No. 12-144

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,
v.

KRISTIN M. PERRY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE SOUTHERN POVERTY LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Statement of Interest

The Southern Poverty Law Center ("SPLC")[1] is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. SPLC's lawsuits have toppled institutional racism in the South, bankrupted some of the nation's most violent white supremacist groups, and won justice for exploited workers, abused prison inmates, disabled children, and other victims of discrimination.

SPLC's advocacy and impact litigation on behalf of the lesbian, gay, bisexual, and transgender ("LGBT") community spans decades, beginning with a case challenging the military's anti-gay policy in the late 1970s and the monitoring of anti-gay hate and extremist groups today. The SPLC's analysis of the FBI's hate crime statistics from years 1995 to 2008 found that gay men and lesbians, or those perceived to be gay, are more than twice as likely to be attacked in a violent hate crime as Jewish or black people; more than four times as likely as people of the Muslim faith; and 14 times as likely as Latinos.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* represents that no counsel for a party authored this brief, nor has any counsel, party, or third person made a monetary contribution intended to fund the preparation or submission of this brief. This brief is filed with the consent of all parties.

The SPLC has also appeared as counsel or *amicus curiae* in numerous cases challenging discrimination on the basis of sex and sexual orientation, including as counsel of record in *Frontiero v. Richardson*, 411 U.S. 677 (1973), which paved the way for the Supreme Court's subsequent holding that intermediate scrutiny applies to gender-based classifications. Currently, the SPLC represents a decorated, disabled Army veteran and her same-sex spouse in a case challenging the federal government's refusal to recognize their legally valid marriage.

The SPLC has a strong interest in ensuring that laws and policies do not reflect animus towards gay men and lesbians and other vulnerable members of society.

Summary of Argument

A law singling out one class of people only "to make them unequal to everyone else" cannot satisfy the Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 635 (1996). The evidence in this case amply demonstrates that that is exactly what Proposition 8 did and was designed to do. At trial, no one questioned that Proposition 8 sought to strip same-sex couples of rights enjoyed by others. Nor was there any real doubt why Proposition 8 was placed on the ballot. The trial record reveals a ballot campaign filled with hostility and fear-mongering against gay citizens, featuring vicious sexual stereotypes, warnings about a moral degradation of society caused by same-sex marriage, and attempts to stoke fear in the hearts of parents for the safety and welfare of their children.

Presented with this record, the Ninth Circuit drew "'the inevitable inference that the disadvantage imposed is born of animosity toward,' or, as is more likely with respect to Californians who voted for the Proposition, mere disapproval of, 'the class of persons affected.'" *Perry v. Brown,* 671 F.3d 1052, 1093 (9th Cir. 2012) (quoting *Romer*, 517 U.S. at 634). The District Court made the same core finding, explaining that "[t]he evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002-03 (N.D. Cal. 2010).

Recognizing naked animus for what it is, the SPLC—based on its own decades-long history of fighting discrimination born of hatred and ill-will—files this brief to spotlight key aspects of the record. Below, the SPLC identifies and summarizes four general themes that supporters of Proposition 8 used extensively in the course of their ballot campaign to engender fear and disgust towards same-sex couples. ***First***, the campaign featured arguments that accepting same-sex marriage would inevitably lead to the legalization of pedophilia, incest, polygamy, prostitution, and bestiality. In fact, a number of campaign materials openly suggested that legalizing sex with children is the ultimate goal of the "gay agenda." ***Second***, the campaign played upon fears that any mention of same-sex marriage in school curricula would somehow erode the developing moral sensibilities of children and ultimately change their sexual orientation. ***Third***, the campaign relied on baseless innuendo and sexual stereotypes to argue that

same-sex parenting presents a danger to stable family life and childhood development. ***Fourth***, in much of its literature, the campaign stated openly and crudely that same-sex marriage is evil and that advocates of same-sex marriage seek to destroy traditional marriage. Together, these four campaign themes sent a clear and unmistakable message to California voters: Same-sex marriage is something to be feared, distrusted, and scorned.

If there were ever any doubt about the malignant purposes behind Proposition 8, what happened after its passage, in the course of this litigation, serves as confirmation. At trial, Petitioners had every opportunity to present evidence to show that Proposition 8 was promoted rationally and fairly during the campaign, without appeals to animus; indeed, regardless of what was said or published during the campaign, Petitioners were invited at trial to prove that Proposition 8 has a rational justification, even in hindsight. They presented no such proof, which is why both the District Court and the Ninth Circuit made the inescapable determination that group animus was the most likely justification for the passage of Proposition 8. Sadly, the same pattern continues to this day, except now without any pretense. Many of the *amicus* briefs supporting reversal before this Court attempt to justify Proposition 8's constitutionality by echoing the same themes of fear, dislike, and moral condemnation that were so central to the Proposition 8 campaign.

