Nos. 10-16751
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.
Plaintiffs-Appellees,
v.
ARNOLD SCHWARZENEGGER, et al.
Defendants.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CIVIL CASE NO. 09-cv-2292 VRW (Honorable Vaughn R. Walker)

MOVANT-APPELLANTS' OPENING BRIEF

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INTRODUCTION

The people of California have now acted twice in exercising their initiative power to define marriage as being between one man and one woman. The people's vote has twice been challenged in the California Supreme Court and is now being challenged in the federal courts. It is a long held principle in California that is "the duty of the courts to jealously guard the right of the people" to exercise their initiative power, which is described as "one of the most precious rights of our democratic process." [1] The district court in this case failed to recognize his role as a judge as opposed to a policy maker. Before this Court is an opportunity to restore the vote of over 7 million Californians by applying rational basis review, while exercising appropriate judicial restraint.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs brought claims under federal law. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Appellant filed a motion to intervene on December 15, 2010. The district court's judgment permanently enjoining enforcement of Proposition 8 is an appealable final decision. The district court issued its ruling on the merits and ordered entry of judgment on August 4, 2010; it

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[1] *Associated Home Builders etc. Inc. v. City of Livermore*, 557 P.2d 473, 477 (Cal. Sup. Ct. 1976) .

entered judgment on August 12, 2010. Also on August 4, 2010, Appellants motion to intervene was denied by the district court. The denial of a motion to intervene is an appealable final decision. *United States v. City of Los Angeles*, 288 F.3d 391, 397 (2002). Appellants timely filed a Notice of Appeal on August 10, 2010. *See* Fed. R. App. Proc. 4(a)(2), 4(a)(1)(A). *See* Part I of the Argument, *infra*.

PRIMARY AUTHORITY

Cal. Const. art. I, § 7.5: "Only marriage between a man and a woman is valid or recognized in California."

U.S. Const. amend. XIV, § 1: "… [N]o State shall … deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STANDARD OF REVIEW

The district court's decision under Federal Rule of Civil Procedure 24(a) regarding intervention, (E.R. Vol. I, p. 016.), as a matter of right is reviewed de novo. *See Prete v. Bradbury*, 438 F.3d 949, 953 (9th Cir. 2006). Whether the legal requirements of Rule 24(a) have been met is reviewed de novo. *See Employee Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994). The district court's determination regarding whether an application to intervene is timely is reviewed for an abuse of discretion. *United States v. Alisal Water Corp.*, 370 F.3d 915, 918-19 (9th Cir. 2004). A district court's decision concerning

permissive intervention pursuant to Rule 24(b)(2) is reviewed for an abuse of discretion. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002).

The district court's rulings that Proposition 8 violates the Equal Protection and Due Process Clauses of the United States Constitution, *see* (E.R. Vol. I, p. 34 (Doc. 708 at 119, 134)), are questions of law reviewed de novo, *United States v. Sahhar*, 56 F.3d 1026, 1028 (9th Cir. 1995), and the same standard applies to any mixed questions of law and fact underlying these judgments, *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009). Finally, the district court's purported "factual" determinations are also subject to de novo review.

STATEMENT OF THE ISSUES

1. Whether the Appellants have standing to appeal and the right to intervene.
2. Whether Proposition 8 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
3. Whether Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Plaintiffs filed suit in the district court on May 22, 2009, alleging that Proposition 8 violated both the Equal Protection Clause and the Due Process

Clause of the Fourteenth Amendment to the United States Constitution. On May 28, 2009, the Official Proponents of the Proposition 8 ballot measure moved to intervene to defend Proposition 8. None of the named government defendants actually defended Proposition 8, and the district court granted intervention to the official proponents on June 30, 2009.

On July 23, 2009, the City and County of San Francisco moved to intervene as a party plaintiff to challenge the constitutionally of Proposition 8. Their intervention was granted on August 19, 2009, allowing them to represent their governmental interest regarding the constitutionality of Proposition 8. (*See* E.R. Vol. I, p. 0187.) The official proponents of Proposition 8 moved for summary judgment on September 9, 2009, and their motion was subsequently denied on October 14, 2009. (E.R. Vol. I, p. 0175.)

The County of Imperial, its Board of Supervisors, and Deputy Clerk Isabel Vargas (collectively referred to as the 'County") moved to intervene as defendants on December 15, 2009. Their motion was argued and submitted on January 6, 2010, but there was no ruling until the final resolution of the entire case post-trial.

Between January 11 and January 27 of this year, this case was tried at the district court, with final arguments being held on June 16, 2010. The district court issued its rulings on August 4, 2010, holding that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S.

Constitution and permanently enjoining the enforcement of Proposition 8. (E.R. Vol. I, pp. 0034-0171.) On that same day, August 4, 2010, the district court denied Appellants' motion to intervene. (E.R. Vol. I, p. 016.)

While requests to stay the judgment pending appeal were denied by the district court, this Court issued a stay of the decision pending appeal on August 16, 2010.

STATEMENT OF FACTS

Plaintiffs are two same-sex couples who sought to be married in California after the passage of Proposition 8. Proposition 8 amended the California Constitution to read, "Only marriage between a man and a woman is valid or recognized in California." Cal. Const. art. I, § 7.5 ("Proposition 8").

After the Plaintiffs were denied, they filed a complaint seeking to have Proposition 8 declared unconstitutional. Plaintiffs claim that Proposition 8 violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

1. The County has standing to appeal the district court's decision due to the simple fact that Deputy Clerk Isabel Vargas's official duties include the enforcement of California's marriage laws and, currently, the enforcement of Proposition 8. The direct interest and significant impact that will result from the

ultimate conclusion of this case gives the County standing, and warrants intervention as a matter of right and permissively. Fed. R. Civ. p. 24(a)(2); Fed. R. Civ. p. 24(b).

2. *Baker v. Nelson*, 409 U.S. 810 (1972) ("*Baker*"), established binding precedent that prevents a decision holding Proposition 8 unconstitutional.

3. Plaintiffs assertion of a fundamental right to marry a person of the same-sex under the Substantive Due Process Clause is flawed. Same-sex marriage is not deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

4. Plaintiffs assert a right to same-sex marriage under the Equal Protection Clause. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Plaintiffs are not part of a suspect class and no fundamental right is at stake. Therefore, Proposition 8 should be upheld because its passage is based upon legitimate interests that are rationally related to its purpose.

ARGUMENT

I. THE COUNTY OF IMPERIAL HAS STANDING TO APPEAL

The County of Imperial, the Board of Supervisors of the County of Imperial, and Deputy Clerk Isabel Vargas (collectively referred to as "the County") seek to intervene to defend Proposition 8 because it has significantly protectable interests at stake in this litigation and because none of the named Government defendants have defended the State's own constitution. This case presents the truly extraordinary situation of a constitutional provision without a single governmental defender, because the Attorney General, Governor, and all other Government defendants are either not defending Proposition 8 or are taking an active position against Proposition 8, coupled with their subsequent refusals to appeal the decision of the district court declaring it unconstitutional. And although the official ballot proponents of Proposition 8 (the "Official Proponents") have properly intervened and offered a vigorous defense of Proposition 8, their Article III standing to appeal has been called into question by the Plaintiffs and the district court. The momentous issues in this case – which have national implications – surely warrant review and definitive resolution by this Court and perhaps even the Supreme Court.

The County has multiple significantly protectable interests that satisfy the requirements for intervention. The County's clerk and deputy clerks are

"commissioner[s] of civil marriages." Cal. Family Code § 401(a); Cal. Gov't Code §§ 24100, 24101. As an Imperial County Deputy Clerk and Deputy Commissioner of Civil Marriages, Isabel Vargas issues marriage licenses and performs marriages, and thus will be placed in an untenable position directly relating to the performance of her official duties if the state officials bound by the district court's ruling that Proposition 8 is unconstitutional seek to compel statewide compliance with that ruling as the district court has directed them to do. Specifically, Deputy Clerk Vargas will be forced to choose between complying with the directives of those officials, on the one hand, and honoring her oath to uphold the California Constitution, on the other hand, for the California Constitution mandates that "[o]nly a marriage between a man and a woman is valid or recognized in California," Cal. Const. art. I, § 7.5, and directs Deputy Clerk Vargas not to disregard state law "on the basis that federal law prohibit[s] enforcement of [that law] unless an *appellate* court has made a determination that the enforcement of such [law] is prohibited by federal law," *id*. art. III, § 3.5(c). In short, Deputy Clerk Vargas is responsible for the implementation and enforcement of Proposition 8 and, as a result, has a direct interest in the outcome of this litigation. The Board, in turn, oversees County clerks to ensure that marriage laws are faithfully executed. Cal. Gov't Code § 25303. Additionally, the County of Imperial has a financial interest in the continued enforcement of Proposition 8.

