Nos. 10-16751

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

ARNOLD SCHWARZENEGGER, et al.
Defendants,

and

COUNTY OF IMPERIAL, et al.
Movants-Appellants.

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

MOVANTS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiff's Opposition Brief articulately sets forth an emotional plea for same-sex marriage. The 106 pages of hyperbole found within the Brief do not, however, establish a constitutional right to same-sex marriage. They do, however, establish what Plaintiffs believe to be strong policy reasons for same-sex marriage. Found within those pages are the same arguments, innuendo, and religious disapproval the "No on 8" campaign articulated throughout the entirety of the Proposition 8 campaign. California voters listened to those arguments, and a myriad of others, and voted for the second time to define marriage as being between one man and one woman.

Remarkably, Plaintiffs now ask this Court to declare a constitutional right to same-sex marriage, thereby disregarding the votes of over 7 million Californians. Plaintiffs' arguments rest on generalizations of voter intent and assumptions about why Californians voted for Proposition 8. In fact, Plaintiffs assert that a majority of California voters simply deemed "gay and lesbian relationships inferior, morally reprehensible, or religiously unacceptable." (Appellees' Merits Brief ("Aplees' Merits Br.") 56.) The immense population of California, diverse as it is, surely voted in favor of Proposition 8 for a plethora of different reasons. Marriage is the bedrock of our social structure and exists as an institution that does not simply recognize loving relationships but is an irreplaceable good in American society.

The societal significance of marriage and the dramatic definitional change forced upon Californians by the California Supreme Court resulted in widespread support for Proposition 8. Proposition 8 represents California's support for the historical definition of marriage and direct democracy.

Plaintiffs appear to believe that success can only be achieved through reframing this case with generalized and inaccurate statements about voter intent. In their words, "[t]his case tests the proposition whether the gay and lesbian Americans among us should be counted as 'persons' under the Fourteenth Amendment…" (Aplees' Merits Br. 1.) Far from it, this case tests whether direct democracy is permitted to stand despite the fact that the minority does not agree with the policy decision made when the voters stepped into the voting booth. The Fourteenth Amendment sought to assure that Americans who were initially labeled as 3/5 a person in the Constitution were counted as "persons" and protected as such. There is no question that California laws have vigorously counted homosexuals as persons, and rightly so, as legislation protecting their interests has flooded California statutes.

According to Plaintiffs, we contend the "State may 'draw a line' around its gay and lesbian citizens and exclude them from the entire panoply of state benefits, services, and privileges…" (Aplees' Merits Br. 3.) Proposition 8 certainly did not exclude homosexuals from "the entire panoply of state benefits, services, and

privileges" and any assertion that such an argument was made by the Proponents is pure fiction. Moreover, Plaintiffs Opposition Brief discussing domestic partnerships and adoption rights makes clear that homosexuals were not excluded in this manner.

The "unmistakable, undeniable purpose and effect of Proposition 8" is to draw a line around the historical definition of marriage between one man and one woman, and in drawing that line make a final policy decision on a very controversial issue. Plaintiffs and the vast number of corporations, unions, politicians, and individuals supporting them waged a comprehensive and expensive campaign setting forth the policy arguments that now litter their legal briefing. The remedy when one objects to the democratic result is not to create a new constitutional right, but rather to educate the populace and get an initiative placed on a future ballot.

Furthermore, in relation to the County's intervention, Plaintiffs want it both ways. They claim the district court's final order binds local officials but that no one except acquiescent state officials can appeal. That would be convenient for them, but it is not the law. The law is clear that Deputy County Clerk Vargas has standing to appeal, regardless of whether she and the other Imperial County Intervenors (collectively, "the County") were improperly denied intervention, and regardless of whether her duties are characterized as ministerial or discretionary,

simply because the district court's order purports to bind her in the performance of her statutory duties respecting marriage. One who is bound by an order has Article III standing to appeal.

Contrary to Plaintiffs' argument, Vargas also has protectable interests justifying intervention as of right under Rule 24(a) because this adjudication will directly affect her official duties and powers under state law. *Blake v. Pallan*, 554 F.2d 947, 953 (9th Cir. 1977). Nothing more is required under this Court's precedents. Indeed, no other defendant—including the State Registrar—has anything more at stake, and some have less.

Plaintiffs' must-win argument, repeatedly stated throughout their brief, is that the duties of county clerks are merely ministerial and that county clerks are wholly subject to the authority and supervision of the State Registrar. The first assertion is true but irrelevant, and the second is completely false. Vargas's duties with respect to marriage are indeed ministerial, but that is true of all state and local officials—no one but the Legislature has discretion over the requirements for marriage. At any rate, ministerial officials like county clerks are proper and common defendants in civil rights cases—indeed, county clerks are indispensable here because they alone have authority to issue marriage licenses. And Plaintiffs' claim, adopted wholesale by the district court, that county clerks are subservient to the State Registrar in respect to their marriage duties flatly contradicts California

law. County clerks alone have the statutory authority to issue marriage licenses, and they do so without any supervision by the State Registrar. Nothing in *Lockyer* remotely hints that the State Registrar has supervisory authority over county clerks, much less that they must blindly follow his dictates on the requirements for marriage. Plaintiffs' entire standing argument collapses on this point alone.

As is obvious, the magnitude of this extraordinary case cries out for appellate review. Indeed, the legitimacy of the judicial process itself is at stake. The fate of California's marriage laws must not be decided by a single district court judge. Plaintiffs' standing and intervention arguments are wholly self-serving and evince an effort to win this case at any cost. They should be rejected.

ARGUMENT

I. VARGAS HAS STANDING TO APPEAL REGARDLESS OF INTERVENTION.

Deputy County Clerk Vargas has standing to appeal regardless of the motion to intervene and regardless of whether her duties are characterized as ministerial or discretionary. She has standing merely because she has the obligation under California law to determine whether applicants meet the requirements for a marriage license and because the district court's injunction purports to bind her.

A. Even As A Non-Party, Vargas Has Standing To Appeal Because The Court's Order Purports To Bind Her.

The district court's order denying intervention ruled that "[c]ounty clerks … perform their marriage-related duties 'under the supervision and direction of the State Registrar.'" (E.R. Vol. I, p. 21.) The district court's final order and judgment prohibits the State Registrar "from applying or enforcing Proposition 8 and direct[s] [the Registrar] that all persons under [his] control or supervision shall not apply or enforce Proposition 8." (E.R. Vol. I, p. 171.) In short, the district court's order purports to bind all county clerks by binding the State Registrar. Plaintiffs repeatedly make the same argument. (*See* Aplees' Br. 7, 12.)

The district court and Plaintiffs take the remarkable position that even though Vargas is bound by the injunction, she has no protectable interest in the case and no right to intervene or appeal. Both cannot be true. If Vargas has no protectable interest, she cannot be bound by the injunction. In *In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539 (9th Cir. 1996), an injunction purported to bind the Republic of the Philippines as an agent of the estate of Ferdinand Marcos. The Republic appealed the injunction. The plaintiff, Hilao, argued that the Republic was bound by the injunction but lacked standing to appeal. This Court rejected that argument. "Hilao seems to want to have it both ways. On the one hand, it asserts that the Republic has no standing to appeal because it has not been harmed by the injunction. On the other hand, it contended

at oral argument that the Republic could be cited for contempt if it were to violate the injunction." *Id*. at 544. The Court concluded that because "[t]he injunction clearly confronts the Republic with the choice of either conforming its conduct to the dictates of the injunction or ignoring the injunction and risking contempt proceedings," the Republic had standing to appeal. "*This constitutes sufficient injury-in-fact to give the Republic standing to challenge the injunction even in the absence of an actual finding of contempt against it*." *Id*. (emphasis added).

This Court has unequivocally held "that a non-party who is enjoined or otherwise directly aggrieved by a judgment has standing to appeal the judgment without having intervened in the district court." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1277 (9th Cir. 1992); *see also Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1990) (a nonparty is not bound by judgment and "has standing without having intervened" to appeal an order that purportedly binds him).[1] Vargas has standing to appeal on this basis alone.

