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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

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1 Plaintiffs challenge a November 2008 voter-enacted
2 amendment to the California Constitution ("Proposition 8" or "Prop
3 8"). Cal Const Art I, § 7.5. In its entirety, Proposition 8
4 provides: "Only marriage between a man and a woman is valid or
5 recognized in California." Plaintiffs allege that Proposition 8
6 deprives them of due process and of equal protection of the laws
7 contrary to the Fourteenth Amendment and that its enforcement by
8 state officials violates 42 USC § 1983.

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

17 Having considered the trial evidence and the arguments of
18 counsel, the court pursuant to FRCP 52(a) finds that Proposition 8
19 is unconstitutional and that its enforcement must be enjoined.
20

21 BACKGROUND TO PROPOSITION 8

22 In November 2000, the voters of California adopted
23 Proposition 22 through the state's initiative process. Entitled
24 the California Defense of Marriage Act, Proposition 22 amended the
25 state's Family Code by adding the following language: "Only
26 marriage between a man and a woman is valid or recognized in
27 California." Cal Family Code § 308.5. This amendment further
28 codified the existing definition of marriage as "a relationship

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 \\
29

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 \\

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 \\

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
12 his or her choice;
- 13 2. The choice of a marriage partner is sheltered by the
14 Fourteenth Amendment from the state's unwarranted
15 usurpation of that choice; and
- 16 3. California's provision of a domestic partnership — a
17 status giving same-sex couples the rights and
18 responsibilities of marriage without providing marriage
19 — does not afford plaintiffs an adequate substitute for
20 marriage and, by disabling plaintiffs from marrying the
21 person of their choice, invidiously discriminates,
22 without justification, against plaintiffs and others who
23 seek to marry a person of the same sex.

24 The Equal Protection Clause provides that no state shall
25 "deny to any person within its jurisdiction the equal protection of
26 the laws." US Const Amend XIV, § 1. According to plaintiffs,
27 Proposition 8 violates the Equal Protection Clause because it:

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

Plaintiffs argue that Proposition 8 should be subjected to
heightened scrutiny under the Equal Protection Clause because gays

1 and lesbians constitute a suspect class. Plaintiffs further
2 contend that Proposition 8 is irrational because it singles out
3 gays and lesbians for unequal treatment, as they and they alone may
4 not marry the person of their choice. Plaintiffs argue that
5 Proposition 8 discriminates against gays and lesbians on the basis
6 of both sexual orientation and sex.

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

12
13 PROponents' DEFENSE OF PROPOSITION 8

14 Proponents organized the official campaign to pass
15 Proposition 8, known as ProtectMarriage.com — Yes on 8, a Project
16 of California Renewal ("Protect Marriage"). Proponents formed and
17 managed the Protect Marriage campaign and ensured its efforts to
18 pass Proposition 8 complied with California election law. See FF
19 13-17 below. After orchestrating the successful Proposition 8
20 campaign, proponents intervened in this lawsuit and provided a
21 vigorous defense of the constitutionality of Proposition 8.

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

25 Proposition 8 is simple and straightforward. * * *
26 Proposition 8 is about preserving marriage; it's not an attack
27 on the gay lifestyle. * * * It protects our children from
28 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.

1 * * * If the gay marriage ruling [of the California Supreme
2 Court] is not overturned, TEACHERS COULD BE REQUIRED to teach
3 young children there is no difference between gay marriage and
4 traditional marriage.

5 We should not accept a court decision that may
6 result in public schools teaching our own kids that gay
7 marriage is ok. * * * [W]hile gays have the right to their
8 private lives, they do not have the right to redefine marriage
9 for everyone else.

10 PX0001¹ California Voter Information Guide, California General
11 Election, Tuesday, November 4, 2008 at PM 003365 (emphasis in
12 original).

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

- 21 1. Denial of marriage to same-sex couples preserves
22 marriage;
- 23 2. Denial of marriage to same-sex couples allows gays and
24 lesbians to live privately without requiring others,
25 including (perhaps especially) children, to recognize or
26 acknowledge the existence of same-sex couples;
- 27 3. Denial of marriage to same-sex couples protects children;
- 28 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>

1 A state's interest in an enactment must of course be
2 secular in nature. The state does not have an interest in
3 enforcing private moral or religious beliefs without an
4 accompanying secular purpose. See Lawrence v Texas, 539 US 558,
5 571 (2003); see also Everson v Board of Education of Ewing
6 Township, 330 US 1, 15 (1947).

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

- 12 1. Maintains California's definition of marriage as
13 excluding same-sex couples;
- 14 2. Affirms the will of California citizens to exclude same-
15 sex couples from marriage;
- 16 3. Promotes stability in relationships between a man and a
17 woman because they naturally (and at times
18 unintentionally) produce children; and
- 19 4. Promotes "statistically optimal" child-rearing
20 households; that is, households in which children are
21 raised by a man and a woman married to each other.

22 Doc #8 at 17-18.

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

27 Proponents argued that Proposition 8 should be evaluated
28 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

1 and raising the next generation." Doc #172-1 at 21. Proponents
2 asserted that marriage for same-sex couples is not implicit in the
3 concept of ordered liberty and thus its denial does not deprive
4 persons seeking such unions of due process. See generally Doc
5 #172-1. Nor, proponents continued, does the exclusion of same-sex
6 couples in California from marriage deny them equal protection
7 because, among other reasons, California affords such couples a
8 separate parallel institution under its domestic partnership
9 statutes. Doc #172-1 at 75 et seq.

10 At oral argument on proponents' motion for summary
11 judgment, the court posed to proponents' counsel the assumption
12 that "the state's interest in marriage is procreative" and inquired
13 how permitting same-sex marriage impairs or adversely affects that
14 interest. Doc #228 at 21. Counsel replied that the inquiry was
15 "not the legally relevant question," *id*, but when pressed for an
16 answer, counsel replied: "Your honor, my answer is: I don't know.
17 I don't know." *Id* at 23.

18 Despite this response, proponents in their trial brief
19 promised to "demonstrate that redefining marriage to encompass
20 same-sex relationships" would effect some twenty-three specific
21 harmful consequences. Doc #295 at 13-14. At trial, however,
22 proponents presented only one witness, David Blankenhorn, to
23 address the government interest in marriage. Blankenhorn's
24 testimony is addressed at length hereafter; suffice it to say that
25 he provided no credible evidence to support any of the claimed
26 adverse effects proponents promised to demonstrate. During closing
27 arguments, proponents again focused on the contention that
28 "responsible procreation is really at the heart of society's

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 //

1 for summary judgment, Doc #228 at 72-91, the court set the matter
2 for trial.

3 The parties were given a full opportunity to present
4 evidence in support of their positions. They engaged in
5 significant discovery, including third-party discovery, to build an
6 evidentiary record. Both before and after trial, both in this
7 court and in the court of appeals, the parties and third parties
8 disputed the appropriate boundaries of discovery in an action
9 challenging a voter-enacted initiative. See, for example, Doc
10 ##187, 214, 237, 259, 372, 513.

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

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

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

27 Framed by these three questions and before detailing the
28 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

1 175:22. Marriage would be a way to tell "our friends, our family,
2 our society, our community, our parents * * * and each other that
3 this is a lifetime commitment * * * we are not girlfriends. We are
4 not partners. We are married." Tr 172:8-12.

5 Plaintiffs and proponents presented expert testimony on
6 the meaning of marriage. Historian Nancy Cott testified about the
7 public institution of marriage and the state's interest in
8 recognizing and regulating marriages. Tr 185:9-13. She explained
9 that marriage is "a couple's choice to live with each other, to
10 remain committed to one another, and to form a household based on
11 their own feelings about one another, and their agreement to join
12 in an economic partnership and support one another in terms of the
13 material needs of life." Tr 201:9-14. The state's primary purpose
14 in regulating marriage is to create stable households. Tr 222:13-
15 17.

16 Think tank founder David Blankenhorn testified that
17 marriage is "a socially-approved sexual relationship between a man
18 and a woman" with a primary purpose to "regulate filiation." Tr
19 2742:9-10, 18. Blankenhorn testified that others hold to an
20 alternative and, to Blankenhorn, conflicting definition of
21 marriage: "a private adult commitment" that focuses on "the tender
22 feelings that the spouses have for one another." Tr 2755:25-
23 2756:1; 2756:10-2757:17; 2761:5-6. To Blankenhorn, marriage is
24 either a socially approved sexual relationship between a man and a
25 woman for the purpose of bearing and raising children who are
26 biologically related to both spouses or a private relationship
27 between two consenting adults.

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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

1 the state, to gays and lesbians and to American ideals were
2 California to recognize same-sex marriage, Blankenhorn testified
3 that the state should not recognize same-sex marriage. Blankenhorn
4 reasoned that the benefits of same-sex marriage are not valuable
5 enough because same-sex marriage could conceivably weaken marriage
6 as an institution. Cott testified that the state would benefit
7 from recognizing same-sex marriage because such marriages would
8 provide "another resource for stability and social order." Tr
9 252:19-23.

10 Psychologist Letitia Anne Peplau testified that couples
11 benefit both physically and economically when they are married.
12 Peplau testified that those benefits would accrue to same-sex as
13 well as opposite-sex married couples. To Peplau, the desire of
14 same-sex couples to marry illustrates the health of the institution
15 of marriage and not, as Blankenhorn testified, the weakening of
16 marriage. Economist Lee Badgett provided evidence that same-sex
17 couples would benefit economically if they were able to marry and
18 that same-sex marriage would have no adverse effect on the
19 institution of marriage or on opposite-sex couples.

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

27 \\
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29

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

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

8 Psychologist Gregory Herek defined sexual orientation as
9 "an enduring sexual, romantic, or intensely affectional attraction
10 to men, to women, or to both men and women. It's also used to
11 refer to an identity or a sense of self that is based on one's
12 enduring patterns of attraction. And it's also sometimes used to
13 describe an enduring pattern of behavior." Tr 2025:5-11. Herek
14 explained that homosexuality is a normal expression of human
15 sexuality; the vast majority of gays and lesbians have little or no
16 choice in their sexual orientation; and therapeutic efforts to
17 change an individual's sexual orientation have not been shown to be
18 effective and instead pose a risk of harm to the individual.
19 Proponents did not present testimony to contradict Herek but
20 instead questioned him on data showing that some individuals report
21 fluidity in their sexual orientation. Herek responded that the
22 data proponents presented does nothing to contradict his conclusion
23 that the vast majority of people are consistent in their sexual
24 orientation.

25 Peplau pointed to research showing that, despite
26 stereotypes suggesting gays and lesbians are unable to form stable
27 relationships, same-sex couples are in fact indistinguishable from
28 opposite-sex couples in terms of relationship quality and

1 stability. Badgett testified that same-sex and opposite-sex
2 couples are very similar in most economic and demographic respects.
3 Peplau testified that the ability of same-sex couples to marry will
4 have no bearing on whether opposite-sex couples choose to marry or
5 divorce.

6 Social epidemiologist Ilan Meyer testified about the harm
7 gays and lesbians have experienced because of Proposition 8. Meyer
8 explained that Proposition 8 stigmatizes gays and lesbians because
9 it informs gays and lesbians that the State of California rejects
10 their relationships as less valuable than opposite-sex
11 relationships. Proposition 8 also provides state endorsement of
12 private discrimination. According to Meyer, Proposition 8
13 increases the likelihood of negative mental and physical health
14 outcomes for gays and lesbians.

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

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

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

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

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

17 Political scientist Gary Segura provided many examples of
18 ways in which private discrimination against gays and lesbians is
19 manifested in laws and policies. Segura testified that negative
20 stereotypes about gays and lesbians inhibit political compromise
21 with other groups: "It's very difficult to engage in the give-and-
22 take of the legislative process when I think you are an inherently
23 bad person. That's just not the basis for compromise and
24 negotiation in the political process." Tr 1561:6-9. Segura
25 identified religion as the chief obstacle to gay and lesbian
26 political advances. Political scientist Kenneth Miller disagreed
27 with Segura's conclusion that gays and lesbians lack political
28 power, Tr 2482:4-8, pointing to some successes on the state and

1 national level and increased public support for gays and lesbians,
2 but agreed that popular initiatives can easily tap into a strain of
3 antiminority sentiment and that at least some voters supported
4 Proposition 8 because of anti-gay sentiment.

5 Proponent Hak-Shing William Tam testified about his role
6 in the Proposition 8 campaign. Tam spent substantial time, effort
7 and resources campaigning for Proposition 8. As of July 2007, Tam
8 was working with Protect Marriage to put Proposition 8 on the
9 November 2008 ballot. Tr 1900:13-18. Tam testified that he is the
10 secretary of the America Return to God Prayer Movement, which
11 operates the website "1man1woman.net." Tr 1916:3-24.

12 1man1woman.net encouraged voters to support Proposition 8 on
13 grounds that homosexuals are twelve times more likely to molest
14 children, Tr 1919:3-1922:21, and because Proposition 8 will cause
15 states one-by-one to fall into Satan's hands, Tr 1928:6-13. Tam
16 identified NARTH (the National Association for Research and Therapy
17 of Homosexuality) as the source of information about homosexuality,
18 because he "believe[s] in what they say." Tr 1939:1-9. Tam
19 identified "the internet" as the source of information connecting
20 same-sex marriage to polygamy and incest. Tr 1957:2-12. Protect
21 Marriage relied on Tam and, through Tam, used the website
22 1man1woman.net as part of the Protect Marriage Asian/Pacific
23 Islander outreach. Tr 1976:10-15; PX2599 (Email from Sarah Pollo,
24 Account Executive, Schubert Flint Public Affairs (Aug 22, 2008)
25 attaching meeting minutes). Tam signed a Statement of Unity with
26 Protect Marriage, PX2633, in which he agreed not to put forward
27 "independent strategies for public messaging." Tr 1966:16-1967:16.

28 \\

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

18 Egan and Badgett testified that Proposition 8 harms the
19 State of California and its local governments economically. Egan
20 testified that San Francisco faces direct and indirect economic
21 harms as a consequence of Proposition 8. Egan explained that San
22 Francisco lost and continues to lose money because Proposition 8
23 slashed the number of weddings performed in San Francisco. Egan
24 explained that Proposition 8 decreases the number of married
25 couples in San Francisco, who tend to be wealthier than single
26 people because of their ability to specialize their labor, pool
27 resources and access state and employer-provided benefits.
28 Proposition 8 also increases the costs associated with

1 discrimination against gays and lesbians. Proponents challenged
2 only the magnitude and not the existence of the harms Egan
3 identified. Badgett explained that municipalities throughout
4 California and the state government face economic disadvantages
5 similar to those Egan identified for San Francisco.

6 For the reasons stated in the sections that follow, the
7 evidence presented at trial fatally undermines the premises
8 underlying proponents' proffered rationales for Proposition 8. An
9 initiative measure adopted by the voters deserves great respect.
10 The considered views and opinions of even the most highly qualified
11 scholars and experts seldom outweigh the determinations of the
12 voters. When challenged, however, the voters' determinations must
13 find at least some support in evidence. This is especially so when
14 those determinations enact into law classifications of persons.
15 Conjecture, speculation and fears are not enough. Still less will
16 the moral disapprobation of a group or class of citizens suffice,
17 no matter how large the majority that shares that view. The
18 evidence demonstrated beyond serious reckoning that Proposition 8
19 finds support only in such disapproval. As such, Proposition 8 is
20 beyond the constitutional reach of the voters or their
21 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

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.")

28 \\\

- 1 4. Sandra Stier, a plaintiff, testified about her relationship
2 with Perry, with whom she raises their four children. (Tr
3 167:3-5: "I have fallen in love one time and it's with
4 [Perry]."). Stier explained why she wants to marry Perry
5 despite their domestic partnership. (Tr 171:8-13: "[T]here is
6 certainly nothing about domestic partnership as an institution
7 — not even as an institution, but as a legal agreement that
8 indicates the love and commitment that are inherent in
9 marriage, and [domestic partnership] doesn't have anything to
10 do for us with the nature of our relationship and the type of
11 enduring relationship we want it to be.")
12
- 13 5. Helen Zia, a lay witness, testified regarding her experiences
14 with discrimination and about how her life changed when she
15 married her wife in 2008. (Tr 1235:10-13: "I'm beginning to
16 understand what I've always read — marriage is the joining of
17 two families.")
18
- 19 6. Jerry Sanders, the mayor of San Diego and a lay witness,
20 testified regarding how he came to believe that domestic
21 partnerships are discriminatory. (Tr 1273:10-17: On a last-
22 minute decision not to veto a San Diego resolution supporting
23 same-sex marriage: "I was saying that one group of people did
24 not deserve the same dignity and respect, did not deserve the
25 same symbolism about marriage.")
26
- 27 7. Ryan Kendall, a lay witness, testified about his experience as
28 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 United 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
8 Library on the History of Women in America;
9 b. PX2323: In 1974, Cott received a PhD from Brandeis
10 University in the history of American civilization;
11 c. PX2323: Cott has published eight books, including Public
12 Vows: A History of Marriage and the Nation (2000), and
13 has published numerous articles and essays;
14 d. Tr 186:5-14: Cott devoted a semester in 1998 to
15 researching and teaching a course at Yale University in
16 the history of marriage in the United States;
17 e. Tr 185:9-13; 188:6-189:10: Cott's marriage scholarship
18 focuses on marriage as a public institution and as a
19 structure regulated by government for social benefit.

