Patrick J. Gorman
Wild, Carter & Tipton
246 W. Shaw Avenue
Fresno, California 93704
(559) 224-2131 (tel)
(559) 229-7295 (fax)
pgorman@wctlaw.com

Christopher M. Gacek
Senior Fellow for Regulatory Affairs
Family Research Council
801 G. Street, N.W.
Washington, D.C. 20001
(202) 393-2100 (tel)
(202) 393-2134 (fax)
cmg@FRC.ORG
Pro Hac Vice Application Pending

Paul Benjamin Linton
Special Counsel
Thomas More Society
921 Keystone Avenue
Northbrook, Illinois 60062
(847) 291-3848 (tel)
(847) 412-1594 (fax)
PBLCONLAW@AOL.COM
Pro Hac Vice Application Pending

Thomas Brejcha
President & Chief Counsel
Thomas More Society
29 S. La Salle Street Suite 440
Chicago, Illinois 60603
(312) 782-1680 (tel)
(312) 782-1887 (fax)
BREJCHA@AOL.COM
Pro Hac Vice Application Pending

Attorneys for *Amicus Curiae*
The Family Research Council

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, AND JEFFREY J. ZARILLO,

Plaintiffs,

vs.

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

Case No. 09-CV-2292 VRW

PRE-TRIAL BRIEF OF THE FAMILY RESEARCH COUNCIL, AS *AMICUS CURIAE*, IN SUPPORT OF DEFENDANTS-INTERVENORS

Date and Time of Hearing:
To Be Determined by the Court
Judge: Chief Judge Walker
Location: Courtroom 6, 17th Floor

of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants.

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A JANSSON; and PROTECT MARRIAGE.COM-YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

Defendants-Intervenors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

INTEREST OF THE *AMICUS*

The interest of the Family Research Counsel, as *amicus curiae*, is set forth in the motion for leave to file this Brief in support of defendants-intervenors.

ARGUMENT

I.

RESTRICTING THE NAME OF "MARRIAGE" TO THE UNION OF OPPOSITE-SEX COUPLES DOES NOT VIOLATE THE FUNDAMENTAL RIGHT TO MARRY PROTECTED BY THE DUE PROCESS CLAUSE.

Plaintiffs complain that, by reserving marriage to the union of opposite-sex couples, Proposition 8 (CAL. CONST. art. I, § 7.5) violates the fundamental right to marry protected by the Due Process Clause. Doc. 1-2 at 9, ¶¶ 38-39. Section 1 of the Fourteenth Amendment provides, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. AMEND. XIV, § 1. *Amicus* responds that Proposition 8 does not violate the fundamental right to marry because that right applies only to opposite-sex marriages. Accordingly, the name "marriage" may be restricted to the union of opposite-sex couples.

The central error in plaintiffs' due process analysis is their failure to define the precise nature of the liberty interest they have asserted. The issue before this Court is not whether the liberty language of the Due Process Clause confers a fundamental right to marry, but whether that right extends to same-sex unions. Plaintiffs, proceeding from the assumption that the right to marry embraces same-sex, as well as opposite-sex, unions, not surprisingly arrive at the conclusion that Proposition 8 interferes with their right to marry and, therefore, that it may be justified only by a compelling state interest. Doc. 7 at 11-13; Doc. 52 at 15; Doc. 202 at 29-31, 46-47. But that is to assume what is to be proved, to wit, that the fundamental right to enter into a marriage includes the right to enter into a *same-sex* marriage. Question begging is no substitute for proper legal analysis. The evaluation of substantive due process claims calls for a different and more principled methodology.

In determining whether an asserted liberty interest (or right) should be regarded as fundamental for purposes of substantive due process analysis under the Fourteenth Amendment (infringement of which would call for strict scrutiny review), the Supreme Court applies a two-prong test. First, there must be a "careful description" of the asserted fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation and internal quotation marks omitted). Second, the interest, so described, must be firmly rooted in "the Nation's history, legal traditions, and practices." *Id.* at 710.[1] In *Glucksberg*, the Court characterized the asserted liberty interest as "a right to commit suicide which itself includes a right to assistance in doing