The SPLC submits that the evidence of animus against gay people and against the idea of same-sex marriage in general must be kept in the forefront when

this case is decided. There could be no better illustration why fear, hostility, intolerance, and appeals to the superior morality of one group over another should never have any place in Equal Protection analysis. Because the Equal Protection Clause does not permit a "status-based enactment divorced from any factual context from which [the courts] could discern a relationship to legitimate state interests," Proposition 8 is unconstitutional and the decision below should be affirmed. *See Romer,* 517 U.S at 635.

Argument

I. The evidence presented at trial conclusively shows that the purpose of Proposition 8 was to single out gay men and lesbians based on animus and to label them as inferior.

Respondents introduced exhaustive evidence at trial about the Proposition 8 campaign and the content of the messages disseminated to the public by supporters of that measure. This evidence demonstrates that supporters of Proposition 8 relied on alarmist falsehoods, long-discredited stereotypes, and hateful language to make the point that same-sex relationships are inferior to opposite-sex relationships and that gay men and lesbians should be disabled from enjoying a social status available to all other citizens. The evidence reveals four themes of animus behind the Proposition 8 campaign: (1) a link between homosexuality and pedophilia, incest, polygamy, prostitution, and bestiality; (2) same-sex marriage's threat to children's welfare and identities; (3) the

dangers of same-sex parenting; and (4) the relationship between homosexuality and evil.

Leaving no room for doubt, even Proponents' expert admitted what the evidence makes clear: many supporters of Proposition 8 were motivated by animus towards homosexuals. Petitioners' expert Professor Kenneth Miller stated that "at least some people voted for Proposition 8 on the basis of anti-gay stereotypes and prejudice." Tr. 2608:16-18. Respondents' expert Dr. Ilan Meyer explained why this is so: Proposition 8 "sends a message that it is okay to reject. Not only that it is okay, that this is very highly valued by our Constitution to reject gay people, to designate them a different class of people in terms of their intimate relationships." Tr. 863:3-6.

A. Supporters of Proposition 8 insisted that legalization of same-sex marriage would require legalization of pedophilia, incest, polygamy, prostitution, and bestiality, all of which were action items on the so-called "gay agenda."

"Consequence messages" were a primary strategy of the Yes on 8 Campaign. According to the lead campaign strategists, the campaign's objective was to "convince voters that same-sex marriage had broader implications for Californians and was not only about the two individuals involved in a committed gay relationship." PX0577; J.A. Exh. 108 ("Passing Prop 8" by Frank Schubert and Jeff Flint). Instead, supporters of Proposition 8 consistently made reference to a parade of horribles that they insisted would inevitably

result from same-sex marriage, all of which were expressly intended by the so-called "gay agenda." Drawing on a term first broadly used in the 1980s and early 1990s to overturn or prohibit protections for LGBT persons, the Proposition 8 supporters' view of the "gay agenda" was based not on any factual information, but on stereotypes and falsehoods about gay men and lesbians. Some references to the "gay agenda" were vague, but ominous, warnings of unspecified but horrible consequences. As one Proposition 8 advertisement warned, "if Prop. 8 fails, it opens up the door for all the other laws that the homosexual agenda wants to enforce on other people." PX0401 at 00:22-00:29; Exh. 86 ("Stand up for Righteousness. Vote Yes on Proposition 8" video, featuring Ron Prentice, Tony Perkins and Miles McPherson); *see also* PX2403 at 8 (Email from Kenyn Cureton, Vice President for Church Ministries with the Family Research Council, to Ron Prentice, Chairman of ProtectMarriage.com, stating that "[t]he practical result will be force-feeding the homosexual agenda through public institutions, discrimination against those who reject homosexuality, and a loss of our First Amendment freedoms.").

But other complaints against the "gay agenda" were far more specific and plainly laden with animus. Supporters' most common tactic was to link recognition of same-sex marriage to pedophilia, incest, polygamy, prostitution, and bestiality. According to Evangelical leader and Proposition 8 Proponent Bill Tam, "legalizing drugs, prostitution and polygamy are also the ultimate goals of the homosexual movement." PX2343B; J.A. Exh. 187 (professional translations of "The Harm to Children from Same Sex Marriage" by

Tam Hak Sing, a.k.a. Bill Tam). Mr. Tam explained to supporters that in Denmark, where gay couples have been allowed to marry, sex education CDs produced with the permission of the Education Ministry "include pictures of 'man-and animal intercourse' and 'man eating feces' (note: eating feces is an example of one type of homosexual intercourse.)." *Id.* Mr. Tam also wrote that gay people "lose no time in pushing the gay agenda—after legalizing same-sex marriage, they want to legalize prostitution. What will be next? On their agenda list is: legalizing having sex with children." PX0513; J. A. Exh. 102 (Bill Tam, "What if We Lose"). On his website, Mr. Tam provided "facts" demonstrating that "homosexuality is linked to pedophilia." PX2199; J.A. Exh. 177 (onemanonewoman.net). Another advocacy group encouraged these connections by describing the "homosexual inclination" as "objectively disordered." PX0301; J. A. Exh. 79 (Catholics for the Common Good website article, "Excerpts from Vatican Document on Legal Recognition of Homosexual Unions").

