Jacobsen (1989b)

This study was reviewed and critiqued earlier.

Scallenn (1981)

This is an unpublished Ph.D. dissertation that was not reviewed for this brief.

Harris and Turner (1985/86).

This article was reviewed and critiqued earlier.

APPENDIX VI

The Children of Gay and Lesbian Parents are as Well Adjusted as Those of Their Heterosexual Counterparts.

Patterson (1992)

The researcher assembled one non-probability sample of 37 families (26 lesbian couples, 7 single lesbian mothers, and 4 separated/divorced lesbians – some of whom had partners) producing 66 self-selected lesbian subjects. All but four subjects were employed, and 44 of the 66 had at least a college education. All children in the families were born, or adopted by lesbians, and therefore had grown up for their entire lives in such families. This design minimizes the inherent biases that would be present in studies that focus on children (of gay or lesbian parents) who were born in heterosexual relationships (as in almost all studies cited thus far). Sampling was by snowball methods. Of 39 families contacted, 37 agreed to participate. There was no comparison group. Instead, the researcher compared the children in such families to national norms established for the reliable measures used to assess children's well being. There is no report about how many researchers participated in the collection of information in face-to-face encounters in the subject's home. No statistical controls were applied to compensate for extraneous factors, though such controls would have been of little value absent a comparison group. In the end, findings about how the children from these affluent, self-selected lesbian families compare with national norms is of little statistical value because national norms are established on average, heterogeneous samples very unlike the sample used in the current study.

Patterson and Redding (1996)

This is a review of family laws relevant to lesbian and gay parents. The researchers neither conduct, nor claim to conduct any research pertaining to the parental abilities of homosexuals.

Bigner and Bozett (1990)

This is a review of the literature on gay parents. The researchers neither conduct, nor claim to conduct any research pertaining to the parental abilities of homosexuals.

Brewaeys and Van Hall (1997)

This is a balanced and reasoned review of the literature on lesbian motherhood. The authors do not conduct, nor claim to conduct any original research pertaining to the parental abilities of homosexuals.

Cramer (1986)

This is a review of the literature on gay parents. The authors do not conduct, nor claim to conduct any original research pertaining to the parental abilities of homosexuals.

Falk (1989)

The researcher neither conducted, nor claimed to have conducted any research in support of the assertion about lesbian mother.

Gottman (1990)

This is a review of the literature on gay and lesbian parents. The authors do not conduct, nor claim to conduct any original research pertaining to the parental abilities of homosexuals.

Green and Bozett (1991)

This article was reviewed and critiqued earlier.

Kirkpatrick (1987)

This is a review of several clinical cases seen for therapy by the author. There is no sampling, instrumentation, or research protocol

Kirkpatrick (1996)

This is a review of the literature on lesbian parents. The authors do not conduct, nor claim to conduct any original research pertaining to the parental abilities of homosexuals

MacCandlish (1987)

The author invited five lesbian mother families to participate in a two-hour structured interview in the subject's home. There are no details provided about how these families were recruited, their backgrounds, their motivations to participate, or the instrumentation used. There was no comparison group, and there was no analysis (quantitative) of results. No scientific inferences may be drawn from this project.

O'Connell (1993)

This was described as an "exploratory design" involving "open-ended" interviews with a questionnaire guide. It relied on a non-probability self-selected sample of 6 lesbian (age 16-23) and 5 gay (aged 19 to 23) parents obtained through snowball methods, and by placing an advertisement in two Boston gay newspapers and a local woman's newspaper. The subjects had all experienced their parents' divorce. Interviews were conducted by the researcher only. No mention of reliability is made. Instrumentation is not described sufficiently to judge its quality. There was no comparison group. No scientific inferences may be drawn from this project.

Patterson and Chan (1997)

This is a review of the literature on gay fathers. The researchers do not report any new research in this article.

Pennington (1987) # 31

The researcher describes a clinical sample of 32 children from 28 lesbian mother families that she treated since 1977. All but 2 children were seen at an outpatient psychotherapy clinic for gay men, lesbians, and their families in San Francisco. The author provides her

impressions of the issues that these children faced as they dealt with their parents' troubles. There is no sampling, instrumentation, or statistical analysis. There was no comparison made with children from heterosexual parents.

Pies (1990)

This is not a research article. It is a journalistic account of personal experiences.

Allen and Burrell (1996).

The analysis of this study is described in detail in the body of the affidavit.

Chan, Raboy and Patterson (1998).