It is also clear that, if permitted to intervene, the County has standing to pursue this appeal. Had the County been permitted to intervene, it would have been bound by the district court's judgment, thereby erasing any doubt that the County lacks standing to appeal. As the district court stated in its judgment, "Defendants in their official capacities … are permanently enjoined from applying or enforcing Art. I, § 7.5 of the California Constitution." (E.R. Vol. I, p. 0002.) Therefore, once Deputy Clerk Vargas is permitted to intervene, she will be bound by the district court's judgment, and her standing to appeal will be beyond dispute.

Furthermore, by its own terms the district court's broadly worded judgment purports to dictate the manner in which Deputy Clerk Vargas performs her official duties regardless of whether she is a party to the lawsuit. The district court, in its order denying the County's intervention motion, asserted that "County clerks have no discretion to disregard a legal directive from the existing state defendants, who are bound by the court's judgment regarding the constitutionality of Proposition 8." (E.R. Vol. I, p. 0024.) The district court's judgment, therefore, directly affects Deputy Clerk Vargas and every other county clerk throughout the State of California. "[A] non-party who is enjoined or otherwise directly aggrieved by a judgment has standing to appeal the judgment." *See Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1277 (9th Cir. 1992). Accordingly, Deputy Clerk Vargas has standing to appeal regardless of whether she was permitted to intervene as a party.

In sum, then, the County has standing to appeal, first, as a result of the intervention that should have been granted, and, second, due to the breadth of the district court's ruling and the direct application to Deputy Clerk Vargas's performance of her official duties. The first of these options, that is, the district court's improvident denial of the County's intervention motion, is discussed in detail below.

A. The County Is Entitled to Intervene As Of Right.

Four requirements must be satisfied to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2): (1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to the subject of the action; (3) the disposition of the action might, as a practical matter, impair the applicant's ability to protect that interest; and (4) the applicant's interest might be inadequately represented by the existing parties. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001). Each of these requirements must be evaluated liberally in favor of intervention:

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, [the court] often prevent[s] or simplif[ies] future litigation involving related interests; at

> the same time, [the court] allow[s] an additional interested party to express its views . . . .

United States v. City of Los Angeles, 288 F.3d 391, 398 (9th Cir. 2002) ("*City of Los Angeles*").

The liberal policy in favor of intervention exists to further efficient resolution of issues and access to the courts. The County seeks to intervene for exactly those purposes. Implicitly acknowledging the direct relationship between Proposition 8 and Deputy Clerk Vargas's duties, the district court noted that she can "pursue declaratory relief" if she is "uncertain about her duties … following entry of judgment." (E.R. Vol. I, p. 0021.) Judicial economy, however, favors the County's intervention in order to ensure that this matter can be heard by this Court and that a secondary action for declaratory relief is not necessary following the resolution of this case.

And as explained below, the County has satisfied all four requirements for intervention as of right, and in particular, the district court's novel attempt to marginalize a county clerk's interest in cases involving state marriage laws is not supported by relevant state or federal precedent.

1. <u>The County timely filed The Motion to Intervene</u>.

Three criteria determine the timeliness of a motion to intervene: (1) the stage of the proceedings; (2) the reason for delay, if any, in moving to intervene;

and (3) prejudice to the parties. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996). The court may permit intervention at any stage in the proceeding, including post-judgment. *See, e.g.*, *U.S. v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992). The district court noted that it would not rely on the timeliness factor in denying the County's motion to intervene because "its intervention would not prejudice existing parties and there is no showing of bad faith." (E.R. Vol. I, p. 0019.)

The district court also recognized the County's potentially vital role on appeal, which it recognized would further ameliorate any timeliness concerns with its motion. The court stated that "Imperial County raises serious concerns whether the existing defendants are willing and able to seek appellate review," and because "Imperial County states its motive for intervention is to defend Proposition 8 on appeal if no other defendant is willing or able to do so," the court correctly decided to consider the other grounds for intervention. *Id*. These observations apply even more now. Since the time for appeal has now run, there can be no doubt that none of the Government Defendants, including the Governor and Attorney General, will seek appellate review. Further, the standing of the Official Proponents has been called into question by the Plaintiffs, Plaintiff-Intervenors, and district court, not to mention that this Court has specifically requested briefing on the Official Proponents' standing to pursue their appeal.

Courts frequently permit intervention even after trial for the purpose of appealing an adverse ruling. *See, e.g.*, *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *Legal Aid Soc'y of Alameda County v. Brennan*, 608 F.2d 1319, 1328 (9th Cir.1979); *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953); *Hodgson v. United Mine Workers*, 473 F.2d 118 (D.C. Cir. 1972); *United States Casualty Co. v. Taylor*, 64 F.2d 521 (4th Cir. 1933); *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co*., 3 F.R.D. 162 (S.D.N.Y. 1942). As this Court has explained, "[i]ntervention should be allowed even after a final judgment where it is necessary to preserve some right which cannot otherwise be protected [such as] the right to appeal from the judgments entered on the merits by the District Court." *Pellegrino*, 203 F.2d at 465-66 (citations omitted); *see also Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1412 n.8 (9th Cir. 1996) ("the Guild's right to intervene [postjudgment] for the purpose of appealing is well established"); *Park & Tilford v. Schults*, 160 F.2d 984 (2d Cir. 1947) (post-judgment motion to intervene was timely where purpose was to appeal adverse ruling). Allowing intervention to facilitate appellate review is especially appropriate where a substantial question, such as the constitutionality of Proposition 8, might otherwise be left unsettled. *See Associated Builders and Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386, 391 (6th Cir. 1997) ("The existence of a substantial unsettled question of law is a proper circumstance for allowing

intervention and appeal. Where such uncertainty exists, one whose interests have been adversely affected by a district court's decision should be entitled to receive the protection of appellate review.") (internal quotation marks and citations omitted).

The County proceeded expeditiously to file a motion to intervene at the district court after learning that the Attorney General, Governor, and Defendant County Clerks would not defend Proposition 8, and that Plaintiff-Intervenor challenged the Official Proponents' Article III standing and thus their ability to appeal an adverse ruling. (*See* E.R. Vol. IV, p. 0896-97, Declaration of Wally Leimgruber, ¶¶ 2-4.) This conduct surely satisfies the timeliness requirement.

Finally, and perhaps most importantly, the district court determined that the timing of the County's motion to intervene did not prejudice existing parties. (E.R. Vol. I, p. 0019.) This strongly bolsters the conclusion that the County's motion to intervene was timely filed.

2. The County, Board of Supervisors, and Deputy Clerk Vargas have a significantly protectable interest in the subject of this action.

Whether a proposed intervenor has a significantly protectable interest is a "practical, threshold inquiry," and "[n]o specific legal or equitable interest need be established." *Berg*, 268 F.3d at 818 (quotations omitted). "It is generally enough

that the interest asserted is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Id*. (quotations and alterations omitted). The interests of the County, Board of Supervisors, and Deputy Clerk Vargas satisfy this standard because of the type of interests they hold, the legal confusion that will occur should the district court's ruling be insulated from appellate review, and the district court's assertion that its ruling in the Northern District of California extends outside its jurisdiction to the County of Imperial. (E.R. Vol. I, p. 0024.)

a. Deputy Clerk Vargas has a significantly protectable interest.

County clerks and their deputies have the practical, day-to-day responsibilities relating to new marriages. They are designated as "commissioner[s] of civil marriages." Cal. Family Code § 401(a). They issue marriage licenses (*id*. § 350), perform civil marriages (*id*. § 400), and maintain vital marriage records (*id.* § 511(a); *see also* California Health & Safety Code §§ 102285, 102295). (*See also* E.R. Vol. IV, p. 0892, Declaration of Isabel Vargas, ¶ 1.) Their direct interest in the same-sex marriage debate itself is longstanding, dating at least to the 1970s when the County Clerks' Association successfully petitioned the Legislature to amend the law to clarify that marriage is only between a man and a woman. *See In re Marriage Cases*, 43 Cal.4th 757, 794-95 (Cal.