Supporters of Proposition 8 did not stop at suggesting that gay men and lesbians hoped to make these crimes legal; they suggested that recognition of same-sex marriage would inevitably lead to such legalization. A simulcast to Proposition 8 supporters warned that "the polygamists are waiting in the wings because if a man can marry a man and a woman can marry a woman based on the fact that you have the right to marry whoever you want to marry, then the polygamists are going to use that exact same argument and they're probably going to win." PX0504A at 00:22-00:36 (excerpts from simulcast video paid for by ProtectMarriage.com); J.A. Exh. 93 (transcript of

same). Another advocate in the video explained that if "sexual orientation or sexual attractions" were the basis upon which people were allowed to marry, "pedophiles would have to be allowed to marry 6-7-8 year olds" and the "man from Massachusetts who petitioned to marry his horse after marriage was instituted in Massachusetts [would] have to be allowed to do so. Mothers and sons, sisters and brothers, any, any combination would have to be allowed." *Id.* at 08:17-08:35; J.A. Exh. 97. Similarly, Mr. Tam wrote to voters that "[i]f 'sexual preference' can be listed as a civil right, then 'pedophilia,' 'incest,' and 'polygamy' can also be listed as civil rights." PX2343A; J.A. Exh. 181. A flyer urging voters to "Vote Yes on Prop. 8" cited the "moral decline" of countries that permit same-sex marriage, explaining that countries that extended the right of marriage to same-sex couples also legalized bestiality, incest, and polygamy, among other things. PX2595; J.A. Exh. 211.

Other materials threatened that the "gay agenda" aimed to destroy religious freedom. A California Family Council brochure cautioned that "[t]hose challenging this agenda will lose their freedom to express biblical truth[,] . . . and fear of legal retaliation is intended to silence the Church." PX0021; J.A. Exh. 65. In a letter to supporters on his website, Proponent Tam detailed the goal of "gay activists" to destroy churches:

> Gay activists would target the big churches and request to be married by their pastors. If the church refuse [sic], they would sue the church. Even if they know they may not win, they would still sue because they have a big army of lawyers

> from ACLU who would work for free. They know a prolonged law suit would cripple the church. . . . The church would have to spend lots of money in defending the case. The court fight would be long and the congregation would be discouraged and leave – how long are they willing to shoulder the law suit costs. The church may give in and accept them, their membership would grow and take over the church. Then a righteous pastor would have to leave. Such scenarios have happened in Scandinavian countries.

PX0513; J.A. Exh. 103. He warned that if Proposition 8 failed, gay men and lesbians "would do more and change more laws so as to persecute us easier." *Id.*

Advocates in favor of Proposition 8 expressly linked the proposition to their efforts to preserve animus against gay men and lesbians, by preventing society from learning about or accepting same-sex relationships. In a simulcast entitled "ABCs of Protecting Marriage," a supporter argued that "[l]aws can have a tremendous effect on the way we view marriage and if we have same-sex marriage legalized, it's really giving implicitly our political blessing to this thing." PX1867; J.A. Exh. 160-61. "It's an affirmation that it's just as good. And then we're going to have this society that eventually is going to come to believe it over generations." *Id.* In another simulcast, an advocate warned that after recognizing same-sex marriages in Massachusetts, people were being "desensitized day by day concerning homosexuality and becoming more and more adjusted to the idea of homosexual marriage being the law of the land and the

homosexual agenda becoming more and more of a powerful element in the life of our society." PX0504A at 04:24-04:43 (ProtectMarriage.com simulcast); J.A. Exh. 95 (transcript of same).

B. The campaign relied on animus-based appeals for the "protection of children" from gay men and lesbians.

"Protecting California children" was one of the main slogans of the campaign, and dominated many of the official campaign materials. The official ballot argument stated that Proposition 8 "protects our children from being taught in public schools that 'same-sex marriage' is the same as traditional marriage." PX0001; J.A. Exh. 56. It also warned that if Proposition 8 failed, "TEACHERS COULD BE REQUIRED to teach young children that there is *no difference* between gay marriage and traditional marriage." *Id.* (emphasis in original). Imagery of children and messages about the menace homosexual marriage posed to their safety and welfare pervaded California during the campaign. *See, e.g.,* PX1763; J.A. Exh. 154 (Yes on 8 official campaign flyer); PX2187; J.A. Exh. 174 (flyer for "Restore Marriage – Protect Children" rally).