The researchers assembled a self-selected sample by recurring families from former clients of The Sperm Bank of California. Clients who conceived and gave birth to children at least 5 years before the study was conducted were invited to participate. 195 families were so identified. The researchers were able to locate and contact 108 (55%). Of these 108, a total of 80 (74%) agreed to participate. The overall response rate, therefore, was 80/195 = 41%. Response rates, however, differed dramatically by sexual orientation of the parent. All eligible lesbian couples (100%) participated. But only 30% of lesbian single mothers, 31% of heterosexual couples and 30% of heterosexual single mothers participated.

As almost every study reviewed so far has found, these researchers note that the sample of lesbian biological mothers had significantly more education than did others. The lesbians also had higher average incomes. We cannot know about the majority of heterosexuals who decided not to participate.

The researchers administered several well-known and reliable measures of children's well being.

The authors acknowledge the limited power of their statistical analyses, and failed to incorporate statistical controls for the differences (in education and income) found among their groups.

Several potential sources of bias are acknowledged. First, the initial contact with potential subjects was from The Sperm Bank rather than the researchers. The extent to which this elicited differential participation rates is unknown. But surely, the dramatically different response rates are a critical source of concern for the results of this study. The failure to control for (acknowledged) differences among groups is also a flaw in the analysis. And probably most important, the use of women who have been artificially inseminated raises very serious questions about how representative this group of lesbians is. Due to the problems with the sample and methods of analysis, no scientific inferences may be drawn from this research.

Brewaeys, Ponjaert, Van Hall, and Golombok (1997)

This is a well-designed analysis that attempted to study entire populations rather than samples of them. The "sample" of 30 lesbian mother families with children (aged 4-8) conceived through Donor Insemination was recruited through the Fertility Department of the Brussels University Hospital. All families where the mother had attended the clinic between 1986 and 1991 were asked to participate. The agreement rate was 100%. The comparison group of 38 heterosexual Donor Insemination families and of 30 naturally conceived heterosexual families was recruited through the Fertility Department and the Obstetric Department of the University Hospital Leiden. All heterosexual families with a child born between 1986 and 1990 were asked to participate. Similar requests were made to parents whose children were born naturally. Response rates were 53% for the heterosexual Donor Insemination families, and 60% for the naturally conceived families. In-home interviews were conducted. It is fair to say that the sample may be considered broadly representative for the general population of lesbian mothers who attended a fertility clinic in order to conceive. Response rates and self-selection biases for the other groups jeopardize the degree to which each represents the relevant population, although the procedure is vastly superior to almost all others reviewed in this brief.

Comparisons of the groups revealed that they differed on educational levels with lesbians having considerably higher average educational attainments. Education, however, was not controlled in subsequent analyses. Much of the instrumentation consisted of reliable measures of child well being. The statistical analyses (though lacking needed controls) revealed no significant differences in the quality of relationships between lesbians (and their partners) and heterosexual couples. Nor was the parent-child relationship different among groups when biological mothers were compared. Unfortunately, the samples were too small to draw any conclusions about the lack of difference between groups (i.e. the study lacked sufficient statistical power). And finally, this study suffers from the same problem noted above, women who have been inseminated by artificial methods are likely to differ in important, yet unknown ways from lesbians who have conceived naturally. Still, despite the obvious limitations, this is one of the better studies among all that were reviewed.

Flacks, Ficher, Masterpasqua, and Josepth (1995)

This study was reviewed and critiqued above.

Steckel (1985)

This citation refers to an unpublished doctoral dissertation.

Golombok, Spencer, and Rutter (1983).

This study was reviewed and critiqued above.

Tasker and Golombok (1997)

This study was reviewed and critiqued above.

Gottman (1990)

This review of the literature was discussed earlier.

Schwartz (1985) Unpublished dissertation)

This citation refers to an unpublished doctoral dissertation.

Karkpatrick, Smith, and Roy (1981)

The researchers report on a study of the psychological status of a non-probability self-selected sample of 10 boys and 10 girls living full time with their "self identified" lesbian mothers. A comparison group of 10 boys and 10 girls living full-time with their single-heterosexual mothers was also evaluated. Mothers were recruited through snowball sampling and with a request in a National Organization for Women newsletter. All participants in the study, therefore, were self-selected. Each child was evaluated by several different researchers. No descriptive information is provided that would allow me to assess the differences between the two groups in terms of education, income, or other possibly extraneous influences. No information is provided about the children's backgrounds that might allow the reader to assess the findings in light of such factors. In the absence of statistical analysis, the authors conclude "lesbian mothers and heterosexual mothers were very much alike in their marital and maternal interests, current life-styles, and childrearing practices." (p 550). This is a good qualitative study, though it does not offer scientific evidence about the comparative profiles of the two groups.

