

1 COOPER AND KIRK, PLLC
 Charles J. Cooper (DC Bar No. 248070)*
 2 *ccooper@cooperkirk.com*
 David H. Thompson (DC Bar No. 450503)*
 3 *dthompson@cooperkirk.com*
 Howard C. Nielson, Jr. (DC Bar No. 473018)*
 4 *hnielson@cooperkirk.com*
 Nicole J. Moss (DC Bar No. 472424)*
 5 *nmoss@cooperkirk.com*
 Peter A. Patterson (OH Bar No. 0080840)*
 6 *ppatterson@cooperkirk.com*
 1523 New Hampshire Ave. N.W., Washington, D.C. 20036
 7 Telephone: (202) 220-9600, Facsimile: (202) 220-9601

8 LAW OFFICES OF ANDREW P. PUGNO
 Andrew P. Pugno (CA Bar No. 206587)
 9 *andrew@pugnotlaw.com*
 101 Parkshore Drive, Suite 100, Folsom, California 95630
 10 Telephone: (916) 608-3065, Facsimile: (916) 608-3066

11 ALLIANCE DEFENSE FUND
 Brian W. Raum (NY Bar No. 2856102)*
 12 *braum@telladf.org*
 James A. Campbell (OH Bar No. 0081501)*
 13 *jcampbell@telladf.org*
 15100 North 90th Street, Scottsdale, Arizona 85260
 14 Telephone: (480) 444-0020, Facsimile: (480) 444-0028

15 ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH,
 GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON,
 16 and PROTECTMARRIAGE.COM – YES ON 8, A
 PROJECT OF CALIFORNIA RENEWAL

17 * Admitted *pro hac vice*

18 **UNITED STATES DISTRICT COURT**
 19 **NORTHERN DISTRICT OF CALIFORNIA**

20 KRISTIN M. PERRY, SANDRA B. STIER, PAUL
 21 T. KATAMI, and JEFFREY J. ZARRILLO,

22 Plaintiffs,

23 CITY AND COUNTY OF SAN FRANCISCO,

24 Plaintiff-Intervenor,

25 v.

26 ARNOLD SCHWARZENEGGER, in his official
 27 capacity as Governor of California; EDMUND G.
 BROWN, JR., in his official capacity as Attorney
 28 General of California; MARK B. HORTON, in his

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS’
 RESPONSE TO AMICUS
 SUBMISSIONS**

1 official capacity as Director of the California
2 Department of Public Health and State Registrar of
3 Vital Statistics; LINETTE SCOTT, in her official
4 capacity as Deputy Director of Health Information
5 & Strategic Planning for the California Department
6 of Public Health; PATRICK O'CONNELL, in his
7 official capacity as Clerk-Recorder for the County
8 of Alameda; and DEAN C. LOGAN, in his official
9 capacity as Registrar-Recorder/County Clerk for
10 the County of Los Angeles,

11
12
13 Defendants,

14 and

15 PROPOSITION 8 OFFICIAL PROPONENTS
16 DENNIS HOLLINGSWORTH, GAIL J.
17 KNIGHT, MARTIN F. GUTIERREZ, HAK-
18 SHING WILLIAM TAM, and MARK A.
19 JANSSON; and PROTECTMARRIAGE.COM –
20 YES ON 8, A PROJECT OF CALIFORNIA
21 RENEWAL,

22
23 Defendant-Intervenors.
24
25
26
27
28

Additional Counsel for Defendant-Intervenors

ALLIANCE DEFENSE FUND

Timothy Chandler (CA Bar No. 234325)

tchandler@telladf.org

101 Parkshore Drive, Suite 100, Folsom, California 95630

Telephone: (916) 932-2850, Facsimile: (916) 932-2851

Jordan W. Lorence (DC Bar No. 385022)*

jlorence@telladf.org

Austin R. Nimocks (TX Bar No. 24002695)*

animocks@telladf.org

801 G Street NW, Suite 509, Washington, D.C. 20001

Telephone: (202) 393-8690, Facsimile: (202) 347-3622

* Admitted *pro hac vice*

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1 http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf and original at
2 <http://www.assemblee-nationale.fr/12/pdf/rap-info/i2832.pdf>); and Marriage Equality Amendment
3 Bill 2009, Australian Senate Legal and Constitutional Affairs Legislation Committee Report
4 (available at
5 http://www.aph.gov.au/senate/committee/legcon_ctte/marriage_equality/report/report.pdf)).

6 While gay and lesbian individuals can have children through adoption, surrogacy, or artificial
7 insemination, these processes all require planning, forethought, and the involvement of a third
8 party, distinguishing them from the natural way in which opposite-sex couples alone can become
9 parents. *See* Jan. 13, 2010 Tr. of Hr'g at 640:13-641:1.

10 There are also practical differences between same-sex and opposite-sex couples related to
11 this biological difference. For one, research shows that individuals in gay couples are less likely
12 to be monogamous than their counterparts in heterosexual couples. *See* Jan. 13, 2010 Tr. of Hr'g
13 at 617:8-16; *see also* Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y.
14 TIMES, Jan. 29, 2010, at 17A. For another, only a small portion of gay and lesbian individuals
15 have elected to enter into marriage in jurisdictions that provide them with that option. *See*
16 Statistics Belgium, Population Trend by Marital Status: By Year 1990-2008 (DIX2427, 2427a);
17 Statistics Belgium, Homosexual Marriages 2004-2008 (DIX2644, 2644a); Jan. 13, 2010 Tr. of
18 Hr'g at 636:4-10; Statistics Netherlands, Statistical Yearbook 2009 at 192 (DIX2430); Statistics
19 Netherlands, Marriages and Partnership Registrations 1950-2008 (DIX1887); Jan. 13, 2010 Tr. of
20 Hr'g at 638:25-639:13. Because same-sex couples, unlike opposite-sex couples, cannot naturally
21 conceive children, these behaviors have different consequences for the individuals and couples
22 involved—and for society.