Several campaign ads focused exclusively on children. The ads explained that Proposition 8 "has everything to do with schools" and warned that gay marriage would be taught in schools if Proposition 8 failed. PX0091 at 00:00-00:05; J.A. Exh. 70; PX0095; J.A. Exh. 70 (Yes on 8 Campaign ads). According to the Proposition 8 campaign strategists, the final period of the campaign was "largely about education," and the

No on 8 campaign's lack of response to the "education message" was crucial. PX0577; J.A. Exh. 110-11 ("Passing Prop 8" by Frank Schubert and Jeff Flint). Proponents aired ads featuring a "prominent law school professor" warning that a result of the California Supreme Court's decision, "gay marriage would be taught in the public schools." *Id.*

In a video posted on the American Family Association's website, Proposition 8 supporters expressed concern about "the influence of a culturally triumphant homosexual movement upon children," warning that "children will face a constant onslaught of the message that homosexuality is not only something to tolerate, it's something to celebrate." PX0480A at 00:55-01:35; J.A. Exh. 89 (transcript). Mr. Tam wrote that if Proposition 8 passed, "[c]hildren will be protected and will not be subjected to brainwashing like education in public schools that states that homosexuality is normal." PX2343B; J.A. Exh. 189. A host of other advocacy literature and videos urged a yes vote on Proposition 8 in order to protect children and families. *See* PX0079 (Asian American Community Newsletter and Voter Guide); PX0097 at 00:34-00:40 (Yes on 8 campaign video); DIX2460 (Spanish language Yes on 8 Campaign literature).

At trial, Respondent Sandra Stier explained that the Yes on 8 Campaign's "constant reference to children – it felt manipulative and it felt very harmful to me, as an individual, to us, as a couple, and our children, our family, our community." Tr. 177: 5-8; J.A. 391. The message was "that there was a great evil to be feared and that evil must be stopped and that evil is us." *Id.* As a parent, Stier recognized that nothing is

"stronger than the desire to protect your children," and explained "the very notion that I be part of what others need to protect their children from was just – it was more than upsetting. It was sickening, truly. I felt sickened by that campaign." Tr. 177:14-18, J.A. 391-92.

Going even further, Proposition 8 supporters implied that Proposition 8 was necessary to prevent children not only from accepting homosexuality, but from becoming gay themselves. Ron Prentice, the Chairman of Protectmarriage.com, worried that "[i]f traditional marriage goes by the wayside, then in every public school, children will be indoctrinated with a message that is absolutely contrary to the values that their family is attempting to teach them at home." PX0480A at 00:59-01:11 (American Family Association video entitled "Proposition 8 and the Case for Traditional Marriage,"); J.A. Exh. 89 (transcript). Several official advertisements showed parents' horror upon hearing that their children learned at school that "a prince married a prince." PX0116 at 01:10-01:30; PX0100; J.A. Exh. 70 (Spanish language campaign ad). Respondents' expert Professor George Chauncey testified that this video shows a "pretty strong echo of this idea that simple exposure to gay people and their relationships is going to somehow lead a generation of young kids to become gay." Tr. 430:5-8; J.A. 489. Respondents' expert Professor Gary Segura concurred, explaining at trial that the underlying campaign message was "that if Prop 8 failed, the public schools are going to turn my daughter into a lesbian." Tr. 1579:14-15.

A simulcast by supporters of Proposition 8 warned that children in kindergarten were already being taught "perversion": "in kindergarten they're being taught if a little boy thinks he's a little girl, in the State of California, he is a little girl." PX0504A at 06:58-07:04; J.A. Exh. 96 (transcript). Proponent Tam warned that, without Proposition 8, "[e]very child, when growing up, would fantasize marrying someone of the same sex. More children would become homosexuals." PX0513; J.A. Exh. 103. Mr. Tam testified at trial that to prevent children from fantasizing about marrying people of the same sex, it was necessary to distinguish between domestic partnership and marriage. Tr. 1962:17-1963:11; J.A. 804-05.

Professor Chauncey testified at trial that the "protect children" message is a reliable standby of the historical opposition to gay rights. Professor Chauncey described how in the infamous Save Our Children Campaign led by Anita Bryant in 1977, opponents of civil rights for gay men and lesbians "decided to focus on some of what they argued were the consequences of allowing an anti-discrimination law to stand, and they focused particularly on the effects that this might have on children." Tr. 418:15-18; J.A. 477. Professor Chauncey recognized the same message in the Proposition 8 Campaign, a message about the "undesirability of homosexuality, that we don't want our children to become this way." Tr. 432:10-11; J.A. 491.

