

No. 10-16696

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

vs.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants,

and

DENNIS HOLLINGSWORTH, *et al.*,
Defendant-Intervenors-Appellants.

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

**BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION FOR
MARRIAGE, NATIONAL ORGANIZATION FOR MARRIAGE
RHODE ISLAND, AND FAMILY LEADER
IN SUPPORT OF THE INTERVENING DEFENDANTS-APPELLANTS.**

William C. Duncan
MARRIAGE LAW FOUNDATION
1868 N 800 E
Lehi, UT 84043
Phone: (801) 367-4570
duncanw@marriagelawfoundation.org

Joshua K. Baker
NATIONAL ORGANIZATION FOR MARRIAGE
2029 K Street NW, Suite 300
Washington, DC 20006
Phone: (888) 894-3604
Fax: (866) 383-2074
jbaker@nationformarriage.org

Attorneys for Amici Curiae National Organization for Marriage, et al.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that none of the *amici* is a corporation that issues stock or has a parent corporation that issues stock.

/s/ Joshua K. Baker
Joshua K. Baker
Counsel for *Amici Curiae*
September 24, 2010

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INTERESTS OF THE *AMICI* AND CONSENT TO FILE

The National Organization for Marriage (NOM), also d/b/a National Organization for Marriage Rhode Island, is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. NOM Rhode Island is the Rhode Island state chapter of the National Organization for Marriage. NOM was formed in response to the need for an organized opposition to same-sex marriage in state legislatures and it serves as a national resource for marriage-related initiatives at the state and local level, having been described by the Washington Post as “the preeminent organization dedicated to preventing the legalization of same-sex marriage.” Monica Hesse, *Opposing Gay Unions With Sanity and a Smile*, Washington Post, August 28, 2009, at C01. In 2008, NOM formed a California ballot initiative committee in support of Proposition 8, emerging as the largest single donor to the Prop 8 campaign. The outcome of this litigation will impact NOM’s ability to pursue its mission not only in California, but also in states throughout the 9th Circuit, with implications nationally. The National Organization for Marriage is exempt from federal income tax under Internal Revenue Code § 501(c)(4).

Family Leader is the recognized and respected source to whom conservative citizens and policy makers turn to for accurate information and research on timely

issues focused on strengthening one-woman one-man marriage, supporting traditional families, ensuring parental rights, and advocating religious freedoms and media decency. Family Leader's vision is to help shape a hopeful future for the rising generations, to stand fast for family, faith and freedom in the public square and to support responsible citizenship and higher cultural standards. In so doing Amicus will advocate the principles reflecting the gospel of Jesus Christ. Family Leader markets its education pieces to 600,000 individuals and boasts 27,000 members.

All parties have consented to the filing of all amicus briefs.

INTRODUCTION

How does gay marriage harm marriage? This case is in part about the power of words, of the "social meanings" attached to the word marriage. May the voters of the state of California classify marriage as the union of male and female, even while extending identical legal incidents to same-sex couples through civil unions?

Do not take our word for this, the plaintiffs in this case have made it clear the harm they allege, quite apart from any practical consequences, is the harm of having their relationships excluded from the "social meaning" of marriage. They want this court to short-circuit the hard task of persuading their fellow citizens that

their unions ARE marriages, by asking this court to re-educate the voters and re-assign the meaning of a word.

This brief argues that same-sex marriage works a profound change in the public meaning of marriage; this change in public definition from “sexual union of male and female” to “union of any two persons” clearly severs the connections between marriage and its core historic civil mission: increasing the likelihood that children will be born to and raised by their mother and father. If it is rational for the plaintiffs to be concerned about the meaning of the word, it is rational for 7 million California voters to be concerned as well.

ARGUMENT

I. REDEFINING MARRIAGE TO INCLUDE SAME-SEX COUPLES WILL CHANGE THE PUBLIC MEANING AND PURPOSE OF MARRIAGE IN A WAY THAT WILL WEAKEN OR SEVER ITS RELATIONSHIP TO PROCREATION IN THE PUBLIC MIND.

A. Marriage is intrinsically linked to procreation in law and society

Sexual unions of male and female are unique: they alone can make new life, and when they do so will either connect (or disconnect) children from mothers and fathers. As set forth more fully in the opening brief of the Defendant-Intervenors, it is this biological reality that has given rise to the marriage relationship, not just

in America, but across all cultural, ethnic, religious and tribal lines throughout recorded history. Defendant-Intervenors-Appellants' Brief 51-57 (Def-Intvrs.' Br.).

This global consensus on marriage formed the foundation of our common law, animating the laws governing marriage not only in California, but throughout the United States. In speaking of marriage, our state courts have reinforced this understanding with clear and repeated pronouncements that marriage is centrally concerned with procreation. *Id.* at 57-60. The vast majority of children are conceived through acts of sexual passion; marriage provides a means to help society regulate this passion so that children do not get hurt.