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

- 28 a. PX2322 Chauncey CV: Chauncey is a professor of history
and American studies at Yale University; from 1991-2006,
Chauncey was a professor of history at the University of
Chicago;
b. Tr 357:15-17: Chauncey received a PhD in history from
Yale University in 1989;

- 1 c. PX2322: Chauncey has authored or edited books on the
2 subject of gay and lesbian history, including Gay New
3 York: Gender, Urban Culture, and the Making of the Gay
4 Male World, 1890-1940 (1994) and Hidden from History:
5 Reclaiming the Gay and Lesbian Past (1989, ed);
- 6 d. Tr 359:17-360:11: Chauncey relies on government records,
7 interviews, diaries, films and advertisements along with
8 studies by other historians and scholars in conducting
9 his research;
- 10 e. Tr 360:12-21: Chauncey teaches courses in twentieth
11 century United States history, including courses on
12 lesbian and gay history.
- 13 3. Lee Badgett, an economist, testified as an expert on
14 demographic information concerning gays and lesbians, same-sex
15 couples and children raised by gays and lesbians, the effects
16 of the exclusion of same-sex couples from the institution of
17 marriage and the effect of permitting same-sex couples to
18 marry on heterosexual society and the institution of marriage.
19 Badgett offered four opinions: (1) Proposition 8 has inflicted
20 substantial economic harm on same-sex couples and their
21 children; (2) allowing same-sex couples to marry would not
22 have any adverse effect on the institution of marriage or on
23 opposite-sex couples; (3) same-sex couples are very similar to
24 opposite-sex couples in most economic and demographic
25 respects; and (4) Proposition 8 has imposed economic losses on
26 the State of California and on California counties and
27 municipalities. Tr 1330:9-1331:5.
- 28 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:

- 1 Money, Myths, and Change: The Economic Lives of Lesbians
2 and Gay Men (2001) and When Gay People Get Married: What
3 Happens When Societies Legalize Same-Sex Marriage (2009);
4 Badgett has also published several articles on the same
5 subjects;
- 6 d. Tr 1326:4-13: Badgett co-authored two reports (PX1268
7 Brad Sears and M V Lee Badgett, The Impact of Extending
8 Marriage to Same-Sex Couples on the California Budget,
9 The Williams Institute (June 2008) and PX1283 M V Lee
10 Badgett and R Bradley Sears, Putting a Price on Equality?
11 The Impact of Same-Sex Marriage on California's Budget,
12 16 Stan L & Pol Rev 197 (2005)) analyzing the fiscal
13 impact of allowing same-sex couples to marry in
14 California;
- 15 e. Tr 1326:18-1328:4: Badgett has been invited to speak at
16 many universities and at the American Psychological
17 Association convention on the economics of same-sex
18 relationships;
- 19 f. Tr 1329:6-22: Badgett has testified before federal and
20 state government bodies about domestic partner benefits
21 and antidiscrimination laws.
- 22 4. Edmund A Egan, the chief economist in the San Francisco
23 Controller's Office, testified for CCSF as an expert in urban
24 and regional economic policy. Egan conducted an economic
25 study of the prohibition of same-sex marriage on San
26 Francisco's economy and concluded that the prohibition
27 negatively affects San Francisco's economy in many ways. Tr
28 683:19-684:19.
- 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;

- 1 d. Tr 679:1-14: Egan is an adjunct faculty member at UC
2 Berkeley and teaches graduate students on regional and
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
vice chair of graduate studies in psychology at UCLA;
- 14 b. Tr 569:10-12: Peplau's research focuses on social
15 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
20 about ten books, authored about 120 peer-reviewed
21 articles and published literature reviews on psychology,
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.

- 1 a. PX2328 Meyer CV: Meyer is an associate professor of
2 sociomedical sciences at Columbia University's Mailman
3 School of Public Health;
- 4 b. PX2328; Tr 807:20-808:7: Meyer received a PhD in
5 sociomedical sciences from Columbia University in 1993;
- 6 c. Tr 810:19-811:16: Meyer studies the relationship between
7 social issues and structures and patterns of mental
8 health outcomes with a specific focus on lesbian, gay and
9 bisexual populations;
- 7 d. Tr 812:9-814:22: Meyer has published about forty peer-
8 reviewed articles, teaches a course on gay and lesbian
9 issues in public health, has received numerous awards for
10 his professional work and has edited and reviewed
11 journals and books.
- 10 7. Gregory Herek, a psychologist, testified as an expert in
11 social psychology with a focus on sexual orientation and
12 stigma. Herek offered opinions concerning: (1) the nature of
13 sexual orientation and how sexual orientation is understood in
14 the fields of psychology and psychiatry; (2) the amenability
15 of sexual orientation to change through intervention; and (3)
16 the nature of stigma and prejudice as they relate to sexual
17 orientation and Proposition 8. Tr 2023:8-14.
- 18 a. PX2326 Herek CV: Herek is a professor of psychology at UC
19 Davis;
- 20 b. PX2326: Herek received a PhD in personality and social
21 psychology from UC Davis in 1983;
- 22 c. Tr 2018:5-13: Social psychology is the intersection of
23 psychology and sociology in that it focuses on human
24 behavior within a social context; Herek's dissertation
25 focused on heterosexuals' attitudes towards lesbians and
26 gay men;
- 27 d. Tr 2020:1-5: Herek regularly teaches a course on sexual
28 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.

- 1 8. Michael Lamb, a psychologist, testified as an expert on the
2 developmental psychology of children, including the
3 developmental psychology of children raised by gay and lesbian
4 parents. Lamb offered two opinions: (1) children raised by
5 gays and lesbians are just as likely to be well-adjusted as
6 children raised by heterosexual parents; and (2) children of
7 gay and lesbian parents would benefit if their parents were
8 able to marry. Tr 1009:23-1010:4.
- 9 a. PX2327 Lamb CV: Lamb is a professor and head of the
10 Department of Social and Developmental Psychology at the
University of Cambridge in England;
- 11 b. Tr 1003:24-1004:6; PX2327: Lamb was the head of the
12 section on social and emotional development of the
National Institute of Child Health and Human Development
13 in Washington DC for seventeen years;
- 14 c. Tr 1007:2-1008:8; PX2327: Lamb has published
15 approximately 500 articles, many about child adjustment,
has edited 40 books in developmental psychology, reviews
16 about 100 articles a year and serves on editorial boards
on several academic journals;
- 17 d. PX2327: Lamb received a PhD from Yale University in 1976.
- 18 9. Gary Segura, a political scientist, testified as an expert on
19 the political power or powerlessness of minority groups in the
20 United States, and of gays and lesbians in particular. Segura
21 offered three opinions: (1) gays and lesbians do not possess a
22 meaningful degree of political power; (2) gays and lesbians
23 possess less power than groups granted judicial protection;
24 and (3) the conclusions drawn by proponents' expert Miller are
25 troubling and unpersuasive. Tr 1535:3-18.
- 26 a. PX2330 Segura CV: Segura is a professor of political
27 science at Stanford University and received a PhD in
28 political science from the University of Illinois in
1992;

- 1 b. Tr 1525:1-10: Segura and a colleague, through the
2 Stanford Center for Democracy, operate the American
3 National Elections Studies, which provides political
4 scientists with data about the American electorate's
5 views about politics;
- 6 c. Tr 1525:11-19: Segura serves on the editorial boards of
7 major political science journals;
- 8 d. Tr 1525:22-1526:24: Segura's work focuses on political
9 representation and whether elected officials respond to
10 the voting public; within the field of political
11 representation, Segura focuses on minorities;
- 12 e. PX2330; Tr 1527:25-1528:14: Segura has published about
13 twenty-five peer-reviewed articles, authored about
14 fifteen chapters in edited volumes and has presented at
15 between twenty and forty conferences in the past ten
16 years;
- 17 f. PX2330; Tr 1528:21-24: Segura has published three pieces
18 specific to gay and lesbian politics and political
19 issues;
- 20 g. Tr 1532:11-1533:17: Segura identified the methods he used
21 and materials he relied on to form his opinions in this
22 case. Relying on his background as a political
23 scientist, Segura read literature on gay and lesbian
24 politics, examined the statutory status of gays and
25 lesbians and public attitudes about gays and lesbians,
26 determined the presence or absence of gays and lesbians
27 in political office and considered ballot initiatives
28 about gay and lesbian issues.

PROPOSERS' 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 because they "were extremely concerned about their personal safety,
2 and did not want to appear with any recording of any sort,
3 whatsoever." Tr 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 S Ct 1132 (Jan 11, 2010); Hollingsworth v Perry, 130 S Ct
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

1 the same desire for love and commitment as opposite-sex couples.
2 PX2545 (dep tr); PX2544 (video of same). Young also explained that
3 several cultures around the world and across centuries have had
4 variations of marital relationships for same-sex couples. Id.

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

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

- 19
20 1. David Blankenhorn, founder and president of the Institute for
21 American Values, testified on marriage, fatherhood and family
22 structure. Plaintiffs objected to Blankenhorn's qualification
23 as an expert. For the reasons explained hereafter,
24 Blankenhorn lacks the qualifications to offer opinion
25 testimony and, in any event, failed to provide cogent
26 testimony in support of proponents' factual assertions.

27
28

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:

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

1 reliable principles and methods." Id. Expert testimony must be
2 both relevant and reliable, with a "basis in the knowledge and
3 experience of [the relevant] discipline." Kumho Tire Co v
4 Carmichael, 526 US 137, 147, 149 (1999) (citing Daubert v Merrell
5 Dow Pharm, 509 US 579, 589, 592 (1993)).

6 While proponents correctly assert that formal training in
7 the relevant disciplines and peer-reviewed publications are not
8 dispositive of expertise, education is nevertheless important to
9 ensure that "an expert, whether basing testimony upon professional
10 studies or personal experience, employs in the courtroom the same
11 level of intellectual rigor that characterizes the practice of an
12 expert in the relevant field." Kumho Tire, 526 US at 152. Formal
13 training shows that a proposed expert adheres to the intellectual
14 rigor that characterizes the field, while peer-reviewed
15 publications demonstrate an acceptance by the field that the work
16 of the proposed expert displays "at least the minimal criteria" of
17 intellectual rigor required in that field. Daubert v Merrell Dow
18 Pharm, 43 F3d 1311, 1318 (9th Cir 1995) (on remand) ("Daubert II").

19 The methodologies on which expert testimony may be based
20 are "not limited to what is generally accepted," Daubert II at 1319
21 n11, but "nothing in either Daubert or the Federal Rules of
22 Evidence requires a district court to admit opinion evidence that
23 is connected to existing data only by the ipse dixit of the
24 expert." General Electric Co v Joiner, 522 US 136, 146 (1997).
25 The party proffering the evidence "must explain the expert's
26 methodology and demonstrate in some objectively verifiable way that
27 the expert has both chosen a reliable * * * method and followed it
28 faithfully." Daubert II, 43 F3d at 1319 n11.

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 Clair 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

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 Conjuality: 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

1 recitation of text in evidence does not assist the court in
2 understanding the evidence because reading, as much as hearing, "is
3 within the ability and experience of the trier of fact." Beech
4 Aircraft Corp v United States, 51 F3d 834, 842 (9th Cir 1995).

5 Blankenhorn testified that his research has led him to
6 conclude there are three universal rules that govern marriage: (1)
7 the rule of opposites (the "man/woman" rule); (2) the rule of two;
8 and (3) the rule of sex. Tr 2879:17-25. Blankenhorn explained
9 that there are "no or almost no exceptions" to the rule of
10 opposites, Tr 2882:14, despite some instances of ritualized same-
11 sex relationships in some cultures, Tr 2884:25-2888:16.

12 Blankenhorn explained that despite the widespread practice of
13 polygamy across many cultures, the rule of two is rarely violated,
14 because even within a polygamous marriage, "each marriage is
15 separate." Tr 2892:1-3; Tr 2899:16-2900:4 ("Q: Is it your view
16 that that man who has married one wife, and then another wife, and
17 then another wife, and then another wife, and then another wife,
18 and now has five wives, and they are all his wives at the same
19 time, that that marriage is consistent with your rule of two? * * *
20 A: I concur with Bronislaw Malinowski, and others, who say that
21 that is consistent with the two rule of marriage."). Finally,
22 Blankenhorn could only hypothesize instances in which the rule of
23 sex would be violated, including where "[h]e's in prison for life,
24 he's married, and he is not in a system in which any conjugal
25 visitation is allowed." Tr 2907:13-19.

26 Blankenhorn's interest and study on the subjects of
27 marriage, fatherhood and family structure are evident from the
28 record, but nothing in the record other than the "bald assurance"

1 of Blankenhorn, Daubert II, 43 F3d at 1316, suggests that
2 Blankenhorn's investigation into marriage has been conducted to the
3 "same level of intellectual rigor" characterizing the practice of
4 anthropologists, sociologists or psychologists. See Kumho Tire,
5 526 US at 152. Blankenhorn gave no explanation of the methodology
6 that led him to his definition of marriage other than his review of
7 others' work. The court concludes that Blankenhorn's proposed
8 definition of marriage is "connected to existing data only by the
9 ipse dixit" of Blankenhorn and accordingly rejects it. See Joiner,
10 522 US at 146.

11 Blankenhorn's second opinion is that a body of evidence
12 supports the conclusion that children raised by their married,
13 biological parents do better on average than children raised in
14 other environments. Tr 2767:11-2771:11. The evidence Blankenhorn
15 relied on to support his conclusion compares children raised by
16 married, biological parents with children raised by single parents,
17 unmarried mothers, step families and cohabiting parents. Tr
18 2769:14-24 (referring to DIX0026 Kristin Anderson Moore, Susan M
19 Jekielek, and Carol Emig, Marriage from a Child's Perspective: How
20 Does Family Structure Affect Children, and What Can We Do about It,
21 Child Trends (June 2002)); Tr 2771:1-11 (referring to DIX0124 Sara
22 McLanahan and Gary Sandefur, Growing Up with a Single Parent: What
23 Hurts, What Helps (Harvard 1994)).

24 Blankenhorn's conclusion that married biological parents
25 provide a better family form than married non-biological parents is
26 not supported by the evidence on which he relied because the
27 evidence does not, and does not claim to, compare biological to
28 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

1 credible evidence supports Blankenhorn's conclusion that same-sex
2 marriage could lead to the other manifestations of
3 deinstitutionalization.

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

17 Blankenhorn's book, The Future of Marriage, DIX0956,
18 lists numerous consequences of permitting same-sex couples to
19 marry, some of which are the manifestations of
20 deinstitutionalization listed above. Blankenhorn explained that
21 the list of consequences arose from a group thought experiment in
22 which an idea was written down if someone suggested it. Tr 2844:1-
23 12; DIX0956 at 202. Blankenhorn's group thought experiment began
24 with the untested assumption that "gay marriage, like almost any
25 major social change, would be likely to generate a diverse range of
26 consequences." DIX0956 at 202. The group failed to consider that
27 recognizing the marriage of same-sex couples might lead only to
28 minimal, if any, social consequences.

1 During trial, Blankenhorn was presented with a study that
2 posed an empirical question whether permitting marriage or civil
3 unions for same-sex couples would lead to the manifestations
4 Blankenhorn described as indicative of deinstitutionalization.
5 After reviewing and analyzing available evidence, the study
6 concludes that "laws permitting same-sex marriage or civil unions
7 have no adverse effect on marriage, divorce, and abortion rates,
8 the percent of children born out of wedlock, or the percent of
9 households with children under 18 headed by women." PX2898 (Laura
10 Langbein & Mark A Yost, Jr, Same-Sex Marriage and Negative
11 Externalities, 90 Soc Sci Q 2 (June 2009) at 305-306). Blankenhorn
12 had not seen the study before trial and was thus unfamiliar with
13 its methods and conclusions. Nevertheless, Blankenhorn dismissed
14 the study and its results, reasoning that its authors "think that
15 [the conclusion is] so self-evident that anybody who has an
16 opposing point of view is not a rational person." Tr 2918:19-21.

17 Blankenhorn's concern that same-sex marriage poses a
18 threat to the institution of marriage is further undermined by his
19 testimony that same-sex marriage and opposite-sex marriage operate
20 almost identically. During cross-examination, Blankenhorn was
21 shown a report produced by his Institute in 2000 explaining the six
22 dimensions of marriage: (1) legal contract; (2) financial
23 partnership; (3) sacred promise; (4) sexual union; (5) personal
24 bond; and (6) family-making bond. PX2879 (Coalition for Marriage,
25 Family and Couples Education, et al, The Marriage Movement: A
26 Statement of Principles (Institute for American Values 2000)).
27 Blankenhorn agreed that same-sex marriages and opposite-sex
28 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

1 might be interested in adoption and foster care, same-sex marriage
2 might well lead to fewer children growing up in state institutions
3 and more children growing up in loving adoptive and foster
4 families; and (2) same-sex marriage would signify greater social
5 acceptance of homosexual love and the worth and validity of same-
6 sex intimate relationships. Tr 2839:16-2842:25; 2847:1-2848:3;
7 DIX0956 at 203-205.

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

13
14 Kenneth P Miller

15 Proponents called Kenneth P Miller, a professor of
16 government at Claremont McKenna College, as an expert in American
17 and California politics. Tr 2427:10-12. Plaintiffs conducted voir
18 dire to examine whether Miller had sufficient expertise to testify
19 authoritatively on the subject of the political power of gays and
20 lesbians. Tr 2428:3-10. Plaintiffs objected to Miller's
21 qualification as an expert in the areas of discrimination against
22 gays and lesbians and gay and lesbian political power but did not
23 object to his qualification as an expert on initiatives. Tr
24 2435:21-2436:4.