23 Amici, of course, cannot dispute the facts of biology. The American Civil Liberties
24 Union, Lambda Legal Defense and Education Fund, Inc., and National Center for Lesbian Rights
25 (collectively, "ACLU"), however, argue that "California recognizes that same-sex couples are
26 similarly situated to different-sex couples." Doc # 552 at 7.

27 This argument cannot be squared with Proposition 8. By virtue of that amendment,
28 California's Constitution—"the ultimate expression of the people's will," *In re Marriage Cases*,

1 183 P.3d 384, 450 (Cal. 2008)—now provides that “Only marriage between a man and a woman
 2 is valid or recognized in California.” CAL. CONST. art. I, sec. 7.5. While a 4-3 decision of the
 3 California Supreme Court, overruling the California Court of Appeals, held that same-sex and
 4 opposite-sex couples were similarly situated with respect to marriage because both “consist of
 5 pairs of individuals who wish to enter into a formal, legally binding and officially recognized,
 6 long-term family relationship that affords the same rights and privileges and imposes the same
 7 obligations and responsibilities,” *Marriage Cases*, 183 P.3d at 435 n.54, that determination has
 8 itself been overruled by the ultimate constitutional authority in California—the people themselves.
 9 What is more, it ignores the critical biological difference between same-sex and opposite-sex
 10 couples. Surely it cannot be the case that a faulty, superseded state constitutional determination
 11 establishes an issue of federal constitutional law.

12 It also is of no moment that California provides same-sex couples with the rights,
 13 protections, and benefits of married couples through domestic partnerships. *See* CAL. FAM. CODE
 14 § 297.5.¹ If anything, the creation of a separate domestic partnership regime indicates that
 15 California maintains that same-sex and opposite-sex couples are *not* similarly situated with
 16 respect to marriage.²

17 **II. Gays and Lesbians Are Not Politically Powerless**

18
 19 ¹Justice King argues that, due to unresolved legal issues raised by same-sex parenting, the
 20 children of same-sex domestic partners are currently not vested with all the rights of the children of
 21 married couples. *See* Doc # 556 at 13. To the extent he is right, it is difficult to see how permitting
 22 same-sex couples to marry would remedy the situation, as California law already provides that
 23 “[t]he rights and obligations of registered domestic partners with respect to a child of either shall be
 24 the same as those of spouses.” CAL. FAM. CODE § 297.5(d). Justice King also observes that
 25 California domestic partnerships will not necessarily be recognized by other states, Doc # 556 at 15;
 the same, of course, is true with same-sex marriages should California permit them. *See* 28 U.S.C.
 § 1738C. Indeed, it appears that some states treat out-of-state domestic partners preferably to same-
 sex spouses. *See, e.g.*, WASH. REV. CODE § 26.60.090 (“A legal union of two persons of the same
 sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially
 equivalent to a domestic partnership under this chapter, shall be recognized as a valid domestic
 partnership in this state and shall be treated the same as a domestic partnership registered in this
 state regardless of whether it bears the name domestic partnership.”).

26 ²Furthermore, polling data shows that although Californians are broadly supportive of gay and
 27 lesbian rights, a majority of them favor limiting marriage to opposite-sex couples. *See* The Field
 28 Poll, Release #2189, *Greater Acceptance of Homosexual Relations and Support for Anti-Discriminatory Policies Toward Gays and Lesbians, But Californians Remain Narrowly Opposed to Allowing Same-Sex Couples to Marry*, March 22, 2006 (attached as Exhibit A). This bespeaks a recognition that same-sex and opposite-sex couples differ with respect to the purposes of marriage.

1 Should the Court determine that same-sex couples and opposite-sex couples are similarly
2 situated for purposes of marriage, it must then decide the level of Equal Protection scrutiny to
3 apply to Proposition 8. One factor in this determination is whether gays and lesbians are
4 politically powerless. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563,
5 573 (9th Cir. 1990). The Asian Law Caucus *et al.* attack Proponents' articulation of political
6 powerlessness as the inability to "attract the attention of the lawmakers," *Cleburne*, 473 U.S. at
7 445, as "rigid and narrow." Doc # 567 at 13. As an initial matter, this is how the Supreme Court
8 described political powerlessness in *Cleburne*. The Court favorably contrasted this conception
9 with one that looked to whether a minority could "assert direct control over the legislature"; if that
10 were the test, the Court explained, "much economic and social legislation would now be suspect."
11 *Cleburne*, 473 U.S. at 445.

12 Furthermore, the *Cleburne* test has been applied by the federal courts in this context. In
13 *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), the court held that "homosexuals are proving
14 that they are not without growing political power. It cannot be said 'they have no ability to attract
15 the attention of the lawmakers.'" *Id.* at 466 (quoting *Cleburne*). And, in a decision that is
16 binding on this Court, the Ninth Circuit held that "homosexuals are not without political power;
17 they have the ability to and do 'attract the attention of the lawmakers.'" *High Tech Gays*, 895
18 F.2d at 574 (quoting *Cleburne*).