[1] Contrary to the implications of plaintiffs' pleadings, *see* Doc. 7 at 7, 11, 13 n.3, 16 n. 6, Doc. 52 at 14-15, Doc. 202 at 8-9, 10, 30-31, nothing in the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), changes the analysis for evaluating whether a right should be deemed "fundamental" under the liberty language of the Due Process Clause. First, in striking down the state sodomy statute, "the *Lawrence* Court did not apply strict scrutiny," *Witt v. Dep't of the Air Force*, 527 F.3d 806, 818 n. 6 (9th Cir. 2008), which would have been the appropriate standard of review if a fundamental right been implicated. Second, the Court never modified or even mentioned the many cases in which it has emphasized the need to define carefully an asserted liberty interest in determining whether that interest is "fundamental." Those cases should not be regarded as having been overruled *sub silentio*. *See Lofton v. Secretary of Dep't of Children & Family Services*, 358 F.3d 804, 816 (11th Cir. 2004) ("We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental rights analysis"). Third, notwithstanding the language used at one point to describe the liberty interest at stake–to form "a personal bond" with another person that includes "overt expression in intimate conduct," 539 U.S. at 567–the Court later focused on *sexual* activity. *Id.* at 572 (identifying "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters *pertaining to sex*") (emphasis added). This "awareness," in turn, was based upon an examination of "our laws and traditions in the past half century." *Id*. at 571. By way of contrast, "[t]he history and tradition of the last fifty years have not shown the definition of marriage to include a union of two people regardless of their sex." *Smelt v. County of Orange*, 374 F. Supp.2d 861, 878 (C.D. Cal. 2005) ("[t]he"), *aff'd in part*, *vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006). That thirty States have amended their constitutions to reserve marriage to opposite-sex couples strongly suggests that there is no "emerging awareness" that the right to marry extends to same-sex couples.

so," not whether there is "a liberty interest in determining the time and manner of one's death," "a right to die," "a liberty to choose how to die," "[a] right to choose a humane, dignified death" or "[a] liberty to shape death." *Id*. at 722-23 (citations and internal quotation marks omitted).[2]

In an effort to evade *Glucksberg's* emphasis on our history, legal traditions and practices, none of which supports a right to enter into a same-sex marriage, plaintiffs argue that what is at stake here is simply the right to marry, not the gender of the person one chooses to marry. Doc. 7 at 6-7, 11-12; Doc. 52 at 5, 15; Doc. 202 at 8, 9-10, 29-30. But the right to enter into a marriage is not at issue because Proposition 8 does not bar any of the plaintiffs from entering into a civil marriage–they are free to marry on the same terms as any other citizens. Contrary to plaintiffs' understanding, the reservation of marriage to opposite-sex couples is not a limitation on *who* can marry, but is the principal defining characteristic of *what* marriage is–the union of a man and a woman.[3] When the issue is properly framed in terms of the constitutional right being asserted

---

[2] *Glucksberg* was not an anomaly in demanding precision in defining the nature of the interest (or right) being asserted. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993) (describing asserted right as "the . . . right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than that of a government-operated or government-selected child-care institution," not whether there is a right to "freedom from physical restraint," "a right to come and go at will" or "the right of a child to be released from all other custody into the custody of its parents, legal guardians, or even close relatives"); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 126 (1992) (describing asserted interest as a government employer's duty "to provide its employees with a safe working environment"). Most recently, the Supreme Court cited *Glucksberg*, *Reno* and *Collins* in holding that a convicted felon has no freestanding "substantive due process right" to obtain the State's DNA evidence in order to apply new DNA-testing technology that was not available at the time of his trial. *See District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S.__, ___, No. 08-6 (June 18, 2009), slip op. at 19-20.

[3] *See Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d 136, 141 (N.Y. App. Div. 2006), *aff'd*, 855 N.E.2d 1 (N.Y. 2006): "To remove from 'marriage' a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and state . . . would, to a certain extent, extract some of the deep roots that support its elevation to a fundamental right." Citation and internal quotation marks omitted.

(*i.e.*, to enter into a same-sex marriage),[4] it is apparent that there is no such right.

The Supreme Court has recognized a substantive due process right to marry. *See Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987). But the right recognized in these decisions all concerned *opposite*-sex, not *same*-sex, couples. *See Loving*, 388 U.S. at 12, *Zablocki*, 434 U.S. at 384, *Turner*, 482 U.S. at 94-97. That the right to marry is limited to opposite-sex couples is clearly implied in a series of Supreme Court cases relating marriage to procreation and childrearing. *See Skinner v. Oklahoma ex rel. Williamson*, 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) (liberty language in Due Process Clause includes "the right of the individual . . . to marry, establish a home and bring up children"); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (characterizing the institution of marriage as "the foundation of the family and of society, without which there would

