No. 10-16696

In the United States Court of Appeals for the Ninth Circuit

KRISTIN PERRY, *et al.*,
Plaintiffs-Appellees,

vs.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

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

BRIEF OF *AMICUS CURIAE*, THE FAMILY RESEARCH COUNCIL, IN SUPPORT OF THE INTERVENING DEFENDANTS-APPELLANTS.

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that *amicus curiae*, the Family Research Council, is not a corporation that issues stock or has a parent corporation that issues stock.

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September 22, 2010

Table of Contents

Corporate Disclosure Statement i

Table of Authorities iii

Interest of the *Amicus* 1

ARGUMENT:

I. PROPOSITION 8 DOES NOT INTERFERE WITH THE FUNDAMENTAL RIGHT TO MARRY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 2

II. PROPOSITION 8 DOES NOT DISCRIMINATE ON THE BASIS OF SEX IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT 9

III. PROPOSITION 8 DOES NOT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT . . . 16

CONCLUSION 25

Certificate of Compliance

Certificate of Service

Table of Authorities

Cases

Andersen v. King County, 138 P.3d 963 (Wash. 2006) . . . . *passim*

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) . . . . *passim*

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971),
appeal dismissed for want of a substantial federal question,
409 U.S. 910 (1972) 10,15

Baker v. State, 744 A.2d 864 (Vt. 1999) . . . . *passim*

Brown v. Board of Education, 347 U.S. 483 (1954) 13

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006) 21, 24

Collins v. City of Harker Heights, Texas, 503 U.S. 115 (1992) 3

Conaway v. Deane, 932 A.2d 571 (Md. 2007) 5, 10, 15

Craig v. Boren, 429 U.S. 190 (1976) 9, 13

Dean v. District of Columbia, 653 A.2d 307 (D.C. App. 1995) 10, 17

District Attorney's Office for the Third Judicial District v. Osborne,
129 S.Ct. 2308 (2009) 3, 7, 8

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,
128 F.3d 289 (6th Cir. 1997) 23, 24

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 22

Flores v. Morgan Hill Unified School District,
324 F.3d 1130 (9th Cir. 2003) 20

Force by Force v. Pierce City R-VI School District,
570 F. Supp. 1020 (W.D. Mo. 1983) 13

Frontiero v. Richardson, 411 U.S. 677 (1973) 14

Gill v. Office of Personnel Mgmt.,
699 F. Supp.2d 374 (D. Mass. 2010) 11

Goodridge v. Dep't of Health, 798 N.E.2d 941 (Mass. 2003) . . . . *passim*

Hernandez v. Robles, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005),
aff'd 855 N.E.2d 1 (N.Y. 2006) 5, 11, 14-15

Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) 10, 15, 18

High Tech Gays v. Defense Industrial Services Clearance Office,
895 F.2d 563 (9th Cir. 1990) 19

Holmes v. California Army National Guard,
124 F.3d 1126 (9th Cir. 1997) 20, 24

In re Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2005) 11

In re Kane, 808 N.Y.S.2d 566 (N.Y. App. Div. 2006),
aff'd 855 N.E.2d 1 (N.Y. 2006) 11

In re Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006),
rev'd on other grounds, 183 P.3d 384 (Cal. 2008) 11

In re Marriage Cases, 183 P.3d 384 (Cal. 2008) . . . . *passim*

In re Parentage of L.B., 89 P.3d 271 (Wash. Ct. App. 2004),
aff'd in part, rev'd in part on other grounds,
122 P.3d 161 (Wash. 2005) 18

Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) 10

Lawrence v. Texas, 539 U.S. 558 (2003) 3, 7, 8

Lewis v. Harris, 875 A.2d 259 (N.J. Super Ct. App. Div. 2005),
aff'd in part and modified in part, 908 A.2d 196 (N.J. 2006) 15

Lewis v. Harris, 908 A.2d 196 (N.J. 2006) 5

Lofton v. Secretary of Dep't of Children & Family Services, 358 F.3d 804
(11th Cir. 2004) 3, 24

Lofton v. Secretary of Dep't of Children & Family Services,
377 F.3d 1275 (11th Cir. 2004) 23

Louisiana High School Athletic Ass'n v. St. Augustine High School,
396 F.2d 224 (5th Cir. 1968) 12

Loving v. Virginia, 388 U.S. 1 (1967) 6, 12, 14, 15

Massachusetts v. United States Dep't of Health & Human Serv.,
698 F. Supp.2d 234 (D. Mass. 2010) 11

Maynard v. Hill, 125 U.S. 190 (1888) 6

McLaughlin v. Florida, 379 U.S. 184 (1964) 13

Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994) 19

Meyer v. Nebraska, 262 U.S. 390 (1923) 6

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 13

O'Connor v. Board of Education of School District No. 23,
645 F.2d 578 (7th Cir. 1981) 13

Personnel Administrator of Massachusetts v. Feeney,
442 U.S. 256 (1979) 19

Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997) 19

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 8

Reed v. Reed, 404 U.S. 71 (1971) 14

Reno v. Flores, 507 U.S. 292 (1993) 3

Romer v. Evans, 517 U.S. 620 (1996) 9, 21, 23

Samuels v. New York State Dep't of Health, 811 N.Y.S.2d 136
(N.Y. App. Div. 2006), *aff'd* 855 N.E.2d 1 (N.Y. 2006) 4, 5, 11, 15