2008). Hence, it is no surprise that plaintiffs themselves named two county clerks as defendants in this action. (E.R. Vol. IV, p. 0924, ¶¶ 16-18 (Defendant County Clerks are "responsible for maintaining vital records of marriage, issuing marriage licenses, and performing civil marriage ceremonies" and "are responsible for the enforcement of Prop. 8").) County clerks are frequently defendants in same-sex marriage litigation. *See, e.g., Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (lawsuit against Orange County clerk for injunction and declaratory relief arguing that California law defining marriage as the union of a man and a woman was unconstitutional); *Lockyer v. City & County of San Francisco*, 33 Cal.4th 1055 (Cal. 2004) ("*Lockyer*") (county clerks sued for issuing same-sex marriage licenses); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (same-sex couples sue county clerks for refusing to issue marriage licenses); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (same). Indeed, County clerks are likely necessary defendants to such litigation under California law. *See Walker v. United States*, No. 08-1314, 2008 U.S. Dist. LEXIS 107664, at *7, *9 (S.D. Cal. Dec. 3, 2008) (dismissing suit challenging California's "ban on same-sex marriage" because it named only the Governor and Attorney General as defendants and the plaintiff did "not allege that either the Governor or the Attorney General were charged with the duty of issuing marriage licenses or directly denied him such a license in violation of the Constitution").

Any injunctive relief granted in this case – particularly the far-reaching injunction issued by the district court – would directly affect the Deputy Clerk Vargas's performance of her legal duties. (E.R. Vol. I, p. 0002; *See, e.g.*, E.R. Vol. IV, p. 0893, Declaration of Isabel Vargas, ¶ 3.) Indeed, the district court's order alone provides Deputy Clerk Vargas a significantly protectable interest warranting her intervention. *See Portland Audobon Soc'y v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989) (where plaintiff sought injunction, "the governmental bodies charged with compliance can be the only defendants"). The outcome of this action, therefore, will indisputably affect Deputy Clerk Vargas's ability to comply with Proposition 8's mandate that "[o]nly a marriage between a man and a woman is valid or recognized in California," Cal. Const. art. I, § 7.5—a mandate that was duly enacted as a constitutional amendment by the people of California and has been upheld by the California Supreme Court, *see Strauss v. Horton*, 46 Cal.4th 364 (2009) ("*Strauss*")—and/or subject her to conflicting duties.

As in *American Association of People with Disabilities v. Herrera*, 257 F.R.D. 236 (D.N.M. 2008), Deputy Clerk Vargas's interest in the effective performance of her duties and the threat of an injunction impacting those duties—either from a federal court or a California state court seeking to enforce an order from the Attorney General or other state officials—justify intervention. In

Herrera, which involved a challenge to a New Mexico state voter-registration law, the court permitted a county clerk to intervene:

> If the injunction was issued, Coakley [the county clerk] would be prohibited from performing certain electoral duties that New Mexico law requires. This direct effect on what Coakley can and cannot do as a county clerk is the direct and substantial effect that is recognized as a legally protectable interest under rule 24(a).

Id. at 256 (citing *Utah Assoc. of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001)); *see also Bogaert v. Land*, 2008 WL 2952006 (W.D. Mich. July 29, 2009) (county clerks permitted to intervene where plaintiffs sought injunction that would change clerks' obligations in administering a recall election).

Moreover, the California Constitution prohibits state officials from relying on a trial court decision to declare a state law unenforceable under federal law. *See* Cal. Const. art. III, § 3.5(c) ("An administrative agency . . . has no power . . . [t]o declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law prohibit[s] the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law"); *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 812 (9th Cir. 2002) ("California agencies … are explicitly prohibited by the state constitution from agreeing to be enjoined from enforcing state laws that have not been declared unconstitutional by

an appellate court.”). In light of the district court’s broadly worded judgment, Deputy Clerk Vargas must now determine whether she will adhere to the California Constitution, which she has sworn to uphold, or the direction of state officials acting in obedience to the district court’s injunction. Deputy Clerk Vargas thus has a significant interest in this matter, and specifically this appeal, as her involvement will resolve this conflict and allow her to obtain a final resolution on how to perform her official duties.

The holding in *Richardson v. Ramirez*, 418 U.S. 24 (1974), supports intervention under these circumstances. There, ex-felons sued three county election officials, challenging California’s constitutional provision prohibiting ex-felons from voting. All three officials indicated that they would allow the ex-felons to register and vote, essentially mooting the dispute, and the Secretary of State disclaimed a desire to contest the claims. At that point, the County Clerk of Mendocino County filed a complaint in intervention, alleging that the suit was collusive. The California Supreme Court ordered that the clerk be added as a party defendant. The clerk then became the defendant who appealed the action to the United States Supreme Court, which upheld the law. Rejecting Article III concerns, the Supreme Court opined that, without the opportunity to appeal, the intervening clerk and all other county clerks in the state would have been

"permanently bound" by the lower court's decision. *Id*. at 35. Similar reasoning applies here.

Despite the significant and direct interests of Deputy Clerk Vargas in the litigation, the district court held that Vargas's intervention was not warranted because "duties as a county clerk are purely ministerial and do not create a significant protectable interest that bears a relationship to the plaintiffs' claims in this litigation." (E.R. Vol. I, p. 0021.) That reasoning, even if true, is beside the point. Deputy Clerk Vargas's interest in the validity of Proposition 8 derives from whether she is charged with enforcing it, not from whether her duties are ministerial or discretionary in nature. And in light of her official duties, there is no question that Deputy Clerk Vargas is responsible for the enforcement of Proposition 8.

Furthermore, while a county clerk cannot disregard or violate a presumptively valid statute in fulfilling his or her ministerial duties, which is what the clerk in *Lockyer* attempted to do, the *Lockyer* decision does not stand for the proposition, as the district court suggests it does, that clerks lack standing because their duties are largely ministerial. To the contrary, *Lockyer* acknowledges Supreme Court precedent, *Board of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968), establishing that a clerk has a sufficient interest "*to bring a court action* to challenge the statute." *Lockyer*, 33 Cal.4th at 1101 n.29 (emphasis in original).

The clerk's "oath to support the Constitution" endows the official with standing to judicially test the constitutionality of a statute. *Id.* As *Lockyer* explained,

> [T]he court in *Allen* noted that no one had questioned the standing of the local district and its officials "to press their claim in this Court," and then stated that "[b]elieving [the statute in question] to be unconstitutional, [the officials] are in the position of having to choose between violating their oath [to support the United States Constitution] and taking a step—refusal to comply with [the applicable statute]—that would likely bring their expulsion from office and also a reduction in state funding for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation.

Id. (alterations in original). Surely similar considerations compel the conclusion that a county clerk has a personal stake in the validity of laws she must enforce sufficient to support intervention in a constitutional challenge to those laws.

In short, Imperial County officials, just like the clerks involved in *Lockyer*, took an oath to uphold the State Constitution in fulfilling their duties. That Constitution now includes Proposition 8. To be sure, the duties of county clerks with respect to marriage are largely ministerial, and county clerks are not independent judges of the constitutionality of state law. *See Lockyer*, 33 Cal.4th 1055. But, Proposition 8 has been upheld by the California Supreme Court as a

valid constitutional amendment (*Strauss*, 46 Cal.4th 364), and County clerks are directly charged with enforcing that law. Thus, Imperial County officials' interest in this litigation far surpasses the undifferentiated, generalized interest of citizens. This is no doubt why Plaintiffs named two other county clerks as defendants in this action. (E.R. Vol. IV, p. 0924, ¶¶ 16-18). It is also why county clerks and similarly situated officials are frequent parties to same-sex marriage cases and myriad other cases involving constitutional challenges to statutes that affect their duties. (E.R. Vol. IV, p. 0899.) And it is why the County and its officials here seek to intervene in this case so that their constitutional and statutory duties will be clear and so that appropriate appellate review can occur.

b. The Board of Supervisors and County of Imperial Have a significantly protectable interest.