C. The campaign relied on animus-based stereotypes asserting the inferiority of and danger posed by same-sex parenting.

Another variant of the "protect children" message was that same-sex parents posed a danger to their children's development. Supporters of the proposition warned that it would be "radically anti-human" to say that a husband and wife were "just really optional for the family." PX1868 ("Love, Power and a Sound Mind" simulcast); J.A. Exh. 169 (transcript). Advocates claimed that "the specter of children being raised in same-sex homes also turns nature on its head." PX0480 at 16:25-16:32 (video posted on the American Family Association's website entitled "Proposition 8 and the Case for Traditional Marriage"); J.A. Exh. 90 (transcript). Another group warned that allowing children to be adopted by same-sex couples "would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development." PX0301; J.A. Exh. 78 (Catholics for the Common Good webpage).

Gender stereotypes played a large role in Proposition 8 advocates' explanation of the necessity of a male and female parent. An American Family Association video commentator, identified as Dr. Melson, remarked that she "can only imagine the confusion with two moms or two dads. I mean, who do you go to when you need to learn how to change the oil if you're a guy? Who is there—I mean, God's giving, given moms a natural instinct to mother and love." PX0480 at 16:42-16:58; J.A. Exh. 90 (transcript).

Another Proposition 8 video contained an assertion that Proposition 8 was necessary because "children are confused about what marriage is and about what men and women are." PX0401 at 00:18-00:22; Exh. 86.

Supporters' threat that if Proposition 8 failed, "the concept of what a family is will be redefined, and *it will be up for grabs*," is irreconcilable with the preexisting parenting rights of domestic partners in California. *See* PX0401 at 00:05-00:11; Exh. 86. As the Official Voter Information Guide explained, Proposition 8 "doesn't take away any rights or benefits of gay or lesbian domestic partners." PX0001; J.A. Exh. 53. Moreover, the Yes on 8 Campaign recognized that "[t]he protection of marriage in no way infringes upon the rights of gay couples to enjoy the same legal benefits as married couples through a civil union, including adoption . . . ." PX0008; J.A. Exh. 60 (Yes on 8 press release). The messaging about same-sex parenting was therefore only a vehicle through which to stereotype about same-sex relationships and traditional gender roles, in order to cast same-sex relationships as inferior. The message bore no rational relationship to Proposition 8's actual effects. The Ninth Circuit recognized this conflict, and refused to "credit a justification for Proposition 8 that is totally inconsistent with the measure's actual effect and with the operation of California's family laws both before and after its enactment." *Perry v. Brown*, 671 F.3d at 1087.

D. Proposition 8 supporters characterized their campaign as a struggle against literal evil and the certain collapse of American society.

Evocative imagery helped supporters of Proposition 8 brand the LGBT movement, and the desire for recognition of same-sex marriage, as threatening and inspired by evil. Advocates linked support of same-sex marriage to the devil. According to a simulcast video, "[t]he devil understands if I can get a kid, I've got him. That's why they had the school, the education [about same-sex relationships] in kindergarten." PX0504A at 06:38-06:48; J.A. Exh. 96 (transcript). As another Proposition 8 video put it, "[t]he devil wants to blur the lines between right and wrong when it comes to family structure." PX0401 at 00:14-00:18; Exh. 86. Other supporters warned against the "move from tolerance to the legitimization of specific rights for cohabiting homosexual persons," stating that supporters of same-sex marriage "need to be reminded that the approval or legalization of evil is something far different from the toleration of evil." PX0301; J. A. Exh. 79 (Catholics for the Common Good website). Some advocates went so far as to compare the struggle for the recognition of same-sex marriage to the terrorist attacks of September 11, explaining that "after 9/11 the world was a fundamentally different place and that has affected me. The change in the redefinition of marriage is the same type of thing." PX0504A at 07:52-08:05 (ProtectMarriage.com simulcast video); J.A. Exh. 97 (transcript). The American Family Association's video called on voters to "stop the gay marriage juggernaut in California as the Armageddon." PX0480 at 23:07-23:26; J.A. Exh. 87.

Advertisements for Proposition 8 starkly conveyed that gay men and lesbians were to be feared. One featured images of freight trains approaching the camera. PX0401; Exh. 86. Respondent Katami explained his reaction to being likened to a freight train: "Well, what happens to you when a freight train hits you? You're going to be either majorly harmed or killed by that, right?" Tr. 107:17-19; J.A. 350.

The Yes on 8 Campaign tried to distance the LGBT movement from its goal of equal rights. Supporters of Proposition 8 stated publically that the gay rights movement was in no way like the civil rights struggle because, unlike gay men and lesbians, African Americans "did not choose to come into the world and live a deviant lifestyle." PX0504A at 05:54:-05:58 (excerpts from Protect Marriage simulcast video); J.A. Exh. 95 (transcript); *see also* PX0025 (official Yes on 8 Campaign literature quoting a pastor as saying "We strongly reject and find it insulting that radical gay activists try to equate the civil rights movement to people of the same sex demanding that the definition of marriage be forever changed."). Official campaign materials faulted same-sex marriage supporters for the decision of some individuals to vindicate their constitutional rights in court, stating they had "gone behind the backs of voters and convinced four activist judges in San Francisco to redefine marriage for all of society." PX0563; J.A. Exh. 106 ("Myths and Facts about Proposition 8").