Sell v. United States, 539 U.S. 166 (2003) 8

Seymour v. Holcomb, 811 N.Y.S.2d 134 (N.Y. App. Div. 2006),
aff'd 855 N.E.2d 1 (N.Y. 2006) 11

Singer v Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) 10, 15

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 6

Smelt v. County of Orange, 374 F. Supp.2d 861 (C.D. Cal. 2005),
aff'd in part, vacated in part and remanded with directions to dismiss for lack of standing, 447 F.3d 673 (9th Cir. 2006) . . 7, 11, 13, 17

Southern Alameda Spanish Speaking Organization v. City of Union City, California, 424 F.2d 291 (9th Cir. 1970) 22

Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003) 5, 7, 24

Turner v. Safley, 482 U.S. 78 (1987) 6

United States v. Virginia, 518 U.S. 515 (1996) 13

Village of Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977) 19

Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976),
aff'd mem. by an equally divided Court, 430 U.S. 703 (1977) 13

Washington v. Davis, 426 U.S. 229 (1976) 19

Washington v. Glucksberg, 521 U.S. 702 (1997) 3, 4, 7-8

Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) 10

Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008) 3, 8, 20

Witt v. Dep't of the Air Force, 548 F.3d 1264 (9th Cir. 2008) 8

Zablocki v. Redhail, 434 U.S. 374 (1978) 6

Statutes

U.S. CONST. AMEND. XIV, § 1 . . . . *passim*

1 U.S.C. § 7 (2005) 11

28 U.S.C. § 1738C (Supp. 2005) 11

CAL. CONST. art. I, § 7.5 . . . . *passim*

HAW. CONST. art. I, § 23 12

Interest of the *Amicus*

The Family Research Council (FRC) was founded in 1983 as an organization dedicated to the promotion of marriage and family and the sanctity of human life in national policy. Through books, pamphlets, media appearances, public events, debates and testimony, FRC's team of policy experts review data and analyze Congressional and executive branch proposals that affect the family. FRC also strives to assure that the unique attributes of the family are recognized and respected through the decisions of courts and regulatory bodies.

FRC champions marriage and family as the foundation of civilization, the seedbed of virtue and the wellspring of society. Believing that God is the author of life, liberty and the family, FRC promotes the Judeo-Christian worldview as the basis for a just, free and stable society. Consistent with its mission statement, FRC is committed to strengthening traditional families in America.

FRC publicly supported the successful effort to adopt Proposition 8, as well as similar amendments in other States. FRC, therefore, has a particular interest in the outcome of this case. In FRC's judgment, recognition of same-sex marriages–either by state legislators or by the courts–would be detrimental to the institution of marriage, children and society as a whole. And, for the reasons set forth herein, nothing in the Constitution, properly understood, requires such recognition.

ARGUMENT

I.

PROPOSITION 8 DOES NOT INTERFERE WITH THE FUNDAMENTAL RIGHT TO MARRY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The district court held that Proposition 8 (Cal. Const. art. I, § 7.5), which reserves marriage to opposite-sex couples, impermissibly interferes with the fundamental right to marry protected by the Due Process Clause. Doc. 708 at 112-19. In arriving at this holding, the district court made the remarkable, indeed, stunning, statement that the restriction of marriage to opposite-sex couples was "*never* part of the historical core of the institution of marriage." *Id*. at 115 (emphasis added). That statement is not supported by the single "finding of fact" on which it is allegedly based, *id*. at 68-69 (Finding of Fact # 33), which does not even discuss the opposite-sex nature of marriage (as opposed to certain legal doctrines associated with marriage). It is precisely because the opposite-sex nature of marriage is the *essence* of marriage as it has been understood in our history, that the district court's fundamental rights analysis must be rejected.

In determining whether an asserted liberty interest (or right) should be regarded as fundamental for purposes of substantive due process analysis under the Due Process Clause of the Fourteenth Amendments (infringement of which would call for strict scrutiny review), the Supreme Court applies a two-prong test.

First, there must be a "careful description" of the asserted fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation and internal quotation marks omitted).[1] Second, the interest, so described, must be firmly rooted in "the Nation's history, legal traditions, and practices." *Id.* at 710.[2]

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[1] *Glucksberg* was not an anomaly in demanding precision in defining the nature of the interest (or right) being asserted. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993) (describing alleged right as "the . . . right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than that of a government-operated or government-selected child-care institution," not whether there is a right to 'freedom from physical restraint," "a right to come and go at will" or "the right of a child to be released from all other custody into the custody of its parents, legal guardians, or even close relatives"); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125-26 (1992) (describing asserted interest as a government employer's duty "to provide its employees with a safe working environment"). *See also District Attorney's Office for the Third Judicial District v. Osborne*, 129 S.Ct. 2308, 2322-23 (2009) (convicted felon has no freestanding "substantive due process right" to obtain the State's DNA evidence in order to apply new DNA-testing technology that was not available at the time of his trial) (relying upon *Glucksberg*, *Reno* and *Collins*).