How does marriage as an enduring and exclusive sexual union of male and female serve the state's interest in procreation and child well-being? The connection is two-fold: First, every child conceived by a married couple begins life with a mother and father precommitted to caring for him or her together. Almost no child conceived in any other sexual union receives this great benefit. Additionally, every person who remains faithfully married, whether they have children together or not, is much less likely create fatherless children in alternate relationships. Every married couple minimally serves the public purpose of marriage and none contradict the link between marriage and procreation.

As noted by the Defendant-Intervenors, this rational connection between marriage and procreation is not ancient history, but has been recently and repeatedly affirmed by numerous state and federal appellate courts. Def-Intvrs.’ Br. at 91-92. Under the rational basis standard, it is difficult to conceive how the trial court could flatly ignore (and implicitly impugn as irrational) opinions by numerous respected jurists from other jurisdictions—including the United States Court of Appeals for the Eighth Circuit, the New York Court of Appeals, the Maryland Court of Appeals, and the Washington Supreme Court. These cases, even if one disagrees with the holding, clearly establish this important proposition: Reasonable people may believe that marriage promotes the state’s interest in encouraging children to be born to a mother and father who are committed both to one another and to the children their union may create. This alone is sufficient to uphold Proposition 8 under rational basis review.

B. The public meaning of marriage matters.

The State’s definition of marriage helps shape the cultural understanding of what marriage is and what purposes it serves. Legally redefining marriage as “the union of any two persons,” particularly through the blunt instrument of constitutional mandate, will weaken or sever the connection in the public square between marriage and procreation, elevating adult desires for love and

commitment over the needs of children as the defining public purpose of marriage in law.

The ability of the law to shape public understanding of social institutions has been long recognized. Scholars have explained that marriage law regulates opposite-sex relationships by providing a bright line marker that would be difficult or impossible for any individual to sustain alone.

This is the function of family law that Professor Carl Schneider describes as the “channeling function”: “[I]n the channeling function the law recruits, builds, shapes, sustains, and promotes social institutions.” Carl E. Schneider, *The Channeling Function in Family Law*, 20 Hofstra L. Rev. 495, 496 (1992). Schneider notes that “our failure to recognize the function regularly causes courts and scholars to misunderstand the regulation of families and the work of the law.” *Id.* “Generally,” he writes “the channeling function does not specifically require people to use these social institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is their very presence, the social currency they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them. Thus people can be said to be channeled into them.” *Id.* at 498.

The norms that constitute the social institution are aspirational in nature. That means these normative models “are not and never were the descriptions of any universal empirical reality.” *Id.* at 502. They are nevertheless important for promoting the social ideal and lifting the empirical reality.

The definition of marriage is one way the law of marriage helps further this civic purpose: our laws give a baseline definition of who is or is not married, providing a shared framework from which concepts such as out-of-wedlock pregnancies, or even adultery, can be understood. *See Marriage and the Law: A Statement of Principles* 25-26 (Institute for American Values: New York, 2006) (jointly signed by more than 100 family and family law scholars, available at <http://www.marriagedebate.com/pdf/imapp.mlawstmnt.pdf>).

C. Same-sex marriage will disconnect marriage in law from its public purpose of promoting responsible procreation.

After same-sex marriage, marriage in law will have no obvious or intrinsic relationship to childbearing, connecting natural parents to their children, or to

providing children with mothers and fathers.¹ If two men are a marriage, then marriage is clearly, and in a new public way, no longer about procreation, no longer about natural parenthood, and no longer about connecting mothers and fathers to children. Our historic conception of marriage will be replaced (in a definitive new way) by a new legal conception of marriage.

Two ideas are in conflict here: one is that children deserve mothers and fathers and marriage is intrinsically oriented towards serving this vital purpose. That is the classic marriage idea. The other idea is that adult interests in forging romantic relationships of choice (*i.e.*, to marry the person they love) are more important than recognizing and protecting the natural family. This latter idea is at the heart of the idea that same-sex marriage is a civil right. And it is the core idea that must be rejected if the state's interest in marriage is to be sustained.

¹ As a matter of rational basis review, Defendant-Intervenors have no burden to demonstrate that the redefinition of marriage will necessarily result in any specific or concrete harms. It is sufficient that the legislative lines drawn be rationally related to the state interests at stake, and the burden rests with the Plaintiffs to negate any conceivable rational basis for Proposition 8. Arguments here and throughout this brief explaining how a redefinition of marriage could potentially harm society are intended to demonstrate the reasonableness of the action taken by California voters.

The trial court rejected this first view, asserting that procreation has never been a purpose of marriage because elderly people and infertile people have always been allowed to marry. But throughout the period during which judges were explicitly and repeatedly affirming that marriage is about procreation, the elderly were allowed to marry and infertility was no bar.² We have explained the rationality of the settled law that marriage and procreation are related. But note something else: as a matter of hard historical fact, the inclusion of elderly and childless couples never in the minds of judges or the public challenged the connection between marriage and procreation, but advocacy of same-sex marriage clearly does so.