25 Miller received a PhD from the University of California
26 (Berkeley) in 2002 in political science and is a professor of
27 government at Claremont McKenna College. Doc #280-6 at 39-44
28 (Miller CV). Plaintiffs contend that Miller lacks sufficient

1 expertise to offer an opinion on the relative political power of
2 gay men and lesbians. Having considered Miller's background,
3 experience and testimony, the court concludes that, while Miller
4 has significant experience with politics generally, he is not
5 sufficiently familiar with gay and lesbian politics specifically to
6 offer opinions on gay and lesbian political power.

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

13 Miller described religious, political and corporate
14 support for gay and lesbian rights. Miller pointed to failed
15 initiatives in California relating to whether public school
16 teachers should be fired for publicly supporting homosexuality and
17 whether HIV-positive individuals should be quarantined or reported
18 as examples of political successes for gays and lesbians. Tr
19 2475:21-2477:16. Miller testified that political powerlessness is
20 the inability to attract the attention of lawmakers. Tr 2487:1-2.
21 Using that test, Miller concluded that gays and lesbians have
22 political power both nationally and in California. Tr 2487:10-21.

23 Plaintiffs cross-examined Miller about his knowledge of
24 the relevant scholarship and data underlying his opinions. Miller
25 admitted that proponents' counsel provided him with most of the
26 "materials considered" in his expert report. Tr 2497:13-2498:22;
27 PX0794A (annotated index of materials considered). See also Doc
28 #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-

1 2547:7. In 2001 Miller wrote that he was especially concerned that
2 initiative constitutional amendments undermine representative
3 democracy. Tr 2546:14-2548:15.

4 Plaintiffs questioned Miller on data showing 84 percent
5 of those who attend church weekly voted yes on Proposition 8, 54
6 percent of those who attend church occasionally voted no on
7 Proposition 8 and 83 percent of those who never attend church voted
8 no on Proposition 8. Tr 2590:10-2591:7; PX2853 at 9 Proposition 8
9 Local Exit Polls - Election Center 2008, CNN). Plaintiffs also
10 asked about polling data showing 56 percent of those with a union
11 member in the household voted yes on Proposition 8. Tr 2591:25-
12 2592:6; PX2853 at 13. Miller stated he had no reason to doubt the
13 accuracy of the polling data. Tr 2592:7-8. Miller did not explain
14 how the data in PX2853 are consistent with his conclusion that many
15 religious groups and labor unions are allies of gays and lesbians.

16 Miller testified that he did not investigate the extent
17 of anti-gay harassment in workplaces or schools. Tr 2600:7-17,
18 2603:9-24. Miller stated he had not investigated the ways in which
19 anti-gay stereotypes may have influenced Proposition 8 voters. Tr
20 2608:19-2609:1. Miller agreed that a principle of political
21 science holds that it is undesirable for a religious majority to
22 impose its religious views on a minority. Tr 2692:16-2693:7.

23 Miller explained on redirect that he had reviewed "most"
24 of the materials listed in his expert report and that he "tried to
25 review all of them." Tr 2697:11-16. Miller testified that he
26 believes initiatives relating to marriage for same-sex couples
27 arise as a check on the courts and do not therefore implicate a
28 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 \\
\\

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

5
6 II

7 FINDINGS OF FACT²

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

15
16 THE PARTIES

17 Plaintiffs

- 18 1. Kristin Perry and Sandra Stier reside together in Alameda
19 County, California and are raising four children. They are
20 lesbians in a committed relationship who seek to marry.
21 2. On May 21, 2009, Perry and Stier applied for a marriage
22 license from defendant O'Connell, the Alameda County
23 Clerk-Recorder, who denied them a license due to Proposition 8
24 because they are of the same sex.

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

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

1 Health. Scott reports to Horton and is the official
2 responsible for prescribing and furnishing the forms for
3 marriage license applications, the certificate of registry of
4 marriage, including the license to marry, and the marriage
5 certificate. See Doc #46 ¶ 16 (admitting Doc #1 ¶ 16).

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

10 12. Dean C Logan is the Los Angeles County
11 Registrar-Recorder/County Clerk and is responsible for
12 maintaining vital records of marriages, issuing marriage
13 licenses and performing civil marriage ceremonies. Doc #41 ¶
14 13 (admitting Doc #1 ¶ 18).

15
16 Defendant-Intervenors (Proponents)

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

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

21 b. Doc #8 at 14 (Proponents' motion to intervene:
22 "Proponents complied with a myriad of legal requirements
23 to procure Proposition 8's enactment, such as (1) filing
24 forms prompting the State to prepare Proposition 8's
25 Title and Summary, (2) paying the initiative filing fee,
26 (3) drafting legally compliant signature petitions, (4)
27 overseeing the collection of more than 1.2 million
28 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
4 in 2008 working to pass Proposition 8;
- 5 b. Doc #8-1 at ¶ 27 (Decl of Dennis Hollingsworth);
- 6 c. Doc #8-2 at ¶ 27 (Decl of Gail J Knight);
- 7 d. Doc #8-3 (Decl of Martin F Gutierrez: describing
8 activities to pass and enforce Proposition 8);
- 9 e. Doc #8-4 at ¶ 27 (Decl of Hak-Shing William Tam);
- 10 f. Doc #8-5 at ¶ 27 (Decl of Mark A Jansson).
- 11 15. Proponents established ProtectMarriage.com — Yes on 8, a
12 Project of California Renewal ("Protect Marriage") as a
13 "primarily formed ballot measure committee" under California
14 law.
- 15 a. Doc #8-1 at ¶ 13 (Decl of Dennis Hollingsworth);
- 16 b. Doc #8-2 at ¶ 13 (Decl of Gail J Knight);
- 17 c. Doc #8-3 at ¶ 13 (Decl of Martin F Gutierrez);
- 18 d. Doc #8-4 at ¶ 13 (Decl of Hak-Shing William Tam);
- 19 e. Doc #8-5 at ¶ 13 (Decl of Mark A Jansson).
- 20 16. The Protect Marriage Executive Committee includes Ron
21 Prentice, Edward Dolejsi, Mark A Jansson and Doug Swardstrom.
22 Andrew Pugno acts as General Counsel. David Bauer is the
23 Treasurer and officer of record for Protect Marriage.
- 24 a. Doc #372 at 4 (identifying the above individuals based on
25 the declaration of Ron Prentice, submitted under seal on
26 November 6, 2009);
- 27 b. PX0209 Letter from Protect Marriage to Jim Abbott (Oct
28 20, 2008): Letter to a business that donated money to a
group opposing Proposition 8 demanding "a donation of a
like amount" to Protect Marriage. The letter is signed
by: Ron Prentice, Protect Marriage Chairman; Andrew
Pugno, Protect Marriage General Counsel; Edward Dolejsi,
Executive Director, California Catholic Conference; and

1 Mark Jansson, a Protect Marriage Executive Committee
2 Member.

- 3 17. Protect Marriage was responsible for all aspects of the
4 campaign to qualify Proposition 8 for the ballot and enact it
5 into law.
- 6 a. Doc #8-6 at ¶¶ 4, 6, 10, 11 (Decl of David Bauer);
 - 7 b. PX2403 Email from Kenyn Cureton, Vice-President, Family
8 Research Council, to Prentice at 1 (Aug 25, 2008):
9 Cureton attaches a kit to be distributed to Christian
10 voters through churches to help them promote Proposition
11 8. Cureton explains to Prentice that Family Research
12 Council ("FRC") found out from Pugno that FRC "need[s] to
13 take FRC logos off of the CA version of the videos (legal
14 issues) and just put ProtectMarriage.com on everything"
15 and FRC is "making those changes.";
 - 16 c. PX2640 Email from Pugno to Tam (Feb 5, 2008) at 2: "I do
17 not think it is likely, but in the event you are
18 contacted by the media or anyone else regarding the
19 Marriage Amendment [Proposition 8], I would encourage you
20 to please refer all calls to the campaign phone number.
21 * * * It is crucial that our public message be very
22 specific.";
 - 23 d. PX2640 Email from Pugno to Tam (Feb 5, 2008) at 2: Pugno
24 explains that Tam is "an exception" to Protect Marriage's
25 press strategy and should speak on behalf of the campaign
26 directly to the Chinese press. See Tr 1906:9-12;
 - 27 e. Tr 1892:9-12 (Tam: In October 2007, Tam was waiting for
28 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

1 instructions of when we would start the signature
2 collection for [Proposition 8]."

- 3 18. Protect Marriage is a "broad coalition" of individuals and
4 organizations, including the Church of Jesus Christ of
5 Latter-Day Saints (the "LDS Church"), the California Catholic
6 Conference and a large number of evangelical churches.
- 7 a. PX2310 About ProtectMarriage.com, Protect Marriage
8 (2008): Protect Marriage "about" page identifies a
"broad-based coalition" in support of Proposition 8;
- 9 b. PX0577 Frank Schubert and Jeff Flint, Passing Prop 8,
10 Politics (Feb 2009) at 47: "We had the support of
virtually the entire faith community in California.";
- 11 c. Tr 1585:20-1590:2 (Segura: Churches, because of their
12 hierarchical structure and ability to speak to
13 congregations once a week, have a "very strong
14 communication network" with churchgoers. A network of
"1700 pastors" working with Protect Marriage in support
15 of Proposition 8 is striking because of "the sheer
16 breadth of the [religious] organization and its level of
17 coordination with Protect Marriage.");
- 18 d. Tr 1590:23-1591:12 (Segura: An "organized effort" and
"formal association" of religious groups formed the
19 "broad-based coalition" of Protect Marriage.);
- 20 e. Tr 1609:12-1610:6 (Segura: The coalition between the
Catholic Church and the LDS Church against a minority
21 group was "unprecedented.");
- 22 f. PX2597 Email from Prentice to Lynn Vincent (June 19,
2008): Prentice explains that "[f]rom the initial efforts
23 in 1998 for the eventual success of Prop 22 in 2000, a
coalition of many organizations has existed, including
24 evangelical, Catholic and Mormon groups" and identifies
Catholic and evangelical leaders working to pass
25 Proposition 8;
- 26 g. PX0390A Video, Ron Prentice Addressing Supporters of
Proposition 8, Excerpt: Prentice explains the importance
27 of contributions from the LDS Church, Catholic bishops
and evangelical ministers to the Protect Marriage
28 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

1 though the LDS were the last major denomination to join
2 the campaign, their members were immensely helpful in
3 early fundraising, providing much-needed contributions
4 while we were busy organizing Catholic and Evangelical
5 fundraising efforts."

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

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

15 a. Tr 195:13-196:21 (Cott: "[C]ivil law has always been
16 supreme in defining and regulating marriage. * * *
17 [Religious practices and ceremonies] have no particular
18 bearing on the validity of marriages. Any clerics,
19 ministers, rabbis, et cetera, that were accustomed to
20 * * * performing marriages, only do so because the state
21 has given them authority to do that.");

22 b. Cal Fam Code §§ 400, 420.

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

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

28 b. Cal Fam Code §§ 300, 301.

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

32 a. Cal Fam Code § 300 et seq;

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

- 1 children biologically related to both] is fundamentally
2 flawed[.]");
- 3 c. Lawrence v Texas, 539 US 558, 604-05 (2003) (Scalia, J,
4 dissenting) ("If moral disapprobation of homosexual
5 conduct is 'no legitimate state interest' for purposes of
6 proscribing that conduct * * * what justification could
7 there possibly be for denying the benefits of marriage to
8 homosexual couples exercising 'the liberty protected by
9 the Constitution'? Surely not the encouragement of
10 procreation, since the sterile and the elderly are
11 allowed to marry.");
- 12 d. Tr 222:22-223:22 (Cott: "There has never been a
13 requirement that a couple produce children in order to
14 have a valid marriage. Of course, people beyond
15 procreative age have always been allowed to marry. * * *
16 [P]rocreative ability has never been a qualification for
17 marriage.").
- 18 22. When California became a state in 1850, marriage was
19 understood to require a husband and a wife. See Cal Const,
20 Art XI § 14 (1849); In re Marriage Cases, 183 P3d at 407.
- 21 23. The states have always required the parties to give their free
22 consent to a marriage. Because slaves were considered
23 property of others at the time, they lacked the legal capacity
24 to consent and were thus unable to marry. After emancipation,
25 former slaves viewed their ability to marry as one of the most
26 important new rights they had gained. Tr 202:2-203:12 (Cott).
- 27 24. Many states, including California, had laws restricting the
28 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.

- 1 a. PX0710 at RFA No 12: Attorney General admits that the
2 doctrine of coverture, under which women, once married,
3 lost their independent legal identity and became the
4 property of their husbands, was once viewed as a central
5 component of the civil institution of marriage;
6
7 b. Tr 240:11-240:15 (Cott: Under coverture, "the wife was
8 covered, in effect, by her husband's legal and economic
9 identity. And she — she lost her independent legal and
10 economic individuality.");
11
12 c. Tr 240:22-241:6 (Cott: Coverture "was the marital bargain
13 to which both spouses consented. And it was a reciprocal
14 bargain in which the husband had certain very important
15 * * * obligations that were enforced by the state. His
16 obligation was to support his wife, provide her with the
17 basic material goods of life, and to do so for their
18 dependents. And her part of the bargain was to serve and
19 obey him, and to lend to him all of her property, and
20 also enable him to take all of her earnings, and
21 represent her in court or in any sort of legal or
22 economic transaction.");
23
24 d. Tr 241:7-11 (Cott: Coverture "was a highly-asymmetrical
25 bargain that, to us today, appears to enforce inequality.
26 * * * But I do want to stress it was not simply
27 domination and submission. It was a mutual bargain, a
28 reciprocal bargain joined by consent.");
29
30 e. Tr 243:5-244:10 (Cott: The sexual division of roles of
31 spouses began to shift in the late nineteenth century and
32 came fully to an end under the law in the 1970s.
33 Currently, the state's assignment of marital roles is
34 gender-neutral. "[B]oth spouses are obligated to support
35 one another, but they are not obligated to one another
36 with a specific emphasis on one spouse being the provider
37 and the other being the dependent.");
38
39 f. Follansbee v Benzenberg, 122 Cal App 2d 466, 476 (2d Dist
40 1954) ("The legal status of a wife has changed. Her
41 legal personality is no longer merged in that of her
42 husband.");
43
44 27. Marriage between a man and a woman was traditionally organized
45 based on presumptions of a division of labor along gender
46 lines. Men were seen as suited for certain types of work and
47 women for others. Women were seen as suited to raise children
48 and men were seen as suited to provide for the family.

- 1 a. Tr 239:25-245:8, 307:14-308:9, 340:14-342:12 (Cott:
2 Marriage laws historically have been used to dictate the
3 roles of spouses. Under coverture, a wife's legal and
4 economic identity was merged into that of her husband's.
5 The coverture system was based on assumptions of what was
6 then considered a natural division of labor between men
7 and women.);
- 8 b. Tr 241:19-23 (Cott: "[A]ssumptions were, at the time,
9 that men were suited to be providers * * * whereas,
10 women, the weaker sex, were suited to be dependent.");
- 11 c. PX1245 Letitia Anne Peplau and Adam W Fingerhut, The
12 Close Relationships of Lesbians and Gay Men, 58 Annual
13 Rev Pschol 405, 408 (2007): "Traditional heterosexual
14 marriage is organized around two basic principles: a
15 division of labor based on gender and a norm of greater
16 male power and decision-making authority.";
- 17 d. PX2547 (Nathanson Nov 12, 2009 Dep Tr 108:24-109:9:
18 Defenders of prejudice or stereotypes against women
19 argued that such discrimination was meant to be
20 protective of the family. (PX2546 video of same); see
21 also PX2545 (Young Nov 13, 2009 Dep Tr 214:19-215:13:
22 same, PX2544 video of same);
- 23 e. PX1319 Hendrik Hartog, Lecture, Marital Exits and Marital
24 Expectations in Nineteenth Century America, 80 Georgetown
25 L J 95, 101, 128-129 (1991): "Even in equity, a wife
26 could not usually sue under her own name." And "the most
27 important feature of marriage was the public assumption
28 of a relationship of rights and duties, of men acting as
husbands and women acting as wives.";
- 29 f. PX1328 Note, A Reconsideration of Husband's Duty to
30 Support and Wife's Duty to Render Services, 29 Va L Rev
31 857, 858 (1943): "Marriage deprived [the wife] of her
32 legal capacity in most matters affecting property."
- 33 28. The development of no-fault divorce laws made it simpler for
34 spouses to end marriages and allowed spouses to define their
35 own roles within a marriage.
- 36 a. Tr 338:5-14 (Cott: No-fault divorce "was an indication of
37 the shift * * * [that] spousal roles used to be dictated
38 by the state. Now they are dictated by the couple
39 themselves. There's no requirement that they do X or Y
40 if they are one spouse or the other.");
- 41 b. Tr 339:10-14 (Cott: The move to no-fault divorce
42 underlines the fact that marriage no longer requires

- 1 specific performance of one marital role or another based
2 on gender.);
- 3 c. PX1319 Hendrik Hartog, Lecture, Marital Exits and Marital
4 Expectations in Nineteenth Century America, 80 Georgetown
5 L J 95, 97, 121 (1991): In nineteenth century America,
6 marriage was permanent, spousal roles were non-negotiable
7 and divorce "punished the guilty for criminal conduct"
8 and "provided a form of public punishment for a spouse
9 who had knowingly and criminally violated his or her
10 public vows of marriage.";
- 11 d. PX1308 Betsey Stevenson and Justin Wolfers, Marriage and
12 Divorce: Changes and their Driving Forces, Institute for
13 the Study of Labor at 2-3, Fig 1 (Feb 2007): Current
14 divorce rates are consistent with trends that developed
15 before states adopted no-fault divorce.
- 16 29. In 1971, California amended Cal Civ Code § 4101, which had
17 previously set the age of consent to marriage at twenty-one
18 years for males and eighteen years for females, to read "[a]ny
19 unmarried person of the age of 18 years or upwards, and not
20 otherwise disqualified, is capable of consenting to and
21 consummating marriage." Cal Civ Code § 4101 (1971); In re
22 Marriage Cases, 183 P3d at 408.
- 23 30. In the 1970s, several same-sex couples sought marriage
24 licenses in California, relying on the amended language in Cal
25 Civ Code § 4101. In re Marriage Cases, 183 P3d at 409. In
26 response, the legislature in 1977 amended the marriage
27 statute, former Cal Civ Code § 4100, to read "[m]arriage is a
28 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.