Plaintiffs claim that Vargas lacks standing to appeal because she suffers no "injury in fact" from a declaration that Proposition 8 is unconstitutional. (Aplees' Br. 28-31.) This is because, Plaintiffs argue, Vargas's "marriage-related duties are

[1] Other Circuits agree. *See e.g. United States v. Kirschenbaum*, 156 F.3d 784, 794 (7th Cir. 1988) ("[N]on-parties who are bound by a court's equitable decrees have a right to move to have the order dissolved."); *In re Piper Funds, Inc.*, 71 F.3d 298, 301 (8th Cir. 1995) ("A nonparty normally has standing to appeal when it is adversely affected by an injunction.").

solely ministerial … and must be performed in compliance with the Registrar's direction no matter the outcome of this lawsuit." (Aplees' Br. 29-30.) What Plaintiffs mean is that Vargas has no *personal* stake in Proposition 8. Yet, as government officials, *none* of the named defendants, and especially not the State Registrar or the defendant county clerks, has any truly *personal* stake in this litigation. Nevertheless, county clerks and other local ministerial officials with nothing more than an official stake in the outcome of cases routinely appeal lower court rulings. *See Richardson v. Ramirez*, 418 U.S. 24 (1974) (county clerk of Mendocino County with ministerial duty of applying law regarding ex-felon voter registration had standing to appeal constitutional challenge because of her responsibility for administering the law); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (appeal by county clerk from lower court decision striking down marriage law). Vargas has standing to appeal because the district court's order purports to bind her as one directly responsible for administering state marriage laws.

B. Vargas's Right To Appeal Is Not Abridged By The State Registrar's Duties; She Is Directly Responsible For Enforcing Proposition 8 And Is Not An Agent Or Subordinate Of The State Registrar.

Plaintiffs' argument suggests that even though Vargas is bound by the district court's order, she does not have independent standing to appeal because she is merely an agent of the State Registrar and her duties are purely ministerial. The argument holds that Vargas is bound by the district court's injunction only because

the State Registrar is bound, but she has no independent interest in this case because she is merely a ministerial subordinate of the State Registrar. (*See* Aplees' Br. 17.)

As discussed next, however, it has been established since at least *Ex Parte Young* that civil rights claims must be brought against the *ministerial* official with direct responsibility for administering the challenged law. In California, only county clerks can issue or deny marriage licenses. They are, therefore, not only proper but indispensable parties. And Plaintiffs are plainly wrong when they argue that county clerks perform their marriage-related responsibilities under the direction of the State Registrar. Under California law, the State Registrar has no authority to issue marriage licenses and no supervisory authority over a county clerk's decision to issue or deny a marriage license.

1. A plaintiff challenging the constitutionality of a state law must sue the official with direct responsibility for administering that law.

This case began when the defendant county clerks complied with Proposition 8 and refused to issue marriage licenses to Plaintiffs. (*See* Supplemental Excerpts of Record ("SER"), p. 48, ¶¶ 32-33.) Plaintiffs properly named these county clerks as defendants. Indeed, under the Eleventh Amendment, they may be the only proper defendants.

> Under *Ex Parte Young*, [209 U.S. 123 (1908)] the state officer sued "must have some connection with the enforcement of the [allegedly

> unconstitutional] act." This connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit.

Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992) (internal citation omitted). "[T]here must be a connection between the official sued and enforcement of the allegedly unconstitutional statute." *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (questioning whether the "general supervisory powers of the California Attorney General are sufficient to establish the connection with enforcement required by *Ex Parte Young*"). "That connection must be determined under state law depending on whether and under what circumstances a particular defendant has a connection with the challenged state law." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). "The purpose of allowing suit against state officials to enjoin their enforcement of an unconstitutional statute is not aided by enjoining the actions of a state official not directly involved in enforcing the subject statute." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (dismissing governor from civil rights action) (citations omitted).

2. In California, only County Clerks can issue marriage licenses.

Plaintiffs who challenge laws prohibiting same-sex marriage *must* sue the official who actually enforced the law, even if the official's duties are merely ministerial. It is not enough to sue state officials with general responsibility to

enforce all laws. In *Walker v. United States*, 2008 U.S. Dist. Lexis 107664 (S.D.Cal., Dec. 3, 2008), the plaintiff filed a civil rights lawsuit against California's governor and attorney general challenging the ban on same-sex marriage. The court dismissed the claim explaining that the plaintiff "does not allege any individual act or omission by either of these parties which violated his constitutional rights." *Id*. at *8.

> Plaintiff does not allege that either the Governor or the Attorney General were charged with the duty of issuing marriage licenses or directly denied him such a license in violation of the Constitution. Instead, he points only to each Defendants' generalized duty to execute and enforce the laws of the entire State, and makes no allegations whatsoever to show a nexus between the violation of federal law and the individual accused of violating the law.

Id. at *9-10. Numerous courts have reached similar conclusions.[2]

In California, the duty to issue (or deny) marriage licenses belongs exclusively to county clerks:

> [State] statutes provide that "before entering a marriage, ... the parties shall first obtain a marriage license from a county clerk" (Fam. Code,

[2] *See e.g. Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute. Nor is the mere fact that an attorney general has a duty to prosecute all actions in which the state is interested enough to make him a proper defendant in every such action."); *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976) ("The Attorney General has no connection with the enforcement of § 230(5), and therefore cannot be a party to this suit…. Although he has a duty to support the constitutionality of challenged state statutes, and to defend actions in which the state is 'interested,' the Attorney General does so, not as an adverse party, but as a representative of the State's interest in asserting the validity of its statutes.") (internal citations omitted).

> § 350), and the provisions state what information must be contained on the license (Fam. Code, § 351) *and place the responsibility on the county clerk to ensure that the statutory requirements for obtaining a marriage license are satisfied*. (Fam. Code, § 354.)

Lockyer v. City and County of San Francisco, 95 P.3d 459, 468-69 (Cal. 2004) (emphasis added).[3] Thus, under California law county clerks are indispensable parties in a suit challenging the state's marriage laws.

Here, Plaintiffs' complaint correctly identifies county clerks as the officials charged with issuing marriage licenses and seeks injunctive relief compelling them "to issue them a marriage license." (SER, p. 48, ¶ 36.)

3. County clerks are not subordinates of the State Registrar.

Plaintiffs nevertheless argue that *all* of the State's county clerks are bound by the district court's decision because the State Registrar is bound and "county clerks perform marriage-related duties under supervision of the State Registrar." (Aplees' Br. 5.) Indeed, this assertion is the linchpin of Plaintiffs' argument that Vargas lacks standing to appeal and has no protectable interest in this litigation, and so they repeat it again and again.[4] The argument holds that Vargas is bound by

[3] The one irrelevant exception is that a notary public may issue a "confidential" marriage license if the notary public "is approved by the county clerk to issue confidential marriage licenses." Cal. Fam. Code, § 530(a).

[4] *See* Aplees' Br. 7 ("Deputy Clerk Vargas … must follow whatever direction she receives from the State Registrar."); *id*. at 12 ("the State Registrar … supervises the performance of the clerks' marriage-related duties"); *id*. at 15 ("[T]he law requires Ms. Vargas to follow the directives of the State Registrar."); *id*. at 17 ("Ms. Vargas does not have the discretion to disregard the Registrar's directions

the district court's injunction because the State Registrar is bound, but she has no independent interest in this case because she is merely a ministerial subordinate of the State Registrar. *Id*. at 17.

But this argument flatly contradicts California law—the State Registrar has no supervisory authority over county clerks or responsibility for issuing marriage licenses. The State Registrar of Vital Statistics is a record-keeper. His job is to prepare forms and keep records of births and marriages.[5]

Plaintiffs confuse local registrars with county clerks. They cite three statutes from the California Health & Safety Code—sections 102180, 102295, and 103125—trying to show that the State Registrar supervises county clerks. (Aplees' Br. 12, 15.) Section 102180 gives the State Registrar "supervisory power over *local registrars*". And section 102295 states, "Each *local registrar* is hereby

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with respect to the marriage laws."); *id*. ("she executes her duties under the direction of the State Registrar"); *id*. at 29-30 ("County Clerk's marriage-related duties … must be performed in compliance with the Registrar's direction"); *id*. at 30 ("Ms. Vargas's duty is to carry out the marriage laws as directed"); *id*. at 31 ("perform those ministerial responsibilities as directed by the State Registrar").

[5] State law requires that "[e]ach live birth, fetal death, and marriage that occurs in the state shall be registered as provided in this part on the prescribed certificate forms." Cal. Health & Safety Code § 102100. The State Registrar's job is to prepare the forms and keep these records. *Id*. §§ 102200, 102230; *see also id*. § 102205 ("State Registrar shall prepare and issue detailed instructions as may be required to procure the uniform observance of [the vital records statutes] and maintenance of a satisfactory system of registration"). Importantly, detailed instructions about what the marriage license form should contain are provided by statute. *Id*. § 103175. Plaintiffs do not allege that they were denied a license because of the form.

charged with the enforcement of this part in his or her registration district under the supervision and the direction of the State Registrar ….” (emphasis added). These two statutes give the State Registrar supervisory authority over *local registrars*, not county clerks. The third statute, section 103125, simply says that the State Registrar prepares the form of the marriage license.