---

[4] *See Lewis v. Harris*, 908 A.2d 196, 206 (N.J. 2006) (defining issue as "whether the right of a person to marry someone of the same sex is so deeply rooted in the traditions and collective conscience of our people that it must be deemed fundamental"). In rejecting a state privacy challenge to the state law reserving marriage to opposite-sex couples, the Hawaii Supreme Court stated that "the precise question facing this court is whether we will extend the *present* boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, *we are being asked to recognize a new fundamental right*." *Baehr v. Lewin*, 852 P.2d 44, 56-57 (Haw. 1993) (second emphasis added). *See also Hernandez v. Robles*, 805 N.Y.S.2d 354, 359 (N.Y. App. Div. 2005) (observing that plaintiffs seek "an alteration in the definition of marriage"), *aff'd*, 855 N.E.2d 1 (N.Y. 2006). *See also Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003) ("recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage.'"); *Samuels*, 811 N.Y.S.2d at 141 ("this case is not simply about the right to marry the person of one's choice, but represents a significant expansion into new territory which is, in reality, *a redefinition of marriage*") (emphasis added). In requiring the Commonwealth of Massachusetts to recognize same-sex marriages, the majority in *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), freely acknowledged that "our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries." *Id*. at 965.

be neither civilization nor progress").[5]

The Supreme Court has never stated or even implied that the federal right to marry extends to same-sex couples. And no court has ever held that marriage, traditionally understood, extends to same-sex couples. "[S]ame-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty." *Standhardt*, 77 P.3d at 459. For that reason, the right to marry does not extend to same-sex unions.

II.

RESTRICTING THE NAME OF "MARRIAGE" TO THE UNION OF OPPOSITE-SEX COUPLES DOES NOT DISCRIMINATE ON THE BASIS OF SEX IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Plaintiffs complain that Proposition 8 discriminates on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment. Doc. 1-2 at 10, ¶ 44. Section 1 of the Fourteenth Amendment provides, in part, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1. *Amicus* responds that Proposition 8 cannot be said to "deny" either men or women the "equal protection of the laws." The marriage statutes are gender neutral. Both men and women may marry someone of the opposite sex; neither may marry anyone of the same sex. Accordingly, restricting the name of

---

[5] Contrary to plaintiffs' understanding, *see* Doc. 202 at 11, 17, 19, 30-31, *Turner v. Safley* did not hold otherwise. At issue in *Turner* was a state prison regulation that prohibited inmates from marrying, absent a compelling reason for allowing their marriage. The Court concluded that the fundamental right to marriage applies to prison inmates just as it applies to those who are not incarcerated. *Turner*, 482 U.S. at 95. Among the reasons given for applying the right to marry to prison inmates was that "most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they will be fully consummated." *Id*. at 96. The Court also reasoned that marriage often serves as a "precondition" to certain tangible and intangible benefits, including "[the] legitimation of children born out of wedlock." *Id*. To be sure, the reasons given in support of recognizing the fundamental right of inmates to marry were not linked in express terms to procreation. And some of the reasons given were wholly independent of procreation. That said, "it is clear that the Court was contemplating marriage between a man and a woman when it declared [the regulation] unconstitutional." *Conaway v. Deane*, 932 A.2d 571, 621 (Md. 2007).

"marriage" to the union of opposite-sex couples does not discriminate on the basis of sex.

The fundamental flaw with the argument that laws reserving marriage to opposite-sex couples "discriminate" on the basis of sex is that "the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Baker v. State*, 744 A.2d 864, 880 n. 13 (Vt. 1999). "[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct." *Id*. Other state courts have also rejected the claim that "defining marriage as the union of one man and one woman discriminates on the basis of sex." *Id.*[6] Federal courts reviewing challenges to the Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C, are in accord.[7]

Relying upon *Loving v. Virginia*, 388 U.S. 1 (1967), however, which struck down Virginia's anti-miscegenation statutes, plaintiffs argue that Proposition 8 is not immune from challenge under the Equal Protection Clause merely because it treats men and women equally. Doc. 202 at 11-12, 29. The analogy to *Loving* is unconvincing at several levels.

First, *Loving* dealt with race, not sex. The two characteristics are not fungible for purposes of constitutional analysis. For example, although public high schools and colleges may *not* field sports teams segregated by *race*, *see Louisiana High School Athletic Ass'n v. St. Augustine High*

---

[6] Citing *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972), and *Singer v Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974). *See also In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008) (same); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (same); *Conaway v. Deane*, 932 A.2d 571, 585-602 (Md. 2007) (same); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006) (plurality) (same); *Andersen v. King County*, 138 P.3d 963, 988 (Wash. 2006) (plurality) (same); *Dean v. District of Columbia*, 653 A.2d 307, 363 n. 2 (D.C. App. 1995) (same).

[7] *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005) ("DOMA does not discriminate on the basis of sex because it treats women and men equally"); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 877 (C.D. Cal. 2005) (same), *aff'd in part*, *vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2005) (same).

