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August 18, 2010

VIA COURIER

Lisa Matz
Clerk of the Court
Fifth Court of Appeals
George C. Allen, Sr. Courts Bldg.
600 Commerce Street, Suite 200
Dallas, Texas 75202

Re: Case No. 05-09-01170-CV, consolidated with No. 05-09-01208-CV; *In the Matter of the Marriage of J.B. and H.B.*; In the Fifth Court of Appeals

Dear Ms. Matz:

This case was submitted on April 21, 2010. I enclose eight (8) copies of this letter. Please distribute the enclosed copies to the panel and return a file-marked copy to the waiting courier. Thank you for your assistance with this matter.

To the Honorable Court of Appeals for the Fifth District of Texas:

Since this case was submitted, there have been significant developments in the body of law relating to the constitutional infirmity of efforts to deprive lawfully-married same-sex couples of the same benefits, responsibilities, and protections afforded all other married couples. This court should take heed of these decisions, which vindicate the trial court's holding in this case that laws depriving lawfully-married same-sex couples of the right to obtain a divorce are unconstitutional.

On July 8, 2010, the United States District Court for the District of Massachusetts issued a pair of rulings declaring unconstitutional Section 3 of the Defense of Marriage Act ("DOMA"), which defines marriage for purposes of federal law to refer only to "a legal union between one man and one woman."[1] *See* Pub. L. No. 104-99, § 3(a), 110 Stat. 2419 (codified at 1 U.S.C. § 7 (1996)). In *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010), the U.S. District Court for the District of Massachusetts ruled that this definition of marriage violated the Equal Protection Clause of the United States Constitution because it excluded an

[1] This provision of DOMA is different from the portion of DOMA involved in this case, 28 U.S.C. Section 1738C, which purports to allow states to decline to give full faith and credit to any "act, record, or judicial proceeding" respecting relationships between same-sex couples. *See* Pub. L. 104-199, § 2(a), 110 Stat. 2419 (1996).

entire class of lawfully-married couples based solely on the identity of the parties to the union, and in the process denied them access to a host of "federal marriage-based benefits," such as federal employee benefits, social security, and marital income tax deductions. *Id*. at 377-78, 380-83. The court determined that this definition of marriage could not survive even deferential rational-basis scrutiny because it found "no reason to believe" that married same-sex couples were different in any relevant respect from their opposite-sex counterparts, and as a result concluded "it is only irrational prejudice that motivates the challenged classification." *Id*. at 396-97.

Likewise, in *Gill*'s companion case, *Massachusetts v. USDHHS*, 698 F. Supp. 2d 234 (D. Mass. 2010), the court provided further reasons to hold that Section 3 of DOMA was unconstitutional. First, it held that imposing a universal federal definition of marriage unconstitutionally infringed on state sovereignty under the Tenth Amendment by restricting Massachusetts' right to determine for itself who it wanted to marry. *Id*. at 236, 247. And it further held that Section 3 of DOMA violated the Spending Clause under Article I, Section 8 of the United States Constitution, by forcing Massachusetts to discriminate against its own citizens by requiring that it implement DOMA's unconstitutional definition of marriage as a condition to receive federal funds for programs such as Medicaid and certain state-run veterans programs. *Id*. at 239-244.

Finally, earlier this month in *Perry v. Schwarzenegger*, --- F. Supp. 2d ---, No. C 09-2292 VRW, 2010 WL 3025614 (N.D. Cal. Aug. 4, 2010), the U.S. District Court for the Northern District of California held that California's Proposition 8 voter initiative—which declared that "only marriage between a man and a woman" would be considered valid in California—violated the Due Process and Equal Protection rights of homosexuals. *Id*. at *1; *see* Cal. Const. art. I, § 7.5. The court concluded, after an exhaustive presentation of evidence, that Proposition 8 was premised solely "on the belief that same-sex couples simply are not as good as opposite-sex couples," and found this to be inadequate as a basis to uphold the law. *Perry*, 2010 WL 3170286, at *78. The court also determined that domestic partnerships did not serve as an adequate substitute for marriage because domestic partnerships "exist solely to differentiate same-sex unions from marriages," and thus the distinction between marriage and domestic partnership served solely to stigmatize same-sex unions. *Id*. at *69.

I attach copies of these cases for the Court's convenience.

Respectfully yours,

James J. Scheske

Enclosures

cc: James C. Ho (*via facsimile w/enclosures*)
H.B.

TAB 1

699 F.Supp.2d 374, 109 Fair Empl.Prac.Cas. (BNA) 1333, 106 A.F.T.R.2d 2010-5184, 2010-2 USTC P 50,509
(Cite as: 699 F.Supp.2d 374)

C

United States District Court,
D. Massachusetts.
Nancy GILL & Marcelle Letourneau, et al.,
Plaintiffs,
v.
OFFICE OF PERSONNEL MANAGEMENT, et al., Defendants.
Civil Action No. 09-10309-JLT.

July 8, 2010.

Background: Same-sex couples married in Massachusetts and three survivors of same-sex spouses, also married in Massachusetts, brought action alleging that, due to operation of Defense of Marriage Act (DOMA), they were denied certain federal marriage-based benefits that were available to similarly-situated heterosexual couples, in violation of equal protection principles embodied in Fifth Amendment's Due Process Clause. Federal officials moved to dismiss, and plaintiffs moved for summary judgment.

Holdings: The District Court, Tauro, J., held that:
(1) court could not redress inability of surviving same-sex spouse of deceased federal employee to enroll in Federal Employees Health Benefits (FEHB) program;
(2) DOMA violated core constitutional principles of equal protection;
(3) there was no rational relationship between DOMA and Congress's goal of preserving status quo; and
(4) purported administrative burden presented by changing patchwork of state approaches to same-sex marriage in distributing federal marriage-based benefits did not provide rational basis for DOMA.

Motions granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A ⚿103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Federal Civil Procedure 170A ⚿103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; redressability. Most Cited Cases
Irreducible constitutional minimum of standing contains three requirements: (1) there must be alleged and ultimately proven injury in fact; (2) there must be fairly traceable connection between plaintiff's injury and complained-of conduct of defendant; and (3) there must be likelihood that requested relief will redress alleged injury. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[2] Federal Civil Procedure 170A ⚿103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases
Where plaintiff lacks standing to pursue his claim, court, in turn, lacks subject matter jurisdiction over dispute. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[3] Constitutional Law 92 ⚿704

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)3 Particular Questions or Grounds of Attack in General
92k704 k. Family law; marriage. Most

Cited Cases
Federal district court could not redress inability of surviving same-sex spouse of deceased federal employee to enroll as annuitant in Federal Employees Health Benefits (FEHB) program, and thus spouse lacked standing to challenge constitutionality of Defense of Marriage Act's (DOMA) exclusion of same-sex spouses from definition of "spouse" under federal law, where Office of Personnel Management (OPM) found spouse ineligible for survivor annuity, Merit Systems Review Board affirmed OPM's denial, and spouse's appeal of Board's decision was pending before Federal Circuit. 1 U.S.C.A. § 7.

[4] United States 393 ⚿39(2)

393 United States
393I Government in General
393k39 Compensation of Officers, Agents, and Employees
393k39(2) k. Form and amount in general. Most Cited Cases
Statute establishing Federal Employees Health Benefits (FEHB) program did not confer upon Office of Personnel Management (OPM) discretion to provide health benefits to same-sex couples, notwithstanding Defense of Marriage Act (DOMA). 1 U.S.C.A. § 7; 5 U.S.C.A. § 8901(5).

[5] Constitutional Law 92 ⚿3051

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3051 k. Differing levels set forth or compared. Most Cited Cases
In examining equal protection claims, courts apply strict scrutiny only to those laws that burden fundamental right or target suspect class, and law that does neither will be upheld if it bears rational relationship to legitimate government interest. U.S.C.A. Const.Amends. 5, 14.

[6] Constitutional Law 92 ⚿3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and civil unions. Most Cited Cases

Marriage 253 ⚿17.5(1)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(1) k. In general. Most Cited Cases
There existed no fairly conceivable set of facts that could ground rational relationship between Defense of Marriage Act (DOMA) and legitimate government objective, and thus DOMA violated core constitutional principles of equal protection; consensus among medical, psychological, and social welfare communities was that children raised by gay and lesbian parents were as likely to be well-adjusted as those raised by heterosexual parents, denial of same-sex marriage did nothing to promote stability in heterosexual parenting, ability to procreate was never precondition to marriage, and federal government's denial of benefits to same-sex spouses could not encourage homosexual people to marry members of opposite sex. U.S.C.A. Const.Amend. 5; 1 U.S.C.A. § 7.

[7] Constitutional Law 92 ⚿1020

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1020 k. Classification or discrimination in general. Most Cited Cases

Constitutional Law 92 ⚿1055

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1055 k. Reasonableness or rationality. Most Cited Cases
Classification neither involving fundamental rights nor proceeding along suspect lines is accorded strong presumption of validity, and courts are compelled under rational-basis review to accept legislature's generalizations even when there is imperfect fit between means and ends. U.S.C.A. Const.Amends. 5, 14.

[8] Constitutional Law 92 ⚿3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and other written regulations and rules. Most Cited Cases
Law challenged on equal protection principles can only survive rational basis inquiry if it is narrow enough in scope and grounded in sufficient factual context for court to ascertain some relation between classification and purpose it serves. U.S.C.A. Const.Amends. 5, 14.

[9] Constitutional Law 92 ⚿3053

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3053 k. In general. Most Cited Cases

Constitutional Law 92 ⚿3054

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3054 k. Arbitrary, capricious, or unreasonable action in general. Most Cited Cases
Constitutional equal protection principles will not tolerate government reliance on classification whose relationship to asserted goal is so attenuated as to render distinction arbitrary or irrational. U.S.C.A. Const.Amends. 5, 14.

[10] Constitutional Law 92 ⚿3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and other written regulations and rules. Most Cited Cases
Law must fail rational basis review under constitutional equal protection principles where purported justifications make no sense in light of how government treated other groups similarly situated in relevant respects. U.S.C.A. Const.Amends. 5, 14.

[11] States 360 ⚿18.13

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.13 k. State police power. Most Cited Cases
Fact that governing majority in State has traditionally viewed particular practice as immoral is not sufficient reason for upholding law.

[12] Constitutional Law 92 ⚿2970

92 Constitutional Law
92XXV Class Legislation; Discrimination and Classification in General
92k2970 k. In general. Most Cited Cases
Concern for preservation of resources standing alone cannot justify classification used in allocating

those resources.

[13] Constitutional Law 92 ⚿2970

92 Constitutional Law
92XXV Class Legislation; Discrimination and Classification in General
92k2970 k. In general. Most Cited Cases
Mere negative attitudes, or fear, unsubstantiated by factors that are properly cognizable by government, are impermissible bases upon which to ground legislative classification.

[14] Constitutional Law 92 ⚿3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and civil unions. Most Cited Cases

Marriage 253 ⚿17.5(1)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(1) k. In general. Most Cited Cases
There was no rational relationship, for equal protection purposes, between Defense of Marriage Act (DOMA) and Congress's goal of preserving status quo pending resolution of socially contentious debate taking place in states over whether to sanction same-sex marriage; Congress had no interest in uniform definition of marriage for purposes of determining federal rights, benefits, and privileges, federal government had historically deferred to state marital status determinations, DOMA did not provide for nationwide consistency in distribution of federal benefits among married couples, and federal government recognized heterosexual marriages that would not be sanctioned in other states. U.S.C.A. Const.Amend. 5; 1 U.S.C.A. § 7.

[15] Marriage 253 ⚿25(3)

253 Marriage
253k25 Licenses and Licensing Officers
253k25(3) k. Authority to issue license. Most Cited Cases
Congress does not have authority to place restrictions on states' power to issue marriage licenses.

[16] Constitutional Law 92 ⚿3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and civil unions. Most Cited Cases

Marriage 253 ⚿17.5(1)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(1) k. In general. Most Cited Cases
Purported administrative burden presented by changing patchwork of state approaches to same-sex marriage in distributing federal marriage-based benefits did not provide rational basis for Defense of Marriage Act's (DOMA) exclusion of same-sex marriages from definition of "marriage" under federal law, for purpose of determining whether DOMA violated equal protection principles; federal agencies merely distributed federal marriage-based benefits to couples that had already obtained state-sanctioned marriage licenses, DOMA injected complexity into an otherwise straightforward administrative task by sundering class of state-sanctioned marriages into two, and DOMA's scope reached far beyond realm of pecuniary benefits. U.S.C.A. Const.Amend. 5; 1 U.S.C.A. § 7.

West Codenotes
Held Unconstitutional1 U.S.C.A. § 7 ***376** Gary D. Buseck, Mary L. Bonauto, Janson Wu, Gay & Lesbian Advocates and Defenders, Amy Senier, Catherine C. Deneke, Claire Laporte, Matthew E. Miller , Vickie L. Henry, Foley Hoag LLP, Richard L.

Jones, William E. Halmkin, David J. Nagle, Sullivan & Worcester LLP, Boston, MA, Paul M. Smith, Jenner & Block, LLP, Washington, DC, for Plaintiffs.

W. Scott Simpson, U.S. Department of Justice, Washington, DC, for Defendants.

MEMORANDUM

TAURO, District Judge.

I. *Introduction*

This action presents a challenge to the constitutionality of Section 3 of the Defense of Marriage Act [FN1] as applied to Plaintiffs, who are seven same-sex couples married in Massachusetts and three survivors of same-sex spouses, also married in Massachusetts.[FN2] Specifically, Plaintiffs contend that, due to the operation of Section 3 of the Defense of Marriage Act, they have been denied certain federal marriage-***377** based benefits that are available to similarly-situated heterosexual couples, in violation of the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.[FN3] Because this court agrees, *Defendants' Motion to Dismiss* [# 20] is DENIED and *Plaintiffs' Motion for Summary Judgment* [# 25] is ALLOWED, except with regard to Plaintiff Dean Hara's claim for enrollment in the Federal Employees Health Benefits Plan, as he lacks standing to pursue that claim in this court.

FN1. 1 U.S.C. § 7.

FN2. Defendants in this action are the Office of Personnel Management; the United States Postal Service; John E. Potter, in his official capacity as the Postmaster General of the United States of America; Michael J. Astrue, in his official capacity as the Commissioner of the Social Security Administration; Eric H. Holder, Jr., in his individual capacity as the United States Attorney General; and the United States of America. Hereinafter, this court collectively refers to the Defendants as "the government."

FN3. Though the Fifth Amendment to the United States Constitution does not contain an Equal Protection Clause, as the Fourteenth Amendment does, the Fifth Amendment's Due Process Clause includes an Equal Protection component. *See Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

II. *Background* [FN4]

FN4. In the companion case of *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.,* No. 09-cv-11156-JLT, 698 F.Supp.2d 234 (D.Mass. July 8, 2010) (Tauro, J.) this court holds that the Defense of Marriage Act is additionally rendered unconstitutional by operation of the Tenth Amendment and the Spending Clause.

A. *The Defense of Marriage Act*

In 1996, Congress enacted, and President Clinton signed into law, the Defense of Marriage Act ("DOMA").[FN5] At issue in this case is Section 3 of DOMA, which defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman. In particular, it provides that:

FN5. Pub.L. No. 104-199, 110 Stat. 2419 (1996)

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the

opposite sex who is a husband or wife.[FN6]

FN6. 1 U.S.C. § 7.

In large part, the enactment of DOMA can be understood as a direct legislative response to *Baehr v. Lewin,*[FN7] a 1993 decision issued by the Hawaii Supreme Court, which indicated that same-sex couples might be entitled to marry under the state's constitution.[FN8] That decision raised the possibility, for the first time, that same-sex couples could begin to obtain state-sanctioned marriage licenses. [FN9]

FN7. 74 Haw. 530, 852 P.2d 44 (1993).

FN8. *See id.* at 59-67.

FN9. Notably, the Baehr decision did not carry the day in Hawaii. Rather, Hawaii ultimately amended its constitution to allow the state legislature to limit marriage to opposite-sex couples. *See* HAW. CONST.. art. I, § 23. However, five other states and the District of Columbia now extend full marriage rights to same-sex couples. These five states are Iowa, New Hampshire, Connecticut, Vermont, and Massachusetts, where Plaintiffs reside.

The House Judiciary Committee's Report on DOMA (the "House Report") referenced the *Baehr* decision as the beginning of an "orchestrated legal assault being waged against traditional heterosexual marriage," and expressed concern that this development "threaten[ed] to have very real consequences ... on federal law." [FN10] Specifically, the Report warned that "a redefinition of marriage in Hawaii to include homosexual couples ***378** could make such couples eligible for a whole range of federal rights and benefits." [FN11]

FN10. Aff. of Gary D. Buseck, Ex. D, H.R.Rep. No. 104-664 at 2-3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 ("H. Rep.") [hereinafter "House Report"].

FN11. *Id.* at 10.

And so, in response to the Hawaii Supreme Court's decision, Congress sought a means to both "preserve[ ] each State's ability to decide" what should constitute a marriage under its own laws and to "lay[ ] down clear rules" regarding what constitutes a marriage for purposes of federal law.[FN12]

FN12. *Id.* at 2.

In enacting Section 2 of DOMA,[FN13] Congress permitted the states to decline to give effect to the laws of other states respecting same-sex marriage. In so doing, Congress relied on its "express grant of authority," under the second sentence of the Constitution's Full Faith and Credit Clause, "to prescribe the effect that public acts, records, and proceedings from one State shall have in sister States." [FN14] With regard to Section 3 of DOMA, the House Report explained that the statute codifies the definition of marriage set forth in "the standard law dictionary," for purposes of federal law.[FN15]

FN13. Section 2 of DOMA provides that "[n]o State ... shall be required to give effect to any public act, record, or judicial proceeding of any other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State."

FN14. *Id.* at 25.

FN15. *Id.* at 29. (citing BLACK'S LAW DICTIONARY 972 (6th ed.1990)).

The House Report acknowledged that federalism constrained Congress' power, and that "[t]he determination of who may marry in the United States is uniquely a function of state law." [FN16] Nonetheless, it asserted that Congress was not "supportive of (or even indifferent to) the notion of same-sex 'marriage,' " [FN17] and, therefore, embraced DOMA as a step toward furthering Congress's interests in "defend[ing] the institution of traditional heterosexual marriage." [FN18]

FN16. *Id.* at 3.

FN17. *Id.* at 12.

FN18. *Id.*

The House Report further justified the enactment of DOMA as a means to "encourag[e] responsible procreation and child-rearing," conserve scarce resources,[FN19] and reflect Congress' "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." [FN20] In one unambiguous expression of these objectives, Representative Henry Hyde, then-Chairman of the House Judiciary Committee, stated that "[m]ost people do not approve of homosexual conduct ... and they express their disapprobation through the law." [FN21]

FN19. *Id.* at 13, 18.

FN20. *Id.* at 16 (footnote omitted).

FN21. 142 CONG. REC. H7480 (daily ed. July 12, 1996).

In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion" and "an attack upon God's principles." [FN22] They argued that marriage by gays and lesbians would "demean" and "trivialize" heterosexual marriage [FN23] and ***379** might indeed be "the final blow to the American family." [FN24]

FN22. 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn); 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); *Id.* at H7494 (statement of Rep. Smith).

FN23. *Id.* at H7494 (statement of Rep. Smith); *see also* 142 CONG. REC. S10, 110 (daily ed. Sept. 10, 1996) (statement of Sen. Helms) ("[Those opposed to DOMA] are demanding that homosexuality be considered as just another lifestyle-these are the people who seek to force their agenda upon the vast majority of Americans who reject the homosexual lifestyle ... Homosexuals and lesbians boast that they are close to realizing their goal-legitimizing their behavior.... At the heart of this debate is the moral and spiritual survival of this Nation."); 142 CONG. REC. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (stating that marriage is "under direct assault by the homosexual extremists all across this country").

FN24. *Id.* at H7276 (statement of Rep. Largent); *see also* 142 CONG. REC. H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski) ("Allowing for gay marriages would be the final straw, it would devalue the love between a man and a woman and weaken us as a Nation.").

Although DOMA drastically amended the eligibility criteria for a vast number of different federal benefits, rights, and privileges that depend upon marital status, the relevant committees did not engage in a meaningful examination of the scope or effect of the law. For example, Congress did not hear testimony from agency heads regarding how DOMA would affect federal programs. Nor was there testimony from historians, economists, or specialists in family or child welfare. Instead, the House Report simply observed that the terms "marriage" and "spouse" appeared hundreds of times in various federal laws and regulations, and that those terms were defined, prior to DOMA, only by reference to each state's marital status determinations.[FN25]

FN25. House Report at 10-11.

In January 1997, the General Accounting Office issued a report clarifying the scope of DOMA's effect. It concluded that DOMA implicated at least 1,049 federal laws, including those related to entitlement programs, such as Social Security, health

benefits and taxation, which are at issue in this action. [FN26] A follow-up study conducted in 2004 found that 1,138 federal laws tied benefits, protections, rights, or responsibilities to marital status. [FN27]

FN26. Aff. of Gary D. Buseck, Ex. A, Report of the U.S. General Accounting Office, Office of General Counsel, January 31, 1997 (GAO/OGC-97-16).

FN27. U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), *available at* http:// www. gao. gov/ new. items/ d 04353 r. pdf.

B. *The Federal Programs Implicated in This Action*

Prior to filing this action, each Plaintiff, or his or her spouse, made at least one request to the appropriate federal agency or authority for treatment as a married couple, spouse, or widower with respect to particular federal benefits available to married individuals. But each request was denied. In denying Plaintiffs access to these benefits, the government agencies responsible for administering the relevant programs all invoked DOMA's mandate that the federal government recognize only those marriages between one man and one woman.

1. *Health Benefits Based on Federal Employment*

Plaintiffs' allegations in this case encompass three federal health benefits programs: the Federal Employees Health Benefits Program (the "FEHB"), the Federal Employees Dental and Vision Insurance Program (the "FEDVIP"), and the federal Flexible Spending Arrangement program.

Plaintiff Nancy Gill, an employee of the United States Postal Service, seeks to add her spouse, Marcelle Letourneau, as a beneficiary under Ms. Gill's existing self and family enrollment in the FEHB, to add ***380** Ms. Letourneau to FEDVIP, and to use her flexible spending account for Ms. Letourneau's medical expenses.

Plaintiff Martin Koski, a former employee of the Social Security Administration, seeks to change his "self only" enrollment in the FEHB to "self and family" enrollment in order to provide coverage for his spouse, James Fitzgerald. And Plaintiff Dean Hara seeks enrollment in the FEHB as the survivor of his spouse, former Representative Gerry Studds.

A. *Federal Employees Health Benefits Program*

The FEHB is a comprehensive program of health insurance for federal civilian employees,[FN28] annuitants, former spouses of employees and annuitants, and their family members.[FN29] The program was created by the Federal Employees Health Benefits Act, which established (1) the eligibility requirements for enrollment, (2) the types of plans and benefits to be provided, and (3) the qualifications that private insurance carriers must meet in order to offer coverage under the program.[FN30]

FN28. "Employee" is defined as including a Member of Congress. 5 U.S.C. § 8901(1)(B).

FN29. 5 U.S.C. § 8905.

FN30. *Id.* §§ 8901-8914.

The Office of Personnel Management ("OPM") administers the FEHB and is empowered to negotiate contracts with potential carriers, as well as to set the premiums for each plan.[FN31] OPM also prescribes regulations necessary to carry out the program, including those setting forth "the time at which and the manner and conditions under which an employee is eligible to enroll," [FN32] as well as "the beginning and ending dates of coverage of employees, annuitants, members of their families, and former spouses." [FN33] Both the government and the enrollees contribute to the payment of insurance premiums associated with FEHB coverage.[FN34]

FN31. *Id.* §§ 8902, 8903, 8906.

FN32. *Id.* § 8913.

FN33. *Id.*

FN34. *Id.* § 8906.

An enrollee in the FEHB chooses the carrier and plan in which to enroll, and decides whether to enroll for individual, i.e. "self only," coverage or for "self and family" coverage.[FN35] Under OPM's regulations, "[a]n enrollment for self and family includes all family members who are eligible to be covered by the enrollment." [FN36] For the purposes of the FEHB statute, a "member of family" is defined as either "the spouse of an employee or annuitant [or] an unmarried dependent child under 22 years of age...." [FN37] An employee enrolled in the FEHB for "self only" coverage may change to "self and family" coverage by submitting documentation to the employing office during an annual "open season," or within sixty days after a change in family status, "including a change in marital status." [FN38]

FN35. *Id.* §§ 8905, 8906.

FN36. 5 C.F.R. § 890.302(a)(1).

FN37. *Id.* § 8901(5).

FN38. *See* 5 U.S.C. § 8905(f); 5 C.F.R. § 890.301(f), (g).

An "annuitant" eligible for coverage under the FEHB is, generally speaking, either an employee who retires on a federal annuity, or "a member of a family who receives an immediate annuity as the survivor of an employee ... or of a retired employee...." [FN39] To be covered under the FEHB, anyone who is not a current federal employee, or the family member of a current employee, must be eligible for a ***381** federal annuity, either as a former employee or as the survivor of an employee or former employee. When a federal employee or annuitant dies under "self and family" enrollment in FEHB, the enrollment is "transferred automatically to his or her eligible survivor annuitants." [FN40]

FN39. *See* 5 U.S.C. § 8901(3)(B).

FN40. 5 C.F.R. § 890.303(c).

B. *Federal Employees Dental and Vision Insurance Program ("FEDVIP")*

The Federal Employees Dental and Vision Insurance Program provides enhanced dental and vision coverage to federal civilian employees, annuitants, and their family members, in order to supplement health insurance coverage provided by the FEHB. [FN41] The program was created by the Federal Employee Dental and Vision Benefits Enhancement Act of 2004,[FN42] and, as with the FEHB generally, FEDVIP is administered by OPM, which contracts with qualified companies and sets the premiums associated with coverage.[FN43] OPM is also authorized to "prescribe regulations to carry out" this program.[FN44]

FN41. 5 U.S.C. §§ 8951, 8952, 8981, 8982 .

FN42. *Id.* §§ 8951, 8954, 8981, 8984.

FN43. *Id.* §§ 8952(a), 8953, 8982(a), 8983.

FN44. *Id.* §§ 8962(a), 8992(a).

Persons enrolled in FEDVIP pay the full amount of the premiums,[FN45] choose the plan in which to enroll, and decide whether to enroll for "self only," "self plus one," or "self and family" coverage.[FN46] Under the associated regulations, an enrollment for "self and family" "covers the enrolled employee or annuitant and all eligible family members." [FN47] An employee enrolled in FEDVIP for "self only" coverage may change to "self and family" coverage during an annual "open season" or within 60 days after a "qualifying life event," including marriage or "acquiring an eligible child." [FN48] The terms "annuitant" and "member of family" are defined in the same manner for the purposes of the FEDVIP as they are for the FEHB more generally.[FN49]

FN45. *Id.* §§ 8958(a), 8988(a).

FN46. *Id.* §§ 8956(a), 8986(a); *see* 5 C.F.R. § 894.201(b).

FN47. *Id.* § 894.201(c).

FN48. *Id.* 894.509(a), (b).

FN49. *See* 5 U.S.C. §§ 8951(2), 8991(2).

C. *Flexible Spending Arrangement Program* [FN50]

FN50. Plaintiffs' *First Amended and Supplemental Complaint* refers to the "Federal Flexible Spending Account Program". Compl. ¶ 401. Although OPM and the Internal Revenue Service have occasionally used that term, the term now used by both agencies is "Flexible Spending Arrangement." The term "HCFSA" used by the plaintiffs means "health care flexible spending arrangement." *Id.*¶¶ 401, 410-12.

A Flexible Spending Arrangement ("FSA") allows federal employees to set aside a portion of their earnings for certain types of out-of-pocket health care expenses. The money withheld in an FSA is not subject to income taxes. [FN51] OPM established the federal Flexible Spending Arrangement program in 2003.[FN52] This program does not apply, however, to "[c]ertain executive branch agencies with independent compensation authority," such as the United States Postal Service, which established its own flexible benefits plan prior to the creation of the FSA.[FN53]

FN51. 26 U.S.C. § 125.

FN52. *See* 71 Fed.Reg. 66,827 (Nov. 17, 2006).

FN53. *Id.; see* 68 Fed.Reg. 56,525 (Oct. 1, 2003). Because Plaintiff Gill works for the United State Postal Service, her claim with regard to her FSA is asserted only against the Postal Service and not against OPM.

***382** 2. *Social Security Benefits*

The Social Security Act ("Act") provides, among other things, Retirement and Survivors' Benefits to eligible persons. The Act is administered by the Social Security Administration, which is headed by the Commissioner of Social Security.[FN54] The Commissioner has the authority to "make rules and regulations and to establish procedures, not inconsistent with the [pertinent] provisions of [the Social Security Act], which are necessary or appropriate to carry out such provisions." [FN55]

FN54. 42 U.S.C. §§ 901, 902.

FN55. *Id.* § 405(a); *see id.* § 902(a)(5).

A number of the plaintiffs in this action seek certain Social Security Benefits under the Act, based on marriage to a same-sex spouse. Specifically, Jo Ann Whitehead seeks Retirement Insurance Benefits based on the earnings record of her spouse, Bette Jo Green. Three of the Plaintiffs, Dean Hara, Randell Lewis-Kendell, and Herbert Burtis, seek Lump-Sum Death Benefits based on their marriages to same-sex spouses who are now deceased. And Plaintiff Herbert Burtis seeks Widower's Insurance Benefits.

A. *Retirement Benefits*

The amount of Social Security Retirement Benefits to which a person is entitled depends on an individual's lifetime earnings in employment or self-employment.[FN56] In addition to seeking Social Security Retirement Benefits based on one's own earnings, an individual may claim benefits based on the earnings of a spouse, if the claimant "is not entitled to old-age ... insurance benefits [on his or her own account], or is entitled to old-age ... insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of [his or her spouse]." [FN57]

FN56. *Id.* §§ 402, 413(a), 414, 415.

FN57. *Id.* § 402(b), (c).

B. *Social Security Survivor Benefits*

The Act also provides certain benefits to the surviving spouse of a deceased wage earner. This action implicates two such types of Survivor Benefits, the Lump-Sum Death Benefit and the Widower's Insurance Benefit.[FN58]

FN58. The Social Security Act also provides for a Widow's Insurance Benefit, *see* 42 U.S.C. § 402(e), but only the Widower's Insurance Benefit is implicated here because the only plaintiff who seeks such benefits herein is Herbert Burtis, a male.

i. *Lump-Sum Death Benefit*

The Lump-Sum Death Benefit is available to the surviving widow or widower of an individual who had adequate lifetime earnings from employment or self-employment.[FN59] The amount of the benefit is the lesser of $255 or an amount determined based on a formula involving the individual's lifetime earnings.[FN60]

FN59. *Id.* §§ 402(I), 413(a), 414(a), (b).

FN60. *Id.* §§ 402(I), 415(a).

ii. *Widower's Insurance Benefit*

The Widower's Insurance Benefit is available to the surviving husband of an individual who had adequate lifetime earnings from employment or self-employment.[FN61] The claimant, with a few limited exceptions, must not have "married" since the death of the individual, must have attained the age set forth in the statute, and must be either (1) ineligible for old-age insurance benefits on his own account or (2) entitled to old-age insurance benefits "each of which is less than the primary insurance amount" of his deceased spouse.[FN62]

FN61. *Id.* §§ 402(f), 413(a), 414(a), (b).

FN62. *Id.* § 402(f)(1); *see id.* § 402(f)(3).

***383** 3. *Filing Status Under the Internal Revenue Code*

Lastly, a number of Plaintiffs in this case seek the ability to file federal income taxes jointly with their spouses. The amount of income tax imposed on an individual under the Internal Revenue Code depends in part on the taxpayer's "filing status." In accordance with the income tax scheme utilized by the federal government, a "married individual ... who makes a single [tax] return jointly with his spouse" is generally subject to a lower tax than an "unmarried individual" or a "head of household." [FN63] "[I]f an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse," the couple may file a joint return within three years after the filing of the original returns.[FN64] Should the amended return call for a lower tax due than the original return, the taxpayer may also file an administrative request for a refund of the difference. [FN65]

FN63. 26 U.S.C. § 1(a), (b), (c); *see id.* § 6013(a) ("A husband and wife may make a single return jointly of income taxes ... even though one of the spouses has neither gross income nor deductions [subject to certain exceptions].").

FN64. *Id.* § 6013(b)(1), (2).

FN65. *Id.* § 6511(a); *see* 26 C.F.R. § 301.6402-2(a)(1).

III. *Discussion*

A. *Summary Judgment*

Pursuant to Federal Rule of Civil Procedure 56(a),

summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[FN66] In granting a summary judgment motion, the court "must scrutinize the record in the light most favorable to the summary judgment loser and draw all reasonable inferences therefrom to that party's behoof." [FN67] Because the Parties do not dispute the material facts relevant to the questions raised by this action, it is appropriate for this court to dispose of the issues as a matter of law.[FN68]

FN66. *Prescott v. Higgins,* 538 F.3d 32, 40 (1st Cir.2008).

FN67. *Alliance of Auto. Mfrs. v. Gwadosky,* 430 F.3d 30, 34 (1st Cir.2005).

FN68. This court notes that *Defendants' Motion to Dismiss* [# 20] is also currently pending. Because there are no material facts in dispute and *Defendants' Motion to Dismiss* turns on the same purely legal question as the pending *Motion for Summary Judgment,* this court finds it appropriate, as a matter of judicial economy, to address the two motions simultaneously.

B. *Plaintiff Dean Hara's Standing to Pursue his Claim for Health Benefits*

As a preliminary matter, this court addresses the government's assertion that Plaintiff Dean Hara lacks standing to pursue his claim for enrollment in the FEHB, as a survivor annuitant, in this court.

[1][2] "The irreducible constitutional minimum of standing contains three requirements. First and foremost, there must be alleged (and ultimately proven) an injury in fact.... Second, there must be causation-a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability-a likelihood that the requested relief will redress the alleged injury." [FN69] Where the plaintiff lacks standing to pursue his claim, the court, in turn, lacks subject matter ***384** jurisdiction over the dispute.[FN70] At issue here is the question of redressability.

FN69. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102-03, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal citations omitted).

FN70. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).

A surviving spouse can enroll in the FEHB program only if he or she is declared eligible to receive a survivor annuity under federal retirement laws. [FN71] Such eligibility is a matter determined initially by OPM,[FN72] subject to review by the Merit Systems Review Board, and finally subject to the *exclusive* judicial review of the United States Court of Appeals for the Federal Circuit.[FN73]

FN71. 5 U.S.C. § 8905(b).

FN72. 5 U.S.C. § 8347(b).

FN73. *See* 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9); *see also Lindahl v. OPM,* 470 U.S. 768, 775, 791-99, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985).

[3] Prior to this action, Mr. Hara sought to enroll in the FEHB as a survivor annuitant based on his deceased spouse's federal employment. OPM found Mr. Hara ineligible for a survivor annuity both on initial review and on reconsideration. Mr. Hara appealed that decision to the Merit Systems Review Board, which affirmed OPM's denial. And currently, Mr. Hara's appeal of the Merit Systems Review Board's decision is pending before the Federal Circuit. [FN74] Accordingly, the government asserts that a ruling in this court cannot redress Mr. Hara's inability to enroll in the FEHB as an annuitant, because the Federal Circuit has yet to resolve his appeal of the Merit Systems Review Board's decision, which affirmed OPM's finding adverse to Mr. Hara. And so the government maintains that, if Mr. Hara

has not been declared eligible for a survivor annuity, he will remain ineligible for FEHB enrollment, regardless of the outcome of this proceeding. This court agrees.

> FN74. The appeal, however, has been stayed pending the outcome of this action.

Plaintiffs arguments to the contrary are unavailing. First, Plaintiffs argue that, in basing its decision on reconsideration explicitly on the finding that Mr. Hara's spouse failed to elect self and family FEHB coverage prior to his death, OPM effectively conceded Mr. Hara's status as an annuitant for purposes of appeal to the Federal Circuit. But, regardless of the grounds upon which OPM rested its decision, the fact remains that Mr. Hara applied for an annuity, and the agency which has authority over such matters denied his claim.

Because the Federal Circuit has not held differently, this court must accept OPM's determination, affirmed by the Merit Systems Review Board, that Mr. Hara is ineligible to receive a survivor annuity pursuant to the FEHB statute. And if he is ineligible to receive a survivor annuity, then he cannot enroll in the FEHB program, notwithstanding this court's finding that Section 3 of DOMA as applied to Plaintiffs violates principles of equal protection.

Second, Plaintiffs argue that, because OPM did not file a cross-appeal to the Federal Circuit, it is estopped from raising the issue of whether Mr. Hara is an "annuitant" on appeal and, therefore, Mr. Hara's eligibility for a survivor annuity turns solely on the constitutionality of DOMA. This argument stems from the fact that, unlike OPM, the Merit Systems Review Board deemed Mr. Hara's spouse to have made the requisite "self and family" benefits election prior to his death, based on unrebutted evidence of his intent.

The Merit Systems Review Board affirmed OPM's decision that Mr. Hara is ineligible for a survivor annuity only because***385** DOMA precluded federal recognition of Mr. Hara's same-sex marriage. Plaintiffs therefore contend that, as a matter of judicial economy, it makes sense for this court to render a decision on Mr. Hara's claim, because the pending appeal in the Federal Circuit ultimately turns on the precise legal question at issue here, the constitutionality of DOMA.

Though this court is empathetic to Plaintiffs' argument, identity of issues does not confer standing. The question of standing is one of jurisdiction, not one of efficiency.[FN75] So if this court cannot redress Mr. Hara's injury, it is without *power* to hear his claim. Based on this court's reading of the Merit Systems Review Board's decision, Plaintiffs are correct that Mr. Hara will be rendered eligible for a survivor annuity if the question of DOMA's constitutionality is resolved in his favor. But that question, as it pertains to Mr. Hara, must be answered by the Federal Circuit. Accordingly, a decision by this court cannot redress Mr. Hara's injury and, therefore, this court is without power to hear his claim.

> FN75. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102-03, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal citations omitted).

C. *The FEHB Statute*

In the alternative to the constitutional claims analyzed below, Plaintiffs assert that, notwithstanding DOMA, the FEHB statute confers on OPM the discretion to extend health benefits to same-sex spouses. In support of this argument, Plaintiffs contend that the terms "family members" and "members of family" as used in the FEHB statute set a floor, but not a ceiling, to coverage eligibility. Plaintiffs assert, therefore, that OPM may, in its discretion, consider same-sex spouses to be eligible "family members" for purposes of distributing health benefits. To arrive at this interpretation of the FEHB statute, Plaintiffs rely on associated regulations which state that an "enrollment for self and family *includes* all family members who are eli-

gible to be covered by the enrollment." FN76

FN76. 5 C.F.R. § 890.302(a)(1) (emphasis added).

[4] A basic tenet of statutory construction teaches that "where the plain language of a statute is clear, it governs." FN77 Under the circumstances presented here, this basic tenet readily resolves the issue of interpretation before this court. The FEHB statute unambiguously proclaims that " 'member of family' *means* the spouse of an employee or annuitant [or] an unmarried dependent child under 22 years of age." FN78 And "[w]here, as here, Congress defines what a particular term 'means,' that definition controls to the exclusion of any meaning that is not explicitly stated in the definition." FN79

FN77. *One Nat'l Bank v. Antonellis,* 80 F.3d 606, 615 (1st Cir.1996).

FN78. 5 U.S.C. § 8901(5) (emphasis added).

FN79. *United States v. Roberson,* 459 F.3d 39, 53 (1st Cir.2006).

In other words, through the plain language of the FEHB statute, Congress has clearly limited coverage of family members to spouses and unmarried dependent children under 22 years of age. And DOMA, with similar clarity, defines the word "spouse," for purposes of determining the meaning of *any* Act of Congress, as "a person of the opposite sex who is a husband or wife." FN80 In the face of such strikingly unambiguous statutory language to the contrary, this court cannot plausibly interpret the FEHB statute to confer on ***386** OPM the discretion to provide health benefits to same-sex couples, notwithstanding DOMA.FN81

FN80. 1 U.S.C. § 7.

FN81. *Accord In re Brad Levenson,* 560 F.3d 1145, 1150 (9th Cir.2009) (Reinhardt, J.); *but see, In re Karen Golinski,* 587 F.3d 956, 963 (9th cir.2009) (Kozinski, C.J.). This court also takes note of Plaintiffs' argument that the FEHB statute should not be read to exclude same-sex couples as a matter of constitutional avoidance. The doctrine of constitutional avoidance counsels that "between two plausible constructions of a statute, an inquiring court should avoid a constitutionally suspect one in favor of a constitutionally uncontroversial alternative." *United States v. Dwinells,* 508 F.3d 63, 70 (1st Cir.2007). Because this court has concluded that there is but one plausible construction of the FEHB statute, the doctrine of constitutional avoidance has no place in the analysis.

Having reached this conclusion, the analysis turns to the central question raised by Plaintiffs' Complaint, namely whether Section 3 of DOMA as applied to Plaintiffs FN82 violates constitutional principles of equal protection.

FN82. In the remainder of this Memorandum, this court uses the term "DOMA" as a shorthand for "Section 3 of DOMA as applied to Plaintiffs."

D. *Equal Protection of the Laws*

"[T]he Constitution 'neither knows nor tolerates classes among citizens.' " FN83 It is with this fundamental principle in mind that equal protection jurisprudence takes on "governmental classifications that 'affect some groups of citizens differently than others.' " FN84 And it is because of this "commitment to the law's neutrality where the rights of persons are at stake" FN85 that legislative provisions which arbitrarily or irrationally create discrete classes cannot withstand constitutional scrutiny.FN86

FN83. *Romer v. Evans,* 517 U.S. 620, 623, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (quoting *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896)

(Harlan, J. dissenting)).

FN84. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, ----, 128 S.Ct. 2146, 2152, 170 L.Ed.2d 975 (2008) (quoting *McGowan v. Maryland,* 366 U.S. 420, 425, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)).

FN85. *Romer,* 517 U.S. at 623, 116 S.Ct. 1620.

FN86. *Id.*

[5] To say that all citizens are entitled to equal protection of the laws is "essentially a direction [to the government] that all persons similarly situated should be treated alike." [FN87] But courts remain cognizant of the fact that "the promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." [FN88] And so, in an attempt to reconcile the promise of equal protection with the reality of lawmaking, courts apply strict scrutiny, the most searching of constitutional inquiries, only to those laws that burden a fundamental right or target a suspect class.[FN89] A law that does neither will be upheld if it merely survives the rational basis inquiry-if it bears a rational relationship to a legitimate government interest.[FN90]

FN87. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citing *Plyler v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)).