The County's Board of Supervisors has ultimate responsibility to ensure that county clerks and their deputies faithfully perform their legal duties, including those relating to marriage. Cal. Gov't Code § 25303. More broadly, the Board and Clerks have a sworn duty to uphold and defend the California Constitution, which includes both Proposition 8 and the "precious" initiative right by which it was enacted. *See* Cal. Const. art. 20, § 3; *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal.3d 582, 591 (Cal. 1976) (describing initiative right as "one of the most precious rights of our democratic process"). As noted above, Proposition

8 has been duly enacted by the people of California as part of their Constitution and has upheld by the California Supreme Court. (S*ee Strauss*, 46 Cal.4th 364). It is nevertheless undefended by state officials. This lack of governmental defense particularly concerns Imperial County whose voters overwhelmingly supported Proposition 8 by a margin of approximately 70% to 30%. (*See* E.R. IV, p. 0897, Declaration of Wally Leimgruber, ¶ 5.)

Furthermore, as is fully set forth below, the County of Imperial and the Board of Supervisors have an interest in the continued enforcement of Proposition 8 because of their responsibility to provide social welfare programs for the County's residents. In light of the County's understanding that promoting opposite-sex marriage will benefit the public welfare, and reduce a wide variety of problems including, but not limited to, teenage pregnancy, depression in adolescents and adults, incarceration rates, and the inability of parents to be the sole financial providers for their children, the County has a direct financial interest in assuring that the vote of its residents is defended and ultimately upheld. Significantly, the district court held that the City and County of San Francisco's purported financial interests in the invalidation of Proposition 8 was an interest sufficient to support intervention. (*See* E.R. Vol. I, p. 185 ("San Francisco has identified an independent interest in the action: It claims a financial interest that it

alleges is adversely affected by Proposition 8.") (oral ruling on San Francisco's motion to intervene).)

Finally, the weighty constitutional questions presented by this case plainly warrant definitive resolution by this Court and perhaps even the Supreme Court. The district court's injunction purports to effectively bind everyone in California by compelling the state official defendants to enforce its ruling statewide. Yet the judgments of federal district courts have no precedential effect except on the parties. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (federal trial court decisions are not binding precedent). Every federal district court judge "sits alone and renders decisions not binding on the others," even within the same district. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 430 n.10 (1996). "The doctrine of stare decisis does not compel one district court judge to follow the decision of another." *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 (9th Cir. 1977). "In the judicial scheme of things, a district court decision which has not withstood the acid test of appellate review cannot be regarded as authoritative …." *Bank of Marin v. England*, 352 F.2d 186, 189 n.1 (9th Cir. 1965). Indeed, as noted above, the California Constitution bars California officials from declining to enforce state laws that have not been determined to violate federal law by an appellate court. Cal. Const. art. III, § 3.5(c). For all of these

reasons, appellate review is essential to settle validity of Proposition 8 and provide clear guidance to the County as to their official duties and responsibilities.

The County, the Board of Supervisors, and the Deputy Clerk all have sufficiently protectable interests to warrant intervention. Their official duties and the confusion resulting from conflicting legal authorities establish these interests. In addition, the unique procedural posture of a constitutional amendment that has no Government defendant willing to defend it also warrants the intervention of the County.

3. **The District Court's ruling impaired the County's significantly protectable interest.**

As *Berg* held, this Court "follow[s] the guidance of Rule 24 advisory committee notes that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Berg*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee's notes). As demonstrated above, the outcome of this action will, as a practical matter, affect the County's ability to comply with Proposition 8, affect the County's ability to perform official duties, and subject the County to conflicting duties. This requirement is thus plainly met.

4. **<u>The existing parties will not adequately represent the County's interests.</u>**

The burden of showing inadequacy of representation by existing parties is "'minimal'"; "the applicant need only show that the representation of its interests by existing parties 'may be' inadequate." *Berg*, 268 F.3d at 823 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Courts consider the following three factors when analyzing this element of intervention:

> (1) Whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary element to the proceedings that other parties would neglect.

Id. at 822.

The Attorney General's and the Governor's legal positions manifestly show that they could not adequately protect the County's interests in defending Proposition 8. And while similarly situated to the County, Defendant County Clerks were likewise unwilling to mount an active defense. (E.R. Vol. IV, p. 0905 ("the County Clerks at present do not anticipate presenting evidence to the Court or making any motions.").) Most important, the Government defendants have

refused to appeal the district court's decision, conclusively demonstrating that they are unwilling to adequately represent the County's interests.

Neither are the Official Proponents' able to adequately represent the County's interests on appeal if it is determined that the Official Proponents lack Article III standing to appeal. This reality underlies this Court's decision in *United States v. State of Washington*, 86 F.3d 1499 (9th Cir. 1996) ("*Washington*"), and many other cases holding that a party *must* promptly intervene when it becomes aware that another party does not represent its interests.

In *Washington*, multiple parties attempted to intervene post-judgment. *Washington*, 86 F.3d 1499. One of the intervenors ("Inner Sound") had attempted to intervene at an earlier stage in the litigation, but was denied and failed to appeal that denial. *Id*. The court rejected *all* of the intevenors' post-judgment motions because the parties should have appealed the district court's denial of Inner Sound's earlier motion to intervene. *Id*. The Court specifically chided another intervenor ("Harvest Divers") for not attempting to intervene when the district court denied Inner Sound's earlier motion, holding that Harvest Divers "should have sought intervention to protect [the] right of appeal" as soon as it ascertained that Inner Sound would not appeal the denial. *Id*. at 1504. Inner Sound's decision not to appeal clearly signaled to Harvest Divers that Inner Sound did not represent its interests. This was true "even if Harvest Divers believed that Inner Sound's

arguments adequately represented the interests of Harvest Divers." *Washington*, 86 F.3d at 1505-06 (emphasis added). Similarly, here, if the Official Proponents lack standing to appeal, then it necessarily follows that they cannot adequately represent the County's interests regardless of the arguments they advance.

Further, and most importantly, County officials, not the Official Proponents, are charged with complying with the marriage laws and thus may be subject to injunctions in the event it is struck down. A party with a direct stake in the enforcement and administration of California's marriage laws that is willing to defend Proposition 8 should be represented in this action. (E.R. Vol. I, p. 0189 (allowing City and County of San Francisco to intervene "to present issue of alleged effect [of Proposition 8] on governmental interests").)

B. Alternatively, The County Is Entitled To Permissive Intervention.

Courts have discretion to grant permissive intervention under Fed. R. Civ. p. 24(b). *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002) ("*Kootenai*") (granting permissive intervention). Unlike intervention as of right, a significantly protectable interest is not required. *See Employee Staffing Services, Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994). "[A] court may grant permissive intervention where the applicant shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and

the main action, have a question of law or question of fact in common." *City of Los Angeles*, 288 F.3d at 403.

As the district court found, the County satisfies all the requirements for permissive intervention: First, it timely filed its motion for all of the reasons discussed above. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). Second, the County has "independent jurisdictional grounds" for appeal. *Id.* at 1109 (*citing Didrickson v. United States Dep't of the Interior,* 982 F.2d 1332, 1337-38 (9th Cir. 1992) (explaining that standing constitutes an "independent jurisdictional ground" for permissive intervention)). As explained above, the County has standing by virtue of its officials' oaths to defend the Constitution and because the County will be affected by the final judgment in this case. *See Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5; *Lockyer*, 33 Cal.4th at 1101 n.29. Finally, the County's proposed defense presents common questions of law with the other parties—whether Proposition 8 is constitutional—and will not introduce any new claims or defenses.

Paraphrasing this Court's decision in *Kootenai*, the County's intervention is appropriate because "the magnitude of this case is such that [its] intervention will contribute to the equitable resolution of this case," and because intervention disrupts nothing, prejudices no one, and assists in ensuring appellate review.

Kootenai, 313 F.3d at 1111. There is thus "good and substantial reason for . . . permit[ting] the permissive intervention." *Id.* Given the lack of prejudice to the parties or these proceedings, there is no reasonable objection to another entity seeking to be bound by the ultimate judgment.

The County thus satisfies the requirements for both intervention as of right and permissive intervention. In light of the County's significantly protectable interests and the direct impact on its performance of official duties, intervention is appropriate, particularly because the Government defendants have not appealed the district court's ruling and the Official Proponents' standing has been questioned.

C. Because The District Court Erred In Denying Intervention, This Court May Proceed To Consider The Merits Of The Appeals.

Imperial County has noticed an appeal both from the district court's order denying intervention and also from its decision invalidating Proposition 8. This is the proper course for a proposed intervenor to take when final judgment is entered at or near the time its motion to intervene is denied. *See* 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3902.1 ("If final judgment is entered with or after the denial of intervention, however, the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed."). Accordingly, this Court may reverse the district court's erroneous decision denying intervention and proceed

directly to the merits of the Imperial County and Official Proponents' appeals. *See United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994) (holding that the district court "erred in denying the government's motion to intervene in a limited way for the purpose of appeal" and thus "proceed[ing] with the merits of the case"); *United States ex rel. McGough v. Covington Tech. Co.*, 967 F.2d 1391, 1392 (9th Cir. 1992) (same).