School, 396 F.2d 224 (5th Cir. 1968), they *may* field teams segregated by *sex* (at least where equal opportunities are afforded to males and females on separate teams) without violating the Equal Protection Clause of the Fourteenth Amendment (or a state equal rights provision). *See Force by Force v. Pierce City R-VI School District*, 570 F. Supp. 1020, 1026 (W.D. Mo. 1983) (noting that "a number of courts have held that the establishment of separate male/female teams in a sport is a constitutionally permissible way of dealing with the problem of potential male athletic dominance"). Indeed, a school district may go so far as to provide identical sets of single-gender public schools without running afoul of the Equal Protection Clause. *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880, 885-88 (3d Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977). Although, since *Brown v. Board of Education*, 347 U.S. 483 (1954), classifications based on race have been subjected to strict scrutiny review without regard to whether a given classification happens to apply equally to members of different races, *see McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (striking down laws that criminalized interracial cohabitation), "the laws in which the Supreme Court has found sex-based classifications have all treated men and women differently." *Smelt*, 374 F. Supp. 2d at 876-77 (collecting cases).

Second, anti-miscegenation statutes were intended to keep persons of *different* races *separate.* Marriage statutes, on the other hand, are intended to bring persons of the *opposite* sex *together*. Statutes that mandated *segregation* of the *races* with respect to marriage cannot be compared in any relevant, or even intelligible, sense to statutes that promote *integration* of the *sexes* in marriage. *See Hernandez v. Robles*, 805 N.Y.S.2d at 370-71 (Catterson, J., concurring).

Third, unlike the history of the anti-miscegenation statutes struck down in *Loving*, which stigmatized blacks as inferior to whites,[8] "there is no evidence that laws reserving marriage to

[8] The statutes challenged in *Loving* did not prohibit all interracial marriages, but only marriages between "white persons" and "nonwhite persons." *Loving*, 388 U.S. at 11 & n. 11. Noting that "Virginia prohibits only interracial marriages involving white persons," the Supreme Court determined that "the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." 388 U.S. at 11 & n. 11. That "justification," of course, was patently inadequate. *Id*. at 11-12.

opposite-sex couples were enacted with an intent to discriminate against either men or women. Accordingly, such laws cannot be equated in a facile manner with anti-miscegenation laws." *Hernandez*, 805 N.Y.S.2d at 370 (Catterson, J., concurring). Nor is there any evidence that Proposition 8 was motivated by a desire to benefit or burden either men or women.

Statutes, ordinances, common law doctrines and public policies that treat men and women equally, and do not subject them to different restrictions or disabilities, cannot be said to deny either men or women the equal protection of the law. In restricting the name "marriage" to the union of opposite-sex couples, Proposition 8 does not discriminate on the basis of sex.

III.

RESTRICTING THE NAME OF "MARRIAGE" TO THE UNION OF OPPOSITE-SEX COUPLES DOES NOT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Plaintiffs complain that Proposition 8 discriminates on the basis of sexual orientation in violation of the Equal Protection Clause. Doc. 1-2 at 9-10, ¶¶ 42-43. *Amicus* responds that Proposition 8 does not, on its face, discriminate against homosexuals. Opposite-sex marriage is available to both heterosexuals and homosexuals on an equal basis. Moreover, although Proposition 8 may have a disparate impact on homosexuals seeking to enter into a same-sex marriage, that impact is not constitutionally cognizable in the absence of proof that Proposition 8 was enacted with the intent or purpose of discriminating against homosexuals.[9] The California Supreme Court has determined, however, that the identically worded statutory predecessor to Proposition 8 (Proposition 22) was *not* enacted with such an intent or purpose.[10] Accordingly, it cannot be said that Proposition 8 had that intent or purpose, either. Finally, even assuming that

---

[9] *See Washington v. Davis*, 426 U.S. 229 (1976) (race); *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977) (race); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (sex).

[10] *See In re Marriage Cases*, 183 P.3d 384, 452 n. 73 (Cal. 2008) ("We emphasize that in reaching this conclusion [that the statutes violate the state constitution] we do not suggest that the current marriage provisions were enacted with an invidious intent or purpose").

Proposition 8 discriminates against homosexuals, such discrimination is not subject to heightened scrutiny. In this argument, *amicus* shall focus on the last point– determining the appropriate standard of review for classifications allegedly based on sexual orientation.

Under controlling Ninth Circuit precedent, "classifications having to do with homosexuality may survive challenge if there is any rational basis for them." *Meinhold v. United States Department of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994) (citing *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990)). *See also Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1997) (same) (citing *High Tech Gays*); *Holmes v. California Army National Guard*, 124 F.3d 1126, 1132-33 (9th Cir. 1997) (same) (citing *High Tech Gays* and *Philips v. Perry*).[11]