- 1 31. In 2008, the California Supreme Court held that certain
2 provisions of the Family Code violated the California
3 Constitution to the extent the statutes reserve the
4 designation of marriage to opposite-sex couples. In re
5 Marriage Cases, 183 P3d at 452. The language "between a man
6 and a woman" was stricken from section 300, and section 308.5
7 (Proposition 22) was stricken in its entirety. Id at 453.
- 8 32. California has eliminated marital obligations based on the
9 gender of the spouse. Regardless of their sex or gender,
10 marital partners share the same obligations to one another and
11 to their dependants. As a result of Proposition 8, California
12 nevertheless requires that a marriage consist of one man and
13 one woman.
- 14 a. Cal Const Art, I § 7.5 (Proposition 8);
15 b. Cal Fam Code § 720.
- 16 33. Eliminating gender and race restrictions in marriage has not
17 deprived the institution of marriage of its vitality.
- 18 a. PX0707 at RFA No 13: Proponents admit that eliminating
19 the doctrine of coverture has not deprived marriage of
20 its vitality and importance as a social institution;
- 21 b. PX0710 at RFA No 13: Attorney General admits that
22 gender-based reforms in civil marriage law have not
23 deprived marriage of its vitality and importance as a
24 social institution;
- 25 c. Tr 245:9-247:3 (Cott: "[T]he primacy of the husband as
26 the legal and economic representative of the couple, and
27 the protector and provider for his wife, was seen as
28 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

- 1 apparent damage to the institution. And, in fact, I
2 think to the benefit of the institution.");
- 3 d. PX0707 at RFA No 13: Proponents admit that eliminating
4 racial restrictions on marriage has not deprived marriage
5 of its vitality and importance as a social institution;
- 6 e. PX0710 at RFA No 13: Attorney General admits that
7 race-based reforms in civil marriage law have not
8 deprived marriage of its vitality and importance as a
9 social institution;
- 10 f. Tr 237:9-239:24 (Cott: When racial restrictions on
11 marriage across color lines were abolished, there was
12 alarm and many people worried that the institution of
13 marriage would be degraded and devalued. But "there has
14 been no evidence that the institution of marriage has
15 become less popular because * * * people can marry
16 whoever they want.").
- 17 34. Marriage is the state recognition and approval of a couple's
18 choice to live with each other, to remain committed to one
19 another and to form a household based on their own feelings
20 about one another and to join in an economic partnership and
21 support one another and any dependents. Tr 187:11-16; 188:16-
22 189:2; 201:9-14 (Cott).
- 23 35. The state has many purposes in licensing and fostering
24 marriage. Some of the state's purposes benefit the persons
25 married while some benefit the state:
- 26 a. Facilitating governance and public order by organizing
27 individuals into cohesive family units. Tr 222:13-17
28 (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.);

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- d. Legitimizing 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

- 1 committed to one another by their own consents will
2 support one another as well as their dependents.");
- 3 b. Cal Fam Code § 720.
- 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
10 the Centers for Disease Control found that married
11 individuals, on average, fare better on "virtually every
12 measure" of health compared to non-married individuals.);
- 13 b. PX0708 at RFA No 84: Proponents admit that opposite-sex
14 couples who are married experience, on average, less
15 anxiety and depression and greater happiness and
16 satisfaction with life than do non-married opposite-sex
17 couples or persons not involved in an intimate
18 relationship;
- 19 c. Tr 578:2-10 (Peplau: "[T]he very consistent findings from
20 [a very large body of research on the impact of marriage
21 on health] are that, on average, married individuals fare
22 better. They are physically healthier. They tend to
23 live longer. They engage in fewer risky behaviors. They
24 look better on measures of psychological well-being.");
- 25 d. Tr 688:10-12 (Egan: "[M]arried individuals are healthier,
26 on average, and, in particular, behave themselves in
27 healthier ways than single individuals.");
- 28 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.";
- 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.

1 41. The tangible and intangible benefits of marriage flow to a
2 married couple's children.

- 3 a. Tr 1042:20-1043:8 (Lamb: explaining that when a
4 cohabiting couple marries, that marriage can improve the
5 adjustment outcomes of the couple's child because of "the
6 advantages that accrue to marriage.");
- 7 b. PX0886 Position Statement, American Psychiatric
8 Association, Support of Legal Recognition of Same-Sex
9 Civil Marriage (July 2005): Marriage benefits children of
10 that couple.

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

13 42. Same-sex love and intimacy are well-documented in human
14 history. The concept of an identity based on object desire;
15 that is, whether an individual desires a relationship with
16 someone of the opposite sex (heterosexual), same sex
17 (homosexual) or either sex (bisexual), developed in the late
18 nineteenth century.

- 19 a. Tr 531:25-533:24 (Chauncey: The categories of
20 heterosexual and homosexual emerged in the late
21 nineteenth century, although there were people at all
22 time periods in American history whose primary erotic and
23 emotional attractions were to people of the same sex.);
- 24 b. Tr 2078:10-12 (Herek: "[H]eterosexual and homosexual
25 behaviors alike have been common throughout human
26 history[.]");
- 27 c. Tr 2064:22-23 (Herek: In practice, we generally refer to
28 three groups: homosexuals, heterosexuals and bisexuals.);
- 29 d. Tr 2027:4-9 (Herek: "[S]exual orientation is at its heart
30 a relational construct, because it is all about a
31 relationship of some sort between one individual and
32 another, and a relationship that is defined by the sex of
33 the two persons involved[.]").

34 43. Sexual orientation refers to an enduring pattern of sexual,
35 affectional or romantic desires for and attractions to men,
36 women or both sexes. An individual's sexual orientation can

1 be expressed through self-identification, behavior or
2 attraction. The vast majority of people are consistent in
3 self-identification, behavior and attraction throughout their
4 adult lives.

- 5 a. Tr 2025:3-12 (Herek: "Sexual orientation is a term that
6 we use to describe an enduring sexual, romantic, or
7 intensely affectional attraction to men, to women, or to
8 both men and women. It's also used to refer to an
9 identity or a sense of self that is based on one's
10 enduring patterns of attraction. And it's also sometimes
11 used to describe an enduring pattern of behavior.");
- 12 b. Tr 2060:7-11 (Herek: Most social science and behavioral
13 research has assessed sexual orientation in terms of
14 attraction, behavior or identity, or some combination
15 thereof.);
- 16 c. Tr 2072:19-2073:4 (Herek: "[T]he vast majority of people
17 are consistent in their behavior, their identity, and
18 their attractions.");
- 19 d. Tr 2086:13-21 (Herek: The Laumann study (PX0943 Edward O
20 Laumann, et al, The Social Organization of Sexuality:
21 Sexual Practices in the United States (Chicago 1994)
22 shows that 90 percent of people in Laumann's sample were
23 consistently heterosexual in their behavior, identity and
24 attraction, and a core group of one to two percent of the
25 sample was consistently lesbian, gay or bisexual in their
26 behavior, identity and attraction.);
- 27 e. Tr 2211:8-10 (Herek: "[I]f I were a betting person, I
28 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,

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lesbian or bisexual, and that is a question people generally are able to answer.);

- b. Tr 858:24-859:5 (Meyer: Sexual orientation is perceived as "a core thing about who you are." People say: "This is who I am. * * * [I]t is a central identity that is important.");
- c. Tr 2027:14-18 (Herek: These sorts of relationships, that need for intimacy and attachment is a very core part of the human experience and a very fundamental need that people have.);
- d. Tr 2324:8-13 (Herek: If two women wish to marry each other, it is reasonable to assume that they are lesbians. And if two men want to marry each other, it is reasonable to assume that they are gay.);
- e. Tr 2304:9-2309:1 (Herek: Researchers may define sexual orientation based on behavior, identity or attraction based on the purpose of a study, so that an individual studying sexually transmitted infections may focus on behavior while a researcher studying child development may focus on identity. Researchers studying racial and ethnic minorities similarly focus their definition of the population to be studied based on the purpose of the study. Most people are nevertheless consistent in their behavior, identity and attraction.);
- f. Tr 2176:23-2177:14 (Herek, responding to cross-examination that sexual orientation is a socially constructed classification and not a "valid concept": "[Social constructionists] are talking about the construction of [sexual orientation] at the cultural level, in the same way that we have cultural constructions of race and ethnicity and social class. * * * But to say that there's no such thing as class or race or ethnicity or sexual orientation is to, I think, minimize the importance of that construction.);
- g. Tr 1372:10-1374:7 (Badgett: DIX1108 The Williams Institute, Best Practices for Asking Questions about Sexual Orientation on Surveys (Nov 2009), includes a discussion about methods for conducting surveys; it does not conflict with the substantial evidence demonstrating that sexual orientation is a distinguishing characteristic that defines gay and lesbian individuals as a discrete group.).

45. Proponents' campaign for Proposition 8 assumed voters understood the existence of homosexuals as individuals distinct from heterosexuals.

- 1 a. PX0480A Video supporting Proposition 8: Supporters of
2 Proposition 8 identified "homosexuals and those
3 sympathetic to their demands" as supporters of marriage
4 for same-sex couples;
- 5 b. PX2153 Advertisement, Honest Answers to Questions Many
6 Californians Are Asking About Proposition 8, Protect
7 Marriage (2008): "The 98% of Californians who are not gay
8 should not have their religious freedoms and freedom of
9 expression be compromised to afford special legal rights
10 for the 2% of Californians who are gay.";
- 11 c. PX2156 Protect Marriage, Myths and Facts About
12 Proposition 8: "Proposition 8 does not interfere with
13 gays living the lifestyle they choose. However, while
14 gays can live as they want, they should not have the
15 right to redefine marriage for the rest of society.";
- 16 d. PX0021 Leaflet, California Family Council, The California
17 Marriage Protection Act ("San Diego County's 'Tipping
18 Point'") at 2: The leaflet asserts that "homosexuals" do
19 not want to marry; instead, the goal of the "homosexual
20 community" is to annihilate marriage;
- 21 e. PX0577 Frank Schubert and Jeff Flint, Passing Prop 8,
22 Politics at 45 (Feb 2009): The Proposition 8 campaign was
23 organized in light of the fact that many Californians are
24 "tolerant" of gays;
- 25 f. PX0001 California Voter Information Guide, California
26 General Election, Tuesday, November 4, 2008 at PM 3365:
27 "[W]hile gays have the right to their private lives, they
28 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

- 1 about their sexual orientation. Among lesbians, 70
2 percent said that they had no or very little choice about
3 their sexual orientation.); Tr 2056:4-25 (Herek: PX0930
4 demonstrates that 88 percent of gay men reported that
5 they had "no choice at all" about their sexual
6 orientation, and 68 percent of lesbians said they had "no
7 choice at all," and another 15 percent reported a small
8 amount of choice.);
- 9 c. Tr 2252:1-10 (Herek: "It is certainly the case that there
10 have been many people who, most likely because of
11 societal stigma, wanted very much to change their sexual
12 orientation and were not able to do so.");
- 13 d. Tr 2314:3-17 (Herek: Herek agrees with Peplau's statement
14 that "[c]laims about the potential erotic plasticity of
15 women do not mean that most women will actually exhibit
16 change over time. At a young age, many women adopt
17 patterns of heterosexuality that are stable across their
18 lifetime. Some women adopt enduring patterns of same-sex
19 attractions and relationships.");
- 20 e. Tr 2202:8-22 (Herek: "[M]ost people are brought up in
21 society assuming that they will be heterosexual. Little
22 boys are taught that they will grow up and marry a girl.
23 Little girls are taught they will grow up and marry a
24 boy. And growing up with those expectations, it is not
25 uncommon for people to engage in sexual behavior with
26 someone of the other sex, possibly before they have
27 developed their real sense of who they are, of what their
28 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.");

- 1 j. Tr 91:15-17 (Katami: Katami has been a "natural-born gay"
2 "as long as he can remember.");
- 3 k. Tr 1506:2-11 (Kendall: "When I was a little kid, I knew I
4 liked other boys. But I didn't realize that meant I was
5 gay until I was, probably, 11 or 12 years old. * * * I
6 ended up looking up the word 'homosexual' in the
7 dictionary. And I remember reading the definition[.]
8 * * * And it slowly dawned on me that that's what I
9 was.");
- 10 l. Tr 1510:6-8 (Kendall: "I knew I was gay just like I knew
11 I'm short and I'm half Hispanic. And I just never
12 thought that those facts would change.").
- 13 47. California has no interest in asking gays and lesbians to
14 change their sexual orientation or in reducing the number of
15 gays and lesbians in California.
- 16 a. PX0707 at RFA No 21: Proponents admit that same-sex
17 sexual orientation does not result in any impairment in
18 judgment or general social and vocational capabilities;
- 19 b. PX0710 at RFA No 19: Attorney General admits that sexual
20 orientation bears no relation to a person's ability to
21 perform in or contribute to society;
- 22 c. PX0710 at RFA No 22: Attorney General admits that the
23 laws of California recognize no relationship between a
24 person's sexual orientation and his or her ability to
25 raise children; to his or her capacity to enter into a
26 relationship that is analogous to marriage; or to his or
27 her ability to participate fully in all economic and
28 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.").

- 1 48. Same-sex couples are identical to opposite-sex couples in the
2 characteristics relevant to the ability to form successful
3 marital unions. Like opposite-sex couples, same-sex couples
4 have happy, satisfying relationships and form deep emotional
5 bonds and strong commitments to their partners. Standardized
6 measures of relationship satisfaction, relationship adjustment
7 and love do not differ depending on whether a couple is same-
8 sex or opposite-sex.
- 9 a. PX0707 at RFA No 65: Proponents admit that gay and
10 lesbian individuals, including plaintiffs, have formed
11 lasting, committed and caring relationships with persons
12 of the same sex and same-sex couples share their lives
13 and participate in their communities together;
- 14 b. PX0707 at RFA No 58: Proponents admit that many gay men
15 and lesbians have established loving and committed
16 relationships;
- 17 c. PX0710 at RFA No 65: Attorney General admits that gay men
18 and lesbians have formed lasting, committed and caring
19 same-sex relationships and that same-sex couples share
20 their lives and participate in their communities
21 together;
- 22 d. PX0710 at RFA No 58: Attorney General admits that
23 California law implicitly recognizes an individual's
24 capacity to establish a loving and long-term committed
25 relationship with another person that does not depend on
26 the individual's sexual orientation;
- 27 e. Tr 583:12-585:21 (Peplau: Research that has compared the
28 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

- 1 clients' or their own actual or perceived * * * sexual
2 orientation.";
- 3 f. Cal Fam Code § 297.5(d): "The rights and obligations of
4 registered domestic partners with respect to a child of
5 either of them shall be the same as those of spouses.";
- 6 g. Elisa B v Superior Court, 117 P3d 660, 670 (Cal 2005)
7 (holding that under the Uniform Parentage Act, a parent
8 may have two parents of the same sex);
- 9 h. PX2096 Adam Romero, et al, Census Snapshot: California,
10 The Williams Institute at 2 (Aug 2008): "18% of same-sex
11 couples in California are raising children under the age
12 of 18.";
- 13 i. Tr 1348:23-1350:2 (Badgett: Same-sex couples in
14 California are raising 37,300 children under the age of
15 18.).
- 16 50. Same-sex couples receive the same tangible and intangible
17 benefits from marriage that opposite-sex couples receive.
- 18 a. Tr 594:17-20 (Peplau: "My opinion, based on the great
19 similarities that have been documented between same-sex
20 couples and heterosexual couples, is th[at] if same-sex
21 couples were permitted to marry, that they also would
22 enjoy the same benefits [from marriage].");
- 23 b. Tr 598:1-599:19 (Peplau: Married same-sex couples in
24 Massachusetts have reported various benefits from
25 marriage including greater commitment to the
26 relationship, more acceptance from extended family, less
27 worry over legal problems, greater access to health
28 benefits and benefits for their children.);
- 29 c. PX0787 Position Statement, American Psychiatric
30 Association, Support of Legal Recognition of Same-Sex
31 Civil Marriage at 1 (July 2005): "In the interest of
32 maintaining and promoting mental health, the American
33 Psychiatric Association supports the legal recognition of
34 same-sex civil marriage with all rights, benefits, and
35 responsibilities conferred by civil marriage, and opposes
36 restrictions to those same rights, benefits, and
37 responsibilities."
- 38 51. Marrying a person of the opposite sex is an unrealistic option
39 for gay and lesbian individuals.
- 40 a. PX0707 at RFA No 9: Proponents admit that for many gay
41 and lesbian individuals, marriage to an individual of the
42 opposite sex is not a meaningful alternative;

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- 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. Gill v Office of Personnel Management et al, 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

1 and thus the court did not address whether a person in a
2 domestic partnership would have standing to challenge
3 DOMA.); see also In re Karen Golinski, 587 F3d 901, 902
4 (9th Cir 2009) (finding that Golinski could obtain
5 coverage for her wife under the Federal Employees Health
6 Benefits Act without needing to consider whether the
7 result would be the same for a federal employee's
8 domestic partner).