Elderly couples and childless couples are all part of the natural lifecycle of marriage. They do not contradict the idea that a key purpose of “an enduring, exclusive sexual union of male and female” is responsible procreation. By contrast, the forced inclusion of same-sex couples into the category “marriage” will be a

² Courts throughout the United States clearly and repeatedly asserted procreation as a key state interest in marriage, even though sterility or age was never a bar to marriage (although impotence was). *See* Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 Colum. L. Rev. 1089, 1109 (2002); *Wendel v. Wendel*, 30 A.D. 447, 449 (2d Dept. 1898).

dramatic transformation in the meaning of marriage in law, and as the law influence cultural norms, in the public mind.

If same-sex unions are deemed just the same as unions of husband and wife, it becomes difficult to see how marriage could have any public relationship to its great historic task of producing families in which the mother and father who make the baby raise the baby in love together. This court will have declared that marriage is not about children; rather it is primarily about adult interests, with no particular relationship to children at all. The idea that marriage is important for children's well-being will be privatized not publicly shared, undermined rather than reinforced, in the law. The idea that marriage matters because children need a mother and father will be stigmatized as irrational bigotry.

It is very reasonable for California voters to believe that government promotion of this new idea of marriage would have its most lasting effect over time, as the next generation's attitudes toward marriage, childbearing, and the importance of mothers and fathers are shaped by a new legal regime.

Same-sex marriage informs our culture that two fathers or two mothers are not only just as good as a child's own mother and a father, *they are just the same*. If two mothers are just the same as a child's own mother and a father, for example, why can't a single mother living with her mom (the child's grandmother) do just as well as a married mother and father? Why are dads relevant at all?

Consistently regulating acts of sexual passion so they do not produce fatherless children—whether through abstinence, contraception, confining one’s relationships to marriage partners, or potential partners—is hard, very hard, especially for young people. Same-sex couples do not have these issues, and society need not worry about the effects of their sexual activity in the same way. If these goals of marriage are key, they do not fit. If they fit, these goals are probably not key to marriage.

If the ruling below is upheld, can an advocate for reducing divorce or unmarried childbearing still say, “Marriage really matters because children need a mom and a dad?” With the advent of gay marriage, this public argument will no longer make sense in a new way. The law of marriage will clearly and obviously be repudiating this as a core public purpose of marriage.

D. Supporters and opponents of gay marriage agree that redefining marriage will transform marriage and its public meaning.

Many voices argued for Proposition 8 on the grounds that same-sex marriage would sever the link between marriage and children.³ Even more significantly, many gay marriage advocates agree, concluding that the redefinition of marriage would it will radically transform marriage as we know it.

For example, journalist E.J. Graff argues, approvingly, that “Same-sex marriage is a breathtakingly subversive idea. . . . If same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers.” E.J. Graff, *Retying the Knot*, *The Nation* 12 (June 24, 1996) (DIX1445).

In their book on the likely consequences of redefining marriage, Professor William Eskridge and co-author Darren Spedale respond to anti-assimilationist criticisms from gay activists that marriage is an oppressive institution—by noting that “marriage may be unattractive and even oppressive as it is currently structured and practiced, but enlarging the concept to embrace same-sex couples would necessarily transform it into something new.” William N. Eskridge & Darren R.

³ See, e.g., David Blankenhorn, *Protecting Marriage to Protect Children*, *Los Angeles Times*, Sept. 19, 2008, at A27; Maggie Gallagher, ‘*Biology Not Bigotry*’ *Is the Foundation for the Traditional Form of Marriage*, *Los Angeles Times*, November 1, 2008, at A21.

Spedale, *Gay Marriage: For Better or for Worse? What We've Learned from the Evidence* 19 (2006) (PX2342).

Professor M.V. Lee Badgett notes that “many optimistic feminists hope that gay couples will change marriage by reshaping the troubling gender dynamics still embedded in heterosexual marriage.” M.V. Lee Badgett, *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* 6 (2009) (PX1273).) One of these optimists, Judith Stacey, predicts: “Legitimizing gay and lesbian marriages would promote a democratic, pluralist expansion of the meaning, practice, and politics of family life in the United States, helping to supplant the destructive sanctity of *The Family* with respect for diverse and vibrant *families*.”⁴

Even Plaintiffs’ expert Nancy Cott admits that gay marriage would be a “watershed” change in marriage that would have real social consequences for the public understanding of marriage, producing changes which would be hard to predict. Tr. 268:1-7 (Cott).

⁴ Judith Stacey, “Gay and Lesbian Families: Queer Like Us” in *All Our Families: New Policies for a New Century* 117, 128-29 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., 1998) (DIX1033).