FN88. *Romer,* 517 U.S. at 631, 116 S.Ct. 1620 (citing *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 271-72, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)).

FN89. *Id.*

FN90. *Id.* (citing *Heller v. Doe,* 509 U.S. 312, 319-320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)). This constitutional standard of review is alternately referred to as the rational relationship test or the rational basis inquiry.

***387** Plaintiffs present three arguments as to why this court should apply strict scrutiny in its review of DOMA, namely that:

- DOMA marks a stark and anomalous departure from the respect and recognition that the federal government has historically afforded to state marital status determinations;

- DOMA burdens Plaintiffs' fundamental right to maintain the integrity of their existing family relationships, and;

- The law should consider homosexuals, the class of persons targeted by DOMA, to be a suspect class.

[6] This court need not address these arguments, however, because DOMA fails to pass constitutional muster even under the highly deferential rational basis test. As set forth in detail below, this court is convinced that "there exists no fairly conceivable set of facts that could ground a rational relationship" [FN91] between DOMA and a legitimate government objective. DOMA, therefore, violates core constitutional principles of equal protection.

FN91. *Medeiros v. Vincent,* 431 F.3d 25, 29 (1st Cir.2005) (internal citation omit- ted).

1. *The Rational Basis Inquiry*

[7] This analysis must begin with recognition of the fact that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." [FN92] A "classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of

validity ... [and] courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." [FN93] Indeed, a court applying rational basis review may go so far as to hypothesize about potential motivations of the legislature, in order to find a legitimate government interest sufficient to justify the challenged provision.[FN94]

FN92. *Heller v. Doe,* 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (internal citations omitted).

FN93. *Id.* (internal citations omitted).

FN94. *Shaw v. Oregon Public Employees' Retirement Bd.,* 887 F.2d 947, 948-49 (9th Cir.1989) (internal quotation omitted).

[8] Nonetheless, "the standard by which legislation such as [DOMA] must be judged is not a toothless one." [FN95] "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." [FN96] In other words, a challenged law can only survive this constitutional inquiry if it is "narrow enough in scope and grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]." [FN97] Courts thereby "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." [FN98]

FN95. *Mathews v. de Castro,* 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976) (internal quotation omitted).

FN96. *Romer,* 517 U.S. at 633, 116 S.Ct. 1620.

FN97. *Id.*

FN98. *Id.* (citing *Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 181, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.")).

[9][10] Importantly, the objective served by the law must be not only a proper arena for government action, but also properly cognizable by the governmental body responsible for the law in question. [FN99] And the classification created in furtherance of this objective "must find ***388** some footing in the realities of the subject addressed by the legislation." [FN100] That is to say, the constitution will not tolerate government reliance "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." [FN101] As such, a law must fail rational basis review where the "purported justifications ... [make] no sense in light of how the [government] treated other groups similarly situated in relevant respects." [FN102]

FN99. *Bd. of Trs. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 366, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (quoting *City of Cleburne,* 473 U.S. at 441, 105 S.Ct. 3249).

FN100. *Heller v. Doe,* 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

FN101. *City of Cleburne,* 473 U.S. at 447, 105 S.Ct. 3249.

FN102. *Garrett,* 531 U.S. at 366 n. 4, 121 S.Ct. 955 (citing *City of Cleburne,* 473 U.S. at 447-450, 105 S.Ct. 3249).

2. *Congress' Asserted Objectives*

The House Report identifies four interests which Congress sought to advance through the enactment of DOMA: (1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4)

preserving scarce resources.[FN103] For purposes of this litigation, the government has disavowed Congress's stated justifications for the statute and, therefore, they are addressed below only briefly.

FN103. House Report at 12-18.

But the fact that the government has distanced itself from Congress' previously asserted reasons for DOMA does not render them utterly irrelevant to the equal protection analysis. As this court noted above, even in the context of a deferential rational basis inquiry, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." [FN104]

FN104. *City of Cleburne,* 473 U.S. at 446, 105 S.Ct. 3249.

This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA. [FN105] Since the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.[FN106] But even if Congress believed at the time of DOMA's passage that children had the best chance at success if raised jointly by their biological mothers and fathers, a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not ***389** provide a rational basis for denying federal recognition to same-sex marriages. Such denial does nothing to promote stability in heterosexual parenting. Rather, it "prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure," [FN107] when afforded equal recognition under federal law.

FN105. *See* Def.'s Mem. Supp. Mot. Dismiss, 19 n. 10.

FN106. Def.'s Mem. Supp. Mot. Dismiss, 19 n. 10 (citing American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, *Coparent or second-parent adoption by same-sex parents,* 109 PEDIATRICS 339 (2002), available at http:// aappolicy. aap publications. org/ cgi/ content/ full/ pediatrics; American Psychological Association, *Policy Statement on Lesbian and Gay Parents,* http:// www. apa. org/ about/ governance/ council/ policy/ parenting. aspx; American Academy of Child & Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement* http:// www. aacap. org/ cs/ root/ policy_ statements/ gay_ lesbian_ transgender_ and_ bisexual_ parents_ policy_ statement; American Medical Association, *AMA Policy Regarding Sexual Orientation,* http:// www. ama- assn. org/ ama/ pub/ about- ama/ our- people/ member- groups-sections/ glbt- advisory- committee/ ama-policy- regarding- sexual- orientation. shtml; Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults,* http:// www. cwla. org/ programs/ culture/ glbtqposition. htm).

FN107. *Goodridge v. Dep't of Public Health,* 440 Mass. 309, 335, 798 N.E.2d 941 (2003).

Moreover, an interest in encouraging responsible procreation plainly cannot provide a rational basis upon which to exclude same-sex marriages from federal recognition because, as Justice Scalia pointed out in his dissent to *Lawrence v. Texas,* the ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country. [FN108] Indeed, "the sterile and the elderly" have never been denied the right to marry by any of the fifty states.[FN109] And the federal government has

never considered denying recognition to marriage based on an ability or inability to procreate.

FN108. *See Lawrence v. Texas,* 539 U.S. 558, 605, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (Scalia, J., dissenting).

FN109. *Id.*

Similarly, Congress' asserted interest in defending and nurturing heterosexual marriage is not "grounded in sufficient factual context [for this court] to ascertain some relation" between it and the classification DOMA effects. [FN110] To begin with, this court notes that DOMA cannot possibly encourage Plaintiffs to marry members of the opposite sex because Plaintiffs are *already* married to members of the same sex. But more generally, this court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex.[FN111] And denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure.

FN110. *Romer,* 517 U.S. at 632-33, 116 S.Ct. 1620.

FN111. *Accord In re Brad Levenson,* 560 F.3d 1145, 1150 (9th Cir. Jud. Council 2009) (Reinhardt, J.).

What remains, therefore, is the possibility that Congress sought to deny recognition to same-sex marriages in order to make heterosexual marriage appear more valuable or desirable. But to the extent that this was the goal, Congress has achieved it " *only* by punishing same-sex couples who exercise their rights under state law." [FN112] And this the Constitution does not permit. "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean" [FN113] that the Constitution will not abide such "a bare congressional desire to harm a politically unpopular group." [FN114]

FN112. *Id.*

FN113. *United States Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973).

FN114. *Moreno,* 413 U.S. at 534, 93 S.Ct. 2821 (1973); *see also, Lawrence,* 539 U.S. at 571, 578, 123 S.Ct. 2472 (suggesting that the government cannot justify discrimination against same-sex couples based on traditional notions of morality alone).

[11] Neither does the Constitution allow Congress to sustain DOMA by reference to the objective of defending traditional notions of morality. As the Supreme Court made abundantly clear in *Lawrence v. Texas* and *Romer v. Evans,* "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a ***390** sufficient reason for upholding a law...." [FN115]

FN115. *Lawrence,* 539 U.S. at 577, 123 S.Ct. 2472 (quoting *Bowers v. Hardwick,* 478 U.S. 186, 216, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (Stevens, J., dissenting)).

[12][13] And finally, Congress attempted to justify DOMA by asserting its interest in the preservation of scarce government resources. While this court recognizes that conserving the public fisc can be a legitimate government interest,[FN116] "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." [FN117] This court can discern no principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress' desire to express its disapprobation of same-sex marriage. And "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [by the government]" are decidedly impermissible bases upon which to ground a legislative classification.[FN118]

FN116. This court notes that, though Congress paid lip service to the preservation of resources as a rationale for DOMA, such financial considerations did not actually motivate the law. In fact, the House rejected a proposed amendment to DOMA that would have required a budgetary analysis of DOMA's impact prior to passage. *See* 142 CONG. REC. H7503-05 (daily ed. July 12, 1996). Furthermore, the Congressional Budget Office concluded in 2004 that federal recognition of same-sex marriages by all fifty states would actually result in a net *increase* in federal revenue. *See* Buseck Aff., Ex. C at 1, Cong. Budget Office, The Potential Budgetary Impact of Recognizing Same-Sex Marriages.

FN117. *Plyler v. Doe,* 457 U.S. 202, 227, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (quoting *Graham v. Richardson,* 403 U.S. 365, 374-75, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)).

FN118. *City of Cleburne,* 473 U.S. at 448, 105 S.Ct. 3249.

3. *Objectives Now Proffered for Purposes of Litigation*

Because the rationales asserted by Congress in support of the enactment of DOMA are either improper or without relation to DOMA's operation, this court next turns to the potential justifications for DOMA that the government now proffers for the purposes of this litigation.

In essence, the government argues that the Constitution permitted Congress to enact DOMA as a means to preserve the "status quo," pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage. Had Congress not done so, the argument continues, the definitions of "marriage" and "spouse" under federal law would have changed along with each alteration in the status of same-sex marriage in any given state because, prior to DOMA, federal law simply incorporated each state's marital status determinations. And, therefore, Congress could reasonably have concluded that DOMA was necessary to ensure consistency in the distribution of federal marriage-based benefits.

In addition, the government asserts that DOMA exhibits the type of incremental response to a new social problem which Congress may constitutionally employ in the face of a changing socio-political landscape.

[14] For the reasons set forth below, this court finds that, as with Congress' prior asserted rationales, the government's current justifications for DOMA fail to ground a rational relationship between the classification employed and a legitimate governmental objective.

To begin, the government claims that the Constitution permitted Congress to wait for the heated debate over same-sex marriage in the states to come to some ***391** resolution before formulating an enduring policy at the national level. But this assertion merely begs the more pertinent question: whether the federal government had any proper role to play in formulating such policy in the first instance.

[15] There can be no dispute that the subject of domestic relations is the exclusive province of the states.[FN119] And the powers to establish eligibility requirements for marriage, as well as to issue determinations of martial status, lie at the very core of such domestic relations law. [FN120] The government therefore concedes, as it must, that Congress does not have the authority to place restrictions on the states' power to issue marriage licenses. And indeed, as the government aptly points out, DOMA refrains from directly doing so. Nonetheless, the government's argument assumes that Congress has some interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges. There is no such interest.[FN121]

"The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familiar relationship [because] there is no federal law of domestic relations." [FN122]

FN119. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (quoting *In re Burrus,* 136 U.S. 586, 593, 10 S.Ct. 850, 34 L.Ed. 500 (1890)); *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.,* No. 09-cv-11156-JLT, 698 F.Supp.2d 234 (D.Mass. July 8, 2010) (Tauro, J.).

FN120. *See Ankenbrandt v. Richards,* 504 U.S. 689, 716, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992) (Blackmun, J., concurring).

FN121. *See, generally, Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.,* No. 09-cv-11156-JLT, 698 F.Supp.2d 234 (D.Mass. July 8, 2010) (Tauro, J.).

FN122. *De Sylva v. Ballentine,* 351 U.S. 570, 580, 76 S.Ct. 974, 100 L.Ed. 1415 (1956) (internal citation omitted).

This conclusion is further bolstered by an examination of the federal government's historical treatment of state marital status determinations. [FN123] Marital eligibility for heterosexual couples has varied from state to state throughout the course of history. Indeed, pursuant to the sovereign power over family law granted to the states by virtue of the federalist system, as well as the states' well-established right to "experiment[ ] and exercis[e] their own judgment in an area to which States lay claim by right of history and expertise," [FN124] individual states have changed their marital eligibility requirements in myriad ways over time.[FN125] And yet the federal government has fully embraced these variations and inconsistencies in state marriage laws by recognizing as valid for federal purposes any heterosexual marriage which has been declared valid pursuant to state law. [FN126]

FN123. This court addresses the federal government's historical treatment of state marital status determinations at length in the companion case of *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.,* No. 09-cv-11156-JLT, 698 F.Supp.2d 234 (D.Mass. July 8, 2010) (Tauro, J.).

FN124. *United States v. Lopez,* 514 U.S. 549, 580-83, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring).

FN125. *See, e.g.,* Michael Grossberg, *Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony,* 26 Amer. J. of Legal Hist. 197, 197-200 (1982).

FN126. *See, e.g., Dunn v. Comm'r of Internal Revenue,* 70 T.C. 361, 366 (1978) ("recognizing that whether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile"); 5 C.F.R. § 843.102 (defining "spouse" for purposes of federal employee benefits by reference to State law); 42 U.S.C. § 416(h)(1)(A)(i) (defining an "applicant" for purposes of Social Security survivor and death benefits as "the wife, husband, widow or widower" of an insured person "if the courts of the State" of the deceased's domicile "would find such an applicant and such insured individual were validly married"); 20 C.F.R. § 404.345 (Social Security) ("If you and the insured were validly married under State law at the time you apply for ... benefits, the relationship requirement will be met."); 38 U.S.C. § 103(c) (Veterans' benefits); 20 C.F.R. § 10.415 (Workers' Compensation);

45 C.F.R. § 237.50(b)(3) (Public Assistance); 29 C.F.R. §§ 825.122 and 825.800 (Family Medical Leave Act); 20 C.F.R. §§ 219.30 and 222.11 (Railroad Retirement Board); 38 C.F.R. § 3.1(j) (Veterans' Pension and Compensation). Indeed, the only federal statute other than DOMA, of which this court is aware, that denies federal recognition to *any* state-sanctioned marriages is another provision that targets same-sex couples, regarding burial in veterans' cemeteries, enacted in 1975. *See* 38 U.S.C. § 101(31).

***392** By way of one pointed example, so-called miscegenation statutes began to fall, state by state, beginning in 1948. But no fewer than sixteen states maintained such laws as of 1967 when the Supreme Court finally declared that prohibitions on interracial marriage violated the core constitutional guarantees of equal protection and due process.[FN127] Nevertheless, throughout the evolution of the stateside debate over interracial marriage, the federal government saw fit to rely on state marital status determinations when they were relevant to federal law.

FN127. *See Loving v. Virginia,* 388 U.S. 1, 6 n. 5, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

The government suggests that the issue of same-sex marriage is qualitatively different than any historical state-by-state debate as to who should be allowed to marry because, though other such issues have indeed arisen in the past, "none had become a topic of great debate in numerous states with such fluidity." [FN128] This court, however, cannot lend credence to the government's unsupported assertion in this regard, particularly in light of the lengthy and contentious state-by-state debate that took place over the propriety of interracial marriage not so very long ago.[FN129]

FN128. Def.'s Reply Mem., 14.

FN129. *See* NANCY COTT, PUBLIC VOWS 163 (2000).

Importantly, the passage of DOMA marks the *first* time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage-or any other core concept of domestic relations, for that matter. This is so, notwithstanding the occurrence of other similarly politically-charged, protracted, and fluid debates at the state level as to who should be permitted to marry. [FN130]

FN130. Congress has contemplated regulating the marital relationship a number of times in the past, but always by way of proposed constitutional amendments, rather than legislation. And none of these proposed constitutional amendments have ever succeeded in garnering enough support to come to a vote in either the House or the Senate. *See* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage,* 82 WASH. U.L.Q. 611, 614-15 (2004). It is worthy of note that Congress' resort to constitutional amendment when it has previously considered wading into the area of domestic relations appears to be a tacit acknowledgment that, indeed, regulation of familial relationships lies beyond the bounds of its legislative powers. *See id.* at 620 (internal citations omitted) ("Advocates for nationwide changes to marriage laws typically consider amending the Constitution in part because of the widely-accepted view that, in the United States, for the most part, family law is state law.... Although the process of passing a law is much easier than amending the Constitution, a law may still be found unconstitutional. Advocates of federal marriage laws are worried that such laws would be in tension with the thesis that family law is state law and for this reason would be

found unconstitutional. Reaching marriage laws by amending the Constitution sidesteps this tension.").

***393** Though not dispositive of a statute's constitutionality in and of itself, "a longstanding history of related federal action ... can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme,' and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests." [FN131] And the *absence* of precedent for the legislative classification at issue here is equally instructive, for " 'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [C]onstitution [ ]....' " [FN132]

FN131. *United States v. Comstock,* --- U.S. ----, ----, 130 S.Ct. 1949, 1952, 176 L.Ed.2d 878, 892 (2010) (internal citations omitted).

FN132. *Romer,* 517 U.S. at 633, 116 S.Ct. 1620 (quoting *Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37-38, 48 S.Ct. 423, 72 L.Ed. 770 (1928)).

The government is certainly correct in its assertion that the scope of a federal program is generally determined with reference to federal law. But the historically entrenched practice of incorporating state law determinations of marital status where they are relevant to federal law reflects a long-recognized reality of the federalist system under which this country operates. The states alone have the authority to set forth eligibility requirements as to familial relationships and the federal government cannot, therefore, have a legitimate interest in disregarding those family status determinations properly made by the states.[FN133]

FN133. *See, generally, Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.,* No. 09-cv-11156-JLT, 698 F.Supp.2d 234 (D.Mass. July 8, 2010).

Moreover, in order to give any meaning to the government's notion of preserving the status quo, one must first identify, with some precision, the relevant status quo to be preserved. The government has claimed that Congress could have had an interest in adhering to federal policy regarding the recognition of marriages as it existed in 1996. And this may very well be true. But even assuming that Congress could have had such an interest, the government's assertion that pursuit of this interest provides a justification for DOMA relies on a conspicuous misconception of what the status quo was *at the federal level* in 1996.

The states alone are empowered to determine who is eligible to marry and, as of 1996, no state had extended such eligibility to same-sex couples. In 1996, therefore, it was indeed the status quo *at the state level* to restrict the definition of marriage to the union of one man and one woman. But, the status quo *at the federal level* was to recognize, for federal purposes, any marriage declared valid according to state law. Thus, Congress' enactment of a provision denying federal recognition to a particular category of valid state-sanctioned marriages was, in fact, a significant *departure* from the status quo at the federal level.

Furthermore, this court seriously questions whether it may even consider preservation of the status quo to be an "interest" independent of some legitimate governmental objective that preservation of the status quo might help to achieve. Staying the course is not an end in and of itself, but rather a means to an end. Even assuming for the sake of argument that DOMA succeeded in preserving the federal status quo, which this court has concluded that it did not, such assumption does nothing more than describe what DOMA does. It does not provide a justification for doing it. This court does not doubt that Congress occasionally encounters social problems best dealt with by preserving the status quo or adjusting national policy ***394** incrementally. [FN134] But to assume that such a congressional response is appropriate requires a predicate assump-

tion that there indeed exists a "problem" with which Congress must grapple.[FN135]

> FN134. The government asserts, without explaining, that DOMA exhibits legislative incrementalism. As Plaintiffs aptly point out, it is unclear how this is so. DOMA, by its language, permanently and sweepingly excludes same-sex married couples from recognition for all federal purposes.
>
> FN135. Indeed, the cases cited by the government support this court's interpretation of the incrementalist approach as a means by which to achieve a legitimate government objective and not an objective in and of itself. *See, e.g., Medeiros v. Vincent,* 431 F.3d 25, 31-32 (1st Cir.2005) (upholding regulation of lobster fishing method, notwithstanding differential treatment of other fishing methods, to ameliorate problem of overfishing); *Butler v. Apfel,* 144 F.3d 622, 625 (9th Cir.1998) (upholding denial of Social Security benefits to incarcerated felons to conserve welfare resources, notwithstanding different treatment of other institutionalized groups because these groups are different in relevant respects); *Massachusetts v. EPA,* 549 U.S. 497, 524, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (noting that a massive problem, such as global change, is not generally resolved at once but rather with "reform" moving one step at a time, addressing what seems "most acute to the legislative mind"); *SEC v. Chenery Corp.,* 332 U.S. 194, 202, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) (addressing need for regulatory flexibility to address "specialized problems which arise"); *Nat'l Parks Conserv. Ass'n v. Norton,* 324 F.3d 1229, 1245 (11th Cir.2003) (preserving status quo by allowing leaseholders of stilted structures on national park land to continue to live in structures to extend their leases for a limited period of time served legitimate interest in ensuring that structures were maintained pending development of planning process); *Teigen v. Renfrow,* 511 F.3d 1072, 1084-85 (10th Cir.2007) (preserving status quo by not promoting employees involved in active litigation against government employer served government's legitimate interest in avoiding courses of action that might negatively impact its prospects of success in the litigation).

The only "problem" that the government suggests DOMA might address is that of state-to-state inconsistencies in the distribution of federal marriage-based benefits. But the classification that DOMA effects does not bear any rational relationship to this asserted interest in consistency. Decidedly, DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples. Rather it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy.

And even within the narrower class of heterosexual married couples, this court cannot apprehend any rational relationship between DOMA and the goal of nationwide consistency. As noted above, eligibility requirements for heterosexual marriage vary by state, but the federal government nonetheless recognizes any heterosexual marriage, which a couple has validly entered pursuant to the laws of the state that issued the license. For example, a thirteen year-old female and a fourteen year-old male, who have the consent of their parents, can obtain a valid marriage license in the state of New Hampshire.[FN136] Though this court knows of no other state in the country that would sanction such a marriage, the federal government recognizes it as valid simply because New Hampshire has declared it to be so.

> FN136. RSA 457:4-5.

More importantly, however, the pursuit of consistency in the distribution of federal marriage-based benefits can only constitute a legitimate govern-

ment objective if there exists a relevant characteristic by which to distinguish those who are entitled to receive benefits from those who are not.[FN137] And, notably, there is a readily ***395** discernible and eminently relevant characteristic on which to base such a distinction: *marital status.* Congress, by premising eligibility for these benefits on marriage in the first instance, has already made the determination that married people make up a class of similarly-situated individuals, different in relevant respects from the class of non-married people. Cast in this light, the claim that the federal government may also have an interest in treating all same-sex couples alike, whether married or unmarried, plainly cannot withstand constitutional scrutiny. [FN138]

> FN137. *City of Cleburne,* 473 U.S. at 439, 105 S.Ct. 3249 (explaining that equal protection of the laws is "essentially a direction [to the government] that all persons similarly situated should be treated alike") (internal citation omitted).
>
> FN138. *See Garrett,* 531 U.S. at 366 n. 4, 121 S.Ct. 955 (finding that a law failed rational basis review where the "purported justifications ... made no sense in light of how the [government] treated other groups similarly situated").

[16] Similarly unavailing is the government's related assertion that "Congress could reasonably have concluded that federal agencies should not have to deal immediately with [the administrative burden presented by] a changing patchwork of state approaches to same-sex marriage" [FN139] in distributing federal marriage-based benefits. Federal agencies are not burdened with the administrative task of implementing changing state marriage laws-that is a job for the states themselves. Rather, federal agencies merely distribute federal marriage-based benefits to those couples that have already obtained state-sanctioned marriage licenses. That task does not become more administratively complex simply because some of those couples are of the same sex. Nor does it become more complex simply because some of the couples applying for marriage-based benefits were previously ineligible to marry. Every heterosexual couple that obtains a marriage license was at some point ineligible to marry due to the varied age restrictions placed on marriage by each state. Yet the federal administrative system finds itself adequately equipped to accommodate their changed status.

> FN139. Def.'s Mem. Opp. Summ. Judg., 16.

In fact, as Plaintiffs suggest, DOMA seems to inject complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not. As such, this court finds the suggestion of potential administrative burden in distributing marriage-based benefits to be an utterly unpersuasive excuse for the classification created by DOMA.

Lastly, even if DOMA succeeded in creating consistency in the distribution of federal marriage-based benefits, which this court has concluded that it does not, DOMA's comprehensive sweep across the entire body of federal law is so far removed from that discrete goal that this court finds it impossible to credit the proffered justification of consistency as the motivating force for the statute's enactment.[FN140]

> FN140. *See Romer,* 517 U.S. at 635, 116 S.Ct. 1620 (rejecting proffered rationale for state constitutional amendment because "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them.").

The federal definitions of "marriage" and "spouse," as set forth by DOMA, are incorporated into at least 1,138 different federal laws, many of which implicate rights and privileges far beyond the realm of pecuniary benefits. [FN141] For example, persons who

are considered married for purposes of federal law enjoy the right to ***396** sponsor their non-citizen spouses for naturalization,[FN142] as well as to obtain conditional permanent residency for those spouses pending naturalization.[FN143] Similarly, the Family and Medical Leave Act ("FMLA") entitles federal employees, who are considered married for federal purposes, to twelve weeks of unpaid leave in order to care for a spouse who has a serious health condition or because of any qualifying exigency arising out of the fact that a spouse is on active military duty. [FN144] But because DOMA dictates that the word "spouse", as used in the above-referenced immigration and FMLA provisions, refers only to a husband or wife of the opposite sex, these significant non-pecuniary federal rights are denied to same-sex married couples.

FN141. *See* U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), *available at* http:// www. gao. gov/ new. items/ d 04353 r. pdf.

FN142. 8 U.S.C. § 1430.

FN143. 8 U.S.C. § 1186b(2)(A).

FN144. *See* 5 U.S.C. § 6382.

It strains credulity to suggest that Congress might have created such a sweeping status-based enactment, touching every single federal provision that includes the word marriage or spouse, simply in order to further the discrete goal of consistency in the distribution of federal marriage-based pecuniary benefits. For though the government is correct that the rational basis inquiry leaves room for a less than perfect fit between the means Congress employs and the ends Congress seeks to achieve,[FN145] this deferential constitutional test nonetheless demands some *reasonable* relation between the classification in question and the purpose it purportedly serves.

FN145. *See Heller,* 509 U.S. at 319-20, 113 S.Ct. 2637 (internal citations omitted).

In sum, this court is soundly convinced, based on the foregoing analysis, that the government's proffered rationales, past and current, are without "footing in the realities of the subject addressed by [DOMA]." [FN146] And "when the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. [Because] animus alone cannot constitute a legitimate government interest," [FN147] this court finds that DOMA lacks a rational basis to support it.

FN146. *Id.* at 321, 113 S.Ct. 2637.

FN147. *Lofton v. Sec'y of the Dep't of Children & Family Servs.,* 377 F.3d 1275, 1280 (11th Cir.2004) (Birch, J., specially concurring in the denial of rehearing en banc) (interpreting the mandate of *Romer v. Evans*).

This court simply "cannot say that [DOMA] is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which [this court] could discern a relationship to legitimate [government] interests." [FN148] Indeed, Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification, the Constitution clearly will not permit.

FN148. *Romer,* 517 U.S. at 635, 116 S.Ct. 1620.

In the wake of DOMA, it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue. By premising eligibility for these benefits on marital status in the first instance, the federal government signals to this court that the relevant distinction to be drawn is between married individuals and unmarried individuals. To further divide the class of married indi-

viduals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning. And where, ***397** as here, "there is no reason to believe that the disadvantaged class is different, in *relevant* respects" from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification.[FN149] As irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.

> FN149. *Lofton,* 377 F.3d at 1280 (Birch, J., specially concurring in the denial of rehearing en banc) (interpreting the mandate of *City of Cleburne v. Cleburne Living Center*) (emphasis added).

IV. *Conclusion*

For the foregoing reasons, *Defendants' Motion to Dismiss* [# 20] is DENIED and *Plaintiffs' Motion for Summary Judgment* [# 25] is ALLOWED, except with regard to Plaintiff Dean Hara's claim for enrollment in the Federal Employees Health Benefits Plan, as he lacks standing to pursue that claim in this court.

AN ORDER HAS ISSUED.

ORDER

For the reasons set forth in the accompanying Memorandum, this court hereby orders that:

1. *Defendants' Motion to Dismiss* [# 20] is ALLOWED IN PART and DENIED IN PART. Specifically, *Defendant's Motion to Dismiss* [# 20] is DENIED as to all claims, except Plaintiff Dean Hara's claim for enrollment in the Federal Employees Health Benefits Plan.

2. *Plaintiffs' Motion for Summary Judgment* [# 25] is ALLOWED.

IT IS SO ORDERED.

D.Mass.,2010.
Gill v. Office of Personnel Management
699 F.Supp.2d 374, 109 Fair Empl.Prac.Cas. (BNA) 1333, 106 A.F.T.R.2d 2010-5184, 2010-2 USTC P 50,509

END OF DOCUMENT

TAB 2

Westlaw

698 F.Supp.2d 234, Med & Med GD (CCH) P 303,487
(Cite as: 698 F.Supp.2d 234)

H

United States District Court,
D. Massachusetts.
Commonwealth of MASSACHUSETTS, Plaintiff,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; Kathleen Sebelius, in her official capacity as the Secretary of the United States Department of Health and Human Services; United States Department of Veterans Affairs; Eric K. Shinseki, in his official capacity as the Secretary of the United States Department of Veterans Affairs; and the United States of America, Defendants.
Civil Action No. 1:09-11156-JLT.

July 8, 2010.

Background: Commonwealth of Massachusetts brought action challenging constitutionality of federal Defense of Marriage Act (DOMA). United States moved to dismiss, and Commonwealth moved for summary judgment.

Holdings: The District Court, Tauro, J., held that:
(1) Commonwealth had standing to challenge DOMA's constitutionality;
(2) DOMA exceeded Congress's power under Spending Clause; and
(3) DOMA violated Tenth Amendment.

United States' motion denied, and Commonwealth's motion granted.

West Headnotes

[1] Federal Civil Procedure 170A ⚿103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Federal Civil Procedure 170A ⚿103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; redressability. Most Cited Cases
Irreducible constitutional minimum of standing hinges on claimant's ability to establish following requirements: (1) there must be alleged and ultimately proven injury in fact; (2) there must be fairly traceable connection between plaintiff's injury and complained-of conduct of defendant; and (3) there must be likelihood that requested relief will redress alleged injury. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[2] Constitutional Law 92 ⚿704

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)3 Particular Questions or Grounds of Attack in General
92k704 k. Family law; marriage. Most Cited Cases
Commonwealth of Massachusetts suffered sufficient injury in fact to establish standing to challenge constitutionality of federal Defense of Marriage Act (DOMA), where United States Department of Veterans Affairs (VA) had informed Massachusetts Department of Veterans' Services that federal government was entitled to recapture millions of dollars in federal grants if Commonwealth decided to entomb otherwise ineligible same-sex spouse of veteran at state veterans cemetery, Commonwealth had already determined that veteran's same-sex spouse was eligible for burial, and Commonwealth had amassed approximately $640,661 in additional tax liability and forsaken at least $2,224,018 in federal funding because DOMA barred Centers for Medicare & Medicaid Services

from using federal funds to insure same-sex married couples. 1 U.S.C.A. § 7.

[3] Statutes 361 ⚿4

361 Statutes
361I Enactment, Requisites, and Validity in General
361k4 k. Powers and duties of Legislature in general. Most Cited Cases
Every law enacted by Congress must be based on one or more of its powers enumerated in Constitution.

[4] States 360 ⚿4.16(1)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(1) k. In general. Most Cited Cases
As long as Congress acts pursuant to one of its enumerated powers, its work product does not offend Tenth Amendment. U.S.C.A. Const.Amend. 10.

[5] United States 393 ⚿82(2)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to state and local agencies in general. Most Cited Cases
Congress has broad power to set terms on which it disburses federal money to states pursuant to its spending power, but that power is not unlimited. U.S.C.A. Const. Art. 1, § 8, cl. 1.

[6] United States 393 ⚿82(2)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to state and local agencies in general. Most Cited Cases
Spending Clause legislation must satisfy five requirements: (1) it must be in pursuit of general welfare, (2) conditions of funding must be imposed unambiguously, so states are cognizant of consequences of their participation, (3) conditions must not be unrelated to federal interest in particular national projects or programs funded under challenged legislation, (4) legislation must not be barred by other constitutional provisions, and (5) financial pressure created by conditional grant of federal funds must not rise to level of compulsion. U.S.C.A. Const. Art. 1, § 8, cl. 1.

[7] Constitutional Law 92 ⚿3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and civil unions. Most Cited Cases

Marriage 253 ⚿2

253 Marriage
253k2 k. Power to regulate and control. Most Cited Cases

Marriage 253 ⚿17.5(1)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(1) k. In general. Most Cited Cases

United States 393 ⚿82(2)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to state and local agencies in general. Most Cited Cases
Provision of federal Defense of Marriage Act (DOMA) defining terms "marriage" and "spouse," for purposes of federal law, to include only union of one man and one woman induced Commonwealth of Massachusetts to violate equal protection

rights of its citizens, and thus exceeded Congress's power under Spending Clause, where DOMA conditioned receipt of federal funding on denial of marriage-based benefits to same-sex married couples, though same benefits were provided to similarly-situated heterosexual couples. U.S.C.A. Const. Art. 1, § 8, cl. 1; U.S.C.A. Const.Amend. 14 ; 1 U.S.C.A. § 7.

[8] Marriage 253 ⚿2

253 Marriage
253k2 k. Power to regulate and control. Most Cited Cases

Marriage 253 ⚿17.5(1)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(1) k. In general. Most Cited Cases

States 360 ⚿4.16(2)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(2) k. Federal laws invading state powers. Most Cited Cases
Provision of federal Defense of Marriage Act (DOMA) defining terms "marriage" and "spouse," for purposes of federal law, to include only union of one man and one woman intruded on core area of state sovereignty, namely, ability to define marital status of its citizens, and thus violated Tenth Amendment as applied to Commonwealth of Massachusetts, where DOMA's refusal to recognize same-sex marriages caused state to face significant additional healthcare costs, increased state's tax burden for healthcare provided to same-sex spouses of state employees, and forced state to face possibility of returning funds used to build state veterans cemeteries, there was historically entrenched tradition of federal reliance on state marital status determinations, and compliance with DOMA would require Commonwealth to violate its own constitution. U.S.C.A. Const.Amend. 10; 1 U.S.C.A. § 7.

[9] States 360 ⚿4.16(1)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(1) k. In general. Most Cited Cases
Tenth Amendment attack on federal statute cannot succeed without three ingredients: (1) statute must regulate States as States, (2) it must concern attributes of state sovereignty, and (3) it must be of such nature that compliance with it would impair state's ability to structure integral operations in areas of traditional governmental functions. U.S.C.A. Const.Amend. 10.

West Codenotes
Held Unconstitutional1 U.S.C.A. § 7 ***235** Christopher K. Barry-Smith, Maura T. Healey, Massachusetts Attorney General's Office, Jonathan B. Miller, Office of the Attorney General, Jessica M. Lindemann, Office of Attorney General Martha Coakley, Boston, MA, for Plaintiff.

Christopher R. Hall, U.S. Department of Justice, Washington, DC, for Defendants.

MEMORANDUM

TAURO, District Judge.

I. *Introduction*

This action presents a challenge to the constitutionality of Section 3 of the Defense of Marriage Act [FN1] as applied to Plaintiff,***236** the Commonwealth of Massachusetts (the "Commonwealth"). [FN2] Specifically, the Commonwealth contends that DOMA violates the Tenth Amendment of the Con-

stitution, by intruding on areas of exclusive state authority, as well as the Spending Clause, by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funds in connection with two joint federal-state programs. Because this court agrees, *Defendants' Motion to Dismiss* [# 16] is DENIED and *Plaintiff's Motion for Summary Judgment* [# 26] is ALLOWED.[FN3]

FN1. 1 U.S.C. § 7.

FN2. Defendants in this action are the United States Department of Health and Human Services, Kathleen Sebelius, in her official capacity as the Secretary of the Department of Health and Human Services, the United States Department of Veterans Affairs, Eric K. Shinseki, in his official capacity as the Secretary of the Department of Veterans Affairs, and the United States of America. Hereinafter, this court collectively refers to the Defendants as "the government."

FN3. In the companion case of *Gill et al. v. Office of Pers. Mgmt. et al.*, No. 09-cv-10309-JLT, --- F.Supp.2d ---- (D.Mass. July 8, 2010) (Tauro, J.), this court held that DOMA violates the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.

II. *Background* [FN4]

FN4. Defendants, with limited exception, concede the accuracy of Plaintiff's Statement of Material Facts [# 27]. Resp. to Pl.'s Stmt. Mat'l Facts, ¶¶ 1, 2. For that reason, for the purposes of this motion, this court accepts the factual representations propounded by Plaintiff, unless otherwise noted.

A. *The Defense of Marriage Act*

Congress enacted the Defense of Marriage Act ("DOMA") in 1996, and President Clinton signed it into law.[FN5] The Commonwealth, by this lawsuit, challenges Section 3 of DOMA, which defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman. In pertinent part, Section 3 provides:

FN5. Pub.L. No. 104-199, 110 Stat. 2419 (1996). Please refer to the background section of the companion case, *Gill et al. v. Office of Pers. Mgmt. et al.*, No. 09-cv-10309-JLT, --- F.Supp.2d ---- (D.Mass. July 8, 2010) (Tauro, J.), for a more thorough review of the legislative history of this statute.

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." [FN6]

FN6. 1 U.S.C. § 7.

As of December 31, 2003, there were at least "a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges," according to estimates from the General Accounting Office. [FN7] These statutory provisions pertain to a variety of subjects, including, but not limited to Social Security, taxes, immigration, and healthcare.[FN8]

FN7. Aff. of Jonathan Miller, Ex. 3, p. 1, Report of the U.S. General Accounting Office, Office of General Counsel, January 23, 2004 (GAO-04-353R).

FN8. *Id.* at 1.

B. *The History of Marital Status Determinations in the United States*

State control over marital status determinations predates the Constitution. Prior to the American Revolution, colonial legislatures, rather than Parliament, established***237** the rules and regulations regarding marriage in the colonies.[FN9] And, when the United States first declared its independence from England, the founding legislation of each state included regulations regarding marital status determinations.[FN10]

FN9. Aff. of Nancy Cott (hereinafter, "Cott Aff."), ¶ 9. Nancy F. Cott, Ph.D., the Jonathan Trumbull Professor of American History at Harvard University, submitted an affidavit on the history of the regulation of marriage in the United States, on which this court heavily relies.

FN10. *Id.*

In 1787, during the framing of the Constitution, the issue of marriage was not raised when defining the powers of the federal government.[FN11] At that time, "[s]tates had exclusive power over marriage rules as a central part of the individual states' 'police power'-meaning their responsibility (subject to the requirements and protections of the federal Constitution) for the health, safety and welfare of their populations." [FN12]

FN11. *Id.*, ¶ 10.

FN12. *Id.*

In large part, rules and regulations regarding marriage corresponded with local circumstances and preferences.[FN13] Changes in regulations regarding marriage also responded to changes in political, economic, religious, and ethnic compositions in the states.[FN14] Because, to a great extent, rules and regulations regarding marriage respond to local preferences, such regulations have varied significantly from state to state throughout American history.[FN15] Indeed, since the founding of the United States "there have been many nontrivial differences in states' laws on who was permitted to marry, what steps composed a valid marriage, what spousal roles should be, and what conditions permitted divorce." [FN16]

FN13. *Id.*

FN14. *Id.*

FN15. *Id.*, ¶ 14.

FN16. *Id.*

In response to controversies stemming from this "patchwork quilt of marriage rules in the United States," there have been many attempts to adopt a national definition of marriage.[FN17] In the mid-1880s, for instance, a constitutional amendment to establish uniform regulations on marriage and divorce was proposed for the first time.[FN18] Following the failure of that proposal, there were several other unsuccessful efforts to create a uniform definition of marriage by way of constitutional amendment.[FN19] Similarly, "[l]egislative and constitutional proposals to nationalize the definition of marriage were put before Congress again and again, from the 1880s to 1950s, with a particular burst of activity during and after World War II, because of the war's perceived damage to the stability of marriage and because of a steep upswing in divorce." [FN20] None of these proposals succeeded, however, because "few members of Congress were willing to supersede their own states' power over marriage and divorce." [FN21] And, despite a substantial increase in federal power during the twentieth century, members of Congress jealously guarded their states' sovereign control over marriage. [FN22]

FN17. *Id.*,¶¶ 15, 18-19.

FN18. *Id.*, ¶ 19.

FN19. *Id.*

FN20. *Id.*

FN21. *Id.*

FN22. *Id.*

Several issues relevant to the formation and dissolution of marriages have served ***238** historically as the subject of controversy, including common law marriage, divorce, and restrictions regarding race, "hygiene," and age at marriage.[FN23] Despite contentious debate on all of these subjects, however, the federal government consistently deferred to state marital status determinations.[FN24]

FN23. *See id.*,¶¶ 20-52.

FN24. *Id.*

For example, throughout much of American history a great deal of tension surrounded the issue of interracial marriage. But, despite differences in restrictions on interracial marriage from state to state, the federal government consistently accepted all state marital status determinations for the purposes of federal law.[FN25] For that reason, a review of the history of the regulation of interracial marriage is helpful in assessing the federal government's response to the "contentious social issue" [FN26] now before this court, same-sex marriage.

FN25. *Id.*, ¶ 45.

FN26. Defs.' Mem. Mot. Dismiss, 27.

Rules and regulations regarding interracial marriage varied widely from state to state throughout American history, until 1967, when the Supreme Court declared such restrictions unconstitutional.[FN27] And, indeed, a review of the history of the subject suggests that the strength of state restrictions on interracial marriage largely tracked changes in the social and political climate.

FN27. *See* Cott Aff., ¶¶ 36, 44.

Following the abolition of slavery, many state legislatures imposed additional restrictions on interracial marriage.[FN28] "As many as 41 states and territories of the U.S. banned, nullified, or criminalized marriages across the color line for some period of their history, often using 'racial' classifications that are no longer recognized." [FN29] Of those states, many imposed severe punishment on relationships that ran afoul of their restrictions.[FN30] Alabama, for instance, "penalized marriage, adultery, or fornication between a white and 'any negro, or the descendant of any negro to the third generation,' with hard labor of up to seven years." [FN31]

FN28. *Id.*, ¶ 35.

FN29. *Id.*

FN30. *Id.*, ¶ 37.

FN31. *Id.*

In contrast, some states, like Vermont, did not bar interracial marriage.[FN32] Similarly, Massachusetts, a hub of antislavery activism, repealed its prohibition on interracial marriage in the 1840s. [FN33]

FN32. *Id.*, ¶ 36.