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10 54. The availability of domestic partnership does not provide gays
11 and lesbians with a status equivalent to marriage because the
12 cultural meaning of marriage and its associated benefits are
13 intentionally withheld from same-sex couples in domestic
14 partnerships.

- 15 a. Tr 613:23-614:12 (Peplau: There is a significant symbolic
16 disparity between marriage and domestic partnerships; a
17 domestic partnership is "not something that is
18 necessarily understood or recognized by other people in
19 your environment.");
- 20 b. Tr 659:8-15 (Peplau: As a result of the different social
21 meanings of a marriage and a domestic partnership, there
22 is a greater degree of an enforceable trust in a marriage
23 than a domestic partnership.);
- 24 c. Tr 2044:20-2045:22 (Herek: The difference between
25 domestic partnerships and marriage is much more than
26 simply a word. "[J]ust the fact that we're here today
27 suggests that this is more than just a word * * *
28 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.");

- 1 g. Tr 153:4-155:5 (Perry: Stier and Perry completed
2 documents to register as domestic partners and mailed
3 them in to the state. Perry views domestic partnership
4 as an agreement; it is not the same as marriage, which
5 symbolizes "maybe the most important decision you make as
6 an adult, who you choose [as your spouse].");
- 7 h. Tr 170:12-171:14 (Stier: To Stier, domestic partnership
8 feels like a legal agreement between two parties that
9 spells out responsibilities and duties. Nothing about
10 domestic partnership indicates the love and commitment
11 that are inherent in marriage, and for Stier and Perry,
12 "it doesn't have anything to do * * * with the nature of
13 our relationship and the type of enduring relationship we
14 want it to be. It's just a legal document.");
- 15 i. Tr 172:6-21 (Stier: Marriage is about making a public
16 commitment to the world and to your spouse, to your
17 family, parents, society and community. It is the way to
18 tell them and each other that this is a lifetime
19 commitment. "And I have to say, having been married for
20 12 years and been in a domestic partnership for 10 years,
21 it's different. It's not the same. I want — I don't
22 want to have to explain myself.");
- 23 j. Tr 82:9-83:1 (Zarrillo: "Domestic partnership would
24 relegate me to a level of second class citizenship. * * *
25 It's giving me part of the pie, but not the whole thing
26 * * * [I]t doesn't give due respect to the relationship
27 that we have had for almost nine years.");
- 28 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

- 1 couples to marry will not have an adverse effect on the
2 institution of marriage.);
- 3 c. Tr 600:12-602:15 (Peplau: Allowing same-sex couples to
4 marry will have "no impact" on the stability of
5 marriage.);
- 6 d. PX1145 Matthew D Bramlett and William D Mosher, First
7 Marriage Dissolution, Divorce, and Remarriage: United
8 States, US Department of Health and Human Services at 2
9 (May 31, 2001): Race, employment status, education, age
10 at marriage and other similar factors affect rates of
11 marriage and divorce;
- 12 e. PX1195 Matthew D Bramlett and William D Mosher,
13 Cohabitation, Marriage, Divorce, and Remarriage in the
14 United States, Vital and Health Statistics 23:22, US
15 Department of Health and Human Services at 12 (July
16 2002): Race and socioeconomic status, among other
17 factors, are correlated with rates of marital stability;
- 18 f. PX0754 American Anthropological Association, Statement on
19 Marriage and the Family: The viability of civilization or
20 social order does not depend upon marriage as an
21 exclusively heterosexual institution.
- 22 56. The children of same-sex couples benefit when their parents
23 can marry.
- 24 a. Tr 1332:19-1337:25 (Badgett: Same-sex couples and their
25 children are denied all of the economic benefits of
26 marriage that are available to married couples.);
- 27 b. PX0787 Position Statement, American Psychiatric
28 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.).

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

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
12 General Election, Tuesday, November 4, 2008: Proposition
13 8 "eliminates right of same-sex couples to marry."

14 58. Proposition 8 places the force of law behind stigmas against
15 gays and lesbians, including: gays and lesbians do not have
16 intimate relationships similar to heterosexual couples; gays
17 and lesbians are not as good as heterosexuals; and gay and
18 lesbian relationships do not deserve the full recognition of
19 society.

20 a. Tr 611:13-19 (Peplau: "[B]eing prevented by the
21 government from being married is no different than other
22 kinds of stigma and discrimination that have been
23 studied, in terms of their impact on relationships.");

24 b. Tr 529:21-530:23 (Chauncey: The campaign for Proposition
25 8 presented marriage for same-sex couples as an adult
26 issue, although children are frequently exposed to
27 romantic fairy tales or weddings featuring opposite-sex
28 couples.);

29 c. Tr 854:5-14 (Meyer: "Proposition 8, in its social
30 meaning, sends a message that gay relationships are not
31 to be respected; that they are of secondary value, if of
32 any value at all; that they are certainly not equal to
33 those of heterosexuals.");

34 d. Tr 2047:13-2048:13 (Herek: In 2004, California enacted
35 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

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"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

1 to adoption. Um Yvette just mentioned some statistics
2 about growing up in families without a mother and father
3 at home. How important it is to have that kind of thing.
4 I'm not a sociologist. I'm not a psychologist. I'm just
5 a human being but you don't need to be wearing a white
6 coat to know that kids need a mom and dad. I'm a dad and
7 I know that I provide something different than my wife
8 does in our family and my wife provides something
9 entirely different than I do in our family and both are
10 vital.";

- 11 c. PX0506 Protect Marriage, The Fine Line Transcript at 6
12 (Oct 1, 2008): "When moms are in the park taking care of
13 their kids they always know where those kids are. They
14 have like a, like a radar around them. They know where
15 those kids are and there's just a, there's a bond between
16 a mom and a kid different from a dad. I'm not saying
17 dads don't have that bond but they don't. It's just
18 different. You know middle of the night mom will wake
19 up. Dad will just sleep you know if there's a little
20 noise in the room. And, and when kids get scared they
21 run to mommy. Why? They spent 9 months in mommy. They
22 go back to where they came.";
- 23 d. PX390 Video, Ron Prentice Addressing Supporters of
24 Proposition 8, Part I at 5:25-6:04: Prentice tells people
25 at a religious rally that marriage is not about love but
26 instead about women civilizing men: "Again, because it's
27 not about two people in love, it's about men becoming
28 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.";
- 29 e. PX0506 Protect Marriage, The Fine Line Transcript (Oct 1,
30 2008) at 15: "Skin color is morally trivial as you
31 pointed out but sex is fundamental to everything. There
32 is no difference between a white or a black human being
33 but there's a big difference between a man and a woman.";
- 34 f. PX1867 Transcript, ABC Protecting Marriage at 27:6-9: Dr
35 Jennifer Roback Morse states that "[t]he function of
36 marriage is to attach mothers and fathers to one another
37 and mothers and fathers to their children, especially
38 fathers to children.";
- 39 g. PX0480A Video supporting Proposition 8 at 2:00-2:24:
40 Prentice states that "[c]hildren need the chance to have
41 both mother love and father love. And that moms and
42 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);

- 1 b. Tr 194:24-196:21 (Cott: Civil law, not religious custom,
2 is supreme in defining and regulating marriage in the
3 United States.);
- 3 c. Cal Fam Code §§ 400, 420.
- 4 63. Proposition 8 eliminates the right to marry for gays and
5 lesbians but does not affect any other substantive right under
6 the California Constitution. Strauss, 207 P3d at 102
7 ("Proposition 8 does not eliminate the substantial substantive
8 [constitutional] protections afforded to same-sex couples[.]")
9 (emphasis in original).
- 10 64. Proposition 8 has had a negative fiscal impact on California
11 and local governments.
- 12 a. Tr 1330:23-25 (Badgett: "Proposition 8 has imposed some
13 economic losses on the State of California and on
14 counties and municipalities.");
- 15 b. Tr 1364:16-1369:4 (Badgett: Denying same-sex couples the
16 right to marry imposes costs on local governments such as
17 loss of tax revenue, higher usage of means-tested
18 programs, higher costs for healthcare of uninsured
19 same-sex partners and loss of skilled workers.);
- 20 c. Tr 720:1-12 (Egan: "What we're really talking about in
21 the nonquantifiable impacts are the long-term advantages
22 of marriage as an institution, and the long-term costs of
23 discrimination as a way that weakens people's
24 productivity and integration into the labor force.
25 Whether it's weakening their education because they're
26 discriminated against at school, or leading them to
27 excessive reliance on behavioral and other health
28 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.).

- 1 65. CCSF would benefit economically if Proposition 8 were not in
2 effect.
- 3 a. CCSF would benefit immediately from increased wedding
4 revenue and associated expenditures and an increased
5 number of county residents with health insurance. Tr
6 691:24-692:3; Tr 708:16-20 (Egan);
- 7 b. CCSF would benefit economically from decreased
8 discrimination against gays and lesbians, resulting in
9 decreased absenteeism at work and in schools, lower
10 mental health costs and greater wealth accumulation.
11 Tr 685:10-14; Tr 689:4-10; Tr 692:12-19; Tr 720:1-12
12 (Egan);
- 13 c. CCSF enacted the Equal Benefits Ordinance to mandate that
14 city contractors and vendors provide same-sex partners of
15 employees with benefits equal to those provided to
16 opposite-sex spouses of employees. CCSF bears the cost
17 of enforcing the ordinance and defending it against legal
18 challenges. Tr 714:15-715:10 (Egan).
- 19 66. Proposition 8 increases costs and decreases wealth for same-
20 sex couples because of increased tax burdens, decreased
21 availability of health insurance and higher transactions costs
22 to secure rights and obligations typically associated with
23 marriage. Domestic partnership reduces but does not eliminate
24 these costs.
- 25 a. Tr 1330:14-16 (Badgett: Proposition 8 has "inflicted
26 substantial economic harm on same-sex couples and their
27 children who live here in California.");
- 28 b. Tr 1331:12-1337:25 (Badgett: Marriage confers economic
benefits including greater specialization of labor,
reduced transactions costs, health and insurance benefits
and more positive workplace outcomes.);
- c. Tr 1341:2-1342:13 (Badgett: Couples that would marry but
would not enter into a domestic partnership suffer
tangible economic harm such as higher taxes and limited
access to health insurance.);
- d. PX1259 MV Lee Badgett, Unequal Taxes on Equal Benefits:
The Taxation of Domestic Partner Benefits, The Williams
Institute at 1 (Dec 2007): "[W]orkers who have an
unmarried domestic partner are doubly burdened: Their
employers typically do not provide coverage for domestic

- 1 partners; and even when partners are covered, the
2 partner's coverage is taxed as income to the employee.";
- 3 e. PX2898 Laura Langbein and Mark A Yost, Same-Sex Marriage
4 and Negative Externalities, 490 Soc Sci Q 293, 307
5 (2009): "For example, the ban on gay marriage induces
6 failures in insurance and financial markets. Because
7 spousal benefits do not transfer (in most cases) to
8 domestic partners, there are large portions of the
9 population that should be insured, but instead receive
10 inequitable treatment and are not insured properly. * * *
11 This is equally true in the treatment of estates on the
12 death of individuals. In married relationships, it is
13 clear to whom an estate reverts, but in the cases of
14 homosexual couples, there is no clear right of ownership,
15 resulting in higher transactions costs, widely regarded
16 as socially inefficient.";
- 17 f. PX0188 Report of the Council on Science and Public
18 Health, Health Care Disparities in Same-Sex Households, C
19 Alvin Head (presenter) at 9: "Survey data confirm that
20 same-sex households have less access to health insurance.
21 If they have health insurance, they pay more than married
22 heterosexual workers, and also lack other financial
23 protections. * * * [C]hildren in same-sex households lack
24 the same protections afforded children in heterosexual
25 households.";
- 26 g. PX0189 American Medical Association Policy: Health Care
27 Disparities in Same-Sex Partner Households, Policy D-
28 160.979 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

1 couples. In 2009, the differential treatment of same-sex
2 and married couples in the estate tax code will affect an
3 estimated 73 same-sex couples, costing each of them, on
4 average, more than \$3.3 million."

- 5 67. Proposition 8 singles out gays and lesbians and legitimates
6 their unequal treatment. Proposition 8 perpetuates the
7 stereotype that gays and lesbians are incapable of forming
8 long-term loving relationships and that gays and lesbians are
9 not good parents.
- 10 a. Tr 2054:7-11 (Herek: In "a definitional sense,"
11 Proposition 8 is an instance of structural stigma against
12 gays and lesbians.);
 - 13 b. Tr 826:21-828:4 (Meyer: Domestic partnership does not
14 eliminate the structural stigma of Proposition 8 because
15 it does not provide the symbolic or social meaning of
16 marriage.);
 - 17 c. Tr 820:23-822:5 (Meyer: One of the stereotypes that is
18 part of the stigma surrounding gay men and lesbians is
19 that gay men and lesbians are incapable of, uninterested
20 in and not successful at having intimate relationships.);
 - 21 d. Tr 407:8-408:4 (Chauncey: The fear of homosexuals as
22 child molesters or as recruiters continues to play a role
23 in debates over gay rights, and with particular attention
24 to gay teachers, parents and married couples — people
25 who might have close contact with children.);
 - 26 e. PX0001 California Voter Information Guide, California
27 General Election, Tuesday, November 4, 2008 at PM 3365:
28 "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.").

- 1 68. Proposition 8 results in frequent reminders for gays and
2 lesbians in committed long-term relationships that their
3 relationships are not as highly valued as opposite-sex
4 relationships.
- 5 a. Tr 846:22-847:12 (Meyer: When gay men and lesbians have
6 to explain why they are not married, they "have to
7 explain, I'm really not seen as equal. I'm — my status
8 is — is not respected by my state or by my country, by
9 my fellow citizens.");
- 10 b. Tr 1471:1-1472:8 (Badgett: Badgett's interviews with
11 same-sex couples indicate that couples value the social
12 recognition of marriage and believe that the alternative
13 status conveys a message of inferiority.);
- 14 c. Tr 151:20-24 (Perry: A passenger on a plane once assumed
15 that she could take the seat that Perry had been saving
16 for Stier because Perry referred to Stier as her
17 "partner.");
- 18 d. Tr 174:3-175:4 (Stier: It has been difficult to explain
19 to others her relationship with Perry because they are
20 not married.);
- 21 e. Tr 175:5-17 (Stier: It is challenging to fill out forms
22 in doctor's offices that ask whether she is single,
23 married or divorced because "I have to find myself, you
24 know, scratching something out, putting a line through it
25 and saying 'domestic partner' and making sure I explain
26 to folks what that is to make sure that our transaction
27 can go smoothly.");
- 28 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

1 availability of economic and social resources. Tr 1010:13-
2 1011:13 (Lamb).

3 70. The gender of a child's parent is not a factor in a child's
4 adjustment. The sexual orientation of an individual does not
5 determine whether that individual can be a good parent.
6 Children raised by gay or lesbian parents are as likely as
7 children raised by heterosexual parents to be healthy,
8 successful and well-adjusted. The research supporting this
9 conclusion is accepted beyond serious debate in the field of
10 developmental psychology.

11 a. Tr 1025:4-23 (Lamb: Studies have demonstrated "very
12 conclusively that children who are raised by gay and
13 lesbian parents are just as likely to be well-adjusted as
14 children raised by heterosexual parents." These results
15 are "completely consistent with our broader understanding
16 of the factors that affect children's adjustment.");

17 b. PX2565 American Psychological Association, Answers to
18 Your Questions: For a Better Understanding of Sexual
19 Orientation and Homosexuality at 5 (2008): "[S]ocial
20 science has shown that the concerns often raised about
21 children of lesbian and gay parents — concerns that are
22 generally grounded in prejudice against and stereotypes
23 about gay people — are unfounded.";

24 c. PX2547 (Nathanson Nov 12, 2009 Dep Tr 49:05-49:19:
25 Sociological and psychological peer-reviewed studies
26 conclude that permitting gay and lesbian individuals to
27 marry does not cause any problems for children); PX2546
28 at 2:20-3:10 (video of same).

22 71. Children do not need to be raised by a male parent and a
23 female parent to be well-adjusted, and having both a male and
24 a female parent does not increase the likelihood that a child
25 will be well-adjusted. Tr 1014:25-1015:19; 1038:23-1040:17
26 (Lamb).