[2] Nothing in *Lawrence v. Texas*, 539 U.S. 558 (2003), changes the analysis for evaluating whether a right should be deemed "fundamental" under the liberty language of the Due Process Clause. First, in striking down the state sodomy statute, "the *Lawrence* Court did not apply strict scrutiny," *Witt v. Dep't of the Air Force*, 527 F.3d 806, 818 n. 6 (9th Cir. 2008), which would have been the appropriate standard of review if a fundamental right been implicated. Second, the Court never modified or even mentioned the cases in which it has emphasized the need to define carefully an asserted liberty interest in determining whether that interest is "fundamental." Those cases should not be regarded as having been overruled *sub silentio*. *See Lofton v. Secretary of Dep't of Children & Family Services*, 358 F.3d 804, 816 (11th Cir. 2004) ("We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental rights analysis").

In *Glucksberg*, the Court characterized the asserted liberty interest as "a right to commit suicide which itself includes a right to assistance in doing so," not whether there is "a liberty interest in determining the time and manner of one's death," "a right to die," "a liberty to choose how to die," "[a] right to choose a humane, dignified death" or "[a] liberty to shape death." *Id*. at 722-23 (citations and internal quotation marks omitted).

As in other cases asserting fundamental liberty interests, it is necessary to provide a "careful description" of the fundamental liberty interest at stake. For purposes of substantive due process analysis, therefore, the issue here is not *who* may marry, but *what* marriage is. The principal defining characteristic of marriage, as it has been understood in our "history, legal traditions, and practices," *is* the union of a man and a woman.[3] Properly framed, therefore, the issue before this Court is not whether there is a fundamental right to enter into a marriage with the person of one's choice, but whether there is a right to enter into a same-sex marriage. The district court's belief that "Plaintiffs do not seek recognition of a new right," Doc. 708 at 116, is, therefore, mistaken. With the exception of the

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

decision that Proposition 8 itself overturned, *see In re Marriage Cases*, 183 P.3d 384, 421 (Cal. 2008), every reviewing court to have considered the issue has understood that same-sex couples challenging restrictions on same-sex marriage *are*, in fact, seeking recognition of a new right.[4] But nothing in our "Nation's history, legal traditions, and practices" supports recognition of such a right.

The Supreme Court has recognized a substantive due process right to marry.

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[4] *See Lewis v. Harris*, 908 A.2d 196, 206 (N.J. 2006) (defining issue as "whether the right of a person to marry someone of the same sex is so deeply rooted in the traditions and collective conscience of our people that it must be deemed fundamental"). In rejecting a state privacy challenge to the state law reserving marriage to opposite-sex couples, the Hawaii Supreme Court stated that "the precise question facing this court is whether we will extend the *present* boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, *we are being asked to recognize a new fundamental right*." *Baehr v. Lewin*, 852 P.2d 44, 56-57 (Haw. 1993) (second emphasis added). *See also Hernandez v. Robles*, 805 N.Y.S.2d 354, 359 (App. Div. 2005) (observing that plaintiffs seek "an alteration in the definition of marriage"), *aff'd*, 855 N.E.2d 1 (N.Y. 2006); *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003) ("recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage.'"); *Samuels*, 811 N.Y.S.2d at 141 ("this case is not simply about the right to marry the person of one's choice, but represents a significant expansion into new territory which is, in reality, *a redefinition of marriage*") (emphasis added); *Conaway v. Deane*, 932 A.2d 571, 617-24 (Md. 2007); *Andersen v. King County*, 138 P.3d 963, 976-80 (Wash. 2006) (plurality), *id*. at 993 (J.M. Johnson, J., concurring in judgment only) (no court possesses the power "to create a new fundamental right to same-sex 'marriage'"). *See also Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 965 (Mass. 2003) (acknowledging that "our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries").

See Loving v. Virginia, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987). But the right recognized in these decisions all concerned *opposite*-sex, not *same*-sex, couples. *See Loving*, 388 U.S. at 12, *Zablocki*, 434 U.S. at 384, *Turner*, 482 U.S. at 94-97. That the right to marry is limited to opposite-sex couples is clearly implied in a series of Supreme Court cases relating marriage to procreation and childrearing. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty language in Due Process Clause includes "the right of the individual . . . to marry, establish a home and bring up children"); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (characterizing the institution of marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress").[5]

The Supreme Court has never stated or even implied that the federal right to marry extends to same-sex couples. In sharp contrast to the "emerging awareness

[5] The district court's observation that not all opposite-sex couples can or want to have children, and that no State inquires into the fertility of opposite-sex couples as a condition of issuing a marriage license, Doc. 708 at 62-63 (Finding of Fact # 21), 113-14, 115, does not change the biological reality that only opposite-sex couples are capable of procreating through their sexual activity. Marriage is the institution designed to channel that activity into stable relationships that protect the children so procreated. It is simply obtuse not to recognize this.

that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex," *Lawrence*, 539 U.S. at 572, which, in turn, was based upon an examination of "our laws and traditions in the past half century, *id*. at 571, "[t]he history and tradition of the last fifty years have not shown the definition of marriage to include a union of two people regardless of their sex." *Smelt v. County of Orange*, 374 F. Supp.2d 861, 878 (C.D. Cal. 2005), *aff'd in part*, *vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006). If anything, the fact that twenty-nine States have amended their constitutions to reserve marriage to opposite-sex couples strongly suggests that there is no "emerging awareness" that the right to marry extends to same-sex couples. To paraphrase *Osborne*, there is no "long history" of a right to enter into a same-sex marriage and "[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it." 129 S.Ct. at 2322 (citation and internal quotation marks omitted). "[S]ame-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty." *Standhardt*, 77 P.3d at 459. For that reason, the district court's holding that the right to marry includes the right to enter into a same-sex marriage cannot stand.