Proposition 8 supporters also warned voters that the true motivation behind recognition of same-sex marriage was not equal rights, but rather the destruction of marriage and the domination of gay men

and lesbians over others. As Kenyn Cureton, Vice President for Church Ministries with the Family Research Council, wrote to Ron Prentice, Chairman of ProtectMarriage.com, "homosexual activists won't stop at recognition, their aim is domination." PX2403 at 8. The California Family Council claimed, "[t]he goal of the homosexual community is not 'marriage.'" PX0021; J.A. Exh. 65. Rather, the organization continued, "in countries where homosexual 'marriage' is legal, no more than three percent of homosexuals are 'married.' The ultimate goal is the annihilation of marriage and full legal acceptance of homosexuality." *Id.* Needless to say, there is no evidence that, in any country (or State) that has accepted same-sex marriage, opposite-sex marriage has been "annihilated" as a result.

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In sum, the record is replete with evidence that Proposition 8 was proposed and passed out of deep-seated animus toward gay men and lesbians. For anyone who was not in California at the time, it is important to appreciate the prevailing electoral atmosphere. Supporters' justifications were comprised of baseless "slippery slope" arguments linking homosexuality with objectively harmful criminal behavior. Gay people were cast as a threat to all children in California, especially those unlucky enough to be raised by same-sex couples. Claims were made about the inherent evil and immorality of homosexuality. This is not a situation where it is necessary to attribute a singular "intent" to those who supported Proposition 8, when they could have had any number of motivations, some rational and some not. The record shows, without doubt, that animus towards

homosexuals put Proposition 8 on the ballot and carried it to victory, which is exactly what the courts below found.

II. Petitioners did not put forth any evidence of non-animus purposes for Proposition 8.

Respondents' exhaustive evidence of animus is even more compelling when contrasted with the absence of evidence offered by Petitioners grounding Proposition 8 in any legitimate state interest. Petitioners offered literally no remotely credible rationale for supporting Proposition 8 other than an animus-based desire to treat gay citizens unfavorably compared to all other Californians.

Petitioners called only two expert witnesses at trial, and only one so-called expert on the social role and impacts of marriage. The court permitted this expert, David Blankenhorn, to testify, but reserved its right to question the weight of his testimony. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 946. Following trial, the court held that the testimony was inadmissible opinion testimony entitled to "essentially no weight" under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *Id.*

Blankenhorn offered opinions "on the definition of marriage, the ideal family structure and potential consequences of state recognition of marriage for same-sex couples." *Id.* at 947. First, Blankenhorn proposed that the definition of marriage is "a socially approved sexual relationship between a man and a woman." *Id.* at 947. The court rejected this definition because it "is

'connected to existing data only by the *ipse dixit*' of Blankenhorn." *Id.* at 948 (quoting *General Electric Co. v. Joiner,* 522 U.S. 136, 146 (1997)). The court rejected Blankenhorn's second opinion, that children raised by their married, biological parents do better than their counterparts, because there was no data cited regarding outcomes for children of gay parents to support the proffered opinion. *Id.* (citing *Joiner*, 522 U.S. at 146). Instead, Blankenhorn relied on evidence comparing "children raised by married, biological parents with children raised by single parents, unmarried mothers, step families and cohabiting parents." *Id.* Blankenhorn did not "consider any study comparing children raised by their married biological parents to children raised by their married adoptive parents." *Id.* Third, the court held unreliable Blankenhorn's opinion that permitting same-sex marriage, and thereby allowing more committed relationships to enjoy the benefits of marriage, would lead to the deinstitutionalization of marriage. The court correctly noted that Blankenhorn "gave absolutely no explanation why manifestations of the deinstitutionalization of marriage would be exacerbated (and not, for example, ameliorated) by the presence of marriage for same-sex couples." *Id.* at 950.

Equally hollow was Proponents' claim that through Proposition 8, California "reserved a special form of recognition and support to those relationships that have long been thought to uniquely further vital societal interests." Pet. Br. at 4. Proponents characterized opposition to same-sex marriage as furthering "society's vital interests in the uniquely procreative nature of opposite-sex relationships." *Id.* at 27. But Proponents put forward *no* reliable evidence or

argument explaining how Proposition 8's ban on same-sex marriage would have any effect on opposite-sex procreation. This argument was also inconsistent with California law that affords same-sex couples the same parenting rights as married couples. *See* Cal. Fam. Code § 297.5(d). Without any evidence linking same-sex marriage by gay couples to harm to children, the deinstitutionalization of marriage, or an impact on procreation, the only non-animus based reasons offered by the Proponents at trial collapsed.