Puryear (1983)

This citation refers to an unpublished doctoral dissertation.

Rees (1979) unpublished doctoral dissertation

This citation refers to an unpublished doctoral dissertation.

Barrett and Robinson (1990)

This is not a research report but a series of case studies of an unknown group of children of gay fathers. The authors raise an important point. They note: "In reviewing the impact

of gay fathering on children, it is important to acknowledge that most children who live with gay fathers are also the products of divorce and may present psychological distress that typically accompanies families experiencing marital dissolution. All too often the emotional distress of children with gay parents is solely attributed to the parents' sexual orientation rather than seen as a complex mixture of family dynamics, divorce adjustment, and incorporation of the parents' sexual coming out." (p 82). In making this point, the author reminds us that research on this subject must control for such obvious factors. Failure to do so will bias the results of any study. None of the studies reviewed controlled for such factors.

Golombok, Spencer, and Rutter (1983) # 10

The researchers report the results of studies conducted on non-probability samples of 27 lesbian families with a total of 37 children, and a comparison group of 27 heterosexual families with a total of 37 children. The definition of "lesbian" used was that a women must regard herself as predominantly or wholly lesbian and must currently be in a homosexual relationship, or have been in one in her last relationship. "Heterosexual" was defined behaviorally, by recruiting women whose last sexual relationship was with a man. Personal interviews were conducted. Instrumentation is not described in detail, reliability of indicators is not reported, nor is inter-rater reliability noted.

The two groups differed in an important way. All of the single-parents lived alone with their children. Most of the lesbians lived with a partner (only 9 of 27 lived alone with their children). Though the two groups were similar in regards age, and past marital status, they differed importantly on educational levels (67% of the lesbians and 37% of the heterosexual women had advanced education/training (p 556). The two groups of mothers also differed in their contact with their children's father.

Despite the differences between the two groups, appropriate statistical controls were not employed to adjust for these differences. The authors acknowledge the limitations of these results when they note "It is not possible to know what biases were involved in the method of sample selection." (569). Moreover, since almost all the children had been

born into a heterosexual household where they had spent at least two years, "This may be relevant in that both gender identity and sex role behavior are established early in the preschool years and the roots of sexual object choice (in so far as they are experiential) may also be found in the same age period. Accordingly, it would be unjustified to generalize our findings to rearing in a lesbian household from the outset." (p 569)

Huggins (1989) # 15

This article reports the results of a study of self-esteem among adolescents. The author assembled two non-probability samples. 36 adolescent children (13 to 19) from 32 families were divided into two groups based on their mother's sexual "object choice." The resulting samples contained nine male and female adolescents each. There is no description of how the sample was selected or obtained. The author notes that "to be asked to participate in the study, the children had to be aged 13 to 19 years and be living with their self-designated lesbian mother or self-designated heterosexual mother. The children were the biological products of a heterosexual marriage that had ended in divorce at least one year prior to the time of the study." (p 126). The author relies on a well-known measure that has established reliability in large samples. Presumably, all in-person interviews were conducted by the author (though this is not mentioned). There are no statistical controls used to compensate for potential extraneous factors. And without any information about how the sample was obtained, it is not possible to comment on the likely biases inherent in this project.

Green, Mandel, Hotvedt, Gray, and Smith (1986)

This research was reviewed and critiqued above.

Hotvedt and Mandel (1982) # 45

The authors report a study of "self designated" lesbians with custody or joint custody of at least one child (age 3-11) and a matched heterosexual sample of "self designated" heterosexual single mothers. Sample sizes are not reported. Sample recruitment strategies are not reported. The author made a good attempt to deal with extraneous

factors by matching the (unknown size) samples on age, race, and marital status of the mother, sex of the child, length of separation from the father, income of the family, education of the mother, and mother's religion as a child. Self administered questionnaires appear to have been employed. There is no description of the instrumentation except for well-known measures of mental ability. No results are presented. No response rate can be calculated. Without any description of the sample, or any statistical results, it is impossible to evaluate this study.

Lesbian and Gay Parenting at (American Psychological Association)(1995).

This is a joint publication of the American Psychological Association's Committee on Women in Psychology, Committee on Lesbian and Gay Concerns, and Committee on Children, Youth, and Families. It is written by Professor Charlotte Patterson, and is a review of the literature and annotated bibliography. It is not a research article.