FN33. *Id.*

The issue of interracial marriage again came to the legislative fore in the early twentieth century.[FN34] The controversy was rekindled at that time by the decline of stringent Victorian era sexual standards and the migration of many African-Americans to the northern states.[FN35] Legislators in fourteen states introduced bills to institute or strengthen prohibitions on interracial marriage in response to the marriage of the African-American boxer Jack Johnson to a young white woman.[FN36] These bills were universally defeated in northern states, however, as a result of organized pressure from African-American voters.[FN37]

FN34. *Id.*, ¶ 38.

FN35. *Id.*

FN36. *Id.*

FN37. *Id.*, ¶ 38.

***239** In the decades after World War II, in response to the civil rights movement, many states began to eliminate laws restricting interracial marriage. [FN38] And, ultimately, such restrictions were completely voided by the courts.[FN39] Throughout this entire period, however, the federal government consistently relied on state determinations with regard to marriage, when they were relevant to federal law.[FN40]

FN38. *Id.*, ¶ 43.

FN39. In 1948, the Supreme Court of California became the first state high court to hold that marital restrictions based on race were unconstitutional. *Id.*, ¶ 43. In 1948, the Supreme Court finally eviscerated existing state prohibitions on interracial marriage, finding that "deny[ing] this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

FN40. Cott Aff., ¶ 45.

C. *Same-Sex Marriage in Massachusetts*

In 2003, the Supreme Judicial Court of Massachusetts held that excluding same-sex couples from marriage violated the equality and liberty provisions of the Massachusetts Constitution.[FN41] In accordance with this decision, on May 17, 2004, Massachusetts became the first state to issue marriage licenses to same-sex couples.[FN42] And, since then, the Commonwealth has recognized "a single marital status that is open and available to every qualifying couple, whether same-sex or different-sex." [FN43] The Massachusetts legislature rejected both citizen-initiated and legislatively-proposed constitutional amendments to bar the recognition of same-sex marriages.[FN44]

FN41. *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 798 N.E.2d 941, 959-61, 968 (2003).

FN42. Aff. of Stanley E. Nyberg (hereinafter, "Nyberg Aff."), ¶ 5.

FN43. Compl. ¶ 17.

FN44. *Id.*, ¶¶ 18-19.

As of February 12, 2010, the Commonwealth had issued marriage licenses to at least 15,214 same-sex couples.[FN45] But, as Section 3 of DOMA bars federal recognition of these marriages, the Commonwealth contends that the statute has a significant negative impact on the operation of certain state programs, discussed in further detail below.

FN45. Nyberg Aff., ¶¶ 6-7.

D. *Relevant Programs*

1. *The State Cemetery Grants Program*

There are two cemeteries in the Commonwealth that are used for the burial of eligible military veterans, their spouses, and their children.[FN46] These cemeteries, which are located in Agawam and Winchendon, Massachusetts, are owned and operated solely by the Commonwealth.[FN47] As of February 17, 2010, there were 5,379 veterans and their family members buried at Agawam and 1,075 veterans and their family members buried at Winchendon.[FN48]

FN46. Aff. of William Walls (hereinafter, "Walls Aff."), ¶¶ 5, 7.

FN47. *Id.*

FN48. *Id.*, ¶ 4.

The Massachusetts Department of Veterans' Services ("DVS") received federal funding from the United States Department of Veterans Affairs ("VA") for the construction of the cemeteries at Agawam and Winchendon, pursuant to the State Cemetery Grants Program.[FN49] The federal ***240** government created the State Cemetery Grants Program in 1978 to complement the VA's network of national veterans' cemeteries.[FN50] This program aims to make veterans' cemeteries available within seventy-five miles of 90% of the veterans across the country.[FN51]

FN49. *Id.*, ¶ 4.

FN50. Walls Aff., ¶ 8 (citations omitted).

FN51. *Id.*

DVS received $6,818,011 from the VA for the initial construction of the Agawam cemetery, as well as $4,780,375 for its later expansion, pursuant to the State Cemetery Grants Program.[FN52] DVS also received $7,422,013 from the VA for the construction of the Winchendon cemetery.[FN53]

FN52. *Id.*, ¶ 5.

FN53. *Id.*, ¶ 5.

In addition to providing funding for the construction and expansion of state veterans' cemeteries, the VA also reimburses DVS $300 for the costs associated with the burial of each veteran at Agawam and Winchendon.[FN54] In total, the VA has provided $1,497,300 to DVS for such "plot allowances." [FN55]

FN54. *Id.*, ¶ 6 (citing 38 U.S.C. § 2303(b) ("When a veteran dies in a facility described in paragraph (2), the Secretary shall ... pay the actual cost (not to exceed $ 300) of the burial and funeral or, within such limits, may make contracts for such services without regard to the laws requiring advertisement for proposals for supplies and services for the Department ...")).

FN55. *Id.*, ¶ 6.

By statute, federal funding for the state veterans' cemeteries in Agawam and Winchendon is conditioned on the Commonwealth's compliance with regulations promulgated by the Secretary of the VA.[FN56] If either cemetery ceases to be operated as a veterans' cemetery, the VA can recapture from the Commonwealth any funds provided for the construction, expansion, or improvement of the cemeteries.[FN57]

FN56. 38 U.S.C. § 2408(c).

FN57. Walls Aff., ¶ 10.

The VA regulations require that veterans' cemeteries "be operated solely for the interment of veterans, their spouses, surviving spouses, [and certain of their] children...." [FN58] Since DOMA provides that a same-sex spouse is not a "spouse" under federal law, DVS sought clarification from the VA regarding whether DVS could "bury the same-sex spouse of a veteran in its Agawam or Winchendon state veterans cemetery without losing federal funding provided under [the] VA's state cemeteries program," after the Commonwealth began recognizing same-sex marriage in 2004.[FN59] In response, the VA informed DVS by letter that "we believe [the] VA would be entitled to recapture Federal grant funds provided to DVS for either [the Agawam or Winchendon] cemeteries should [Massachusetts] decide to bury the same-sex spouse of a veteran in the cemetery, unless that individual is independently eligible for burial." [FN60]

FN58. 38 C.F.R. § 39.5(a).

FN59. Walls Aff., ¶ 17, Ex. 1., Letter from Tim S. McClain, General Counsel to the Department of Veteran Affairs, to Joan E. O'Connor, General Counsel, Massachusetts Department of Veterans' Services (June 18, 2004).

FN60. *Id.*

More recently, the National Cemetery Administration ("NCA"), an arm of the VA, published a directive in June 2008 stating that "individuals in a same-sex civil union or marriage are not eligible for burial in a national cemetery or State veterans cemetery that receives federal grant funding based on being the spouse or surviving spouse of a same-sex veteran." [FN61] In addition, at a 2008 NCA conference, "a representative from the VA gave a presentation ***241** making it clear that the VA would not permit the burial of any same-sex spouses in VA supported veterans' cemeteries." [FN62]

FN61. Walls Aff., Ex. 2, NCA Directive 3210/1 (June 4, 2008).

FN62. Walls Aff., ¶ 20.

On July 17, 2007, Darrel Hopkins and Thomas Hopkins submitted an application for burial in the Winchendon cemetery.[FN63] The couple were married in Massachusetts on September 18, 2004.[FN64] Darrel Hopkins retired from the United States Army in 1982, after more than 20 years of active military service.[FN65] During his time in the Army, Darrel Hopkins served thirteen months in the Vietnam conflict, three years in South Korea, seven years in Germany (including three years in occupied Berlin), and three years at the School of U.S. Army Intelligence at Fort Devens, Massachusetts. [FN66] He is a decorated soldier, having earned two Bronze Stars, two Meritorious Service Medals, a Meritorious Unit Commendation, an Army Commendation Medal, four Good Conduct Medals, and Vietnam Service Medals (1-3), and having achieved the rank of Chief Warrant Officer, Second Class. [FN67]

FN63. Walls Aff., Ex. 3, Copy of Approved Application.

FN64. Walls Aff., ¶ 22, Ex. 4, Marriage License.

FN65. Walls Aff., ¶ 23.

FN66. *Id.*

FN67. *Id.*, ¶ 24.

Because of his long service to the United States Army, as well as his Massachusetts residency, Darrel Hopkins is eligible for burial in Winchendon cemetery.[FN68] By virtue of his marriage to Darrel Hopkins, Thomas Hopkins is also eligible for burial in the Winchendon cemetery in the eyes of the Commonwealth, which recognizes their marriage. [FN69] But because the Hopkins' marriage is not valid for federal purposes, in the eyes of the federal government, Thomas Hopkins is ineligible for burial in Winchendon.[FN70]

FN68. *Id.*, ¶ 25.

FN69. *Id.*, ¶ 26.

FN70. *Id.*, ¶ 26.

Seeking to honor the Hopkins' wishes, DVS approved their application for burial in the Winchendon cemetery and intends to bury the couple together. [FN71]

FN71. *Id.*, ¶¶ 21, 27.

2. *MassHealth*

Medicaid is a public assistance program dedicated to providing medical services to needy individuals by,[FN72] providing funding (also known as "federal financial participation" or "FFP") to states that pay for medical services on behalf of those individuals. [FN73] Massachusetts' Executive Office of Health and Human Services administers the Commonwealth's Medicaid program, known as MassHealth. [FN74]

FN72. Aff. of Robin Callahan (hereinafter, "Callahan Aff."), ¶ 4.

FN73. *Id.*

FN74. *Id.*, ¶¶ 2, 5.

MassHealth provides comprehensive health insurance or assistance in paying for private health insurance to approximately one million residents of Massachusetts.[FN75] The Department of Health and Human Services ("HHS") reimburses MassHealth for approximately one-half of its Medicaid expenditures [FN76] and administration costs.[FN77] HHS provides MassHealth with billions of dollars in federal funding every year.[FN78] For the fiscal year ending ***242** on June 30, 2008, for example, HHS provided MassHealth with approximately $5.3 billion in federal funding.[FN79]

FN75. *Id.*, ¶ 5.

FN76. *Id.*, ¶ 7.

FN77. *Id.*, ¶ 7.

FN78. *Id.*, ¶ 6.

FN79. *Id.*, ¶ 6 (Commonwealth of Massachusetts, OMB Circular A-133 Report (June 30, 2008) at 9, http:// www. mass. gov/ Aosc/ docs/ reports- audits/ SA/ 2008/ 2008- single- audit. pdf (last visited Feb. 17, 2010)).

To qualify for federal funding, the Secretary of HHS must approve a "State plan" describing the nature and scope of the MassHealth program.[FN80] Qualifying plans must meet several statutory requirements.[FN81] For example, qualifying plans must ensure that state-assisted healthcare is not provided to individuals whose income or resources exceed certain limits. [FN82]

FN80. *Id.*, ¶ 8.

FN81. *Id.*, ¶ 9 (citing 42 U.S.C. §§ 1396a(a)(1)-(65)).

FN82. *Id.*, ¶ 9.

Marital status is a relevant factor in determining whether an individual is eligible for coverage by MassHealth.[FN83] The Commonwealth asserts that, because of DOMA, federal law requires MassHealth to assess eligibility for same-sex spouses as though each were single, a mandate which has significant financial consequences for the state.[FN84] In addition, the Commonwealth cannot obtain federal funding for expenditures made for coverage provided to same-sex spouses who do not qualify for Medicaid when assessed as single, even though they would qualify if assessed as married.[FN85]

FN83. *Id.*, ¶ 11.

FN84. *Id.*, ¶ 14.

FN85. *Id.*

The Commonwealth contends that, under certain circumstances, the recognition of same-sex marriage leads to the denial of health benefits, resulting in cost savings for the state. By way of example, in a household of same-sex spouses under the age of 65, where one spouse earns $65,000 and the other is disabled and receives $13,000 per year in Social Security benefits,[FN86] neither spouse would be eligible for benefits under MassHealth's current practice, since the total household income, $78,000, substantially exceeds the federal poverty level, $14,412.[FN87] Since federal law does not recognize same-sex marriage, however, the disabled spouse, who would be assessed as single according to federal practice, would be eligible for coverage since his income alone, $13,000, falls below the federal poverty level.[FN88]

FN86. *Id.*, ¶ 11.

FN87. *Id.*, ¶ 11.

FN88. *Id.*, ¶ 11.

The recognition of same-sex marriages also renders certain individuals eligible for benefits for which they would otherwise be ineligible.[FN89] For instance, in a household consisting of two same-sex spouses under the age of 65, one earning $33,000 per year and the other earning only $7,000 per year,

FN90 both spouses are eligible for healthcare under MassHealth because, as a married couple, their combined income-$40,000-falls below the $43,716 minimum threshold established for spouses.FN91 In the eyes of the federal government, however, only the spouse earning $7,000 per year is eligible for Medicaid coverage.FN92

FN89. *Id.*, ¶ 12.

FN90. *Id.*, ¶ 12.

FN91. *Id.*, ¶ 12.

FN92. *Id.*, ¶ 12.%

After the Commonwealth began recognizing same-sex marriages in 2004, MassHealth sought clarification, by letter, from HHS's Centers for Medicare & Medicaid***243** Services ("CMS") as to how to implement its recognition of same-sex marriages with respect to Medicaid benefits.FN93 In response, CMS informed MassHealth that "[i]n large part, DOMA dictates the response" to the Commonwealth's questions, because "DOMA does not give the [CMS] the discretion to recognize same-sex marriage for purposes of the Federal portion of Medicaid." FN94

FN93. *Id.*, ¶ 15.

FN94. *Id.*, ¶¶ 15-17, Ex. 1, Letter from Charlotte S. Yeh, Regional Administrator, Centers for Medicare & Medicaid Services, to Kristen Reasoner Apgar, General Counsel, Commonwealth of Massachusetts, Executive Office of Health and Human Services (May 28, 2004).

The Commonwealth enacted the MassHealth Equality Act in July 2008, which provides that "[n]otwithstanding the unavailability of federal financial participation, no person who is recognized as a spouse under the laws of the commonwealth shall be denied benefits that are otherwise available under this chapter due to the provisions of [DOMA] or any other federal nonrecognition of spouses of the same sex." FN95

FN95. Callahan Aff., ¶ 18, MASS. GEN. LAWS ch. 118E, § 61.

Following the passage of the MassHealth Equality Act, CMS reaffirmed that DOMA "limits the availability of FFP by precluding recognition of same sex couples as 'spouses' in the Federal program." FN96 In addition, CMS stated that "because same sex couples are not spouses under Federal law, the income and resources of one may not be attributed to the other without actual contribution, i.e. you must not deem income or resources from one to the other." FN97 Finally, CMS informed the Commonwealth that it "must pay the full cost of administration of a program that does not comply with Federal law." FN98

FN96. Callahan Aff., Ex. 2, Letter from Richard R. McGreal, Associate Regional Administrator, Centers for Medicare & Medicaid Services, to JudyAnn Bigby, M.D., Secretary, Commonwealth of Massachusetts, Executive Office of Health and Human Services (August 21, 2008).

FN97. *Id.*

FN98. *Id.*

Currently, MassHealth denies coverage to married individuals who would be eligible for medical assistance if assessed as single pursuant to DOMA, a course of action which saves MassHealth tens of thousands of dollars annually in additional healthcare costs.FN99 Correspondingly, MassHealth provides coverage to married individuals in same-sex relationships who would not be eligible if assessed as single, as required by DOMA. To date, the Commonwealth estimates that CMS' refusal to provide federal funding to individuals in same-sex couples has resulted in $640,661 in additional costs and as much as much as $2,224,018 in lost federal funding.FN100

FN99. Callahan Aff., ¶ 22.

FN100. *Id.*, ¶ 23.

3. *Medicare Tax*

Under federal law, health care benefits for a different-sex spouse are excluded from an employee's taxable income.[FN101] The value of health care benefits provided to an employee's same-sex spouse, however, is considered taxable and must be imputed as extra income to the employee for federal tax withholding purposes.[FN102]

FN101. Aff. of Kevin McHugh (hereinafter, "McHugh Aff."), ¶ 4 (citing 26 U.S.C. § 106; 26 C.F.R. § 1.106-1).

FN102. McHugh Aff., ¶ 4.

The Commonwealth is required to pay Medicare tax for each employee hired after April 1, 1986, in the amount of 1.45% of each employee's taxable income. [FN103] Because***244** health benefits for same-sex spouses of Commonwealth employees are considered to be taxable income for federal purposes, the Commonwealth must pay an additional Medicare tax for the value of the health benefits provided to the same-sex spouses.[FN104]

FN103. *Id.*, ¶ 5 (citing 26 U.S.C. § § 3121(u), 3111(b)).

FN104. *Id.*

As of December 2009, 398 employees of the Commonwealth provided health benefits to their same-sex spouses.[FN105] For those employees, the amount of monthly imputed income for healthcare benefits extended to their spouses ranges between $400 and $1000 per month.[FN106] For that reason, the Commonwealth has paid approximately $122,607.69 in additional Medicare tax between 2004, when the state began recognizing same-sex marriages, and December 2009.[FN107]

FN105. *Id.*

FN106. *Id.*, ¶ 7.

FN107. *Id.*, ¶ 8.

Furthermore, in order to comply with DOMA, the Commonwealth's Group Insurance Commission has been forced to create and implement systems to identify insurance enrollees who provide healthcare coverage to their same-sex spouses, as well as to calculate the amount of imputed income for each such enrollee. [FN108] Developing such a system cost approximately $47,000, and the Group Insurance Commission continues to incur costs on a monthly basis to comply with DOMA.[FN109]

FN108. Aff. of Dolores Mitchell (hereinafter, "Mitchell Aff."), ¶¶ 2, 4-9.

FN109. *Id.*, ¶ 10.

III. *Discussion*

A. *Summary Judgment*

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [FN110] In reviewing a motion for summary judgment, the court "must scrutinize the record in the light most favorable to the summary judgment loser and draw all reasonable inferences therefrom to that party's behoof." [FN111] As the Parties do not dispute the material facts relevant to the constitutional questions raised by this action, it is appropriate to dispose of the issues as a matter of law.[FN112]

FN110. *Prescott v. Higgins,* 538 F.3d 32, 40 (1st Cir.2008).

FN111. *Alliance of Auto. Mfrs. v. Gwadosky,* 430 F.3d 30, 34 (1st Cir.2005).

FN112. This court notes that *Defendants' Motion to Dismiss* [# 16] is also currently pending. Because there are no material facts in dispute and *Defendants' Motion to Dismiss* turns on the same purely legal question as the pending *Motion for Sum-*

mary Judgment, this court finds it appropriate, as a matter of judicial economy, to address the two motions simultaneously.

B. *Standing*

This court first addresses the government's contention that the Commonwealth lacks standing to bring certain claims against the VA and HHS.[FN113]

FN113. The government does not dispute that the Commonwealth has standing to challenge restrictions on the provision of federal Medicaid matching funds that have already been applied. Defs.' Mem. Mot. Dismiss, 34.

[1] "The irreducible constitutional minimum of standing" hinges on a claimant's ability to establish the following requirements: "[f]irst and foremost, there must be alleged (and ultimately proven) an injury in fact.... Second, there must be causation-a fairly traceable connection between the plaintiff's injury and the complained-of***245** conduct of the defendant. And third, there must be redressability-a likelihood that the requested relief will redress the alleged injury." [FN114]

FN114. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102-04, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

[2] The government claims that the Commonwealth has failed to sufficiently establish an injury in fact because "its claims are based on the 'risk' of speculative future injury." [FN115] Specifically, the government contends that (1) allegations that the VA intends to recoup federal grants for state veterans' cemeteries grants lacks the "imminency" required to establish Article III standing, and (2) allegations regarding the HHS' provision of federal Medicaid matching funds constitute nothing more than a hypothetical risk of future enforcement. The government's arguments are without merit.

FN115. Defs.' Mem. Mot. Dismiss, 32.

The evidentiary record is replete with allegations of past and ongoing injuries to the Commonwealth as a result of the government's adherence to the strictures of DOMA. Standing is not contingent, as the government suggests, on Thomas Hopkins-or another similarly-situated individual-being lowered into his grave at Winchendon, or on the Commonwealth's receipt of an invoice for millions in federal state veterans cemetery grant funds. Indeed, a plaintiff is not required "to expose himself to liability before bringing suit to challenge the basis for the threat," particularly where, as here, it is the government that threatens to impose certain obligations.[FN116]

FN116. *See MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128-129, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007).

By letter, the VA already informed the Massachusetts Department of Veterans' Services that the federal government is entitled to recapture millions of dollars in federal grants if the Commonwealth decides to entomb an otherwise ineligible same-sex spouse of a veteran at Agawam or Winchendon. And, given that the Hopkins' application to be buried together has already received the Commonwealth's stamp of approval, the matter is ripe for adjudication.

Moreover, in light of the undisputed record evidence, the argument that the Commonwealth lacks standing to challenge restrictions on the provision of federal Medicaid matching funds to MassHealth cannot withstand scrutiny. The Commonwealth has amassed approximately $640,661 in additional tax liability and forsaken at least $2,224,018 in federal funding because DOMA bars HHS's Centers for Medicare & Medicaid Services from using federal funds to insure same-sex married couples. Given that the HHS has given no indication that it plans to change course, it is disingenuous to now argue that the risk of future funding denials is "merely ... speculative." [FN117] The evidence before this court clearly demonstrates that the Commonwealth has suffered, and will continue to suffer, economic

harm sufficient to satisfy the injury in fact requirement for Article III standing.

FN117. Def.'s Mem. Mot. Dismiss, 34.

C. *Challenges to DOMA Under the Tenth Amendment and the Spending Clause of the Constitution*

This case requires a complex constitutional inquiry into whether the power to establish marital status determinations lies exclusively with the state, or whether Congress may siphon off a portion of that traditionally state-held authority for itself. This Court has merged the analyses of the Commonwealth challenges to DOMA under*246 the Spending Clause and Tenth Amendment because, in a case such as this, "involving the division of authority between federal and state governments," these inquiries are two sides of the same coin. [FN118]

FN118. *New York v. United States,* 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

[3] It is a fundamental principle underlying our federalist system of government that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." [FN119] And, correspondingly, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [FN120] The division between state and federal powers delineated by the Constitution is not merely "formalistic." [FN121] Rather, the Tenth Amendment "leaves to the several States a residuary and inviolable sovereignty." [FN122] This reflects a founding principle of governance in this country, that "[s]tates are not mere political subdivision of the United States," but rather sovereigns unto themselves.[FN123]

FN119. *United States v. Morrison,* 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

FN120. U.S. CONST. Amend. X.

FN121. *New York v. United States,* 505 U.S. 144, 187, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

FN122. *Id.* at 188, 112 S.Ct. 2408 (quoting The Federalist No. 39, p. 245 (C. Rossiter ed.1961)).

FN123. *Id.*

The Supreme Court has handled questions concerning the boundaries of state and federal power in either of two ways: "In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution.... In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment." [FN124]

FN124. *New York,* 505 U.S. at 155, 112 S.Ct. 2408.

Since, in essence, "the two inquiries are mirror images of each other," [FN125] the Commonwealth challenges Congress' authority under Article I to promulgate a national definition of marriage, and, correspondingly, complains that, in doing so, Congress has intruded on the exclusive province of the state to regulate marriage.

FN125. *Id.* at 156, 112 S.Ct. 2408.

1. *DOMA Exceeds the Scope of Federal Power*

[4] Congress' powers are "defined and limited," and, for that reason, every federal law "must be based on one or more of its powers enumerated in the Constitution." [FN126] As long as Congress acts pursuant to one of its enumerated powers, "its work product does not offend the Tenth Amendment." [FN127] Moreover, "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon

a plain showing that Congress has exceeded its constitutional bounds." [FN128] Accordingly, it is for this court to determine whether DOMA represents a valid exercise of congressional authority under the Constitution,***247** and therefore must stand, or indeed has no such footing.

FN126. *United States v. Morrison,* 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (quoting *Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803)).

FN127. *United States v. Meade,* 175 F.3d 215, 224 (1st Cir.1999) (citing *Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)).

FN128. *Morrison,* 529 U.S. at 607, 120 S.Ct. 1740.

The First Circuit has upheld federal regulation of family law only where firmly rooted in an enumerated federal power.[FN129] In many cases involving charges that Congress exceeded the scope of its authority, e.g. *Morrison*[FN130] and *Lopez,*[FN131] courts considered whether the challenged federal statutes contain "express jurisdictional elements" tying the enactment to one of the federal government's enumerated powers. DOMA, however, does not contain an explicit jurisdictional element. For that reason, this court must weigh the government's contention that DOMA is grounded in the Spending Clause of the Constitution. The Spending Clause provides, in pertinent part:

FN129. *See United States v. Bongiorno,* 106 F.3d 1027 (1st Cir.1997) (the Child Support Recovery Act is a valid exercise of congressional authority pursuant to the Commerce Clause).

FN130. 529 U.S. at 612, 120 S.Ct. 1740 (noting that Section 13981 of the Violence Against Women Act of 1994 "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce").

FN131. *United States v. Lopez,* 514 U.S. 549, 561-62, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (" § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

> The Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.[FN132]

FN132. U.S. CONST. art. I, § 8.

The government claims that Section 3 of DOMA is plainly within Congress' authority under the Spending Clause to determine how money is best spent to promote the "general welfare" of the public.

It is first worth noting that DOMA's reach is not limited to provisions relating to federal spending. The broad sweep of DOMA, potentially affecting the application of 1,138 federal statutory provisions in the United States Code in which marital status is a factor, impacts, among other things, copyright protections, provisions relating to leave to care for a spouse under the Family and Medical Leave Act, and testimonial privileges.[FN133]

FN133. Pl.'s Reply Mem., 3.

[5] It is true, as the government contends, that "Congress has broad power to set the terms on which it disburses federal money to the States" pursuant to its spending power.[FN134] But that power is not unlimited. Rather, Congress' license to act pursuant to the spending power is subject to certain general restrictions.[FN135]

FN134. *Arlington Cent. Sch. Dist. Bd. of*

Educ. v. Murphy, 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006).

FN135. *South Dakota v. Dole,* 483 U.S. 203, 207, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

[6] In *South Dakota v. Dole,*[FN136] the Supreme Court held that "Spending Clause legislation must satisfy five requirements: (1) it must be in pursuit of the 'general welfare,' (2) conditions of funding must be imposed unambiguously, so states are cognizant of the consequences of their participation, (3) conditions must not be 'unrelated to the federal interest in particular national projects or programs' funded under the challenged legislation, (4) the legislation must not be barred by other constitutional provisions, and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion." [FN137]

FN136. 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

FN137. *Nieves-Marquez v. Puerto Rico,* 353 F.3d 108, 128 (1st Cir.2003) (citing *Dole,* 483 U.S. at 207-08, 211, 107 S.Ct. 2793).

***248** The Commonwealth charges that DOMA runs afoul of several of the above-listed restrictions. First, the Commonwealth argues that DOMA departs from the fourth *Dole* requirement, regarding the constitutionality of Congress' exercise of its spending power, because the statute is independently barred by the Equal Protection Clause. Second, the Commonwealth claims that DOMA does not satisfy the third *Dole* requirement, the "germaneness" requirement, because the statute's treatment of same-sex couples is unrelated to the purposes of Medicaid or the State Veterans Cemetery Grants Program.

This court will first address the Commonwealth's argument that DOMA imposes an unconstitutional condition on the receipt of federal funds. This fourth Dole requirement "stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional." [FN138]

FN138. *Dole,* 483 U.S. at 210, 107 S.Ct. 2793.

The Commonwealth argues that DOMA impermissibly conditions the receipt of federal funding on the state's violation of the Equal Protection Clause of the Fourteenth Amendment by requiring that the state deny certain marriage-based benefits to same-sex married couples. "The Fourteenth Amendment 'requires that all persons subjected to ... legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' " [FN139] And where, as here, "those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions." [FN140]

FN139. *Engquist v. Or. Dep't of Agric.,* 553 U.S. 591, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008) (quoting *Hayes v. Missouri,* 120 U.S. 68, 71-72, 7 S.Ct. 350, 30 L.Ed. 578 (1887)).

FN140. *Id.* (internal citation omitted).

[7] In the companion case, *Gill et al. v. Office of Pers. Mgmt. et al.,* No. 09-cv-10309-JLT, --- F.Supp.2d ---- (D.Mass. July 8, 2010) (Tauro, J.), this court held that DOMA violates the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. There, this court found that DOMA failed to pass constitutional muster under rational basis scrutiny, the most highly deferential standard of review.[FN141] That analysis, which this court will not reiterate here, is equally applicable in this case. DOMA plainly conditions the receipt of federal funding on the denial of marriage-based benefits to same-sex married

couples, though the same benefits are provided to similarly-situated heterosexual couples. By way of example, the Department of Veterans Affairs informed the Commonwealth in clear terms that the federal government is entitled to "recapture" millions in federal grants if and when the Commonwealth opts to bury the same-sex spouse of a veteran in one of the state veterans cemeteries, a threat which, in essence, would penalize the Commonwealth for affording same-sex married couples the same benefits as similarly-situated heterosexual couples that meet the criteria for burial in Agawam or Winchendon. Accordingly, this court finds that DOMA induces the Commonwealth to violate the equal protection rights of its citizens.

> FN141. *Gill et al. v. Office of Pers. Mgmt. et al.,* No. 09-cv-10309-JLT, --- F.Supp.2d ---- (D.Mass. July 8, 2010) (Tauro, J.).

And so, as DOMA imposes an unconstitutional condition on the receipt of federal funding, this court finds that the statute ***249** contravenes a well-established restriction on the exercise of Congress' spending power. Because the government insists that DOMA is founded in this federal power and no other, this court finds that Congress has exceeded the scope of its authority.

Having found that DOMA imposes an unconstitutional condition on the receipt of federal funding, this court need not reach the question of whether DOMA is sufficiently related to the specific purposes of Medicaid or the State Cemetery Grants Program, as required by the third limitation announced in Dole.

2. *DOMA Impermissibly Interferes with the Commonwealth's Domestic Relations Law*

[8] That DOMA plainly intrudes on a core area of state sovereignty-the ability to define the marital status of its citizens-also convinces this court that the statute violates the Tenth Amendment.

[9] In *United States v. Bongiorno,* the First Circuit held that "a Tenth Amendment attack on a federal statute cannot succeed without three ingredients: (1) the statute must regulate the States as States, (2) it must concern attributes of state sovereignty, and (3) it must be of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional governmental functions." FN142

> FN142. 106 F.3d 1027, 1033 (1st Cir.1997) (citations and internal quotation marks omitted) (quoting *Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc.,* 452 U.S. 264, 287-88, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981)); *Z.B. v. Ammonoosuc Cmty. Health Servs.,* 2004 WL 1571988, at *5, 2004 U.S. Dist. LEXIS 13058, at *15 (D.Me. July 13, 2004).

A. *DOMA Regulates the Commonwealth "as a State"*

With respect to the first prong of this test, the Commonwealth has set forth a substantial amount of evidence regarding the impact of DOMA on the state's bottom line. For instance, the government has announced that it is entitled to recapture millions of dollars in federal grants for state veterans' cemeteries at Agawam and Winchendon should the same-sex spouse of a veteran be buried there. And, as a result of DOMA's refusal to recognize same-sex marriages, DOMA directly imposes significant additional healthcare costs on the Commonwealth, and increases the state's tax burden for healthcare provided to the same-sex spouses of state employees.FN143 In light of this evidence, the Commonwealth easily satisfies the first requirement of a successful Tenth Amendment challenge.

> FN143. The government contends that additional federal income and Medicare tax withholding requirements do not offend the Tenth Amendment because they regulate the Commonwealth not as a state but as an employer. It is clear that the Com-

monwealth has standing to challenge DOMA's interference in its employment relations with its public employees, *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment,* 477 U.S. 41, 51 n. 17, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), and this court does not read the first prong of the *Bongiorno* test so broadly as to preclude the Commonwealth from challenging this application of the statute.

B. *Marital Status Determinations Are an Attribute of State Sovereignty*

Having determined that DOMA regulates the Commonwealth "as a state," this court must now determine whether DOMA touches upon an attribute of state sovereignty, the regulation of marital status.

"The Constitution requires a distinction between what is truly national and what is truly local." FN144 And, significantly, family law, including "declarations of status, e.g. marriage, annulment, divorce, custody and ***250** paternity," FN145 is often held out as the archetypal area of local concern. FN146

FN144. *Morrison,* 529 U.S. at 618, 120 S.Ct. 1740 (citing *Lopez,* 514 U.S. at 568, 115 S.Ct. 1624).

FN145. *Ankenbrandt v. Richards,* 504 U.S. 689, 716, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992) (Blackmun, J., concurring).

FN146. *See, e.g., Boggs v. Boggs,* 520 U.S. 833, 848, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997) ("As a general matter, 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' ") (citation omitted); *Haddock v. Haddock,* 201 U.S. 562, 575, 26 S.Ct. 525, 50 L.Ed. 867 (1906) ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce [and that] the Constitution delegated no authority to the Government of the United States on [that subject]."), overruled on other grounds, *Williams v. North Carolina,* 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942); *see also Morrison,* 529 U.S. at 616, 120 S.Ct. 1740.

The Commonwealth provided this court with an extensive affidavit on the history of marital regulation in the United States, and, importantly, the government does not dispute the accuracy of this evidence. After weighing this evidence, this court is convinced that there is a historically entrenched tradition of federal reliance on state marital status determinations. And, even though the government objects to an over-reliance on the historical record in this case,FN147 "a longstanding history of related federal action ... can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme,' and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests." FN148

FN147. Defs.' Reply Mem., 4-5 ("a history of respecting state definitions of marriage does not itself mandate that terms like 'marriage' and 'spouse,' when used in *federal* statutes, yield to definitions of these same terms in state law.") (emphasis in original).

FN148. *United States v. Comstock,* --- U.S. ----, ----, 130 S.Ct. 1949, 1952, 176 L.Ed.2d 878, 892 (2010) (internal citations omitted).

State control over marital status determinations is a convention rooted in the early history of the United States, predating even the American Revolution. Indeed, the field of domestic relations was regarded as such an essential element of state power that the subject of marriage was not even broached at the time of the framing of the Constitution. And, as a consequence of continuous local control over marit-

al status determinations, what developed was a checkerboard of rules and restrictions on the subject that varied widely from state to state, evolving throughout American history. Despite the complexity of this approach, prior to DOMA, every effort to establish a national definition of marriage met failure, largely because politicians fought to guard their states' areas of sovereign concern.

The history of the regulation of marital status determinations therefore suggests that this area of concern is an attribute of state sovereignty, which is "truly local" in character.

That same-sex marriage is a contentious social issue, as the government argues, does not alter this court's conclusion. It is clear from the record evidence that rules and regulations regarding marital status determinations have been the subject of controversy throughout American history. Interracial marriage, for example, was at least as contentious a subject. But even as the debate concerning interracial marriage waxed and waned throughout history, the federal government consistently yielded to marital status determinations established by the states. That says something. And this court is convinced that the federal government's long history of acquiescence in this arena indicates that, indeed, the federal government traditionally regarded marital status determinations***251** as the exclusive province of state government.

That the Supreme Court, over the past century, has repeatedly offered family law as an example of a quintessential area of state concern, also persuades this court that marital status determinations are an attribute of state sovereignty.[FN149] For instance, in *Morrison,* the Supreme Court noted that an overly expansive view of the Commerce Clause could lead to federal legislation of "family law and other areas of *traditional state regulation* since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." [FN150] Similarly, in *Elk Grove Unified Sch. Dist. v. Newdow,* the Supreme Court observed "that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' " [FN151]

> FN149. *See, e.g., Lopez,* 514 U.S. 549, 564, 115 S.Ct. 1624 (1995) (noting with disfavor that a broad reading of the Commerce Clause could lead to federal regulation of "family law (including marriage, divorce and child custody)"); *Ankenbrandt v. Richards,* 504 U.S. 689, 703, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992); *Haddock,* 201 U.S. at 575, 26 S.Ct. 525 ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce [and that] the Constitution delegated no authority to the Government of the United States on [that subject]."); *see also, United States v. Molak,* 276 F.3d 45, 50 (1st Cir.2002) ("[d]omestic relations and family matters are, in the first instance, matters of state concern").
>
> FN150. 529 U.S. at 615, 120 S.Ct. 1740 (emphasis added).
>
> FN151. 542 U.S. 1, 12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (quoting *In re Burrus,* 136 U.S. 586, 593, 10 S.Ct. 850, 34 L.Ed. 500 (1890)) (other citations omit- ted).

The government has offered little to disprove the persuasive precedential and historical arguments set forth by the Commonwealth to establish that marital status determinations are an attribute of state sovereignty.[FN152] The primary thrust of the government's rebuttal is, in essence, that DOMA stands firmly rooted in Congress' spending power, and, for that reason, "the fact that Congress had not chosen to codify a definition of marriage for purposes of federal law prior to 1996 does not mean that it was without power to do so or that it renders the 1996 enactment invalid." [FN153] Having determined that DOMA is not rooted in the Spending Clause,

however, this court stands convinced that the authority to regulate marital status is a sovereign attribute of statehood.

> FN152. Certain immigration cases cited by the government do not establish, as it contends, that "courts have long recognized that federal law controls the definition of 'marriage' and related terms." Defs.' Reply Mem., 5. None of these cases involved the displacement of a state marital status determination by a federal one. *Adams v. Howerton,* 673 F.2d 1036 (9th Cir.1982), for instance, involved a challenge by a same-sex spouse to the denial of an immigration status adjustment. Because this case was decided before any state openly and officially recognized marriages between individuals of the same sex, as the Commonwealth does here, *Adams* carries little weight. And, in *Lockhart v. Napolitano,* 573 F.3d 251 (6th Cir.2009), and *Taing v. Napolitano,* 567 F.3d 19 (1st Cir.2009), the courts merely determined that it would be unjust to deny the adjustment of immigration status to surviving spouses of state-sanctioned marriages solely attributable to delays in the federal immigration process.
>
> FN153. Defs.' Reply Mem., 5.

C. *Compliance with DOMA Impairs the Commonwealth's Ability to Structure Integral Operations in Areas of Traditional Governmental Functions*

Having determined that marital status determinations are an attribute of state sovereignty, this court must now determine***252** whether compliance with DOMA would impair the Commonwealth's ability to structure integral operations in areas of traditional governmental functions.[FN154]

> FN154. *United Transp. Union v. Long Island R.R. Co.,* 455 U.S. 678, 684, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982) (citations and quotation marks omitted). It is worth noting up front that this "traditional government functions" analysis has been the subject of much derision. Indeed, this rubric was once explicitly disavowed by the Supreme Court in the governmental immunity context in *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), in which the Court stated that the standard is not only "unworkable but is also inconsistent with established principles of federalism." *Id.* at 531, 105 S.Ct. 1005, see also *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 368-369, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007) (noting that legal standards hinging on "judicial appraisal[s] of whether a particular governmental function is 'integral' or 'traditional' " were "abandon[ed] ... as analytically unsound") (Alito, J., dissenting).
>
> Still, it is this court's understanding that such an analysis is nonetheless appropriate in light of more recent Supreme Court cases, *see, e.g., New York,* 505 U.S. at 159, 112 S.Ct. 2408 (noting that the Tenth Amendment challenges "discern[ ] the core of sovereignty retained by the States"), and *Morrison,* 529 U.S. at 615-16, 120 S.Ct. 1740, which revive the concept of using the Tenth Amendment to police intrusions on the core of sovereignty retained by the state. Moreover, this analysis is necessary, in light of First Circuit precedent, which post-dates the Supreme Court's disavowal of the traditional governmental functions analysis in *Garcia. Bongiorno,* 106 F.3d at 1033.

This third requirement, viewed as the "key prong" of the Tenth Amendment analysis, addresses "whether the federal regulation affects basic state

prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its separate and independent existence." FN155 And, in view of more recent authority, it seems most appropriate for this court to approach this question with a mind towards determining whether DOMA "infring[es] upon the core of state sovereignty." FN156

> FN155. *United Transp. Union v. Long Island R.R. Co.,* 455 U.S. 678, 686-687, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982) (internal citations and quotation marks omitted). This court notes that the concept of "traditional governmental functions" has been the subject of disfavor, *see, e.g., Morrison,* 529 U.S. 598, 645-52, 120 S.Ct. 1740 (2000) (describing this part of the test as "incoherent" because there is "no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other") (Souter, J., dissenting), but was revived by the court in *Morrison.*
>
> FN156. *New York,* 505 U.S. at 177, 112 S.Ct. 2408. It is also important to note that in recent history, Tenth Amendment challenges have largely policed the federal government's efforts to "commandeer" the processes of state government. Here, however, the Commonwealth acknowledges that "this is not a commandeering case." Pl.'s Mem. Supp. Summ. Judg., 22.

Tenth Amendment caselaw does not provide much guidance on this prong of the analysis. It is not necessary to delve too deeply into the nuances of this standard, however, because the undisputed record evidence in this case demonstrates that this is not a close call. DOMA set the Commonwealth on a collision course with the federal government in the field of domestic relations. The government, for its part, considers this to be a case about statutory interpretation, and little more. But this case certainly implicates more than tidy questions of statutory interpretation, as the record includes several concrete examples of the impediments DOMA places on the Commonwealth's basic ability to govern itself.

First, as a result of DOMA, the VA has directly informed the Commonwealth that if it opts to bury same-sex spouses of veterans in the state veterans' cemeteries ***253** at Agawam and Winchendon, the VA is entitled to recapture almost $19 million in federal grants for the construction and maintenance of those properties. The Commonwealth, however, recently approved an application for the burial of Thomas Hopkins, the same-sex partner of Darrel Hopkins, in the Winchendon cemetery, because the state constitution requires that the Commonwealth honor their union. The Commonwealth therefore finds itself in a Catch-22: it can afford the Hopkins' the same privileges as other similarly-situated married couples, as the state constitution requires, and surrender millions in federal grants, or deny the Hopkins' request, and retain the federal funds, but run afoul of its own constitution.

Second, it is clear that DOMA effectively penalizes the state in the context of Medicaid and Medicare.

Since the passage of the MassHealth Equality Act, for instance, the Commonwealth is required to afford same-sex spouses the same benefits as heterosexual spouses. The HHS Centers for Medicare & Medicaid Services, however, has informed the Commonwealth that the federal government will not provide federal funding participation for same-sex spouses because DOMA precludes the recognition of same-sex couples. As a result, the Commonwealth has incurred at least $640,661 in additional costs and as much as $2,224,018 in lost federal funding.

In the same vein, the Commonwealth has incurred a significant additional tax liability since it began to recognize same-sex marriage in 2004 because, as a consequence of DOMA, health benefits afforded to same-sex spouses of Commonwealth employees must be considered taxable income.

That the government views same-sex marriage as a contentious social issue cannot justify its intrusion on the "core of sovereignty retained by the States," [FN157] because "the Constitution ... divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." [FN158] This court has determined that it is clearly within the authority of the Commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status. The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, the statute is invalid.