The local registrar’s duties also relate to record keeping.[6] The State Registrar has supervisory authority over local registrars to ensure “uniform compliance” with statutory record-keeping duties. *Id*. § 102180. But neither the State Registrar nor local registrars have any authority over the actual issuance of a marriage license.

In contrast, “the *county clerk* is designated as a commissioner of civil marriages.” Cal. Fam. Code § 401(a) (emphasis added). “Before entering a marriage, … parties shall first obtain a marriage license *from a county clerk*.” Cal. Fam. Code § 350(a) (emphasis added); *see also id.* § 359(a) (“applicants to be

[6] “The county recorder is the local registrar of marriages and shall perform all the duties of the local registrar of marriages.” Cal. Health & Safety Code § 102285. The offices of county clerk and county recorder are separate. *See* Cal. Gov’t Code § 24000. In some counties, the County Board of Supervisors can, by ordinance, consolidate the offices of the county clerk and county recorder. *Id.* § 24300. Nevertheless, “[t]he offices of county clerk and of county recorder are distinct offices, though they may be held by the same person ….”*People ex rel. Anderson v. Durick*, 20 Cal. 94, 1862 WL 508 *2 (Cal. 1862).

married shall first appear together in person before the county clerk to obtain a marriage license").[7]

The local registrar's duties arise only *after* the marriage is performed and do not affect the validity of the marriage. *See Estate of DePasse*, 97 Cal.App.4th 92, 106 (2002) ("a failure by the person solemnizing the marriage to return the certificate of registry would not invalidate the marriage"). The person who solemnizes the marriage returns the license to the local registrar. Cal. Fam. Code § 359(e); *see also id*. § 423. Before accepting it for registration, the local registrar ensures that it is properly filled out. Cal. Health & Safety Code § 102310. If the license is complete, the local registrar signs and dates it "for registration in his or her office." *Id*. § 102315. Once the license is registered with the local registrar, it becomes a marriage certificate. *See* Cal. Fam. Code §§ 300(b), 500.5; Cal. Health & Safety Code § 102285; *compare* § 102310 with § 102315. The local registrar numbers the marriage certificates, Cal. Health & Safety Code § 102325, keeps a copy, *id*. § 102330, and then transmits the certificates to the State Registrar *id*. § 102355. The State Registrar then conducts his own examination of the marriage

[7]Applicants for a marriage license present the necessary information to the county clerk. Cal. Fam. Code § 354(a). The clerk may "examine the applicants for a marriage license on oath at the time of the application." *Id*. § 354(b). The clerk may also "request additional documentary proof as to the accuracy of the facts stated." *Id*. § 354(c). If the applicants meet the requirements of the law, the county clerk must issue the license. *See Lockyer*, 95 P.3d at 472. The clerk transmits copies of completed marriage licenses to the local registrar. Cal. Fam. Code § 357(a).

certificate and "if they are incomplete or unsatisfactory [then he] shall require any further information that may be necessary to make the record complete and satisfactory." *Id*. § 102225. The State Registrar also "preserve[s] the certificates in a systematic manner …." *Id*. § 102230.

In short, local registrars and the State Registrar have nothing to do with the actual issuance of marriage licenses and no supervisory authority over county clerks.[8] (Presumably, that is why the only relief Plaintiffs requested against the State Registrar is modification of the forms. (SER, p. 7, ¶ 36.) Accordingly, the district court improperly ruled that "[c]ounty clerks . . . perform their marriage-related duties 'under the supervision and direction of the State Registrar.'" (E.R. Vol. I, p. 21.) On the contrary, "the responsibility [is] on the county clerk to ensure that the *statutory requirements* for obtaining a marriage license are satisfied." *Lockyer*, 95 P.3d at 468-69 (emphasis added).[9]

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[8] *See* Cal. Health & Safety Code § 102180 ("The State Registrar is charged with the execution *of this part* in this state, and has supervisory power over local *registrars* so that there shall be uniform compliance with all of the requirements *of this part*." (emphasis added).

[9] Plaintiffs cite *Lockyer* several times for the proposition that county clerks' responsibilities are ministerial and that the State Registrar has supervisory authority over county clerks. *See* Aplees' Br. 12, 15. The former point is undisputed. But nothing in *Lockyer* remotely suggests that county clerks are supervised in any way by the State Registrar. Rather, *Lockyer* makes clear that the State Registrar's duties relate to record keeping and that he supervises local registrars—not county clerks—in these record-keeping responsibilities. 95 P.3d at 465-66, 468-472.

Hence, the limited and irrelevant powers of the State Registrar in no way limit Vargas's standing or right to appeal a judicial order that purports to bind her in the performance of her statutory duties.[10] Vargas has filed a timely notice of appeal and is now a proper defendant in this action.[11]

II. THE DISTRICT COURT ERRED IN DENYING VARGAS'S MOTION TO INTERVENE.

A. The District Court Erred In Denying The Motion To Intervene As Of Right.

As explained in our Opening Brief (at 10), this Court applies a four-part test for intervention as of right:

> (1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest;

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[10] Plaintiffs cite *Doe v. Gallinot*, 657 P.2d 1017, 1025 (9th Cir. 1981), and argue that because the district court declared Proposition 8 facially invalid, the scope of the injunction was appropriate. In *Gallinot*, the court's injunction applied only to the named defendants. The equivalent would be if the district court here enjoined the defendant county clerks from denying marriage licenses not only to the named plaintiffs but to other same-sex couples in their counties who sought a marriage license. The court in *Gallinot* did not purport to bind nonparty defendants.

[11] Plaintiffs are essentially seeking the benefits of a class action – a broad ruling applying to all same-sex couples and all county clerks in California – without the burdens of pleading a class action. They want to bind all county clerks through the supposed authority of the State Registrar and then exclude from intervention or participation on appeal any potential defendant who is not acquiescent on the ground that only the State Registrar has authority over the matter. In addition to resting on a false premise (the State Registrar has no such authority), such a ruling would turn this litigation into a sham proceeding based on gamesmanship and invite other such proceedings.

> and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 817 (9th Cir. 2001) (citation omitted).

Except for its timeliness determination, where it found for the Imperial County Intervenors, the district court is entitled to no deference on its ruling denying the motion to intervene as of right. This Court "review[s] de novo a district court's denial of a motion to intervene as of right, with the exception of timeliness, which we review for abuse of discretion." *Id*.

And in contrast to the cramped and formulaic approach advanced by Plaintiffs and adopted wholesale by the district court, this Court interprets the criteria in Rule 24(a) liberally and practically in favor of intervention:

> In general, we construe Rule 24(a) liberally in favor of potential intervenors. In addition to mandating broad construction, our review is guided primarily by practical considerations, not technical distinctions.

Id. at 818 (citations and quotation marks omitted).

1. The Motion to Intervene was timely.

Plaintiffs do not deny that even post-judgment motions to intervene should be granted where, as this Court has held, "it is necessary to preserve some right which cannot otherwise be protected [such as] the right to appeal from the judgments entered on the merits by the District Court." *Pellegrino v. Nesbit*, 203 F.2d 463, 465-66 (9th Cir. 1953). Prejudice to existing parties is the key

consideration (*Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996)), and the district court found none here. (E.R. Vol. I, p. 0019.) Plaintiffs cannot claim prejudice based on an interest in foreclosing appellate review. The district court did not abuse its discretion when it ruled that the motion to intervene was timely.

Under the "practical considerations, not technical distinctions" that govern the analysis (*Berg*, 268 F.3d at 818), the County and its officials meet all the requirements for intervention as of right under Rule 24(a). The district court erred as a matter of law when it denied the motion to intervene.

2. Vargas has significant protectable interests impaired by this action.

Plaintiffs are correct that "'at some fundamental level the proposed intervenor must have a stake in the litigation.'" (Aplees' Br. 11 (citation omitted).) But "'[w]hether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established.'" *Berg*, 268 F.3d at 818 (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir.1993)). Direct damage to property-related interests certainly qualifies, as Plaintiffs' quotation from *Berg* indicates (*see* Aplees' Br. 11), but so do other interests:

> "*It is generally enough that the interest [asserted] is protectable under some law*, and that there is a relationship between the legally

> protected interest and the claims at issue." *Sierra Club v. United States EPA*, 995 F.2d 1478, 1484 (9th Cir.1993).

Id. (emphasis added).