Rees (1979)

This citation refers to an unpublished doctoral dissertation.

Flaks, Fischer, Masterpasqua, and Joseph (1995)

This study was reviewed and critiqued above.

Green, Mandel, Hotvedt, Gray, and Smith (1986)

This research was reviewed and critiqued above.

Kirkpatrick, Smith and Roy (1981)

This article was reviewed and critiqued above.

Golombok, Spencer and Rutter (1983)

This article was reviewed and critiqued above.

Kirkpatrick (1987)

This summary of several clinical cases was reviewed and critiqued earlier.

Patterson and Redding (1996)

This review of the literature was discussed earlier.

Bailey, Bobrow, Wolfe and Mikach (1995)

The researchers recruited a non-probability sample of 55 gay and bisexual fathers through advertisements in homophile publications. These self-selected men were asked to discuss their sons. The sons were subsequently contacted by the researchers. Of the total of 82 sons available, information was gathered from 43 (52%). Instrumentation is not described, and there are no reports on reliability. There was no comparison group. The number of interviewers is not reported, nor are inter-rater reliabilities reported. 9% of the (contacted) sons were found to be homosexuals, though no operational definition of that term is provided. Rather, both fathers and sons were asked to characterize (the sons) as homosexual, heterosexual, or bisexual, allowing the subjects to define the terms as they wished.

The authors acknowledge the most serious potential bias of the study, self-selection. "The most important potential bias is that fathers decisions to participate might depend in part on their sons' sexual orientations. .. The second limitation concerns the absence of a control group." (p 127). Most interestingly, the researchers acknowledge that the rate of homosexuality among the sons of gay men is higher than found in the general population. "It could be argued the rate of homosexuality in the sons (9%) is several time higher than that suggested by the population-based surveys and is consistent with a degree of father-to-son transmission." (p 128). The authors argue that this is not the case, however, due to the design problems of the study and the sample. The authors appear unwilling to accept

the findings of their own study and go to lengths to explain why the results should not be interpreted on their face. .

Golombok, Spencer and Rutter (1983)

This study was reviewed and critiqued above.

Golombok and Tasker (1996)

This study is reviewed in the body of my affidavit.

Gottman (1990)

This article was reviewed and discussed earlier.

Green, Mandel, Hotvedt, Gray, and Smith (1986)

This research was reviewed and critiqued above.

Green (1978)

The author reports on his study of the sexual identity of 37 children raised by homosexual or transsexual parents. The author (a psychiatrist) examined 37 children who were being raised by at least one parent who was either transsexual or homosexual. This is a clinical sample and cannot be regarded as representative of any defined population. The instrumentation (psychiatric treatments) are not detailed. There is no mention of reliability given that the author conducted all sessions. There is no comparison group.

Hoeffer (1981)

The author reports the result of a comparison of 20 lesbian and 20 heterosexual single mothers from the San Francisco Bay area and their only or oldest child, ages six through nine. The definitions of homosexual and heterosexual are "self identified." The author gives no indication of how the subjects were recruited. No comparative statistics are

provided to permit a comparison of the two groups. A modified version of a reliable measure of children's toy preferences was employed. All interviews were conducted by the author in the home of the subject. Without information about how the two groups compared (on, for example, education, age, income, race, etc.) or how the subjects were recruited for the study, it is impossible to comment on the potential biases in this study.

Kirkpatrick, Smith, and Roy (1981)

This study was reviewed and critiqued above.

Miller (1979)

The author conducted depth interviews with a snowball sample of 40 homosexual fathers and 14 of their children. No further description of the sampling is provided. No details are offered about the instrumentation. No comparison group was involved. There is no discussion of how "homosexuality" was measured. The author reports that 3 of the 14 men said they had fantasized about having sex with their sons (but none had ever acted on it)(p546). One in six sons, and one in eight daughters were homosexuals. This finding led the author to conclude "On the basis of this small, nonrandom sample, there does not appear to be a disproportionate amount of homosexuality among the children of gay fathers."(p 547) despite the absence of any comparative evidence from heterosexuals.

Schwartz (1986)

This is an unpublished doctoral dissertation. .

142. The comments and analysis contained in the main body of this affidavit and the six Appendices that follow the main body comprise the totality of my opinion in this matter

Sworn before me at the City
of in the State
of Virginia, in the United
States of America, this
day of March, 2001

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Steven L. Nock

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Notary Public