- 1 72. The genetic relationship between a parent and a child is not
2 related to a child's adjustment outcomes. Tr 1040:22-1042:10
3 (Lamb).
- 4 73. Studies comparing outcomes for children raised by married
5 opposite-sex parents to children raised by single or divorced
6 parents do not inform conclusions about outcomes for children
7 raised by same-sex parents in stable, long-term relationships.
8 Tr 1187:13-1189:6 (Lamb).
- 9 74. Gays and lesbians have been victims of a long history of
10 discrimination.
- 11 a. Tr 3080:9-11 (Proponents' counsel: "We have never
12 disputed and we have offered to stipulate that gays and
13 lesbians have been the victims of a long and shameful
14 history of discrimination.");
- 15 b. Tr 361:11-15 (Chauncey: Gays and lesbians "have
16 experienced widespread and acute discrimination from both
17 public and private authorities over the course of the
18 twentieth century. And that has continuing legacies and
19 effects."); see also Tr 361-390 (Chauncey: discussing
20 details of discrimination against gays and lesbians);
- 21 c. PX2566 Letter from John W Macy, Chairman, Civil Service
22 Commission, to the Mattachine Society of Washington (Feb
23 25, 1966) at 2-4: The Commission rejected the Mattachine
24 Society's request to rescind the policy banning active
25 homosexuals from federal employment. "Pertinent
26 considerations here are the revulsion of other employees
27 by homosexual conduct and the consequent disruption of
28 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,

1 1974): The Pride Foundation is not entitled to an
2 exemption under Internal Revenue Code § 501(c)(3) because
3 the organization's goal of "advanc[ing] the welfare of
4 the homosexual community" was "perverted or deviate
5 behavior" "contrary to public policy and [is] therefore,
6 not 'charitable.'"

7 75. Public and private discrimination against gays and lesbians
8 occurs in California and in the United States.

- 9 a. PX0707 at RFA No 29: Proponents admit that gays and
10 lesbians continue to experience instances of
11 discrimination;
- 12 b. PX0711 at RFA Nos 3, 8, 13, 18, 23: Attorney General
13 admits 263 hate crime events based on sexual orientation
14 bias occurred in California in 2004, 255 occurred in
15 2005, 246 occurred in 2006, 263 occurred in 2007 and 283
16 occurred in 2008;
- 17 c. PX0672 at 18; PX0673 at 20; PX0674 at 20; PX0675 at 3;
18 PX0676 at 1 (California Dept of Justice, Hate Crime in
19 California, 2004-2008): From 2004 to 2008, between 17 and
20 20 percent of all hate crime offenses in California were
21 motivated by sexual orientation bias;
- 22 d. PX0672 at 26; PX0673 at 28; PX0674 at 28; PX0675 at 26;
23 PX0676 at 20 (California Dept of Justice, Hate Crime in
24 California, 2004-2008): From 2004 to 2008, between 246
25 and 283 hate crime events motivated by sexual orientation
26 bias occurred each year in California;
- 27 e. Tr 548:23 (Chauncey: There is still significant
28 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

- 1 Gender Identity in State Employment at 1 (Sept 2009):
2 "There is a widespread and persistent pattern of
3 unconstitutional discrimination on the basis of sexual
4 orientation and gender identity against [California]
5 government employees" and the pattern of discrimination
6 is similar for private sector employees in California;
- 7 h. PX0619 The Williams Institute, Chapter 14: Other Indicia
8 of Animus against LGBT People by State and Local
9 Officials, 1980-Present at 14-8 (2009): Statements made
10 by legislators, judges, governors and other officials in
11 all fifty states show hostility towards gays and
12 lesbians, including a 1999 statement by California State
13 Senator Richard Mountjoy that "being gay 'is a sickness
14 * * * an uncontrolled passion similar to that which would
15 cause someone to rape.'";
- 16 i. Tr 2510:23-2535:7 (Miller: Miller agrees that "there has
17 been severe prejudice and discrimination against gays and
18 lesbians" and "widespread and persistent" discrimination
19 against gays and lesbians and that "there is ongoing
20 discrimination in the United States" against gays and
21 lesbians.);
- 22 j. Tr 2572:11-16 (Miller: Gays and lesbians are still the
23 "object of prejudice and stereotype.");
- 24 k. Tr 2599:17-2604:7 (Miller: Miller agrees that "there are
25 some gays and lesbians who are fired from their jobs,
26 refused work, paid less, and otherwise discriminated
27 against in the workplace because of their sexual
28 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.";

- 1 b. Tr 474:12-19 (Chauncey: Medical pronouncements that were
2 hostile to gays and lesbians provided a powerful source
3 of legitimation to anti-homosexual sentiment and were
 themselves a manifestation of discrimination against gays
 and lesbians.);
- 4 c. Tr 820:23-822:5 (Meyer: One of the stereotypes that is
5 part of the stigma surrounding gay men and lesbians is
6 that gay men and lesbians are incapable of, uninterested
7 in and not successful at having intimate relationships.
8 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.");
- 9 d. PX1011 David Reuben, Everything You Always Wanted to Know
10 About Sex (But Were Afraid to Ask) 129-151 at 143 (Van
11 Rees 1969): "What about all of the homosexuals who live
12 together happily for years? What about them? They are
13 mighty rare birds among the homosexual flock. Moreover,
14 the 'happy' part remains to be seen. The bitterest
15 argument between husband and wife is a passionate love
16 sonnet by comparison with a dialogue between a butch and
17 his queen. Live together? Yes. Happily? Hardly.";
- 18 e. Tr 361:23-363:9 (Chauncey: Even though not all sodomy
19 laws solely penalized homosexual conduct, over the course
20 of the twentieth century, sodomy laws came to symbolize
21 the criminalization of homosexual sex in particular.
22 This was most striking in Bowers v Hardwick, which reads
23 as though the law at issue simply bears on homosexual sex
24 when in fact the Georgia law at issue criminalized both
25 homosexual and heterosexual sodomy.);
- 26 f. Tr 484:24-485:5 (Chauncey: The federal government was
27 slow to respond to the AIDS crisis, and this was in part
28 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

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

- 8 i. Tr 395:6-25 (Chauncey: Like most outsider groups, there
9 have been stereotypes associated with gay people; indeed,
10 a range of groups, including medical professionals and
11 religious groups, have worked in a coordinated way to
12 develop stereotypical images of gay people.);
- 13 j. Tr 397:2-6; Tr 397:25-398:5 (Chauncey: “[I]n some ways,
14 the most dangerous stereotypes for homosexuals really
15 developed between the 1930s and ‘50s, when there were a
16 series of press and police campaigns that identified
17 homosexuals as child molesters.” These press campaigns
18 against assaults on children focused on sex perverts or
19 sex deviants. Through these campaigns, the homosexual
20 emerged as a sex deviant.);
- 21 k. PX2281 George Chauncey, The Postwar Sex Crime Panic, in
22 William Graebner, ed, True Stories from the Past 160, 171
23 (McGraw-Hill 1993): Contains excerpts from wide-
24 circulation Coronet Magazine, Fall 1950: “Once a man
25 assumes the role of homosexual, he often throws off all
26 moral restraints. * * * Some male sex deviants do not
27 stop with infecting their often-innocent partners: they
28 descended through perversions to other forms of
depravity, such as drug addiction, burglary, sadism, and
even murder.”;
- 29 l. Tr 400:18-401:8 (Chauncey: This excerpt from Coronet
30 Magazine, PX2281 at 171, depicts homosexuals as subjects
31 of moral decay. In addition, there is a sense of
32 homosexuality as a disease in which the carriers infect
33 other people. And the term “innocent” pretty clearly
34 indicates that the authors are talking about children.);
- 35 m. PX2281 Chauncey, The Postwar Sex Crime Panic, at 170-171:
36 Contains a statement made by a Special Assistant Attorney
37 General of California in 1949: “The sex pervert, in his
38 more innocuous form, is too frequently regarded as merely
39 a ‘queer’ individual who never hurts anyone but himself.
40 * * * All too often we lose sight of the fact that the
41 homosexual is an inveterate seducer of the young of both
42 sexes * * * and is ever seeking for younger victims.”;
- 43 n. Tr 402:21-24 (Chauncey: These articles (in PX2281) were
44 mostly addressed to adults who were understandably
45 concerned about the safety of their children, and who
46 “were being taught to believe that homosexuals posed a
47 threat to their children.”);

- 1 o. Tr 407:8-408:4 (Chauncey: One of the most enduring
2 legacies of the emergence of these stereotypes is the
3 creation and then reenforcement of a series of demonic
4 images of homosexuals that stay with us today. This fear
5 of homosexuals as child molesters or as recruiters
6 continues to play a role in debates over gay rights, and
7 with particular attention to gay teachers, parents and
8 married couples — people who might have close contact
9 with children.);
- 10 p. Tr 1035:13-1036:19 (Lamb: Social science studies have
11 disproven the hypothesis that gays and lesbians are more
12 likely to abuse children.).
- 13 77. Religious beliefs that gay and lesbian relationships are
14 sinful or inferior to heterosexual relationships harm gays and
15 lesbians.
- 16 a. PX2547 (Nathanson Nov 12, 2009 Dep Tr 102:3-8: Religions
17 teach that homosexual relations are a sin and that
18 contributes to gay bashing); PX2546 (video of same);
- 19 b. PX2545 (Young Nov 13, 2009 Dep Tr 55:15-55:20,
20 56:21-57:7: There is a religious component to the bigotry
21 and prejudice against gay and lesbian individuals); see
22 also id at 61:18-22, 62:13-17 (Catholic Church views
23 homosexuality as "sinful."); PX2544 (video of same);
- 24 c. Tr 1565:2-1566:6 (Segura: "[R]eligion is the chief
25 obstacle for gay and lesbian political progress, and it's
26 the chief obstacle for a couple of reasons. * * * [I]t's
27 difficult to think of a more powerful social entity in
28 American society than the church. * * * [I]t's a very
29 powerful organization, and in large measure they are
30 arrayed against the interests of gays and lesbians. * * *
31 [B]iblical condemnation of homosexuality and the teaching
32 that gays are morally inferior on a regular basis to a
33 huge percentage of the public makes the * * * political
34 opportunity structure very hostile to gay interests.
35 It's very difficult to overcome that.");
- 36 d. PX0390 Video, Ron Prentice Addressing Supporters of
37 Proposition 8, Part I at 0:20-0:40: Prentice explains
38 that "God has led the way" for the Protect Marriage
39 campaign and at 4:00-4:30: Prentice explains that "we do
40 mind" when same-sex couples want to take the name
41 "marriage" and apply it to their relationships, because
42 "that's not what God wanted. * * * It's real basic. * * *
43 It starts at Genesis 2.";
- 44 e. Tr 395:14-18 (Chauncey: Many clergy in churches
45 considered homosexuality a sin, preached against it and
46 have led campaigns against gay rights.);

- 1 f. Tr 440:19-441:2 (Chauncey: The religious arguments that
2 were mobilized in the 1950s to argue against interracial
3 marriage and integration as against God's will are
4 mirrored by arguments that have been mobilized in the
5 Proposition 8 campaign and many of the campaigns since
6 Anita Bryant's "Save Our Children" campaign, which argue
7 that homosexuality itself or gay people or the
8 recognition of their equality is against God's will.);
- 9 g. PX2853 Proposition 8 Local Exit Polls - Election Center
10 2008, CNN at 8: 84 percent of people who attended church
11 weekly voted in favor of Proposition 8;
- 12 h. PX0005 Leaflet, James L Garlow, The Ten Declarations For
13 Protecting Biblical Marriage at 1 (June 25, 2008): "The
14 Bible defines marriage as a covenantal union of one male
15 and one female. * * * We will avoid unproductive
16 arguments with those who, through the use of casuistry
17 and rationalization, revise biblical passages in order to
18 condone the practice of homosexuality or other sexual
19 sins.";
- 20 i. PX0770 Congregation for the Doctrine of Faith,
21 Considerations Regarding Proposals to Give Legal
22 Recognition to Unions Between Homosexual Persons at 2:
23 "Sacred Scripture condemns homosexual acts as 'a serious
24 depravity.'";
- 25 j. PX0301 Catholics for the Common Good, Considerations
26 Regarding Proposals to Give Legal Recognition to Unions
27 Between Homosexual Persons, Excerpts from Vatican
28 Document on Legal Recognition of Homosexual Unions (Nov
29 22, 2009): There are absolutely no grounds for
30 considering homosexual unions to be "in any way similar
31 or even remotely analogous to God's plan for marriage and
32 family"; "homosexual acts go against the natural moral
33 law" and "[u]nder no circumstances can * * * be
34 approved"; "[t]he homosexual inclination is * * *
35 objectively disordered and homosexual practices are sins
36 gravely contrary to chastity"; "[a]llowing children to be
37 adopted by persons living in such unions would actually
38 mean doing violence to these children"; and "legal
39 recognition of homosexual unions * * * would mean * * *
40 the approval of deviant behavior.";
- 41 k. PX0168 Southern Baptist Convention, SBC Resolution, On
42 Same-Sex Marriage at 1 (June 2003): "Legalizing 'same-sex
43 marriage' would convey a societal approval of a
44 homosexual lifestyle, which the Bible calls sinful and
45 dangerous both to the individuals involved and to society
46 at large.";
- 47 l. PX0771 Southern Baptist Convention, Resolution on
48 President Clinton's Gay and Lesbian Pride Month
Proclamation (June 1999): "The Bible clearly teaches that

- 1 homosexual behavior is an abomination and shameful before
2 God.";
- 3 m. PX2839 Evangelical Presbyterian Church, Position Paper on
4 Homosexuality at 3: "[H]omosexual practice is a
5 distortion of the image of God as it is still reflected
6 in fallen man, and a perversion of the sexual
7 relationship as God intended it to be.";
- 8 n. PX2840 The Christian Life — Christian Conduct: As
9 Regards the Institutions of God, Free Methodist Church at
10 5: "Homosexual behavior, as all sexual deviation, is a
11 perversion of God's created order.";
- 12 o. PX2842 A L Barry, What About * * * Homosexuality, The
13 Lutheran Church-Missouri Synod at 1: "The Lord teaches us
14 through His Word that homosexuality is a sinful
15 distortion of His desire that one man and one woman live
16 together in marriage as husband and wife.";
- 17 p. PX2844 On Marriage, Family, Sexuality, and the Sanctity
18 of Life, Orthodox Church of America at 1: "Homosexuality
19 is to be approached as the result of humanity's rebellion
20 against God.";
- 21 q. Tr 1566:18-22 (Segura: "[Proponents' expert] Dr Young
22 freely admits that religious hostility to homosexuals
23 [plays] an important role in creating a social climate
24 that's conducive to hateful acts, to opposition to their
25 interest in the public sphere and to prejudice and
26 discrimination.");
- 27 r. Tr 2676:8-2678:24 (Miller: Miller agrees with his former
28 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.);

- 1 c. Tr 2608:16-18 (Miller: "My view is that at least some
2 people voted for Proposition 8 on the basis of anti-gay
3 stereotypes and prejudice.");
- 4 d. Tr 538:15-539:10 (Chauncey: Chauncey is less optimistic
5 now that same-sex marriage will become common in the
6 United States than he was in 2004. Since 2004, when
7 Chauncey wrote Why Marriage? The History Shaping Today's
8 Debate over Gay Equality, the majority of states have
9 enacted legislation or constitutional amendments that
10 would prohibit same-sex couples from marrying. Some have
11 been enacted by legislative vote, but a tremendous number
12 of popular referenda have enacted these discriminatory
13 measures.);
- 14 e. Tr 424:18-23 (Chauncey: "[T]he wave of campaigns that we
15 have seen against gay marriage rights in the last decade
16 are, in effect, the latest stage and cycle of anti-gay
17 rights campaigns of a sort that I have been describing;
18 that they continue with a similar intent and use some of
19 the same imagery.");
- 20 f. Tr 412:20-413:1 (Chauncey: The series of initiatives we
21 have seen since the mid-to-late 1970s over gay rights are
22 another example of continuing prejudice and hostility.);
- 23 g. Tr 564:4-16 (Chauncey: The term "the gay agenda" was
24 mobilized particularly effectively in the late 1980s and
25 early 1990s in support of initiatives designed to
26 overturn gay rights laws. The term tries to construct
27 the idea of a unitary agenda and that picks up on
28 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
2 the same way." Additionally, "the initiative process
3 could be fertile ground to try to mobilize some of these
4 voters to the polls for that cause.");

5 j. PX0619 The Williams Institute, Chapter 14: Other Indicia
6 of Animus against LGBT People by State and Local
7 Officials, 1980-Present at 9 (2009): The Williams
8 Institute collected negative comments made by politicians
9 about gays and lesbians in all fifty states. An Arizona
10 state representative compared homosexuality to
11 "bestiality, human sacrifice, and cannibalism." A
12 California state senator described homosexuality as "a
13 sickness * * * an uncontrolled passion similar to that
14 which would cause someone to rape.";

15 k. PX0796 Kenneth P Miller, The Democratic Coalition's
16 Religious Divide: Why California Voters Supported Obama
17 but Not Same-Sex Marriage, 119 *Revue Française d'Études*
18 *Américaines* 46, 52 (2009): "In the decade between 1998
19 and 2008, thirty states held statewide elections on state
20 constitutional amendments defining marriage as a union
21 between a man and a woman. * * * Voters approved marriage
22 amendments in all thirty states where they were able to
23 vote on the question, usually by large margins."