In *Hernandez-Montiel v. Immigration & Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000), *overruled in part on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177, 1186-87 (9th Cir. 2005) *(en banc*), upon which plaintiffs rely, *see* Doc. 7 at 20, Doc. 52 at 13, a panel of the Ninth Circuit determined that asylum should be granted to an immigration applicant, reasoning, *inter alia*, that as a homosexual man with a female sexual identity the applicant had a well-grounded fear of persecution as a member of a particular social group. *Id*. at 1091-99. The court concluded that the applicant was a member of a particular social group because "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." *Id*. *Hernandez-Montiel*, however, did *not* determine that classifications based on sexual orientation are subject to a more rigorous standard of review. Moreover, the Ninth Circuit has since referenced *High Tech Gays* for its holding that homosexuals do not constitute a suspect class. *See Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1137 (9th Cir. 2003) *(citing High Tech Gays*). Most recently, the Ninth Circuit, citing its earlier decision in *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997), has reiterated that "rational basis review" is the appropriate standard of review for evaluating equal protection

[11] The only opinion in which the Ninth Circuit held that sexual orientation is a suspect basis for classification, *see Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), was later withdrawn. *See Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (*en banc*).

challenges to classifications based on sexual orientation. *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).[12] In its multiple decisions holding that classifications based on sexual orientation are not subject to intermediate or strict scrutiny review, the Ninth Circuit is in accord with its sister circuits. Eleven of the thirteen federal circuit courts of appeals have held that homosexuals do not constitute a suspect or quasi-suspect class requiring greater than rational basis review under the Equal Protection Clause,[13] and a twelfth has applied rational basis review without deciding whether a higher standard would be warranted.[14]

Even apart from binding Ninth Circuit precedent, it is apparent that homosexuals are not

---

[12] Plaintiffs' attempt to dismiss the precedential force of *High Tech Gays* on the basis that it relied on the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was later overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), *see* Doc. 7 at 18 n.7, Doc. 202 at 29, is unavailing. The Ninth Circuit's decisions in *Holmes*, *Philips* and *Flores* were all decided after *Romer v. Evans*, 517 U.S. 620 (1996), which clearly, if only by implication, cast a long shadow on the continuing vitality of *Bowers*, *see Romer*, 517 U.S. at 636 (Scalia, J., dissenting), and its decision in *Witt* was decided after both *Romer* and *Lawrence*.

[13] In addition to the Ninth Circuit decisions cited in the text are: *Cook v. Gates*, 528 F.3d 42, 60-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (*en banc*); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*); *Scarborough v. Morgan County Board of Education*, 470 F.3d 250, 261 (6th Cir. 2006); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261, 265-68 & n. 2 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996), *on remand*, 128 F.3d 289, 292-93 & nn. 1-2 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998)*; Schroeder v. Hamilton School District*, 282 F.3d 946, 950-51, 953-54 (7th Cir. 2002), *id*. at 957 (Posner, J., concurring); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 & n. 8 (7th Cir. 1989); *McConnell v. United States*, 188 Fed. App. 540 (8th Cir. 2006); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-69 (8th Cir. 2006); *Richenberg v. Perry*, 97 F.3d 256, 260 & n. 5 (8th Cir. 1996); *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976); *Jantz v. Muci*, 976 F.2d 623, 627-30 (10th Cir. 1992); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903 (1985); *Lofton v. Secretary of the Dep't of Children & Family Services*, 358 F.3d 804, 817-18 & n. 16 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n. 3 (D.C. Cir. 1994) (*en banc*); *Padula v. Webster*, 822 F.2d 97, 101-04 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989).

[14] *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998). The Third Circuit has not addressed the issue to date.

a "suspect" class. The Supreme Court has identified four characteristics that suspect classes commonly share: (1) a history of discrimination; (2) a trait that "bears no relation to ability to perform or contribute to society"; (3) an immutable trait; and (4) political powerlessness. *City of Cleburne*, *Texas v. Cleburne Living Center*, 473 U.S. 432, 440-46 (1985); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). *Amicus* does not dispute that homosexuals have been subjected to a history of discrimination, but they do not satisfy the remaining criteria of "suspectness."

With respect to the second criterion, *amicus* acknowledges that homosexuals are able to "perform or contribute to society" in many areas. But, for purposes of equal protection analysis, "groups that are treated differently by a statute are not similarly situated unless they 'are in *all* relevant respects alike.'" *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 520 (Conn. 2008) (Zarella, J., dissenting) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added by Justice Zarella)). "The fact that same sex couples cannot engage in sexual conduct of a type that can result in the birth of a child is a critical difference in this regard." *Id*. So, too, is the fact that, by definition, same-sex couples are unable to provide the benefits of dual-gender parenting. As an institution, marriage exists for the primary purposes of "ensuring a stable legal and societal framework in which children are procreated and raised, and providing the benefits of dual-gender parenting for the children so procreated." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 374 (N.Y. App. Div. 2005) (Catterson, J., concurring), *aff'd*, 855 N.E.2d 1 (N.Y. 2006). Because same-sex couples can neither "procreate by themselves" nor "provide dual-gender parenting," *id*., they are not similarly situated to opposite-sex couples. The sexual orientation of homosexuals (their "trait" for purposes of suspect class analysis) quite obviously *is* related to their willingness (if not their ability) to engage in the only kind of sexual relations that can result in the birth of a child and to enter into a union with an opposite-sex partner to provide dual-gender parenting. *See Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006) (plurality) ("[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best"). The Supreme Court has cautioned that "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to

closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Cleburne*, 473 U.S. at 441-42. "In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id*. at 442.