Philosopher Joseph Raz of Columbia Law School explains it bluntly:

“[T]here can be no doubt that the recognition of gay marriage will affect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage.” Joseph Raz, *Ethics in the Public Domain* 23 (1994) (DIX1444).

Perhaps a new genderless vision of marriage disconnected from procreation or the ideal that children need a mother and father would be a good thing for our society. Or perhaps not. The point here again is not that this court must necessarily endorse the view that redefining marriage will radically disconnect marriage from procreation – but when both those who support and those who oppose gay marriage are predicting a dramatic change, the concerns of California voters must be seen as rational as well.

This is especially true when the district court essentially validated the worst fears of voters. In its decision below, the district court first eliminated procreation from the history of marriage altogether, then privatized this purpose of marriage, and finally attempted to stigmatize those who hold that view as irrational bigots. In this progression, the court first denied that procreation has ever been a public purpose of marriage (Doc. 708 at 60-61), suggesting instead that Proposition 8 is supported only by private moral views (*id.* at 85), and finally concluding that, in

the absence of a public justification, those private moral views produce an inference of bigotry, supportable only by moral disapproval of homosexuality, animus toward gays and lesbians, or heterosexist superiority (*id.* at 132).

In such a context, not only will the law find it more difficult to connect mothers and fathers with children, but civil society will as well under the weight of such judicial disapproval as was expressed in the trial court opinion. *See, e.g.*, Doc. 708 at 101 (#77) (finding traditional religious beliefs about sex and marriage to be irrational in themselves and harmful to gays and lesbians).

If marriage is redefined, that decision will, in a new, definitive, and institutionalized way, disconnect marriage in law from its core historic public purpose: regulating procreation so that children have mothers and fathers.

When so many gay marriage advocates and opponents jointly agree that a redefinition of marriage is “breathtakingly subversive” and would fundamentally transform the institution of marriage, the people of California cannot be faulted for taking them at their word.

II. GAY MARRIAGE MAY UNDERMINE MALE WILLINGNESS TO SACRIFICE FOR CHILDREN, BY UNDERMINING THE IDEA THAT CHILDREN NEED THEIR FATHERS.

When law and society discards as irrational bigotry the traditional understanding of marriage, it is fatherhood that is likely to be most profoundly affected. The retreat from marriage in recent years does not produce equal numbers of single fathers and single mothers. Sex between men and women makes babies, even in a society with constitutional rights to abortion and contraception. When society simply weakens its support for the ideal that children should be cared for by both the man and the woman who made them, children end up disproportionately in the care of solo mothers. What will happen when the law and society rejects that view altogether as irrational bigotry? If the district court has its way, we will find out.

The children themselves are at substantially increased risk for a wide array of outcomes: poverty, infant mortality, mental and physical illness, school failure, juvenile delinquency, sexually transmitted disease. The mothers themselves face higher rates of negative outcomes and a structural gendered inequality that a child support check does not erase. *See, e.g.,* W. Bradford Wilcox, et al., *Why Marriage Matters, Second Edition: Twenty-Six Conclusions from the Social Sciences* (New York: Institute for American Values) (2005).

Defining marriage as the union of a husband and wife recognizes a core biological reality—that each child has a parent of each sex. Marriage encourages those who are responsible for creating children, both fathers and mothers, to jointly

assume responsibility for raising the child – mitigating the gendered inequality which frequently occurs when single mothers bear the burdens of parenting alone.

As the district court's opinion makes crystal clear, same-sex marriage announces that we have discarded as irrational bigotry the idea that gender or biology matters. It can hardly be questioned that encouraging parental responsibility in general is an important social good. Given the high number of men who do not care for the children created by acts of sexual passion, encouraging natural parents to feel responsible for their children is also an important good.

The state involves itself in that effort in ways that might seem unreasonable in other settings. Apart from marriage, a body of law assists in the determination of parental status, then provides for legal actions to establish support obligations and then government agencies stringently enforce those obligations.

With marriage, the narrative is different, but the aims clear. The husband of the child's mother is considered the father of the child and is presumed to adequately support the child. Cal. Fam. Code § 7540. With only rare exceptions, his paternity cannot be challenged and not by any third party. With the automatic parental status come enforceable responsibilities and the spouses cannot abandon one another or their children without some formal decree and even then, the

support obligations that began with marriage continue, between the spouses for a time and for the child until adulthood.

As University of Texas Sociology Professor Norval Glenn points out, redefining marriage creates a risk of “a politically motivated denial of the value of fathers for the socialization, development, and well-being of children.” Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 *Society* 25, 25 (2004) (DIX60).

Can we raise boys to be good family men in a society that says they are unnecessary to children? Parentage, then, appears a matter of choice, particularly for young men, to be accepted or rejected independent of any ongoing relationship to the child’s mother. In such an environment, it can only become more difficult to encourage young men to make the hard choice to assume the responsibilities of fatherhood in the context of marriage.