As a result, the record before this Court is devoid of any rationale for Proposition 8 other than rank discrimination. Proponents had ample opportunity below to present a non-animus based purpose behind Proposition 8, in the form of admissible evidence or simply as rational argument. They failed to do so. In the absence of evidence showing a fit between the purported state interest behind Proposition 8 and the means used to achieve it, the only thing left was, and is, unvarnished prejudice.

III. The *amicus curiae* briefs submitted in support of reversal confirm that Proposition 8 was intended to express moral disapproval of same-sex relationships.

The *amicus* briefs submitted in favor of reversal echo the main themes of the Proposition 8 campaign described above. Wittingly or unwittingly to their authors, these briefs further demonstrate the deep well of animus and moral disapproval of gay men and lesbians that undergirds all of the allegedly "rational" bases put forward in support of Proposition 8.

For instance, many of the briefs repeat the specter raised in the Proposition 8 campaign that accepting same-sex marriage will inevitably lead to legalization of polygamy and incest. *See*, *e.g.*, Br. of *Amicus Curiae* Foundation for Moral Law in Supp. of Pet. at 10 n.4 (worrying that same-sex marriage will start society on a slippery slope to polygamy of three, four, or twenty men); Br. of The Lighted Candle Society *Amicus Curiae* in Supp. of Pets. at 3 (stating that same-sex marriage "would inevitably create strong pressure to redefine marriage further to include polygamy and polyamory . . . and incestuous marriage").

As during the Proposition 8 campaign, some briefs argue that Proposition 8 was necessary to prevent societal acceptance of gay people and their relationships as equal in dignity and worth to heterosexual people and relationships. These arguments emphasize the view that same-sex relationships are inherently immoral. One brief revealingly argues that Californians did "not want to put their stamp of approval upon same-sex unions that the people of California regard as immoral and unhealthy for children and for society." Br. of Foundation for Moral Law at 19. Similarly, the Lighted Candle Society suggests that Proposition 8 carries out a "moral imperative" not to convey the message that same-sex marriage is a "good thing" or equivalent to opposite-sex marriage in value. Br. of the Lighted Candle Society at 3. The brief submitted by Citizens United adds that "many Californians who support Proposition 8 embrace the Holy Bible as the Word of God" and that Californians made "a choice to avoid and discourage behaviors repeatedly declared immoral by God in both testaments." Br. of *Amicus*

Curiae Citizens United's National Committee for Family, Faith, and Prayer, et al., in Supp. of Pets. at 36-37; *see also* Br. of *Amici Curiae* National Association of Evangelicals, et al., in Supp. of Pets. at 30 ("Enacting Proposition 8 recovered the meaning of marriage that is most consistent with the value choices or moral sense of California voters."). A central concern of these briefs is that the law should not convey approval or acceptance of gay relationships; instead, it should affirm that those relationships are lesser and immoral.

In addition, a number of the briefs echo the concerns articulated in the Proposition 8 campaign materials that, without Proposition 8, children would be exposed to information about same-sex marriage in school. These briefs express deep concern that children will be taught that same-sex relationships deserve the same respect accorded to opposite-sex relationships, or that being gay is acceptable. The Lighted Candle Society suggests that it is "astounding" to think that this Court would require kindergarteners to learn "that same-sex marriage is a 'good thing' and equally desirable with opposite-sex marriage." Br. of the Lighted Candle Society at 20. The Foundation for Moral Law worries that children will "conclude that same-sex marriage is normal and moral, a conclusion many if not most California parents do not want their children to draw." Br. of Foundation for Moral Law at 19. These briefs openly fret that children might grow up thinking that gay men and lesbians are of equal worth and human dignity as straight people.

Many *amici* also generalize and stereotype about gay people so as to make their relationships seem deviant and abnormal. Patrick Henry College's brief

asserts that being gay is "moral error" and that gay people "follow a different moral code from that of the majority of the People of California." Br. of *Amicus Curiae* Patrick Henry College in Supp. of Pets. at 1, 12. Citizens United describes same-sex intimacy as "unnatural" and "contrary to the law of human nature." Br. of Citizens United's National Committee for Family, Faith, and Prayer at 16-17. Other briefs are more explicit about the "otherness" of gay people. Liberty Counsel asserts that same-sex relationships are uncommitted and non-monogamous. Br. of *Amici* Liberty Counsel, Inc. and Campaign for Children and Families in Supp. of Pets. at 24-25, 29 (quoting an article stating that when gay men say they have been together for thirty years, that means that they "go out and pick up strangers every two weeks"). The Lighted Candle Society adds that it would be rational to conclude that gay relationships are "seldom 'lifelong' in nature" because "[e]xtreme promiscuity is a well-known feature of the homosexual subculture." Br. of the Lighted Candle Society at 25 n.19. These stereotyped and overgeneralized views of same-sex couples, unsupported by factual evidence of actual behavior, ultimately reflect only the moral disapproval *amici* feel toward gay and lesbian people and the so-called "gay lifestyle."