19 Nor is the *Cleburne* test "rigid and narrow." Proponents do not dispute the relevance of an
20 "empirically-based analysis" of a particular group's political power in determining whether that
21 group has the ability to attract the attention of the lawmakers. Doc # 567 at 11; *see* Jan. 25, 2010
22 Tr. of Hr'g at 2437:9-14.³ To that end, we adduced evidence at trial showing, among other things,

23
24 ³ The Asian Law Caucus cites to the history of discrimination experienced by gays and lesbians,
25 but that history is not directly relevant to the current level of political power enjoyed by gays and
26 lesbians. As one indicator of such discrimination, the Asian Law Caucus cites a 2005 survey which
27 found that 39% of LGBT employees experienced sexual-orientation discrimination. *See* Doc # 567
28 at 20. That survey's participants, however, were hardly a representative sample; they were drawn
"through an invitation to members of the Lambda Legal online community." Lambda Legal and
Deloitte Financial Advisory Services LLP, 2005 Workplace Fairness Survey at 4 (2006). Professor
Badgett, at any rate, has written that "the relative invisibility of sexual orientation as a defining
characteristic would make it difficult, if not impossible, for an employer to consciously exploit
differences in sexual orientation among workers," and has recognized that "[l]esbians and gay
(Continued)

1 that gays and lesbians have been increasingly successful at having their priorities considered—and
 2 often adopted—through the legislative process, *see* Jan. 25, 2010 Tr. of Hr’g 2472:17-19; *id.* at
 3 2482:19-2483:14, that gays and lesbians have been successful in raising money in support of their
 4 political goals, *see id.* at 2438:7-2439:3,⁴ that gays and lesbians have strong political allies, *see id.*
 5 at 2442:2-2443:12, and that gays and lesbians have had success electing candidates of their
 6 choice, *see id.* at 2470:11-2471:9.

7 This latter consideration—the ability of a group to elect candidates of their choice—is
 8 *broader* than the related consideration advanced by the Asian Law Caucus, *i.e.*, the ability of
 9 members of a minority to attain public office themselves. *See* Doc # 567 at 17-18; *see also* Jan.
 10 20, 2010 Tr. of Hr’g at 1720:24-1721:10. At any rate, the Asian Law Caucus has not
 11 demonstrated that gays and lesbians are “*vastly* under-represented in this Nation’s decisionmaking
 12 councils.” *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality) (emphasis added).⁵
 13 In California, for example, the statistics cited by the Asian Law Caucus indicate that 3.33 percent
 14 of California’s legislators are openly gay or lesbian, *see* Doc # 567 at 17, while the Williams

15 (Cont’d)
 16 people are actively integrated into the economic life of the United States.” M.V. LEE BADGETT,
 17 MONEY, MYTHS & CHANGE: THE ECONOMIC LIVES OF LESBIANS & GAY MEN 43-44, 171 (2001)
 (DIX950).

18 ⁴The ability to raise significant sums of money in support of their political goals belies the
 19 assertion that gays and lesbians are hampered by an “organizational problem.” Doc # 567 at 10.
 20 Indeed, in 2008 alone, eight lesbian and gay rights organizations raised over \$186 million. *See* Gay
 21 & Lesbian Alliance Against Defamation, Performance Report, at 17 (2008) (reporting \$14,178,095
 22 in total revenue), *available at* <http://www.glaad.org/Document.Doc?id=88>; Gay Men’s Health
 23 Crisis, Annual Report: Web of Truth, at 14 (2008) (DIX1311) (reporting \$31,031,025 in total
 24 support and revenue for 2008); Gay, Lesbian, & Straight Educ. Network, Financial Statements, at 3
 25 (2008) (DIX1314) (reporting \$12,751,127 in total public support and revenue); Human Rights
 26 Campaign, Annual Report: Politics of the Possible, at 14 (2008) (DIX1329) (reporting combined
 27 total revenue and support for the Human Rights Campaign and the Human Rights Campaign
 28 Foundation of \$43,947,191); L.A. Gay & Lesbian Ctr., Annual Report (2008) (DIX1336) (reporting
 \$48,465,012 in total public support and other revenue); Lambda Legal, Annual Report: Equality: In
 Focus, at 46 (2008) (DIX1321) (reporting \$25,871,414 in total support and revenue); Nat’l Ctr. For
 Lesbian Rights, Annual Report, at 4 (2008) (reporting \$6,618,232 in total public support and
 revenue), *available at*
http://www.nclrights.org/site/DocServer/NCLR_2008_Annual_Report_Web_vNo_Donors.pdf?docID=6321;
 Parents, Families, & Friends of Lesbians & Gays, Inc., Financial Statements, at 3 (2008)
 (reporting \$3,334,842 in total revenue and support), *available at*
<http://community.pflag.org/Document.Doc?id=191>.

⁵This *Frontiero* opinion, of course, commanded only a plurality of the Court. It would have
 extended strict scrutiny to sex discrimination, *see id.* at 688, an approach that has never commanded
 a majority of the Court, *see, e.g., United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).

1 Institute in 2008 estimated that 3.2 percent of California’s adult population is lesbian, gay, or
2 bisexual, *see* Gary J. Gates & Christopher Ramos, Williams Inst., *Census Snapshot: California*
3 *Lesbian, Gay, & Bisexual Population* at 1 (2008) (DIX1287). As another example, with the
4 recent election of an openly gay man as the speaker of the Rhode Island House of Representatives,
5 two out of the 50 states have chosen openly gay men to serve as the speaker of their lower
6 legislative body. *See* Ray Henry, *R.I. Officials Elect 1st Openly Gay Speaker*, BOSTON GLOBE,
7 Feb. 12, 2010, Metro Pg. 3; Jan. 20, 2010 Tr. of Hr’g at 1662:8-22.