Previous cultural shifts demonstrate the challenges inherent in such sweeping institutional change, and numerous scholars have observed that the consequences of redefining marriage, albeit perhaps unintended and unknowable at this time, will bear most heavily on those most vulnerable. As Christopher Jencks explains regarding an earlier tectonic shift in understandings of family life:

Single parenthood began its rapid spread during the 1960s, when elite attitudes toward sex, marriage, divorce, and parenthood were undergoing a dramatic change. . . . In the space of a decade we moved from thinking that society ought to discourage extramarital sex, and especially out-of-wedlock births, to thinking that such efforts were an unwarranted infringement on personal liberty.

Christopher Jencks, *Deadly Neighborhoods*, New Republic, June 13, 1998, at 28.

Jencks notes that many of these cultural changes in attitudes “almost certainly improved the lives of the educated elite,” but “[f]or less privileged couples, however, the demise of traditional norms about marriage and divorce posed more serious problems.” *Id.* at 29. Specifically, “[o]nce the two parent norm loses its moral sanctity, the selfish considerations that always pulled poor parents apart often become overwhelming.” *Id.* at 30.

James Q. Wilson makes a similar point with a telling analogy:

Imagine a game of crack-the-whip, in which a line of children, holding hands, starts running in a circle. The first few children have no problem keeping up, but near the end of the line the last few must run so fast that many fall down. Those children who did not begin the turning suffer most from the turn.

James Q. Wilson, *Why We Don't Marry*, City Journal, Winter 2002, *available at*:

http://city-journal.org/html/12_1_why_we.html.⁵

⁵ See also David Blankenhorn, *The Future of Marriage* 152 (2007) (DIX956) (“To the degree that adopting same-sex marriage requires the further deinstitutionalization of marriage, adopting same-sex marriage would be likely to contribute over time to a further social devaluation of marriage.”).

We've been through this cycle before, in other words. The unintended consequences of changing family laws have already been myriad, hard to predict, and have often fallen on those least able to bear them. Constitutionalizing the idea that children do not need a mother and father, that marriage can bear such a dramatic change in public definition with no ill-effects, is a very bad idea, because it is so hard to retreat, modify, or adapt if negative consequences result.

The district court's ruling reinforces the legitimacy of these concerns. The district court has come up with its own new definition of marriage, one passed by no legislature, with no roots in our jurisprudence, based on one single historian's opinion, and which centers on adult needs and desires: "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." Doc. 708 at 67 (#34).

This definition hardly describes a robust institution that protects children's interest in ties to their biological parents in a stable relationship. It is instead a minimalist description of a relationship without any significance beyond its importance to the two people forming the couple, which—inexplicably—is then given government recognition and also government's Housekeeping Seal of Approval.

Plaintiffs and the court below suggest that the mere word marriage is enough to provide dignity to same-sex couples, but at the same time so powerless that it is irrational to believe its messages will have any effect on attitudes and behaviors regarding children and the family. This is an intellectually untenable position, yet it forms the foundation for the district court's unjust allegations of animus levied against California's voters.

Marriage cannot mean two contradictory things simultaneously. While marriage may have different meanings for individuals, when the law defines marriage for public purposes, that definition has consequences. The law can either endorse the idea that marriage is the union of a husband and wife united for the benefit of their children, or the idea that marriage's primary purpose is to publicly acknowledge and validate the loving relationships of consenting adults regardless of sex. When the law endorses the latter idea it is changing the public meaning of marriage in ways that will make the social task of giving more children effective and loving fathers harder.

III. BY SEVERING THE LINK TO PROCREATION, THE REDEFINITION OF MARRIAGE TO INCLUDE ANY TWO PEOPLE REGARDLESS OF GENDER WOULD UNDERMINE THE ENTIRE STRUCTURE OF GOVERNMENT MARRIAGE REGULATION.

In today's sphere of personal autonomy, *see Lawrence v. Texas*, 539 U.S. 558 (2003), any governmental preference for marriage over other relationships must be justified by a coherent theory of what governmental interests marriage serves.

If, as the district court suggests, marriage were to become an essentially private, intimate, emotional relationship created by two people to enhance their own personal well-being, it is wrong, discriminatory, and counterproductive for the state to favor certain kinds of intimate relations over others. Sisters can cohabit and commit, and so can best friends in nonromantic relationships. Three people can cohabit and commit, too. Why can't these people claim marriage as well? Once a key feature of marriage has been deconstructed, other historic features of marriage will become much harder to explain and defend, both in law and culture.

In the absence of an alternative theory which would justify the recognition of same-sex couples over other intimate and dependent relationships, Plaintiffs' argument becomes not an argument for same-sex marriage, but an argument for the abolition of marriage as a legal status and the extension of its benefits to all intimate and dependent relations.