In *Glucksberg*, the Court emphasized that, unless "a challenged state action

implicate[s] a fundamental right," there is no need for "complex balancing of competing interests in every case." 521 U.S. at 722. All that is necessary is that the state action bear a "reasonable relationship to a legitimate state interest . . . ." *Id*. Apart from the subject-area-specific standards that govern the regulation of abortion, *see Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and the forcible administration of anti-psychotic drugs to mentally ill defendants, *see Sell v. United States,* 539 U.S. 166 (2003), there is no "intermediate" standard of review that applies to substantive due process claims. *See Witt v. Dep't of the Air Force*, 548 F.3d 1264, 1272-75 (9th Cir. 2008) (O'Scannlain, J., dissenting from the denial of rehearing *en banc*).[6] For the reasons set forth in the brief of the appellants, Proposition 8 is rationally related to multiple, legitimate state interests. The district court's holding to the contrary was erroneous and must be reversed.

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[6] Language in this Court's opinion in *Witt v. Dep't of the Air Force*, 527 F.3d at 813-21, suggests that the Supreme Court's decision in *Lawrence v. Texas*, requires something more than traditional rational basis review (although not strict scrutiny) of statutes that infringe upon private adult consensual sexual behavior. But *Witt* did not address *Glucksberg's* holding that, except when fundamental rights are implicated, due process analysis requires only rational basis review, a holding that was reaffirmed by the Supreme Court after *Witt* was decided. *See Osborne*, 129 S.Ct. at 2322-23. Moreover, unlike *Witt*, this case concerns whether the State must give public recognition (through the institution of marriage) to homosexual relationships, not whether the sexual conduct underlying such relationships may be criminalized or otherwise punished. In *Lawrence*, the Court emphasized that it was *not* deciding whether "the government must give formal recognition to any relationship that homosexuals persons seek to enter," 539 U.S. at 578, which is exactly the issue presented here.

II.

PROPOSITION 8 DOES NOT DISCRIMINATE ON ACCOUNT OF SEX IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The district court held that Proposition 8 discriminates on account of sex in violation of the Equal Protection Clause of the Fourteenth Amendment. Doc. 708 at 121-23. The district court's entire analysis is contained in four short sentences:

> Sexual orientation discrimination can take the form of sex discrimination. Here, for example, [Kristin] Perry is prohibited from marrying [Sandra] Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict [a person's] choice of marital partner because of her [or his] sex.

Id. at 121.[7]

The fundamental flaw with the district court's holding that Proposition 8 discriminates on the basis of sex is that "the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Baker*

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[7] Contrary to the district court's understanding, an equal protection claim based on sexual orientation is *not* "equivalent to a claim of discrimination based on sex." Doc. 708 at 123. Classifications based on sex are subject to intermediate review under the Equal Protection Clause. *See Craig v. Boren*, 429 U.S. 190 (1976). Classifications based upon sexual orientation have been reviewed under the rational basis standard. *See Romer v. Evans*, 517 U.S. 629 (1996). *See also In re Marriage Cases*, 183 P.3d 384, 439 (Cal. 2008) (holding that "discrimination on the basis of sexual orientation cannot appropriately be viewed as a subset of, or subsumed within, discrimination on the basis of sex").

v. State, 744 A.2d 864, 880 n. 13 (Vt. 1999). "[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct." *Id*. Other state courts have also rejected the claim that "defining marriage as the union of one man and one woman discriminates on the basis of sex."[8]

In the last four years, the California Supreme Court, the Maryland Court of Appeals, the New York Court of Appeals and the Washington Supreme Court have added their voices to the chorus of state reviewing court decisions holding that laws reserving marriage to opposite-sex couples do not discriminate on account of sex.[9] Federal courts reviewing challenges to the Federal Defense of Marriage Act, 1 U.S.C. § 7 (2005), 28 U.S.C. § 1738C (Supp. 2005), are in accord with these decisions.[10]

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[8] *Id.* (citing *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 910 (1972), and *Singer v Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974)). *See also Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (same); *Dean v. District of Columbia*, 653 A.2d 307, 363 n. 2 (D.C. App. 1995) (Op. of Steadman, J.) (same).

[9] *In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571, 585-602 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006) (plurality); *id*. at 20 (Graffeo, J., concurring); *Andersen v. King County*, 138 P.3d 963, 988 (Wash. 2006) (plurality); *id*. at 1010 (J.M. Johnson, J., concurring in judgment only).