8 The Asian Law Caucus also asserts that Proponents’ approach to political powerlessness
9 would “mean the end to suspect classification of any kind, including those relating to race and
10 gender.” Doc # 567 at 13. At the time the Supreme Court decided *Cleburne* in 1985, however, it
11 was already well-established that racial and gender classifications were subject to heightened
12 scrutiny under the Equal Protection Clause. *See Cleburne*, 473 U.S. at 440-41. The Supreme
13 Court was not calling into question its settled precedent on race and gender.

14 With respect to race, moreover, “[t]he clear and central purpose of the Fourteenth
15 Amendment was to eliminate all official sources of invidious racial discrimination in the States.”
16 *Loving v. Virginia*, 388 U.S. 1, 10 (1967). With respect to women, they, like African-Americans
17 (and unlike gays and lesbians), were at one time disenfranchised. *See Virginia*, 518 U.S. at 531;
18 *cf. Foley v. Connelie*, 435 U.S. 291, 294 (1978) (“[T]he Court has treated certain restrictions on
19 aliens with heightened judicial solicitude, a treatment deemed necessary since aliens ... have no
20 direct voice in the political process.”) (quotation marks and citation omitted). And women, of
21 course, are not a minority group at all. This certainly impacts the probative value of measures
22 such as legislative successes and representation in Congress—with only 14 female members, for
23 example, women certainly were vastly under-represented in that body in 1973. *See Frontiero*, 411
24 U.S. at 686 n.17; *see also Cleburne*, 473 U.S. at 475 (“Any *minority* can be said to be powerless
25 to assert direct control over the legislature.”) (emphasis added). The Asian Law Caucus, at any
26 rate, has not undertaken an exhaustive review of women’s ability to attract the attention of
27 lawmakers when the Court began applying heightened scrutiny to gender discrimination in the
28 1970s.

1 In sum, gays and lesbians have demonstrated that they wield substantial power in the
2 political process. In light of the evidence, it certainly cannot be said that they “command
3 extraordinary protection from the majoritarian political process.” *San Antonio Indep. Sch. Dist. v.*
4 *Rodriguez*, 411 U.S. 1, 28 (1973).

5 **III. Harms Allegedly Caused by Proposition 8 Are Unproven and Legally Irrelevant**

6 Several amici assert that Proposition 8 imposes costs on same-sex couples and their
7 children that outweigh its benefits. As Proponents have explained, such cost-benefit analysis is
8 the province of the democratic process, not the courts: “[E]qual protection is not a license for
9 courts to judge the wisdom, fairness, or logic of legislative choices.” *FCC v. Beach Commc’ns*,
10 508 U.S. 307, 313 (1993); *see also Board of Trustees v. Garrett*, 531 U.S. 356, 367-68 (2001).
11 Instead, “[i]n areas of social and economic policy,” a classification such as the one in Proposition
12 8 “that neither proceeds along suspect lines nor infringes fundamental constitutional rights must
13 be upheld against equal protection challenge if there is any reasonably conceivable state of facts
14 that could provide a rational basis for the classification.” *Beach Communications*, 508 U.S. at
15 313. The claims of harm asserted by amici, moreover, do not withstand scrutiny.

16 *First*, several amici argue that California’s system of reserving marriage to opposite-sex
17 couples while offering legal recognition to same-sex couples through domestic partnerships
18 stigmatizes gays and lesbians, and thus harms them and their children. *See* Doc # 537-1 at 15-18;
19 Doc # 550-1 at 9-18; Doc # 552 at 16 n.12; Doc # 561 at 20; Doc # 563 at 12-18; Doc # 574 at 17-
20 18. This argument rests on the assumptions that same-sex couples and opposite-sex couples are
21 similarly situated with respect to marriage and that the purpose of marriage is to provide official
22 approval of heterosexuals. Proponents have already explained why these assumptions are faulty.
23 Treating different things differently is neither discriminatory nor stigmatic. Indeed, as some
24 advocates for gay and lesbian rights have recognized, treating same-sex couples as if they are the
25 same as opposite-sex couples may pose the greater risk to the dignity of gays and lesbians. *See*
26 Jeffrey A. Redding, *Proposition 8 & the Future of American Same-Sex Marriage Activism*, 14
27 NEXUS J. OP. 113, 122-23 (2009) (DIX1020); Paula Ettelbrick, *Since When is Marriage a Path to*
28 *Liberation?*, in WILLIAM B. RUBENSTEIN, *LESBIANS, GAY MEN, AND THE LAW* at 403, 405 (1993)

1 (DIX1025); Mark Vernon, *We Don't Need Gay Marriage*, GUARDIAN UNLIMITED, July 4, 2009
 2 (DIX1026). It is thus unsurprising that not all gays and lesbians support same-sex marriage
 3 recognition. *See, e.g.*, Lynn Vincent, *The Gay Point of View, In Weighing in on California's*
 4 *Proposition 8, Voices from San Diego's Gay Mecca are Hardly of One Mind on the Measure*,
 5 WORLD MAG.COM, Nov. 4, 2008 (DIX1066); Elaine Herscher, *Most Gays Embrace Right to*
 6 *Marry, But Others Ask, Why?*, S.F. CHRON., Feb. 22, 2000 at A13 (DIX1064); Martin Wisckol,
 7 *Foes See a Veil on Prop. 22*, O.C. REG., Jan. 3, 2000 at A01 (DIX1474); Tammy Bruce,
 8 *Respecting Marriage & Equal Rights*, MENSNEWS DAILY.COM, Feb. 25, 2004 (DIX1063).