Finally, a number of the briefs go so far as to predict that allowing gay people to marry will be the "destruction of America." Br. of Westboro Baptist Church as *Amicus Curiae* in Supp. of Neither Party Suggesting Reversal at 1. The Westboro Baptist Church warns that same-sex marriage is "the most ruinous of all sins" and that accepting it will lead to mayhem and carnage. *Id.* at 5, 20. Presumably

intending no hyperbole, the Lighted Candle Society claims that the Ninth Circuit's decision below is "a threat to the very survival of our society." Br. of the Lighted Candle Society at 8. The Foundation for Moral Law states that it has an interest in this case because "the Framers of the Constitution would be shocked to see their document twisted to protect something they regarded as abhorrent." Br. of Foundation for Moral Law at 1. One brief ominously warns that Respondents' efforts to obtain marriage equality are really just a "Trojan Horse" designed to deinstitutionalize and destroy marriage entirely. *See* Br. of the Lighted Candle Society at 28.

The stereotypes, fears about social acceptance of gay people, and overblown warnings about threats to the very fabric of American life expressed in the *amicus* briefs in support of reversal simply confirm what Proposition 8 was really about: expressing animus toward, and imposing a legal disability on, California's gay and lesbian citizens as a disfavored social group.

IV. The animus-based justifications offered by the supporters of Proposition 8 must be rejected.

In constitutional law, appeals to stereotype and group animus, once all too common, are now relics of the past.[2] The last traces of this outmoded approach to

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[2] *See Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856) (adopting the view, said to have been a "fixed and universal" "axiom in morals as well as in politics" at the time of the Founders, that African Americans are "beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations,

constitutional argument can be seen in a line of cases that is directly pertinent here – the authority recognizing the right to marry, a principle first announced by this Court in *Loving v. Virginia*, 388 U.S. 1 (1967).

An important precursor to *Loving* was *Perez v. Sharp*, 198 P.2d 17 (1948), decided by the California Supreme Court in an opinion authored by Justice Roger Traynor. At issue in *Perez* was the validity of a state law barring racially mixed marriage. The *Perez* Court held that:

> The right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring. . . . 'Marriage and procreation are fundamental to the very existence and survival of the race.' *Legislation infringing such rights must be based upon more than prejudice* and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws.

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and so far inferior that they had no rights which the white man was bound to respect"); *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896) ("Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences . . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."); *cf. Buck v. Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough." (internal citation omitted)).

Id. at 19 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)) (emphasis added).

Perez was a visionary opinion, for at the time it was decided, no court, state or federal, had invalidated an anti-miscegenation statute in any of the twenty-nine states that had them. In the course of its opinion, the California Supreme Court addressed, and firmly rejected, a variety of animus-based arguments advanced in support of the challenged statute.[3] In stark contrast, the dissenting opinion, authored by Justice John Shenk, citing a variety of "scientific" papers written by adherents of the now-discredited but then still-popular eugenics movement, and claiming the mantle of religious morality, openly embraced the racial prejudices of the day.[4]

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[3] *See e.g. id.* at 23 ("respondent has sought to justify the statute by contending that the prohibition of intermarriage between Caucasians and members of the specified races prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians"); *id*. at 24 ("Respondent also contends that Negroes, and impliedly the other [races specified in the statute], are inferior mentally to Caucasians.").

[4] *See e.g. id.* at 44 ("the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock"); *id.* (citing a South African diplomat for the idea that, in his country, "where the European population is greatly outnumbered by the natives . . . the free mixing of all the races could in fact only lower the general level"); *id*. at 45 (quoting a religious writer for the proposition that "[t]here are *grave* reasons against any general practice of intermarriage between the members of different racial groups. These reasons, where clearly verified, amount to a moral prohibition of such a practice.") (emphasis in original); *id*. at 36

The arguments advanced by supporters of Proposition 8 seem like echoes from the past. The warnings of social atrophy and moral decline and the invocation of religious prohibition are all eerily familiar. Although at this point we can safely say that Justice Shenk was on the wrong side of history, now, nearly seventy-five years after *Perez* was decided, Petitioners adopt the same approach that the dissent took in that case. They, too, seek to justify a marriage ban that is specific to a group they despise with a combination of pseudo-scientific justifications and moral righteousness.

We urge this Court to reject these animus-based arguments – and to do so firmly and definitively – while instead following the better examples of *Loving* and *Perez*. To be constitutional, as Justice Traynor explained in *Perez*, a marriage ban drawn selectively to burden a disfavored few "must be based on more than prejudice." 198 P.2d at 19.

("the Church bids her ministers to respect these laws, and to do all that is in their power to dissuade persons from entering into such unions").

Conclusion

For the reasons set forth above, the Court should affirm the judgment below.

Respectfully Submitted,

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