24 79. The Proposition 8 campaign relied on fears that children
25 exposed to the concept of same-sex marriage may become gay or
26 lesbian. The reason children need to be protected from same-
27 sex marriage was never articulated in official campaign
28 advertisements. Nevertheless, the advertisements insinuated
that learning about same-sex marriage could make a child gay
or lesbian and that parents should dread having a gay or
lesbian child.

a. Tr 424:24-429:6 (Chauncey: Proposition 8 Official Voter
Guide evoked fears about and contained stereotypical
images of gay people.);

b. PX0710 at RFA No 51: Attorney General admits that some of
the advertising in favor of Proposition 8 was based on
fear of and prejudice against homosexual men and women;

c. Tr 2608:16-18 (Miller: "My view is that at least some
people voted for Proposition 8 on the basis of anti-gay
stereotypes and prejudice.");

- 1 d. PX0577 Frank Schubert and Jeff Flint, Passing Prop 8,
2 Politics at 45-47 (Feb 2009): "[P]assing Proposition 8
3 would depend on our ability to convince voters that
4 same-sex marriage had broader implications for
5 Californians and was not only about the two individuals
6 involved in a committed gay relationship." "We strongly
7 believed that a campaign in favor of traditional marriage
8 would not be enough to prevail." "We probed long and
9 hard in countless focus groups and surveys to explore
10 reactions to a variety of consequences our issue experts
11 identified" and they decided to create campaign messaging
12 focusing on "how this new 'fundamental right' would be
13 inculcated in young children through public schools."
14 "[T]here were limits to the degree of tolerance
15 Californians would afford the gay community. They would
16 entertain allowing gay marriage, but not if doing so had
17 significant implications for the rest of society." "The
18 Prop 8 victory proves something that readers of Politics
19 magazine know very well: campaigns matter.";
- 20 e. PX2150 Mailing leaflet, Protect Marriage: "[F]our
21 activist judges on the Supreme Court in San Francisco
22 ignored four million voters and imposed same-sex marriage
23 on California. Their ruling means it is no longer about
24 'tolerance.' Acceptance of Gay Marriage is Now
25 Mandatory.";
- 26 f. PX0015 Video, Finally the Truth; PX0016 Video, Have You
27 Thought About It?; and PX0091 Video, Everything to Do
28 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

1 history of anti-gay rhetoric. It reproduces many of the
2 major themes of the anti-gay rights campaigns of previous
3 decades and a longer history of anti-gay
4 discrimination.);

- 5 i. PX0116 Video, Massachusetts Parents Oppose Same-Sex
6 Marriage: Robb and Robin Wirthlin, Massachusetts parents,
7 warn that redefining marriage has an impact on every
8 level of society, especially on children, and claim that
9 in Massachusetts homosexuality and gay marriage will soon
10 be taught and promoted in every subject, including math,
11 reading, social studies and spelling;
- 12 j. Tr 530:24-531:11 (Chauncey: The Wirthlins' advertisement
13 implies that the very exposure to the idea of
14 homosexuality threatens children and threatens their
15 sexual identity, as if homosexuality were a choice. In
16 addition, it suggests that the fact that gay people are
17 being asked to be recognized and have their relationships
18 recognized is an imposition on other people, as opposed
19 to an extension of fundamental civil rights to gay and
20 lesbian people.);
- 21 k. PX0391 Ron Prentice Addressing Supporters of Proposition
22 8, Part II at 1:25-1:40: "It's all about education, and
23 how it will be completely turned over, not just
24 incrementally now, but whole hog to the other side.";
- 25 l. Tr 1579:5-21 (Segura: "[O]ne of the enduring * * * tropes
26 of anti-gay argumentation has been that gays are a threat
27 to children. * * * [I]n the Prop 8 campaign [there] was a
28 campaign advertisement saying, * * * 'At school today, I
was told that I could marry a princess too.' And the
underlying message of that is that * * * if Prop 8
failed, the public schools are going to turn my daughter
into a lesbian.");
- m. PX0015 Video, Finally the Truth; PX0099 Video, It's
Already Happened; PX0116 Video, Massachusetts Parents
Oppose Same-Sex Marriage; PX0401 Video, Tony Perkins,
Miles McPherson and Ron Prentice Asking for Support of
Proposition 8: Proposition 8 campaign videos focused on
the need to protect children;
- n. PX0079 Asian American Empowerment Council, Asian American
Community Newsletter & Voter Guide (Oct/Nov 2008):
Children need to be protected from gays and lesbians;
- o. Tr 1913:17-1914:12 (Tam: Tam supported Proposition 8
because he thinks "it is very important that our children
won't grow up to fantasize or think about, Should I marry
Jane or John when I grow up? Because this is very
important for Asian families, the cultural issues, the
stability of the family.");

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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

1 (Touchstone 1999): (Chauncey: One of the earliest
2 anti-gay initiative campaigns used overt messaging of
content similar to the Proposition 8 campaign.);

- 3 c. PX0008 Memorandum, Protect Marriage, New YouTube Video
4 Clarifies Yes on 8 Proponents' Concerns: Education and
Protection of Children is [sic] at Risk (Oct 31, 2008);
5 PX0025 Leaflet, Protect Marriage, Vote YES on Prop 8
(Barack Obama: "I'm not in favor of gay marriage
6 * * *."); PX1565 News Release, Protect Marriage, First
7 Graders Taken to San Francisco City Hall for Gay Wedding
(Oct 11, 2008): Proposition 8 campaign materials warn
8 that unless Proposition 8 passes, children will be
exposed to indoctrination on gay lifestyles. These
materials invoke fears about the gay agenda.

9
10 III

11 CONCLUSIONS OF LAW³

12 Plaintiffs challenge Proposition 8 under the Due Process
13 and Equal Protection Clauses of the Fourteenth Amendment. Each
14 challenge is independently meritorious, as Proposition 8 both
15 unconstitutionally burdens the exercise of the fundamental right to
16 marry and creates an irrational classification on the basis of
17 sexual orientation.

18
19 DUE PROCESS

20 The Due Process Clause provides that no "State [shall]
21 deprive any person of life, liberty, or property, without due
22 process of law." US Const Amend XIV, § 1. Due process protects
23 individuals against arbitrary governmental intrusion into life,
24 liberty or property. See Washington v Glucksberg, 521 US 702, 719-
25 720 (1997). When legislation burdens the exercise of a right
26 deemed to be fundamental, the government must show that the

27
28 ³ To the extent any of the conclusions of law should more properly be considered
findings of fact, they shall be deemed as such.

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

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

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

1 the vast majority of people are heterosexual and have had no reason
2 to challenge the restriction, FF 43. The evidence shows that the
3 movement of marriage away from a gendered institution and toward an
4 institution free from state-mandated gender roles reflects an
5 evolution in the understanding of gender rather than a change in
6 marriage. The evidence did not show any historical purpose for
7 excluding same-sex couples from marriage, as states have never
8 required spouses to have an ability or willingness to procreate in
9 order to marry. FF 21. Rather, the exclusion exists as an
10 artifact of a time when the genders were seen as having distinct
11 roles in society and in marriage. That time has passed.

12 The right to marry has been historically and remains the
13 right to choose a spouse and, with mutual consent, join together
14 and form a household. FF 19-20, 34-35. Race and gender
15 restrictions shaped marriage during eras of race and gender
16 inequality, but such restrictions were never part of the historical
17 core of the institution of marriage. FF 33. Today, gender is not
18 relevant to the state in determining spouses' obligations to each
19 other and to their dependents. Relative gender composition aside,
20 same-sex couples are situated identically to opposite-sex couples
21 in terms of their ability to perform the rights and obligations of
22 marriage under California law. FF 48. Gender no longer forms an
23 essential part of marriage; marriage under law is a union of
24 equals.

25 Plaintiffs seek to have the state recognize their
26 committed relationships, and plaintiffs' relationships are
27 consistent with the core of the history, tradition and practice of
28 marriage in the United States. Perry and Stier seek to be spouses;

1 they seek the mutual obligation and honor that attend marriage, FF
2 52. Zarrillo and Katami seek recognition from the state that their
3 union is "a coming together for better or for worse, hopefully
4 enduring, and intimate to the degree of being sacred." Griswold,
5 381 US at 486. Plaintiffs' unions encompass the historical purpose
6 and form of marriage. Only the plaintiffs' genders relative to one
7 another prevent California from giving their relationships due
8 recognition.

9 Plaintiffs do not seek recognition of a new right. To
10 characterize plaintiffs' objective as "the right to same-sex
11 marriage" would suggest that plaintiffs seek something different
12 from what opposite-sex couples across the state enjoy — namely,
13 marriage. Rather, plaintiffs ask California to recognize their
14 relationships for what they are: marriages.

15 DOMESTIC PARTNERSHIPS DO NOT SATISFY CALIFORNIA'S OBLIGATION TO
16 ALLOW PLAINTIFFS TO MARRY

17 Having determined that plaintiffs seek to exercise their
18 fundamental right to marry under the Due Process Clause, the court
19 must consider whether the availability of Registered Domestic
20 Partnerships fulfills California's due process obligation to same-
21 sex couples. The evidence shows that domestic partnerships were
22 created as an alternative to marriage that distinguish same-sex
23 from opposite-sex couples. FF 53-54; In re Marriage Cases, 183 P3d
24 384, 434 (Cal 2008) (One of the "core elements of th[e] fundamental
25 right [to marry] is the right of same-sex couples to have their
26 official family relationship accorded the same dignity, respect,
27 and stature as that accorded to all other officially recognized
28 family relationships."); id at 402, 434, 445 (By "reserving the

1 historic and highly respected designation of marriage exclusively
2 to opposite-sex couples while offering same-sex couples only the
3 new and unfamiliar designation of domestic partnership," the state
4 communicates the "official view that [same-sex couples'] committed
5 relationships are of lesser stature than the comparable
6 relationships of opposite-sex couples."). Proponents do not
7 dispute the "significant symbolic disparity between domestic
8 partnership and marriage." Doc #159-2 at 6.

9 California has created two separate and parallel
10 institutions to provide couples with essentially the same rights
11 and obligations. Cal Fam Code § 297.5(a). Domestic partnerships
12 are not open to opposite-sex couples unless one partner is at least
13 sixty-two years old. Cal Fam Code § 297(b)(5)(B). Apart from this
14 limited exception — created expressly to benefit those eligible
15 for benefits under the Social Security Act — the sole basis upon
16 which California determines whether a couple receives the
17 designation "married" or the designation "domestic partnership" is
18 the sex of the spouses relative to one another. Compare Cal Fam
19 Code §§ 297-299.6 (domestic partnership) with §§ 300-536
20 (marriage). No further inquiry into the couple or the couple's
21 relationship is required or permitted. Thus, California allows
22 almost all opposite-sex couples only one option — marriage — and
23 all same-sex couples only one option — domestic partnership. See
24 *id.*, FF 53-54.

25 The evidence shows that domestic partnerships do not
26 fulfill California's due process obligation to plaintiffs for two
27 reasons. First, domestic partnerships are distinct from marriage
28 and do not provide the same social meaning as marriage. FF 53-54.

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

1 US 624, 638 (1943). Under strict scrutiny, the state bears the
2 burden of producing evidence to show that Proposition 8 is narrowly
3 tailored to a compelling government interest. Carey v Population
4 Services International, 431 US 678, 686 (1977). Because the
5 government defendants declined to advance such arguments,
6 proponents seized the role of asserting the existence of a
7 compelling California interest in Proposition 8.

8 As explained in detail in the equal protection analysis,
9 Proposition 8 cannot withstand rational basis review. Still less
10 can Proposition 8 survive the strict scrutiny required by
11 plaintiffs' due process claim. The minimal evidentiary
12 presentation made by proponents does not meet the heavy burden of
13 production necessary to show that Proposition 8 is narrowly
14 tailored to a compelling government interest. Proposition 8
15 cannot, therefore, withstand strict scrutiny. Moreover, proponents
16 do not assert that the availability of domestic partnerships
17 satisfies plaintiffs' fundamental right to marry; proponents
18 stipulated that "[t]here is a significant symbolic disparity
19 between domestic partnership and marriage." Doc #159-2 at 6.
20 Accordingly, Proposition 8 violates the Due Process Clause of the
21 Fourteenth Amendment.

22
23 EQUAL PROTECTION

24 The Equal Protection Clause of the Fourteenth Amendment
25 provides that no state shall "deny to any person within its
26 jurisdiction the equal protection of the laws." US Const Amend
27 XIV, § 1. Equal protection is "a pledge of the protection of equal
28 laws." Yick Wo v Hopkins, 118 US 356, 369 (1886). The guarantee

1 of equal protection coexists, of course, with the reality that most
2 legislation must classify for some purpose or another. See Romer v
3 Evans, 517 US 620, 631 (1996). When a law creates a classification
4 but neither targets a suspect class nor burdens a fundamental
5 right, the court presumes the law is valid and will uphold it as
6 long as it is rationally related to some legitimate government
7 interest. See, for example, Heller v Doe, 509 US 312, 319-320
8 (1993).

9 The court defers to legislative (or in this case,
10 popular) judgment if there is at least a debatable question whether
11 the underlying basis for the classification is rational. Minnesota
12 v Clover Leaf Creamery Co, 449 US 456, 464 (1980). Even under the
13 most deferential standard of review, however, the court must
14 "insist on knowing the relation between the classification adopted
15 and the object to be attained." Romer, 517 US at 632; Heller, 509
16 US at 321 (basis for a classification must "find some footing in
17 the realities of the subject addressed by the legislation"). The
18 court may look to evidence to determine whether the basis for the
19 underlying debate is rational. Plyler v Doe, 457 US 202, 228
20 (1982) (finding an asserted interest in preserving state resources
21 by prohibiting undocumented children from attending public school
22 to be irrational because "the available evidence suggests that
23 illegal aliens underutilize public services, while contributing
24 their labor to the local economy and tax money to the state fisc").
25 The search for a rational relationship, while quite deferential,
26 "ensure[s] that classifications are not drawn for the purpose of
27 disadvantaging the group burdened by the law." Romer, 517 US at
28 633. The classification itself must be related to the purported

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

1 sexual orientation; that discrimination continues to the present.
2 FF 74-76. As the case of Perry and the other plaintiffs
3 illustrates, sex and sexual orientation are necessarily
4 interrelated, as an individual's choice of romantic or intimate
5 partner based on sex is a large part of what defines an
6 individual's sexual orientation. See FF 42-43. Sexual orientation
7 discrimination is thus a phenomenon distinct from, but related to,
8 sex discrimination.

9 Proponents argue that Proposition 8 does not target gays
10 and lesbians because its language does not refer to them. In so
11 arguing, proponents seek to mask their own initiative. FF 57.
12 Those who choose to marry someone of the opposite sex —
13 heterosexuals — do not have their choice of marital partner
14 restricted by Proposition 8. Those who would choose to marry
15 someone of the same sex — homosexuals — have had their right to
16 marry eliminated by an amendment to the state constitution.
17 Homosexual conduct and identity together define what it means to be
18 gay or lesbian. See FF 42-43. Indeed, homosexual conduct and
19 attraction are constitutionally protected and integral parts of
20 what makes someone gay or lesbian. Lawrence, 539 US at 579; FF 42-
21 43; see also Christian Legal Society v Martinez, 561 US ___, 130 Sct
22 2971, No 08-1371 Slip Op at 23 ("Our decisions have declined to
23 distinguish between status and conduct in [the context of sexual
24 orientation].") (June 28, 2010) (citing Lawrence, 539 US at 583
25 (O'Connor, J, concurring)).

26 Proposition 8 targets gays and lesbians in a manner
27 specific to their sexual orientation and, because of their
28 relationship to one another, Proposition 8 targets them

1 specifically due to sex. Having considered the evidence, the
2 relationship between sex and sexual orientation and the fact that
3 Proposition 8 eliminates a right only a gay man or a lesbian would
4 exercise, the court determines that plaintiffs' equal protection
5 claim is based on sexual orientation, but this claim is equivalent
6 to a claim of discrimination based on sex.

7
8 STANDARD OF REVIEW

9 As presently explained in detail, the Equal Protection
10 Clause renders Proposition 8 unconstitutional under any standard of
11 review. Accordingly, the court need not address the question
12 whether laws classifying on the basis of sexual orientation should
13 be subject to a heightened standard of review.

14 Although Proposition 8 fails to possess even a rational
15 basis, the evidence presented at trial shows that gays and lesbians
16 are the type of minority strict scrutiny was designed to protect.
17 Massachusetts Board of Retirement v Murgia, 427 US 307, 313 (1976)
18 (noting that strict scrutiny may be appropriate where a group has
19 experienced a "'history of purposeful unequal treatment' or been
20 subjected to unique disabilities on the basis of stereotyped
21 characteristics not truly indicative of their abilities" (quoting
22 San Antonio School District v Rodriguez, 411 US 1, 28 (1973)). See
23 FF 42-43, 46-48, 74-78. Proponents admit that "same-sex sexual
24 orientation does not result in any impairment in judgment or
25 general social and vocational capabilities." PX0707 at RFA No 21.

26 The court asked the parties to identify a difference
27 between heterosexuals and homosexuals that the government might
28 fairly need to take into account when crafting legislation. Doc

1 #677 at 8. Proponents pointed only to a difference between same-
2 sex couples (who are incapable through sexual intercourse of
3 producing offspring biologically related to both parties) and
4 opposite-sex couples (some of whom are capable through sexual
5 intercourse of producing such offspring). Doc #687 at 32-34.
6 Proponents did not, however, advance any reason why the government
7 may use sexual orientation as a proxy for fertility or why the
8 government may need to take into account fertility when
9 legislating. Consider, by contrast, City of Cleburne v Cleburne
10 Living Center, 473 US 432, 444 (1985) (Legislation singling out a
11 class for differential treatment hinges upon a demonstration of
12 "real and undeniable differences" between the class and others);
13 see also United States v Virginia, 518 US 515, 533 (1996)
14 ("Physical differences between men and women * * * are enduring.").
15 No evidence at trial illuminated distinctions among lesbians, gay
16 men and heterosexuals amounting to "real and undeniable
17 differences" that the government might need to take into account in
18 legislating.