[10] *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005) ("DOMA does not discriminate on the basis of sex because it treats women and men

In sum, thirteen state reviewing courts,[11] three federal courts and the District of Columbia Court of Appeals have all held that statutes reserving marriage to opposite-sex couples "do[] not subject men to different treatment from women; each is equally prohibited from the same conduct." *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 991 (Mass. 2003) (Cordy, J., dissenting) (Justice Cordy was addressing an *alternative* argument raised by the plaintiffs but not reached by the majority in their opinion invalidating the marriage statute–whether the statute

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equally"); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 877 (C.D. Cal. 2005) (same), 447 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2005) (same). The recent pair of decisions by the district court in Massachusetts striking down § 3 of DOMA, *see Massachusetts v. United States Dep't of Health & Human Serv.*, 698 F. Supp.2d 234 (D. Mass. 2010), *Gill v. Office of Personnel Mgmt.*, 699 F. Supp.2d 347 (D. Mass. 2010), were based on other grounds.

[11] In addition to the eight state court decisions previously cited from California (*In re Marriage Cases*), Kentucky (*Jones v. Hallahan*), Maryland (*Conaway v. Deane*), Minnesota (*Baker v. Nelson*), New York (*Hernandez v. Robles*), Vermont (*Baker v. State*) and Washington (*Singer v. Hara*, *Andersen v. King County*) are the decision of the California Court of Appeal in *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 706 (Cal. Ct. App. 2006), *rev'd on other grounds*, 183 P.3d 384 (Cal. 2008), and four decisions of the New York Supreme Court, Appellate Division, later affirmed by the New York Court of Appeals: *Hernandez v. Robles*, 805 N.Y.S.2d 354, 370 (N.Y. App. Div. 2005) (Catterson, J., concurring) ("there is no discrimination on account of sex" because "both men and women may marry persons of the opposite sex; neither may marry anyone of the same sex"); *Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d 136, 143 (N.Y. App. Div. 2006) (state marriage law is "facially neutral"); *In re Kane*, 808 N.Y.S.2d 566 (N.Y. App. Div. 2006) (following *Samuels*), *Seymour v. Holcomb*, 811 N.Y.S.2d 134 (N.Y. App. Div. 2006) (same), *aff'd* 855 N.E.2d 1 (N.Y. 2006).

violated the state equal rights amendment).[12]

In its highly abbreviated sex discrimination analysis, the district court apparently accepted plaintiffs' argument, based on *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down state anti-miscegenation statutes, that facial neutrality ("equal application" in plaintiffs' parlance) does not immunize a statute (or, in this case, a state constitutional amendment) from federal constitutional challenge. *See* Doc. 202 at 29; Doc. 281 at 19. Therefore, the fact that Proposition 8 affects men and women equally does not provide an automatic defense against an equal protection attack. The analogy to *Loving* is unconvincing at several levels.

First, *Loving* dealt with race, not sex. The two characteristics are not fungible for purposes of constitutional analysis. For example, although it is clear that public high schools and colleges may *not* field sports teams segregated by *race*, see *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968), they *may* field teams segregated by *sex* (at least where equal opportunities are afforded to males and females on separate teams) without

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[12] The only contrary authority from any reviewing court is *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). In *Baehr*, a two-judge plurality expressed the view that a law reserving marriage to opposite-sex couples constituted sex discrimination under the state constitution, subject to a heightened standard of judicial review. *Id*. at 59-63. That view did not command a majority of the court, however, and, in any event, was later superceded by an amendment to the Hawaii Constitution recognizing the legislature's power "to reserve marriage to opposite-sex couples." HAW. CONST. art I, § 23. The plurality opinion in *Baehr* is an outlier in the law.

violating the Equal Protection Clause.[13] Indeed, a school district may go so far as to provide identical sets of single-gender public schools without running afoul of the Equal Protection Clause. *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880, 885-88 (3d Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977). Although, since *Brown v. Board of Education*, 347 U.S. 483 (1954), classifications based on race have been subjected to strict scrutiny review without regard to whether a given classification happens to apply equally to members of different races, *see McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (striking down laws that criminalized interracial cohabitation), "the laws in which the Supreme Court has found sex-based classifications have all treated men and women differently." *Smelt*, 374 F. Supp. 2d at 876.[14]

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[13] *See Force by Force v. Pierce City R-VI School District*, 570 F. Supp. 1020, 1026 (W.D. Mo. 1983) (noting that "a number of courts have held that the establishment of separate male/female teams in a sport is a constitutionally permissible way of dealing with the problem of potential male athletic dominance"); *O'Connor v. Board of Education of School District No. 23*, 645 F.2d 578, 582 (7th Cir. 1981) (in dissolving a preliminary injunction directing a school board to permit a junior high school girl to try out for the boys' basketball team, the Seventh Circuit commented that it was "highly unlikely" that the plaintiff could demonstrate that the school board's policy of "separate but equal" sports programs for boys and girls violated either the Equal Protection Clause or the equal rights provision of the Illinois Constitution).

[14] Citing *United States v. Virginia*, 518 U.S. 515, 519-20 (1996) (law prevented women from attending military college); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 719 (1982) (law excluded men from attending nursing school); *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (law allowed

Second, anti-miscegenation statutes were intended to keep persons of *different* races *separate.* Marriage statutes, on the other hand, are intended to bring persons of the *opposite* sex *together*. Statutes that mandated *segregation* of the *races* with respect to marriage cannot be compared in any relevant sense to statutes that promote *integration* of the *sexes* in marriage.