With respect to government officials, this Court has held that ***"[a] state official has a sufficient interest [to intervene as of right under Rule 24(a)] in adjudications which will directly affect his own duties and powers under the state laws."*** *Blake v. Pallan*, 554 F.2d 947, 953 (9th Cir.1977) (citing *Hines v. D'Artois*, 531 F.2d 726, 738 (5th Cir. 1976)) (emphasis added); *see also California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 792 F.2d 779, 782 (9th Cir. 1986) (per curiam) (quoting *Blake* for same rule); *Harris v. Pernsley*, 820 F.2d 592 (3d Cir. 1987) ("If his rights and duties, as defined by Pennsylvania law, may be affected directly by the disposition of this litigation, the District Attorney has a sufficient interest to intervene as of right in this action.").

The district court's order strikes down the traditional definition of marriage under California law and purports to require (via the State Registrar) all county clerks to issue marriage licenses to same-sex couples. Therefore, the order "directly affect[s] [the] duties and powers" of county clerks like Vargas, who alone have the statutory duty and power to issue marriage licenses and who also have the duty to perform civil marriages. It imposes a new legal duty on Vargas to grant marriage licenses to same-sex couples. It may also impose a new duty to solemnize same-sex marriages. Under this Court's precedent, nothing more is

needed for a government official to establish a "sufficient interest." *Blake*, 554 F.2d at 953.

Plaintiffs attempt to avoid this conclusion by essentially arguing that county clerks don't have their own "duties and powers" that can be affected by the order because they are merely robotic implementers of the State Registrar's unilateral dictates. (*See* Aplees' Br. 11-13.) That false proposition is thoroughly rebutted above. *See supra* § I.B.(3). The State Registrar has absolutely no statutory authority to supervise or direct county clerks in the issuance of marriage licenses or the performance of marriages.

Vargas's statutory duties and powers are no less cognizable for being "ministerial." California law itself—and only that law—dictates the definition and requirements of marriage. No State or local official has the slightest discretion to disregard the statutory requirements relating to marriage licenses. *Lockyer*, 95 P.3d at 463-64 (stating that no executive official has "authority to disregard the statutory mandate based on the official's own determination that the statute is unconstitutional"), citing *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the president to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the constitution, and entirely inadmissible."). That is what the California Supreme Court in *Lockyer* meant when it held that the duties of county clerks

respecting marriage are "ministerial." 95 P.3d at 463-64. In fact, when it comes to issuing marriage licenses, there are *only* ministerial duties and powers. The core holding in *Lockyer* was that because county clerks have a ministerial duty to strictly comply with State marriage laws, *no official has legal authority to direct a county clerk to do otherwise*. That applies as much to the State Registrar as to the Mayor of San Francisco.

Vargas's interest in this action does not turn on whether her duties are ministerial, but rather on whether the district court's order purports to alter her duty under state law to enforce Proposition 8. It plainly does. In seeking to enforce and defend Proposition 8, her position is thus indistinguishable from that of the county clerk in *Richardson v. Ramirez*, 418 U.S. 24 (1974), who enforced California's felon voting restriction. Plaintiffs claim the county clerks in *Ramirez* "were sued because of their discretionary determination not to register certain ex-felons to vote," in contrast with Vargas's "purely ministerial duty to follow the directions of a superior state official." (Aplees' Br. 13.) The assertion is both false and irrelevant. The California Supreme Court has described the "duty of permitting qualified voters to register" as "ministerial." *See Jolicoeur v. Mihaly*, 488 P.2d 1, 3 n.2 (Cal. 1971). The clerks in *Ramirez* had no policy-making discretion. Their ministerial duty was to exclude from voting persons who met the statutory definition of ineligible felons. *Ramirez*, 418 U.S. at 27-30. Although one

allegation in the suit was that the ban had not been uniformly applied (*id*. at 33), even if true that was not because the clerks had legal authority to make discretionary (as opposed to ministerial) determinations of who was qualified to vote—as with marriage here, that was a matter of statutory definition, not discretion. *See Lockyer*, 95 P.3d at 473 n.12 ("There is no claim here that the officials acted as they did because of questions regarding the proper interpretation of the applicable statutes ….") . In any event, the Supreme Court's holding that the intervening clerk preserved Article III jurisdiction over the appeal had nothing to do with whether she had discretionary or ministerial functions. The point was that as an official with the duty to enforce the law being challenged, the clerk was a proper defendant with a sufficient interest in the outcome. The same is true of Vargas. Indeed, ministerial officials are routinely sued for enforcing allegedly unconstitutional laws and routinely appeal adverse decisions. That is the standard path of same-sex marriage litigation.[12] Indeed, under the original rule of *Ex parte*

[12] In *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), in which the California Supreme Court struck down California's anti-miscegenation law, the *only* defendant was a county clerk. The plaintiffs sought a writ of mandamus compelling the clerk to issue the marriage license. The clerk "rest[ed] his refusal to issue a certificate and license to them on the ground that he is expressly prohibited from so doing by the provisions of section 69 of the Civil Code, and upon the further ground that their purported marriage in this state would be illegal and void." *Id*. at 36. *See also Zablocki v. Redhail*, 434 U.S. 374 (1978) (appeal by county clerk from lower court decision striking down marriage law); *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (lawsuit against Orange County clerk for injunction and declaratory relief that California law prohibiting same-sex marriage was unconstitutional);

Young, to avoid Eleventh Amendment problems a federal court "can *only* direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action." 209 U.S. at 158 (emphasis added).

Consistent with these principles, county clerks were found to have legally protectable interests in *American Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236 (D.N.M. 2008), and *Bogaert v. Land*, No. 1:08-CV-687, 2008 WL 2952006 (W.D. Mich. July 29, 2008). (*See* County Br. 17-18 (discussing *Herrera* and noting holding in *Bogaert*).)[13] Plaintiffs dismiss these decisions on the ground that the party opposing intervention did not argue that "the relevant county clerk's duties were wholly ministerial and conducted under the supervision of a state official." (Aplees' Br. 14.) But they provide no case authority or rationale for why the existence of a supervisor negates a ministerial official's legal interest in performing his or her duties, while at the same time conceding that suing a county clerk (as they did) in a same-sex marriage case may be "necessary to afford

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Lockyer, 95 P.3d 459 (county clerks sued for issuing same-sex marriage licenses); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) ("*Conaway*") (same-sex couples sue county clerks for refusing to issue marriage licenses); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (same).

[13] In its opening brief (at 17), the County mistakenly stated that intervention was granted in *Herrera*. Although the court ultimately denied intervention on the ground that the county clerk's interests were adequately represented by the existing defendants, it first ruled that the clerk had a protectable interest under Rule 24(a) in the performance of her "statutory obligations" (257 F.R.D. at 256)—the purpose for which the County cited the case.

complete relief in a given case" (*id.* at 14 n.2)—a position facially inconsistent with their mistaken argument that county clerks are superfluous because the State Registrar has full authority over marriage.

Plaintiffs deny that the district court's injunction subjects Vargas to conflicting duties on the view that "the law requires Ms. Vargas to follow the directives of the State Registrar" without regard to any other statutory directive. Aplees' Br. 15, 17-18. Although this view is legally false, the district court believes it and has ordered the State Registrar to direct county clerks like Vargas not to comply with Proposition 8. Further, Plaintiffs claim broad enforcement powers for the district court under the Supremacy Clause. *See id.* at 15 n. 3, 17. Nevertheless, the judgments of federal district courts have no precedential effect except on the parties, *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001), and the California Constitution bars California officials from declining to enforce state laws that have not been determined to violate federal law by an appellate court. Cal. Const. art. III, § 3.5(c). Moreover, the Imperial County Intervenors believe not only that Proposition 8 is constitutional but that they have a duty based on their oath of office to support and defend it. Given all this, it is virtually inevitable that

Vargas will be subjected to conflicting legal duties over the issue of same-sex marriage.[14]

In short, this litigation will undoubtedly affect Vargas's "own duties and powers under the state laws" respecting marriage. *Blake*, 554 F.2d at 953. She thus has a protectable interest for purposes of intervention.

