No. 12-144

In the
Supreme Court of the United States

Dennis Hollingsworth, *et al.*, *Petitioners*,

vs.

Kristin M Perry, *et al.*, *Respondents*.

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

Brief *Amicus Curiae* of the Family Research Council in Support of Petitioners Addressing the Merits and Supporting Reversal

Paul Benjamin Linton
Counsel of Record
Special Counsel
Thomas More Society
921 Keystone Avenue
Northbrook, Illinois 60062
PBLCONLAW@AOL.COM
(847) 291-3848 (tel)

Christopher M. Gacek
Family Research Council
801 G. Street, N.W.
Washington, D.C. 20001
(202) 393-2100 (tel)

Thomas Brejcha
President & Chief Counsel
Thomas More Society
29 S. La Salle Street
Chicago, Illinois 60603
(312) 782-1680 (tel)

TABLE OF CONTENTS

(Table of Contents Continued on Next Page)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

INTEREST OF *AMICUS CURIAE*[*]

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 publications, media appearances, public events, debates and testimony, FRC's team of policy experts reviews data and analyzes 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 in the decisions of courts and regulatory bodies.

FRC champions marriage and family as the foundation of civilization, the source of virtue and the wellspring of society. Believing that God is the author of life, liberty and the family, FRC promotes the Judeo-Christian world view 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. Recognition of same-sex marriages would not promote either of the principal interests on the basis of which opposite-sex marriage is a protected institution – channeling procreative sexual activity into a stable social and

---

[*] Letters of consent have been filed with the Clerk. None of the counsel for the parties authored this brief in whole or in part, and no one other than *amicus* or its counsel has contributed money or services to the preparation or submission of this brief.

cultural environment in which the children so procreated may be raised and providing the benefits of dual-gender parenting. And, for the reasons set forth herein, nothing in the Constitution, properly understood, compels such recognition. Accordingly, the judgment of the court of appeals should be reversed.

SUMMARY OF ARGUMENT

On November 4, 2008, the People of the State of California, adopted Proposition 8, an amendment to the state constitution, which provides: "Only a marriage between a man and a woman is valid or recognized in California." Cal. Const., art. I, sec. 7.5 (2008). Proposition 8 overturned the California Supreme Court's decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), which had struck down, on state constitutional grounds, Proposition 22, a citizen-initiated statute, and other state statutes that reserved marriage to opposite-sex couples.

In a subsequent federal constitutional challenge, the district court held that Proposition 8 interferes with the fundamental right to marry protected by the Due Process Clause of the Fourteenth Amendment and, further, that it discriminates on the basis of both sex and sexual orientation in violation of the Equal Protection Clause. Order of August 4, 2010, 109-35. In a two-to-one decision, the court of appeals affirmed, but on different grounds. The court of appeals essentially held that once California had recognized same-sex marriages, effective with the issuance of the mandate from the California Supreme Court in June 2008, it could not subsequently withdraw that "right" via a citizen-initiated constitutional amendment because, in the majority's opinion, the amendment (Proposition 8) "serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and

families as inferior to those of opposite-sex couples." Op. of Feb. 7, 2012 (hereafter "Op.") 5. The majority opinion stated that there was no "legitimate reason for the passage of a law that treats different classes of people differently." *Id.* at 4.

Petitioners have adequately addressed in their brief the flawed reasoning in the court of appeals majority opinion and its misreading of this Court's opinion in *Romer v. Evans*, 517 U.S. 620 (1996). In this brief, *amicus curiae* addresses what plaintiffs may argue as *alternative* grounds for affirming the lower court's judgment, to wit, that strict or intermediate scrutiny is required because Proposition 8 interferes with the fundamental right to marry protected by the Due Process Clause and because Proposition 8 discriminates on the basis of sex and sexual orientation in violation of the Equal Protection Clause.

With respect to plaintiffs' first argument, *amicus* submits that the fundamental right to marry that has been recognized by this Court is limited, by the nature of marriage itself, to opposite-sex couples. None of the Court's precedents supports a right to enter into a same-sex marriage and, with the exception of the district court's holding and the decision of the California Supreme Court, which was overturned by Proposition 8, no state or federal court has held otherwise. Reserving marriage to opposite-sex couples does not violate the fundamental right to marry protected by the Due Process Clause.