9 As a practical matter, the notion that domestic partnerships are stigmatic is belied by the
 10 fact that they have been conceived, sponsored, and championed by gays and lesbians and their
 11 allies. *See* Equality Cal., *AB 205 Fact Sheet* (Aug. 18, 2003) (DIX1067); Press Release, Equality
 12 Cal., *Governor Davis Makes History With Signature on Domestic Partner Rights &*
 13 *Responsibilities Act of 2003* (Sept. 19, 2003) (DIX1068); Answer Brief of State of California &
 14 the Attorney General to Opening Briefs on the Merits at 46, *In re Marriage Cases*, 43 Cal. 4th 757
 15 (2008) (DIX1034).⁶ This endorsement also refutes the notion that gays and lesbians are worse off
 16 with the option to enter a domestic partnership than if the state provided their relationships with
 17 no recognition whatsoever. *See, e.g.*, Doc # 552 at 16 n.13; *see also* Jan. 13, 2010 Tr. of Hr'g at
 18 610:12-13. And if a particular couple feels that entering a domestic partnership would harm their
 19 relationship in some way, they are not required to form one. Furthermore, when given the choice
 20 between marriage and an alternative institution such as domestic partnerships, many same-sex
 21 couples have chosen the latter. *See* California Domestic Partnership Statistics (DIX2647);
 22 Statistics Netherlands, *Statistical Yearbook 2009* at 200 (DIX2430); Statistics Belgium, *Contrats*
 23 *de Cohabitation et Cessation de Contrats de Cohabitation, Par Region, 2000-2007* (2009)

24
 25 ⁶ *See also, e.g.*, *Toward Perfect Unions: California's New Domestic Partnership Law Is Second*
 26 *Only to Vermont's*, THE ADVOCATE, Oct. 14, 2003; Gregg Jones and Nancy Vogel, *Domestic*
 27 *Partners Law Expands Gay Rights*, L.A. TIMES, Sept. 20, 2003 at A1 (DIX1476); Jon Ortiz, *Davis:*
 28 *I'll Sign Gay Rights Bill*, SACRAMENTO BEE, Aug. 17, 2003 at A3 (DIX1477); Bill Ainsworth, *Bill*
Affords New Rights to Same-Sex Couples, SAN DIEGO UNION-TRIBUNE, June 5, 2003 at A3
 (DIX1480); *Gay Rights Groups Praise New California Laws*, THE GLOBE AND MAIL, Oct. 4, 1999 at
 A16 (DIX1481).

1 (DIX1258; English translation attached as Exhibit B).

2 Indeed, consistent with these practical realities, although Plaintiffs' experts claimed that
3 gays and lesbians suffer adverse health outcomes as a result of stigma, they were unable to
4 identify any empirical support whatsoever for the proposition that gays and lesbians suffer from a
5 higher prevalence of allegedly stigma-related adverse health outcomes in California than in any
6 jurisdiction that recognizes same-sex marriages. *See* Jan. 14, 2010 Tr. of Hr'g at 961:4-963:12,
7 969:1-7.

8 *Second*, amici argue that gays and lesbians and their children would benefit from marriage
9 in ways similar to opposite-sex couples and their children. As expert after expert for Plaintiffs
10 confirmed at trial, however, this claim is not supported by empirical evidence.⁷ *See* Jan. 13, 2010
11 Tr. of Hr'g 607:8-19; Jan. 15, 2010 Tr. of Hr'g at 1184:5-11; Jan 14, 2010 Tr. of Hr'g at 788:20-
12 789:2; Jan. 22, 2010 Tr. of Hr'g at 2050:1-5.⁸ Given this dearth of research, it is unsurprising that
13 there is also a lack of evidence regarding any *incremental* benefit to gays and lesbians and their
14 children from marriage versus an alternative institution such as domestic partnerships. *See* Jan.
15 13, 2010 Tr. of Hr'g 608:12-22; *cf.* Jan. 27, 2010 Tr. of Hr'g at 2937:15-21.⁹

16 *Third*, amici argue that permitting same-sex marriage would not harm the institution or the
17 purposes it serves. *See, e.g.*, Doc # 556 at 10. As Mr. Blankenhorn testified at trial, however,

18 ⁷ The claim that "children in LGBT households are disproportionately exposed to the risk
19 factors of living in poverty," Doc # 553 at 11, is difficult to square with the evidence that gays and
20 lesbians are relatively affluent. *See* Gary J. Gates & Christopher Ramos, Williams Inst., Census
21 Snapshot: California Lesbian, Gay, & Bisexual Population at 3 (2008) (DIX1287); Christopher
22 Carpenter and Gary J. Gates, *Gay and Lesbian Partnership: Evidence from California*, 45
Demography 573 (2008) (PX894); Declaration of M.V. Lee Badgett in Support of City & County
of San Francisco ¶ 13, *In re Marriage Cases*, No. 429-539 (Cal. Sup. Ct. Aug. 31, 2004) (DIX96;
quoted at Jan. 15, 2010 Tr. of Hr'g at 1062:2-12).

23 ⁸ The Williams Institute has analyzed a survey of certain same-sex couples who married in
24 Massachusetts. *See* Christopher Ramos et al., The Williams Inst., *The Effects of Marriage
Equality in Massachusetts* (2009) (PX959); *see also* Doc # 553 at 20. Due to the methodology
25 of that survey, however, its results cannot be generalized beyond the particular respondents.
26 *See, e.g.*, Jan. 13, 2010 Tr. at Hr'g at 649:1-9.