3. The other Imperial County intervenors also have significant protectable interests impaired by this action.

Plaintiffs do not deny that the County's Board of Supervisors has a statutory duty to ensure that "all county officers"—including county clerks—"faithfully perform their duties" (Cal. Gov't Code § 25303), including those relating to marriage. (*See* County Br. 21-22; Aplees' Br. 19.) Plaintiffs argue instead that the Board's "supervisory authority over the clerk's performance of her duties pertaining to marriage" does not support "an interest in this litigation" because no

[14] Plaintiffs give no weight in the interest analysis to Vargas's oath to support both the United States and California constitutions, despite the Supreme Court's holding in *Board of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968), that school officials had a "'personal stake'" in litigation based on conflicting demands arising from their oath of office. To be sure, as Plaintiffs note, this Court in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980), held that local officials have no standing based on their oaths to *challenge* the federal constitutionality of state law, given that local officials are themselves creatures of state law. But nothing in *City of South Lake Tahoe* denies the personal stake that local officials have, by virtue of their oath and their statutory responsibilities, to *defend* the constitutionality of state law when their own legal duties and powers are at issue. Vargas's oath to uphold the California Constitution—including Proposition 8—only adds to her already substantial interest in this litigation and is all the more weighty given the Governor's and Attorney General's abdication of their duties to defend the law.

municipal official can direct the county clerk (or registrar) not to comply with their statutory duties respecting marriage. (Aplees' Br. 19.)

While it is certainly true that the Board cannot interfere as county clerks comply with their statutory duties respecting marriage, as Mayor Newsom did in *Lockyer*, it by no means follows that the Board lacks an interest in "see[ing] that they faithfully perform their duties." Cal. Gov't Code §25303. That is what the statute directs, after all. If a county clerk simply refused to perform her marriage-related duties (*e.g.*, declining to issue any marriage licenses), or if she performed her duties in manifest violation of state law (*e.g.*, granting marriage licenses to underage parties), the Board would undoubtedly have a statutory duty to exercise its supervisory authority and take appropriate steps to ensure strict obedience to state law. The critical distinction is between *interfering* with a clerk's compliance with state marriage laws (which *Lockyer* forbids) and *ensuring* such compliance (which Cal. Gov't Code §25303 requires). Thus, contrary to Plaintiffs' argument (at 20), the Board has a direct *statutory* interest in whether its clerk faithfully complies with state marriage laws—including Proposition 8. Ironically, that interest is essentially the same one Plaintiffs erroneously attribute to the State Registrar.

This litigation interferes with that interest. The Board maintains that Proposition 8 is constitutional and binding on its clerks and that it has a duty—

statutory and by virtue of its members' oath of office—to see that Proposition 8 is faithfully applied. The district court's order, which Plaintiffs and the court below deem binding on the County and its officers, would "directly affect [the Board's] own duties and powers under the state laws" (*California ex rel. Van de Kamp*, 792 F.2d at 782) by barring it from fulfilling its statutory duty to ensure that its clerks comply with all state marriage laws. As a practical matter, the order also interferes by purportedly stripping the Board of its supervisory duties over county clerks and improperly bestowing them on the State Registrar.

Plaintiffs' Supremacy Clause argument (at 20-21) merely illustrates the inevitable conflicts over legal duties and sharpens the urgency of granting intervention to ensure a proper appeal. The Supremacy Clause does not compel County officials to agree with the district court's untested ruling or deem compliance with it part of their oath of office. And while County officials cannot invoke their oath of office to challenge state law as violating the federal Constitution, as explained above that rule does not limit their ability to intervene to defend the constitutionality of state law, especially where "their own duties and powers under the state laws" are directly at stake. *California ex rel. Van de Kamp*, 792 F.2d at 782.[15]

[15] For the reasons set forth above, Vargas and the Board of Supervisors should have been allowed to intervene and have standing to appeal. As argued in the opening brief, the County itself also has standing because of its direct financial

4. The existing parties will not adequately represent the interests of the County and its officials.

Plaintiffs' argument that the existing state defendants adequately represent the County's interests is wrong as a matter of law and practical reality. Plaintiffs largely ignore the legal test for adequacy of representation. (County Br. 25; Aplees' Br. 22-24.) Instead, they recycle the assertion that County officials have no interest in defending the marriage laws because state officials have sole authority over the matter. That is false for several reasons. For one, "California law … explicitly provides that a county's board of supervisors, not the state Attorney General, directs and controls litigation in which a county is a party." *PG&E v. County of Stanislaus*, 947 P.2d 291, 300-01 (Cal. 1997). The mere fact that neither the Attorney General nor the Administration will defend Proposition 8 is of no moment. County clerks, moreover, have the most direct, immediate, and substantial interest of all California officials in the defense of California's marriage laws. The State Registrar's interests are minor and those of the Governor and

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interest in the outcome of this case. County Br. 8, 22-23. Plaintiffs argue that this issue requires extensive factual discovery and should have been raised below. Aplees' Br. 21. The argument is overblown. The precise extent of the County's financial interest is ultimately unknowable and irrelevant. The point is sociological, not a matter of accounting—the County claims that the adverse social effects resulting from changing the traditional definition of marriage will have adverse financial effects on the County as demands increase for social services and benefits. These adverse effects are real and there is no requirement under Rule 24(a) that the County quantify them. If the City and County of San Francisco's alleged financial interests are sufficient for intervention, so are Imperial County's.

Attorney General so generalized and attenuated that a district court dismissed a same-sex marriage suit against them on Eleventh Amendment grounds for failing to name county clerks. *See Walker v. United States*, No. 08-1314, 2008 U.S. Dist. LEXIS 107664 (S.D. Cal. Dec. 3, 2008) (relying *inter alia* on *Eu*, 979 F.2d at 704). As *Lockyer* expressly holds, the interests of county clerks in strictly complying with the marriage statutes are subservient to no official—they exist as a matter of nondiscretionary state law. 95 P.3d at 472-73 ("When the substantive and procedural requirements *established by the state marriage statutes* are satisfied, the county clerk and county recorder each has the respective mandatory duty to issue a marriage license and record a certificate of registry of marriage …. By the same token, when the statutory requirements have not been met, the county clerk and county recorder are not granted any discretion under the statutes to issue a marriage license or register a certificate of registry of marriage.") (emphasis added).

So the virtually unprecedented decision of the Attorney General and the Administration to abandon the defense of Proposition 8 is their own and not binding in the least on County officials like Vargas with their own and much more direct interest in the outcome of this case. To suggest that such abandonment constitutes adequate representation of those interests under intervention law is specious. It cannot possibly be said—legally or practically—that they "will

undoubtedly make all the intervenor's arguments" or that they are "capable and willing to make such arguments" or that the County would not "offer any necessary element to the proceedings"—such as an actual legal defense by officials with statutory duties over marriage itself—"that other parties would neglect." *Berg*, 268 F.3d at 822. And it is disingenuous for Plaintiffs to argue on the one hand (at 24) that the County's interests are "adequately represented by Proponents" while simultaneously arguing that the Proponents lack standing to appeal and, thus, that Plaintiffs should prevail by default.

The burden to show inadequacy of representation is "minimal"—demonstrating that it "'may be' inadequate" is enough (*Berg*, 268 F.3d at 823 (citation omitted))—and easily met here.

B. The District Court Abused Its Discretion in Denying Permissive Intervention.

The County and its officials so clearly meet the standard for intervention as of right that they necessarily meet the standard for permissive intervention. The district court found, and Plaintiffs do not dispute, that the "County satisfies the threshold requirements for permissive intervention" under Rule 24(b). (E.R. Vol. I, p. 29.). At bottom, its denial of permissive intervention was based on the same erroneous conclusion that county clerks are ministerial subordinates of the State Registrar. (*Id.* at 32)

The abuse of discretion is especially clear in the light of the broader context of this litigation. As this Court has held, "the magnitude of th[e] case" can be "a good and substantial reason" for permissive intervention. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002). It would be difficult to imagine a more momentous case than this. The legal, social, and political consequences are enormous. An appellate court decision on the merits is vital on many levels—indeed, the very legitimacy of the legal process is at stake. The district court should have accommodated every good-faith effort to help ensure appellate jurisdiction. Its refusal to allow permissive intervention was an abuse of discretion.

III. BINDING PRECEDENT FROM THE UNITED STATES SUPREME COURT AND THE NINTH CIRCUIT ESTABLISHES THAT PROPOSITION 8 IS CONSTITUTIONAL.

Plaintiffs' claims on the merits are foreclosed by the Supreme Court's ruling in *Baker v. Nelson*, 409 U.S. 810 (1972) ("*Baker*"). Plaintiffs agree that summary dismissals are binding on lower courts "on the *precise* issues presented and necessarily decided" by the Supreme Court, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added), and only to the extent that they have not been undermined by subsequent "doctrinal developments" in the Supreme Court's jurisprudence. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) ("*Hicks*") (internal quotation marks omitted); *see also Turner v. Safley*, 482 U.S. 78, 96 (1987).

(Aplees' Merits Br. 36.)[16] Plaintiffs are in error, however, concerning the applicability of *Baker*'s summary dismissal on the constitutionality of Proposition 8.