With respect to the second argument, *amicus*

submits that the reservation of marriage to opposite-sex couples does not discriminate against either men or women. Proposition 8 treats men and women the same. Both may marry someone of the opposite sex; neither may marry someone of the same sex. With the exception of the district court's judgment in this case and a two-judge plurality opinion of the Hawaii Supreme Court, no state or federal court has accepted plaintiffs' sex discrimination argument. Proposition 8 does not violate the Equal Protection Clause.

With respect to the third argument, *amicus* submits, first, that Proposition 8, on its face, does not discriminate on the basis of sexual orientation; second, that although Proposition 8 may have a disparate impact on homosexuals, that impact is not constitutionally cognizable in the absence of evidence that Proposition 8 was adopted with the *intent* or *purpose* to discriminate against homosexuals, as opposed to the *knowledge* that it could have a disparate impact on them; and third, assuming that Proposition 8 classifies on the basis of sexual orientation, such classification is subject to rational basis review. Homosexuals do not meet several of the factors the Court has identified as "indicia" of "suspectness." And no state or federal court applying federal equal protection analysis has held that classifications based upon one's sexual orientation are subject to heightened review. Because Proposition 8 is reasonably related to multiple, legitimate state interests, it passes constitutional muster.

ARGUMENT

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

The district court held that Proposition 8 interferes with the fundamental right to marry protected by the Due Process Clause of the Fourteenth Amendment. Order at 109-15. In arriving at this holding, the 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 113 (emphasis added). That statement and the court's holding are erroneous.

In determining whether an asserted liberty interest (or right) should be regarded as fundamental, this 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

---

[1] *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

interest, so described, must be firmly rooted in "the Nation's history, legal traditions, and practices." *Id.* at 710.[2] 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]

---

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"). Recently, the Court, relying upon *Glucksberg*, *Reno* and *Collins*, held that a convicted felon has no freestanding "substantive due process right" to obtain the State's DNA evidence in order to apply new DNA-testing technology that was not available at the time of his trial. *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 72 (2009).

[2] Nothing in *Lawrence v. Texas*, 539 U.S. 558 (2003), changes the analysis for evaluating whether an asserted liberty interest should be deemed "fundamental." 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 if a fundamental right had been implicated. Second, the Court never modified or even mentioned the many cases in which it has emphasized the need to define carefully an asserted liberty interest in determining whether that interest is "fundamental." Those cases should not be regarded as having been overruled *sub silentio*. *See Lofton v. Secretary of Dep't of Children & Family Services*, 358 F.3d 804, 816 (11th Cir. 2004) ("We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental rights analysis").

liberty to shape death." *Id.* at 722-23 (citations and internal quotation marks omitted). *Glucksberg* 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." *Id.* at 722. All that is necessary is that the state action bear a "reasonable relationship to a legitimate state interest . . . ." *Id.* Accordingly, unless there is a fundamental right to enter into a same-sex marriage, the reservation of marriage to opposite-sex couples is subject to rational basis review.

For purposes of substantive due process analysis, the issue is not *who* may marry, but *what* marriage is. The principal defining characteristic of marriage 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.[4]

---

[3] "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." *Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d 136, 141 (App. Div. 2006) (citation and internal quotation marks omitted), *aff'd*, 855 N.E.2d 1 (N.Y. 2006).

[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

The Court has recognized a substantive due process right to marry. *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. *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 cases relating marriage to procreation and childrearing.

---

fundamental"). In rejecting a state privacy challenge to the State's marriage law, 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, . . . *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") (citations and internal quotation marks omitted), *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). In requiring the Commonwealth of Massachusetts to recognize same-sex marriages, the Massachusetts Supreme Judicial Court conceded 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." *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 965 (Mass. 2003).

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) (referring to marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress").