FN157. *New York,* 505 U.S. at 159, 112 S.Ct. 2408.

FN158. *Id.* at 187, 112 S.Ct. 2408.

IV. *Conclusion*

For the foregoing reasons, Defendants' *Motion to Dismiss* is DENIED and Plaintiff's *Motion for Summary Judgment* is ALLOWED.

AN ORDER HAS ISSUED.

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698 F.Supp.2d 234, Med & Med GD (CCH) P 303,487

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TAB 3

--- F.Supp.2d ----, 2010 WL 3025614 (N.D.Cal.)
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United States District Court,
N.D. California.
Kristin M. PERRY, Sandra B. Stier, Paul T. Katami and Jeffrey J. Zarrillo, Plaintiffs,
City and County of San Francisco, Plaintiff-Intervenor,
v.
Arnold SCHWARZENEGGER, in his official capacity as Governor of California; Edmund G Brown Jr, in his official capacity as Attorney General of California; Mark B Horton, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as Clerk-Recorder of the County of Alameda; and Dean C Logan, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants,
Dennis Hollingsworth, Gail J Knight, Martin F Gutierrez, Hak-Shing William Tam, Mark A Jansson And Protectmarriage.Com-Yes On 8, A Project of California Renewal, as official proponents of Proposition 8, Defendant-Intervenors.
No. C 09-2292 VRW.

Aug. 4, 2010.

Background: Two same-sex couples brought action against Governor of California, Attorney General, Director and Deputy Director of Public Health, and county clerks, challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman, and alleging violation of due process and equal protection under the Fourteenth Amendment. Proponents of amendment intervened on behalf of defendants, and city and county intervened on behalf of plaintiffs.

Holdings: The District Court, Walker, Chief Judge, held that:
(1) witness was qualified to testify as expert in history of marriage in United States;
(2) witness testimony constituted inadmissible opinion testimony that would be given essentially no weight;
(3) constitutional amendment violated Due Process Clause of Fourteenth Amendment; and
(4) constitutional amendment violated Equal Protection Clause of Fourteenth Amendment.

Amendment unconstitutional.

West Headnotes

[1] Constitutional Law 92 ⚿1296

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1294 Establishment of Religion
92k1296 k. Secular Purpose. Most Cited Cases
A state's interest in an enactment must be secular in nature; the state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose.

[2] Evidence 157 ⚿536

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k536 k. Knowledge, Experience, and Skill in General. Most Cited Cases
Witness was qualified to testify as expert in history of marriage in United States, in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman; witness was professor of American history, received PhD in history of American civilization, published 8 books, and marriage scholarship focused on marriage as public institution and as structure regulated by government

for social benefit. West's Ann.Cal. Const. Art. 1, § 7.5.

[3] Evidence 157 ⚿536

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k536 k. Knowledge, Experience, and Skill in General. Most Cited Cases
Witness was qualified to offer expert testimony on social history, especially as it related to gays and lesbians, in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman; witness was professor of history and American studies, received PhD in history, and authored or edited books on subject of gay and lesbian history. West's Ann.Cal. Const. Art. 1, § 7.5.

[4] Evidence 157 ⚿536

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k536 k. Knowledge, Experience, and Skill in General. Most Cited Cases
Witness was qualified to testify as expert on demographic information concerning gays and lesbians, same-sex couples and children raised by gays and lesbians, effects of exclusion of same-sex couples from institution of marriage and effect of permitting same-sex couples to marry on heterosexual society and institution of marriage, in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman; witness was professor of economics and law, received PhD in economics, wrote two books and several articles on gay and lesbian relationships and same-sex marriage, co-authored two reports analyzing fiscal impact of allowing same-sex couples to marry in California, and testified before federal and state government bodies about domestic partner benefits and antidiscrimination laws. West's Ann.Cal. Const. Art. 1, § 7.5.

[5] Evidence 157 ⚿536

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k536 k. Knowledge, Experience, and Skill in General. Most Cited Cases
Witness was qualified to testify as expert in urban and regional economic policy in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman; witness was chief economist in city controller's officer and prepared economic impact analysis reports for pending legislation, in preparing economic impact reports witness relied on government data and reports, private reports and independent research to determine whether legislation had "real regulatory power" and effects of legislation on private behavior, witness received PhD in city and regional planning, and was adjunct faculty member at university teaching graduate students on regional and urban economics and regional and city planning. West's Ann.Cal. Const. Art. 1, § 7.5.

[6] Evidence 157 ⚿536

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k536 k. Knowledge, Experience, and Skill in General. Most Cited Cases
Witness was qualified to testify as expert on couple relationships within field of psychology in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman; witness was professor of psychology and vice chair of graduate studies in psychology, her research focused on social psychology, which was branch of psychology that focused on human relationships and social influence, she began studying same-sex relationships in the 1970s, and published or edited about 10 books, authored about 120 peer-reviewed articles and published literature reviews on psychology, relationships and sexuality. West's Ann.Cal.

Const. Art. 1, § 7.5.

[7] Evidence 157 ⚿536

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k536 k. Knowledge, Experience, and Skill in General. Most Cited Cases

Evidence 157 ⚿537

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k537 k. Bodily and Mental Condition. Most Cited Cases
Witness was qualified to testify as expert in public health with a focus on social psychology and psychiatric epidemiology in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman; witness was associate professor of sociomedical sciences, received PhD in sociomedical sciences, studied relationship between social issues and structures and patterns of mental health outcomes with specific focus on lesbian, gay and bisexual populations, published about 40 peer-reviewed articles, taught course on gay and lesbian issues in public health, received numerous awards for his professional work, and edited and reviewed journals and books. West's Ann.Cal. Const. Art. 1, § 7.5.

[8] Evidence 157 ⚿536

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k536 k. Knowledge, Experience, and Skill in General. Most Cited Cases

Evidence 157 ⚿537

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k537 k. Bodily and Mental Condition. Most Cited Cases
Witness was qualified to testify as expert in social psychology with a focus on sexual orientation and stigma in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman; witness was professor of psychology, received PhD in personality and social psychology, his dissertation focused on heterosexuals' attitudes towards lesbians and gay men, he regularly taught course on sexual orientation and prejudice, he served on editorial boards of peer-reviewed journals and published over 100 articles and chapters on sexual orientation, stigma and prejudice. West's Ann.Cal. Const. Art. 1, § 7.5.

[9] Evidence 157 ⚿537

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k537 k. Bodily and Mental Condition. Most Cited Cases
Witness was qualified to testify as expert on the developmental psychology of children, including the developmental psychology of children raised by gay and lesbian parents, in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman; witness received PhD, was professor and head of university department of social and developmental psychology, was head of section on social and emotional development of governmental organization for 17 years, published approximately 500 articles, many about child adjustment, edited 40 books in developmental psychology, reviewed about 100 articles a year and served on editorial boards on several academic journals. West's Ann.Cal. Const. Art. 1, § 7.5.

[10] Evidence 157 ⚿536

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts

157k536 k. Knowledge, Experience, and Skill in General. Most Cited Cases
Witness was qualified to testify as expert on political power or powerlessness of minority groups in United States, and of gays and lesbians in particular, in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman; witness was professor of political science and received PhD in political science, operated institute which provided political scientists with data about American electorate's views about politics, served on editorial boards of major political science journals, published about 25 peer-reviewed articles, authored about 15 chapters in edited volumes, presented at between 20 and 40 conferences in 10 years, and published three pieces specific to gay and lesbian politics and political issues. West's Ann.Cal. Const. Art. 1, § 7.5.

[11] Evidence 157 ⚿555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases

Evidence 157 ⚿555.4(5)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.4 Sources of Data
157k555.4(5) k. Opinions of Others. Most Cited Cases
Proffered expert's opinions on definition of marriage, ideal family structure, and potential consequences of state recognition of marriage for same-sex couples was not supported by reliable evidence or methodology, and thus constituted inadmissible opinion testimony that would be given essentially no weight in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman; opinions relied on quotations of others to define marriage and provided no explanation of meaning of passages cited or their sources, witness gave no explanation of methodology that led him to his definition of marriage other than review of others' work, and witness failed to consider evidence contrary to his view in presenting testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.West's Ann.Cal. Const. Art. 1, § 7.5.

[12] Evidence 157 ⚿555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases
Expert testimony must be both relevant and reliable, with a basis in the knowledge and experience of the relevant discipline. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[13] Evidence 157 ⚿555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases
The party proffering the evidence must explain the expert's methodology and demonstrate in some objectively verifiable way that the expert has both chosen a reliable method and followed it faithfully. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[14] Evidence 157 ⚿555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Suffi-

ciency. Most Cited Cases
Several factors are relevant to an expert's reliability: (1) whether a method can be and has been tested, (2) whether the method has been subjected to peer review and publication, (3) the known or potential rate of error, (4) the existence and maintenance of standards controlling the method's operation, (5) a degree of acceptance of the method within a relevant community, (6) whether the expert is proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, (8) whether the expert has adequately accounted for obvious alternative explanations, (9) whether the expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field, and (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[15] Evidence 157 ⚿536

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k536 k. Knowledge, Experience, and Skill in General. Most Cited Cases
Witness was not qualified to testify as expert on gay and lesbian political power, and thus opinions on gay and lesbian political power were entitled to little weight and only to extent they were amply supported by reliable evidence in same-sex couples' action challenging California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman, although witness had significant experience with politics generally; witness stated that he did not know at time of his deposition status of antidiscrimination provisions to protect gays and lesbians at state and local level and could only identify two federal examples of official discrimination against gays and lesbians, witness admitted he had not investigated scope of private employment discrimination against gays and lesbians and had no reason to dispute data on discrimination, witness did not know whether gays and lesbians had more or less political power than African Americans, either in California or nationally, and conceded that gays and lesbians faced current discrimination and that current discrimination was relevant to group's political power. West's Ann.Cal. Const. Art. 1, § 7.5.

[16] Constitutional Law 92 ⚿3876

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3876 k. Arbitrariness. Most Cited Cases
Due process protects individuals against arbitrary governmental intrusion into life, liberty or property. U.S.C.A. Const.Amend. 14, § 1.

[17] Constitutional Law 92 ⚿1053

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1053 k. Strict or Heightened Scrutiny; Compelling Interest. Most Cited Cases
When legislation burdens the exercise of a right deemed to be fundamental, the government must show that the intrusion withstands strict scrutiny.

[18] Constitutional Law 92 ⚿4384

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4383 Marital Relationship
92k4384 k. In General. Most Cited Cases
The freedom to marry is recognized as a fundamental right protected by the Due Process Clause.

U.S.C.A. Const.Amend. 14, § 1.

[19] Constitutional Law 92 ⚿3870

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3870 k. Fundamental Rights. Most Cited Cases
To determine whether a right is fundamental under the Due Process Clause, the court inquires into whether the right is rooted in the Nation's history, legal traditions, and practices. U.S.C.A. Const.Amend. 14, § 1.

[20] Constitutional Law 92 ⚿4385

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4383 Marital Relationship
92k4385 k. Same-Sex Marriage. Most Cited Cases

Marriage 253 ⚿2

253 Marriage
253k2 k. Power to Regulate and Control. Most Cited Cases

Marriage 253 ⚿17.5(1)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(1) k. In General. Most Cited Cases
California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman was not narrowly tailored to meeting compelling governmental interest, and thus violated Due Process Clause of Fourteenth Amendment; same-sex couples sought to exercise fundamental right to marry, and availability of domestic partnerships to same-sex couples did not satisfy fundamental right to marry. U.S.C.A. Const.Amend. 14; West's Ann.Cal. Const. Art. 1, § 7.5; West's Ann.Cal.Fam. Code §§ 297.5(a), 297(b)(5)(B).

[21] Constitutional Law 92 ⚿1052

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1052 k. Fundamental Rights. Most Cited Cases
Fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

[22] Constitutional Law 92 ⚿1053

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1053 k. Strict or Heightened Scrutiny; Compelling Interest. Most Cited Cases
Under strict scrutiny, the state bears the burden of producing evidence to show that a provision is narrowly tailored to a compelling government interest. U.S.C.A. Const.Amend. 14.

[23] Constitutional Law 92 ⚿1020

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1020 k. Classification or Discrimination in General. Most Cited Cases

Constitutional Law 92 ⚿2970

92 Constitutional Law
92XXV Class Legislation; Discrimination and Classification in General
92k2970 k. In General. Most Cited Cases

When a law creates a classification but neither targets a suspect class nor burdens a fundamental right, the court presumes the law is valid and will uphold it as long as it is rationally related to some legitimate government interest.

[24] Constitutional Law 92 ⚿2970

92 Constitutional Law
92XXV Class Legislation; Discrimination and Classification in General
92k2970 k. In General. Most Cited Cases
The court defers to legislative or popular judgment when determining whether law is rationally related to some legitimate government interest if there is at least a debatable question whether the underlying basis for the classification is rational.

[25] Constitutional Law 92 ⚿3053

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3053 k. In General. Most Cited Cases
The search for a rational relationship, for purposes of an equal protection analysis, while quite deferential, ensures that classifications are not drawn for the purpose of disadvantaging the group burdened by the law; the classification itself must be related to the purported interest. U.S.C.A. Const.Amend. 14, § 1.

[26] Constitutional Law 92 ⚿3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
To survive rational basis review, for equal protection purposes, a law must do more than disadvantage or otherwise harm a particular group. U.S.C.A. Const.Amend. 14, § 1.

[27] Constitutional Law 92 ⚿3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and Civil Unions. Most Cited Cases

Marriage 253 ⚿2

253 Marriage
253k2 k. Power to Regulate and Control. Most Cited Cases

Marriage 253 ⚿17.5(1)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(1) k. In General. Most Cited Cases
Excluding same-sex couples from marriage was not rationally related to legitimate state interest, and thus California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman violated Equal Protection Clause of Fourteenth Amendment, although proponents alleged state interests including reserving marriage as union between a man and a woman and excluding any other relationship from marriage, proceeding with caution when implementing social changes, promoting opposite-sex parenting over same-sex parenting, protecting freedom of those who opposed same-sex marriage, and treating same-sex couples differently from opposite-sex couples; marriage licenses in California were not limited commodity, state had resources to allow both same-sex and opposite-sex couples to wed, tradition of restricting marriage to opposite-sex couples did not further state interest, allowing same-sex couples to

marry had at least neutral, if not positive, effect on institution of marriage same-sex couples' marriages would benefit state, parents' genders were irrelevant to children's developmental outcomes, amendment did not protect rights of those opposed to same-sex couples, and amendment hindered administrative convenience. U.S.C.A. Const.Amend. 14; West's Ann.Cal. Const. Art. 1, § 7.5.

West Codenotes
Held UnconstitutionalWest's Ann.Cal. Const. Art. 1, § 7.5

PRETRIAL PROCEEDINGS AND TRIAL EVIDENCE

WALKER, Chief Judge.

CREDIBILITY DETERMINATIONS

FINDINGS OF FACT

CONCLUSIONS OF LAW

ORDER

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Plaintiffs challenge a November 2008 voter-enacted amendment to the California Constitution ("Proposition 8" or "Prop 8"). Cal Const Art I, § 7.5. In its entirety, Proposition 8 provides: "Only marriage between a man and a woman is valid or recognized in California." Plaintiffs allege that Proposition 8 deprives them of due process and of equal protection of the laws contrary to the Fourteenth Amendment and that its enforcement by state officials violates 42 USC § 1983.

Plaintiffs are two couples. Kristin Perry and Sandra Stier reside in Berkeley, California and raise four children together. Jeffrey Zarrillo and Paul Katami

reside in Burbank, California. Plaintiffs seek to marry their partners and have been denied marriage licenses by their respective county authorities on the basis of Proposition 8. No party contended, and no evidence at trial suggested, that the county authorities had any ground to deny marriage licenses to plaintiffs other than Proposition 8.

Having considered the trial evidence and the arguments of counsel, the court pursuant to FRCP 52(a) finds that Proposition 8 is unconstitutional and that its enforcement must be enjoined.

BACKGROUND TO PROPOSITION 8

In November 2000, the voters of California adopted Proposition 22 through the state's initiative process. Entitled the California Defense of Marriage Act, Proposition 22 amended the state's Family Code by adding the following language: "Only marriage between a man and a woman is valid or recognized in California." Cal Family Code § 308.5. This amendment further codified the existing definition of marriage as "a relationship between a man and a woman." *In re Marriage Cases,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 407 (Cal 2008).

In February 2004, the mayor of San Francisco instructed county officials to issue marriage licenses to same-sex couples. The following month, the California Supreme Court ordered San Francisco to stop issuing such licenses and later nullified the marriage licenses that same-sex couples had received. See *Lockyer v. City & County of San Francisco,* 33 Cal.4th 1055, 17 Cal.Rptr.3d 225, 95 P.3d 459 (Cal 2004). The court expressly avoided addressing whether Proposition 22 violated the California Constitution.

Shortly thereafter, San Francisco and various other parties filed state court actions challenging or defending California's exclusion of same-sex couples from marriage under the state constitution. These actions were consolidated in San Francisco superior court; the presiding judge determined that, as a matter of law, California's bar against marriage by same-sex couples violated the equal protection guarantee of Article I Section 7 of the California Constitution. *In re Coordination Proceeding, Special Title [Rule 1550(c)],* 2005 WL 583129 (March 14, 2005). The court of appeal reversed, and the California Supreme Court granted review. In May 2008, the California Supreme Court invalidated Proposition 22 and held that all California counties were required to issue marriage licenses to same-sex couples. See *In re Marriage Cases,* 189 P3d 384. From June 17, 2008 until the passage of Proposition 8 in November of that year, San Francisco and other California counties issued approximately 18,000 marriage licenses to same-sex couples.

***2** After the November 2008 election, opponents of Proposition 8 challenged the initiative through an original writ of mandate in the California Supreme Court as violating the rules for amending the California Constitution and on other grounds; the California Supreme Court upheld Proposition 8 against those challenges. *Strauss v. Horton,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (Cal 2009). *Strauss* leaves undisturbed the 18,000 marriages of same-sex couples performed in the four and a half months between the decision in In *re Marriage Cases* and the passage of Proposition 8. Since Proposition 8 passed, no same-sex couple has been permitted to marry in California.

PROCEDURAL HISTORY OF THIS ACTION

Plaintiffs challenge the constitutionality of Proposition 8 under the Fourteenth Amendment, an issue not raised during any prior state court proceeding. Plaintiffs filed their complaint on May 22, 2009, naming as defendants in their official capacities California's Governor, Attorney General and Director and Deputy Director of Public Health and the Alameda County Clerk-Recorder and the Los Angeles County Registrar-Recorder/County Clerk (collectively "the government defendants"). Doc # 1. With the exception of the Attorney General, who concedes that Proposition 8 is unconstitutional, Doc

39, the government defendants refused to take a position on the merits of plaintiffs' claims and declined to defend Proposition 8. Doc # 42 (Alameda County), Doc # 41 (Los Angeles County), Doc # 46 (Governor and Department of Public Health officials).

Defendant-intervenors, the official proponents of Proposition 8 under California election law ("proponents"), were granted leave in July 2009 to intervene to defend the constitutionality of Proposition 8. Doc # 76. On January 8, 2010, Hak-Shing William Tam, an official proponent and defendant-intervenor, moved to withdraw as a defendant, Doc # 369; Tam's motion is denied for the reasons stated in a separate order filed herewith. Plaintiff-intervenor City and County of San Francisco ("CCSF" or "San Francisco") was granted leave to intervene in August 2009. Doc # 160 (minute entry).

The court denied plaintiffs' motion for a preliminary injunction on July 2, 2009, Doc # 77 (minute entry), and denied proponents' motion for summary judgment on October 14, 2009, Doc # 226 (minute entry). Proponents moved to realign the Attorney General as a plaintiff; the motion was denied on December 23, 2009, Doc # 319. Imperial County, a political subdivision of California, sought to intervene as a party defendant on December 15, 2009, Doc # 311; the motion is denied for the reasons addressed in a separate order filed herewith.

***3** The parties disputed the factual premises underlying plaintiffs' claims and the court set the matter for trial. The action was tried to the court January 11-27, 2010. The trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law; the clerk is now DIRECTED to file the trial recording under seal as part of the record. The parties may retain their copies of the trial recording pursuant to the terms of the protective order herein, see Doc # 672. Proponents' motion to order the copies' return, Doc # 698, is accordingly DENIED.

PLAINTIFFS' CASE AGAINST PROPOSITION 8

The Due Process Clause provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." US Const Amend XIV, § 1. Plaintiffs contend that the freedom to marry the person of one's choice is a fundamental right protected by the Due Process Clause and that Proposition 8 violates this fundamental right because:

1. It prevents each plaintiff from marrying the person of his or her choice;

2. The choice of a marriage partner is sheltered by the Fourteenth Amendment from the state's unwarranted usurpation of that choice; and

3. California's provision of a domestic partnership -- a status giving same-sex couples the rights and responsibilities of marriage without providing marriage -- does not afford plaintiffs an adequate substitute for marriage and, by disabling plaintiffs from marrying the person of their choice, invidiously discriminates, without justification, against plaintiffs and others who seek to marry a person of the same sex.

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." US Const Amend XIV, § 1. According to plaintiffs, Proposition 8 violates the Equal Protection Clause because it:

1. Discriminates against gay men and lesbians by denying them a right to marry the person of their choice whereas heterosexual men and women may do so freely; and

2. Disadvantages a suspect class in preventing only gay men and lesbians, not heterosexuals, from marrying.

Plaintiffs argue that Proposition 8 should be subjected to heightened scrutiny under the Equal Protection Clause because gays and lesbians constitute a suspect class. Plaintiffs further contend that Propos-

ition 8 is irrational because it singles out gays and lesbians for unequal treatment, as they and they alone may not marry the person of their choice. Plaintiffs argue that Proposition 8 discriminates against gays and lesbians on the basis of both sexual orientation and sex.

Plaintiffs conclude that because Proposition 8 is enforced by state officials acting under color of state law and because it has the effects plaintiffs assert, Proposition 8 is actionable under 42 USC § 1983. Plaintiffs seek a declaration that Proposition 8 is invalid and an injunction against its enforcement.

PROPONENTS' DEFENSE OF PROPOSITION 8

***4** Proponents organized the official campaign to pass Proposition 8, known as ProtectMarriage.com -- Yes on 8, a Project of California Renewal ("Protect Marriage"). Proponents formed and managed the Protect Marriage campaign and ensured its efforts to pass Proposition 8 complied with California election law. See FF 13-17 below. After orchestrating the successful Proposition 8 campaign, proponents intervened in this lawsuit and provided a vigorous defense of the constitutionality of Proposition 8.

The ballot argument submitted to the voters summarizes proponents' arguments in favor of Proposition 8 during the 2008 campaign. The argument states:

> Proposition 8 is simple and straightforward. * * * Proposition 8 is about preserving marriage; *it's not an attack on the gay lifestyle.* * * * *It protects our children* from being taught in public schools that "same-sex marriage" is the same as traditional marriage. * * * 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. * * * If the gay marriage ruling [of the California Supreme Court] is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is *no difference* between gay marriage and traditional marriage.
>
> We should not accept a court decision that may result in public schools teaching our own kids that gay marriage is ok. * * * [W]hile gays have the right to their private lives, *they do not have the right to redefine marriage* for everyone else.

PX0001 [FN1] California Voter Information Guide, California General Election, Tuesday, November 4, 2008 at PM 003365 (emphasis in original).

In addition to the ballot arguments, the Proposition 8 campaign presented to the voters of California a multitude of television, radio and internet-based advertisements and messages. The advertisements conveyed to voters that same-sex relationships are inferior to opposite-sex relationships and dangerous to children. See FF 79-80 below. The key premises on which Proposition 8 was presented to the voters thus appear to be the following:

1. Denial of marriage to same-sex couples preserves marriage;

2. Denial of marriage to same-sex couples allows gays and lesbians to live privately without requiring others, including (perhaps especially) children, to recognize or acknowledge the existence of same-sex couples;

3. Denial of marriage to same-sex couples protects children;

4. The ideal child-rearing environment requires one male parent and one female parent;

5. Marriage is different in nature depending on the sex of the spouses, and an opposite-sex couple's marriage is superior to a same-sex couple's marriage; and

6. Same-sex couples' marriages redefine opposite-sex couples' marriages.

***5** [1] A state's interest in an enactment must of course be secular in nature. The state does not have

an interest in enforcing private moral or religious beliefs without an accompanying secular purpose. See *Lawrence v. Texas,* 539 U.S. 558, 571, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); see also *Everson v. Board of Education of Ewing Township,* 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

Perhaps recognizing that Proposition 8 must advance a secular purpose to be constitutional, proponents abandoned previous arguments from the campaign that had asserted the moral superiority of opposite-sex couples. Instead, in this litigation, proponents asserted that Proposition 8:

1. Maintains California's definition of marriage as excluding same-sex couples;

2. Affirms the will of California citizens to exclude same-sex couples from marriage;

3. Promotes stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children; and

4. Promotes "statistically optimal" child-rearing households; that is, households in which children are raised by a man and a woman married to each other.

Doc # 8 at 17-18.

While proponents vigorously defended the constitutionality of Proposition 8, they did so based on legal conclusions and cross-examinations of some of plaintiffs' witnesses, eschewing all but a rather limited factual presentation.

Proponents argued that Proposition 8 should be evaluated solely by considering its language and its consistency with the "central purpose of marriage, in California and everywhere else, * * * to promote naturally procreative sexual relationships and to channel them into stable, enduring unions for the sake of producing and raising the next generation." Doc # 172-1 at 21. Proponents asserted that marriage for same-sex couples is not implicit in the concept of ordered liberty and thus its denial does not deprive persons seeking such unions of due process. See generally Doc # 172-1. Nor, proponents continued, does the exclusion of same-sex couples in California from marriage deny them equal protection because, among other reasons, California affords such couples a separate parallel institution under its domestic partnership statutes. Doc # 172-1 at 75 et seq.

At oral argument on proponents' motion for summary judgment, the court posed to proponents' counsel the assumption that "the state's interest in marriage is procreative" and inquired how permitting same-sex marriage impairs or adversely affects that interest. Doc # 228 at 21. Counsel replied that the inquiry was "not the legally relevant question," id, but when pressed for an answer, counsel replied: "Your honor, my answer is: I don't know. I don't know." Id at 23.

Despite this response, proponents in their trial brief promised to "demonstrate that redefining marriage to encompass same-sex relationships" would effect some twenty-three specific harmful consequences. Doc # 295 at 13-14. At trial, however, proponents presented only one witness, David Blankenhorn, to address the government interest in marriage. Blankenhorn's testimony is addressed at length hereafter; suffice it to say that he provided no credible evidence to support any of the claimed adverse effects proponents promised to demonstrate. During closing arguments, proponents again focused on the contention that "responsible procreation is really at the heart of society's interest in regulating marriage." Tr 3038:7-8. When asked to identify the evidence at trial that supported this contention, proponents' counsel replied, "you don't have to have evidence of this point." Tr 3037:25-3040:4.

Proponents' procreation argument, distilled to its essence, is as follows: the state has an interest in encouraging sexual activity between people of the opposite sex to occur in stable marriages because such sexual activity may lead to pregnancy and children, and the state has an interest in encouraging parents to raise children in stable households.

Tr 3050:17-3051:10. The state therefore, the argument goes, has an interest in encouraging all opposite-sex sexual activity, whether responsible or irresponsible, procreative or otherwise, to occur within a stable marriage, as this encourages the development of a social norm that opposite-sex sexual activity should occur within marriage. Tr 3053:10-24. Entrenchment of this norm increases the probability that procreation will occur within a marital union. Because same-sex couples' sexual activity does not lead to procreation, according to proponents the state has no interest in encouraging their sexual activity to occur within a stable marriage. Thus, according to proponents, the state's only interest is in opposite-sex sexual activity.

TRIAL PROCEEDINGS AND SUMMARY OF TESTIMONY

***6** The parties' positions on the constitutionality of Proposition 8 raised significant disputed factual questions, and for the reasons the court explained in denying proponents' motion for summary judgment, Doc # 228 at 72-91, the court set the matter for tri- al.

The parties were given a full opportunity to present evidence in support of their positions. They engaged in significant discovery, including third-party discovery, to build an evidentiary record. Both before and after trial, both in this court and in the court of appeals, the parties and third parties disputed the appropriate boundaries of discovery in an action challenging a voter-enacted initiative. See, for example, Doc # # 187, 214, 237, 259, 372, 513.

Plaintiffs presented eight lay witnesses, including the four plaintiffs, and nine expert witnesses. Proponents' evidentiary presentation was dwarfed by that of plaintiffs. Proponents presented two expert witnesses and conducted lengthy and thorough cross-examinations of plaintiffs' expert witnesses but failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest.

Although the evidence covered a range of issues, the direct and cross-examinations focused on the following broad questions:

> WHETHER ANY EVIDENCE SUPPORTS CALIFORNIA'S REFUSAL TO RECOGNIZE MARRIAGE BETWEEN TWO PEOPLE BECAUSE OF THEIR SEX;
>
> WHETHER ANY EVIDENCE SHOWS CALIFORNIA HAS AN INTEREST IN DIFFERENTIATING BETWEEN SAME-SEX AND OPPOSITE-SEX UNIONS; and
>
> WHETHER THE EVIDENCE SHOWS PROPOSITION 8 ENACTED A PRIVATE MORAL VIEW WITHOUT ADVANCING A LEGITIMATE GOVERNMENT INTEREST.

Framed by these three questions and before detailing the court's credibility determinations and findings of fact, the court abridges the testimony at tri- al:

WHETHER ANY EVIDENCE SUPPORTS CALIFORNIA'S REFUSAL TO RECOGNIZE MARRIAGE BETWEEN TWO PEOPLE BECAUSE OF THEIR SEX

All four plaintiffs testified that they wished to marry their partners, and all four gave similar reasons. Zarrillo wishes to marry Katami because marriage has a "special meaning" that would alter their relationships with family and others. Zarrillo described daily struggles that arise because he is unable to marry Katami or refer to Katami as his husband. Tr 84:1-17. Zarrillo described an instance when he and Katami went to a bank to open a joint account, and "it was certainly an awkward situation walking to the bank and saying, 'My partner and I want to open a joint bank account,' and hearing, you know, 'Is it a business account? A partnership?' It would just be a lot easier to describe the situation -- might not make it less awkward for those individuals, but it would make it -- crystalize it more by being able to say * * * 'My husband and

I are here to open a bank account.' " Id. To Katami, marriage to Zarrillo would solidify their relationship and provide them the foundation they seek to raise a family together, explaining that for them, "the timeline has always been marriage first, before family." Tr 89:17-18.

*7 Perry testified that marriage would provide her what she wants most in life: a stable relationship with Stier, the woman she loves and with whom she has built a life and a family. To Perry, marriage would provide access to the language to describe her relationship with Stier: "I'm a 45-year-old woman. I have been in love with a woman for 10 years and I don't have a word to tell anybody about that." Tr 154:20-23. Stier explained that marrying Perry would make them feel included "in the social fabric." Tr 175:22. Marriage would be a way to tell "our friends, our family, our society, our community, our parents * * * and each other that this is a lifetime commitment * * * we are not girlfriends. We are not partners. We are married." Tr 172:8-12.

Plaintiffs and proponents presented expert testimony on the meaning of marriage. Historian Nancy Cott testified about the public institution of marriage and the state's interest in recognizing and regulating marriages. Tr 185:9-13. She explained that marriage is "a couple's choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life." Tr 201:9-14. The state's primary purpose in regulating marriage is to create stable households. Tr 222:13-17.

Think tank founder David Blankenhorn testified that marriage is "a socially-approved sexual relationship between a man and a woman" with a primary purpose to "regulate filiation." Tr 2742:9-10, 18. Blankenhorn testified that others hold to an alternative and, to Blankenhorn, conflicting definition of marriage: "a private adult commitment" that focuses on "the tender feelings that the spouses have for one another." Tr 2755:25-2756:1; 2756:10-2757:17; 2761:5-6. To Blankenhorn, marriage is either a socially approved sexual relationship between a man and a woman for the purpose of bearing and raising children who are biologically related to both spouses or a private relationship between two consenting adults.

Cott explained that marriage as a social institution encompasses a socially approved sexual union and an affective relationship and, for the state, forms the basis of stable households and private support obligations.

*8 Both Cott and Blankenhorn addressed marriage as a historical institution. Cott pointed to consistent historical features of marriage, including that civil law, as opposed to religious custom, has always been supreme in regulating and defining marriage in the United States, Tr 195:9-15, and that one's ability to consent to marriage is a basic civil right, Tr 202:2-5. Blankenhorn identified three rules of marriage (discussed further in the credibility determinations, section I below), which he testified have been consistent across cultures and times: (1) the rule of opposites (the "man/woman" rule); (2) the rule of two; and (3) the rule of sex. Tr 2879:17-25.

Cott identified historical changes in the institution of marriage, including the removal of race restrictions through court decisions and the elimination of coverture and other gender-based distinctions. Blankenhorn identified changes that to him signify the deinstitutionalization of marriage, including an increase in births outside of marriage and an increasing divorce rate.

Both Cott and Blankenhorn testified that California stands to benefit if it were to resume issuing marriage licenses to same-sex couples. Blankenhorn noted that marriage would benefit same-sex couples and their children, would reduce discrimination against gays and lesbians and would be "a victory for the worthy ideas of tolerance and inclusion." Tr 2850:12-13. Despite the multitude of benefits identified by Blankenhorn that would flow to the state,

to gays and lesbians and to American ideals were California to recognize same-sex marriage, Blankenhorn testified that the state should not recognize same-sex marriage. Blankenhorn reasoned that the benefits of same-sex marriage are not valuable enough because same-sex marriage could conceivably weaken marriage as an institution. Cott testified that the state would benefit from recognizing same-sex marriage because such marriages would provide "another resource for stability and social order." Tr 252:19-23.

Psychologist Letitia Anne Peplau testified that couples benefit both physically and economically when they are married. Peplau testified that those benefits would accrue to same-sex as well as opposite-sex married couples. To Peplau, the desire of same-sex couples to marry illustrates the health of the institution of marriage and not, as Blankenhorn testified, the weakening of marriage. Economist Lee Badgett provided evidence that same-sex couples would benefit economically if they were able to marry and that same-sex marriage would have no adverse effect on the institution of marriage or on opposite-sex couples.

As explained in the credibility determinations, section I below, the court finds the testimony of Cott, Peplau and Badgett to support findings on the definition and purpose of civil marriage; the testimony of Blankenhorn is unreliable. The trial evidence provides no basis for establishing that California has an interest in refusing to recognize marriage between two people because of their sex.

WHETHER ANY EVIDENCE SHOWS CALIFORNIA HAS AN INTEREST IN DIFFERENTIATING BETWEEN SAME-SEX AND OPPOSITE-SEX UNIONS

***9** Plaintiffs' experts testified that no meaningful differences exist between same-sex couples and opposite-sex couples. Blankenhorn identified one difference: some opposite-sex couples are capable of creating biological offspring of both spouses while same-sex couples are not.

Psychologist Gregory Herek defined sexual orientation as "an enduring sexual, romantic, or intensely affectional attraction to men, to women, or to both men and women. It's also used to refer to an identity or a sense of self that is based on one's enduring patterns of attraction. And it's also sometimes used to describe an enduring pattern of behavior." Tr 2025:5-11. Herek explained that homosexuality is a normal expression of human sexuality; the vast majority of gays and lesbians have little or no choice in their sexual orientation; and therapeutic efforts to change an individual's sexual orientation have not been shown to be effective and instead pose a risk of harm to the individual. Proponents did not present testimony to contradict Herek but instead questioned him on data showing that some individuals report fluidity in their sexual orientation. Herek responded that the data proponents presented does nothing to contradict his conclusion that the vast majority of people are consistent in their sexual orientation.

Peplau pointed to research showing that, despite stereotypes suggesting gays and lesbians are unable to form stable relationships, same-sex couples are in fact indistinguishable from opposite-sex couples in terms of relationship quality and stability. Badgett testified that same-sex and opposite-sex couples are very similar in most economic and demographic respects. Peplau testified that the ability of same-sex couples to marry will have no bearing on whether opposite-sex couples choose to marry or divorce.

Social epidemiologist Ilan Meyer testified about the harm gays and lesbians have experienced because of Proposition 8. Meyer explained that Proposition 8 stigmatizes gays and lesbians because it informs gays and lesbians that the State of California rejects their relationships as less valuable than opposite-sex relationships. Proposition 8 also provides state endorsement of private discrimination. According to Meyer, Proposition 8 increases the likelihood of negative mental and physical health outcomes for

gays and lesbians.

Psychologist Michael Lamb testified that all available evidence shows that children raised by gay or lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents and that the gender of a parent is immaterial to whether an adult is a good parent. When proponents challenged Lamb with studies purporting to show that married parents provide the ideal child-rearing environment, Lamb countered that studies on child-rearing typically compare married opposite-sex parents to single parents or step-families and have no bearing on families headed by same-sex couples. Lamb testified that the relevant comparison is between families headed by same-sex couples and families headed by opposite-sex couples and that studies comparing these two family types show conclusively that having parents of different genders is irrelevant to child outcomes.

Lamb and Blankenhorn disagreed on the importance of a biological link between parents and children. Blankenhorn emphasized the importance of biological parents, relying on studies comparing children raised by married, biological parents with children raised by single parents, unmarried mothers, step families and cohabiting parents. Tr 2769:14-24 (referring to DIX0026 Kristin Anderson Moore, Susan M Jekielek, and Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It,* Child Trends (June 2002)); Tr 2771:1-13 (referring to DIX0124 Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Harvard 1994)). As explained in the credibility determinations, section I below, none of the studies Blankenhorn relied on isolates the genetic relationship between a parent and a child as a variable to be tested. Lamb testified about studies showing that adopted children or children conceived using sperm or egg donors are just as likely to be well-adjusted as children raised by their biological parents. Tr 1041:8-17. Blankenhorn agreed with Lamb that adoptive parents "actually on some outcomes outstrip biological parents in terms of providing protective care for their children." Tr 2795:3-5.

***10** Several experts testified that the State of California and California's gay and lesbian population suffer because domestic partnerships are not equivalent to marriage. Badgett explained that gays and lesbians are less likely to enter domestic partnerships than to marry, meaning fewer gays and lesbians have the protection of a state-recognized relationship. Both Badgett and San Francisco economist Edmund Egan testified that states receive greater economic benefits from marriage than from domestic partnerships. Meyer testified that domestic partnerships actually stigmatize gays and lesbians even when enacted for the purpose of providing rights and benefits to same-sex couples. Cott explained that domestic partnerships cannot substitute for marriage because domestic partnerships do not have the same social and historical meaning as marriage and that much of the value of marriage comes from its social meaning. Peplau testified that little of the cultural esteem surrounding marriage adheres to domestic partnerships.

To illustrate his opinion that domestic partnerships are viewed by society as different from marriage, Herek pointed to a letter sent by the California Secretary of State to registered domestic partners in 2004 informing them of upcoming changes to the law and suggesting dissolution of their partnership to avoid any unwanted financial effects. Tr 2047:15-2048:5, PX2265 (Letter from Kevin Shelley, California Secretary of State, to Registered Domestic Partners). Herek concluded that a similar letter to married couples would not have suggested divorce. Tr 2048:6-13.

The experts' testimony on domestic partnerships is consistent with the testimony of plaintiffs, who explained that domestic partnerships do not satisfy their desire to marry. Stier, who has a registered domestic partnership with Perry, explained that "there is certainly nothing about domestic partnership* * * that indicates the love and commitment that are in-

herent in marriage." Tr 171:8-11. Proponents did not challenge plaintiffs' experts on the point that marriage is a socially superior status to domestic partnership; indeed, proponents stipulated that "[t]here is a significant symbolic disparity between domestic partnership and marriage." Doc # 159-2 at 6.

Proponents' cross-examinations of several experts challenged whether people can be categorized based on their sexual orientation. Herek, Meyer and Badgett responded that sexual orientation encompasses behavior, identity and attraction and that most people are able to answer questions about their sexual orientation without formal training. According to the experts, researchers may focus on one element of sexual orientation depending on the purpose of the research and sexual orientation is not a difficult concept for researchers to apply.

***11** As explained in the credibility determinations, section I below, and the findings of fact, section II below, the testimony shows that California has no interest in differentiating between same-sex and opposite-sex unions.

WHETHER THE EVIDENCE SHOWS PROPOSITION 8 ENACTED A PRIVATE MORAL VIEW WITHOUT ADVANCING A LEGITIMATE GOVERNMENT INTEREST

The testimony of several witnesses disclosed that a primary purpose of Proposition 8 was to ensure that California confer a policy preference for opposite-sex couples over same-sex couples based on a belief that same-sex pairings are immoral and should not be encouraged in California.

Historian George Chauncey testified about a direct relationship between the Proposition 8 campaign and initiative campaigns from the 1970s targeting gays and lesbians; like earlier campaigns, the Proposition 8 campaign emphasized the importance of protecting children and relied on stereotypical images of gays and lesbians, despite the lack of any evidence showing that gays and lesbians pose a danger to children. Chauncey concluded that the Proposition 8 campaign did not need to explain what children were to be protected from; the advertisements relied on a cultural understanding that gays and lesbians are dangerous to children.

This understanding, Chauncey observed, is an artifact of the discrimination gays and lesbians faced in the United States in the twentieth century. Chauncey testified that because homosexual conduct was criminalized, gays and lesbians were seen as criminals; the stereotype of gay people as criminals therefore became pervasive. Chauncey noted that stereotypes of gays and lesbians as predators or child molesters were reinforced in the mid-twentieth century and remain part of current public discourse. Lamb explained that this stereotype is not at all credible, as gays and lesbians are no more likely than heterosexuals to pose a threat to children.

Political scientist Gary Segura provided many examples of ways in which private discrimination against gays and lesbians is manifested in laws and policies. Segura testified that negative stereotypes about gays and lesbians inhibit political compromise with other groups: "It's very difficult to engage in the give-and-take of the legislative process when I think you are an inherently bad person. That's just not the basis for compromise and negotiation in the political process." Tr 1561:6-9. Segura identified religion as the chief obstacle to gay and lesbian political advances. Political scientist Kenneth Miller disagreed with Segura's conclusion that gays and lesbians lack political power, Tr 2482:4-8, pointing to some successes on the state and national level and increased public support for gays and lesbians, but agreed that popular initiatives can easily tap into a strain of antiminority sentiment and that at least some voters supported Proposition 8 because of anti-gay sentiment.