> The *Loving* analogy is inapt on purely logical grounds. The statutes struck down in *Loving* . . . prohibited marriages between members of *different* races, not between members of the *same* race. The equivalent, in the area of sex, of an anti-miscegenation statute would not be a statute prohibiting *same*-sex marriages, but one prohibiting *opposite*-sex marriages, an absurdity which no State has ever contemplated. The equivalent, in the area of race, of a statute prohibiting same-sex marriage, would be a statute that prohibited marriage between members of the *same* race. Laws banning marriages between members of the same race would be unconstitutional, not because they would segregate the races and perpetuate the notion that blacks are inferior to whites, . . . but because there could be no possible rational basis prohibiting members of the same race from marrying. Laws against same-sex marriage, on the other hand, are supported by multiple reasons . . . .

Hernandez v. Robles, 805 N.Y.S.2d at 370-71 (Catterson, J., concurring) (citation and internal quotation marks omitted).

Third, unlike the history of the anti-miscegenation statutes struck down in

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women to buy low-alcohol beer at a younger age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (law imposed a higher burden on female servicewomen than on male servicemen to establish dependency of their spouses); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (law created an automatic preference of men over women in the administration of estates).

Loving, which stigmatized blacks as inferior to whites,[15] "there is *no* evidence that laws reserving marriage to opposite-sex couples were enacted with an intent to discriminate against either men or women. Accordingly, such laws cannot be equated in a facile manner with anti-miscegenation laws." *Hernandez*, 805 N.Y.S.2d at 370 (Catterson, J., concurring).[16] As in *Goodridge*, which was decided on other grounds, there is no evidence that Proposition 8 was "motivated by sexism in general or a desire to disadvantage men or women in particular." 798

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[15] The statutes challenged in *Loving* did not prohibit all interracial marriages, but only marriages between "white persons" and "nonwhite persons." *Loving*, 388 U.S. at 11 & n. 11. Interracial marriages between "nonwhites" were not banned. Noting that "Virginia prohibits only interracial marriages involving white persons," the Supreme Court determined that "the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." 388 U.S. at 11 & n. 11. That "justification," the Court concluded, was patently inadequate: "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id*. at 11-12.

[16] With the exception of the plurality opinion in *Baehr*, 852 P.2d at 59-63 & nn. 23-25, and a passing reference in *Goodridge*, 798 N.E.2d at 958 & n. 16, no reviewing court has found the equal protection analysis set forth in *Loving* to be applicable to laws reserving marriage to opposite-sex couples. *See In re Marriage Cases*, 49 Cal. Rptr. 3d at 707-08; *Conaway v. Deane*, 932 A.2d at 599-604; *Baker v. Nelson*, 191 N.W.2d at 187; *Lewis v. Harris*, 875 A.2d 259, 272 (N.J. Super Ct. App. Div. 2005), *aff'd in part and modified in part*, 908 A.2d 196 (N.J. 2006); *Hernandez*, 855 N.E.2d at 8, *id*. at 19-20 (Graffeo, J., concurring); *Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d at 144; *Baker v. State*, 744 A.2d at 880 n. 13, 887; *Andersen,* 138 P.3d at 989, *id*. at 1001 (J.M. Johnson, J., concurring in judgment only); *Singer*, 522 P.2d at 1195-96.

N.E.2d at 992 (Cordy, J., dissenting). Nor has either gender been subjected to "any harm, burden, disadvantage, or advantage," *id*., from the adoption of those statutes.

Contrary to the understanding of the district court, whose analysis of the sex discrimination argument has been rejected by every other court (other than the two-judge plurality opinion of the Hawaii Supreme Court in *Baehr*), Proposition 8 does *not* "mandate[] that men and women be treated differently, . . . " Doc. 708 at 126. Proposition 8 treats men and women equally. And laws that treat men and women equally, and do not subject them to different restrictions or disabilities, cannot be said to deny either men or women the equal protection of the law. Accordingly, Proposition 8 does not discriminate on account of sex.

III.

PROPOSITION 8 DOES NOT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The district court held that Proposition 8 also discriminates on account of sexual orientation in violation of the Equal Protection Clause. Doc. 708 at 121-23. In its analysis, the court assumed that Proposition 8, by its own terms, discriminates against homosexuals, and found that only an irrational animus against homosexuals could possibly explain support for the measure. *Id*. at 107-11

(Findings of Fact # 79 and # 80), 134-38. But the court's assumption was mistaken. Moreover, there is no evidence, nor could there be any, of the voters' intent–other than to restore the traditional understanding of marriage.

Proposition 8 does not discriminate on the basis of sexual orientation. Homosexuals *may* marry someone of the opposite sex, and heterosexuals may *not* marry someone of the same sex. "Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals." *Baehr v. Lewin*, 852 P.2d 44, 51 n. 11 (Haw. 1993) (plurality).[17] *See also Dean v. District of Columbia*, 653 A.2d 307, 363 n. 1 (D.C. App. 1995) (following *Baehr*) ("just as not all opposite-sex marriages are between heterosexuals, not all same-sex marriages would necessarily be between homosexuals"); *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 953 n. 11 (Mass. 2003) (same); *Smelt v. County of Orange*, 374 F.Supp. 2d, 861, 874 (C.D. Cal. 2005) (same) (interpreting the Defense of Marriage Act).[18]

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[17] Accordingly, "'[h]omosexual' and 'same-sex' marriages are not synonymous; by the same token, a 'heterosexual' same-sex marriage is not, in theory, oxymoronic"). *Id*. A third judge in *Baehr* noted that "[t]he effect of the statute [reserving marriage to opposite-sex couples] is to prohibit same sex marriages on the part of professed or non-professed heterosexuals, homosexuals, bisexuals or asexuals"). *Id*. at 71 (Heen, J., dissenting).