This Court has never stated or even implied that the federal right to marry extends to same-sex couples. And, with the exception of the district court's decision below, which was affirmed on other grounds by the court of appeals, no state or federal court has held that the fundamental right to marry extends to same-sex couples.[5] In sharp contrast to

---

[5] *See Smelt v. County of Orange*, 374 F. Supp.2d 861, 877-79 (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); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305-07 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 138-41 (W.D. Wash. 2004); *Standhardt*, 77 P.3d at 455-460; *Baehr*, 852 P.2d at 56 ("the federal construct of the fundamental right to marry . . . presently contemplates unions between men and women) (case decided on state grounds); *Conaway v. Deane*, 932 A.2d 571, 624 (Md. 2010) (rejecting argument that "the right to same-sex marriage is so deeply embedded in the history, tradition, and culture of this State and Nation, that it should be deemed fundamental"); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) ("[t]he right to marry someone of the same sex

the "emerging awareness 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*, 374 F. Supp.2d at 878. If anything, the fact that thirty States have amended their constitutions to reserve marriage to opposite-sex couples strongly suggests that there is no "emerging awareness" that the right to marry extends to same-sex couples. As in *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." 557 U.S. at 72 (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

---

. . . is not 'deeply rooted'" "in this Nation's history and tradition") (citation and internal quotation marks omitted); *Singer v. Hara*, 522 P.2d 1187, 1195-97 & n. 11 (Wash. Ct. App. 1974); *Dean v. District of Columbia*, 653 A.2d 307, 331-33 (D.C. Ct. App. 1995), *id*. at 361-62 (Terry, J., concurring), *id*. at 363-63 (Steadman, J., concurring). *See also Andersen v. King County*, 138 P.3d 963, 979 (Wash. 2006) (rejecting dissent's view that there is a "fundamental right to marry a person of the same sex" as "an astonishing conclusion, given the lack of any authority to support it; *no* appellate court applying a federal constitutional analysis has reached this result") (emphasis in original): *Shahar v. Bowers*, 114 F.3d 1097, 1099 & n. 2 (11th Cir. 1997) (same).

liberty." *Standhardt*, 77 P.3d at 459. The Due Process Clause does not require California to recognize such marriages.

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

In four short sentences, the district court held that Proposition 8 discriminates on account of sex in violation of the Equal Protection Clause:

> Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying 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 Perry's choice of marital partner because of her sex.

Order at 121.

The fundamental flaw with the district court's sex discrimination holding is that "the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Baker v. State*, 744 A.2d 864, 880 n. 13 (Vt. 1999). "[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited

from precisely the same conduct." *Id.* Other state courts have also rejected the claim that "defining marriage as the union of one man and one woman discriminates on the basis of sex."[6]

In the last seven 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 court decisions holding that laws reserving marriage to opposite-sex couples do not discriminate on account of sex.[7] Federal courts reviewing challenges to § 3 of the federal Defense of Marriage Act, 1 U.S.C. § 7 (2005), agree.[8]

---

[6] *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).

[7] *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).

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

In sum, thirteen state reviewing courts,[9] 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 violated the state equal rights amendment).[10]

---

[9] 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).

[10] 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

In its highly abbreviated sex discrimination analysis, the district court apparently accepted plaintiffs' argument, based on *Loving v. Virginia*, 388 U.S. 1 (1967), that facial neutrality does not immunize a statute (or, in this case, a state constitutional amendment) from federal constitutional challenge. 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*, which struck down state anti-miscegenation statutes, 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*, s*ee 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 violating the Equal Protection Clause.[11] Indeed, a school district may go

---

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. *See* Haw. Const. art. I, § 23.

[11] *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

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.[12]

---

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).

[12] Citing *United States v. Virginia*, 518 U.S. 515, 519-20 (1996) (law preventing women from attending military college); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 719 (1982) (excluding men from nursing school); *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (allowing women to buy beer at a younger age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (imposing a higher burden on servicewomen than on servicemen to establish dependency of their spouses); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (creating an automatic

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. *See Hernandez v. Robles*, 805 N.Y.S.2d at 370-71 (Catterson, J., concurring).

Third, unlike the history of the anti-miscegenation statutes struck down in *Loving*, which stigmatized blacks as inferior to whites,[13] "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*,

---

preference for men over women in the administration of estates).

[13] The statutes challenged in *Loving* prohibited 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.