A defense expert made this point explicitly: "My best judgment is that if we move toward a widespread adoption of same-sex marriage, I believe the effect will

be to significantly further and in some respects culminate the process of deinstitutionalization of marriage.” Tr. 2776:16-19 (Blankenhorn). Other family scholars have expressed similar views. Andrew Cherlin, a sociologist at Johns Hopkins University, suggests that the “most recent development in the deinstitutionalization of marriage is the movement to legalize same-sex marriage.” Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marr. & Fam. 848, 850 (2004). Norval Glenn explains that “acceptance of the arguments made by some advocates of same-sex marriage would bring this trend to its logical conclusion. Namely, the definition of marriage as being for the benefit of the couple who enter into it, rather than as an institution for the benefit of society, the community, or any social entity larger than the couple.” Norval D. Glenn, *The Struggle for Same-Sex Marriage* 41 SOCIETY 25, 26 (2004) (DIX60).

From this perspective, marriage would no longer be a social institution regulated by law in order to support important public objectives, but would rather be reduced to an emotionally laden ceremony which confers various legal benefits.

As one family advocate has stated:

There are many problems with this vision of marriage and its relationship to law. It reduces marriage to a creature of the state. By emphasizing the rights of adults, it intrinsically devalues the interest of children and the community in marriage. By reducing marriage to an individual right, it undermines the very norms of commitment it rhetorically upholds. It logically calls into question the notion of family law itself. If the purpose of marriage and family law is to

affirm neutrally the multiplicity of adult emotional choices, because individual declarations of intimacy are sacred matters in which the state has no right to interfere, then the question becomes: why do we have laws about marriage at all?

Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?* 18 Notre Dame J.L. Ethics & Pub. Pol’y 225, 231 (2004).

IV. PRELIMINARY EVIDENCE FROM THE NETHERLANDS, MASSACHUSETTS, AND CANADA SUGGEST CAUSE FOR CONCERN ABOUT THE LONG-TERM CONSEQUENCES OF SAME-SEX MARRIAGE.

For millennia, marriage was recognized worldwide as the union of husband and wife, while same-sex marriage is a very novel family structure. Today the first children to grow up under a same-sex marriage regime are just now reaching their teens. No social science can yet inform us as to the long-term societal impacts of this fundamental redefinition of the marriage relationship.

Notwithstanding the confident prediction of the court below that no harm will result, (Doc. 708 at 126), it is impossible to know the future with any certainty. This was noted by multiple experts—both for the plaintiffs and the intervenors—during the trial, yet completely ignored in the court’s factual conclusions. Nancy Cott testified that it is impossible to accurately predict the consequences of mandating same-sex marriage. Tr. 254:17-22. David Blankenhorn concurred: “It’s impossible to be completely sure about a prediction of future events. I don’t think anyone can.” Tr. 2780 (Blankenhorn). Jonathan Rauch, a

prominent supporter of same-sex marriage concedes: “Gay marriage may bring harms and benefits. Because it has never been tried in the United States, Americans have no way to know just what would happen.” Jonathan Rauch, *Gay Marriage: Why It Is Good For Gays, Good For Straights, and Good For America* 172 (2004) (DIX 81).

History teaches this lesson well. As Andrew Cherlin reminds us, “Not a single 1950s or 1960s sociologist predicted the rise of cohabitation.” Andrew J. Cherlin, *The Deinstitutionalization of American Marriage* 66 J. Marr. & Fam. 848, 857 (2004). Yet even as the first evidence begins to trickle in from the Netherlands, Canada, and Massachusetts, already there appears reasonable cause for concern as to the long-term consequences of such a policy shift.

A. A large body of social science research confirms the significance of marriage for child well-being, in contrast to a limited body of emerging research on gay parenting.

A broad and deep body of evidence shows that:

[F]amily structure matters for children, and the family structure that helps the most is a family headed by two-biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.

Kristin Anderson Moore, et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, Child Trends Research Brief, June 2002, at 1.

Linda J. Waite, a sociology professor at the University of Chicago, testified before the High Court of Ireland in Dublin in 2006, reiterated these findings, explaining that “two biological parents in a married low conflict relationship are the best environment for child development.” *Zappone v. Revenue Commissioners*, IECH 404 at 88 (2006), transcript of hearing Oct. 6, 2006 (testimony of Linda J. Waite).

Dr. Waite went on to note an analogous issue in family policy:

I think when the United States was debating changes in divorce laws, it was firmly believed by child development specialists at the time that as long as children had a loving parent, at least one, that they would be fine if their parents divorced, they would get over it quickly and move on with their lives. Over the last 30 or 40 years, I think evidence has slowly but very steadily accumulated that this is not at all the case, that divorce plays a much larger role in children's lives, in their emotional well-being, in their career and personal accomplishments as adults even through their 30's, and none of that was known or expected at the time.