[18] Judges in other cases have made the same observation. *See*, *e.g*., *Baker v. State*, 744 A.2d 864, 890 (Vt. 1999) (Dooley, J., concurring) ("[t]he marriage statutes do not facially discriminate on the basis of sexual orientation); *id*. at 905

In his concurring opinion in *Andersen v. King County*, 138 P.3d 963 (Wash. 2006), Justice J.M. Johnson noted that the state DOMA "does not distinguish between persons of heterosexual orientation and homosexual orientation," *id*. at 997 (J.M. Johnson, J., concurring in judgment only), and identified a recent case in which a man and a woman, both identified as "gay," entered into a valid opposite-sex marriage. *Id*. at 991, n. 1, 996, citing *In re Parentage of L.B.*, 89 P.3d 271, 273 (Wash. Ct. App. 2004), *aff'd in part*, *rev'd in part on other grounds*, 122 P.3d 161 (Wash. 2005).[19] It is apparent, therefore, that the right to enter into an opposite-sex marriage in California "is not restricted to (self-identified) heterosexual couples," *id*. at 991, n. 1, but extends to all adults without regard to "their sexual orientation." *Id*. at 997. Contrary to the understanding of the California Supreme Court, *see In re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008), Proposition 8 does not, *on its face*, discriminate between heterosexuals and homosexuals. The classification in the amendment is not between men and

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(Johnson, J., concurring in part and dissenting in part) (noting that "sexual orientation does not appear as a qualification for marriage under the marriage statutes" and the State "makes no inquiry into the sexual practices or identities of a couple seeking a license"); *Hernandez v. Robles*, 855 N.E.2d 1, 20 (N.Y. 2006) (Graffeo, J., concurring) (same).

[19] The district court itself noted that "some gay men and lesbians have married members of the opposite sex." Doc. 708 at 82 (Finding of Fact # 51, par. e, citing Tr. 2043:1-2044:10 (testimony of Gregory Herek)).

women, or between heterosexuals and homosexuals, but between opposite-sex couples and same-sex couples.

Admittedly, Proposition 8 has a greater *impact* on homosexuals than on heterosexuals. Nevertheless, disparate impact alone is insufficient to invalidate a classification, even with respect to suspect or quasi-suspect classes such as race and gender. Under well-established federal equal protection doctrine, a facially neutral law (or other official act) may not be challenged on the basis that it has a disparate impact on a particular race or gender unless that impact can be traced back to a discriminatory purpose or intent. The challenger must show that the law was enacted (or the act taken) *because of*, not *in spite of*, its foreseeable disparate impact. *See Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (race); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-71 (1977) (race); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-80 (1979) (sex). Even assuming, for purposes of disparate impact analysis, that sexual orientation is to be treated in the same manner as race or gender and subject to heightened scrutiny, which is contrary to controlling Ninth Circuit authority,[20] nothing in the district court's findings of fact–particularly the

[20] *See High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994), *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1997), *Holmes v. California Army National Guard*, 124 F.3d 1126, 1132-33

two findings the court principally relied upon in its sexual orientation analysis, *see* Doc. 708 at 107-11 (Findings of Fact # 79 and # 80), 134-37–even remotely supports the conclusion that Californians approved Proposition 8 with the *intent* or *purpose* to discriminate against homosexuals, as opposed to their *knowledge* that, if adopted, Proposition 8 would have a disparate impact on homosexuals. Nor are there any facts that *could* support such a conclusion.

In the case of a state legislature or city council that maintains official copies of its proceedings–recorded committee hearings, published committee reports and/or verbatim transcripts of floor debate–it *may* be possible, at least in some instances, to determine whether a facially neutral statute or ordinance can be traced back to a discriminatory intent or purpose (where the existence of such an intent or purpose would be relevant to the validity of the statute or ordinance). So, too, in the case of an act taken by an official, it may be possible to discover whether an improper intent or purpose underlies the official act. But in the case of a statute or state constitutional amendment placed on the ballot through a citizen

(9th Cir. 1997), *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1137 (9th Cir. 2003), and *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008). Surprisingly, in holding that classifications based on sexual orientation should be subject to strict scrutiny review, Doc. 708 at 123-24, the district court cited none of these decisions.

initiative, and approved by the electorate, no such inquiry is even possible.[21] Apart from the language of Proposition 8 itself, which is facially neutral with respect to a person's sexual orientation,[22] how could the intent or purpose of more than seven million voters be determined? By exit polls?[23] Pre- or post-election polling? Random sampling of the electorate? Voter interviews? And how, based on the selective evidence presented by the plaintiffs (from a veritable deluge of messages inundating the voters during the hard fought campaign over Proposition 8), could any court possibly distinguish between the electorate's *knowledge* that what it was voting on would have a disparate impact on a given class of persons (homosexuals) and an *intent* or *purpose* to cause that impact? The district court

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[21] This may explain why, in its decision declaring unconstitutional state statutes reserving marriage to opposite-sex couples, including Proposition 22–the identically worded statutory predecessor to Proposition 8 passed only eight years earlier–the California Supreme Court emphasized that it was *not* suggesting that "the current marriage provisions were enacted with an invidious intent or purpose." *In re Marriage Cases*, 183 P.3d at 452 n. 73.