805 N.Y.S.2d at 370 (Catterson, J., concurring).[14] 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 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.

Proposition 8 does not "mandate[] that men and women be treated differently," Order at 124, but treats men and women equally. And laws that treat men and women equally cannot be said to deny either men or women the equal protection of the law.

---

[14] 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.

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

The district court held further that Proposition 8 discriminates on the basis of sexual orientation in violation of the Equal Protection Clause. Order at 117-35. That holding does not withstand analysis.

Proposition 8, On Its Face, Does Not Discriminate On The Basis Of Sexual Orientation.

Proposition 8, on its face, does not define "marriage" for purposes of state law in terms of the sexual orientation of the parties to a marriage, but whether the parties are of the opposite 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).[15] *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.

[15] 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.*

Cal. 2005) (same) (interpreting the Defense of Marriage Act).[16]

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 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)). The district court conceded that "some gay men and lesbians have married members of the opposite sex." Order at 80. The right to enter into a marriage that would be recognized under Proposition 8 "is not restricted to (self-identified) heterosexual couples," *Andersen*, 138 P.3d at 991, n. 1, but extends to all adults without regard to "their sexual orientation." *Id*. at 997. The classification in Proposition 8 is not between heterosexuals and homosexuals, but between opposite-sex couples and same-sex couples.

---

[16] 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 (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).

Proposition 8's Disparate Impact On Homosexuals Who Wish To Marry Persons Of The Same Sex Is Not Constitutionally Cognizable In The Absence Of Any Evidence That In Adopting Proposition 8, The People Of California Had The Purpose Or Intent To Discriminate Against Homosexuals.

Admittedly, Proposition 8 has a greater *impact* on homosexuals who, if they wish to marry, presumably would want to marry someone of the same sex, than on heterosexuals who would want to marry someone of the opposite sex. 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) (gender).

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, plaintiffs have cited

no competent evidence that even remotely supports the conclusion that in adopting Proposition 8, the People of California had the *intent* or *purpose* to discriminate against homosexuals who wish to marry someone of the same sex, as opposed to the *knowledge* that Proposition 8 could have a disparate impact on them.

In the case of a state legislature that maintains official copies of its proceedings, it *may* be possible, at least some times, to determine whether a facially neutral statute 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). 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 initiative, and approved by the electorate, no such inquiry is even possible.[17] Apart from the language of Proposition 8 itself, which is facially neutral with respect to a person's sexual orientation, how could the intent or purpose of more than seven million voters be determined? By exit polls? Voter interviews? And how, based on the selective evidence presented by the plaintiffs (from a veritable deluge of messages

---

[17] This may explain why, in declaring unconstitutional Proposition 22, the statutory predecessor to Proposition 8, 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.

inundating the voters during the campaign over Proposition 8), could any court possibly distinguish between the electorate's *knowledge* that the ballot measure would have a disparate impact on homosexuals and an *intent* or *purpose* to cause that impact? The district court 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.[18] 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).[19] In the case of

---

[18] "[T]he motivation of the electorate is not only impossible to ascertain, but it is not a proper subject for judicial inquiry." *Yarborough v. City of Warren*, 383 F. Supp. 676, 683 (E.D. Mo. 1974) (citing *Ranjel v. City of Lansing*, 417 F.2d 321, 324 (6th Cir. 1969), and *Southern Alameda Spanish Speaking Organization v. City of Union City, California*, 424 F.2d 291, 295 (9th Cir. 1970)).

[19] Thus, the district court erred in stating that "the voters' determinations must find at least some support in evidence." Order at 24. 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").

Proposition 8, those justifications include, *inter 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.

Assuming That Proposition 8 Classifies On The Basis Of Sexual Orientation, Such Classification Is Subject To Rational Basis Review.

Finally, even assuming, *arguendo*, that Proposition 8 classifies persons on the basis of their sexual orientation, that classification is subject to rational basis review. Consistent with this Court's decision in *Romer v. Evans*, 517 U.S. 629 (1996), eleven of the thirteen circuit courts of appeals have held that homosexuals do *not* constitute a suspect or quasi-suspect class requiring greater than rational basis review.[20] *But see Windsor v. United States*, Nos.