Plaintiffs attempt to distinguish the underlying facts in *Baker* by asserting the following: (1) "*Baker* presented an equal protection challenge based *solely* on sex discrimination" (Aplees' Merits Br. 36; (2) *"Baker* addressed equal protection and due process challenges to a marriage framework that is far different from the one that Plaintiffs were challenging here" (Aplees' Merits Br. 37); and (3) "*Baker* concerned the constitutionality of an outright refusal by a State to afford *any* recognition to a same-sex relationship" as opposed to eliminating only the right to marry. (*Id.*)

The Minnesota Supreme Court considered whether "the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) ("*Baker I*"). The court determined that the Due Process Clause was not violated by the limitation on marriage and refused to restructure the institution of marriage

[16] In footnote 6 of Plaintiffs' brief opposing the County's intervention, Plaintiffs responded to the County's arguments on the merits of its appeal by referring to Plaintiffs' brief on the merits filed in the coordinated case of *Perry v. Schwarzenegger* (Case No. 10-16996, filed Oct. 18, 2010). The County refers to Plaintiffs' brief on the merits as Appellees' Merits Brief ("Aplees' Merits Br.").

through "judicial legislation". *Id.* at 186-87. Further, the court determined that there was no violation of the Equal Protection Clause as a result of the "state's classification of persons authorized to marry." *Id.* at 187 (finding that "[t]here is no irrational or invidious discrimination"). The court completed its analysis under the Fourteenth Amendment by reviewing *Loving v. Virginia*, 388 U.S. 1 (1967) ("*Loving*"). "*Loving* does indicate that all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But, in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Baker I*, 191 N.W.2d at 187.

Plaintiffs refuse to acknowledge that the underlying facts in *Baker* are precisely parallel to the facts before this Court. The questions presented in the Jurisdictional Statement before the Supreme Court erases any doubt that *Baker* concerned the precise legal issues before this Court - whether a state law limiting marriage to opposite sex couples is constitutional pursuant to the Fourteenth Amendment. (E.R. Vol. IV, p. 912.) Just as occurred in *Baker*, Plaintiffs' are clearly seeking to overturn a state law limiting marriage to opposite sex couples because it includes a restriction based upon the fundamental difference in sex. The framework of the state laws are identical in that each limits marriage to one man and one woman. Lastly, it is irrelevant for purposes of federal constitutional

analysis whether the California Supreme Court previously interpreted its own constitution in such a manner as to provide for same-sex marriage. Like *Baker,* this case concerns whether same-sex marriage is constitutionally mandated by the Fourteenth Amendment. Therefore, *Baker* is binding on this court, because "the lower courts are bound by summary decisions . . . 'until such time as the Court informs (them) that (they) are not." *Hicks*, 422 U.S. at 344-45 (*quoting Doe v. Hodgson*, 478 F.2d 537, 539 (2nd Cir. 1973).

Plaintiffs additionally argue that *Romer* and *Lawrence* amount to "doctrinal developments" in the Supreme Court's jurisprudence that undermines its prior dismissal of *Baker* "for want of a substantial federal question." (Aplees' Merits Br. 35.) While *Lawrence* may be significant in terms of protecting personal privacy rights within the home and *Romer* may be significant in terms of prohibiting sweeping and targeted discrimination, neither of these cases implicates or establishes a right to same-sex marriage under the Fourteenth Amendment. In sum, however, neither case establishes a unique analysis under the Fourteenth Amendment for challenges based upon either due process or equal protection. Neither case asserted a fundamental right to same-sex marriage, and neither case asserted that homosexual individuals constitute a suspect class. Ultimately, neither case sets forth doctrinal developments that undermine *Baker*.

Plaintiffs further argue that *Baker's* rational basis review has been undermined by the Supreme Court's establishment of gender as a quasi-suspect classification in *Craig v. Boren*, 429 U.S. 190, 197 (1976) and *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality). Plaintiffs appear to implicitly argue that the intermediate review applicable to gender-based laws may also be applicable to laws limiting marriage to opposite sex couples. However, subsequent to *Craig* and *Frontiero*, the *Romer* Court applied rational basis review to a statute that eliminated all protection under state law for all persons within the homosexual class. See, *e.g.*, *Romer v. Evans*, 517 U.S. 620, 626-32 (1996) ("*Romer*"). *Romer* did not articulate a new standard of review or determine that intermediate review is applicable to laws that distinguish between persons based on their sexual orientation. *Id.* at 631-32.

Finally, Plaintiffs argue that *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) ("*Adams*"), is distinguishable. (Aplees' Merits Br. 38.) *Adams* concerned a challenge to a federal immigration law that prohibited same-sex couples from qualifying as spouses in the immigration context. The plaintiffs challenged the law based on the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at 1041 n. 3. Although Plaintiffs are correct in asserting that "limited judicial review" is applicable to decisions of Congress in relation to immigration, this Court did not merely apply "limited judicial review." Rather, this Court found

that it did not even need to apply limited judicial review because the higher standard of review, rational basis review, was applied to the restriction on marital recognition and no constitutional violation was determined. *Id.* at 1042. Therefore, this Court's ruling in *Adams* is precedential here and this Court should likewise determine Proposition 8 is constitutional.

IV. PLAINTIFFS FAIL TO SATISFY THE INDICIA REQUIRED FOR THE RECOGNITION OF A FUNDAMENTAL RIGHT UNDER THE DUE PROCESS CLAUSE.

Plaintiffs notably failed to support their due process claim by arguing that same-sex marriage is "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed". *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). In failing to do so, Plaintiffs did not address the fundamental inquiry of a substantive due process claim. Instead, Plaintiffs arguments focused on challenging Proponents' position that responsible procreation is an important component of the institution of marriage. This argument is irrelevant. Regardless of whether marriage has always been limited to opposite sex couples because of their natural ability to procreate or because of some other reason, it is impossible to honestly argue that same-sex marriage is deeply rooted in our Nation's history and traditions. Plaintiffs have not, and cannot, establish a fundamental right to same-sex marriage.

"The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. Ct. of Appeal 2006) ("*Hernandez*"). This Court has stated its agreement with *Hernandez*, and has affirmed that the commonsense meaning of the term "'marriage' ordinarily contemplates a relationship between a man and a woman." *Adams*, 673 F.2d at 1040 (citing Webster's Third New International Dictionary 1384 (1971) and Black's Law Dictionary 876 (5th ed. 1979)).

Plaintiffs have implicitly conceded the point that same-sex marriage is not deeply rooted in our Nation's history and have instead chosen an alternative approach. Plaintiffs eloquently and passionately assert that the long-standing fundamental right to marriage necessarily includes the right to marry a person of the same sex, notwithstanding the fact that the universal understanding of marriage is that it consists of "the union of one man and one woman" and that understanding "is as old as the book of Genesis." *Baker I*, 191 N.W.2d at 186. Plaintiffs' arguments recklessly ignore history, reason and commonsense. More importantly, however, they fail to establish a fundamental right in light of the case law.

A. Precedent Declaring A Fundamental Right To Marriage Unmistakably Assumes A Marital Relationship Between One Man And One Woman.

Plaintiffs argue that the fundamental right to marriage is based on the "liberty to select a partner of one's choice – not the one chosen" or, put another way, the "freedom of choice" without regard to gender. Every federal case cited by Plaintiffs for the proposition that the "freedom of choice" includes the choice of gender is taken out of context. Each of the cases cited in support of this erroneous proposition was based on the foundational principle that marriage only consists of opposite-sex marriage. *See*, *e.g.*, *Loving*, 388 U.S. 1; *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Griswold v. Connecticut*, 381 U.S. 479 (1965). In fact, no federal appellate circuit has ever articulated a fundamental right to marriage inclusive ofsame-sex marriage.

As a result, in order to assert that federal law articulates a constitutional right to same-sex marriage Plaintiffs chose to assemble a patchwork of tenuous legal principles. For example, Plaintiffs erroneously combine two distinct statements in *Lawrence* to give the appearance that *Lawrence* articulated a right to same-sex marriage. (Aplees' Merits Br. 22 ("Indeed, the Supreme Court has emphasized that the Constitution 'afford[s] . . . protection to personal decisions relating to marriage' and that '[p]ersons in a homosexual relationship may seek autonomy for th[i]s purpose[ ], just as heterosexual persons do" (citing *Lawrence v. Texas*, 539

U.S. 558, 574 (2003) ("*Lawrence*")).) While *Lawrence* established a right for two adult individuals of the same sex to engage in private consensual sexual acts without fear of criminal prosecution, the Supreme Court did not establish a due process right for same-sex couples to publicly participate as spouses in the institution of marriage. *Lawrence*, 539 U.S. at 578. To the contrary, the Supreme Court specifically stated that *Lawrence* did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578.