With respect to the third criterion–immutability–*amicus* relies upon the submission of the defendants-intervenors and other *amici*. The fourth and final criterion is political powerlessness. The Supreme Court has identified "political powerlessness" as one of the "traditional indicia of suspectness." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 19 (1973).[15] It is (or should be) obvious that homosexuals are not "politically powerless" in the State of California. The California Legislature has prohibited discrimination on the basis of sexual orientation by business establishments that offer services to the public under the Unruh Civil Rights Act, CIV. CODE § 51 *et seq*.,[16] in employment practices and the sale or rental of real estate under the California Fair Employment & Housing Act, GOV'T CODE § 12900 *et seq*.,[17] by adult day care health centers, HEALTH & SAFETY CODE § 1586.7, and in programs or activities funded in whole or in part by the State of California or any of its agencies, GOV'T CODE § 11135. California has added sexual orientation to the categories of offenses covered by its hate crimes legislation, PENAL CODE § 422.55(a)(6), *see also id*. § 190.03 (mandating life imprisonment for first degree murder that involves a hate crime), and to its legislation dealing with terrorism, §§ 11410, 11413(b)(9). Discrimination on the basis of sexual orientation is prohibited in placing minor children with foster parents or for adoption. WELF. & INST. CODE § 16013.

---

[15] The California, Connecticut and Iowa Supreme Courts were able to reach their conclusion that classifications based on sexual orientation warrant intermediate (or strict) scrutiny only by eliminating (in California) or diluting to the point of irrelevancy (in Connecticut and Iowa) the requirement that the class in question be politically powerless. *See In re Marriage Cases*, 183 P.3d at 443; *Kerrigan*, 957 A.2d at 440-61; *Varnum v. Brien*, 763 N.W.2d 862, 893-95 (Iowa 2009). However, for the reasons set forth in Justice Borden's dissent in *Kerrigan*, "the political power of the group that seeks heightened scrutiny is a highly relevant consideration in the formulation and application of the four part test." 957 A.2d at 491 (Borden, J., dissenting).

[16] Section 51(b) (adding sexual orientation).

[17] Sections 12920, 12921, 12926(q), 12940, 12944, 12955, 12955.8, 12956.1.

Of even greater significance is the Legislature's enactment of the Domestic Partner Act and the amendments thereto. FAM. CODE § 297 *et seq*. The Domestic Partner Act, as amended, recognizes domestic partnerships between members of the same sex, creates a mechanism for registering such partnerships and provides that registered domestic partners "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." FAM. CODE § 297.5. The Act, as amended, confers all of the rights and benefits, burdens and obligations, of marriage upon same-sex couples that are within the power of the Legislature to confer.[18] In addition to these legislative accomplishments, homosexuals were successful in persuading the Legislature to pass a same-sex marriage bill in September 2005. *See* Assembly Bill No. 849 (2005-2006 Reg. Sess.). Although that bill was subsequently vetoed by Governor Schwarzenegger, the fact that it passed reflects the political strength of homosexuals, not their political weakness.[19] On a record of legislative accomplishments far less impressive, the Maryland Court of Appeals and the Washington Supreme Court held that homosexuals are not entitled to the special protection accorded suspect classes because they are not politically powerless. *See Conaway v. Deane*, 932 A.2d at 609-14; *Andersen v. King County*, 138 P.3d at 974-75. In California, as in Maryland and Washington, homosexuals have not been "relegated to a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez*, 411 U.S. at 28. Classifications based upon sexual orientation are not subject to heightened review under the Equal Protection Clause.

"[P]ublic discrimination towards persons who are not members of a suspect or quasi-

---

[18] *See also* FAM. CODE §§ 9000(b), (g) (providing for adoption by registered domestic partner).