---

[20] *Cook v. Gates*, 528 F.3d 42, 60-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (*en banc*); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*); *Scarborough v. Morgan County Board of Education*, 470 F.3d 250, 260-61 (6th Cir. 2006); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261, 265-68 & n. 2 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996), *on remand*, 128 F.3d 289, 292-93 & nn. 1-2 (6th Cir. 1997); *Schroeder v. Hamilton School District*, 282 F.3d 946, 950-51, 953-54 (7th Cir. 2002); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 & n. 8 (7th Cir. 1989); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-69 (8th Cir. 2006); *Richenberg v.*

12-2335, 12-2435 (Second Circuit, Oct. 18, 2012) (*contra*), *cert granted*, Dec. 7, 2012, No. 12-307. The Third Circuit has not yet addressed the issue.

It should not be surprising that, with the exception of the Second Circuit's decision in *Windsor*, no federal court of appeals (and no state court applying federal equal protection analysis) has concluded that homosexuals are members of a suspect (or quasi-suspect) class. They do not meet the standards applicable to such classifications. This Court has identified four characteristics that suspect classes commonly share: (1) a history of discrimination; (2) a trait that "bears no relation to ability to perform or contribute to society[;]" (3) an immutable trait; and (4) political powerlessness. *City of Cleburne*, *Texas v. Cleburne Living Center*, 473 U.S. 432, 440-46 (1985); *Lyng v. Castillo*, 477

Perry, 97 F.3d 256, 260 & n. 5 (8th Cir. 1996); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1137 (9th Cir. 2003); *Holmes v. California National Guard*, 124 F.3d 1126, 1132-33 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1999); *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 & n. 9 (10th Cir. 2008); *Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir. 1992); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903 (1985); *Lofton v. Secretary of the Dep't of Children & Family Services*, 358 F.3d 804, 818 & n. 16 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n. 3 (D.C. Cir. 1994) (*en banc*); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

U.S. 635, 638 (1986). *Amicus curiae* does not dispute that homosexuals have been subjected to a history of discrimination, but they do not satisfy the remaining criteria (or "indicia") of "suspectness."

With respect to the second criterion, *amicus curiae* acknowledges that homosexuals are able to "perform or contribute to society" in many areas. But, for purposes of equal protection analysis, "groups that are treated differently by a statute are not similarly situated unless they 'are in *all* relevant respects alike.'" *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 520 (Conn. 2008) (Zarella, J. dissenting) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)) (emphasis added by Justice Zarella). "The fact that same sex couples cannot engage in sexual conduct of a type that can result in the birth of a child is a critical difference in this context." *Id.* So, too, is the fact that, by definition, same-sex couples are unable to provide the benefits of dual-gender parenting. As an institution, marriage exists for the primary purpose of "ensuring a stable legal and societal framework in which children are procreated and raised, and providing the benefits of dual gender parenting for the children so procreated." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 374 (N.Y. App. Div. 2005) (Catterson, J., concurring), *aff'd*, 855 N.E.2d 1 (N.Y. 2006). Because same-sex couples can neither "procreate by themselves" nor "provide dual-gender parenting," *id*., they are not similarly situated to opposite-sex couples. The sexual orientation of homosexuals (their "trait" for purposes of suspect class analysis) quite obviously is related to their willingness (if not their ability) to engage in

the only kind of sexual relations that can result in the birth of a child and to enter into a union with an opposite-sex partner. *See Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006) (plurality) ("[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best"); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 674 (Tex. App. 2010) ("a person's sexual orientation . . . does bear on whether he or she will enter a relationship that is naturally open to procreation and thus trigger the state's legitimate interest in child-rearing"). The Court has cautioned that "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Cleburne*, 473 U.S. at 441-42. "In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id*. at 442.