Plaintiffs further argue that *Turner v. Safley*, 482 U.S. 78, 96 (1987) ("*Turner*"), undermines responsible procreation as being a natural component to the fundamental right to marriage and, therefore, undermines responsible procreation as a significant interest in limiting marriage to opposite-sex couples. In doing so, Plaintiffs concede an important point: the Supreme Court "acknowledged procreation as only *one* among *many* goals of marriage." (Aplees' Merits Br. 44 (citing *Turner*, 482 U.S. at 96) (emphasis in original).) While the parties may disagree as to the relevant importance of responsible procreation, it is surely a goal that has long been recognized as an important goal of the marital institution and the laws regulating that institution. *See*, *e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) ("*Citizens*"); *Conaway*

v. Deane, 932 A.2d 571 (Md. 2007)(citing multiple U.S. Supreme Court cases). Further, it is a goal that same-sex couples can never realize.

Turner recognizes the fact that despite the substantial restrictions placed on prisoners who are married during incarceration, there are many important attributes of marriage that prisoners will experience, including the intangible social benefits and the tangible government benefits. However, not the least of these attributes is the goal that "most inmates will eventually be released by parole or commutation, and therefore most inmate marriages are formed in expectation that they ultimately will be fully consummated." *Turner*, 482 U.S. at 96. Of course, some inmate marriages may end in death or divorce before the inmate is released and some relationships may never be consummated for various reasons. However, these arguments do not eliminate the reality that responsible procreation remains an important public policy and goal for marriage. Important public policies can be and are encouraged, even when the goal of that policy is not realized in every situation. Further, the rationale of that policy is not invalidated merely because of certain isolated situations where the goal is not reached.[17]

[17] *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality'"); *Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("perfection is by no means required").

Additionally, in *Turner,* the Supreme Court made clear that its prior decision in *Butler v. Wilson*, 415 U.S. 953 (1974) ("*Butler*") (*summarily aff'g Johnson v. Rockefeller*, 365 F.Supp. 377 (SDNY 1973)), was not inconsistent with *Turner* because "that case involved a prohibition on marriage only for inmates sentenced to life imprisonment; and, importantly, denial of the right was part of the punishment for crime." *Turner*, 482 U.S. at 96. Together, *Turner* and *Butler* stand for the rationale that an individual's fundamental right to marriage can be infringed where the individual is sentenced to life imprisonment. They do not stand for the proposition that responsible procreation is of little consequence to the state's interest in marriage. Rather, *Turner* and *Butler* affirm the commonsense reality that procreation is a substantial factor and an important state interest in regulating the marital institution.

Constitutional jurisprudence does not tolerate "smoke and mirrors", but instead operates with truth and clarity. Plaintiffs are asking this Court to establish a new fundamental right to same-sex marriage because they cannot truthfully establish that our Nation's history and jurisprudence supports the position that same-sex marriage has always been a fundamental right inclusive within traditional marriage. Despite Plaintiffs arguments to the contrary, the district court in this case did not simply expose a latent fundamental right that has always existed in our Constitution. Rather, it attempted to create a new fundamental right to same-sex

marriage. No one will be served by same-sex marriage that is camouflaged as "traditional" marriage. If Plaintiffs want acceptance and recognition of their relationships by the citizens of this Nation in the form of marriage, they will need to educate their fellow citizens to this end. Their goal will not be realized through judicial legislation. Rather, judicial intrusion into the marital institution will undermine the integrity of the people's initiative power.

B. Plaintiffs' Attack On California Domestic Partnership Law Fails To Establish A Due Process Violation.

Plaintiffs rely on *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) ("*Brown*"), to argue that domestic partnerships are not a constitutionally sufficient substitute for marriage and, therefore, domestic partnerships are constitutionally infirm. (Aplees' Merits Br. 52-54.) This entire argument rests upon a faulty premise – that Plaintiffs have a fundamental right to same-sex marriage based on the Due Process Clause. Plaintiffs cannot establish a fundamental right to marry persons of the same sex and *Brown's* holding is, therefore, inapplicable.[18] Without a fundamental right at stake, this Court is obligated to apply rational basis review

[18] It is also relevant to note that *Brown* was decided under the Fourteenth Amendment's Equal Protection Clause and not the Fourteenth Amendment's Due Process Clause. *Brown,* 347 U.S. 483 at 495. Although the race-based doctrine of "separate but equal" was overruled based on the Fifth Amendment right to due process in a companion case to *Brown*, the Supreme Court found that the law was arbitrary with no proper governmental objective. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). Therefore, the race-based segregation in that case did not even survive rational basis review and strict scrutiny was not necessary.

to Plaintiffs' due process arguments. Therefore, even if there was a "separate but equal" structure in relation to domestic partnerships, the "separate but equal" structure would still withstand rational basis review as articulated in section III(C) of the County's Opening Brief and as is discussed below.

V. PROPOSITION 8 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc*., 508 U.S. 307, 313 (1993) ("*FCC*"). Proposition 8 concerns social policy that is not automatically subjected to heightened scrutiny. Plaintiffs must establish that either a fundamental right is at stake or that they constitute a suspect class for heightened scrutiny to apply. *Id*. Plaintiffs argue that heightened scrutiny is applicable to Proposition 8 solely based their belief that sexual orientation is a suspect classification.

A. Plaintiffs Are Not Entitled To Suspect Status.

Plaintiffs ignore the fact that this Court previously analyzed whether homosexuals are entitled to suspect status for purposes of equal protection analysis. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 595 (9th Cir. 1990) ("*High Tech Gays*"). Rejecting suspect status for

homosexuals, this Court applied a three part test, based on its analysis of Supreme Court precedent, in order to determine whether a group is entitled to suspect status, holding the group must: (1) have suffered a history of discrimination; (2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) show that they are politically powerless. *Id.* at 573 (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (due to a lack of these characteristics, the statutory classifications in question were subject to only a rational basis review).

Plaintiffs erroneously articulated this test in two ways. First, Plaintiffs suggest that strict scrutiny may be applied when any one of the three prongs are satisfied. (Aplees' Merits Br. 60.) However, *High Tech Gays* clearly identifies that all three prongs must be satisfied before heightened scrutiny is applied. *High Tech Gays*, 895 F.2d at 573. Secondly, Plaintiffs do not accurately recite the immutability prong. Plaintiffs improperly argue that heightened scrutiny is applicable when "the distinguishing characteristic is 'immutable' or beyond the group members control." (Aplees' Br. 60 (citing *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) ("*Lyng*").) However, both *Lyng* and *High Tech Gays* require "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Lyng*, 635 at 638; *High Tech Gays*, 895 F.2d at 573. This is an important distinction because, as argued in section III(B)(3) of our Opening Brief, the

homosexual class cannot be discretely defined because the class is complex, variable and can change over time. (E.R. Vol. II, pp. 237-38.)

1. Immutability.

Plaintiffs rely on *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("*Hernandez-Montiel*"), *overruled on other grounds by*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005), for the proposition that sexual orientation is immutable, thereby entitling Plaintiffs to a suspect classification. (Aplees' Br. 63.) Despite this Court's conclusion in *Hernandez-Montiel* that sexual orientation is an immutable characteristic, this Court has since declared that homosexual persons do not constitute a suspect classification such that they are entitled to strict scrutiny. *See Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003) ("homosexuals are not a suspect or quasi-suspect class, but are a definable group entitled to rational basis scrutiny for equal protection purposes") (quoting *High Tech Gays*, 895 F.2d at 573-74)). *Hernandez-Montiel* did not concern an equal protection claim or analysis and the decision in that case is not precedential. *Hernandez-Montiel* has never been followed by any subsequent court. Further, not only has *Hernandez-Montiel* been overturned by this Court, but

all ten federal circuit courts that have addressed the issue are in agreement with the holding in *High Tech Gays*.[19]

2. Political powerlessness.

Plaintiffs criticize Proponents' brief by arguing that Proponents only devoted three sentences in asserting that gay men and lesbians are politically powerful. This criticism ignores section III(B)(2) of the County's brief, wherein the County reflects upon the fact that California has some of the most comprehensive protections in the Nation based on a person's sexual orientation and has adopted more than sixty pieces of civil rights legislation in the last decade. (E.R. Vol. III, p. 587.) A person does not need to be politically astute to recognize the fact that the relatively small group of persons who identify themselves as homosexuals have an inordinate amount of political and social influence in comparison to their size.

[19] *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens*, 455 F.3d at 866-67; *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see also Romer* , 517 U.S. at 631-35 (1996) (applying rational basis scrutiny to classification based on sexual orientation).