19 The trial record shows that strict scrutiny is the
20 appropriate standard of review to apply to legislative
21 classifications based on sexual orientation. All classifications
22 based on sexual orientation appear suspect, as the evidence shows
23 that California would rarely, if ever, have a reason to categorize
24 individuals based on their sexual orientation. FF 47. Here,
25 however, strict scrutiny is unnecessary. Proposition 8 fails to
26 survive even rational basis review.

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1 PROPOSITION 8 DOES NOT SURVIVE RATIONAL BASIS

2 Proposition 8 cannot withstand any level of scrutiny
3 under the Equal Protection Clause, as excluding same-sex couples
4 from marriage is simply not rationally related to a legitimate
5 state interest. One example of a legitimate state interest in not
6 issuing marriage licenses to a particular group might be a scarcity
7 of marriage licenses or county officials to issue them. But
8 marriage licenses in California are not a limited commodity, and
9 the existence of 18,000 same-sex married couples in California
10 shows that the state has the resources to allow both same-sex and
11 opposite-sex couples to wed. See Background to Proposition 8
12 above.

13 Proponents put forth several rationales for Proposition
14 8, see Doc #605 at 12-15, which the court now examines in turn: (1)
15 reserving marriage as a union between a man and a woman and
16 excluding any other relationship from marriage; (2) proceeding with
17 caution when implementing social changes; (3) promoting opposite-
18 sex parenting over same-sex parenting; (4) protecting the freedom
19 of those who oppose marriage for same-sex couples; (5) treating
20 same-sex couples differently from opposite-sex couples; and (6) any
21 other conceivable interest.

22
23 PURPORTED INTEREST #1: RESERVING MARRIAGE AS A UNION BETWEEN A MAN
AND A WOMAN AND EXCLUDING ANY OTHER RELATIONSHIP

24 Proponents first argue that Proposition 8 is rational
25 because it preserves: (1) "the traditional institution of marriage
26 as the union of a man and a woman"; (2) "the traditional social and
27 legal purposes, functions, and structure of marriage"; and (3) "the
28 traditional meaning of marriage as it has always been defined in

1 the English language." Doc #605 at 12-13. These interests relate
2 to maintaining the definition of marriage as the union of a man and
3 a woman for its own sake.

4 Tradition alone, however, cannot form a rational basis
5 for a law. Williams v Illinois, 399 US 235, 239 (1970). The
6 "ancient lineage" of a classification does not make it rational.
7 Heller, 509 US at 327. Rather, the state must have an interest
8 apart from the fact of the tradition itself.

9 The evidence shows that the tradition of restricting an
10 individual's choice of spouse based on gender does not rationally
11 further a state interest despite its "ancient lineage." Instead,
12 the evidence shows that the tradition of gender restrictions arose
13 when spouses were legally required to adhere to specific gender
14 roles. See FF 26-27. California has eliminated all legally-
15 mandated gender roles except the requirement that a marriage
16 consist of one man and one woman. FF 32. Proposition 8 thus
17 enshrines in the California Constitution a gender restriction that
18 the evidence shows to be nothing more than an artifact of a
19 foregone notion that men and women fulfill different roles in civic
20 life.

21 The tradition of restricting marriage to opposite-sex
22 couples does not further any state interest. Rather, the evidence
23 shows that Proposition 8 harms the state's interest in equality,
24 because it mandates that men and women be treated differently based
25 only on antiquated and discredited notions of gender. See FF 32,
26 57.

27 Proponents' argument that tradition prefers opposite-sex
28 couples to same-sex couples equates to the notion that opposite-sex

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

1 a neutral, if not a positive, effect on the institution of marriage
2 and that same-sex couples' marriages would benefit the state. Id.
3 Moreover, the evidence shows that the rights of those opposed to
4 homosexuality or same-sex couples will remain unaffected if the
5 state ceases to enforce Proposition 8. FF 55, 62.

6 The contrary evidence proponents presented is not
7 credible. Indeed, proponents presented no reliable evidence that
8 allowing same-sex couples to marry will have any negative effects
9 on society or on the institution of marriage. The process of
10 allowing same-sex couples to marry is straightforward, and no
11 evidence suggests that the state needs any significant lead time to
12 integrate same-sex couples into marriage. See Background to
13 Proposition 8 above. Consider, by contrast, Cooper v Aaron, 358 US
14 1, 7 (1958) (recognizing that a school district needed time to
15 implement racial integration but nevertheless finding a delay
16 unconstitutional because the school board's plan did not provide
17 for "the earliest practicable completion of desegregation"). The
18 evidence shows that allowing same-sex couples to marry will be
19 simple for California to implement because it has already done so;
20 no change need be phased in. California need not restructure any
21 institution to allow same-sex couples to marry. See FF 55.

22 Because the evidence shows same-sex marriage has and will
23 have no adverse effects on society or the institution of marriage,
24 California has no interest in waiting and no practical need to wait
25 to grant marriage licenses to same-sex couples. Proposition 8 is
26 thus not rationally related to proponents' purported interests in
27 proceeding with caution when implementing social change.

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2 PURPORTED INTEREST #3: PROMOTING OPPOSITE-SEX PARENTING OVER SAME-SEX PARENTING

3 Proponents' largest group of purported state interests
4 relates to opposite-sex parents. Proponents argue Proposition 8:
5 (1) promotes "stability and responsibility in naturally procreative
6 relationships"; (2) promotes "enduring and stable family structures
7 for the responsible raising and care of children by their
8 biological parents"; (3) increases "the probability that natural
9 procreation will occur within stable, enduring, and supporting
10 family structures"; (4) promotes "the natural and mutually
11 beneficial bond between parents and their biological children";
12 (5) increases "the probability that each child will be raised by
13 both of his or her biological parents"; (6) increases "the
14 probability that each child will be raised by both a father and a
15 mother"; and (7) increases "the probability that each child will
16 have a legally recognized father and mother." Doc #605 at 13-14.

17 The evidence supports two points which together show
18 Proposition 8 does not advance any of the identified interests: (1)
19 same-sex parents and opposite-sex parents are of equal quality, FF
20 69-73, and (2) Proposition 8 does not make it more likely that
21 opposite-sex couples will marry and raise offspring biologically
22 related to both parents, FF 43, 46, 51.

23 The evidence does not support a finding that California
24 has an interest in preferring opposite-sex parents over same-sex
25 parents. Indeed, the evidence shows beyond any doubt that parents'
26 genders are irrelevant to children's developmental outcomes. FF
27 70. Moreover, Proposition 8 has nothing to do with children, as
28 Proposition 8 simply prevents same-sex couples from marrying. FF

1 57. Same-sex couples can have (or adopt) and raise children. When
2 they do, they are treated identically to opposite-sex parents under
3 California law. FF 49. Even if California had an interest in
4 preferring opposite-sex parents to same-sex parents — and the
5 evidence plainly shows that California does not — Proposition 8 is
6 not rationally related to that interest, because Proposition 8 does
7 not affect who can or should become a parent under California law.
8 FF 49, 57.

9 To the extent California has an interest in encouraging
10 sexual activity to occur within marriage (a debatable proposition
11 in light of Lawrence, 539 US at 571) the evidence shows Proposition
12 8 to be detrimental to that interest. Because of Proposition 8,
13 same-sex couples are not permitted to engage in sexual activity
14 within marriage. FF 53. Domestic partnerships, in which sexual
15 activity is apparently expected, are separate from marriage and
16 thus codify California's encouragement of non-marital sexual
17 activity. Cal Fam Code §§ 297-299.6. To the extent proponents
18 seek to encourage a norm that sexual activity occur within marriage
19 to ensure that reproduction occur within stable households,
20 Proposition 8 discourages that norm because it requires some sexual
21 activity and child-bearing and child-rearing to occur outside
22 marriage.

23 Proponents argue Proposition 8 advances a state interest
24 in encouraging the formation of stable households. Instead, the
25 evidence shows that Proposition 8 undermines that state interest,
26 because same-sex households have become less stable by the passage
27 of Proposition 8. The inability to marry denies same-sex couples
28 the benefits, including stability, attendant to marriage. FF 50.

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 PURPORTED INTEREST #4: PROTECTING THE FREEDOM OF THOSE WHO OPPOSE
11 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 PURPORTED INTEREST #5: TREATING SAME-SEX COUPLES DIFFERENTLY FROM
13 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

1 interest in treating couples differently; thus, these interests do
2 not provide a rational basis supporting Proposition 8.

3 In addition, proponents appear to claim that Proposition
4 8 advances a state interest in easing administrative burdens
5 associated with issuing and recognizing marriage licenses. Under
6 precedents such as Craig v Boren, "administrative ease and
7 convenience" are not important government objectives. 429 US 190,
8 198 (1976). Even assuming the state were to have an interest in
9 administrative convenience, Proposition 8 actually creates an
10 administrative burden on California because California must
11 maintain a parallel institution for same-sex couples to provide the
12 equivalent rights and benefits afforded to married couples. See FF
13 53. Domestic partnerships create an institutional scheme that must
14 be regulated separately from marriage. Compare Cal Fam Code §§
15 297-299.6 with Cal Fam Code §§ 300-536. California may determine
16 whether to retain domestic partnerships or eliminate them in the
17 absence of Proposition 8; the court presumes, however, that as long
18 as Proposition 8 is in effect, domestic partnerships and the
19 accompanying administrative burden will remain. Proposition 8 thus
20 hinders rather than advances administrative convenience.

21
22 PURPORTED INTEREST #6: THE CATCHALL INTEREST

23 Finally, proponents assert that Proposition 8 advances
24 "[a]ny other conceivable legitimate interests identified by the
25 parties, amici, or the court at any stage of the proceedings." Doc
26 #605 at 15. But proponents, amici and the court, despite ample
27 opportunity and a full trial, have failed to identify any rational
28 basis Proposition 8 could conceivably advance. Proponents,

1 represented by able and energetic counsel, developed a full trial
2 record in support of Proposition 8. The resulting evidence shows
3 that Proposition 8 simply conflicts with the guarantees of the
4 Fourteenth Amendment.

5 Many of the purported interests identified by proponents
6 are nothing more than a fear or unarticulated dislike of same-sex
7 couples. Those interests that are legitimate are unrelated to the
8 classification drawn by Proposition 8. The evidence shows that, by
9 every available metric, opposite-sex couples are not better than
10 their same-sex counterparts; instead, as partners, parents and
11 citizens, opposite-sex couples and same-sex couples are equal. FF
12 47-50. Proposition 8 violates the Equal Protection Clause because
13 it does not treat them equally.

14 A PRIVATE MORAL VIEW THAT SAME-SEX COUPLES ARE INFERIOR TO
15 OPPOSITE-SEX COUPLES IS NOT A PROPER BASIS FOR LEGISLATION

16 In the absence of a rational basis, what remains of
17 proponents' case is an inference, amply supported by evidence in
18 the record, that Proposition 8 was premised on the belief that
19 same-sex couples simply are not as good as opposite-sex couples.
20 FF 78-80. Whether that belief is based on moral disapproval of
21 homosexuality, animus towards gays and lesbians or simply a belief
22 that a relationship between a man and a woman is inherently better
23 than a relationship between two men or two women, this belief is
24 not a proper basis on which to legislate. See Romer, 517 US at
25 633; Moreno, 413 US at 534; Palmore v Sidoti, 466 US 429, 433
26 (1984) ("[T]he Constitution cannot control [private biases] but
27 neither can it tolerate them.").

1 The evidence shows that Proposition 8 was a hard-fought
2 campaign and that the majority of California voters supported the
3 initiative. See Background to Proposition 8 above, FF 17-18, 79-
4 80. The arguments surrounding Proposition 8 raise a question
5 similar to that addressed in Lawrence, when the Court asked whether
6 a majority of citizens could use the power of the state to enforce
7 “profound and deep convictions accepted as ethical and moral
8 principles” through the criminal code. 539 US at 571. The
9 question here is whether California voters can enforce those same
10 principles through regulation of marriage licenses. They cannot.
11 California’s obligation is to treat its citizens equally, not to
12 “mandate [its] own moral code.” Id (citing Planned Parenthood of
13 Southeastern Pa v Casey, 505 US 833, 850, (1992)). “[M]oral
14 disapproval, without any other asserted state interest,” has never
15 been a rational basis for legislation. Lawrence, 539 US at 582
16 (O'Connor, J, concurring). Tradition alone cannot support
17 legislation. See Williams, 399 US at 239; Romer, 517 US at 635;
18 Lawrence, 539 US at 579.

19 Proponents’ purported rationales are nothing more than
20 post-hoc justifications. While the Equal Protection Clause does
21 not prohibit post-hoc rationales, they must connect to the
22 classification drawn. Here, the purported state interests fit so
23 poorly with Proposition 8 that they are irrational, as explained
24 above. What is left is evidence that Proposition 8 enacts a moral
25 view that there is something “wrong” with same-sex couples. See FF
26 78-80.

27 The evidence at trial regarding the campaign to pass
28 Proposition 8 uncloaks the most likely explanation for its passage:

1 a desire to advance the belief that opposite-sex couples are
2 morally superior to same-sex couples. FF 79-80. The campaign
3 relied heavily on negative stereotypes about gays and lesbians and
4 focused on protecting children from inchoate threats vaguely
5 associated with gays and lesbians. FF 79-80; See PX0016 Video,
6 Have You Thought About It? (video of a young girl asking whether
7 the viewer has considered the consequences to her of Proposition 8
8 but not explaining what those consequences might be).

9 At trial, proponents' counsel attempted through cross-
10 examination to show that the campaign wanted to protect children
11 from learning about same-sex marriage in school. See PX0390A
12 Video, Ron Prentice Addressing Supporters of Proposition 8,
13 Excerpt; Tr 132:25-133:3 (proponents' counsel to Katami: "But the
14 fact is that what the Yes on 8 campaign was pointing at, is that
15 kids would be taught about same-sex relationships in first and
16 second grade; isn't that a fact, that that's what they were
17 referring to?"). The evidence shows, however, that Proposition 8
18 played on a fear that exposure to homosexuality would turn children
19 into homosexuals and that parents should dread having children who
20 are not heterosexual. FF 79; PX0099 Video, It's Already Happened
21 (mother's expression of horror upon realizing her daughter now
22 knows she can marry a princess).

23 The testimony of George Chauncey places the Protect
24 Marriage campaign advertisements in historical context as echoing
25 messages from previous campaigns to enact legal measures to
26 disadvantage gays and lesbians. FF 74, 77-80. The Protect
27 Marriage campaign advertisements ensured California voters had
28 these previous fear-inducing messages in mind. FF 80. The

1 evidence at trial shows those fears to be completely unfounded. FF
2 47-49, 68-73, 76-80.

3 Moral disapproval alone is an improper basis on which to
4 deny rights to gay men and lesbians. The evidence shows
5 conclusively that Proposition 8 enacts, without reason, a private
6 moral view that same-sex couples are inferior to opposite-sex
7 couples. FF 76, 79-80; Romer, 517 US at 634 ("[L]aws of the kind
8 now before us raise the inevitable inference that the disadvantage
9 imposed is born of animosity toward the class of persons
10 affected."). Because Proposition 8 disadvantages gays and lesbians
11 without any rational justification, Proposition 8 violates the
12 Equal Protection Clause of the Fourteenth Amendment.

13
14 CONCLUSION

15 Proposition 8 fails to advance any rational basis in
16 singling out gay men and lesbians for denial of a marriage license.
17 Indeed, the evidence shows Proposition 8 does nothing more than
18 enshrine in the California Constitution the notion that opposite-
19 sex couples are superior to same-sex couples. Because California
20 has no interest in discriminating against gay men and lesbians, and
21 because Proposition 8 prevents California from fulfilling its
22 constitutional obligation to provide marriages on an equal basis,
23 the court concludes that Proposition 8 is unconstitutional.

24 \\
25 \\
26 \\
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29

REMEDIES

1
2 Plaintiffs have demonstrated by overwhelming evidence
3 that Proposition 8 violates their due process and equal protection
4 rights and that they will continue to suffer these constitutional
5 violations until state officials cease enforcement of Proposition
6 8. California is able to issue marriage licenses to same-sex
7 couples, as it has already issued 18,000 marriage licenses to same-
8 sex couples and has not suffered any demonstrated harm as a result,
9 see FF 64-66; moreover, California officials have chosen not to
10 defend Proposition 8 in these proceedings.

11 Because Proposition 8 is unconstitutional under both the
12 Due Process and Equal Protection Clauses, the court orders entry of
13 judgment permanently enjoining its enforcement; prohibiting the
14 official defendants from applying or enforcing Proposition 8 and
15 directing the official defendants that all persons under their
16 control or supervision shall not apply or enforce Proposition 8.
17 The clerk is DIRECTED to enter judgment without bond in favor of
18 plaintiffs and plaintiff-intervenors and against defendants and
19 defendant-intervenors pursuant to FRCP 58.

20
21 IT IS SO ORDERED.

22
23 

24 VAUGHN R WALKER
25 United States District Chief Judge
26
27
28