[22] Which, together with its narrow scope, being limited to marriage, distinguishes this case from the broad and sweeping language of Colorado's Amendment 2, struck down in *Romer v. Evans*, 517 U.S. 620 (1996) (which is discussed below). *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864-69 (8th Cir. 2006) (distinguishing *Romer* in opinion upholding state constitutional amendment reserving marriage to opposite-sex couples).

[23] The exit polling results introduced into evidence by plaintiffs did not disclose the voters' reasons for voting for Proposition 8. Those results did reveal, however, that an overwhelming majority of African-Americans (70%) and a strong majority of Latinos voted in favor of the measure.

never addressed either the propriety or the possibility of making such determinations and distinctions.

An inquiry into the subjective reasons that lead voters to support a particular ballot proposition is not only factually impossible, but also legally improper. A court "may not . . . inquire into the electorate's possible actual motivations for adopting a measure via initiative or referendum. Instead, the court must consider *all* hypothetical justifications which potentially support the enactment." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 n. 4 (6th Cir. 1997) (citations omitted) (emphasis added).[24] That is also the law in this Circuit. *See Southern Alameda Spanish Speaking Organization v. City of Union City, California*, 24 F.2d 291, 295 (9th Cir. 1970) ("the question of [voter] motivation" is not "an appropriate one for judicial inquiry").[25] In the case of Proposition 8, those justifications, as appellants' brief establishes, include, *inter*

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[24] Thus, the district court erred in stating that "the voters' determinations must find at least some support in evidence." Doc. 708 at 25. Under rational basis review, they need not. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("a legislative choice is not subject to courtroom factfinding, and may be based on rational speculation unsupported by evidence or empirical data").

[25] Indeed, "[i]f the true motive is to be ascertained not through speculation but through a probing of the private attitude of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise." *Id*. In light of the foregoing, it is not surprising that the district court did not cite a single case in which a federal court has relied upon a *factual* inquiry into voter motivation to determine the constitutionality of a ballot measure.

alia, the interests in preserving traditional marriage, channeling procreative sexual activity into a stable social and cultural environment in which the children so procreated may be raised and providing the benefits of dual-gender parenting. None of those justifications betrays an *intent* or *purpose* to harm homosexuals.

It is precisely because Proposition 8 is supported by multiple, legitimate state interests that the subjective motivations of the voters–even if they could be ascertained and were otherwise admissible–are irrelevant under *Romer*, the district court's primary authority. Doc. 708 at 119, 120, 134, 135. "[P]ublic discrimination towards persons who are not members of a suspect or quasi-suspect class is permissible as long as such official discrimination is rationally linked to the furtherance of some valid public interest." *Equality Foundation*, 128 F.3d at 297 n. 8, citing *Romer*, 517 U.S. at 632.[26] This holding is supported by decisions rejecting equal protection challenges to various forms of alleged discrimination against homosexuals where, *regardless of animus*, the discrimination in question

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[26] *See also Lofton v. Secretary of Dep't of Children & Family Services*, 377 F.3d 1275, 1280 (11th Cir. 2004) (Birch, J., specially concurring in the denial of rehearing *en banc*) (*Romer* essentially stands for the proposition "that when all the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis" and "animus *alone* cannot constitute a legitimate government interest") (emphasis in original); *Andersen*, 138 P.3d at 981 (plurality) (same).

was rationally related to a legitimate governmental purpose.[27] So, too, state courts have upheld statutes reserving marriage to opposite-sex couples, notwithstanding claims that such statutes were motivated in part by an anti-homosexual animus, because they determined that the statutes were reasonably related to legitimate state interests. *Standhardt v. Superior Court*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003); *Andersen*, 138 P.3d at 980-85 (plurality).

In light of the foregoing, it is irrelevant whether, as the district court purported to find, Proposition 8 was motivated by animus against homosexuals. The fact remains that Proposition 8 is reasonably related to legitimate state interests. That is sufficient to sustain its constitutionality under the rational basis standard. The district court's holding to the contrary should be reversed.

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[27] *See Equality Foundation*, 128 F.3d at 300-01 (upholding city charter amendment that repealed special anti-discrimination protections for homosexuals, gays, lesbians and bisexuals, and barred the city and its agencies from restoring such protections); *Citizens for Equal Protection*, 455 F.3d at 864-69 (upholding state marriage amendment); *Lofton v. Secretary of Dep't of Children & Family Services*, 358 F.3d 804, 817-26 (11th Cir. 2004) (upholding statute prohibiting practicing homosexuals from adopting children); *Holmes*, 124 F.3d at 1132-36 (upholding military's "Don't Ask/Don't Tell" policy).

CONCLUSION

For the foregoing reasons, *amicus curiae*, the Family Research Council, respectfully requests that this Honorable Court reverse the judgment of the district court.

Respectfully submitted,

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Case Number 10-16696

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