[19] The mere fact that a class of persons is unable to enact its entire legislative agenda does not reflect "political powerlessness," otherwise *every* class could be said to be "politically powerless." *See Cleburne*, 473 U.S. at 445 ("[a]ny minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect).

suspect class is permissible as long as such official discrimination is rationally linked to the furtherance of some valid public interest." *Equality Foundation*, 128 F.3d at 297 n. 8, citing *Romer*, 517 U.S. at 632. This holding is supported by a wealth of case law rejecting equal protection challenges to various forms of alleged discrimination against homosexuals where, regardless of animus, the discrimination in question was rationally related to one or more legitimate state purposes.[20] So, too, state courts have upheld state statutes reserving marriage to opposite-sex couples, notwithstanding claims that they were motivated in part by an anti-homosexual animus, because the courts determined that the statutes are reasonably related to legitimate state interests. *Standhardt v. Superior Court*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003); *Conaway*, 932 A.2d at 605-16, 629-34; *Hernandez*, 855 N.E.2d at 10-12; *Andersen*, 138 P.3d at 980-85.

Plaintiffs argue that the reservation of marriage to opposite-sex couples is not rationally related to any legitimate state interest. *See*, *e.g.*, Doc. 7 at 14; Doc. 52 at 10; Doc. 202 at 22-26. But plaintiffs have mischaracterized the issue. The issue is *not* whether "denying gay and lesbian individuals the right to marry . . . promotes marriage by heterosexuals or parental responsibility to the children they may conceived," Doc. 202 at 9, but "whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation." *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. Ct. 2005).[21] If it

---

[20] *See Equality Foundation*, 128 F.3d at 300-01 (upholding city charter amendment that removed homosexuals, gays, lesbians and bisexuals from the protections afforded by the municipality anti-discrimination ordinances, and precluded the city from restoring them to protected status); *Citizens for Equal Protection*, 455 F.3d at 864-69 (upholding state constitutional amendment reserving marriage to opposite-sex couples); *Lofton*, 358 F.3d at 817-26 (upholding state law prohibiting practicing homosexuals from adopting children); *Holmes*, 124 F.3d at 1132-36 (upholding "don't ask/don't tell" policy).

[21] Contrary to plaintiffs' view, "there is no requirement in rational basis equal protection analysis that the government interest be furthered by both those included in the statutory classification and by those excluded from it." *Hernandez v. Robles*, 805 N.Y.S.2d at 361. *See also Standhardt*, 77 P.3d at 463 (same); *Conaway*, 932 A.2d at 629-34 (same); *Hernandez*, 855 N.E.2d at 7-8 (plurality) (same); *Andersen v King County*, 138 P.3d at 984-85 (same).

would not, then limiting the institution of marriage to opposite-sex couples is constitutionally acceptable. *Id.*. Recognition of same-sex marriage would not promote the State's interest in marital procreation, particularly unintended procreation from heterosexual intercourse, nor would it promote the State's interest in dual-gender parenting. Accordingly, there are legitimate reasons to reserve marriage to opposite-sex couples. Because the reservation of marriage to opposite-sex couples is reasonably related to legitimate state interests, the reservation of the *name* of marriage to describe the union of opposite-sex couples is also reasonably related to legitimate state interests, including preserving the traditional understanding of marriage and safeguarding the right of the people to enact legislation through the initiative process.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the Family Research Council, respectfully requests that this Honorable Court uphold the constitutionality of Proposition 8.

Respectfully submitted,

Patrick J. Gorman
Wild, Carter & Tipton
246 W. Shaw Avenue
Fresno, California 93704
(559) 224-2131 (tel)
(559) 229-7295 (fax)
pgorman@wctlaw.com

Christopher M. Gacek
Senior Fellow for Regulatory Affairs
Family Research Council
801 G. Street, N.W.
Washington, D.C. 20001
(202) 393-2100 (tel)
(202) 393-2134 (fax)
cmg@FRC.ORG
Pro Hac Vice Application Pending

Paul Benjamin Linton
Special Counsel
Thomas More Society
921 Keystone Avenue
Northbrook, Illinois 60062
(847) 291-3848 (tel)
(847) 412-1594 (fax)
PBLCONLAW@AOL.COM
Pro Hac Vice Application Pending

Thomas Brejcha
President & Chief Counsel
Thomas More Society
29 S. La Salle Street Suite 440
Chicago, Illinois 60603
(312) 782-1680 (tel)
(312) 782-1887 (fax)
BREJCHA@AOL.COM
Pro Hac Vice Application Pending

ATTESTATION PURSUANT TO GENERAL ORDER NO. 45

Pursuant to General Order No. 45 of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

By: _____

Paul Benjamin Linton
Pro Hac Vice Application Pending

Service List

COOPER & KIRK, PLLC
Charles J. Cooper
ccooper@cooperkirk.com
David H. Thompson
dthompson@cooperkirk.com
Howard C. Nielson, Jr.
hnielson@cooperkirk.com
Nicole J. Moss
nmoss@cooperkirk.com
Jesse Panuccio
jpanuccio@cooperkirk.com
Peter A. Patterson
ppaterson@cooperkirk.com
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600 (tel)
(202) 220-9601 (fax)