II. THE SUPREME COURT'S DECISION IN *BAKER V. NELSON* MANDATES REVERSAL

In *Baker v. Nelson*, 409 U.S. 810 (1972) ("*Baker*"), the Supreme Court unanimously dismissed an appeal from the Minnesota Supreme Court, which presented the same substantive questions and issues presented in this case – whether a state's refusal to authorize same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.; see also Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972) (Doc. No. 36-3 at 6); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

The Supreme Court's summary dismissal in *Baker* functions both as precedent and a decision on the merits of the case because there the court ordered the "appeal from Sup. Ct. Minn. [be] dismissed for want of substantial federal question," 409 U.S. 810. Summary dismissals from the Supreme Court were common prior to 1988, as the Court was statutorily required to hear all appeals

from state supreme court decisions presenting federal constitutional questions. *See* 28 U.S.C. § 1257 (1988); Pub. L. No. 100-352, 102 Stat. 662 (1988) (removing mandatory jurisdiction over state supreme court decisions on federal constitutional issues); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary dismissals "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions"). Even "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 238 (1997) (same).

Although the Supreme Court has recently addressed two significant cases pertaining to sexual orientation, neither case can be interpreted to have overruled *Baker*. First, in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("*Lawrence*"), the Supreme Court overruled Texas' sodomy law as a violation of the Fourteenth Amendment's Due Process Clause. The Court considered "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty." *Id.* at 564. However, *Lawrence* provided the Supreme Court no reason to consider whether there was a right founded in due process to same- sex marriage. Rather, the Supreme Court specifically stated that

the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578. Nevertheless, that is exactly what the Plaintiffs seek through this case, formal recognition of their relationships through a judicial declaration overturning Proposition 8 and establishing a right to same-sex marriage.

Second, in *Romer v. Evans*, 517 U.S. 620 (1996) ("*Romer*"), the Supreme Court struck down Colorado's constitutional amendment that operated to "repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination." *Id.* at 629. Colorado's sweeping amendment retroactively repealed and prospectively prohibited "specific legal protections . . . [for homosexuals] in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment." *Id.* Relying upon the Fourteenth Amendment's Equal Protection Clause, the Supreme Court found no rational basis for Colorado's constitutional amendment. The facts in *Romer* do not resemble the facts in this present case. *Romer* did not concern the institution of marriage, but rather the elimination of all basic legal protections normally available to all people within Colorado. As both the ruling and the facts in *Romer* are clearly distinguishable from this present case, *Baker* has not been overturned and this Court should follow its holding.

The Plaintiffs presented the district court with precisely the same substantive issues proffered to the Supreme Court in *Baker*, that is, whether a state's refusal to authorize same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The district court failed to conform its judgment to binding Supreme Court precedent, despite the fact that Plaintiffs' claims here are the same as those rejected in Baker. Accordingly, the district court judgment should be reversed without further consideration.

III. PROPOSITION 8 IS CONSTITUTIONAL WITHIN THE CONFINES OF THE FOURTEENTH AMENDMENT.

"The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving v. Virginia,* 388 U.S. 1, 10 (1967). The broad intention of the Due Process Clause was "to prevent government from abusing [its] power, or employing it as an instrument of oppression", *DeShaney v. Winnebago County Dep't of Soc. Servs.,* 489 US 189, 196 (1989) (quoting *Davidson v Cannon*, 474 US 344, 348 (1986)), while the purpose of the Equal Protection Clause was to "secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech* 528 US 562, 565 (2000).

A law is not deemed unconstitutional merely because it classifies and treats people differently. The Supreme Court noted that "[t]he equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units, A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1980). Moreover, a legislature has considerable discretion in the exercise of its powers to recognize the differences between and among persons and situations with respect to classification. *Barrett v. Indiana*, 229 U.S. 26, 29-30 (1913). Thus, "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

The effects of Proposition 8 are not invidious, but are rationally related to a legitimate governmental end. Therefore, Proposition 8 easily survives the applicable judicial scrutiny under the Fourteenth Amendment, as has been the case in just about every other judicial decision that has analyzed laws that define marriage as being a union between one man and one woman.

A. The Substantive Due Process Clause Does Not Render Proposition 8 Unconstitutional.

While considering whether to establish a new fundamental right as requested by the Plaintiffs, this Court should exercise judicial restraint and proceed with exceptional caution. As the Supreme Court stated in *Washington v. Glucksberg*, 521 U.S. 702 (1997), "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' ... lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court." *Id.* at 720 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992)).

With caution, the Supreme Court has established the method for substantive due process analysis.

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a

> careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause.

Glucksberg, 521 U.S. 702, 720-21 (1997) (internal citations and quotations omitted).

Unlike the district court in this present case, most courts have held that the right to legal recognition of same-sex marriage is not a fundamental right. *See*, *e.g.*, *Smelt*, 374 F.Supp.2d at 879; *Wilson v. Ake*, 354 F.Supp.2d 1298, 1307 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 140-41 (Bkrtcy. W.D. Wash. 2004); *Standhardt v. Superior Court*, 77 P.3d 451, 458-60 (Ariz.Ct.App.2003); *In re Marriage of J.B. and H.B.*, __ S.W.3d __, 2010 WL 3399074, *17 (Tex. App. 2010); *Conaway*, 932 A.2d at 629 (analyzing claims under Maryland Constitution); *Hernandez*, 855 N.E.2d at 10 (analyzing claims under New York Constitution); *Andersen*, 138 P.3d at 979 (analyzing claims under Washington Constitution and noting that " no appellate court applying a federal constitutional analysis" has found a fundamental right to marry a person of the same sex); *Goodridge*, 798 N.E.2d at 987 (Cordy, J., dissenting) ("While the institution of marriage is deeply rooted in the history and traditions of our country and our State, the right to marry someone of the same sex is not").

Likewise, this Court should find that same-sex marriage is not a fundamental right. As discussed below, this Court should further determine that "same-sex marriage" is the most accurate description of the interest being asserted by the Plaintiffs. Additionally, this Court should determine that same-sex marriage can hardly be characterized as a fundamental right that is deeply rooted in our Nation's history and tradition.

1. **The right asserted by the Plaintiffs is the right to "Same-Sex Marriage".**

The Plaintiffs assert that gay and lesbian individuals are denied the right to enter into a civil marriage with the person of their choice. This Court should not merely adopt the right asserted by the Plaintiffs, but should instead itself determine, with a "careful description", the liberty interest asserted by the Plaintiffs. *Glucksberg*, 521 U.S. at 721. Many courts have already confronted this issue and have regularly concluded that the right asserted in cases challenging limitations on marriage to opposite-sex couples should be defined as the right to marry a person of the same sex, not as the right to marry whomever one chooses. See, e.g., , *Smelt*, 374 F. Supp. 2d at 877-79; *In re Kandu*, 315 B.R. at 138-41; *Hernandez*, 855 N.E.2d at 9-10; *Andersen v. King Cnty.*, 138 P.3d 963, 976-79 (Wash. 2006) (plurality op.); *Conaway*, 932 A.2d at 619-21; *In re Marriage of J.B. and H.B.*, __ S.W.3d __, 2010 WL 3399074, 17 (Tex. App. 2010).

The right to marry is a fundamental right. *Loving v. Virgina,* 388 U.S. 1, 12 (1967) (marriage is a "fundamental freedom" that may "not be restricted by invidious racial descriptions"); *Glucksberg*, 521 U.S. 719 (citing *Loving* as establishing a fundamental right to marry). The Supreme Court's jurisprudence in relation to the fundamental right to marry does not support a right to same sex marriage. The cases touching upon the fundamental right to marry have always involved opposite-sex couples with the unquestionable intent of protecting the procreative interests that can only exist naturally between one man and one woman. *See e.g. Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (marriage was described as "fundamental to the very existence and survival of the race"); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("[i]t is not surprising that the decision to marry has been placed in the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.... [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of family in our society").