With respect to the third criterion – immutability – there is no evidence that sexual orientation, unlike race, gender or national origin, is irrevocably fixed at birth. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality) ("sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth). "Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect

classes, *e.g.*, blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature." *Woodward*, 871 F.2d at 1076. "The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups." *Id.* *See also High Tech Gays*, 895 F.2d at 573 ("[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes").[21]

Even assuming, however, that sexual orientation is a "characteristic beyond the control of the individual," "the reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives and thoughts." *Equality Foundation*, 54 F.3d at 267. The Sixth Circuit explained further why homosexuals do not form an identifiable class:

---

[21] Although, in *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other grounds*, *Thomas v. Gonzales*, 408 F.3d 1177, 1187 (9th Cir. 2005), the Ninth Circuit characterized sexual orientation and sexual identity as "immutable," in subsequent cases the court has adhered to its decision in *High Tech Gays* and has continued to evaluate classifications based on a person's sexual orientation under the rational basis standard of review. *See Flores*, 324 F.3d at 1137; *Witt*, 527 F.3d at 821.

> Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class. Because homosexuals generally are not identifiable "on sight" unless they elect to be so identifiable by conduct (such as public displays or homosexual affection or self-proclamations of homosexual tendencies), they cannot constitute a suspect class or a quasi-suspect class because "they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group[.]"

Id. (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987))

In rejecting a state constitutional challenge to the State's law prohibiting same-sex marriage, the Maryland Court of Appeals agreed:

> Based on the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group such that they may be deemed a suspect class for purposes of determining the appropriate level of scrutiny to be accorded the statute in the present case.

Conaway v. Deane, 932 A.2d at 614. *See also Andersen v. King County*, 138 P.3d at 974 (same in rejecting state constitutional challenge to DOMA).

Significantly, in each of the cases in which a state supreme court recognized (on state constitutional grounds) homosexuals as members of a suspect (or quasi-suspect) class, the court dispensed with the immutability requirement, concluding that it was sufficient if the characteristic at issue (sexual orientation) would be very difficult to change. *See In re Marriage Cases*, 183 P.3d at 442 ("immutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes" under the state constitution); *Kerrigan v. Comm'r of Public Health*, 957 A.2d at 437 ("it is not necessary for us to decide whether sexual orientation is immutable in the same way and to the same extent that race, national origin and gender are immutable"); *Varnum v. Brien*, 763 N.W.2d 862, 892-93 (Iowa 2009) (under state equal protection analysis, "[t]he constitutional relevance of the immutability factor is not reserved to those instances in which the trait defining the burdened class is absolutely impossible to change").

With respect to the fourth criterion, it cannot be plausibly said that homosexuals are "politically powerless" in the State of California. The California Legislature has prohibited discrimination on the basis of sexual orientation by business establishments that offer services to the public under the Unruh Civil Rights Act, Civ. Code § 51 *et seq*., in employment practices and the sale or rental

of real estate under the California Fair Employment & Housing Act, Gov't Code § 12900 *et seq*., by adult day care health centers, Health & Safety Code § 1586.7, and in programs or activities funded in whole or in part by the State of California or any of its agencies, Gov't Code § 11135. California has added sexual orientation to the categories of offenses covered by its hate crimes legislation, Penal Code § 422.55(a)(6), and to its legislation dealing with terrorism, §§ 11410, 11413(b)(9). Discrimination on the basis of sexual orientation is prohibited in placing minor children with foster parents or for adoption. Welf. & Inst. Code § 16013.

Of even greater significance is the Legislature's enactment of the Domestic Partner Act and the amendments thereto. Fam. Code § 297 *et seq*. The Domestic Partner Act, as amended, recognizes domestic partnerships between members of the same sex, creates a mechanism for registering such partnerships and provides that registered domestic partners "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." Fam. Code § 297.5. The Act, as amended, confers all of the rights and benefits, burdens and obligations, of marriage upon same-sex couples that are within the power of the Legislature to confer. In addition to these legislative accomplishments, homosexuals were successful in persuading the

Legislature to pass a same-sex marriage bill in September 2005. *See* Assembly Bill No. 849 (2005-2006 Reg. Sess.). Although that bill was vetoed by Governor Schwarzenegger, the fact that it passed reflects the political strength of homosexuals, not their political weakness.[22] On a record of legislative accomplishments far less impressive, the Maryland Court of Appeals and the Washington Supreme Court held that homosexuals are not entitled to the special protection accorded suspect classes because they are not politically powerless. *Conaway v. Deane*, 932 A.2d at 609-14; *Andersen v. King County*, 138 P.3d at 974-75. In California, as in Maryland and Washington, homosexuals have not been "relegated to a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).[23]