Id. at 94.

By contrast the literature on gay parenting is very new, studies limited outcomes, and typically uses non-probability samples, such that they are unable to provide a representative sample of the general population of gay and lesbian

parents. Testifying in Ontario's marriage litigation, University of Virginia Professor Steven Nock testified that every one of the studies on gay parenting he reviewed "contained at least one fatal flaw of design or execution. Not a single one was conducted according to generally accepted standards of scientific research." *Halpern v. Canada (Attorney General)*, [2003] O.J. 2268 (Ont. Ct. App.), Affidavit of Steven Lowell Nock (March 2001) ¶115.

More recent analyses continue to reach much the same conclusion,⁶ while at least one recently published study of adult daughters of gay or bisexual fathers found that "women with gay or bisexual fathers were significantly less comfortable with closeness and intimacy [], less able to trust and depend on others [], and experienced more anxiety in relationships [] than women with heterosexual fathers." Theodora Sirota, *Adult Attachment Style Dimensions in Women Who*

⁶ See William Meezan and Jonathan Rauch, *Gay Marriage, Same-Sex Parenting and America's Children*, 15(2) *Future of Children* 97, 104 (Fall 2005) ("What the evidence does not provide, because of the methodological difficulties we outlined, is much knowledge about whether those studied are typical or atypical of the general population of children raised by gay and lesbian couples. We do not know how the *normative* child in a same-sex family compares with other children."); Timothy Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?* 72 *J. Marr. & Fam.* 3, 6 and appendix (2010) (noting that of the studies the authors found, only "one compared gay male to heterosexual coparents").

Have Gay or Bisexual Fathers, 23(4) Archives of Psychiatric Nursing 289-97 (August 2009) (The author speculates the reason for this gap in well-being is attributable more to the failures of mothering, or to homophobia, than to defects in gay fathering).

The case for the natural family is far from scientifically discredited. The intellectual and scholarly debate should be allowed to continue without a pre-judgment by this court that it is grounded in nothing more than irrational bigotry.

B. Preliminary evidence from the Netherlands suggests that same-sex marriage has exacerbated existing trends away from marriage.

Data from the Netherlands introduced below shows that trends with respect to the marriage rate, unmarried households raising children, and single parenting have worsened since that nation legalized same-sex marriage in 2001. For instance, the marriage rate in the Netherlands was 5.4 marriages per 1,000 people in 1994, dropping to 5.1 by 2001. By 2008 the marriage rate had fallen further to 4.6, almost twice the rate of decline as had been experienced between 1994 and 2001. A similar trends can be seen in the numbers on children being raised outside of marriage. The total number of unmarried couples with children in the Netherlands has climbed from 99,610 in 1994, to 197,099 in 2001, and 314,566 by 2008. DIX2639. As a percent of all families, the percent of unmarried couples with children rose nearly doubled (from 1.54 to 2.84%) between 1994 and 2001 then

rose again to 4.30 by 2008. DIX2639 and DIX2426. For single parent families in the Netherlands, the data indicates a rise from 360,754 in 1994 to 411,691 in 2001 to 474,909 in 2008. As a percentage, the rise is from 5.58 in 1994 to 5.94 in 2001 to 6.49 in 2008. Here, the annual increase from 1994 to 2000 is 0.032% and from 2001 to 2008 it is 0.08%. DIX2426.

C. Evidence from Massachusetts also suggests a weakening in the marriage culture following implementation of same-sex marriage.

Data from Massachusetts likewise does little to alleviate concerns that same-sex marriage could lead to negative consequences. To the contrary, the data relied upon by the district court actually suggests a weakening in the marriage culture in the years immediately following the same-sex marriage ruling in Massachusetts. Def-Intrvrs. Br. at 100.

There is also evidence that societal attitudes about marriage, family and children may be affected by redefining marriage. In 2009, *amicus curiae* National Organization for Marriage commissioned a survey in Massachusetts of attitudes about marriage five years into that state's experiment with same-sex marriage. The survey found that "in the five years since gay marriage became a reality in Massachusetts, support for the idea that the ideal is a married mother and father dropped from 84 percent to 76 percent." National Organization for Marriage, *The 2009 NOM Massachusetts Marriage Survey*, May 19, 2009, available at

<http://www.nationformarriage.org/site/apps/nlnet/content2.aspx?c=omL2KeN0LzH&b=5075189&ct=7000219>.

D. Canada's experience with same-sex marriage suggests that the redefinition of marriage may open the door to the recognition of other sexual unions as well.