LAW OFFICES OF ANDREW P. PUGNO
Andrew P. Pugno
andrew@pugnolaw.com
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 608-3065 (tel)
(916) 608-3066

ALLIANCE DEFENSE FUND
Brian W. Raum
braum@telladf.org
James A. Campbell
jcampbell@telladf.org
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020 (tel)
(480) 444-0028 (fax)

Attorneys for Defendants-Intervenors

ALLIANCE DEFENSE FUND
Timothy Chandler
tchandler@telladf.org
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 932-2850 (tel)
(916) 932-2851 (fax)

Jordan W. Lorence
jlorence@telladf.org
Austin R. Nimocks
animocks@telladf.org
801 G Street, N.W. Suite 509
Washington, D.C. 20001
(202) 637-4610 (tel)
(202) 347-3622 (fax)

Additional Counsel for Defendants-Intervenors

MENNEMEIER, GLASSMAN & STROUD, LLP
Kenneth C. Mennemier
kcm@mgslaw.com
Kelcie M. Gosling
gosling@mgslaw.com
Landon D. Bailey
lbailey@mgslaw.com
aknight@mgslaw.com
stround@mgslaw.com
980 9th Street Suite 1700
Sacramento, California 95814-2736

Attorneys for the Administration Defendants

Office of the Attorney General
Gordon Burns
gordon.Burns@doj.ca.gov
Tamar Pachter
tamar.Pachter@doj.ca.gov
1300 I Street Suite 125
P.O. Box 944255
Sacramento, California 94244-2550

Attorneys for Defendant General
Edmund G. Brown, Jr.

GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Theodore B. Olson
tolson@gibsondunn.com
Matthew McGill
mmgill@gibsondunn.com
Amir Tayrani
atayrani@gibsondunn.com
(202) 955-8500 (tel)
(202) 467–0539 (fax)

GIBSON, DUNN & CRUTCHER, LLP
333 South Grand Avenue
Los Angeles, California 90072-1512
Theodore Boustrous, Jr.
tboustrous@gibsondunn.com
Christopher Dusseault
cdusseault@gibsondunn.com
Theane Kapur
tkapur@gibsondunn.com
smalzahn@gibsondunn.com
(213) 229-7000 (tel)
(213) 229-7520 (fax)

GIBSON, DUNN & CRUTCHER, LLP
555 Mission Street, Suite 3000
San Francisco, California 94105
Ethan Dettmer
edettmer@gibsondunn.com
Enrique Monagas
emonagas@gibsondunn.com
spiepmeier@gibsondunn.com
rjustice@gibsondunn.com
mjanky@gibsondunn.com
(415) 393-8200 (tel)
(415) 393-8306 (fax)

BOIES, SCHILLER & FLEXNER, LLP
1999 Harrison Street, Suite 900
Oakland California, 94612
Theodore Uno
tuno@bsfllp.com
jgoldman@bsfllp.com
brichardson@bsfllp.com
rbettan@bsflip.com
jischiller@bsfllp.com
(510) 874-1000 (tel)
(510) 874-1460 (fax)

BOIES, SCHILLER & FLEXNER, LLP
333 Main Street
Armonk, New York 10504
David Boies
dboies@bsfllp.com

Attorneys for Plaintiffs

OFFICE OF THE CITY ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO
City Hall, Room 234
One Dr. Carlson B. Goodlett Place
San Francisco, California 94102-4682
Dennis J. Herrera
Therese M. Stewart
therese.stewart@sfgov.org
Erin Bernstein
erin.bernstein@sfgov.org
Danny Chou
danny.chou@sfgov.org
Ronald P. Flynn
ronald.flynn@sfgov.org
Vince Chhabria
vince.chhabria@sfgov.org
Mollie M. Lee
mollie.lee@sfgov.org
Christine Van Aken
christine.van.aken@sfgov.org
Catheryn Daly
catheryn.daly@sfgov.org

Attorneys for Plaintiff-Intervenor City and County of San Francisco

OFFICE OF THE CITY COUNSEL
Los Angeles County
500 West Temple Street
Los Angeles, California 90012-2713
Elizabeth M. Cortez
Judy W. Whitehurst
jwhitehurst@counsel.lacounty.gov

Attorneys for Defendant Dean C. Logan, Registrar-Recorder/County Clerk, County of Los Angeles

OFFICE OF CITY COUNSEL
Alameda County
1221 Oak Street, Suite 450
Oakland, California 94612
Richard E. Winnie
Brian E. Washington
brian.washington@acgov.org
Claude F. Kolm
claude.kolm@acgov.org
Manuel F. Martinez
manuel.martinez@acgov.org
jmartinez@ac.gov.org

Attorneys for Defendant Patrick O'Connell, Clerk Recorder of the County of Alameda