---

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

[23] In striking down their marriage statutes, the Supreme Courts of California, Connecticut and Iowa all held that classifications based on sexual orientation warrant intermediate (or strict) scrutiny. *See In re Marriage Cases*, 183 P.3d at 440-44; *Kerrigan v. Comm'r*, 957 A.2d at 431-61; *Varnum v. Brien*, 763 N.W.2d at 885-96. Those holdings, however, were based on the courts' interpretation of their own state constitutions and are inconsistent with the holdings of

"[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). This holding is supported by cases rejecting equal protection challenges to various forms of alleged discrimination against homosexuals where, regardless of animus, the discrimination in question was rationally related to a legitimate governmental purpose.[24] So, too, state courts have upheld state

---

every federal court of appeals to have considered the issue (other than the Second Circuit) that such classifications require only rational basis review. Moreover, in addition to dispensing with the immutability factor, those courts were able to conclude that classifications based on sexual orientation are suspect (or quasi-suspect) only by eliminating (in California) or diluting to the point of irrelevancy (in Connecticut and Iowa) the requirement that the class in question be politically powerless. *See In re Marriage Cases*, 183 P.3d at 443; *Kerrigan*, 957 A.2d at 439-61; *Varnum v. Brien*, 763 N.W.2d at 893-95. But that is to dispense with a factor that this Court has consistently identified as one of the "traditional indicia of suspectness." *Rodriguez*, 411 U.S. at 28. *See also City of Cleburne*, 473 U.S. at 447-49 (1985); *Lyng*, 477 U..S. at 638. For the reasons set forth in the text, it cannot be said that gays and lesbians are "politically powerless." The Second Circuit's decision in *Windsor v. United States*, holding that classifications based on homosexual orientation are subject to intermediate scrutiny (slip op. at 24-34), is similarly flawed because the majority opinion watered down, dispensed with or misapplied three of the four criteria this Court has employed in determining suspect or quasi-suspect status.

[24] *See Equality Foundation*, 128 F.3d at 300-01 (upholding city charter amendment that removed homosexuals,

marriage statutes, notwithstanding claims that they were motivated in part by an anti-homosexual animus, because they determined that the statutes are reasonably related to legitimate state interests. *Standhardt*, 77 P.3d at 464-65; *Andersen*, 138 P.3d at 980-85.[25]

Proposition 8 reserves the institution of marriage to opposite-sex couples. Extending marriage to same-sex couples would not promote the State's legitimate interests in "responsible procreation," *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005), or in dual-gender parenting. That is sufficient to sustain its constitutionality. *See Johnson v. Robison*, 415 U.S. 361, 383 (1974) (when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification . . . is invidiously discriminatory"). Accordingly, the judgment of the court of appeals should be reversed.

---

gays, lesbians and bisexuals from the protections afforded by the municipality's anti-discrimination ordinances, and precluded municipality from restoring them to protected status); *Citizens for Equal Protection*, 455 F.3d at 864-69 (upholding state constitutional amendment reserving marriage to opposite-sex couples).

[25] In *Andersen*, the Washington Supreme Court explained that under rational basis review, "*even if* animus in part motivates legislative decision making, unconstitutionality does not follow if the law is otherwise rationally related to legitimate state interests." 138 P.3d at 981-82 (emphasis in original) (citing *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001)).

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' brief, *amicus curiae*, the Family Research Council, respectfully requests that the judgment of the court of appeals be reversed.

Respectfully submitted,

Paul Benjamin Linton
Counsel of Record
Special Counsel
Thomas More Society
921 Keystone Avenue
Northbrook, Illinois 60062
PBLCONLAW@AOL.COM
(847) 291-3848 (tel)

Christopher M. Gacek
Family Research Council
801 G. Street, N.W.
Washington, D.C. 20001
(202) 393-2100 (tel)

Thomas Brejcha
President & Chief Counsel
Thomas More Society
29 S. La Salle Street
Chicago, Illinois 60603
(312) 782-1680 (tel)