27 ⁹ As amici note, there are federal rights and benefits associated with marriage. *See, e.g.*, Doc #
28 553 at 19; Doc # 567 at 21-22. Same-sex couples in California, of course, would not gain access to
these benefits if the state recognized them as married. *See* 1 U.S.C. § 7. Moreover, the
Congressional Budget Office has estimated that providing federal marriage recognition to same-sex
couples would increase revenues and decrease outlays—in other words, on balance it would work
to the economic disadvantage of same-sex couples. *See* Cong. Budget Office, *The Potential
Budgetary Impact of Recognizing Same-Sex Marriages* (2004) (DIX855).

1 redefining the fundamental elements of an institution will inescapably *change* the institution, and
 2 same-sex marriage would likely contribute to and accelerate the deinstitutionalization of marriage,
 3 leading to negative consequences for society. *See* Jan. 26, 2010 Tr. of Hr’g at 2777:9-15,
 4 2780:16-2781:18. Indeed, many advocates of same-sex marriage celebrate the potential negative
 5 impact of same-sex marriage on the institution and its traditional purposes. *See* E.J. Graff,
 6 *Retying the Knot*, THE NATION, June 24, 1996 at 12 (DIX1445); Judith Stacey, *Gay & Lesbian*
 7 *Families: Queer Like Us*, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY at 155
 8 (1998) (DIX1033); Michelangelo Signorile, *Bridal Wave*, OUT MAG., Dec./Jan. 1994 (DIX1433);
 9 Ellen Willis, contribution to “*Can Marriage be Saved? A Forum*,” THE NATION, July 5, 2004 16-
 10 17 (DIX1030); BeyondMarriage.org, *Beyond Same-Sex Marriage: A New Strategic Vision for*
 11 *All Our Families & Relationships* (July 26, 2006) (DIX1449). And as explained above, there are
 12 differences between same-sex and opposite-sex relationships such that including same-sex
 13 relationships in the institution may work a profound change in it. *See also* Jan. 26, 2010 Tr. of
 14 Hr’g at 2780:16-2781:18; Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage*
 15 *Laws*, 29 HARV. J. L. & PUB. POL’Y 949, 954 (2006) (DIX942); Margaret Somerville, *What About*
 16 *the Children*, in DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA’S NEW SOCIAL
 17 EXPERIMENT at 63-64 (Daniel Cere & Douglas Farrow eds., 2004) (DIX714).¹⁰

18 A related set of arguments is that sexual orientation is not related to parenting ability and
 19 that the children of same-sex couples and opposite-sex couples are comparable in development
 20 and outcomes. *See* Doc # 553 at 13; Doc # 561 at 18. As an initial matter, it is not “the essential
 21

22 ¹⁰ Amici also level the charge that the Yes on 8 campaign advertisements made false
 23 allegations. *See* Doc # 553 at 21; Doc # 559 at 15. The Yes on 8 campaign, however, thoroughly
 24 substantiated the claims made in its campaign advertisements. *See* Letter from Andy Pugno to
 25 Station Managers of California Broadcast and Cable Television Station re Substantiation of
 26 “Everything to do with Schools” ad, October 17, 2008 (PX129); Letter from Andy Pugno to Station
 27 Managers of California Broadcast and Cable Television Station re Substantiation of “Finally the
 28 Truth” ad, October 24, 2008 (PX130); Letter from Andy Pugno to Station Managers of California
 Broadcast and Cable Television Station re Substantiation of “Have you Thought About It” ad,
 October 27, 2008 (PX131); Letter from Andy Pugno to Station Managers of California Broadcast
 and Cable Television Station re Substantiation of “It’s Already Happened” ad, October 8, 2008
 (PX132); Letter from Andy Pugno to Station Managers of California Broadcast and Cable
 Television Station re Substantiation of “Whether You Like it or Not” ad, September 28, 2008
 (PX133).

1 premise” of the state’s interest in the welfare of children “that heterosexual couples are simply
 2 better parents than same-sex couples.” Doc # 561 at 18. *See* Doc # 213 at 29. Nevertheless,
 3 neither Plaintiffs nor their amici have proven that “research clearly demonstrates that the
 4 psychosocial development and well-being of children raised by gay and lesbian couples is
 5 comparable to that of their peers raised by heterosexual parents.” Doc # 553 at 13. For one,
 6 Professor Lamb could not identify at trial a single study that compares the outcomes of children of
 7 same-sex couples with the children of married, biological parents, the family structure that
 8 Proponents contend is the ideal.¹¹ *See, e.g.*, Jan. 15, 2010 Tr. of Hr’g at 1165:3-6. For another,
 9 methodological problems such as unrepresentative samples, a focus on lesbian (as opposed to gay-
 10 male) families, and small sample sizes¹² prevent reliable generalizations to be made from the
 11 extant research on same-sex parenting. *See, e.g.*, Affidavit of Steven Lowell Nock, *Halpern v.*
 12 *Atty. Gen.*, No. 684/00 (Ontario Sup. Ct. 2001) (Ca.) (DIX131); Robert Lerner & Althea K. Nagai,
 13 *No Basis: What the Studies Don’t Tell Us About Same-Sex Parenting*, WASHINGTON, D.C.:

14
 15 ¹¹ Indeed, Professor Lamb has in the past recognized the unique importance of fathers and
 16 mothers. *See* MICHAEL E. LAMB, ED., *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 10 (1997)
 17 (see Jan. 15, 2010 Tr. of Hr’g at 1073:16-19); Michael E. Lamb et al., *Effect of Gender and*
 18 *Caretaking Role on Parent-Infant Interaction*, in *THE DEVELOPMENT OF ATTACHMENT AND*
 19 *AFFILIATIVE SYSTEMS* at 117 (Robert N. Emde & Robert J. Harmon, eds. 1982) (see Jan. 15, 2010
 20 Tr. of Hr’g at 1069:7-14); Michael E. Lamb, *Fathers: Forgotten Contributors to Child*
 21 *Development*, 18 *HUM. DEV.* 245, 246 (1975) (see Jan. 15, 2010 Tr. of Hr’g at 1070:17-18);
 22 MICHAEL E. LAMB, ED., *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 21 (1976) (see Jan. 15,
 23 2010 Tr. of Hr’g at 1075:12-21). This view is consistent with other research highlighting the
 24 importance of children being raised by their biological mothers and fathers. *See, e.g.*, Tr. 2767:11-
 25 2768:23; Kristin Anderson Moore et al., *Marriage From a Child’s Perspective*, *CHILD TRENDS* at 1-
 26 2 (2002) (DIX26); SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT:*
 27 *WHAT HURTS, WHAT HELPS* 1, 2 (1994) (DIX124); Shelly Lundberg & Robert A. Pollak, *The*
 28 *American Family and Family Economics* 5, 19 (2007) (PX1305); Lawrence M. Berger et al.,
Mothers, Men, and Child Protective Services Involvement, 14 *CHILD MALTREATMENT* 263, 274
 (2009) (PX1105); Jocelyn Brown et al., *A Longitudinal Analysis of Risk Factors For Child*
Maltreatment: Findings Of a 17-Year Old Prospective Study of Officially Recorded and Self-
Reported Child Abuse and Neglect, 22 *CHILD ABUSE & NEGLECT* 1065, 1074 (1998) (PX1046). It
 is also consistent with evidence that children desire to know and have a relationship with their
 biological parents. *See* Doc #172-1 at 88-89.

¹² Professor Lamb could identify only one study that includes a large number of same-sex
 couples. *See* Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress through*
School, forthcoming in *Demography* (Draft, April 2009) (PX2299). That study, however, used
 2000 census data—data whose reliability with respect to same-sex couples is flawed. *See* Jan. 19,
 2010 Tr. of Hr’g at 1398:16-23; *id.* at 1404:11-1406:10; Danielle MacCartney et al., *The Williams*
Inst., Census Snapshot: Methodological Details at 2 (2007) (PX1265); Dan Black et al., *Cal. Ctr.*
For Pop. Res., UCLA, The Measurement of Same-Sex Unmarried Partner Couples in the 2000 U.S.
Census (2007) (DIX1299).

1 MARRIAGE LAW PROJECT (2001) (DIX734); Walter R. Schumm, *What Was Really Learned From*
 2 *Tasker and Golombok's (1995) Study of Lesbian and Single Parent Mothers?*, 94 PSYCHOL.
 3 REPORTS 422, 423 (2004) (DIX779); David H. Demo & Martha J. Cox, *Families With Young*
 4 *Children: A Review of Research in the 1990s*, 62 J. MARRIAGE & FAM. 876, 889 (2000)
 5 (DIX749); Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J.
 6 MARRIAGE & FAM. 3, 5 (2010). Finally, several studies have found that children raised by gays
 7 and lesbians are not comparable on certain metrics to children raised by heterosexuals. *See*
 8 Sotirios Sarantakos, *Children in Three Contexts: Family, Education, & Social Development*, 21
 9 CHILD. AUSTR. 23, 30 (1996) (DIX775); Susan Golombok et al., *Children With Lesbian Parents:*
 10 *A Community Study*, 39 DEVELOPMENTAL PSYCHOLOGY 20, 30 (2003) (PX1066); HENNY BOS,
 11 PARENTING IN PLANNED LESBIAN FAMILIES 58, 68 (2004) (DIX801, *quoted at* Jan. 15, 2010 Tr. of
 12 Hr'g at 1159:22-25); FIONA TASKER & SUSAN GOLOMBOK, GROWING UP IN A LESBIAN FAMILY
 13 127 (1997) (PX1396); Katrien Vanfraussen et al., *What Does It Mean for Youngsters to Grow Up*
 14 *in a Lesbian Family Created by Means of Donor Insemination*, 20 JOURNAL OF REPRODUCTIVE
 15 AND INFANT PSYCHOLOGY 237, 250 (2002) (PX1131); Richard Green et al., *Lesbian Mothers and*
 16 *Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15
 17 ARCHIVES SEXUAL BEHAV. 167, 174 (1986) (DIX756).

18 **IV. Plaintiffs' Claims are Subject to Traditional Rational Basis Review**

19 The nature of rational basis review is well-established. *See* Doc # 172-1 at 67-70; Doc #
 20 213 at 23-26. The ACLU and the American Association for Marriage & Family Therapy *et al.*,
 21 however, argue that a more “careful” or “exacting[]” form of rational basis review applies in this
 22 context, *see* Doc # 552 at 17; Doc # 561 at 15; namely, one that “look[s] at the actual purpose of a
 23 classification” rather than requiring a challenger to “negative every conceivable basis that might
 24 support” a law. Doc # 552 at 17-18 (quotation marks and emphasis omitted). The Supreme
 25 Court, however, has never purported to create separate tiers of rational basis review.