Proponent Hak-Shing William Tam testified about his role in the Proposition 8 campaign. Tam spent substantial time, effort and resources campaigning

for Proposition 8. As of July 2007, Tam was working with Protect Marriage to put Proposition 8 on the November 2008 ballot. Tr 1900:13-18. Tam testified that he is the secretary of the America Return to God Prayer Movement, which operates the website "1man1woman.net." Tr 1916:3-24. 1man1woman.net encouraged voters to support Proposition 8 on grounds that homosexuals are twelve times more likely to molest children, Tr 1919:3-1922:21, and because Proposition 8 will cause states one-by-one to fall into Satan's hands, Tr 1928:6-13. Tam identified NARTH (the National Association for Research and Therapy of Homosexuality) as the source of information about homosexuality, because he "believe[s] in what they say." Tr 1939:1-9. Tam identified "the internet" as the source of information connecting same-sex marriage to polygamy and incest. Tr 1957:2-12. Protect Marriage relied on Tam and, through Tam, used the website 1man1woman.net as part of the Protect Marriage Asian/Pacific Islander outreach. Tr 1976:10-15; PX2599 (Email from Sarah Pollo, Account Executive, Schubert Flint Public Affairs (Aug 22, 2008) attaching meeting minutes). Tam signed a Statement of Unity with Protect Marriage, PX2633, in which he agreed not to put forward "independent strategies for public messaging." Tr 1966:16-1967:16.

***12** Katami and Stier testified about the effect Proposition 8 campaign advertisements had on their well-being. Katami explained that he was angry and upset at the idea that children needed to be protected from him. After watching a Proposition 8 campaign message, PX0401 (Video, Tony Perkins, Miles McPherson, and Ron Prentice Asking for Support of Proposition 8), Katami stated that "it just demeans you. It just makes you feel like people are putting efforts into discriminating against you." Tr 108:14-16. Stier, as the mother of four children, was especially disturbed at the message that Proposition 8 had something to do with protecting children. She felt the campaign messages were "used to sort of try to educate people or convince people that there was a great evil to be feared and that evil must be stopped and that evil is us, I guess. * * * And the very notion that I could be part of what others need to protect their children from was just -- it was more than upsetting. It was sickening, truly. I felt sickened by that campaign." Tr 177:9-18.

Egan and Badgett testified that Proposition 8 harms the State of California and its local governments economically. Egan testified that San Francisco faces direct and indirect economic harms as a consequence of Proposition 8. Egan explained that San Francisco lost and continues to lose money because Proposition 8 slashed the number of weddings performed in San Francisco. Egan explained that Proposition 8 decreases the number of married couples in San Francisco, who tend to be wealthier than single people because of their ability to specialize their labor, pool resources and access state and employer-provided benefits. Proposition 8 also increases the costs associated with discrimination against gays and lesbians. Proponents challenged only the magnitude and not the existence of the harms Egan identified. Badgett explained that municipalities throughout California and the state government face economic disadvantages similar to those Egan identified for San Francisco.

For the reasons stated in the sections that follow, the evidence presented at trial fatally undermines the premises underlying proponents' proffered rationales for Proposition 8. An initiative measure adopted by the voters deserves great respect. The considered views and opinions of even the most highly qualified scholars and experts seldom outweigh the determinations of the voters. When challenged, however, the voters' determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval. As such, Proposition 8 is beyond the

constitutional reach of the voters or their representatives.

I

CREDIBILITY DETERMINATIONS

PLAINTIFFS' WITNESSES

***13** Plaintiffs presented the testimony of the four plaintiffs, four lay witnesses and nine expert witnesses. Proponents did not challenge the credibility of the lay witnesses or the qualifications of the expert witnesses to offer opinion testimony.

Having observed and considered the testimony presented, the court concludes that plaintiffs' lay witnesses provided credible testimony:

1. Jeffrey Zarrillo, a plaintiff, testified about coming out as a gay man. (Tr 77:12-15: "Coming out is a very personal and internal process. * * * You have to get to the point where you're comfortable with yourself, with your own identity and who you are.") Zarrillo described his nine-year relationship with Katami. (Tr 79:20-21: "He's the love of my life. I love him probably more than I love myself.")

2. Paul Katami, a plaintiff, testified about his reasons for wanting to marry Zarrillo. (Tr 89:1-3: "Being able to call him my husband is so definitive, it changes our relationship." Tr 90:24-91:2: "I can safely say that if I were married to Jeff, that I know that the struggle that we have validating ourselves to other people would be diminished and potentially eradicated.") Katami explained why it was difficult for him to tell others about his sexual orientation even though he has been gay for "as long as [he] can remember." (Tr 91:17-92:2: "I struggled with it quite a bit. Being surrounded by what seemed everything heterosexual * * * you tend to try and want to fit into that.") Katami described how the Proposition 8 campaign messages affected him. (Tr 97:1-11: "[P]rotect the children is a big part of the [Proposition 8] campaign. And when I think of protecting your children, you protect them from people who will perpetrate crimes against them, people who might get them hooked on a drug, a pedophile, or some person that you need protecting from. You don't protect yourself from an amicable person or a good person. You protect yourself from things that can harm you physically, emotionally. And so insulting, even the insinuation that I would be part of that category.")

3. Kristin Perry, a plaintiff, testified about her relationship with Stier. (Tr 139:16-17; 140:13-14: Stier is "maybe the sparkliest person I ever met. * * * [T]he happiest I feel is in my relationship with [Stier.]") Perry described why she wishes to marry. (Tr 141:22-142:1: "I want to have a stable and secure relationship with her that then we can include our children in. And I want the discrimination we are feeling with Proposition 8 to end and for a more positive, joyful part of our lives to * * * begin.") Perry described the reason she and Stier registered as domestic partners. (Tr 153:16-17: "[W]e are registered domestic partners based on just legal advice that we received for creating an estate plan.")

***14** 4. Sandra Stier, a plaintiff, testified about her relationship with Perry, with whom she raises their four children. (Tr 167:3-5: "I have fallen in love one time and it's with [Perry].."). Stier explained why she wants to marry Perry despite their domestic partnership. (Tr 171:8-13: "[T]here is certainly nothing about domestic partnership as an institution-not even as an institution, but as a legal agreement that indicates the love and commitment that are inherent in marriage, and [domestic partnership] doesn't have anything to do for us with the nature of our relationship and the type of enduring relationship we want it to be.")

5. Helen Zia, a lay witness, testified regarding her experiences with discrimination and about

how her life changed when she married her wife in 2008. (Tr 1235:10-13: "I'm beginning to understand what I've always read --marriage is the joining of two families.")

6. Jerry Sanders, the mayor of San Diego and a lay witness, testified regarding how he came to believe that domestic partnerships are discriminatory. (Tr 1273:10-17: On a last-minute decision not to veto a San Diego resolution supporting same-sex marriage: "I was saying that one group of people did not deserve the same dignity and respect, did not deserve the same symbolism about marriage.")

7. Ryan Kendall, a lay witness, testified about his experience as a teenager whose parents placed him in therapy to change his sexual orientation from homosexual to heterosexual. (Tr 1521:20: "I knew I was gay. I knew that could not be changed.") Kendall described the mental anguish he endured because of his family's disapproval of his sexual orientation. (Tr 1508:9-10, 1511:2-16: "I remember my mother looking at me and telling me that I was going to burn in hell. * * * [M]y mother would tell me that she hated me, or that I was disgusting, or that I was repulsive. Once she told me that she wished she had had an abortion instead of a gay son.")

8. Hak-Shing William Tam, an official proponent of Proposition 8 and an intervening defendant, was called as an adverse witness and testified about messages he disseminated during the Proposition 8 campaign. (Tr 1889:23-25: "Q: Did you invest substantial time, effort, and personal resources in campaigning for Proposition 8? A: Yes.")

Plaintiffs called nine expert witnesses. As the education and experience of each expert show, plaintiffs' experts were amply qualified to offer opinion testimony on the subjects identified. Moreover, the experts' demeanor and responsiveness showed their comfort with the subjects of their expertise. For those reasons, the court finds that each of plaintiffs' proffered experts offered credible opinion testimony on the subjects identified.

***15** [2] 1. Nancy Cott, a historian, testified as an expert in the history of marriage in the United States. Cott testified that marriage has always been a secular institution in the United States, that regulation of marriage eased the state's burden to govern an amorphous populace and that marriage in the United States has undergone a series of transformations since the country was founded.

a. PX2323 Cott CV: Cott is a professor of American history at Harvard University and the director of the Schlesinger Library on the History of Women in America;

b. PX2323: In 1974, Cott received a PhD from Brandeis University in the history of American civilization;

c. PX2323: Cott has published eight books, including *Public Vows: A History of Marriage and the Nation* (2000), and has published numerous articles and essays;

d. Tr 186:5-14: Cott devoted a semester in 1998 to researching and teaching a course at Yale University in the history of marriage in the United States;

e. Tr 185:9-13; 188:6-189:10: Cott's marriage scholarship focuses on marriage as a public institution and as a structure regulated by government for social benefit.

[3] 2. George Chauncey, a historian, was qualified to offer testimony on social history, especially as it relates to gays and lesbians. Chauncey testified about the widespread private and public discrimination faced by gays and lesbians in the twentieth century and the ways in which the Proposition 8 campaign echoed that discrimination and relied on stereotypes against gays and lesbians that had developed in the twentieth century.

a. PX2322 Chauncey CV: Chauncey is a profess-

or of history and American studies at Yale University; from 1991-2006, Chauncey was a professor of history at the University of Chicago;

b. Tr 357:15-17: Chauncey received a PhD in history from Yale University in 1989;

c. PX2322: Chauncey has authored or edited books on the subject of gay and lesbian history, including *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) and *Hidden from History: Reclaiming the Gay and Lesbian Past* (1989, ed);

d. Tr 359:17-360:11: Chauncey relies on government records, interviews, diaries, films and advertisements along with studies by other historians and scholars in conducting his research;

e. Tr 360:12-21: Chauncey teaches courses in twentieth century United States history, including courses on lesbian and gay history.

[4] 3. Lee Badgett, an economist, testified as an expert on demographic information concerning gays and lesbians, same-sex couples and children raised by gays and lesbians, the effects of the exclusion of same-sex couples from the institution of marriage and the effect of permitting same-sex couples to marry on heterosexual society and the institution of marriage. Badgett offered four opinions: (1) Proposition 8 has inflicted substantial economic harm on same-sex couples and their children; (2) allowing same-sex couples to marry would not have any adverse effect on the institution of marriage or on opposite-sex couples; (3) same-sex couples are very similar to opposite-sex couples in most economic and demographic respects; and (4) Proposition 8 has imposed economic losses on the State of California and on California counties and municipalities. Tr 1330:9-1331:5.

a. PX2321 Badgett CV: Badgett is a professor of economics at UMass Amherst and the director of the Williams Institute at UCLA School of Law;

***16 b.** PX2321: Badgett received her PhD in economics from UC Berkeley in 1990;

c. Tr 1325:2-17; PX2321: Badgett has written two books on gay and lesbian relationships and same-sex marriage: *Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men* (2001) and *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* (2009); Badgett has also published several articles on the same subjects;

d. Tr 1326:4-13: Badgett co-authored two reports (PX1268 Brad Sears and M V Lee Badgett, *The Impact of Extending Marriage to Same-Sex Couples on the California Budget,* The Williams Institute (June 2008) and PX1283 M V Lee Badgett and R Bradley Sears, *Putting a Price on Equality? The Impact of Same-Sex Marriage on California's Budget,* 16 Stan L & Pol Rev 197 (2005)) analyzing the fiscal impact of allowing same-sex couples to marry in California;

e. Tr 1326:18-1328:4: Badgett has been invited to speak at many universities and at the American Psychological Association convention on the economics of same-sex relationships;

f. Tr 1329:6-22: Badgett has testified before federal and state government bodies about domestic partner benefits and antidiscrimination laws.

[5] 4. Edmund A Egan, the chief economist in the San Francisco Controller's Office, testified for CCSF as an expert in urban and regional economic policy. Egan conducted an economic study of the prohibition of same-sex marriage on San Francisco's economy and concluded that the prohibition negatively affects San Francisco's economy in many ways. Tr 683:19-684:19.

a. Tr 678:1-7: As the chief economist for CCSF, Egan directs the Office of Economic Analysis and prepares economic impact analysis reports for pending legislation;

b. Tr 681:16-682:25: In preparing economic impact reports, Egan relies on government data and

reports, private reports and independent research to determine whether legislation has "real regulatory power" and the effects of the legislation on private behavior;

c. PX2324 Egan CV: Egan received a PhD in city and regional planning from UC Berkeley in 1997;

d. Tr 679:1-14: Egan is an adjunct faculty member at UC Berkeley and teaches graduate students on regional and urban economics and regional and city planning.

[6] 5. Letitia Anne Peplau, a psychologist, was qualified as an expert on couple relationships within the field of psychology. Peplau offered four opinions: (1) for adults who choose to enter marriage, that marriage is often associated with many important benefits; (2) research has shown remarkable similarities between same-sex and opposite-sex couples; (3) if same-sex couples are permitted to marry, they will likely experience the same benefits from marriage as opposite-sex couples; and (4) permitting same-sex marriage will not harm opposite-sex marriage. Tr 574:6-19.

a. PX2329 Peplau CV: Peplau is a professor of psychology and vice chair of graduate studies in psychology at UCLA;

***17 b.** Tr 569:10-12: Peplau's research focuses on social psychology, which is a branch of psychology that focuses on human relationships and social influence; specifically, Peplau studies close personal relationships, sexual orientation and gender;

c. Tr 571:13: Peplau began studying same-sex relationships in the 1970s;

d. Tr 571:19-572:13; PX2329: Peplau has published or edited about ten books, authored about 120 peer-reviewed articles and published literature reviews on psychology, relationships and sexuality.

[7] 6. Ilan Meyer, a social epidemiologist, testified as an expert in public health with a focus on social psychology and psychiatric epidemiology. Meyer offered three opinions: (1) gays and lesbians experience stigma, and Proposition 8 is an example of stigma; (2) social stressors affect gays and lesbians; and (3) social stressors negatively affect the mental health of gays and lesbians. Tr 817:10-19.

a. PX2328 Meyer CV: Meyer is an associate professor of sociomedical sciences at Columbia University's Mailman School of Public Health;

b. PX2328; Tr 807:20-808:7: Meyer received a PhD in sociomedical sciences from Columbia University in 1993;

c. Tr 810:19-811:16: Meyer studies the relationship between social issues and structures and patterns of mental health outcomes with a specific focus on lesbian, gay and bisexual populations;

d. Tr 812:9-814:22: Meyer has published about forty peer-reviewed articles, teaches a course on gay and lesbian issues in public health, has received numerous awards for his professional work and has edited and reviewed journals and books.

[8] 7. Gregory Herek, a psychologist, testified as an expert in social psychology with a focus on sexual orientation and stigma. Herek offered opinions concerning: (1) the nature of sexual orientation and how sexual orientation is understood in the fields of psychology and psychiatry; (2) the amenability of sexual orientation to change through intervention; and (3) the nature of stigma and prejudice as they relate to sexual orientation and Proposition 8. Tr 2023:8-14.

a. PX2326 Herek CV: Herek is a professor of psychology at UC Davis;

b. PX2326: Herek received a PhD in personality and social psychology from UC Davis in 1983;

c. Tr 2018:5-13: Social psychology is the intersection of psychology and sociology in that it fo-

cuses on human behavior within a social context; Herek's dissertation focused on heterosexuals' attitudes towards lesbians and gay men;

d. Tr 2020:1-5: Herek regularly teaches a course on sexual orientation and prejudice;

e. PX2326; Tr 2021:12-25; Tr 2022:11-14: Herek serves on editorial boards of peer-reviewed journals and has published over 100 articles and chapters on sexual orientation, stigma and prejudice.

[9] 8. Michael Lamb, a psychologist, testified as an expert on the developmental psychology of children, including the developmental psychology of children raised by gay and lesbian parents. Lamb offered two opinions: (1) children raised by gays and lesbians are just as likely to be well-adjusted as children raised by heterosexual parents; and (2) children of gay and lesbian parents would benefit if their parents were able to marry. Tr 1009:23-1010:4.

a. PX2327 Lamb CV: Lamb is a professor and head of the Department of Social and Developmental Psychology at the University of Cambridge in England;

***18 b.** Tr 1003:24-1004:6; PX2327: Lamb was the head of the section on social and emotional development of the National Institute of Child Health and Human Development in Washington DC for seventeen years;

c. Tr 1007:2-1008:8; PX2327: Lamb has published approximately 500 articles, many about child adjustment, has edited 40 books in developmental psychology, reviews about 100 articles a year and serves on editorial boards on several academic journals;

d. PX2327: Lamb received a PhD from Yale University in 1976.

[10] 9. Gary Segura, a political scientist, testified as an expert on the political power or powerlessness of minority groups in the United States, and of gays and lesbians in particular. Segura offered three opinions: (1) gays and lesbians do not possess a meaningful degree of political power; (2) gays and lesbians possess less power than groups granted judicial protection; and (3) the conclusions drawn by proponents' expert Miller are troubling and unpersuasive. Tr 1535:3-18.

a. PX2330 Segura CV: Segura is a professor of political science at Stanford University and received a PhD in political science from the University of Illinois in 1992;

b. Tr 1525:1-10: Segura and a colleague, through the Stanford Center for Democracy, operate the American National Elections Studies, which provides political scientists with data about the American electorate's views about politics;

c. Tr 1525:11-19: Segura serves on the editorial boards of major political science journals;

d. Tr 1525:22-1526:24: Segura's work focuses on political representation and whether elected officials respond to the voting public; within the field of political representation, Segura focuses on minorities;

e. PX2330; Tr 1527:25-1528:14: Segura has published about twenty-five peer-reviewed articles, authored about fifteen chapters in edited volumes and has presented at between twenty and forty conferences in the past ten years;

f. PX2330; Tr 1528:21-24: Segura has published three pieces specific to gay and lesbian politics and political issues;

g. Tr 1532:11-1533:17: Segura identified the methods he used and materials he relied on to form his opinions in this case. Relying on his background as a political scientist, Segura read literature on gay and lesbian politics, examined the statutory status of gays and lesbians and public attitudes about gays and lesbians, determined the presence or absence of gays and lesbians in

political office and considered ballot initiatives about gay and lesbian issues.

PROPONENTS' WITNESSES

Proponents elected not to call the majority of their designated witnesses to testify at trial and called not a single official proponent of Proposition 8 to explain the discrepancies between the arguments in favor of Proposition 8 presented to voters and the arguments presented in court. Proponents informed the court on the first day of trial, January 11, 2010, that they were withdrawing Loren Marks, Paul Nathanson, Daniel N Robinson and Katherine Young as witnesses. Doc # 398 at 3. Proponents' counsel stated in court on Friday, January 15, 2010, that their witnesses "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever." Tr 1094:21-23.

The timeline shows, however, that proponents failed to make any effort to call their witnesses after the potential for public broadcast in the case had been eliminated. The Supreme Court issued a temporary stay of transmission on January 11, 2010 and a permanent stay on January 13, 2010. See *Hollingsworth v. Perry,* --- U.S. ----, 130 S.Ct. 1132, --- L.Ed.2d ---- (Jan 11, 2010); *Hollingsworth v. Perry,* --- U.S. ----, 130 S.Ct. 705, --- L.Ed.2d ---- (Jan 13, 2010). The court withdrew the case from the Ninth Circuit's pilot program on broadcasting on January 15, 2010. Doc # 463. Proponents affirmed the withdrawal of their witnesses that same day. Tr 1094:21-23. Proponents did not call their first witness until January 25, 2010. The record does not reveal the reason behind proponents' failure to call their expert witnesses.

***19** Plaintiffs entered into evidence the deposition testimony of two of proponents' withdrawn witnesses, as their testimony supported plaintiffs' claims. Katherine Young was to testify on comparative religion and the universal definition of marriage. Doc # 292 at 4 (proponents' December 7 witness list) Doc # 286-4 at 2 (expert report). Paul Nathanson was to testify on religious attitudes towards Proposition 8. Doc # 292 at 4 (proponents' December 7 witness list); Doc # 280-4 at 2 (expert report).

Young has been a professor of religious studies at McGill University since 1978. PX2335 Young CV. She received her PhD in history of religions and comparative religions from McGill in 1978. Id. Young testified at her deposition that homosexuality is a normal variant of human sexuality and that same-sex couples possess the same desire for love and commitment as opposite-sex couples. PX2545 (dep tr); PX2544 (video of same). Young also explained that several cultures around the world and across centuries have had variations of marital relationships for same-sex couples. Id.

Nathanson has a PhD in religious studies from McGill University and is a researcher at McGill's Faculty for Religious Studies. PX2334 Nathanson CV. Nathanson is also a frequent lecturer on consequences of marriage for same-sex couples and on gender and parenting. Id. Nathanson testified at his deposition that religion lies at the heart of the hostility and violence directed at gays and lesbians and that there is no evidence that children raised by same-sex couples fare worse than children raised by opposite-sex couples. PX2547 (dep tr); PX2546 (video of same).

Proponents made no effort to call Young or Nathanson to explain the deposition testimony that plaintiffs had entered into the record or to call any of the withdrawn witnesses after potential for contemporaneous broadcast of the trial proceedings had been eliminated. Proponents called two witnesses:

1. David Blankenhorn, founder and president of the Institute for American Values, testified on marriage, fatherhood and family structure. Plaintiffs objected to Blankenhorn's qualification as an expert. For the reasons explained hereafter, Blankenhorn lacks the qualifications to offer

opinion testimony and, in any event, failed to provide cogent testimony in support of proponents' factual assertions.

2. Kenneth P Miller, a professor of government at Claremont McKenna College, testified as an expert in American and California politics. Plaintiffs objected that Miller lacked sufficient expertise specific to gays and lesbians. Miller's testimony sought to rebut only a limited aspect of plaintiffs' equal protection claim relating to political power.

David Blankenhorn

***20** Proponents called David Blankenhorn as an expert on marriage, fatherhood and family structure. Blankenhorn received a BA in social studies from Harvard College and an MA in comparative social history from the University of Warwick in England. Tr 2717:24-2718:3; DIX2693 (Blankenhorn CV). After Blankenhorn completed his education, he served as a community organizer in low-income communities, where he developed an interest in community and family institutions after "seeing the weakened state" of those institutions firsthand, "especially how children were living without their fathers." Tr 2719:3-18. This experience led Blankenhorn in 1987 to found the Institute for American Values, which he describes as "a nonpartisan think tank" that focuses primarily on "issues of marriage, family, and child well-being." Tr 2719:20-25. The Institute commissions research and releases reports on issues relating to "fatherhood, marriage, family structure [and] child well-being." Tr 2720:6-19. The Institute also produces an annual report "on the state of marriage in America." Tr 2720:24-25.

Blankenhorn has published two books on the subjects of marriage, fatherhood and family structure: *Fatherless America: Confronting Our Most Urgent Social Problem* (HarperCollins 1995), DIX0108, and *The Future of Marriage* (Encounter Books 2006), DIX0956. Tr 2722:2-12. Blankenhorn has edited four books about family structure and marriage, Tr 2728:13-22, and has co-edited or co-authored several publications about marriage. Doc # 302 at 21.

Plaintiffs challenge Blankenhorn's qualifications as an expert because none of his relevant publications has been subject to a traditional peer-review process, Tr 2733:2-2735:4, he has no degree in sociology, psychology or anthropology despite the importance of those fields to the subjects of marriage, fatherhood and family structure, Tr 2735:15-2736:9, and his study of the effects of same-sex marriage involved "read[ing] articles and ha[ving] conversations with people, and tr[ying] to be an informed person about it," Tr 2736:13-2740:3. See also Doc # 285 (plaintiffs' motion in limine). Plaintiffs argue that Blankenhorn's conclusions are not based on "objective data or discernible methodology," Doc # 285 at 25, and that Blankenhorn's conclusions are instead based on his interpretation of selected quotations from articles and reports, id at 26.

[11] The court permitted Blankenhorn to testify but reserved the question of the appropriate weight to give to Blankenhorn's opinions. Tr 2741:24-2742:3. The court now determines that Blankenhorn's testimony constitutes inadmissible opinion testimony that should be given essentially no weight.

[12] Federal Rule of Evidence 702 provides that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education." The testimony may only be admitted if it "is based upon sufficient facts or data" and "is the product of reliable principles and methods." Id. Expert testimony must be both relevant and reliable, with a "basis in the knowledge and experience of [the relevant] discipline." *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147, 149, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (citing *Daubert v. Merrell Dow Pharm,* 509 U.S. 579, 589, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

***21** While proponents correctly assert that formal

training in the relevant disciplines and peer-reviewed publications are not dispositive of expertise, education is nevertheless important to ensure that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire,* 526 U.S. at 152. Formal training shows that a proposed expert adheres to the intellectual rigor that characterizes the field, while peer-reviewed publications demonstrate an acceptance by the field that the work of the proposed expert displays "at least the minimal criteria" of intellectual rigor required in that field. *Daubert v. Merrell Dow Pharm,* 43 F.3d 1311, 1318 (9th Cir.1995) (on remand) (*"Daubert II"*).

[13] The methodologies on which expert testimony may be based are "not limited to what is generally accepted," *Daubert II* at 1319 n11, but "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). The party proffering the evidence "must explain the expert's methodology and demonstrate in some objectively verifiable way that the expert has both chosen a reliable * * * method and followed it faithfully." *Daubert II,* 43 F.3d at 1319 n11.

[14] Several factors are relevant to an expert's reliability: (1) "whether [a method] can be (and has been) tested"; (2) "whether the [method] has been subjected to peer review and publication"; (3) "the known or potential rate of error"; (4) "the existence and maintenance of standards controlling the [method's] operation"; (5) "a * * * degree of acceptance" of the method within "a relevant * * * community," *Daubert,* 509 U.S. at 593-94; (6) whether the expert is "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation," *Daubert II,* 43 F.3d at 1317; (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, see *Joiner,* 522 U.S. at 145-146; (8) whether the expert has adequately accounted for obvious alternative explanations, see generally *Claar v. Burlington Northern RR Co,* 29 F.3d 499 (9th Cir.1994); (9) whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *Kumho Tire,* 526 U.S. at 152; and (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give, see id at 151.

Blankenhorn offered opinions on the definition of marriage, the ideal family structure and potential consequences of state recognition of marriage for same-sex couples. None of Blankenhorn's opinions is reliable.

***22** Blankenhorn's first opinion is that marriage is "a socially-approved sexual relationship between a man and a woman." Tr 2742:9-10. According to Blankenhorn, the primary purpose of marriage is to "regulate filiation." Tr 2742:18. Blankenhorn testified that the alternative and contradictory definition of marriage is that "marriage is fundamentally a private adult commitment." Tr 2755:25-2756:1; Tr 2756:4-2757:17 (DIX0093 Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (2001)). He described this definition as focused on "the tender feelings that spouses have for one another," Tr 2761:5-6. Blankenhorn agrees this "affective dimension" of marriage exists but asserts that marriage developed independently of affection. Tr 2761:9-2762:3.

Blankenhorn thus sets up a dichotomy for the definition of marriage: either marriage is defined as a socially approved sexual relationship between a man and a woman for the purpose of bearing and raising children biologically related to both spouses, or marriage is a private relationship between two consenting adults. Blankenhorn did not address the definition of marriage proposed by plaintiffs' expert Cott, which subsumes Blankenhorn's dichotomy.

Cott testified that marriage is "a couple's choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life." Tr 201:9-14. There is nothing in Cott's definition that limits marriage to its "affective dimension" as defined by Blankenhorn, and yet Cott's definition does not emphasize the biological relationship linking dependents to both spouses.

Blankenhorn relied on the quotations of others to define marriage and provided no explanation of the meaning of the passages he cited or their sources. Tr 2744:4-2755:16. Blankenhorn's mere recitation of text in evidence does not assist the court in understanding the evidence because reading, as much as hearing, "is within the ability and experience of the trier of fact." *Beech Aircraft Corp. v. United States,* 51 F.3d 834, 842 (9th Cir.1995).

Blankenhorn testified that his research has led him to conclude there are three universal rules that govern marriage: (1) the rule of opposites (the "man/woman" rule); (2) the rule of two; and (3) the rule of sex. Tr 2879:17-25. Blankenhorn explained that there are "no or almost no exceptions" to the rule of opposites, Tr 2882:14, despite some instances of ritualized same-sex relationships in some cultures, Tr 2884:25-2888:16. Blankenhorn explained that despite the widespread practice of polygamy across many cultures, the rule of two is rarely violated, because even within a polygamous marriage, "each marriage is separate." Tr 2892:1-3; Tr 2899:16-2900:4 ("Q: Is it your view that that man who has married one wife, and then another wife, and then another wife, and then another wife, and then another wife, and now has five wives, and they are all his wives at the same time, that that marriage is consistent with your rule of two?* * * A: I concur with Bronislaw Malinowski, and others, who say that that is consistent with the two rule of marriage."). Finally, Blankenhorn could only hypothesize instances in which the rule of sex would be violated, including where "[h]e's in prison for life, he's married, and he is not in a system in which any conjugal visitation is allowed." Tr 2907:13-19.

Blankenhorn's interest and study on the subjects of marriage, fatherhood and family structure are evident from the record, but nothing in the record other than the "bald assurance" of Blankenhorn, *Daubert II,* 43 F.3d at 1316, suggests that Blankenhorn's investigation into marriage has been conducted to the "same level of intellectual rigor" characterizing the practice of anthropologists, sociologists or psychologists. See *Kumho Tire,* 526 U.S. at 152. Blankenhorn gave no explanation of the methodology that led him to his definition of marriage other than his review of others' work. The court concludes that Blankenhorn's proposed definition of marriage is "connected to existing data only by the *ipse dixit"* of Blankenhorn and accordingly rejects it. See *Joiner,* 522 U.S. at 146.

***23** Blankenhorn's second opinion is that a body of evidence supports the conclusion that children raised by their married, biological parents do better on average than children raised in other environments. Tr 2767:11-2771:11. The evidence Blankenhorn relied on to support his conclusion compares children raised by married, biological parents with children raised by single parents, unmarried mothers, step families and cohabiting parents. Tr 2769:14-24 (referring to DIX0026 Kristin Anderson Moore, Susan M Jekielek, and Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It,* Child Trends (June 2002)); Tr 2771:1-11 (referring to DIX0124 Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Harvard 1994)).

Blankenhorn's conclusion that married biological parents provide a better family form than married non-biological parents is not supported by the evidence on which he relied because the evidence does not, and does not claim to, compare biological to non-biological parents. Blankenhorn did not in his testimony consider any study comparing children

raised by their married biological parents to children raised by their married adoptive parents. Blankenhorn did not testify about a study comparing children raised by their married biological parents to children raised by their married parents who conceived using an egg or sperm donor. The studies Blankenhorn relied on compare various family structures and do not emphasize biology. Tr 2768:9-2772:6. The studies may well support a conclusion that parents' marital status may affect child outcomes. The studies do not, however, support a conclusion that the biological connection between a parent and his or her child is a significant variable for child outcomes. The court concludes that "there is simply too great an analytical gap between the data and the opinion proffered." *Joiner,* 522 U.S. at 146. Blankenhorn's reliance on biology is unsupported by evidence, and the court therefore rejects his conclusion that a biological link between parents and children influences children's outcomes.

Blankenhorn's third opinion is that recognizing same-sex marriage will lead to the deinstitutionalization of marriage. Tr 2772:21-2775:23. Blankenhorn described deinstitutionalization as a process through which previously stable patterns and rules forming an institution (like marriage) slowly erode or change. Tr 2773:4-24. Blankenhorn identified several manifestations of deinstitutionalization: out-of-wedlock childbearing, rising divorce rates, the rise of non-marital cohabitation, increasing use of assistive reproductive technologies and marriage for same-sex couples. Tr 2774:20-2775:23. To the extent Blankenhorn believes that same-sex marriage is both a cause and a symptom of deinstitutionalization, his opinion is tautological. Moreover, no credible evidence supports Blankenhorn's conclusion that same-sex marriage could lead to the other manifestations of deinstitutionalization.

***24** Blankenhorn relied on sociologist Andrew Cherlin (DIX0049 *The Deinstitutionalization of American Marriage,* 66 J Marriage & Family 848 (Nov 2004)) and sociologist Norval Glen (DIX0060 The *Struggle for Same-Sex Marriage,* 41 Society 25 (Sept/Oct 2004)) to support his opinion that same-sex marriage may speed the deinstitutionalization of marriage. Neither of these sources supports Blankenhorn's conclusion that same-sex marriage will further deinstitutionalize marriage, as neither source claims same-sex marriage as a cause of divorce or single parenthood. Nevertheless, Blankenhorn testified that "the further deinstitutionalization of marriage caused by the legalization of same-sex marriage," Tr 2782:3-5, would likely manifest itself in "all of the consequences [already discussed]." Tr 2782:15-16.

Blankenhorn's book, *The Future of Marriage,* DIX0956, lists numerous consequences of permitting same-sex couples to marry, some of which are the manifestations of deinstitutionalization listed above. Blankenhorn explained that the list of consequences arose from a group thought experiment in which an idea was written down if someone suggested it. Tr 2844:1-12; DIX0956 at 202. Blankenhorn's group thought experiment began with the untested assumption that "gay marriage, like almost any major social change, would be likely to generate a diverse range of consequences." DIX0956 at 202. The group failed to consider that recognizing the marriage of same-sex couples might lead only to minimal, if any, social consequences.

During trial, Blankenhorn was presented with a study that posed an empirical question whether permitting marriage or civil unions for same-sex couples would lead to the manifestations Blankenhorn described as indicative of deinstitutionalization. After reviewing and analyzing available evidence, the study concludes that "laws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women." PX2898 (Laura Langbein & Mark A Yost, Jr, *Same-Sex Marriage and Negative Externalities,* 90 Soc Sci Q 2 (June 2009) at 305-306). Blankenhorn had not seen the study before trial and was thus unfamiliar with its methods and conclu-

sions. Nevertheless, Blankenhorn dismissed the study and its results, reasoning that its authors "think that [the conclusion is] so self-evident that anybody who has an opposing point of view is not a rational person." Tr 2918:19-21.

Blankenhorn's concern that same-sex marriage poses a threat to the institution of marriage is further undermined by his testimony that same-sex marriage and opposite-sex marriage operate almost identically. During cross-examination, Blankenhorn was shown a report produced by his Institute in 2000 explaining the six dimensions of marriage: (1) legal contract; (2) financial partnership; (3) sacred promise; (4) sexual union; (5) personal bond; and (6) family-making bond. PX2879 (Coalition for Marriage, Family and Couples Education, et al, *The Marriage Movement: A Statement of Principles* (Institute for American Values 2000)). Blankenhorn agreed that same-sex marriages and opposite-sex marriages would be identical across these six dimensions. Tr 2913:8-2916:18. When referring to the sixth dimension, a family-making bond, Blankenhorn agreed that same-sex couples could "raise" children. Tr 2916:17.

***25** Blankenhorn gave absolutely no explanation why manifestations of the deinstitutionalization of marriage would be exacerbated (and not, for example, ameliorated) by the presence of marriage for same-sex couples. His opinion lacks reliability, as there is simply too great an analytical gap between the data and the opinion Blankenhorn proffered. See *Joiner,* 522 U.S. at 146.

Blankenhorn was unwilling to answer many questions directly on cross-examination and was defensive in his answers. Moreover, much of his testimony contradicted his opinions. Blankenhorn testified on cross-examination that studies show children of adoptive parents do as well or better than children of biological parents. Tr 2794:12-2795:5. Blankenhorn agreed that children raised by same-sex couples would benefit if their parents were permitted to marry. Tr 2803:6-15. Blankenhorn also testified he wrote and agrees with the statement "I believe that today the principle of equal human dignity must apply to gay and lesbian persons. In that sense, insofar as we are a nation founded on this principle, we would be more American on the day we permitted same-sex marriage than we were the day before." DIX0956 at 2; Tr 2805:6-2806:1.

Blankenhorn stated he opposes marriage for same-sex couples because it will weaken the institution of marriage, despite his recognition that at least thirteen positive consequences would flow from state recognition of marriage for same-sex couples, including: (1) by increasing the number of married couples who might be interested in adoption and foster care, same-sex marriage might well lead to fewer children growing up in state institutions and more children growing up in loving adoptive and foster families; and (2) same-sex marriage would signify greater social acceptance of homosexual love and the worth and validity of same-sex intimate relationships. Tr 2839:16-2842:25; 2847:1-2848:3; DIX0956 at 203-205.

Blankenhorn's opinions are not supported by reliable evidence or methodology and Blankenhorn failed to consider evidence contrary to his view in presenting his testimony. The court therefore finds the opinions of Blankenhorn to be unreliable and entitled to essentially no weight.

Kenneth P Miller

***26** [15] Proponents called Kenneth P Miller, a professor of government at Claremont McKenna College, as an expert in American and California politics. Tr 2427:10-12. Plaintiffs conducted voir dire to examine whether Miller had sufficient expertise to testify authoritatively on the subject of the political power of gays and lesbians. Tr 2428:3-10. Plaintiffs objected to Miller's qualification as an expert in the areas of discrimination against gays and lesbians and gay and lesbian political power but did not object to his qualification as an expert on initiatives. Tr 2435:21-2436:4.

Miller received a PhD from the University of California (Berkeley) in 2002 in political science and is a professor of government at Claremont McKenna College. Doc # 280-6 at 39-44 (Miller CV). Plaintiffs contend that Miller lacks sufficient expertise to offer an opinion on the relative political power of gay men and lesbians. Having considered Miller's background, experience and testimony, the court concludes that, while Miller has significant experience with politics generally, he is not sufficiently familiar with gay and lesbian politics specifically to offer opinions on gay and lesbian political power.

Miller testified that factors determining a group's political power include money, access to lawmakers, the size and cohesion of a group, the ability to attract allies and form coalitions and the ability to persuade. Tr 2437:7-14. Miller explained why, in his opinion, these factors favor a conclusion that gays and lesbians have political power. Tr 2442-2461.

Miller described religious, political and corporate support for gay and lesbian rights. Miller pointed to failed initiatives in California relating to whether public school teachers should be fired for publicly supporting homosexuality and whether HIV-positive individuals should be quarantined or reported as examples of political successes for gays and lesbians. Tr 2475:21-2477:16. Miller testified that political powerlessness is the inability to attract the attention of lawmakers. Tr 2487:1-2. Using that test, Miller concluded that gays and lesbians have political power both nationally and in California. Tr 2487:10-21.

Plaintiffs cross-examined Miller about his knowledge of the relevant scholarship and data underlying his opinions. Miller admitted that proponents' counsel provided him with most of the "materials considered" in his expert report. Tr 2497:13-2498:22; PX0794A (annotated index of materials considered). See also Doc # 280 at 23-35 (Appendix to plaintiffs' motion in limine listing 158 sources that appear on both Miller's list of materials considered and the list of proponents' withdrawn expert, Paul Nathanson, including twenty-eight websites listing the same "last visited" date). Miller stated that he did not know at the time of his deposition the status of antidiscrimination provisions to protect gays and lesbians at the state and local level, Tr 2506:3-2507:1, could only identify Don't Ask, Don't Tell and the federal Defense of Marriage Act as examples of official discrimination against gays and lesbians, Tr 2524:4-2525:2, and that he has read no or few books or articles by George Chauncey, Miriam Smith, Shane Phelan, Ellen Riggle, Barry Tadlock, William Eskridge, Mark Blasius, Urvashi Vaid, Andrew Sullivan and John D'Emilio, Tr 2518:15-2522:25.

Miller admitted he had not investigated the scope of private employment discrimination against gays and lesbians and had no reason to dispute the data on discrimination presented in PX0604 (The Employment Non-Discrimination Act of 2009, Hearings on HR 3017 before the House Committee on Education and Labor, 111 Cong, 1st Sess (Sept 23, 2009) (testimony of R Bradley Sears, Executive Director of the Williams Institute)). Tr 2529:15-2530:24. Miller did not know whether gays and lesbians have more or less political power than African Americans, either in California or nationally, because he had not researched the question. Tr 2535:9-2539:13.

***27** Plaintiffs questioned Miller on his earlier scholarship criticizing the California initiative process because initiatives eschew compromise and foster polarization, undermine the authority and flexibility of representative government and violate norms of openness, accountability, competence and fairness. Tr 2544:10-2547:7. In 2001 Miller wrote that he was especially concerned that initiative constitutional amendments undermine representative democracy. Tr 2546:14-2548:15.

Plaintiffs questioned Miller on data showing 84 percent of those who attend church weekly voted yes on Proposition 8, 54 percent of those who attend church occasionally voted no on Proposition 8

and 83 percent of those who never attend church voted no on Proposition 8. Tr 2590:10-2591:7; PX2853 at 9 *Proposition 8 Local Exit Polls-Election Center 2008,* CNN). Plaintiffs also asked about polling data showing 56 percent of those with a union member in the household voted yes on Proposition 8. Tr 2591:25-2592:6; PX2853 at 13. Miller stated he had no reason to doubt the accuracy of the polling data. Tr 2592:7-8. Miller did not explain how the data in PX2853 are consistent with his conclusion that many religious groups and labor unions are allies of gays and lesbians.

Miller testified that he did not investigate the extent of anti-gay harassment in workplaces or schools. Tr 2600:7-17, 2603:9-24. Miller stated he had not investigated the ways in which anti-gay stereotypes may have influenced Proposition 8 voters. Tr 2608:19-2609:1. Miller agreed that a principle of political science holds that it is undesirable for a religious majority to impose its religious views on a minority. Tr 2692:16-2693:7.

Miller explained on redirect that he had reviewed "most" of the materials listed in his expert report and that he "tried to review all of them." Tr 2697:11-16. Miller testified that he believes initiatives relating to marriage for same-sex couples arise as a check on the courts and do not therefore implicate a fear of the majority imposing its will on the minority. Tr 2706:17-2707:6. Miller explained that prohibiting same-sex couples from marriage "wasn't necessarily invidious discrimination against" gays and lesbians. Tr 2707:20-24.

The credibility of Miller's opinions relating to gay and lesbian political power is undermined by his admissions that he: (1) has not focused on lesbian and gay issues in his research or study; (2) has not read many of the sources that would be relevant to forming an opinion regarding the political power of gays and lesbians; (3) has no basis to compare the political power of gays and lesbians to the power of other groups, including African-Americans and women; and (4) could not confirm that he personally identified the vast majority of the sources that he cited in his expert report, see PX0794A. Furthermore, Miller undermined the credibility of his opinions by conceding that gays and lesbians currently face discrimination and that current discrimination is relevant to a group's political power.