The Supreme Court has never issued a ruling even contemplating a fundamental right to marry outside the context of marriage between one man and one woman. Without a doubt, relevant case law supports the fact that the right to marry includes the right to choose a person of one's choice, so long as the other

person is the opposite sex. The Plaintiffs are essentially seeking an exemption from normal regulations limiting marriage to persons of the opposite sex – a regulation that operates like any other limitation such as age or mental capacity. If a person was seeking to marry a minor based on an asserted fundamental right, the court would necessarily frame the asserted right as the right to marry a minor, not the right to marry a person of one's choice. Likewise, this Court should view the Plaintiffs as seeking the right to marry a person of the same sex.

2. "Same-Sex Marriage" Is Not Deeply Rooted In Our Nation's History And Traditions.

In stark contrast to same-sex marriage, our Supreme Court has heralded the deep roots and longstanding traditions that opposite-sex marriage enjoys in our Nation's history. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"). Not surprisingly, those roots find support by anthropologist, Claude Levi-Strauss: "[T]he family - based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children appears to be a practically universal phenomenon, present in every type of society." (E.R. Vol. II, p. 367-68.)

In *Smelt*, this court noted that marriage has long been defined as being limited to one man and one woman. *Smelt,* 447 F.3d at 681 n.18. One need only

consider the societal values underlying our Nation's rich tradition in recognition of marriage and the reasons it has been a preferred and protected legal institution. "(M)arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Adams v. Howerton* (1980) 486 F.Supp. 1119, 1122 (quoting *Singer v. Hara* 11 Wash.App. 247, 522 P.2d 1187, 1195 (1974) and affirmed in *Adams v. Howerton* 673 F.2d 1036 (1982)).

There is no question that same-sex marriage is not similarly rooted in our Nation's history and traditions. The Texas Court of Appeals perhaps said this best in its recent rejection of a challenge to the state's constitutional amendment declaring marriage to be a union of opposite-sex couples. *In re Marriage of J.B. and H.B.*, __ S.W.3d __, 2010 WL 3399074, 17 (Tex. App. 2010). There, the court reasoned:

> Having concluded that the claimed right in question is properly defined as the right to marry a person of the same sex, we consider whether that right is "'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 721 (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality op.)). Plainly, it is not. Until 2003, no state recognized same-sex marriages. *Smelt*, 374 F. Supp. 2d at 878. Congress and most states have

> adopted legislation or constitutional amendments explicitly limiting the institution of marriage to opposite-sex unions.

2010 WL 3399074, 17.

The Supreme Court has also recognized the impact of history and deeply rooted tradition in substantive due process judicial review. In *Washington v. Glucksberg*, 521 U.S. 702 (1997) , the Supreme Court described the established method for due process analysis, particularly noting those fundamental rights and liberties which are, objectively under the Due Process Clause, "deeply rooted in this Nation's history and tradition." 521 U.S. at 721**.** "Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' that direct and restrain our exposition of the Due Process Clause." 521 U.S. at 721 (citing *Collins v. Harker Heights* 503 U.S. 115, 125 (1992).)

"That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected…." 521 U.S. at 727. The Supreme Court's reasoning in *Glucksberg* is equally compelling here. Just as our Nation's history, legal traditions, and practices provided the Court with crucial guideposts for responsible decision making on the sensitive issue of an asserted "right to death," this Court should be so guided when addressing an

asserted right to same-sex marriage. There simply can be no justification to "reverse centuries of legal doctrine and practice and to strike down the considered policy choice" of the people of California through the enactment of Proposition 8. "[T]he limitation of marriage to one man and one woman preserves both its structure and its historic purposes." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 992 n.13 (Mass. 2003) (Cordy, J., dissenting). Opposite-sex marriage increases the likelihood that children will be raised by both their mother and their father, within the context of stable lasting relationships, one of society's paramount goals. Since marriage and procreation are fundamental to the very existence and survival of the human race, its historical roots and traditions should be embraced and accorded great deference by this Court.

B. The Equal Protection Clause Does Not Render Proposition 8 Unconstitutional.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne v Cleburne Living Ctr., Inc.* 473 US 432, 439, (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216, (1982)). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal

protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

The limitation of marriage to one man and one woman is clearly a matter of social and economic policy. *See*, *e.g.*, *Smelt*, 447 F.3d at 681 ("it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves" than the institution of marriage); *Citizens for Equal Prot.*, 455 F.3d at 867 (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878) (states have traditionally enjoyed wide latitude in prescribing "the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved"). The Plaintiffs equal protection claim therefore must fail because Proposition 8 "neither proceeds along suspect lines nor infringes fundamental constitutional rights." *F.C.C.* 508 U.S. at 313.

Having established while analyzing substantive due process that there is no fundamental right to same-sex marriage and, as a result, no fundamental rights were infringed upon by Proposition 8, the next inquiry is whether Plaintiffs belong to a suspect class. The Plaintiffs, as same-sex couples, do not belong to a suspect class due to their sexual orientation. *High Tech Gays*, 895 F.2d at 573. Although "the Supreme Court has identified that legislative classifications based on race,

alienage, or national origin are subject to strict scrutiny and that classifications based upon gender or illegitimacy call for a heightened standard, the Supreme Court has never held homosexuality to a heightened standard of review." *High Tech Gays*, 895 F.2d at 573; *see Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir.2003) (referencing *High Tech Gays* for the holding that "homosexuals are not a suspect or quasi-suspect class, but are a definable group entitled to rational basis scrutiny for equal protection purposes").

1. The Plaintiffs Are Not Entitled To "Suspect" or "Quasi-Suspect Status"..

In *High Tech Gays*, this Court considered a class action lawsuit challenging the Department of Defense's policy of subjecting homosexuals seeking "Secret and Top Secret clearances to expanded investigations" and its "practice of refusing to grant security clearances to known or suspected gay applicants." *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 595 (9th Cir. 1990) . *High Tech Gays* applied a three part test and stated, among other things, that "[t]o be a ;suspect' or 'quasi-suspect' class, homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are politically powerless." *Id.* at 573 (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (due to a lack of these characteristics, the statutory classifications in question were subject to only a

rational basis review). *High Tech Gays* determined that homosexuals did not constitute a suspect or quasi-suspect class. Nothing has changed in the last twenty years since *High Tech Gays* was decided that would qualify sexual orientation as a "suspect" or "quasi-suspect" classification.[2] Rather, the developments over the last twenty years have demonstrated even more that sexual orientation is not a suspect classification.

2. <u>Great results have been realized by those seeking to expand legal protections and benefits to the homosexual population</u>.

Over the last decade, significant changes to the law have been made in order to expand legal protections and benefits to the homosexual population and regardless of the outcome of this case regarding marriage positive changes

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[2] *High Tech Gays* was decided after *Bowers v. Harwick*, 478 U.S. 186 (1986) and before *Lawrence v. Texas*, 539 U.S. 558 (2003). *High Tech Gays* relied upon *Bowers* to find no violation of a fundamental right. *High Tech Gays*, 895 F.2d at 570-71. *Bowers* was subsequently overturned by *Lawrence*. *Lawrence*, 539 U.S. at 578. Although *High Tech Gays* relied upon *Bowers* in finding no Due Process violation, the *High Tech Gay*'s equal protection analysis, and its reasoned decision declaring that sexual orientation does not constitute a suspect classification, remains intact. *See In Re Kandu*, 315 B.R. 123, 143 (2004) (citing *State v. Limon*, 83 P.3d 229, 241 (Kan. Ct. App. 2004) (Malone, J., concurring) (noting that "Lawrence did not confer suspect class status on homosexuals, and in fact specifically declined to do so"). *High Tech Gays* independently determined that "homosexuals are not a suspect or quasi-suspect class…." 895 F.2d at 573 ("[t]here is further support [beyond *Bowers*] for our holding that homosexuals are not a suspect or quasi-s*u*spect class…." The Ninth Circuit went on to perform equal protection analysis as described in the main body of this opening brief.

continue today. California, in particular, provides extensive protection based on an individual's sexual orientation. *See*, *e.g.*, Cal. Fam. Code § 297 (domestic partnerships); Cal. Fam. Code § 297 (domestic partners granted same rights as spouses); Cal. Civ. Code § 51 (public accommodations law); Cal. Civ. Code § 51.7 (hate crimes law); Cal. Penal Code §§ 422.6 and 422.56 (hate crimes law). California has some of the most comprehensive protections in the Nation based on a person's sexual orientation. (*See* E.R. ___ DIX 147 ("In the past decade, EQCA has successfully passed more than 60 pieces of civil rights legislation [in California] for the LGBT community– more than any other statewide LGBT organization in the nation").) It is difficult to imagine any other interest group in California that has had similar success in achieving widespread changes to the law.