26 Indeed, *Heller v. Doe*, 509 U.S. 312 (1993)—which the ACLU cites for the proposition
 27 that the Supreme Court reviews legislation more carefully in “cases involving individual liberty
 28 and human dignity” than in “economic and regulatory contexts,” Doc # 552 at 17—is quite to the

1 contrary. There, the Court explained that “a classification neither involving fundamental rights
2 nor proceeding along suspect lines is accorded a strong presumption of validity. Such a
3 classification *cannot* run afoul of the Equal Protection Clause if there is a rational relationship
4 between the disparity of treatment and *some* legitimate government purpose. ... [A] classification
5 must be upheld against equal protection challenge if there is any reasonably conceivable state of
6 facts that could provide a rational basis for the classification. ... [T]he burden is on the one
7 attacking the legislative arrangement to negative every conceivable basis which might support it.”
8 509 U.S. at 320 (emphases added; citations and quotation marks omitted). Moreover, the Court
9 explained that *Cleburne*—another of the ACLU’s cases—did not “purport to apply a different
10 standard of rational-basis review from that just described.” *Id.* at 321.

11 Amici also cite *Romer v. Evans*, 517 U.S. 620 (1996) as a case in which the Court took a
12 “more careful” look than that afforded by traditional rational basis review. *See* Doc # 552 at 17;
13 Doc # 561 at 15. There, however, the Court (citing *Heller v. Doe*) held that it “will uphold [a]
14 legislative classification so long as it bears a rational relation to *some* legitimate end. Amendment
15 2 fails, indeed defies, even this *conventional inquiry*.” 517 U.S. at 631-32 (emphases added;
16 citation omitted). *Romer*, in other words, did nothing more than apply normal rational basis
17 review.¹³ *See* Doc # 172-1 at 101-03.

18 Amici’s remaining cases—*Eisenstadt v. Baird*, 405 U.S. 438 (1972), *U.S. Department of*
19 *Agriculture v. Moreno*, 413 U.S. 528 (1973), and *Weinberger v. Wiesenfeld*, 420 U.S. 636
20 (1975)—serve them no better. Each predates *U.S. Railroad Retirement Board v. Fritz*, 449 U.S.
21 166 (1980), in which the Court faced the issue of the “appropriate standard of judicial review” to
22 be applied to distinctions that “do not burden fundamental constitutional rights or create ‘suspect’
23 classifications,” *id.* at 174. The Court acknowledged that its “earlier cases [had] not been
24 altogether consistent in [their] pronouncements in this area,” and proceeded to articulate the
25 deferential standard of review Proponents have advanced throughout this case—including that
26

27 ¹³ The same is true for *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), another
28 case cited by the ACLU. *See* Doc # 552 at 17. There, the Court struck down a law after concluding
that it was “not supported by any identifiable state interest.” *Hooper*, 472 U.S. at 623.

1 “[w]here ... there are plausible reasons” for a classification, judicial inquiry “is at an end” and that
2 it is “constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.”
3 *Id.* at 174-79 (quotation marks omitted).¹⁴

4 That leaves amici with two concurring opinions. Justice O’Connor, to be sure, stated in
5 her *Lawrence* concurrence that “[w]hen a law exhibits ... a desire to harm a politically unpopular
6 group, we have applied a more searching form of rational basis review to strike down such laws
7 under the Equal Protection Clause.” *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J.,
8 concurring in the judgment). But as Justice Scalia pointed out, the cases Justice O’Connor cited—
9 *Romer*, *Cleburne*, and *Moreno*—“do not recognize such a standard, and reach their conclusions
10 only after finding, as required by conventional rational-basis analysis, that no conceivable
11 legitimate state interest supports the classification at issue.” *Id.* at 601 (Scalia, J., dissenting). At
12 any rate, Justice O’Connor indicated that “preserving the traditional institution of marriage”
13 would have passed muster under her more searching analysis. *Id.* at 585 (O’Connor, J.,
14 concurring in the judgment).

15 Finally, Justice Kennedy, concurring in *Kelo v. City of New London*, 545 U.S. 469 (2005),
16 stated that “a court applying rational-basis review under the Equal Protection Clause must strike
17 down a government classification that is clearly intended to injure a particular class of private
18 parties, with only incidental or pretextual public justifications,” *id.* at 491 (Kennedy, J.,
19 concurring). The salient point is that the manner in which a court determines that a law must be
20 struck down for the reasons Justice Kennedy describes is by concluding that it is supported by no
21 plausible rational basis. *See* Doc # 172-1 at 101-03.

22
23
24 ¹⁴ Furthermore, the Court has explained that in *Moreno* it “concluded that a bare congressional
25 desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.
26 This statement is merely an application of the usual rational-basis test: if a statute is not rationally
27 related to any legitimate governmental objective, it cannot be saved from constitutional challenge
28 by a defense that relates it to an illegitimate governmental interest. Accordingly, in *Moreno* ... we
examined the challenged provision under the rational-basis standard of review.” *Lyng v. United
Auto. Workers of Am.*, 485 U.S. 360, 370 n.8 (1988) (quotation marks omitted); *see also Moreno*,
413 U.S. at 538 (concluding that the classification failed “[t]raditional equal protection analysis”
because it was “wholly without any rational basis”).

CONCLUSION

The proposed amici submissions in support of Plaintiffs do not change that this Court should enter judgment in favor of the Defendants and Defendant-Intervenors.

Dated: February 26, 2010

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANT-INTERVENORS
DENNIS HOLLINGSWORTH, GAIL J. KNIGHT,
MARTIN F. GUTIERREZ, MARK A. JANSSON, AND
PROTECTMARRIAGE.COM – YES ON 8, A PROJECT
OF CALIFORNIA RENEWAL

By: /s/Charles J. Cooper
Charles J. Cooper