Miller's credibility was further undermined because the opinions he offered at trial were inconsistent with the opinions he expressed before he was retained as an expert. Specifically, Miller previously wrote that gays and lesbians, like other minorities, are vulnerable and powerless in the initiative process, see PX1869 (Kenneth Miller, *Constraining Populism: The Real Challenge of Initiative Reform,* 41 Santa Clara L Rev 1037 (2001)), contradicting his trial testimony that gays and lesbians are not politically vulnerable with respect to the initiative process. Miller admitted that at least some voters supported Proposition 8 based on anti-gay sentiment. Tr 2606:11-2608:18.

***28** For the foregoing reasons, the court finds that Miller's opinions on gay and lesbian political power are entitled to little weight and only to the extent they are amply supported by reliable evidence.

II

FINDINGS OF FACT [FN2]

Having considered the evidence presented at trial, the credibility of the witnesses and the legal arguments presented by counsel, the court now makes the following findings of fact pursuant to FRCP 52(a). The court relies primarily on the testimony and exhibits cited herein, although uncited cumulative documentary evidence in the record and considered by the court also supports the findings.

THE PARTIES

Plaintiffs

1. Kristin Perry and Sandra Stier reside together in

Alameda County, California and are raising four children. They are lesbians in a committed relationship who seek to marry.

2. On May 21, 2009, Perry and Stier applied for a marriage license from defendant O'Connell, the Alameda County Clerk-Recorder, who denied them a license due to Proposition 8 because they are of the same sex.

3. Paul Katami and Jeffrey Zarrillo reside together in Los Angeles County, California. They are gay men in a committed relationship who seek to marry.

4. On May 20, 2009, Katami and Zarrillo applied for a marriage license from defendant Logan, the Los Angeles County Clerk, who denied them a license due to Proposition 8 because they are of the same sex.

Plaintiff-Intervenor

5. San Francisco is a charter city and county under the California Constitution and laws of the State of California. Cal Const Art XI, § 5(a); SF Charter Preamble.

6. San Francisco is responsible for issuing marriage licenses, performing civil marriage ceremonies and maintaining vital records of marriages. Cal Fam Code §§ 350(a), 401(a), 400(b).

Defendants

7. Arnold Schwarzenegger is the Governor of California.

8. Edmund G Brown, Jr is the Attorney General of California.

9. Mark B Horton is the Director of the California Department of Public Health and the State Registrar of Vital Statistics of the State of California. In his official capacity, Horton is responsible for prescribing and furnishing the forms for marriage license applications, the certificate of registry of marriage, including the license to marry, and the marriage 26 certificate. See Doc # 46 ¶ 15 (admitting Doc # 1 ¶ 15).

10. Linette Scott is the Deputy Director of Health Information & Strategic Planning for the California Department of Public Health. Scott reports to Horton and is the official responsible for prescribing and furnishing the forms for marriage license applications, the certificate of registry of marriage, including the license to marry, and the marriage certificate. See Doc # 46 ¶ 16 (admitting Doc # 1 ¶ 16).

***29 11.** Patrick O'Connell is the Alameda County Clerk-Registrar and is responsible for maintaining vital records of marriages, issuing marriage licenses and performing civil marriage ceremonies. See Doc # 42 ¶ 17 (admitting Doc # 1 ¶ 17).

12. Dean C Logan is the Los Angeles County Registrar-Recorder/County Clerk and is responsible for maintaining vital records of marriages, issuing marriage licenses and performing civil marriage ceremonies. Doc # 41 ¶ 13 (admitting Doc # 1 ¶ 18).

Defendant-Intevenors (Proponents)

13. Dennis Hollingsworth, Gail J Knight, Martin F Gutierrez, Hak-Shing William Tam and Mark A Jansson are the "official proponents" of Proposition 8 under California law.

a. Doc # 8-6 at ¶ 19 (Decl of David Bauer);

b. Doc # 8 at 14 (Proponents' motion to intervene: "Proponents complied with a myriad of legal requirements to procure Proposition 8's enactment, such as (1) filing forms prompting the State to prepare Proposition 8's Title and Summary, (2) paying the initiative filing fee, (3) drafting legally compliant signature petitions, (4) overseeing the collection of more than 1.2 million signatures, (5) instructing signature-collectors on state-law guidelines, and (6) obtaining certifications from supervising signature-gatherers.").

14. Proponents dedicated substantial time, effort, reputation and personal resources in campaigning for Proposition 8.

a. Tr 1889:23-1893:15: Tam spent the majority of his hours in 2008 working to pass Proposition 8;

b. Doc # 8-1 at ¶ 27 (Decl of Dennis Hollingsworth);

c. Doc # 8-2 at ¶ 27 (Decl of Gail J Knight);

d. Doc # 8-3 (Decl of Martin F Gutierrez: describing activities to pass and enforce Proposition 8);

e. Doc # 8-4 at ¶ 27 (Decl of Hak-Shing William Tam);

f. Doc # 8-5 at ¶ 27 (Decl of Mark A Jansson).

15. Proponents established ProtectMarriage.com -- Yes on 8, a Project of California Renewal ("Protect Marriage") as a "primarily formed ballot measure committee" under California law.

a. Doc # 8-1 at ¶ 13 (Decl of Dennis Hollingsworth);

b. Doc # 8-2 at ¶ 13 (Decl of Gail J Knight);

c. Doc # 8-3 at ¶ 13 (Decl of Martin F Gutierrez);

d. Doc # 8-4 at ¶ 13 (Decl of Hak-Shing William Tam);

e. Doc # 8-5 at ¶ 13 (Decl of Mark A Jansson).

16. The Protect Marriage Executive Committee includes Ron Prentice, Edward Dolejsi, Mark A Jansson and Doug Swardstrom. Andrew Pugno acts as General Counsel. David Bauer is the Treasurer and officer of record for Protect Marriage.

a. Doc # 372 at 4 (identifying the above individuals based on the declaration of Ron Prentice, submitted under seal on November 6, 2009);

b. PX0209 Letter from Protect Marriage to Jim Abbott (Oct 20, 2008): Letter to a business that donated money to a group opposing Proposition 8 demanding "a donation of a like amount" to Protect Marriage. The letter is signed by: Ron Prentice, Protect Marriage Chairman; Andrew Pugno, Protect Marriage General Counsel; Edward Dolejsi, Executive Director, California Catholic Conference; and Mark Jansson, a Protect Marriage Executive Committee Member.

***30** 17. Protect Marriage was responsible for all aspects of the campaign to qualify Proposition 8 for the ballot and enact it into law.

a. Doc # 8-6 at ¶¶ 4, 6, 10, 11 (Decl of David Bauer);

b. PX2403 Email from Kenyn Cureton, Vice-President, Family Research Council, to Prentice at 1 (Aug 25, 2008): Cureton attaches a kit to be distributed to Christian voters through churches to help them promote Proposition 8. Cureton explains to Prentice that Family Research Council ("FRC") found out from Pugno that FRC "need[s] to take FRC logos off of the CA version of the videos (legal issues) and just put ProtectMarriage.com on everything" and FRC is "making those changes.";

c. PX2640 Email from Pugno to Tam (Feb 5, 2008) at 2: "I do not think it is likely, but in the event you are contacted by the media or anyone else regarding the Marriage Amendment [Proposition 8], I would encourage you to please refer all calls to the campaign phone number. * * * It is crucial that our public message be very specific.";

d. PX2640 Email from Pugno to Tam (Feb 5, 2008) at 2: Pugno explains that Tam is "an exception" to Protect Marriage's press strategy and should speak on behalf of the campaign directly to the Chinese press. See Tr 1906:9-12;

e. Tr 1892:9-12 (Tam: In October 2007, Tam was waiting for instructions from Protect Marriage re-

garding when he should start collecting signatures to place Proposition 8 on the ballot.);

f. Tr 1904:3-5 (Tam: Tam participated in a debate because Protect Marriage told him to do so.);

g. Tr 1998:23-1999:11 (Tam: Protect Marriage reimbursed individuals who ran print and television ads in support of Proposition 8.);

h. Tr 1965:15-1966:4 (Tam: Tam signed a "Statement of Unity with respect to the Proposition 8 campaign" both "[o]n behalf of [him]self and on behalf of the Traditional Family Coalition.");

i. PX2476 Email from Tam to list of supporters (Oct 22, 2007): "I'm still waiting for ProtectMarriage.com for instructions of when we would start the signature collection for [Proposition 8]."

18. Protect Marriage is a "broad coalition" of individuals and organizations, including the Church of Jesus Christ of Latter-Day Saints (the "LDS Church"), the California Catholic Conference and a large number of evangelical churches.

a. PX2310 About ProtectMarriage.com, Protect Marriage (2008): Protect Marriage "about" page identifies a "broad-based coalition" in support of Proposition 8;

b. PX0577 Frank Schubert and Jeff Flint, *Passing Prop 8,* Politics (Feb 2009) at 47: "We had the support of virtually the entire faith community in California.";

c. Tr 1585:20-1590:2 (Segura: Churches, because of their hierarchical structure and ability to speak to congregations once a week, have a "very strong communication network" with churchgoers. A network of "1700 pastors" working with Protect Marriage in support of Proposition 8 is striking because of "the sheer breadth of the [religious] organization and its level of coordination with Protect Marriage.");

***31 d.** Tr 1590:23-1591:12 (Segura: An "organized effort" and "formal association" of religious groups formed the "broad-based coalition" of Protect Marriage.);

e. Tr 1609:12-1610:6 (Segura: The coalition between the Catholic Church and the LDS Church against a minority group was "unprecedented.");

f. PX2597 Email from Prentice to Lynn Vincent (June 19, 2008): Prentice explains that "[f]rom the initial efforts in 1998 for the eventual success of Prop 22 in 2000, a coalition of many organizations has existed, including evangelical, Catholic and Mormon groups" and identifies Catholic and evangelical leaders working to pass Proposition 8;

g. PX0390A Video, Ron Prentice Addressing Supporters of Proposition 8, Excerpt: Prentice explains the importance of contributions from the LDS Church, Catholic bishops and evangelical ministers to the Protect Marriage campaign;

h. PX0577 Frank Schubert and Jeff Flint, *Passing Prop 8,* Politics at 46 (Feb 2009): "By this time, leaders of the Church of Jesus Christ of Latter Day Saints had endorsed Prop 8 and joined the campaign executive committee. Even though the LDS were the last major denomination to join the campaign, their members were immensely helpful in early fundraising, providing much-needed contributions while we were busy organizing Catholic and Evangelical fundraising efforts."

WHETHER ANY EVIDENCE SUPPORTS CALIFORNIA'S REFUSAL TO RECOGNIZE MARRIAGE BETWEEN TWO PEOPLE BECAUSE OF THEIR SEX

19. Marriage in the United States has always been a civil matter. Civil authorities may permit religious leaders to solemnize marriages but not to determine who may enter or leave a civil marriage. Religious leaders may determine independently whether to re-

cognize a civil marriage or divorce but that recognition or lack thereof has no effect on the relationship under state law.

a. Tr 195:13-196:21 (Cott: "[C]ivil law has always been supreme in defining and regulating marriage. * * * [Religious practices and ceremonies] have no particular bearing on the validity of marriages. Any clerics, ministers, rabbis, et cetera, that were accustomed to * * * performing marriages, only do so because the state has given them authority to do that.");

b. Cal Fam Code §§ 400, 420.

20. A person may not marry unless he or she has the legal capacity to consent to marriage.

a. Tr 202:2-15 (Cott: Marriage "is a basic civil right. It expresses the right of a person to have the liberty to be able to consent validly.");

b. Cal Fam Code §§ 300, 301.

21. California, like every other state, has never required that individuals entering a marriage be willing or able to procreate.

a. Cal Fam Code § 300 et seq;

***32 b.** *In re Marriage Cases*, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 431 (Cal 2008) ("This contention [that marriage is limited to opposite-sex couples because only a man and a woman can produce children biologically related to both] is fundamentally flawed[.]");

c. *Lawrence v* Texas, 539 U.S. 558, 604-05, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (Scalia, J, dissenting) ("If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct * * * what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.");

d. Tr 222:22-223:22 (Cott: "There has never been a requirement that a couple produce children in order to have a valid marriage. Of course, people beyond procreative age have always been allowed to marry.* * * [P]rocreative ability has never been a qualification for marriage.").

22. When California became a state in 1850, marriage was understood to require a husband and a wife. See Cal Const, Art XI § 14 (1849); *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 407.

23. The states have always required the parties to give their free consent to a marriage. Because slaves were considered property of others at the time, they lacked the legal capacity to consent and were thus unable to marry. After emancipation, former slaves viewed their ability to marry as one of the most important new rights they had gained. Tr 202:2-203:12 (Cott).

24. Many states, including California, had laws restricting the race of marital partners so that whites and non-whites could not marry each other.

a. Tr 228:9-231:3 (Cott: In "[a]s many as 41 states and territories," laws placed restrictions on "marriage between a white person and a person of color.");

b. Tr 236:17-238:23 (Cott: Racially restrictive marriage laws "prevented individuals from having complete choice on whom they married, in a way that designated some groups as less worthy than other groups[.]" Defenders of race restrictions argued the laws were "naturally-based and God's plan just being put into positive law, the efforts to undo them met extreme alarm among those who thought these laws were correct. * * * [P]eople who supported [racially restrictive marriage laws] saw these as very important definitional features of who could and should marry, and who could not and should not.");

c. Tr 440:9-13 (Chauncey: Jerry Falwell criti-

cized *Brown v. Board of Education,* because school integration could "lead to interracial marriage, which was then sort of the ultimate sign of black and white equality.");

d. PX2547 (Nathanson Nov 12, 2009 Dep Tr 108:12-23: Defenders of race restrictions in marriage argued that such discrimination was protective of the family); PX2546 (video of same);

e. Pace v Alabama, 106 U.S. 583, 585 (1883) (holding that anti-miscegenation laws did not violate the Constitution because they treated African-Americans and whites the same);

***33 f.** PX0710 at RFA No 11: Attorney General admits that California banned interracial marriage until the California Supreme Court invalidated the prohibition in *Perez v. Sharp,* 32 Cal.2d 711, 198 P.2d 17 (Cal 1948);

g. PX0707 at RFA No 11: Proponents admit that California banned certain interracial marriages from early in its history as a state until the California Supreme Court invalidated those restrictions in *Perez,* 32 Cal.2d 711, 198 P.2d 17.

25. Racial restrictions on an individual's choice of marriage partner were deemed unconstitutional under the California Constitution in 1948 and under the United States Constitution in 1967. An individual's exercise of his or her right to marry no longer depends on his or her race nor on the race of his or her chosen partner.

a. *Loving v* Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967);

Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (Cal 1948).

26. Under coverture, a woman's legal and economic identity was subsumed by her husband's upon marriage. The husband was the legal head of household. Coverture is no longer part of the marital bargain.

a. PX0710 at RFA No 12: Attorney General admits that the doctrine of coverture, under which women, once married, lost their independent legal identity and became the property of their husbands, was once viewed as a central component of the civil institution of marriage;

b. Tr 240:11-240:15 (Cott: Under coverture, "the wife was covered, in effect, by her husband's legal and economic identity. And she -- she lost her independent legal and economic individuality.");

c. Tr 240:22-241:6 (Cott: Coverture "was the marital bargain to which both spouses consented. And it was a reciprocal bargain in which the husband had certain very important * * * obligations that were enforced by the state. His obligation was to support his wife, provide her with the basic material goods of life, and to do so for their dependents. And her part of the bargain was to serve and obey him, and to lend to him all of her property, and also enable him to take all of her earnings, and represent her in court or in any sort of legal or economic transaction.");

d. Tr 241:7-11 (Cott: Coverture "was a highly-asymmetrical bargain that, to us today, appears to enforce inequality. * * * But I do want to stress it was not simply domination and submission. It was a mutual bargain, a reciprocal bargain joined by consent.");

e. Tr 243:5-244:10 (Cott: The sexual division of roles of spouses began to shift in the late nineteenth century and came fully to an end under the law in the 1970s. Currently, the state's assignment of marital roles is gender-neutral. "[B]oth spouses are obligated to support one another, but they are not obligated to one another with a specific emphasis on one spouse being the provider and the other being the dependent.");

f. Follansbee v Benzenberg, 122 Cal.App.2d 466, 476, 265 P.2d 183 (2d Dist 1954) ("The legal status of a wife has changed. Her legal personality is no longer merged in that of her husband.").

***34** 27. Marriage between a man and a woman was traditionally organized based on presumptions of a division of labor along gender lines. Men were seen as suited for certain types of work and women for others. Women were seen as suited to raise children and men were seen as suited to provide for the family.

a. Tr 239:25-245:8, 307:14-308:9, 340:14-342:12 (Cott: Marriage laws historically have been used to dictate the roles of spouses. Under coverture, a wife's legal and economic identity was merged into that of her husband's. The coverture system was based on assumptions of what was then considered a natural division of labor between men and women.);

b. Tr 241:19-23 (Cott: "[A]ssumptions were, at the time, that men were suited to be providers * * * whereas, women, the weaker sex, were suited to be dependent.");

c. PX1245 Letitia Anne Peplau and Adam W Fingerhut, The *Close Relationships of Lesbians and Gay Men,* 58 Annual Rev Pschol 405, 408 (2007): "Traditional heterosexual marriage is organized around two basic principles: a division of labor based on gender and a norm of greater male power and decision-making authority.";

d. PX2547 (Nathanson Nov 12, 2009 Dep Tr 108:24-109:9: Defenders of prejudice or stereotypes against women argued that such discrimination was meant to be protective of the family. (PX2546 video of same); see also PX2545 (Young Nov 13, 2009 Dep Tr 214:19-215:13: same, PX2544 video of same);

e. PX1319 Hendrik Hartog, Lecture, *Marital Exits and Marital Expectations in Nineteenth Century America,* 80 Georgetown L J 95, 101, 128-129 (1991): "Even in equity, a wife could not usually sue under her own name." And "the most important feature of marriage was the public assumption of a relationship of rights and duties, of men acting as husbands and women acting as wives.";

f. PX1328 Note, *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services,* 29 Va L Rev 857, 858 (1943): "Marriage deprived [the wife] of her legal capacity in most matters affecting property."

28. The development of no-fault divorce laws made it simpler for spouses to end marriages and allowed spouses to define their own roles within a marriage.

a. Tr 338:5-14 (Cott: No-fault divorce "was an indication of the shift * * * [that] spousal roles used to be dictated by the state. Now they are dictated by the couple themselves. There's no requirement that they do X or Y if they are one spouse or the other.");

b. Tr 339:10-14 (Cott: The move to no-fault divorce underlines the fact that marriage no longer requires specific performance of one marital role or another based on gender.);

c. PX1319 Hendrik Hartog, Lecture, *Marital Exits and Marital Expectations in Nineteenth Century America,* 80 Georgetown L J 95, 97, 121 (1991): In nineteenth century America, marriage was permanent, spousal roles were non-negotiable and divorce "punished the guilty for criminal conduct" and "provided a form of public punishment for a spouse who had knowingly and criminally violated his or her public vows of marriage.";

d. PX1308 Betsey Stevenson and Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces,* Institute for the Study of Labor at 2-3, Fig 1 (Feb 2007): Current divorce rates are consistent with trends that developed before states adopted no-fault divorce.

***35 29.** In 1971, California amended Cal Civ Code § 4101, which had previously set the age of consent to marriage at twenty-one years for males and eighteen years for females, to read "[a]ny unmarried person of the age of 18 years or upwards, and

not otherwise disqualified, is capable of consenting to and consummating marriage." Cal Civ Code § 4101 (1971); *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 408.

30. In the 1970s, several same-sex couples sought marriage licenses in California, relying on the amended language in Cal Civ Code § 4101. *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 409. In response, the legislature in 1977 amended the marriage statute, former Cal Civ Code § 4100, to read "[m]arriage is a personal relation arising out of a civil contract between a man and a woman * * *." Id. That provision became Cal Fam Code § 300. The legislative history of the enactment supports a conclusion that unique roles of a man and a woman in marriage motivated legislators to enact the amendment. See *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 409.

31. In 2008, the California Supreme Court held that certain provisions of the Family Code violated the California Constitution to the extent the statutes reserve the designation of marriage to opposite-sex couples. *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 452. The language "between a man and a woman" was stricken from section 300, and section 308.5 (Proposition 22) was stricken in its entirety. Id at 453.

32. California has eliminated marital obligations based on the gender of the spouse. Regardless of their sex or gender, marital partners share the same obligations to one another and to their dependants. As a result of Proposition 8, California nevertheless requires that a marriage consist of one man and one woman.

a. Cal Const Art, I § 7.5 (Proposition 8);

a. Cal Fam Code § 720.

33. Eliminating gender and race restrictions in marriage has not deprived the institution of marriage of its vitality.

a. PX0707 at RFA No 13: Proponents admit that eliminating the doctrine of coverture has not deprived marriage of its vitality and importance as a social institution;

b. PX0710 at RFA No 13: Attorney General admits that gender-based reforms in civil marriage law have not deprived marriage of its vitality and importance as a social institution;

c. Tr 245:9-247:3 (Cott: "[T]he primacy of the husband as the legal and economic representative of the couple, and the protector and provider for his wife, was seen as absolutely essential to what marriage was" in the nineteenth century. Gender restrictions were slowly removed from marriage, but "because there were such alarms about it and such resistance to change in this what had been seen as quite an essential characteristic of marriage, it took a very very long time before this trajectory of the removal of the state from prescribing these rigid spousal roles was complete." The removal of gender inequality in marriage is now complete "to no apparent damage to the institution. And, in fact, I think to the benefit of the institution.");

d. PX0707 at RFA No 13: Proponents admit that eliminating racial restrictions on marriage has not deprived marriage of its vitality and importance as a social institution;

***36 e.** PX0710 at RFA No 13: Attorney General admits that race-based reforms in civil marriage law have not deprived marriage of its vitality and importance as a social institution;

f. Tr 237:9-239:24 (Cott: When racial restrictions on marriage across color lines were abolished, there was alarm and many people worried that the institution of marriage would be degraded and devalued. But "there has been no evidence that the institution of marriage has become less popular because * * * people can marry whoever they want.").

34. Marriage is the state recognition and approval

of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents. Tr 187:11-16; 188:16-189:2; 201:9-14 (Cott).

35. The state has many purposes in licensing and fostering marriage. Some of the state's purposes benefit the persons married while some benefit the state:

a. Facilitating governance and public order by organizing individuals into cohesive family units. Tr 222:13-17 (Cott: "[T]he purpose of the state in licensing and incentivizing marriage is to create stable households in which the adults who reside there and are committed to one another by their own consents will support one another as well as their dependents.");

b. Developing a realm of liberty, intimacy and free decision-making by spouses, Tr 189:7-15 (Cott: "[T]he realm created by marriage, that private realm has been repeatedly reiterated as a -- as a realm of liberty for intimacy and free decision making by the parties[.]");

c. Creating stable households. Tr 226:8-15 (Cott: The government's aim is "to create stable and enduring unions between couples.);

d. Legitimating children. Tr 225:16-227:4 (Cott: Historically, legitimating children was a very important function of marriage, especially among propertied families. Today, legitimation is less important, although unmarried couples' children still have to show "that they deserve these inheritance rights and other benefits of their parents.");

e. Assigning individuals to care for one another and thus limiting the public's liability to care for the vulnerable. Tr 226:8-227:4 (Cott: Marriage gives private actors responsibility over dependents.); Tr 222:18-20 ("The institution of marriage has always been at least as much about supporting adults as it has been about supporting minors.");

f. Facilitating property ownership. Tr 188:20-22 (Marriage is "the foundation of the private realm of * * * property transmission.").

36. States and the federal government channel benefits, rights and responsibilities through marital status. Marital status affects immigration and citizenship, tax policy, property and inheritance rules and social benefit programs.

a. Tr 1341:2-16 (Badgett: Specific tangible economic harms flow from being unable to marry, including lack of access to health insurance and other employment benefits, higher income taxes and taxes on domestic partner benefits.);

***37 b.** Tr 235:24-236:16 (Cott: The government has historically channeled many benefits through marriage; as an example, the Social Security Act had "a very distinct marital advantage for those who were married couples as compared to either single individuals or unmarried couples.");

c. PX1397 U.S. General Accounting Office Report at 1, Jan 23, 2004: Research identified "a total of 1138 federal statutory provisions classified in the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.".

37. Marriage creates economic support obligations between consenting adults and for their dependents.

a. Tr 222:13-17 (Cott: "[T]he purpose of the state in licensing and incentivizing marriage is to create stable households in which the adults who reside there and are committed to one another by their own consents will support one another as well as their dependents.");

b. Cal Fam Code § 720.

38. Marriage benefits both spouses by promoting physical and psychological health. Married indi-

viduals are less likely to engage in behaviors detrimental to health, like smoking or drinking heavily. Married individuals live longer on average than unmarried individuals.

a. Tr 578:11-579:9 (Peplau: A recent, large-scale study by the Centers for Disease Control found that married individuals, on average, fare better on "virtually every measure" of health compared to non-married individuals.);

b. PX0708 at RFA No 84: Proponents admit that opposite-sex couples who are married experience, on average, less anxiety and depression and greater happiness and satisfaction with life than do non-married opposite-sex couples or persons not involved in an intimate relationship;

c. Tr 578:2-10 (Peplau: "[T]he very consistent findings from [a very large body of research on the impact of marriage on health] are that, on average, married individuals fare better. They are physically healthier. They tend to live longer. They engage in fewer risky behaviors. They look better on measures of psychological well-be- ing.");

d. Tr 688:10-12 (Egan: "[M]arried individuals are healthier, on average, and, in particular, behave themselves in healthier ways than single individuals.");

e. PX1043 Charlotte A Schoenborn, *Marital Status and Health: United States, 1999-2002,* U.S. Department of Health and Human Services at 1 (Dec 15, 2004): "Regardless of population subgroup (age, sex, race, Hispanic origin, education, income, or nativity) or health indicator (fair or poor health, limitations in activities, low back pain, headaches, serious psychological distress, smoking, or leisure-time physical inactivity), married adults were generally found to be healthier than adults in other marital status categories.";

f. PX0803 California Health Interview Survey (2009): Married individuals are less likely to have psychological distress than individuals who are single and never married, divorced, separated, widowed or living with their partner;

***38** g. PX0807 Press Release, Agency for Healthcare Research and Quality, *Marriage Encourages Healthy Behaviors among the Elderly, Especially Men* (Oct 26, 1998): Marriage encourages healthy behaviors among the elderly.

39. Material benefits, legal protections and social support resulting from marriage can increase wealth and improve psychological well-being for married spouses.

a. PX0809 Joseph Lupton and James P Smith, *Marriage, Assets, and Savings,* RAND (Nov 1999): Marriage is correlated with wealth accumulation;

b. Tr 1332:19-1337:2 (Badgett: Marriage confers numerous economic benefits, including greater specialization of labor and economies of scale, reduced transactions costs, health and insurance benefits, stronger statement of commitment, greater validation and social acceptance of the relationship and more positive workplace outcomes. Some benefits are not quantifiable but are nevertheless substantial.);

c. PX0708 at RFA No 85: Proponents admit that societal support is central to the institution of marriage and that marital relationships are typically entered in the presence of family members, friends and civil or religious authorities;

d. PX0708 at RFA No 87: Proponents admit that marriage between a man and a woman can be a source of relationship stability and commitment, including by creating barriers and constraints on dissolving the relationship.

40. The long-term nature of marriage allows spouses to specialize their labor and encourages spouses to increase household efficiency by dividing labor to increase productivity.

a. Tr 1331:15-1332:9; 1332:25-1334:17 (Badgett);

b. PX0708 at RFA No 88: Proponents admit that marriage between a man and a woman encourages spouses to increase household efficiency, including by dividing their labor in ways that increase the family's productivity in producing goods and services for family members.

41. The tangible and intangible benefits of marriage flow to a married couple's children.

a. Tr 1042:20-1043:8 (Lamb: explaining that when a couple marries, that marriage can improve the outcomes of the couple's child because of "the that accrue to marriage.");

b. PX0886 Position Statement, American Psychiatric Association, *Support of Legal Recognition of Same-Sex Civil Marriage* (July 2005): Marriage benefits children of that couple.

WHETHER ANY EVIDENCE SHOWS CALIFORNIA HAS AN INTEREST IN DIFFERENTIATING BETWEEN SAME-SEX AND OPPOSITE-SEX UNIONS

42. Same-sex love and intimacy are well-documented in human history. The concept of an identity based on object desire; that is, whether an individual desires a relationship with someone of the opposite sex (heterosexual), same sex (homosexual) or either sex (bisexual), developed in the late nineteenth century.

a. Tr 531:25-533:24 (Chauncey: The categories of heterosexual and homosexual emerged in the late nineteenth century, although there were people at all time periods in American history whose primary erotic and emotional attractions were to people of the same sex.);

***39 b.** Tr 2078:10-12 (Herek: "[H]eterosexual and homosexual behaviors alike have been common throughout human history[.]");

c. Tr 2064:22-23 (Herek: In practice, we generally refer to three groups: homosexuals, heterosexuals and bisexuals.);

d. Tr 2027:4-9 (Herek: "[S]exual orientation is at its heart a relational construct, because it is all about a relationship of some sort between one individual and another, and a relationship that is defined by the sex of the two persons involved[.]").

43. Sexual orientation refers to an enduring pattern of sexual, affectional or romantic desires for and attractions to men, women or both sexes. An individual's sexual orientation can be expressed through self-identification, behavior or attraction. The vast majority of people are consistent in self-identification, behavior and attraction throughout their adult lives.

a. Tr 2025:3-12 (Herek: "Sexual orientation is a term that we use to describe an enduring sexual, romantic, or intensely affectional attraction to men, to women, or to both men and women. It's also used to refer to an identity or a sense of self that is based on one's enduring patterns of attraction. And it's also sometimes used to describe an enduring pattern of behavior.");

b. Tr 2060:7-11 (Herek: Most social science and behavioral research has assessed sexual orientation in terms of attraction, behavior or identity, or some combination thereof.);

c. Tr 2072:19-2073:4 (Herek: "[T]he vast majority of people are consistent in their behavior, their identity, and their attractions.");

d. Tr 2086:13-21 (Herek: The Laumann study (PX0943 Edward O Laumann, et al, *The Social Organization of Sexuality: Sexual Practices in the United States* (Chicago 1994)) shows that 90 percent of people in Laumann's sample were consistently heterosexual in their behavior, identity and attraction, and a core group of one to two percent of the sample was consistently lesbian,

gay or bisexual in their behavior, identity and attraction.);

e. Tr 2211:8-10 (Herek: "[I]f I were a betting person, I would say that you would do well to bet that [a person's] future sexual behavior will correspond to [his or her] current identity.").

44. Sexual orientation is commonly discussed as a characteristic of the individual. Sexual orientation is fundamental to a person's identity and is a distinguishing characteristic that defines gays and lesbians as a discrete group. Proponents' assertion that sexual orientation cannot be defined is contrary to the weight of the evidence.

a. Tr 2026:7-24 (Herek: In his own research, Herek has asked ordinary people if they are heterosexual, straight, gay, lesbian or bisexual, and that is a question people generally are able to answer.);

b. Tr 858:24-859:5 (Meyer: Sexual orientation is perceived as "a core thing about who you are." People say: "This is who I am. * * * [I]t is a central identity that is important.");

***40 c.** Tr 2027:14-18 (Herek: These sorts of relationships, that need for intimacy and attachment is a very core part of the human experience and a very fundamental need that people have.);

d. Tr 2324:8-13 (Herek: If two women wish to marry each other, it is reasonable to assume that they are lesbians. And if two men want to marry each other, it is reasonable to assume that they are gay.);

e. Tr 2304:9-2309:1 (Herek: Researchers may define sexual orientation based on behavior, identity or attraction based on the purpose of a study, so that an individual studying sexually transmitted infections may focus on behavior while a researcher studying child development may focus on identity. Researchers studying racial and ethnic minorities similarly focus their definition of the population to be studied based on the purpose of the study. Most people are nevertheless consistent in their behavior, identity and attraction.);

f. Tr 2176:23-2177:14 (Herek, responding to cross-examination that sexual orientation is a socially constructed classification and not a "valid concept": "[Social constructionists] are talking about the construction of [sexual orientation] at the cultural level, in the same way that we have cultural constructions of race and ethnicity and social class. * * * But to say that there's no such thing as class or race or ethnicity or sexual orientation is to, I think, minimize the importance of that construction.);

g. Tr 1372:10-1374:7 (Badgett: DIX1108 The Williams Institute, *Best Practices for Asking Questions about Sexual Orientation on Surveys* (Nov 2009), includes a discussion about methods for conducting surveys; it does not conflict with the substantial evidence demonstrating that sexual orientation is a distinguishing characteristic that defines gay and lesbian individuals as a discrete group.).

45. Proponents' campaign for Proposition 8 assumed voters understood the existence of homosexuals as individuals distinct from heterosexuals.

a. PX0480A Video supporting Proposition 8: Supporters of Proposition 8 identified "homosexuals and those sympathetic to their demands" as supporters of marriage for same-sex couples;

b. PX2153 Advertisement, *Honest Answers to Questions Many Californians Are Asking About Proposition 8,* Protect Marriage (2008): "The 98% of Californians who are not gay should not have their religious freedoms and freedom of expression be compromised to afford special legal rights for the 2% of Californians who are gay.";

c. PX2156 Protect Marriage, *Myths and Facts About Proposition 8:* "Proposition 8 does not interfere with gays living the lifestyle they choose.

However, while gays can live as they want, they should not have the right to redefine marriage for the rest of society.";

d. PX0021 Leaflet, California Family Council, The California Marriage Protection Act ("San Diego County's 'Tipping Point' ") at 2: The leaflet asserts that "homosexuals" do not want to marry; instead, the goal of the "homosexual community" is to annihilate marriage;

e. PX0577 Frank Schubert and Jeff Flint, *Passing Prop 8,* Politics at 45 (Feb 2009): The Proposition 8 campaign was organized in light of the fact that many Californians are "tolerant" of gays;

***41 f.** PX0001 California Voter Information Guide, California General Election, Tuesday, November 4, 2008 at PM 3365: "[W]hile gays have the right to their private lives, *they do not have the right to redefine marriage* for everyone else" (emphasis in original).

46. Individuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.

a. Tr 2032:15-22 (Herek: Herek has conducted research in which he has found that the vast majority of lesbians and gay men, and most bisexuals as well, when asked how much choice they have about their sexual orientation say that they have "no choice" or "very little choice" about it.);

b. Tr 2054:12-2055:24 (Herek: PX0928 at 39 contains a table that reports data on approximately 2,200 people who responded to questions about how much choice they had about being lesbian, gay or bisexual. Among gay men, 87 percent said that they experienced no or little choice about their sexual orientation. Among lesbians, 70 percent said that they had no or very little choice about their sexual orientation.); Tr 2056:4-25 (Herek: PX0930 demonstrates that 88 percent of gay men reported that they had "no choice at all" about their sexual orientation, and 68 percent of lesbians said they had "no choice at all," and another 15 percent reported a small amount of choice.);

c. Tr 2252:1-10 (Herek: "It is certainly the case that there have been many people who, most likely because of societal stigma, wanted very much to change their sexual orientation and were not able to do so.");

d. Tr 2314:3-17 (Herek: Herek agrees with Peplau's statement that "[c]laims about the potential erotic plasticity of women do not mean that most women will actually exhibit change over time. At a young age, many women adopt patterns of heterosexuality that are stable across their lifetime. Some women adopt enduring patterns of same-sex attractions and relationships.");

e. Tr 2202:8-22 (Herek: "[M]ost people are brought up in society assuming that they will be heterosexual. Little boys are taught that they will grow up and marry a girl. Little girls are taught they will grow up and marry a boy. And growing up with those expectations, it is not uncommon for people to engage in sexual behavior with someone of the other sex, possibly before they have developed their real sense of who they are, of what their sexual orientation is. And I think that's one of the reasons why * * * [gay men and lesbians have] experience[d] heterosexual intercourse. * * * [I]t is not part of their identity. It's not part of who they are, and not indicative of their current attractions.");

f. Tr 2033:6-2034:20 (Herek: Therapies designed to change an individual's sexual orientation have not been found to be effective in that they have not been shown to consistently produce the desired outcome without causing harm to the individuals involved.); Tr 2039:1-3 (Herek: Herek is not aware of any major mental health organizations that have endorsed the use of such ther-

apies.);

***42 g.** Tr 140:6, 141:14-19 (Perry: Perry is a lesbian and feels that she was born with her sexual orientation. At 45 years old, she does not think that it might somehow change.);

h. Tr 166:24-167:9 (Stier: Stier is 47 years old and has fallen in love one time in her life -- with Perry.);

i. Tr 77:4-5 (Zarrillo: Zarrillo has been gay "as long as [he] can remember.");

j. Tr 91:15-17 (Katami: Katami has been a "natural-born gay" "as long as he can remember.");

k. Tr 1506:2-11 (Kendall: "When I was a little kid, I knew I liked other boys. But I didn't realize that meant I was gay until I was, probably, 11 or 12 years old. * * * I ended up looking up the word 'homosexual' in the dictionary. And I remember reading the definition[.] * * * And it slowly dawned on me that that's what I was.");

l. Tr 1510:6-8 (Kendall: "I knew I was gay just like I knew I'm short and I'm half Hispanic. And I just never thought that those facts would change.").

47. California has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California.

a. PX0707 at RFA No 21: Proponents admit that same-sex sexual orientation does not result in any impairment in judgment or general social and vocational capabilities;

b. PX0710 at RFA No 19: Attorney General admits that sexual orientation bears no relation to a person's ability to perform in or contribute to society;

c. PX0710 at RFA No 22: Attorney General admits that the laws of California recognize no relationship between a person's sexual orientation and his or her ability to raise children; to his or her capacity to enter into a relationship that is analogous to marriage; or to his or her ability to participate fully in all economic and social institutions, with the exception of civil marriage;

d. Tr 1032:6-12 (Lamb: Gay and lesbian sexual orientations are "normal variation[s] and are considered to be aspects of well-adjusted behavi- or.");

e. Tr 2027:19-2028:2 (Herek: Homosexuality is not considered a mental disorder. The American Psychiatric Association, the American Psychological Association and other major professional mental health associations have all gone on record affirming that homosexuality is a normal expression of sexuality and that it is not in any way a form of pathology.);

f. Tr 2530:25-2532:25 (Miller: Miller agrees that "[c]ourts and legal scholars have concluded that sexual orientation is not related to an individual's ability to contribute to society or perform in the workplace.").

48. Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions. Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite-sex.

a. PX0707 at RFA No 65: Proponents admit that gay and lesbian individuals, including plaintiffs, have formed lasting, committed and caring relationships with persons of the same sex and same-sex couples share their lives and participate in their communities together;

***43 b.** PX0707 at RFA No 58: Proponents admit

that many gay men and lesbians have established loving and committed relationships;

c. PX0710 at RFA No 65: Attorney General admits that gay men and lesbians have formed lasting, committed and caring same-sex relationships and that same-sex couples share their lives and participate in their communities together;

d. PX0710 at RFA No 58: Attorney General admits that California law implicitly recognizes an individual's capacity to establish a loving and long-term committed relationship with another person that does not depend on the individual's sexual orientation;

e. Tr 583:12-585:21 (Peplau: Research that has compared the quality of same-sex and opposite-sex relationships and the processes that affect those relationships consistently shows "great similarity across couples, both same-sex and heterosexual.");

f. Tr 586:22-587:1 (Peplau: Reliable research shows that "a substantial proportion of lesbians and gay men are in relationships, that many of those relationships are long-term.");

g. PX2545 (Young Nov 13 2009 Dep Tr 122:17-123:1: Young agrees with the American Psychoanalytic Association's statement that "gay men and lesbians possess the same potential and desire for sustained loving and lasting relationships as heterosexuals."); PX2544 at 12:40-14:15 (video of same);

h. PX2545 (Young Nov 13, 2009 Dep Tr 100:17-101:5: Young agrees that love and commitment are reasons both gay people and heterosexuals have for wanting to marry.); PX2544 at 10:35-10:55 (video of same);

i. Tr 1362:17-21 (Badgett: Same-sex couples wish to marry for many of the same reasons that opposite-sex couples marry.);

j. Tr 1362:5-10 (Badgett: Same-sex couples have more similarities than differences with opposite-sex couples, and any differences are marginal.);

k. PX2096 Adam Romero, et al, *Census Snapshot: California,* The Williams Institute at 1 (Aug 2008): "In many ways, the more than 107,000 same-sex couples living in California are similar to married couples. According to Census 2000, they live throughout the state, are racially and ethnically diverse, have partners who depend upon one another financially, and actively participate in California's economy. Census data also show that 18% of same-sex couples in California are raising children."

49. California law permits and encourages gays and lesbians to become parents through adoption, foster parenting or assistive reproductive technology. Approximately eighteen percent of same-sex couples in California are raising children.

a. PX0707 at RFA No 66: Proponents admit that gay and lesbian individuals raise children together;

b. PX0710 at RFA No 22: Attorney General admits that the laws of California recognize no relationship between a person's sexual orientation and his or her ability to raise children;

c. PX0709 at RFA No 22: Governor admits that California law does not prohibit individuals from raising children on the basis of sexual orienta- tion;

***44 d.** PX0710 at RFA No 57: Attorney General admits that California law protects the right of gay men and lesbians in same-sex relationships to be foster parents and to adopt children by forbidding discrimination on the basis of sexual orientation;

e. Cal Welf & Inst Code § 16013(a): "It is the policy of this state that all persons engaged in providing care and services to foster children * * * shall not be subjected to discrimination or harassment on the basis of their clients' or their own

actual or perceived * * * sexual orientation.";

f. Cal Fam Code § 297.5(d): "The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses.";

g. Elisa B v. Superior Court, 37 Cal.4th 108, 33 Cal.Rptr.3d 46, 117 P.3d 660, 670 (Cal 2005) (holding that under the Uniform Parentage Act, a parent may have two parents of the same sex);

h. PX2096 Adam Romero, et al, *Census Snapshot: California,* The Williams Institute at 2 (Aug 2008): "18% of same-sex couples in California are raising children under the age of 18.";

i. Tr 1348:23-1350:2 (Badgett: Same-sex couples in California are raising 37,300 children under the age of 18.).

50. Same-sex couples receive the same tangible and intangible benefits from marriage that opposite-sex couples receive.

a. Tr 594:17-20 (Peplau: "My opinion, based on the great similarities that have been documented between same-sex couples and heterosexual couples, is th [at] if same-sex couples were permitted to marry, that they also would enjoy the same benefits [from marriage].");

b. Tr 598:1-599:19 (Peplau: Married same-sex couples in Massachusetts have reported various benefits from marriage including greater commitment to the relationship, more acceptance from extended family, less worry over legal problems, greater access to health benefits and benefits for their children.);

c. PX0787 Position Statement, American Psychiatric Association, *Support of Legal Recognition of Same-Sex Civil Marriage* at 1 (July 2005): "In the interest of maintaining and promoting mental health, the American Psychiatric Association supports the legal recognition of same-sex civil marriage with all rights, benefits, and responsibilities conferred by civil marriage, and opposes restrictions to those same rights, benefits, and responsibilities."

51. Marrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals.

a. PX0707 at RFA No 9: Proponents admit that for many gay and lesbian individuals, marriage to an individual of the opposite sex is not a meaningful alternative;

b. PX0710 at RFA No 9: Attorney General admits that for gay men and lesbians, opposite-sex marriage may not be a meaningful alternative to same-sex marriage to the extent that it would compel them to negate their sexual orientation and identity;

c. Tr 85:9-21 (Zarrillo: "I have no attraction, desire, to be with a member of the opposite sex.");

***45 d.** Tr 2042:14-25 (Herek: While gay men and lesbians in California are permitted to marry, they are only permitted to marry a member of the opposite sex. For the vast majority of gay men and lesbians, that is not a realistic option. This is true because sexual orientation is about the relationships people form -- it defines the universe of people with whom one is able to form the sort of intimate, committed relationship that would be the basis for marriage.);

e. Tr 2043:1-2044:10 (Herek: Some gay men and lesbians have married members of the opposite sex, but many of those marriages dissolve, and some of them experience considerable problems simply because one of the partners is gay or lesbian. A gay or lesbian person marrying a person of the opposite sex is likely to create a great deal of conflict and tension in the relationship.).

52. Domestic partnerships lack the social meaning associated with marriage, and marriage is widely regarded as the definitive expression of love and commitment in the United States.

a. PX0707 at RFA No 38: Proponents admit that there is a significant symbolic disparity between domestic partnership and marriage;

b. PX0707 at RFA No 4: Proponents admit that the word "marriage" has a unique meaning;

c. Tr 207:9-208:6 (Cott, describing the social meaning of marriage in our culture: Marriage has been the "happy ending to the romance." Marriage "is the principal happy ending in all of our romantic tales"; the "cultural polish on marriage" is "as a destination to be gained by any couple who love one another.");

d. Tr 208:9-17 (Cott: "Q. Let me ask you this. How does the cultural value and the meaning, social meaning of marriage, in your view, compare with the social meaning of domestic partnerships and civil unions? A. I appreciate the fact that several states have extended -- maybe it's many states now, have extended most of the material rights and benefits of marriage to people who have civil unions or domestic partnerships. But there really is no comparison, in my historical view, because there is nothing that is like marriage except marriage.");

e. Tr 611:1-7 (Peplau: "I have great confidence that some of the things that come from marriage, believing that you are part of the first class kind of relationship in this country, that you are * * * in the status of relationships that this society most values, most esteems, considers the most legitimate and the most appropriate, undoubtedly has benefits that are not part of domestic partnerships.");

f. Tr 1342:14-1343:12 (Badgett: Some same-sex couples who might marry would not register as domestic partners because they see domestic partnership as a second class status.);

g. Tr 1471:1-1472:8 (Badgett: Same-sex couples value the social recognition of marriage and believe that the alternative status conveys a message of inferiority.);

h. Tr 1963:3-8 (Tam: "If 'domestic partner' is defined as it is now, then we can explain to our children that, yeah, there are some same-sex person wants to have a lifetime together as committed partners, and that is called 'domestic partner,' but it is not 'marriage.' " (as stated)).

***46** 53. Domestic partners are not married under California law. California domestic partnerships may not be recognized in other states and are not recognized by the federal government.

a. Cal Fam Code §§ 297-299.6 (establishing domestic partnership as separate from marriage);

b. Compare Doc # 686 at 39 with Doc # 687 at 47: The court asked the parties to identify which states recognize California domestic partnerships. No party could identify with certainty the states that recognize them. Plaintiffs and proponents agree only that Connecticut, New Jersey and Washington recognize California domestic partnerships. See also # 688 at 2: "To the best of the Administrative Defendants' knowledge," Connecticut, Washington DC, Washington, Nevada, New Hampshire and New Jersey recognize California domestic partnerships;

c. Gill v Office of Personnel Management et al, No 09-10309-JLT at Doc # 70 (July 8, 2010) (holding the federal Defense of Marriage Act ("DOMA") unconstitutional as applied to plaintiffs who are married under state law. (Domestic partnerships are not available in Massachusetts and thus the court did not address whether a person in a domestic partnership would have standing to challenge DOMA.)); see also *In re Karen Golinski,* 587 F.3d 901, 902 (9th Cir.2009) (finding that Golinski could obtain coverage for her wife under the Federal Employees Health Benefits Act without needing to consider whether the result would be the same for a federal employee's domestic partner).

54. The availability of domestic partnership does not provide gays and lesbians with a status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships.

a. Tr 613:23-614:12 (Peplau: There is a significant symbolic disparity between marriage and domestic partnerships; a domestic partnership is "not something that is necessarily understood or recognized by other people in your environment.");

b. Tr 659:8-15 (Peplau: As a result of the different social meanings of a marriage and a domestic partnership, there is a greater degree of an enforceable trust in a marriage than a domestic partnership.);

c. Tr 2044:20-2045:22 (Herek: The difference between domestic partnerships and marriage is much more than simply a word. "[J]ust the fact that we're here today suggests that this is more than just a word * * * clearly, [there is] a great deal of strong feeling and emotion about the difference between marriage and domestic partnerships.");

d. Tr 964:1-3 (Meyer: Domestic partnerships reduce the value of same-sex relationships.);

e. PX0710 at RFA No 37: Attorney General admits that establishing a separate legal institution for state recognition and support of lesbian and gay families, even if well-intentioned, marginalizes and stigmatizes gay families;

*47 **f.** Tr 142:2-13 (Perry: When you are married, "you are honored and respected by your family. Your children know what your relationship is. And when you leave your home and you go to work or you go out in the world, people know what your relationship means.");

g. Tr 153:4-155:5 (Perry: Stier and Perry completed documents to register as domestic partners and mailed them in to the state. Perry views domestic partnership as an agreement; it is not the same as marriage, which symbolizes "maybe the most important decision you make as an adult, who you choose [as your spouse].");

h. Tr 170:12-171:14 (Stier: To Stier, domestic partnership feels like a legal agreement between two parties that spells out responsibilities and duties. Nothing about domestic partnership indicates the love and commitment that are inherent in marriage, and for Stier and Perry, "it doesn't have anything to do * * * with the nature of our relationship and the type of enduring relationship we want it to be. It's just a legal document.");

i. Tr 172:6-21 (Stier: Marriage is about making a public commitment to the world and to your spouse, to your family, parents, society and community. It is the way to tell them and each other that this is a lifetime commitment. "And I have to say, having been married for 12 years and been in a domestic partnership for 10 years, it's different. It's not the same. I want -- I don't want to have to explain myself.");

j. Tr 82:9-83:1 (Zarrillo: "Domestic partnership would relegate me to a level of second class citizenship.* * * It's giving me part of the pie, but not the whole thing * * * [I]t doesn't give due respect to the relationship that we have had for almost nine years.");

k. Tr 115:3-116:1 (Katami: Domestic partnerships "make[ ]you into a second, third, and * * * fourth class citizen now that we actually recognize marriages from other states. * * * None of our friends have ever said, 'Hey, this is my domestic partner.' ").

55. Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages.

a. Tr 596:13-597:3 (Peplau: Data from Massachusetts on the "annual rates for marriage and for divorce" for "the four years prior to same-sex marriage being legal and the four years after" show "that the rates of marriage and divorce are no different after [same-sex] marriage was permitted than they were before.");

b. Tr 605:18-25 (Peplau: Massachusetts data are "very consistent" with the argument that permitting same-sex couples to marry will not have an adverse effect on the institution of marriage.);

c. Tr 600:12-602:15 (Peplau: Allowing same-sex couples to marry will have "no impact" on the stability of marriage.);

d. PX1145 Matthew D Bramlett and William D Mosher, *First Marriage Dissolution, Divorce, and Remarriage: United States,* U.S. Department of Health and Human Services at 2 (May 31, 2001): Race, employment status, education, age at marriage and other similar factors affect rates of marriage and divorce;

***48 e.** PX1195 Matthew D Bramlett and William D Mosher, *Cohabitation, Marriage, Divorce, and Remarriage in the United States,* Vital and Health Statistics 23:22, U.S. Department of Health and Human Services at 12 (July 2002): Race and socioeconomic status, among other factors, are correlated with rates of marital stability;

f. PX0754 American Anthropological Association, *Statement on Marriage and the Family:* The viability of civilization or social order does not depend upon marriage as an exclusively heterosexual institution.

56. The children of same-sex couples benefit when their parents can marry.

a. Tr 1332:19-1337:25 (Badgett: Same-sex couples and their children are denied all of the economic benefits of marriage that are available to married couples.);

b. PX0787 Position Statement, American Psychiatric Association, *Support of Legal Recognition of Same-Sex Civil Marriage* at 1 (July 2005): "The children of unmarried gay and lesbian parents do not have the same protection that civil marriage affords the children of heterosexual couples.";

c. Tr 1964:17-1965:2 (Tam: It is important to children of same-sex couples that their parents be able to marry.);

d. Tr 599:12-19 (Peplau: A survey of same-sex couples who married in Massachusetts shows that 95 percent of same-sex couples raising children reported that their children had benefitted from the fact that their parents were able to marry.).

WHETHER THE EVIDENCE SHOWS THAT PROPOSITION 8 ENACTED A PRIVATE MORAL VIEW WITHOUT ADVANCING A LEGITIMATE GOVERNMENT INTEREST

57. Under Proposition 8, whether a couple can obtain a marriage license and enter into marriage depends on the genders of the two parties relative to one another. A man is permitted to marry a woman but not another man. A woman is permitted to marry a man but not another woman. Proposition 8 bars state and county officials from issuing marriage licenses to same-sex couples. It has no other legal effect.

a. Cal Const Art I, § 7.5 (Proposition 8);

b. PX0001 California Voter Information Guide, California General Election, Tuesday, November 4, 2008: Proposition 8 "eliminates right of same-sex couples to marry."

58. Proposition 8 places the force of law behind stigmas against gays and lesbians, including: gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of

society.

a. Tr 611:13-19 (Peplau: "[B]eing prevented by the government from being married is no different than other kinds of stigma and discrimination that have been studied, in terms of their impact on relationships.");

b. Tr 529:21-530:23 (Chauncey: The campaign for Proposition 8 presented marriage for same-sex couples as an adult issue, although children are frequently exposed to romantic fairy tales or weddings featuring opposite-sex couples.);

***49 c.** Tr 854:5-14 (Meyer: "Proposition 8, in its social meaning, sends a message that gay relationships are not to be respected; that they are of secondary value, if of any value at all; that they are certainly not equal to those of heterosexuals.");

d. Tr 2047:13-2048:13 (Herek: In 2004, California enacted legislation that increased the benefits and responsibilities associated with domestic partnership, which became effective in 2005. In the second half of 2004, the California Secretary of State mailed a letter to all registered domestic partners advising them of the changes and telling recipients to consider whether to dissolve their partnership. Herek "find[s] it difficult to imagine that if there were changes in tax laws that were going to affect married couples, that you would have the state government sending letters to people suggesting that they consider whether or not they want to get divorced before this new law goes into effect. I think that -- that letter just illustrates the way in which domestic partnerships are viewed differently than marriage.");

e. PX2265 Letter from Kevin Shelley, California Secretary of State, to Registered Domestic Partners: Shelley explains domestic partnership law will change on January 1, 2005 and suggests that domestic partners dissolve their partnership if they do not wish to be bound by the new structure of domestic partnership;

f. Tr 972:14-17 (Meyer: "Laws are perhaps the strongest of social structures that uphold and enforce stigma.");

g. Tr 2053:8-18 (Herek: Structural stigma provides the context and identifies which members of society are devalued. It also gives a level of permission to denigrate or attack particular groups, or those who are perceived to be members of certain groups in society.);

h. Tr 2054:7-11 (Herek: Proposition 8 is an instance of structural stigma.).

59. Proposition 8 requires California to treat same-sex couples differently from opposite-sex couples.

a. See PX0710 at RFA No 41: Attorney General admits that because two types of relationships -- one for same-sex couples and one for opposite-sex couples --exist in California, a gay or lesbian individual may be forced to disclose his or her sexual orientation when responding to a question about his or her marital status;

b. Compare Cal Fam Code §§ 300-536 (marriage) with Cal Fam Code §§ 297-299.6 (registered domestic partnerships).

60. Proposition 8 reserves the most socially valued form of relationship (marriage) for opposite-sex couples.

a. Tr 576:15-577:14 (Peplau: Study by Gary Gates, Lee Badgett and Deborah Ho suggests that same-sex couples are "three times more likely to get married than to enter into" domestic partnerships or civil unions.);

b. PX1273 M V Lee Badgett, *When Gay People Get Married* at 58, 59, 60 (N.Y.U 2009): "Many Dutch couples saw marriage as better because it had an additional social meaning that registered partnership, as a recent political invention, lacked." "In some places, the cultural and political trappings of statuses that are not marriage send a very clear message of difference and inferiority

to gay and lesbian couples." "[W]hen compared to marriage, domestic partnerships may become a mark of second-class citizenship and are less understood socially. In practice, these legal alternatives to marriage are limited because they do not map onto a well-developed social institution that gives the act of marrying its social and cultural meaning.";

c. Tr 2044:20-2045:22 (Herek: The difference between domestic partnerships and marriage is more than simply a word. If we look at public opinion data, for example, there is a sizable proportion of the public, both in California and the United States, who say that they are willing to let same-sex couples have domestic partnerships or civil unions, but not marriage. This suggests a distinction in the minds of a large number of Americans -- it is not simply a word. In addition, looking at the recent history of California, when it became possible for same-sex couples to marry, thousands of them did. And many of those were domestic partners. So, clearly, they thought there was something different about being married.);

***50 c.** PX0504B Video, Satellite Simulcast in Defense of Marriage, Excerpt at 0:38-0:56: Speaker warns that if Proposition 8 does not pass, children will be taught "that gay marriage is not just a different type of a marriage, they're going to be taught that it's a good thing."

61. Proposition 8 amends the California Constitution to codify distinct and unique roles for men and women in marriage.

a. Tr 1087:5-18 (Lamb: The "traditional family" refers to a family with a married mother and father who are both biologically related to their children where the mother stays at home and the father is the bread winner.);

b. PX0506 Protect Marriage, The Fine Line Transcript (Oct 1, 2008) at 13: "Children need a loving family and yes they need a mother and father. Now going on what Sean was saying here about the consequences of this, if Prop 8 doesn't pass then it will be illegal to distinguish between heterosexual and same sex couples when it comes to adoption. Um Yvette just mentioned some statistics about growing up in families without a mother and father at home. How important it is to have that kind of thing. I'm not a sociologist. I'm not a psychologist. I'm just a human being but you don't need to be wearing a white coat to know that kids need a mom and dad. I'm a dad and I know that I provide something different than my wife does in our family and my wife provides something entirely different than I do in our family and both are vital.";

c. PX0506 Protect Marriage, The Fine Line Transcript at 6 (Oct 1, 2008): "When moms are in the park taking care of their kids they always know where those kids are. They have like a, like a radar around them. They know where those kids are and there's just a, there's a bond between a mom and a kid different from a dad. I'm not saying dads don't have that bond but they don't. It's just different. You know middle of the night mom will wake up. Dad will just sleep you know if there's a little noise in the room. And, and when kids get scared they run to mommy. Why? They spent 9 months in mommy. They go back to where they came.";

d. PX390 Video, Ron Prentice Addressing Supporters of Proposition 8, Part I at 5:25-6:04: Prentice tells people at a religious rally that marriage is not about love but instead about women civilizing men: "Again, because it's not about two people in love, it's about men becoming civilized frankly, and I can tell you this from personal experience and every man in this audience can do the same if they've chosen to marry, because when you do find the woman that you love you are compelled to listen to her, and when the woman that I love prior to my marrying her told me that my table manners were less than adequate I became more civilized; when she told me that my rust colored corduroy were never again to be

worn, I became more civilized.";

e. PX0506 Protect Marriage, The Fine Line Transcript (Oct 1, 2008) at 15: "Skin color is morally trivial as you pointed out but sex is fundamental to everything. There is no difference between a white or a black human being but there's a big difference between a man and a woman.";

***51 f.** PX1867 Transcript, ABC Protecting Marriage at 27:6-9: Dr Jennifer Roback Morse states that "[t]he function of marriage is to attach mothers and fathers to one another and mothers and fathers to their children, especially fathers to children.";

g. PX0480A Video supporting Proposition 8 at 2:00-2:24: Prentice states that "[c]hildren need the chance to have both mother love and father love. And that moms and dads, male and female, complement each other. They don't bring to a marriage and to a family the same natural set of skills and talents and abilities. They bring to children the blessing of both masculinity and femininity.";

h. PX2403 Email from Kenyn Cureton, Vice-President, Family Research Council, to Prentice at 3 (Aug 25, 2008): Attached to the email is a kit to be distributed to Christian voters through churches to help them promote Proposition 8 which states: "Thank God for the difference between men and women. In fact, the two genders were meant to complete each other physically, emotionally, and in every other way. Also, both genders are needed for a healthy home. As Dr James Dobson notes, 'More than ten thousand studies have concluded that kids do best when they are raised by mothers and fathers.' ";

i. PX1868 Transcript, *Love, Power, Mind* (CCN simulcast Sept 25, 2008) at 43:19-24: "Same sex marriage, it will unravel that in a significant way and say that really male and female, mother and father, husband and wife are just really optional for the family, not necessary. And that is a radically anti-human thing to say.";

j. PX1867 Transcript, ABC Protecting Marriage at 28:18-23: "And we know that fatherlessness has caused significant problems for a whole generation of children and same-sex marriage would send us more in that direction of intentionally fatherless homes.";

k. PX0506 Protect Marriage, The Fine Line Transcript at 5 (Oct 1, 2008): Miles McPherson states that it is a truth "that God created the woman bride as the groom's compatible marriage companion."

62. Proposition 8 does not affect the First Amendment rights of those opposed to marriage for same-sex couples. Prior to Proposition 8, no religious group was required to recognize marriage for same-sex couples.

a. *In re Marriage Cases,* 189 P.3d at 451-452 ("[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.") (Citing Cal Const Art I, § 4);

b. Tr 194:24-196:21 (Cott: Civil law, not religious custom, is supreme in defining and regulating marriage in the United States.);

***52 c.** Cal Fam Code §§ 400, 420.

63. Proposition 8 eliminates the right to marry for gays and lesbians but does not affect any other substantive right under the California Constitution. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 102 ("Proposition 8 does not eliminate the substantial substantive [constitutional] protections afforded to same-sex couples[.]") (emphasis in original).

64. Proposition 8 has had a negative fiscal impact on California and local governments.

a. Tr 1330:23-25 (Badgett: "Proposition 8 has imposed some economic losses on the State of California and on counties and municipalities.");

b. Tr 1364:16-1369:4 (Badgett: Denying same-sex couples the right to marry imposes costs on local governments such as loss of tax revenue, higher usage of means-tested programs, higher costs for healthcare of uninsured same-sex partners and loss of skilled workers.);

c. Tr 720:1-12 (Egan: "What we're really talking about in the nonquantifiable impacts are the long-term advantages of marriage as an institution, and the long-term costs of discrimination as a way that weakens people's productivity and integration into the labor force. Whether it's weakening their education because they're discriminated against at school, or leading them to excessive reliance on behavioral and other health services, these are impacts that are hard to quantify, but they can wind up being extremely powerful. How much healthier you are over your lifetime. How much wealth you generate because you are in a partnership.");

d. Tr 1367:5-1368:1 (Badgett: Denying same-sex couples the right to marry tends to reduce same-sex couples' income, which "will make them more likely to need and be eligible for those means-tested programs that are paid for by the state." Similarly, to the extent that same-sex couples cannot obtain health insurance for their partners and children, there will be more people who might need to sign up for the state's sponsored health programs.).

65. CCSF would benefit economically if Proposition 8 were not in effect.

a. CCSF would benefit immediately from increased wedding revenue and associated expenditures and an increased number of county residents with health insurance. Tr 691:24-692:3; Tr 708:16-20 (Egan);

b. CCSF would benefit economically from decreased discrimination against gays and lesbians, resulting in decreased absenteeism at work and in schools, lower mental health costs and greater wealth accumulation. Tr 685:10-14; Tr 689:4-10; Tr 692:12-19; Tr 720:1-12 (Egan);

c. CCSF enacted the Equal Benefits Ordinance to mandate that city contractors and vendors provide same-sex partners of employees with benefits equal to those provided to opposite-sex spouses of employees. CCSF bears the cost of enforcing the ordinance and defending it against legal challenges. Tr 714:15-715:10 (Egan).

66. Proposition 8 increases costs and decreases wealth for same-sex couples because of increased tax burdens, decreased availability of health insurance and higher transactions costs to secure rights and obligations typically associated with marriage. Domestic partnership reduces but does not eliminate these costs.

***53 a.** Tr 1330:14-16 (Badgett: Proposition 8 has "inflicted substantial economic harm on same-sex couples and their children who live here in California.");

b. Tr 1331:12-1337:25 (Badgett: Marriage confers economic benefits including greater specialization of labor, reduced transactions costs, health and insurance benefits and more positive workplace outcomes.);

c. Tr 1341:2-1342:13 (Badgett: Couples that would marry but would not enter into a domestic partnership suffer tangible economic harm such as higher taxes and limited access to health insurance.);

d. PX1259 MV Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits,* The Williams Institute at 1 (Dec 2007): "[W]orkers who have an unmarried do-

mestic partner are doubly burdened: Their employers typically do not provide coverage for domestic partners; and even when partners are covered, the partner's coverage is taxed as income to the employee.";

e. PX2898 Laura Langbein and Mark A Yost, *Same-Sex Marriage and Negative Externalities,* 490 Soc Sci Q 293, 307 (2009): "For example, the ban on gay marriage induces failures in insurance and financial markets. Because spousal benefits do not transfer (in most cases) to domestic partners, there are large portions of the population that should be insured, but instead receive inequitable treatment and are not insured properly. * * * This is equally true in the treatment of estates on the death of individuals. In married relationships, it is clear to whom an estate reverts, but in the cases of homosexual couples, there is no clear right of ownership, resulting in higher transactions costs, widely regarded as socially inefficient.";

f. PX0188 Report of the Council on Science and Public Health, Health Care Disparities in Same-Sex Households, C Alvin Head (presenter) at 9: "Survey data confirm that same-sex households have less access to health insurance. If they have health insurance, they pay more than married heterosexual workers, and also lack other financial protections. * * * [C]hildren in same-sex households lack the same protections afforded children in heterosexual households.";

g. PX0189 American Medical Association Policy: Health Care Disparities in Same-Sex Partner Households, Policy D160.979 at 1: "[E]xclusion from civil marriage contributes to health care disparities affecting same-sex households.";

h. PX1261 California Employer Health Benefits Survey, California HealthCare Foundation at 7 (Dec 2008): Only 56 percent of California firms offered health insurance to unmarried same-sex couples in 2008;

i. PX1266 National Center for Lesbian Rights and Equality California, *The California Domestic Partnership Law: What it Means for You and Your Family* at 13 (2009): Domestic partnerships create more transactions costs than exist in marriage. "Despite * * * automatic legal protection for children born to registered domestic partners, [the National Center for Lesbian Rights] is strongly recommending that all couples obtain a court judgment declaring both partners to be their child's legal parents, either an adoption or a parentage judgment.";

j. PX1269 Michael Steinberger, *Federal Estate Tax Disadvantages for Same-Sex Couples,* The Williams Institute at 1 (July 2009): "Using data from several government data sources, this report estimates the dollar value of the estate tax disadvantage faced by same-sex couples. In 2009, the differential treatment of same-sex and married couples in the estate tax code will affect an estimated 73 same-sex couples, costing each of them, on average, more than $3.3 million."

***54** 67. Proposition 8 singles out gays and lesbians and legitimates their unequal treatment. Proposition 8 perpetuates the stereotype that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents.

a. Tr 2054:7-11 (Herek: In "a definitional sense," Proposition 8 is an instance of structural stigma against gays and lesbians.);

b. Tr 826:21-828:4 (Meyer: Domestic partnership does not eliminate the structural stigma of Proposition 8 because it does not provide the symbolic or social meaning of marriage.);

c. Tr 820:23-822:5 (Meyer: One of the stereotypes that is part of the stigma surrounding gay men and lesbians is that gay men and lesbians are incapable of, uninterested in and not successful at having intimate relationships.);

d. Tr 407:8-408:4 (Chauncey: The fear of homosexuals as child molesters or as recruiters continues to play a role in debates over gay rights, and with particular attention to gay teachers, parents and married couples-people who might have close contact with children.);

e. PX0001 California Voter Information Guide, California General Election, Tuesday, November 4, 2008 at PM 3365: "TEACHERS COULD BE REQUIRED to teach young children that there is *no difference* between gay marriage and traditional marriage." (emphasis in original);

f. Tr 854:5-22 (Meyer: Proposition 8 "sends a message that gay relationships are not to be respected; that they are of secondary value, if of any value at all; that they are certainly not equal to those of heterosexuals. * * * [So] in addition to achieving the literal aims of not allowing gay people to marry, it also sends a strong message about the values of the state; in this case, the Constitution itself. And it sends a message that would, in [Meyer's] mind, encourage or at least is consistent with holding prejudicial attitudes. So that doesn't add up to a very welcoming environment.").

68. Proposition 8 results in frequent reminders for gays and lesbians in committed long-term relationships that their relationships are not as highly valued as opposite-sex relationships.

a. Tr 846:22-847:12 (Meyer: When gay men and lesbians have to explain why they are not married, they "have to explain, I'm really not seen as equal. I'm -- my status is -- is not respected by my state or by my country, by my fellow citizens.");

b. Tr 1471:1-1472:8 (Badgett: Badgett's interviews with same-sex couples indicate that couples value the social recognition of marriage and believe that the alternative status conveys a message of inferiority.);

c. Tr 151:20-24 (Perry: A passenger on a plane once assumed that she could take the seat that Perry had been saving for Stier because Perry referred to Stier as her "partner.");

***55 d.** Tr 174:3-175:4 (Stier: It has been difficult to explain to others her relationship with Perry because they are not married.);

e. Tr 175:5-17 (Stier: It is challenging to fill out forms in doctor's offices that ask whether she is single, married or divorced because "I have to find myself, you know, scratching something out, putting a line through it and saying 'domestic partner' and making sure I explain to folks what that is to make sure that our transaction can go smoothly.");

f. Tr 841:17-844:11; 845:7-10 (Meyer: For lesbians and gay men, filling out a form requiring them to designate their marital status can be significant because the form-filler has no box to check. While correcting a form is a minor event, it is significant for the gay or lesbian person because the form evokes something much larger for the person-a social disapproval and rejection. "It's about, I'm gay and I'm not accepted here.").

69. The factors that affect whether a child is well-adjusted are: (1) the quality of a child's relationship with his or her parents; (2) the quality of the relationship between a child's parents or significant adults in the child's life; and (3) the availability of economic and social resources. Tr 1010:13-1011:13 (Lamb).

70. The gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.

a. Tr 1025:4-23 (Lamb: Studies have demonstrated "very conclusively that children who are raised by gay and lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents." These results are "completely consistent with our broader understanding of the factors that affect children's adjustment.");

b. PX2565 American Psychological Association, *Answers to Your Questions: For a Better Understanding of Sexual Orientation and Homosexuality* at 5 (2008): "[S]ocial science has shown that the concerns often raised about children of lesbian and gay parents -- concerns that are generally grounded in prejudice against and stereotypes about gay people -- are unfounded.";

c. PX2547 (Nathanson Nov 12, 2009 Dep Tr 49:05-49:19: Sociological and psychological peer-reviewed studies conclude that permitting gay and lesbian individuals to marry does not cause any problems for children); PX2546 at 2:20-3:10 (video of same).

71. Children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted. Tr 1014:25-1015:19; 1038:23-1040:17 (Lamb).

72. The genetic relationship between a parent and a child is not related to a child's adjustment outcomes. Tr 1040:22-1042:10 (Lamb).

***56** 73. Studies comparing outcomes for children raised by married opposite-sex parents to children raised by single or divorced parents do not inform conclusions about outcomes for children raised by same-sex parents in stable, long-term relationships. Tr 1187:13-1189:6 (Lamb).

74. Gays and lesbians have been victims of a long history of discrimination.

a. Tr 3080:9-11 (Proponents' counsel: "We have never disputed and we have offered to stipulate that gays and lesbians have been the victims of a long and shameful history of discrimination.");

b. Tr 361:11-15 (Chauncey: Gays and lesbians "have experienced widespread and acute discrimination from both public and private authorities over the course of the twentieth century. And that has continuing legacies and effects."); see also Tr 361-390 (Chauncey: discussing details of discrimination against gays and lesbians);

c. PX2566 Letter from John W Macy, Chairman, Civil Service Commission, to the Mattachine Society of Washington (Feb 25, 1966) at 2-4: The Commission rejected the Mattachine Society's request to rescind the policy banning active homosexuals from federal employment. "Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of the common toilet, shower and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.";

d. PX2581 Letter from E D Coleman, Exempt Organizations Branch, IRS, to the Pride Foundation at 1, 4-5 (Oct 8, 1974): The Pride Foundation is not entitled to an exemption under Internal Revenue Code § 501(c)(3) because the organization's goal of "advanc[ing] the welfare of the homosexual community" was "perverted or deviate behavior" "contrary to public policy and [is] therefore, not 'charitable.' "

75. Public and private discrimination against gays and lesbians occurs in California and in the United States.

a. PX0707 at RFA No 29: Proponents admit that gays and lesbians continue to experience instances of discrimination;

b. PX0711 at RFA Nos 3, 8, 13, 18, 23: Attorney General admits 263 hate crime events based on sexual orientation bias occurred in California in 2004, 255 occurred in 2005, 246 occurred in 2006, 263 occurred in 2007 and 283 occurred in 2008;

c. PX0672 at 18; PX0673 at 20; PX0674 at 20; PX0675 at 3; PX0676 at 1 (California Dept of Justice, *Hate Crime in California,* 2004-2008): From 2004 to 2008, between 17 and 20 percent of all hate crime offenses in California were motivated by sexual orientation bias;

d. PX0672 at 26; PX0673 at 28; PX0674 at 28; PX0675 at 26; PX0676 at 20 (California Dept of Justice, *Hate Crime in California,* 2004-2008): From 2004 to 2008, between 246 and 283 hate crime events motivated by sexual orientation bias occurred each year in California;

***57 e.** Tr 548:23 (Chauncey: There is still significant discrimination against lesbians and gay men in the United States.);

f. Tr 1569:11-1571:5 (Segura: "[O]ver the last five years, there has actually been an increase in violence directed toward gay men and lesbians"; "gays and lesbians are representing a larger and larger portion of the number of acts of bias motivated violence" and "are far more likely to experience violence"; "73 percent of all the hate crimes committed against gays and lesbians also include an act of violence * * * we are talking about the most extreme forms of hate based violence"; the hate crimes accounted for "71 percent of all hate-motivated murders" and "[f]ifty-five percent of all hate-motivated rapes" in 2008; "There is simply no other person in society who endures the likelihood of being harmed as a consequence of their identity than a gay man or lesbian.");

g. PX0605 The Williams Institute, et al, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* at 1 (Sept 2009): "There is a widespread and persistent pattern of unconstitutional discrimination on the basis of sexual orientation and gender identity against [California] government employees" and the pattern of discrimination is similar for private sector employees in Califor- nia;

h. PX0619 The Williams Institute, *Chapter 14: Other Indicia of Animus against LGBT People by State and Local Officials, 1980-Present* at 14-8 (2009): Statements made by legislators, judges, governors and other officials in all fifty states show hostility towards gays and lesbians, including a 1999 statement by California State Senator Richard Mountjoy that "being gay 'is a sickness * * * an uncontrolled passion similar to that which would cause someone to rape.' ";

i. Tr 2510:23-2535:7 (Miller: Miller agrees that "there has been severe prejudice and discrimination against gays and lesbians" and "widespread and persistent" discrimination against gays and lesbians and that "there is ongoing discrimination in the United States" against gays and lesbians.);

j. Tr 2572:11-16 (Miller: Gays and lesbians are still the "object of prejudice and stereotype.");

k. Tr 2599:17-2604:7 (Miller: Miller agrees that "there are some gays and lesbians who are fired from their jobs, refused work, paid less, and otherwise discriminated against in the workplace because of their sexual orientation.").

76. Well-known stereotypes about gay men and lesbians include a belief that gays and lesbians are affluent, self-absorbed and incapable of forming

long-term intimate relationships. Other stereotypes imagine gay men and lesbians as disease vectors or as child molesters who recruit young children into homosexuality. No evidence supports these stereotypes.

a. DIX1162 Randy Albelda, et al, *Poverty in the Lesbian, Gay, and Bisexual Community,* The Williams Institute at 1 (Mar 2009): "A popular stereotype paints lesbians and gay men as an affluent elite * * *. [T]he misleading myth of affluence steers policymakers, community organizations service providers, and the media away from fully understanding poverty among LGBT people.";

***58 b.** Tr 474:12-19 (Chauncey: Medical pronouncements that were hostile to gays and lesbians provided a powerful source of legitimation to anti-homosexual sentiment and were themselves a manifestation of discrimination against gays and lesbians.);

c. Tr 820:23-822:5 (Meyer: One of the stereotypes that is part of the stigma surrounding gay men and lesbians is that gay men and lesbians are incapable of, uninterested in and not successful at having intimate relationships. Gay men and lesbians have been described as social isolates, as unconnected to society and people who do not participate in society the way everyone else does -- as "a pariah, so to speak.");

d. PX1011 David Reuben, *Everything You Always Wanted to Know About Sex (But Were Afraid to Ask)* 129-151 at 143 (Van Rees 1969): "What about all of the homosexuals who live together happily for years? What about them? They are mighty rare birds among the homosexual flock. Moreover, the 'happy' part remains to be seen. The bitterest argument between husband and wife is a passionate love sonnet by comparison with a dialogue between a butch and his queen. Live together? Yes. Happily? Hardly.";

e. Tr 361:23-363:9 (Chauncey: Even though not all sodomy laws solely penalized homosexual conduct, over the course of the twentieth century, sodomy laws came to symbolize the criminalization of homosexual sex in particular. This was most striking in *Bowers v. Hardwick,* which reads as though the law at issue simply bears on homosexual sex when in fact the Georgia law at issue criminalized both homosexual and heterosexual sodomy.);

f. Tr 484:24-485:5 (Chauncey: The federal government was slow to respond to the AIDS crisis, and this was in part because of the association of AIDS with a "despised group.");

g. Tr 585:22-586:8 (Peplau: There is no empirical support for the negative stereotypes that gay men and lesbians have trouble forming stable relationships or that those relationships are inferior to heterosexual relationships.);

h. PX2337 Employment of Homosexuals and Other Sex Perverts in Government, S Rep No 81-241, 81st Congress, 2d Sess (1950) at 4: "Most of the authorities agree and our investigation has shown that the presence of a sex pervert in a Government agency tends to have a corrosive influence on his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. Government officials have the responsibility of keeping this type of corrosive influence out of the agencies under their control. It is particularly important that the thousands of young men and women who are brought into Federal jobs not be subjected to that type of influence while in the service of the Government. One homosexual can pollute a Government office.";

i. Tr 395:6-25 (Chauncey: Like most outsider groups, there have been stereotypes associated with gay people; indeed, a range of groups, including medical professionals and religious groups, have worked in a coordinated way to de-

velop stereotypical images of gay people.);

***59 j.** Tr 397:2-6; Tr 397:25-398:5 (Chauncey: "[I]n some ways, the most dangerous stereotypes for homosexuals really developed between the 1930s and '50s, when there were a series of press and police campaigns that identified homosexuals as child molesters." These press campaigns against assaults on children focused on sex perverts or sex deviants. Through these campaigns, the homosexual emerged as a sex deviant.);

k. PX2281 George Chauncey, *The Postwar Sex Crime Panic,* in William Graebner, ed, *True Stories from the Past* 160, 171 (McGraw-Hill 1993): Contains excerpts from wide-circulation *Coronet Magazine,* Fall 1950: "Once a man assumes the role of homosexual, he often throws off all moral restraints. * * * Some male sex deviants do not stop with infecting their often-innocent partners: they descended through perversions to other forms of depravity, such as drug addiction, burglary, sadism, and even murder.";

l. Tr 400:18-401:8 (Chauncey: This excerpt from *Coronet Magazine,* PX2281 at 171, depicts homosexuals as subjects of moral decay. In addition, there is a sense of homosexuality as a disease in which the carriers infect other people. And the term "innocent" pretty clearly indicates that the authors are talking about children.);

m. PX2281 Chauncey, *The Postwar Sex Crime Panic,* at 170-171: Contains a statement made by a Special Assistant Attorney General of California in 1949: "The sex pervert, in his more innocuous form, is too frequently regarded as merely a 'queer' individual who never hurts anyone but himself. * * * All too often we lose sight of the fact that the homosexual is an inveterate seducer of the young of both sexes * * * and is ever seeking for younger victims.";

n. Tr 402:21-24 (Chauncey: These articles (in PX2281) were mostly addressed to adults who were understandably concerned about the safety of their children, and who "were being taught to believe that homosexuals posed a threat to their children.");

o. Tr 407:8-408:4 (Chauncey: One of the most enduring legacies of the emergence of these stereotypes is the creation and then reenforcement of a series of demonic images of homosexuals that stay with us today. This fear of homosexuals as child molesters or as recruiters continues to play a role in debates over gay rights, and with particular attention to gay teachers, parents and married couples -- people who might have close contact with children.);

p. Tr 1035:13-1036:19 (Lamb: Social science studies have disproven the hypothesis that gays and lesbians are more likely to abuse children.).

77. Religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians.

a. PX2547 (Nathanson Nov 12, 2009 Dep Tr 102:3-8: Religions teach that homosexual relations are a sin and that contributes to gay bashing); PX2546 (video of same);

***60 b.** PX2545 (Young Nov 13, 2009 Dep Tr 55:15-55:20, 56:21-57:7: There is a religious component to the bigotry and prejudice against gay and lesbian individuals); see also id at 61:18-22, 62:13-17 (Catholic Church views homosexuality as "sinful."); PX2544 (video of same);

c. Tr 1565:2-1566:6 (Segura: "[R]eligion is the chief obstacle for gay and lesbian political progress, and it's the chief obstacle for a couple of reasons. * * * [I]t's difficult to think of a more powerful social entity in American society than the church. * * * [I]t's a very powerful organization, and in large measure they are arrayed against the interests of gays and lesbians.* * * [B]iblical condemnation of homosexuality and the teaching that gays are morally inferior on a

regular basis to a huge percentage of the public makes the * * * political opportunity structure very hostile to gay interests. It's very difficult to overcome that.");

d. PX0390 Video, Ron Prentice Addressing Supporters of Proposition 8, Part I at 0:20-0:40: Prentice explains that "God has led the way" for the Protect Marriage campaign and at 4:00-4:30: Prentice explains that "we do mind" when same-sex couples want to take the name "marriage" and apply it to their relationships, because "that's not what God wanted. * * * It's real basic.* * * It starts at Genesis 2.";

e. Tr 395:14-18 (Chauncey: Many clergy in churches considered homosexuality a sin, preached against it and have led campaigns against gay rights.);

f. Tr 440:19-441:2 (Chauncey: The religious arguments that were mobilized in the 1950s to argue against interracial marriage and integration as against God's will are mirrored by arguments that have been mobilized in the Proposition 8 campaign and many of the campaigns since Anita Bryant's "Save Our Children" campaign, which argue that homosexuality itself or gay people or the recognition of their equality is against God's will.);

g. PX2853 *Proposition 8 Local Exit Polls-Election Center 2008,* CNN at 8: 84 percent of people who attended church weekly voted in favor of Proposition 8;

h. PX0005 Leaflet, James L Garlow, *The Ten Declarations For Protecting Biblical Marriage* at 1 (June 25, 2008): "The Bible defines marriage as a covenantal union of one male and one female. * * * We will avoid unproductive arguments with those who, through the use of casuistry and rationalization, revise biblical passages in order to condone the practice of homosexuality or other sexual sins.";

i. PX0770 Congregation for the Doctrine of Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* at 2: "Sacred Scripture condemns homosexual acts as 'a serious depravity.' ";

j. PX0301 Catholics for the Common Good, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons, Excerpts from Vatican Document on Legal Recognition of Homosexual Unions* (Nov 22, 2009): There are absolutely no grounds for considering homosexual unions to be "in any way similar or even remotely analogous to God's plan for marriage and family"; "homosexual acts go against the natural moral law" and "[u]nder no circumstances can * * * be approved"; "[t]he homosexual inclination is * * * objectively disordered and homosexual practices are sins gravely contrary to chastity"; "[a]llowing children to be adopted by persons living in such unions would actually mean doing violence to these children"; and "legal recognition of homosexual unions * * * would mean* * * the approval of deviant behavior.";

k. PX0168 Southern Baptist Convention, SBC Resolution, On *Same-Sex Marriage* at 1 (June 2003): "Legalizing 'same-sex marriage' would convey a societal approval of a homosexual lifestyle, which the Bible calls sinful and dangerous both to the individuals involved and to society at large.";

***61 l.** PX0771 Southern Baptist Convention, *Resolution on President Clinton's Gay and Lesbian Pride Month Proclamation* (June 1999): "The Bible clearly teaches that homosexual behavior is an abomination and shameful before God.";

m. PX2839 Evangelical Presbyterian Church, *Position Paper on Homosexuality* at 3: "[H]omosexual practice is a distortion of the image of God as it is still reflected in fallen man, and a perversion of the sexual relationship as

God intended it to be.";

n. PX2840 *The Christian Life -- Christian Conduct: As Regards the Institutions of God,* Free Methodist Church at 5: "Homosexual behavior, as all sexual deviation, is a perversion of God's created order.";

o. PX2842 A L Barry, *What About * * * Homosexuality,* The Lutheran Church-Missouri Synod at 1: "The Lord teaches us through His Word that homosexuality is a sinful distortion of His desire that one man and one woman live together in marriage as husband and wife.";

p. PX2844 *On Marriage, Family, Sexuality, and the Sanctity of Life,* Orthodox Church of America at 1: "Homosexuality is to be approached as the result of humanity's rebellion against God.";

q. Tr 1566:18-22 (Segura: "[Proponents' expert] Dr Young freely admits that religious hostility to homosexuals [plays] an important role in creating a social climate that's conducive to hateful acts, to opposition to their interest in the public sphere and to prejudice and discrimination.");

r. Tr 2676:8-2678:24 (Miller: Miller agrees with his former statement that "the religious characteristics of California's Democratic voters" explain why so many Democrats voted for Barack Obama and also for Proposition 8.).