Notwithstanding a history of some discrimination, this Court has stated that it does not believe sexual orientation meets the other criteria required for "suspect" status. *High Tech Gays*, 895 F.2d 573. Further, the successes of the homosexual community in California mitigate against any intention of this Court to wade into this area of social policy by declaring "suspect status" based on sexual orientation. Such an act of judicial intervention would be unnecessary and overreaching.

3. <u>The Ninth Circuit has previously determined that sexual orientation is not an obvious, immutable, or distinguishing characteristic</u>.

The Plaintiffs do not satisfy the second prong of the test requiring that they "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group." *High Tech Gays*, 895 F.2d 573. "Homosexuality 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." *Id.* (citing *Woodward v. U.S.*, 871 F.2d 1068, 1076 (Fed. Cir. 1989)); (*see also* E.R. Vol. IV, p. 0859 ("[T]o date there are no replicated scientific studies supporting any specific biological etiology for homosexuality").) "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." *Id.* (citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). Furthermore, cases decided after *Lawrence* agree that sexual orientation or homosexuality is not a classification entitled to suspect or quasi-suspect status. *Conaway v. Deane*, 932 A.2d 571, 608 and 614 (Md. 2007) (scientific and sociological evidence does not establish immutable characteristics that sufficiently define the group); *In re Kandu*,

315 B.R. at 143-44 (following the Ninth Circuit's decision in *High Tech Gays*, and determining that the *Lawrence* Court, while "indicating a shift in the Supreme Court's treatment of same-sex couples," did not declare same-sex couples a suspect or quasi-suspect class for the purposes of equal protection analysis) (quoting *Lawrence*, 539 U.S. at 579-81) (O'Connor, J., concurring) (applying a rational basis standard of constitutional review to the Texas sodomy statute).

The evidence presented in this case also establishes that classifying a person based on their sexual orientation is ineffectual. This is because sexual orientation ranges along a continuum from exclusively heterosexual to exclusively homosexual. According to the Plaintiff's expert witness, Professor Gregory Herek, a person's sexual orientation is found somewhere along that continuum. (E.R. Vol. II, pp. 232-33.) The concept of sexual orientation is complex, variable and, therefore, difficult to define. (E.R. Vol. II, pp. 237-38.) Other experts agree. (E.R. Vol. IV, p. 839) ("Opposite-sex attraction is located on one end and same-sex attraction on the other. This model suggests that sexual orientation is not static and may vary throughout the course of a lifetime"). Yet another expert presented by the Plaintiffs, Letitia Anne Peplau, has written that "[s]cholars from many disciplines have noted that women's sexuality tends to be fluid, malleable, shaped by life experiences, and capable of change over time. Female sexual development is a potentially continuous, lifeling process in which multiple changes in sexual

orientation are possible." (E.R. Vol. 3, p. 753.) These relevant testimony and studies demonstrate that it is impossible to define a class of persons based on sexual orientation because no obvious, immutable or distinguishing characteristic defines the group, let alone the four plaintiffs in this case. At best, it would appear that there are innumerable methods to classify persons based on their sexual preferences and it is unlikely that the results would be the same from one method to another.

4. **The Ninth Circuit previously held that homosexuals are not politically powerless.**

The third prong for considering whether to give status as a suspect class is whether the class of individuals is "politically powerless." *High Tech Gays*, 895 at 573. This Court determined twenty years ago that "homosexuals are not without political power." *Id.* at 574; *see also In re Marriage of J.B. and H.B.*, 2010 WL 3399074, 17 (homosexuals are not politically powerless); *Conaway*, 932 A.2d at 611 ("[W]e are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to extraordinary protection from the majoritarian political process"). Moreover, this Court's determination was made long before the rise of many powerful interest groups promoting the interests of gays and lesbians. The political power of gays and lesbians is readily assessed by looking at the percentage of "No on 8" votes that were cast against Proposition 8.

Close to forty-eight percent of the voters in California opposed Proposition 8. (E.R. Vol. IV, p. 835.) Turning to a nationwide poll, the National Gay and Lesbian Task Force Foundation reported in 2000 that "Americans support sexual orientation nondiscrimination laws by a two to one margin, with 63.9 percent in favor, 30.9 percent opposed, and 5.3 percent undecided." (E.R. Vol. III, p. 594.)

The Plaintiffs thus belong to a class of highly influential individuals. In the past ten years, more than sixty bills have been passed in California promoting or protecting sexual orientation in some fashion. (E.R. Vol. III, p. 587..) One of those bills gave registered domestic partners all "the same rights, protections, and benefits" that are granted to married persons. Cal. Family Code § 297.5. Their political clout is also reflected in the fact that the California Democratic Party adopted a resolution to stand in "solidarity" with same-sex couples to repeal Proposition 8. (E.R. Vol. III, p. 589.) Much of this success could be due to the fact that contributions appear to be readily available for their cause. For example, the Human Rights Campaign reported raising in excess of $45 million dollars in 2009 and claims, "[f]inally, with strong allies in the White House, on Capitol Hill and across the country, the movement for equality has momentum like never before." (E.R. Vol. IV, p. 864.)

Professor Kenneth Miller from Claremont McKenna College identified in his trial testimony that a broad array of groups are "allied politically with gays and

lesbians" including, the Democratic Party, elected officials at all levels of government, organized labor, corporations, newspapers, celebrities, churches and faith-based religious organizations and professional associations. (E.R. Vol. II, p. 258-59.). Further, an amicus brief was filed last year in opposition to Proposition 8 where the amici consisted of fifteen national and international faith organizations, fourteen statewide and regional faith organizations, over 160 local congregations and faith organizations in California, and almost 700 California clergy and faith leaders. (E.R. Vol. III, p. 489.)

The Plaintiffs, and the classification to which they affiliate, are not politically powerless. Rather, the gay and lesbian community is one of the most influential and powerful interest groups in existence today. This fast forecloses this Court from concluding that sexual orientation is a "suspect" classification."

C. Proposition 8 Easily Survives Rational Basis Review

Rational basis review of Proposition 8 is appropriate in this case because the Plaintiffs did not and cannot establish that same-sex marriage is a fundamental right, nor can they or did they establish an entitlement to suspect or quasi suspect status in this case. Under rational basis review, a plaintiff's equal protection claim must be rejected if "there is *any reasonably conceivable state of facts* that could provide a rational basis" for the challenged action. *F.C.C. v Beach Communications, Inc.*, 508 US 307, 313. (1993) (emphasis added); *see also Vance*

v Bradley 440 US 93, 111 (1979). The deference that should be given to Proposition 8 is extraordinary as it bears "a strong presumption of validity" and those attacking the rationality of that measure have the burden "to negative every conceivable basis which might support it." *F.C.C.*, 508 U.S. at 314-15. In effect, rational basis scrutiny must be exceedingly tolerant of the voter's decision to adopt Proposition 8. *See Heller v. Doe*, 509 U.S. 312, 320-321 (1993). It is not enough for the Plaintiffs to simply show that Proposition 8 results in some sort of "inequality." *F.C.C.*, 508 at 316 n.7 (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

"In an equal protection case of this type . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker." *Vance v Bradley*, 440 US 93, 111 (1969). The County has no burden to substantiate the voter's reasoning for the passage of Proposition 8 with evidence of facts asserted at the time of its passage. *F.C.C.*, 508 U.S. at 315. Instead, it is entitled to rely upon post-hoc rationalizations. *Id.* ("because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature"); *see also Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (equal protection "does not demand for

purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). "Thus, the absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis." *F.C.C.*, 508 at 515 (internal quotations and punctuation omitted).

Proposition 8 "is not [and should not have been] subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* As for any rational interests presented, the County does not need to verify those interests with statistical evidence. *Hughes v Alexander Scrap Corp.*, 426 US 794, 812 (1976). The County is permitted to use generalizations so long as "the question is at least debatable." *Heller*, 509 U.S. at 326 (quotation and citation omitted); *see also F.C.C.*, 508 at 316 n.7 (classification does not violate equal protection simply because it is "not made with mathematical nicety" or because it is "unscientific") (citations omitted).