Once our historic definition of marriage has been overturned, proponents of other arrangements previously not given the status of marriage will press for further changes in the definition of marriage to include their relationships. This dynamic has unfolded rapidly in Canada. Marriage was redefined in 2005 to include same-sex union and a short five years later, a case is now pending (initiated by the British Columbia attorney general) to determine whether the government can continue to prohibit polygamy.⁷ Opponents of polygamy argue that polygamy is different than gay marriage because it oppresses women. Proposed intervenors in the British Columbia lawsuit, however, argue that some multiple partner relationships, “polyamory,” should not be illegal since they are consensual and are not organized around gender lines. This line of argument is entirely consistent with

⁷ See Sunny Dhillon, *Polygamous Way of Life Harmful, Former Bountiful, B.C., Residents Allege*, The Canadian Press, August 24, 2010 at <http://www.winnipegfreepress.com/canada/breakingnews/polygamous-way-of-life-harmful-says-former-bountiful-bc-resident-101407364.html>.

the finding of the court below that gender “no longer forms an essential part of marriage.” Doc. 708 at 113.

Again, we cannot predict with certainty what the long-term consequences of redefining marriage to include same-sex couples will be. We do believe, however, that there is ample reason for people of good will to justifiably fear that this dramatic legal and social change in the basic meaning of marriage will have consequences. Californians rationally desire to proceed with any such massive change with due caution for the goods that may be lost, as well as the goods that may be gained.

V. IT IS REASONABLE FOR PEOPLE OF GOOD WILL TO BE CONCERNED THAT REDEFINING MARRIAGE TO INCLUDE SAME-SEX COUPLES MIGHT LEAD TO NEGATIVE SOCIAL CONSEQUENCES.

In adopting Proposition 8, California voters made a judgment call that is rational and that they were entitled to make.

At the end of the day, the trial court stands without support for its confident prediction finding it to be “beyond debate” that same-sex marriage “will have no adverse effects on society or the institution of marriage.” Doc. 708 at 161-62.

Plaintiffs’ Historian Nancy Cott concedes that the redefinition of marriage would be a “watershed” event in the history of marriage which will “unquestionably [have] real world consequences,” which cannot be fully known at

present because “no one predicts the future that accurately.” ER 226, 228, 229-31. Professor Badgett, too, acknowledged the wisdom of taking such social changes “at a sensible pace,” allowing some jurisdictions to experiment while others move more slowly. Tr. 1456:23-1457:4 (Badgett).

Yet once again, even advocates for same-sex marriage concede that other, more charitable, motivations may justify the actions of California voters. Jonathan Rauch, a leading advocate for same-sex marriage, has argued: “The public has come to understand that we can take our time with this. And the way to do this is to let different states do different things. Let’s find out how gay marriage works in a few states. Let’s find out how civil unions work. In the meantime, let the other states hold back.” David Masci, *An Argument for Same-Sex Marriage: An Interview With Jonathan Rauch* at 3 (2008) (DIX1035). Rauch also notes that most of the people who favor preserving the definition of marriage as the union of a husband and wife are “motivated by a sincere desire to do what’s best for their marriages, their children, their society.” Jonathan Rauch, *Gay Marriage: Why it Is Good for Gays, Good for Straights, & Good for America* (2004) (DIX 81).

The most basic background of Proposition 8 clearly rebuts the idea that animus towards gays and lesbians is “the most likely explanation” for the passage of this measure. Proposition 8 enshrined in the California Constitution the only legal definition of marriage that had ever been recognized in California from

statehood in 1850 (Doc. 708 at 61) until 2008 when the California Supreme Court redefined marriage in the state. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). As the Supreme Court has noted, “the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.” *Lawrence v. Texas*, 539 U.S. 558, 568 (2003), suggesting that animus toward gays and lesbians could not explain the origin of California statutes recognizing marriage as exclusively between a man and a woman.

The court below ignored or rejected much evidence that California voters sought to protect marriage and the family – including the official ballot argument itself, in which voters were told that Prop 8 promotes an interest in stable families and child well-being. Rather than accept such evidence at face value, the court below baldly concluded that such arguments were merely a pretext for a hidden agenda: “The evidence and 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.” Doc. 708 at 134.

It seems hardly likely that voters driven by a desire to hurt same-sex couples would persist in maintaining a legal arrangement that provides them access to all benefits but the term marriage. Cal. Fam. Code §§297-299.6.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Honorable Court uphold the constitutionality of Proposition 8 and reverse the judgment of the district court.

Respectfully submitted,

s/ Joshua K. Baker

Joshua K. Baker

NATIONAL ORGANIZATION FOR MARRIAGE

2029 K Street NW, Suite 300

Washington, DC 20006

Phone: (888) 894-3604

jbaker@nationformarriage.org

William C. Duncan

MARRIAGE LAW FOUNDATION

1868 N 800 E

Phone: (801) 367-4570

duncanw@marriagelawfoundation.org

Counsel for *Amici Curiae*

Dated September 24, 2010

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,983 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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s/ Joshua K. Baker
Joshua K. Baker
Counsel for *Amici Curiae*
September 24, 2010

No. 10-16696

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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