78. Stereotypes and misinformation have resulted in social and legal disadvantages for gays and lesbi- ans.

a. Tr 413:22-414:6 (Chauncey: The "Save Our Children" campaign in Dade County, Florida in 1977 was led by Anita Bryant, a famous Baptist singer. It sought to overturn an enactment that added sexual orientation to an antidiscrimination law, and it drew on and revived earlier stereotypes of homosexuals as child molesters.);

b. Tr 1554:14-19 (Segura: Ballot initiatives banning marriage equality have been passed in thirty-three states.);

c. Tr 2608:16-18 (Miller: "My view is that at least some people voted for Proposition 8 on the basis of anti-gay stereotypes and prejudice.");

d. Tr 538:15-539:10 (Chauncey: Chauncey is less optimistic now that same-sex marriage will become common in the United States than he was in 2004. Since 2004, when Chauncey wrote *Why Marriage? The History Shaping Today's Debate over Gay Equality,* the majority of states have enacted legislation or constitutional amendments that would prohibit same-sex couples from marrying. Some have been enacted by legislative vote, but a tremendous number of popular referenda have enacted these discriminatory measures.);

e. Tr 424:18-23 (Chauncey: "[T]he wave of campaigns that we have seen against gay marriage rights in the last decade are, in effect, the latest stage and cycle of anti-gay rights campaigns of a sort that I have been describing; that they continue with a similar intent and use some of the same imagery.");

***62 f.** Tr 412:20-413:1 (Chauncey: The series of initiatives we have seen since the mid-to-late 1970s over gay rights are another example of continuing prejudice and hostility.);

g. Tr 564:4-16 (Chauncey: The term "the gay agenda" was mobilized particularly effectively in the late 1980s and early 1990s in support of initiatives designed to overturn gay rights laws. The term tries to construct the idea of a unitary agenda and that picks up on long-standing stereotypes.);

h. Tr 1560:22-1561:9 (Segura: "[T]he role of prejudice is profound. * * * [I]f the group is envisioned as being somehow * * * morally inferior, a threat to children, a threat to freedom, if there's these deeply-seated beliefs, then the range of compromise is dramatically limited. It's very dif-

ficult to engage in the give-and-take of the legislative process when I think you are an inherently bad person. That's just not the basis for compromise and negotiation in the political process.");

i. Tr 1563:5-1564:21 (Segura: "[T]he American public is not very fond of gays and lesbians." Warmness scores for gays and lesbians are as much as 16 to 20 points below the average score for religious, racial and ethnic groups; over 65 percent of respondents placed gays and lesbians below the midpoint, below the score of 50, whereas a third to 45 percent did the same for other groups. When "two-thirds of all respondents are giving gays and lesbians a score below 50, that's telling elected officials that they can say bad things about gays and lesbians, and that could be politically advantageous to them because * * * many parts of the electorate feel the same way." Additionally, "the initiative process could be fertile ground to try to mobilize some of these voters to the polls for that cause.");

j. PX0619 The Williams Institute, *Chapter 14: Other Indicia of Animus against LGBT People by State and Local Officials, 1980-Present* at 9 (2009): The Williams Institute collected negative comments made by politicians about gays and lesbians in all fifty states. An Arizona state representative compared homosexuality to "bestiality, human sacrifice, and cannibalism." A California state senator described homosexuality as "a sickness * * * an uncontrolled passion similar to that which would cause someone to rape.";

k. PX0796 Kenneth P Miller, *The Democratic Coalition's Religious Divide: Why California Voters Supported Obama but Not Same-Sex Marriage,* 119 Revue Française d'Études Américaines 46, 52 (2009): "In the decade between 1998 and 2008, thirty states held statewide elections on state constitutional amendments defining marriage as a union between a man and a woman. * * * Voters approved marriage amendments in all thirty states where they were able to vote on the question, usually by large margins."

79. The Proposition 8 campaign relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian. The reason children need to be protected from same-sex marriage was never articulated in official campaign advertisements. Nevertheless, the advertisements insinuated that learning about same-sex marriage could make a child gay or lesbian and that parents should dread having a gay or lesbian child.

***63 a.** Tr 424:24-429:6 (Chauncey: Proposition 8 Official Voter Guide evoked fears about and contained stereotypical images of gay people.);

b. PX0710 at RFA No 51: Attorney General admits that some of the advertising in favor of Proposition 8 was based on fear of and prejudice against homosexual men and women;

c. Tr 2608:16-18 (Miller: "My view is that at least some people voted for Proposition 8 on the basis of anti-gay stereotypes and prejudice.");

d. PX0577 Frank Schubert and Jeff Flint, *Passing Prop 8,* Politics at 45-47 (Feb 2009): "[P]assing Proposition 8 would depend on our ability to convince voters that same-sex marriage had broader implications for Californians and was not only about the two individuals involved in a committed gay relationship." "We strongly believed that a campaign in favor of traditional marriage would not be enough to prevail." "We probed long and hard in countless focus groups and surveys to explore reactions to a variety of consequences our issue experts identified" and they decided to create campaign messaging focusing on "how this new 'fundamental right' would be inculcated in young children through public schools." "[T]here were limits to the degree of tolerance Californians would afford the gay community. They would entertain allowing gay marriage, but not if doing so had significant implications for the rest of society." "The Prop 8 victory proves something that readers of *Politics* magazine know

very well: campaigns matter.";

e. PX2150 Mailing leaflet, Protect Marriage: "[F]our activist judges on the Supreme Court in San Francisco ignored four million voters and imposed same-sex marriage on California. Their ruling means it is no longer about 'tolerance.' Acceptance of Gay Marriage is Now Mandatory.";

f. PX0015 Video, *Finally the Truth;* PX0016 Video, *Have You Thought About It?;* and PX0091 Video, *Everything to Do With Schools:* Protect Marriage television ads threatening unarticulated consequences to children if Proposition 8 does not pass;

g. PX0513 Letter from Tam to "friends": "This November, San Francisco voters will vote on a ballot to 'legalize prostitution.' This is put forth by the SF city government, which is under the rule of homosexuals. They lose no time in pushing the gay agenda -- after legalizing same-sex marriage, they want to legalize prostitution. What will be next? On their agenda list is: legalize having sex with children * * * We can't lose this critical battle. If we lose, this will very likely happen * * * 1. Same-Sex marriage will be a permanent law in California. One by one, other states would fall into Satan's hand. 2. Every child, when growing up, would fantasize marrying someone of the same sex. More children would become homosexuals. Even if our children is safe, our grandchildren may not. What about our children's grandchildren? 3. Gay activists would target the big churches and request to be married by their pastors. If the church refuse, they would sue the church." (as written);

h. Tr 553:23-554:14 (Chauncey: Tam's "What If We Lose" letter is consistent in its tone with a much longer history of anti-gay rhetoric. It reproduces many of the major themes of the anti-gay rights campaigns of previous decades and a longer history of anti-gay discrimination.);

***64 i.** PX0116 Video, Massachusetts Parents Oppose Same-Sex Marriage: Robb and Robin Wirthlin, Massachusetts parents, warn that redefining marriage has an impact on every level of society, especially on children, and claim that in Massachusetts homosexuality and gay marriage will soon be taught and promoted in every subject, including math, reading, social studies and spelling;

j. Tr 530:24-531:11 (Chauncey: The Wirthlins' advertisement implies that the very exposure to the idea of homosexuality threatens children and threatens their sexual identity, as if homosexuality were a choice. In addition, it suggests that the fact that gay people are being asked to be recognized and have their relationships recognized is an imposition on other people, as opposed to an extension of fundamental civil rights to gay and lesbian people.);

k. PX0391 Ron Prentice Addressing Supporters of Proposition 8, Part II at 1:25-1:40: "It's all about education, and how it will be completely turned over, not just incrementally now, but whole hog to the other side.";

l. Tr 1579:5-21 (Segura: "[O]ne of the enduring * * * tropes of anti-gay argumentation has been that gays are a threat to children. * * * [I]n the Prop 8 campaign [there] was a campaign advertisement saying, * * * 'At school today, I was told that I could marry a princess too.' And the underlying message of that is that * * * if Prop 8 failed, the public schools are going to turn my daughter into a lesbian.");

m. PX0015 Video, *Finally the Truth;* PX0099 Video, *It's Already Happened;* PX0116 Video, Massachusetts Parents Oppose Same-Sex Marriage; PX0401 Video, Tony Perkins, Miles McPherson and Ron Prentice Asking for Support of Proposition 8: Proposition 8 campaign videos focused on the need to protect children;

n. PX0079 Asian American Empowerment Coun-

cil, Asian American Community Newsletter & Voter Guide (Oct/Nov 2008): Children need to be protected from gays and lesbians;

o. Tr 1913:17-1914:12 (Tam: Tam supported Proposition 8 because he thinks "it is very important that our children won't grow up to fantasize or think about, Should I marry Jane or John when I grow up? Because this is very important for Asian families, the cultural issues, the stability of the family.");

p. Tr 558:16-560:12 (Chauncey: Tam's deposition testimony displays the deep fear about the idea that simple exposure to homosexuality or to marriages of gay and lesbian couples would lead children to become gay. And the issue is not just marriage equality itself -- it is sympathy to homosexuality. They oppose the idea that children could be introduced in school to the idea that there are gay people in the world. It is also consistent with the idea that homosexuality is a choice and there is an association between homosexuality and disease.);

q. PX0480A Video supporting Proposition 8 at 0:58-1:12: Prentice states that "[i]f traditional marriage goes by the wayside, then in every public school, children will be indoctrinated with a message that is absolutely contrary to the values that their family is attempting to teach them at home."

***65** 80. The campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships.

a. Tr 429:15-430:8, 431:17-432:11, 436:25-437:15, 438:8-439:6, 529:25-531:11; PX0015 Video, *Finally the Truth;* PX0016 Video, *Have You Thought About It?;* PX0029 Video, *Whether You Like It Or Not;* PX0091 Video, *Everything to Do With Schools;* PX0099 Video, *It's Already Happened;* PX1775 Photo leaflet, Protect Marriage (black and white); PX1775A Photo leaflet, Protect Marriage (color); PX1763 Poster with Phone Number, Protect Marriage: (Chauncey: The campaign television and print ads focused on protecting children and the concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage. The campaign conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships. The most striking image is of the little girl who comes in to tell her mom that she learned that a princess can marry a princess, which strongly echoes the idea that mere exposure to gay people and their relationships is going to lead a generation of young people to become gay, which voters are to understand as undesirable. The campaign conveyed a message used in earlier campaigns that when gay people seek any recognition this is an imposition on other people rather than simply an extension of civil rights to gay people.);

b. Compare above with Tr 412:23-413:1, 418:11-419:22, 420:3-20; PX1621 Pamphlet, Save Our Children; PX0864 Dudley Clendinen and Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* at 303 (Touchstone 1999): (Chauncey: One of the earliest anti-gay initiative campaigns used overt messaging of content similar to the Proposition 8 campaign.);

c. PX0008 Memorandum, Protect Marriage, New YouTube Video Clarifies Yes on 8 Proponents' Concerns: Education and Protection of Children is [sic] at Risk (Oct 31, 2008); PX0025 Leaflet, Protect Marriage, Vote YES on Prop 8 (Barack Obama: "I'm not in favor of gay marriage * * *."); PX1565 News Release, Protect Marriage, First Graders Taken to San Francisco City Hall for Gay Wedding (Oct 11, 2008): Proposition 8 campaign materials warn that unless Proposition 8 passes, children will be exposed to indoctrination on gay lifestyles. These materials invoke fears about the gay agenda.

III

CONCLUSIONS OF LAW [FN3]

Plaintiffs challenge Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Each challenge is independently meritorious, as Proposition 8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation.

DUE PROCESS

***66** [16][17] The Due Process Clause provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." US Const Amend XIV, § 1. Due process protects individuals against arbitrary governmental intrusion into life, liberty or property. See *Washington v. Glucksberg,* 521 U.S. 702, 719-720 (1997). When legislation burdens the exercise of a right deemed to be fundamental, the government must show that the intrusion withstands strict scrutiny. *Zablocki v. Redhail,* 434 U.S. 374, 388, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).

THE RIGHT TO MARRY PROTECTS AN INDIVIDUAL'S CHOICE OF MARITAL PARTNER REGARDLESS OF GENDER

[18] The freedom to marry is recognized as a fundamental right protected by the Due Process Clause. See, for example, *Turner v. Safely,* 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) ("[T]he decision to marry is a fundamental right" and marriage is an "expression[ ] of emotional support and public commitment."); *Zablocki,* 434 U.S. at 384 (1978) ("The right to marry is of fundamental importance for all individuals."); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-40, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (The "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Griswold v. Connecticut,* 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

The parties do not dispute that the right to marry is fundamental. The question presented here is whether plaintiffs seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new right.

[19] To determine whether a right is fundamental under the Due Process Clause, the court inquires into whether the right is rooted "in our Nation's history, legal traditions, and practices." *Glucksberg,* 521 U.S. at 710. Here, because the right to marry is fundamental, the court looks to the evidence presented at trial to determine: (1) the history, tradition and practice of marriage in the United States; and (2) whether plaintiffs seek to exercise their right to marry or seek to exercise some other right. Id.

Marriage has retained certain characteristics throughout the history of the United States. See FF 19, 34-35. Marriage requires two parties to give their free consent to form a relationship, which then forms the foundation of a household. FF 20, 34. The spouses must consent to support each other and any dependents. FF 34-35, 37. The state regulates marriage because marriage creates stable households, which in turn form the basis of a stable, governable populace. FF 35-37. The state respects an individual's choice to build a family with another

and protects the relationship because it is so central a part of an individual's life. See *Bowers v. Hardwick,* 478 U.S. 186, 204-205, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (Blackmun, J, dissenting).

***67** Never has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse. FF 21. "[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Lawrence,* 539 U.S. at 567. The Supreme Court recognizes that, wholly apart from procreation, choice and privacy play a pivotal role in the marital relationship. See *Griswold,* 381 U.S. at 485-486.

Race restrictions on marital partners were once common in most states but are now seen as archaic, shameful or even bizarre. FF 23-25. When the Supreme Court invalidated race restrictions in *Loving,* the definition of the right to marry did not change. 388 U.S. at 12. Instead, the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry. Id.

The marital bargain in California (along with other states) traditionally required that a woman's legal and economic identity be subsumed by her husband's upon marriage under the doctrine of coverture; this once-unquestioned aspect of marriage now is regarded as antithetical to the notion of marriage as a union of equals. FF 26-27, 32. As states moved to recognize the equality of the sexes, they eliminated laws and practices like coverture that had made gender a proxy for a spouse's role within a marriage. FF 26-27, 32. Marriage was thus transformed from a male-dominated institution into an institution recognizing men and women as equals. Id. Yet, individuals retained the right to marry; that right did not become different simply because the institution of marriage became compatible with gender equality.

The evidence at trial shows that marriage in the United States traditionally has not been open to same-sex couples. The evidence suggests many reasons for this tradition of exclusion, including gender roles mandated through coverture, FF 26-27, social disapproval of same-sex relationships, FF 74, and the reality that the vast majority of people are heterosexual and have had no reason to challenge the restriction, FF 43. The evidence shows that the movement of marriage away from a gendered institution and toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than a change in marriage. The evidence did not show any historical purpose for excluding same-sex couples from marriage, as states have never required spouses to have an ability or willingness to procreate in order to marry. FF 21. Rather, the exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed.

The right to marry has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household. FF 19-20, 34-35. Race and gender restrictions shaped marriage during eras of race and gender inequality, but such restrictions were never part of the historical core of the institution of marriage. FF 33. Today, gender is not relevant to the state in determining spouses' obligations to each other and to their dependents. Relative gender composition aside, same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law. FF 48. Gender no longer forms an essential part of marriage; marriage under law is a union of equals.

***68** Plaintiffs seek to have the state recognize their committed relationships, and plaintiffs' relationships are consistent with the core of the history, tradition and practice of marriage in the United States. Perry and Stier seek to be spouses; they seek the mutual obligation and honor that attend marriage, FF 52. Zarrillo and Katami seek recognition from

the state that their union is "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold,* 381 U.S. at 486. Plaintiffs' unions encompass the historical purpose and form of marriage. Only the plaintiffs' genders relative to one another prevent California from giving their relationships due recognition.

Plaintiffs do not seek recognition of a new right. To characterize plaintiffs' objective as "the right to same-sex marriage" would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy -- namely, marriage. Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.

DOMESTIC PARTNERSHIPS DO NOT SATISFY CALIFORNIA'S OBLIGATION TO ALLOW PLAINTIFFS TO MARRY

Having determined that plaintiffs seek to exercise their fundamental right to marry under the Due Process Clause, the court must consider whether the availability of Registered Domestic Partnerships fulfills California's due process obligation to same-sex couples. The evidence shows that domestic partnerships were created as an alternative to marriage that distinguish same-sex from opposite-sex couples. FF 53-54; *In re Marriage Cases,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 434 (Cal 2008) (One of the "core elements of th[e] fundamental right [to marry] is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships."); id at 402, 434, 445 (By "reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership," the state communicates the "official view that [same-sex couples'] committed relationships are of lesser stature than the comparable relationships of opposite-sex couples."). Proponents do not dispute the "significant symbolic disparity between domestic partnership and marriage." Doc # 159-2 at 6.

California has created two separate and parallel institutions to provide couples with essentially the same rights and obligations. Cal Fam Code § 297.5(a). Domestic partnerships are not open to opposite-sex couples unless one partner is at least sixty-two years old. Cal Fam Code § 297(b)(5)(B). Apart from this limited exception -- created expressly to benefit those eligible for benefits under the Social Security Act -- the sole basis upon which California determines whether a couple receives the designation "married" or the designation "domestic partnership" is the sex of the spouses relative to one another. Compare Cal Fam Code §§ 297-299.6 (domestic partnership) with §§ 300-536 (marriage). No further inquiry into the couple or the couple's relationship is required or permitted. Thus, California allows almost all opposite-sex couples only one option-marriage-and all same-sex couples only one option-domestic partnership. See id, FF 53-54.

***69** The evidence shows that domestic partnerships do not fulfill California's due process obligation to plaintiffs for two reasons. First, domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage. FF 53-54. Second, domestic partnerships were created specifically so that California could offer same-sex couples rights and benefits while explicitly withholding marriage from same-sex couples. Id, Cal Fam Code § 297 (Gov Davis 2001 signing statement: "In California, a legal marriage is between a man and a woman. * * * This [domestic partnership] legislation does nothing to contradict or undermine the definition of a legal marriage.").

The evidence at trial shows that domestic partnerships exist solely to differentiate same-sex unions from marriages. FF 53-54. A domestic partnership is not a marriage; while domestic partnerships offer same-sex couples almost all of the rights and responsibilities associated with marriage, the evidence shows that the withholding of the designation "marriage" significantly disadvantages plaintiffs.

FF 52-54. The record reflects that marriage is a culturally superior status compared to a domestic partnership. FF 52. California does not meet its due process obligation to allow plaintiffs to marry by offering them a substitute and inferior institution that denies marriage to same-sex couples.

PROPOSITION 8 IS UNCONSTITUTIONAL BECAUSE IT DENIES PLAINTIFFS A FUNDAMENTAL RIGHT WITHOUT A LEGITIMATE (MUCH LESS COMPELLING) REASON

[20][21][22] Because plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny. *Zablocki,* 434 U.S. at 388. That the majority of California voters supported Proposition 8 is irrelevant, as "fundamental rights may not be submitted to [a] vote; they depend on the outcome of no elections." *West Virginia State Board of Education v Barnette,* 319 US 624, 638 (1943). Under strict scrutiny, the state bears the burden of producing evidence to show that Proposition 8 is narrowly tailored to a compelling government interest. *Carey v. Population Services International,* 431 U.S. 678, 686, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). Because the government defendants declined to advance such arguments, proponents seized the role of asserting the existence of a compelling California interest in Proposition 8.

As explained in detail in the equal protection analysis, Proposition 8 cannot withstand rational basis review. Still less can Proposition 8 survive the strict scrutiny required by plaintiffs' due process claim. The minimal evidentiary presentation made by proponents does not meet the heavy burden of production necessary to show that Proposition 8 is narrowly tailored to a compelling government interest. Proposition 8 cannot, therefore, withstand strict scrutiny. Moreover, proponents do not assert that the availability of domestic partnerships satisfies plaintiffs' fundamental right to marry; proponents stipulated that "[t]here is a significant symbolic disparity between domestic partnership and marriage." Doc # 159-2 at 6. Accordingly, Proposition 8 violates the Due Process Clause of the Fourteenth Amendment.

EQUAL PROTECTION

***70** [23] The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." US Const Amend XIV, § 1. Equal protection is "a pledge of the protection of equal laws." *Yick Wo v. Hopkins,* 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The guarantee of equal protection coexists, of course, with the reality that most legislation must classify for some purpose or another. See *Romer v. Evans,* 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). When a law creates a classification but neither targets a suspect class nor burdens a fundamental right, the court presumes the law is valid and will uphold it as long as it is rationally related to some legitimate government interest. See, for example, *Heller v. Doe,* 509 U.S. 312, 319-320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

[24][25] The court defers to legislative (or in this case, popular) judgment if there is at least a debatable question whether the underlying basis for the classification is rational. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed.2d 659 (1980). Even under the most deferential standard of review, however, the court must "insist on knowing the relation between the classification adopted and the object to be attained." *Romer,* 517 U.S. at 632; *Heller,* 509 U.S. at 321 (basis for a classification must "find some footing in the realities of the subject addressed by the legislation"). The court may look to evidence to determine whether the basis for the underlying debate is rational. *Plyler v. Doe,* 457 U.S. 202, 228, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (finding an asserted interest in preserving state resources by prohibiting undocumented children from attending public school to be irrational because "the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the

local economy and tax money to the state fisc"). The search for a rational relationship, while quite deferential, "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer,* 517 U.S. at 633. The classification itself must be related to the purported interest. *Plyler,* 457 U.S. at 220 ("It is difficult to conceive of a rational basis for penalizing [undocumented children] for their presence within the United States," despite the state's interest in preserving resources.).

[26] Most laws subject to rational basis easily survive equal protection review, because a legitimate reason can nearly always be found for treating different groups in an unequal manner. See *Romer,* 517 U.S. at 633. Yet, to survive rational basis review, a law must do more than disadvantage or otherwise harm a particular group. *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973).

SEXUAL ORIENTATION OR SEX DISCRIMINATION

***71** Plaintiffs challenge Proposition 8 as violating the Equal Protection Clause because Proposition 8 discriminates both on the basis of sex and on the basis of sexual orientation. Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex. But Proposition 8 also operates to restrict Perry's choice of marital partner because of her sexual orientation; her desire to marry another woman arises only because she is a lesbian.

The evidence at trial shows that gays and lesbians experience discrimination based on unfounded stereotypes and prejudices specific to sexual orientation. Gays and lesbians have historically been targeted for discrimination because of their sexual orientation; that discrimination continues to the present. FF 74-76. As the case of Perry and the other plaintiffs illustrates, sex and sexual orientation are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation. See FF 42-43. Sexual orientation discrimination is thus a phenomenon distinct from, but related to, sex discrimination.

Proponents argue that Proposition 8 does not target gays and lesbians because its language does not refer to them. In so arguing, proponents seek to mask their own initiative. FF 57. Those who choose to marry someone of the opposite sex -- heterosexuals -- do not have their choice of marital partner restricted by Proposition 8. Those who would choose to marry someone of the same sex --homosexuals -- have had their right to marry eliminated by an amendment to the state constitution. Homosexual conduct and identity together define what it means to be gay or lesbian. See FF 42-43. Indeed, homosexual conduct and attraction are constitutionally protected and integral parts of what makes someone gay or lesbian. *Lawrence,* 539 U.S. at 579; FF 42-43; see also *Christian Legal Society v. Martinez,* 561 U.S. ----, 130 S.Ct. 2971, ---L.Ed.2d----, No 08-1371 Slip Op at 23 ("Our decisions have declined to distinguish between status and conduct in [the context of sexual orientation].") (June 28, 2010) (citing *Lawrence,* 539 U.S. at 583 (O'Connor, J, concurring)).

Proposition 8 targets gays and lesbians in a manner specific to their sexual orientation and, because of their relationship to one another, Proposition 8 targets them specifically due to sex. Having considered the evidence, the relationship between sex and sexual orientation and the fact that Proposition 8 eliminates a right only a gay man or a lesbian would exercise, the court determines that plaintiffs' equal protection claim is based on sexual orientation, but this claim is equivalent to a claim of discrimination based on sex.

STANDARD OF REVIEW

***72** As presently explained in detail, the Equal Protection Clause renders Proposition 8 unconstitutional under any standard of review. Accordingly, the court need not address the question whether laws classifying on the basis of sexual orientation should be subject to a heightened standard of review.

Although Proposition 8 fails to possess even a rational basis, the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (noting that strict scrutiny may be appropriate where a group has experienced a " 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities" (quoting *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973)). See FF 42-43, 46-48, 74-78. Proponents admit that "same-sex sexual orientation does not result in any impairment in judgment or general social and vocational capabilities." PX0707 at RFA No 21.

The court asked the parties to identify a difference between heterosexuals and homosexuals that the government might fairly need to take into account when crafting legislation. Doc # 677 at 8. Proponents pointed only to a difference between same-sex couples (who are incapable through sexual intercourse of producing offspring biologically related to both parties) and opposite-sex couples (some of whom are capable through sexual intercourse of producing such offspring). Doc # 687 at 32-34. Proponents did not, however, advance any reason why the government may use sexual orientation as a proxy for fertility or why the government may need to take into account fertility when legislating. Consider, by contrast, *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 444, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Legislation singling out a class for differential treatment hinges upon a demonstration of "real and undeniable differences" between the class and others); see also *United States v. Virginia,* 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) ("Physical differences between men and women * * * are enduring."). No evidence at trial illuminated distinctions among lesbians, gay men and heterosexuals amounting to "real and undeniable differences" that the government might need to take into account in legislating.

The trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation. FF 47. Here, however, strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review.

PROPOSITION 8 DOES NOT SURVIVE RATIONAL BASIS

***73** [27] Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest. One example of a legitimate state interest in not issuing marriage licenses to a particular group might be a scarcity of marriage licenses or county officials to issue them. But marriage licenses in California are not a limited commodity, and the existence of 18,000 same-sex married couples in California shows that the state has the resources to allow both same-sex and opposite-sex couples to wed. See Background to Proposition 8 above.

Proponents put forth several rationales for Proposition 8, see Doc # 605 at 12-15, which the court now examines in turn: (1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those

who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest.

PURPORTED INTEREST # 1: RESERVING MARRIAGE AS A UNION BETWEEN A MAN AND A WOMAN AND EXCLUDING ANY OTHER RELATIONSHIP

Proponents first argue that Proposition 8 is rational because it preserves: (1) "the traditional institution of marriage as the union of a man and a woman"; (2) "the traditional social and legal purposes, functions, and structure of marriage"; and (3) "the traditional meaning of marriage as it has always been defined in the English language." Doc # 605 at 12-13. These interests relate to maintaining the definition of marriage as the union of a man and a woman for its own sake.

Tradition alone, however, cannot form a rational basis for a law. *Williams v. Illinois,* 399 U.S. 235, 239, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). The "ancient lineage" of a classification does not make it rational. *Heller,* 509 U.S. at 327. Rather, the state must have an interest apart from the fact of the tradition itself.

The evidence shows that the tradition of restricting an individual's choice of spouse based on gender does not rationally further a state interest despite its "ancient lineage." Instead, the evidence shows that the tradition of gender restrictions arose when spouses were legally required to adhere to specific gender roles. See FF 26-27. California has eliminated all legally-mandated gender roles except the requirement that a marriage consist of one man and one woman. FF 32. Proposition 8 thus enshrines in the California Constitution a gender restriction that the evidence shows to be nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life.

The tradition of restricting marriage to opposite-sex couples does not further any state interest. Rather, the evidence shows that Proposition 8 harms the state's interest in equality, because it mandates that men and women be treated differently based only on antiquated and discredited notions of gender. See FF 32, 57.

***74** Proponents' argument that tradition prefers opposite-sex couples to same-sex couples equates to the notion that opposite-sex relationships are simply better than same-sex relationships. Tradition alone cannot legitimate this purported interest. Plaintiffs presented evidence showing conclusively that the state has no interest in preferring opposite-sex couples to same-sex couples or in preferring heterosexuality to homosexuality. See FF 48-50. Moreover, the state cannot have an interest in disadvantaging an unpopular minority group simply because the group is unpopular. *Moreno,* 413 U.S. at 534.

The evidence shows that the state advances nothing when it adheres to the tradition of excluding same-sex couples from marriage. Proponents' asserted state interests in tradition are nothing more than tautologies and do not amount to rational bases for Proposition 8.

PURPORTED INTEREST # 2: PROCEEDING WITH CAUTION WHEN IMPLEMENTING SOCIAL CHANGES

Proponents next argue that Proposition 8 is related to state interests in: (1) "[a]cting incrementally and with caution when considering a radical transformation to the fundamental nature of a bedrock social institution"; (2) "[d]ecreasing the probability of weakening the institution of marriage"; (3) "[d]ecreasing the probability of adverse consequences that could result from weakening the institution of marriage"; and (4) "[d]ecreasing the probability of the potential adverse consequences of same-sex marriage." Doc # 605 at 13-14.

Plaintiffs presented evidence at trial sufficient to re-

but any claim that marriage for same-sex couples amounts to a sweeping social change. See FF 55. Instead, the evidence shows beyond debate that allowing same-sex couples to marry has at least a neutral, if not a positive, effect on the institution of marriage and that same-sex couples' marriages would benefit the state. Id. Moreover, the evidence shows that the rights of those opposed to homosexuality or same-sex couples will remain unaffected if the state ceases to enforce Proposition 8. FF 55, 62.

The contrary evidence proponents presented is not credible. Indeed, proponents presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage. The process of allowing same-sex couples to marry is straightforward, and no evidence suggests that the state needs any significant lead time to integrate same-sex couples into marriage. See Background to Proposition 8 above. Consider, by contrast, *Cooper v. Aaron,* 358 U.S. 1, 7, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958) (recognizing that a school district needed time to implement racial integration but nevertheless finding a delay unconstitutional because the school board's plan did not provide for "the earliest practicable completion of desegregation"). The evidence shows that allowing same-sex couples to marry will be simple for California to implement because it has already done so; no change need be phased in. California need not restructure any institution to allow same-sex couples to marry. See FF 55.

Because the evidence shows same-sex marriage has and will have no adverse effects on society or the institution of marriage, California has no interest in waiting and no practical need to wait to grant marriage licenses to same-sex couples. Proposition 8 is thus not rationally related to proponents' purported interests in proceeding with caution when implementing social change.

PURPORTED INTEREST # 3: PROMOTING OPPOSITE-SEX PARENTING OVER SAME-SEX PARENTING

***75** Proponents' largest group of purported state interests relates to opposite-sex parents. Proponents argue Proposition 8:(1) promotes "stability and responsibility in naturally procreative relationships"; (2) promotes "enduring and stable family structures for the responsible raising and care of children by their biological parents"; (3) increases "the probability that natural procreation will occur within stable, enduring, and supporting family structures"; (4) promotes "the natural and mutually beneficial bond between parents and their biological children"; (5) increases "the probability that each child will be raised by both of his or her biological parents"; (6) increases "the probability that each child will be raised by both a father and a mother"; and (7) increases "the probability that each child will have a legally recognized father and mother." Doc # 605 at 13-14.

The evidence supports two points which together show Proposition 8 does not advance any of the identified interests: (1) same-sex parents and opposite-sex parents are of equal quality, FF 69-73, and (2) Proposition 8 does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents, FF 43, 46, 51.

The evidence does not support a finding that California has an interest in preferring opposite-sex parents over same-sex parents. Indeed, the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes. FF 70. Moreover, Proposition 8 has nothing to do with children, as Proposition 8 simply prevents same-sex couples from marrying. FF 57. Same-sex couples can have (or adopt) and raise children. When they do, they are treated identically to opposite-sex parents under California law. FF 49. Even if California had an interest in preferring opposite-sex parents to same-sex parents -- and the evidence plainly shows that California does not --Proposition 8 is not rationally related to that interest, because Proposition 8 does not affect who can or should become a par-

ent under California law. FF 49, 57.

To the extent California has an interest in encouraging sexual activity to occur within marriage (a debatable proposition in light of *Lawrence,* 539 U.S. at 571) the evidence shows Proposition 8 to be detrimental to that interest. Because of Proposition 8, same-sex couples are not permitted to engage in sexual activity within marriage. FF 53. Domestic partnerships, in which sexual activity is apparently expected, are separate from marriage and thus codify California's encouragement of non-marital sexual activity. Cal Fam Code §§ 297-299.6. To the extent proponents seek to encourage a norm that sexual activity occur within marriage to ensure that reproduction occur within stable households, Proposition 8 discourages that norm because it requires some sexual activity and child-bearing and child-rearing to occur outside marriage.

Proponents argue Proposition 8 advances a state interest in encouraging the formation of stable households. Instead, the evidence shows that Proposition 8 undermines that state interest, because same-sex households have become less stable by the passage of Proposition 8. The inability to marry denies same-sex couples the benefits, including stability, attendant to marriage. FF 50. Proponents failed to put forth any credible evidence that married opposite-sex households are made more stable through Proposition 8. FF 55. The only rational conclusion in light of the evidence is that Proposition 8 makes it less likely that California children will be raised in stable households. See FF 50, 56.

***76** None of the interests put forth by proponents relating to parents and children is advanced by Proposition 8; instead, the evidence shows Proposition 8 disadvantages families and their children.

PURPORTED INTEREST # 4: PROTECTING THE FREEDOM OF THOSE WHO OPPOSE MARRIAGE FOR SAME-SEX COUPLES

Proponents next argue that Proposition 8 protects the First Amendment freedom of those who disagree with allowing marriage for couples of the same sex. Proponents argue that Proposition 8:(1) preserves "the prerogative and responsibility of parents to provide for the ethical and moral development and education of their own children"; and (2) accommodates "the First Amendment rights of individuals and institutions that oppose same-sex marriage on religious or moral grounds." Doc # 605 at 14.

These purported interests fail as a matter of law. Proposition 8 does not affect any First Amendment right or responsibility of parents to educate their children. See *In re Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 451-452. Californians are prevented from distinguishing between same-sex partners and opposite-sex spouses in public accommodations, as California antidiscrimination law requires identical treatment for same-sex unions and opposite-sex marriages. *Koebke v. Bernardo Heights Country Club,* 36 Cal.4th 824, 31 Cal.Rptr.3d 565, 115 P.3d 1212, 1217-1218 (Cal 2005). The evidence shows that Proposition 8 does nothing other than eliminate the right of same-sex couples to marry in California. See FF 57, 62. Proposition 8 is not rationally related to an interest in protecting the rights of those opposed to same-sex couples because, as a matter of law, Proposition 8 does not affect the rights of those opposed to homosexuality or to marriage for couples of the same sex. FF 62.

To the extent proponents argue that one of the rights of those morally opposed to same-sex unions is the right to prevent same-sex couples from marrying, as explained presently those individuals' moral views are an insufficient basis upon which to enact a legislative classification.

PURPORTED INTEREST # 5: TREATING SAME-SEX COUPLES DIFFERENTLY FROM OPPOSITE-SEX COUPLES

Proponents argue that Proposition 8 advances a state interest in treating same-sex couples differ-

ently from opposite-sex couples by: (1) "[u]sing different names for different things"; (2) "[m]aintaining the flexibility to separately address the needs of different types of relationships"; (3) "[e]nsuring that California marriages are recognized in other jurisdictions"; and (4) "[c]onforming California's definition of marriage to federal law." Doc # 605 at 14.

Here, proponents assume a premise that the evidence thoroughly rebutted: rather than being different, same-sex and opposite-sex unions are, for all purposes relevant to California law, exactly the same. FF 47-50. The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples. See FF 48, 76-80. The evidence fatally undermines any purported state interest in treating couples differently; thus, these interests do not provide a rational basis supporting Proposition 8.

*77 In addition, proponents appear to claim that Proposition 8 advances a state interest in easing administrative burdens associated with issuing and recognizing marriage licenses. Under precedents such as *Craig v. Boren,* "administrative ease and convenience" are not important government objectives. 429 U.S. 190, 198, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Even assuming the state were to have an interest in administrative convenience, Proposition 8 actually creates an administrative burden on California because California must maintain a parallel institution for same-sex couples to provide the equivalent rights and benefits afforded to married couples. See FF 53. Domestic partnerships create an institutional scheme that must be regulated separately from marriage. Compare Cal Fam Code §§ 297-299.6 with Cal Fam Code §§ 300-536. California may determine whether to retain domestic partnerships or eliminate them in the absence of Proposition 8; the court presumes, however, that as long as Proposition 8 is in effect, domestic partnerships and the accompanying administrative burden will remain. Proposition 8 thus hinders rather than advances administrative convenience.

PURPORTED INTEREST # 6: THE CATCHALL INTEREST

Finally, proponents assert that Proposition 8 advances "[a]ny other conceivable legitimate interests identified by the parties, amici, or the court at any stage of the proceedings." Doc # 605 at 15. But proponents, amici and the court, despite ample opportunity and a full trial, have failed to identify any rational basis Proposition 8 could conceivably advance. Proponents, represented by able and energetic counsel, developed a full trial record in support of Proposition 8. The resulting evidence shows that Proposition 8 simply conflicts with the guarantees of the Fourteenth Amendment.

Many of the purported interests identified by proponents are nothing more than a fear or unarticulated dislike of same-sex couples. Those interests that are legitimate are unrelated to the classification drawn by Proposition 8. The evidence shows that, by every available metric, opposite-sex couples are not better than their same-sex counterparts; instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equal. FF 47-50. Proposition 8 violates the Equal Protection Clause because it does not treat them equally.

A PRIVATE MORAL VIEW THAT SAME-SEX COUPLES ARE INFERIOR TO OPPOSITE-SEX COUPLES IS NOT A PROPER BASIS FOR LEGISLATION

***78** In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. FF 78-80. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two wo-

men, this belief is not a proper basis on which to legislate. See *Romer,* 517 U.S. at 633; *Moreno,* 413 U.S. at 534; *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) ("[T]he Constitution cannot control [private biases] but neither can it tolerate them.").

The evidence shows that Proposition 8 was a hard-fought campaign and that the majority of California voters supported the initiative. See Background to Proposition 8 above, FF 17-18, 79-80. The arguments surrounding Proposition 8 raise a question similar to that addressed in *Lawrence,* when the Court asked whether a majority of citizens could use the power of the state to enforce "profound and deep convictions accepted as ethical and moral principles" through the criminal code. 539 U.S. at 571. The question here is whether California voters can enforce those same principles through regulation of marriage licenses. They cannot. California's obligation is to treat its citizens equally, not to "mandate [its] own moral code." Id (citing *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674, (1992)). "[M]oral disapproval, without any other asserted state interest," has never been a rational basis for legislation. *Lawrence,* 539 U.S. at 582 (O'Connor, J, concurring). Tradition alone cannot support legislation. See *Williams,* 399 U.S. at 239; *Romer,* 517 U.S. at 635; *Lawrence,* 539 U.S. at 579.

Proponents' purported rationales are nothing more than post-hoc justifications. While the Equal Protection Clause does not prohibit post-hoc rationales, they must connect to the classification drawn. Here, the purported state interests fit so poorly with Proposition 8 that they are irrational, as explained above. What is left is evidence that Proposition 8 enacts a moral view that there is something "wrong" with same-sex couples. See FF 78-80.

The evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples. FF 79-80. The campaign relied heavily on negative stereotypes about gays and lesbians and focused on protecting children from inchoate threats vaguely associated with gays and lesbians. FF 79-80; See PX0016 Video, *Have You Thought About It?* (video of a young girl asking whether the viewer has considered the consequences to her of Proposition 8 but not explaining what those consequences might be).

At trial, proponents' counsel attempted through cross-examination to show that the campaign wanted to protect children from learning about same-sex marriage in school. See PX0390A Video, Ron Prentice Addressing Supporters of Proposition 8, Excerpt; Tr 132:25-133:3 (proponents' counsel to Katami: "But the fact is that what the Yes on 8 campaign was pointing at, is that kids would be taught about same-sex relationships in first and second grade; isn't that a fact, that that's what they were referring to?"). The evidence shows, however, that Proposition 8 played on a fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are not heterosexual. FF 79; PX0099 Video, *It's Already Happened* (mother's expression of horror upon realizing her daughter now knows she can marry a princess).

***79** The testimony of George Chauncey places the Protect Marriage campaign advertisements in historical context as echoing messages from previous campaigns to enact legal measures to disadvantage gays and lesbians. FF 74, 77-80. The Protect Marriage campaign advertisements ensured California voters had these previous fear-inducing messages in mind. FF 80. The evidence at trial shows those fears to be completely unfounded. FF 47-49, 68-73, 76-80.

Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples. FF 76, 79-80; *Romer,* 517 U.S. at 634 ("[L]aws of the kind now before us raise the inevit-

able inference that the disadvantage imposed is born of animosity toward the class of persons affected."). Because Proposition 8 disadvantages gays and lesbians without any rational justification, Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.

REMEDIES

Plaintiffs have demonstrated by overwhelming evidence that Proposition 8 violates their due process and equal protection rights and that they will continue to suffer these constitutional violations until state officials cease enforcement of Proposition 8. California is able to issue marriage licenses to same-sex couples, as it has already issued 18,000 marriage licenses to same-sex couples and has not suffered any demonstrated harm as a result, see FF 64-66; moreover, California officials have chosen not to defend Proposition 8 in these proceedings.

Because Proposition 8 is unconstitutional under both the Due Process and Equal Protection Clauses, the court orders entry of judgment permanently enjoining its enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8. The clerk is DIRECTED to enter judgment without bond in favor of plaintiffs and plaintiff-intervenors and against defendants and defendant-intervenors pursuant to FRCP 58.

***80 IT IS SO ORDERED.**

FN1. All cited evidence is available at http:// ecf.cand.uscourts.gov/cand/09cv2292.

FN2. To the extent any of the findings of fact should more properly be considered conclusions of law, they shall be deemed as such.

FN3. To the extent any of the conclusions of law should more properly be considered findings of fact, they shall be deemed as such.

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--- F.Supp.2d ----, 2010 WL 3025614 (N.D.Cal.)

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