Ultimately, the Plaintiffs did not meet their burden at trial to show that there is no conceivable state of facts that could provide a rational basis for the passage of Proposition 8. In fact, the trial simply proved that the social policies relating to the regulation of marriage are hotly debated and subject to legitimate and differing viewpoints. The policy of limiting marriage between one man and one woman can hardly be said to be irrational and, at worst, is a debatable proposition. *Heller*, 509

U.S. at 326 (under rational basis review, inequitable classifications may be justified by "generalizations" so long as "the question is at least debatable"). For example, the debatable nature of the issue can be found in one research study presented at trial where researchers identified and critically undermined the basis of forty-nine studies supporting same-sex parenting. (E.R. Vol. III, p. 0605.) However, despite the fact that the County has no obligation to support the rationale behind Proposition 8 with statistical evidence, empirical data or scientific conclusions, the County has identified numerous interests below that support its interest, and the voter's interest, in the passage of Proposition 8.

1. Opposite-sex marriage can rationally be linked to improved public health, lower levels of poverty, lower crime, and lower economic costs of welfare related programs.

Opposite-sex marriage can rationally be linked to improved economic conditions for the residents of the County of Imperial, not to mention the residents of California. For example, studies and social science support a rational belief that where biological parents remain married and raise their biological children, it is less likely their children will engage in deviant behavior and delinquent acts (E.R. Vol. II, p. 0328; Vol. II, p. 274), less likely their children will have cognitive, emotional or social problems (E.R. Vol. II, p. 279;), less likely their children will live in poverty (E.R. Vol. II, p. 319), less likely to suffer from alcohol and

substance abuse (E.R. Vol. II, p. 323), more likely to be educated (E.R. Vol. II, p. 272), more likely to earn more income, more likely to have a better job, less likely to be idle, less likely to have a nonmarital birth (among daughters), less likely to have troubled marriages as an adult, and less likely to suffer depression. (*Id.*) . For married adults, they are less likely to be either perpetrators or victims of crime (E.R. Vol. II, p. 329), less likely to suffer from alcohol or substance abuse (E.R. Vol II, p. 323), less likely to live in poverty (unwed mothers) (*Id.* at 319), more likely to have better health (*Id.* at 324) , and less likely to be depressed (unwed mothers). (*Id.* at 327.)

As a governmental agency, the County implements a variety of state and local welfare programs to aid those individuals and families in need. *See*, *e.g.* http://www.icphd.org/menu_file/2008_HealthStatusReport.pdf. It also operates the County jail system, provides public safety for its residents through its Sheriff's Department, and provides medical and psychological care through its County operated medical facilities. There is a direct financial cost to the County for policing the community, incarcerating criminals, providing medical services to its residents, providing welfare programs to residents in poverty and providing social programs for unwed mothers - just to name a few. *Id.* Therefore, the County has a direct interest in the sociological well being of its residents.

The County and its residents have a significant interest in promoting the social policies that they rationally believe to benefit themselves and the County as a whole. Compared to other counties in California, the County has experienced the highest rate of poverty, highest rate of unemployment, highest rate of teenage pregnancies, higher rate of drug abuse, and generally, has higher incidents of social problems. *Id.* The studies referenced herein provide a rational basis to believe that marriage between one man and one woman will further the interests of the County and its residents, both economically and socially. While there may be numerous reasons beyond marriage for the results stated in the studies, it is not irrational to believe that marriage between one man and one woman will adequately serve those interests.

2. Opposite-sex Marriage encourages procreation within marriage, which is beneficial to society.

In *Hernandez*, the highest court of New York found a rational interest in procreation for limiting marriage to the union of opposite-sex couples is rationally related to the government's interest in steering procreation, particularly unintentional procreation, into committed relationships:

> [T]the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural

> tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.

Hernandez, 855 N.E.2d at 7. The Eight Circuit agreed with *Hernandez* that "responsible procreation" has a rational relationship to legitimate state interests. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006). As expressed in *Conaway* by the highest court in Maryland, most courts addressing this issue agree:

> [M]arriage enjoys its fundamental status due, in large part, to its link to procreation. *Loving*, 388 U.S. at 12 ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.") (emphasis added); *Skinner*, 316 U.S. at 541 (" Marriage and procreation are fundamental to the very existence and survival of the race."); *Maynard*, 125

> U.S. at 211 ("[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and society, without which there would be neither civilization nor progress."). . . . Acceptance of this notion is found in the clear majority of opinions of the courts that have considered the issue. . . .

Conaway, 932 A.2d at 630-31 (internal citations omitted). Regardless of whether this rationale is socially or scientifically accurate, it cannot be denied that rational judges, legislators and voters agree that responsible procreation is a legitimate interest and encouraging opposite sex couples to marry and limiting marriage to opposite sex is rationally related to that legitimate interest.

3. <u>Biological parenting provides the best family structure for the welfare of children and provides the best opportunity for children to have a relationship with their natural parents</u>

Numerous studies support the rationale that children raised by both of their natural biological parents - a mother and a father - in the same home, will generally be more effective than children who are not raised by both of their natural parents. (E.R. Vol. II, p. 274 ("Merely having two parents is not enough. Studies consistently indicate , however, that children in stepfamilies exhibit more problems

than do children with continuously married parents and about the same number of problems as do children with single parents"); E.R. Vol. II, pp. 291-92 ("Children growing up with stepparents also have lower levels of well-being than children growing up with biological parents. Thus, it is not simply the presence of two parents, as some have assumed, but the presence of two biological parents that seems to support children's development"); *see generally, E*.R. Vol. II, p. 434 - 486). Tellingly, however, one does not need to rely on scholarly articles, but needs only to go to the local bookstore to find bestselling books evidencing the fact that rational people believe that biological parenting is best for children. *See*, *e.g.*, Daniel Kindlon & Michael Thompson, *Raising Cain*, pp. 98-100, 121-122, 254-258 (2000).

The best interests of children are precisely what the voters were presented with in the Ballot Arguments for Proposition 8. (E.R. Vol. IV, p. 885) ("Proposition 8 protects marriage as an essential institution of society. While death, divorce or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father"). The voters of California have a legitimate interest in preserving the traditional institution of marriage the best way they know how – the initiative process. *Conaway*, 932 A.2d at 632-33 (reflecting on statistics and opining that there appears to be a trend towards the gradual erosion of the "traditional" nuclear family). The mere fact that this issue

has generated so much debate is conclusive evidence that reasonable minds can disagree over the wisdom of Proposition 8, and thus no court has the prerogative to declare it unconstitutional based on rational basis review. *Heller*, 509 U.S. at 326.

CONCLUSION

The County respectfully requests that this Court reverse the district court's decision denying the County's intervention and find that the County does have standing to appeal the district court's ruling on the merits. The County further respectfully requests that this Court reverse the district court's judgment in favor of the Plaintiffs and declare that Proposition 8 does not violate either the Due Process or Equal Protection Clause.

Respectfully submitted,
ADVOCATES FOR FAITH AND FREEDOM

Date: September 17, 2010

s/ Robert H. Tyler
Robert H. Tyler, Esq.
Counsel for Movant-Appellants
COUNTY OF IMPERIAL, THE BOARD OF SUPERVISORS OF THE COUNTY OF IMPERIAL, and ISABEL VARGAS

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,759 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

Respectfully submitted,
ADVOCATES FOR FAITH AND FREEDOM

Date: September 17, 2010

s/ Robert H. Tyler
Robert H. Tyler, Esq.
Counsel for Movant-Appellants
COUNTY OF IMPERIAL, THE BOARD OF SUPERVISORS OF THE COUNTY OF IMPERIAL, and ISABEL VARGAS

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Local Rule 28-2.6, Movants-Appellants hereby advise the Court that there is currently a related case pending in this Court, *Perry, et al. v. Schwarzenegger, et al.*, No. 10-16696, arising out of the same district court case as this appeal.

Respectfully submitted,
ADVOCATES FOR FAITH AND FREEDOM

Date: September 17, 2010

s/ Robert H. Tyler
Robert H. Tyler, Esq.
Counsel for Movant-Appellants
COUNTY OF IMPERIAL, THE BOARD OF SUPERVISORS OF THE COUNTY OF IMPERIAL, and ISABEL VARGAS

CERTIFICATE OF SERVICE

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 24910 Las Brisas Road, Suite 110, Murrieta, California 92562.

☒ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 17, 2010.

APPELLANT-MOVANTS' OPENING BRIEF

Executed on September 17, 2010, at Murrieta, California.

☒ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

s/ Robert H. Tyler
Email: rtyler@faith-freedom.com