B. Plaintiffs Use of *Romer* Is Untenable, As *Romer* Does Not Establish Proposition 8 Violates The Equal Protection Clause.

Plaintiffs' analysis of *Romer v. Evans* is extensive, and woven throughout their Opposition Brief. Although Plaintiffs apply *Romer* in a variety of contexts, there is one universal theme running through their analysis, which is that *Romer* precludes this Court from determining that Proposition 8 is constitutional. Relying again on generalizations and dicta, Plaintiffs overstate *Romer's* holding and the analysis that can be threaded from it to a remarkable extent. *Romer's* distinctive facts led to a holding there that requires the exact opposite legal conclusion when analyzed with Proposition 8.

In 1992, Colorado adopted a constitutional amendment in a statewide referendum largely in response to ordinances that had been passed in Colorado municipalities. *Romer*, 517 U.S. at 623. "For example, the cities of Aspen and Boulder and the City and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services." *Id*. at 623-24. Amendment 2, as it was designated on the ballot, "repeals these ordinances to the extent they prohibit discrimination on the basis of 'homosexual, lesbian or bisexual orientation, conduct practices or relationships. Yet, Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local

government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians." *Id*. at 624.

Without question, Amendment 2 resulted in a dramatic change in the law that was unprecedented at the time and has not been replicated by Proposition 8. *Romer*, 517 U.S. at 633. As the Court stated, "Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id*. at 626. In light of the scope and breadth of Amendment 2, the Court held that it could not satisfy even rational basis scrutiny. *Id*. at 632-34.

Plaintiffs use *Romer* far beyond the constitutional confines that its unique facts permit, and fail to acknowledge the vast differences between the purpose and effect of Amendment 2, with its broad scope and complete prohibition of legislative, executive or judicial action to protect the named class, and the narrow intent and language of Proposition 8 seeking to protect the historical definition of marriage. Instead, Plaintiffs stated that "Proposition 8 shares all the salient – and constitutionally unacceptable – features of Colorado's Amendment 2 because, in the absence of any conceivably legitimate government interest, it imposes a 'special disability' on gay and lesbian individuals, who, alone among California's

citizens, have been deprived of their preexisting state constitutional right to marry." *Id*. at 631 (Aplees' Merits Br. 37.) Plaintiffs' statement reflects the same constitutional infirmity of Amendment 2, at once too narrow and too broad, as it fails to recognize or address the patently obvious differences between Amendment 2 and Proposition 8. Plaintiff states that *Romer* holds that "Amendment 2 'confounds' the 'normal process of judicial review' under rational basis scrutiny because it is 'at once too narrow and too broad.'" *Romer*, 517 U.S. at 633; Aplees' Merits Br. 89. Despite acknowledging that *Romer* was constitutionally infirm because it was too "broad," Plaintiffs fail to provide any thoughts as to why the far narrower Proposition 8 is too "broad." Rather, Plaintiffs choose to cut out the words of *Romer* while conveniently leaving the heart of its holding, and generically apply them without providing an honest assessment of the Court's holding or the reality of Amendment 2's breadth.

Proposition 8 did not prohibit the legislature, judiciary, and executive from taking any action to protect the "named class" and Plaintiffs cannot reasonably claim that homosexuals are not broadly protected both in the private and government sector as to a wide variety of issues, and more so with each passing year. Proposition 8 would be more akin to Amendment 2 if it sought to eliminate the sweeping legislation that has been passed in California protecting persons based on sexual orientation, inclusive of, but not limited to, the 2003 Domestic

Partnership Act and the Unruh Civil Rights Act. Cal. Fam. Code § 297.5 *et seq*.; Cal. Civ. Code § 51. The *Romer* Court declared that "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group." *Romer*, 517 U.S. at 632. While Proposition 8 could be said to disadvantage a particular group, this is an "ordinary case" and Proposition 8 easily satisfies rational basis scrutiny.

Several times Plaintiffs rely on *Romer* for the conclusion that "[b]ecause a 'bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest," *Romer*, 517 U.S. at 634, Proposition 8 is unconstitutional. (Aplees' Merits Br. 24.) The language cited from *Romer*, however, is premised again on the breadth of Amendment 2. The Court found that Amendment 2 represented a "bare desire to harm a politically unpopular group" because it made a "general announcement that gays and lesbians shall not have any particular protections from the law . . . ." *Romer*, 517 U.S. at 634-35. Proposition 8 made no such general announcement, and instead narrowly stated that marriage is between a man and a woman.

Notably, Plaintiffs again fail to acknowledge the reasoning behind the Court's statement and its correct application. Plaintiffs assert that this language from *Romer* reveals that voters had an improper purpose when they stepped into

the voting booth based on a few select statements that were pulled out of thousands of documents. The *Romer* Court stated that Amendment 2 represented a "bare desire to harm a politically unpopular group" not because the Court analyzed statements from a single proponent of the initiative, or because the voters were given one specific message from a cacophony of messages, but because of the breadth of Amendment 2 and the fact that it announced that homosexuals would not have *any* particular protections from the law. (Aplees' Merits Br. 97-104.) Plaintiffs attempt to use this language in *Romer* to show that there is "overwhelming evidence" supporting a finding that "Proposition 8 was motivated by a bare desire to make gay men and lesbians unequal to everyone else" is legally and logically flawed. (Aplees' Merits Br. 97.) Seven million Californians voted for Proposition 8 for a plethora of reasons and Plaintiffs attempts to assign a particular reason based on their select versions of a variety of messaging, even if the majority of the electorate never even heard that particular message, is not supported by *Romer* or any other relevant precedent.

Plaintiffs statements, such as "[j]ust as moral disapproval could not justify Amendment 2 in *Romer*, it cannot justify Proposition 8", are not an honest reflection of the law stated by the *Romer* Court, or even an honest reflection of why Californians voted for Proposition 8. (Aplees' Merits Br. 76.) Instead, they

are blatant attempts to invoke an emotional reaction when the law speaks clearly to an opposite result.

C. Under Rational Basis Review, Proposition 8 Is Constitutional.

Under rational basis review, a plaintiff's equal protection claim must be rejected if "there is *any reasonably conceivable state of facts* that could provide a rational basis" for the challenged action. *FCC*, 508 U.S. at 313. (emphasis added); *see also Vance v Bradley*, 440 U.S. 93, 111 (1979) ("*Vance*"). Consistent with the County's opening brief, Plaintiffs articulate the proper legal standard when undertaking rational basis review. (Aplees' Merits Br. 74). However, despite their correct recitation of it, Plaintiffs fail to properly apply the standard.

It is Plaintiffs' burden to eradicate every rational notion that may exist in support of Proposition 8. *FCC*, 508 U.S. at 314-15. This means that Plaintiffs have the responsibility to invalidate every reasonable inference that the voters may have relied upon when they passed Proposition 8. *Vance*, 440 U.S. at 111. Ultimately, the voters do not have to be right in their beliefs, they simply need to have a rational belief that the passage of Proposition 8 would serve a legitimate governmental interest. In fact, California voters could have based their vote on "rational speculation unsupported by evidence or empirical data." *FCC*, 508 at 515.

In the companion case to this appeal (Ninth Circuit Case No. 10-16696), the Proponents referenced a multitude of evidence, including testimony, journals, and other evidentiary materials, supporting the argument that Proposition 8 serves a legitimate interest in promoting responsible procreation, child rearing and other innumerable interests that naturally flow from the traditional institution of marriage.[20] (*See generally* Defendants-Intervenors-Appellants' Opening Brief ("Prop. Br.") 75-113.) Likewise, the County relied upon testimony, journals, cases and other evidentiary materials supporting a rational basis for the passage of Proposition 8. (*See generally*, County's Br. 51-60.) On the other hand, Plaintiffs have relied on contrary materials and testimony to assert that same-sex parenting is equal to biological parenting and that responsible procreation is not a valid concern.

The evidence presented on both sides of this case reveal that reasonable minds can differ in regard to the serious social issues and concerns surrounding the institution of marriage. Plaintiffs argue, however, that every interest asserted by proponents (while ignoring the interests asserted by the County) is irrational. This position is unsustainable, particularly in light of the fact that many federal and state

[20] As stated in footnote 1, *supra*, Plaintiffs responded to the County's arguments on the merits of its appeal by referring to Plaintiffs' brief on the merits filed in the companion case of *Perry v. Schwarzenegger* (Case No. 10-16996, filed Oct. 18, 2010). Additionally, due to the fact that the County was prohibited from participating in the trial, Plaintiffs respectfully request that this court take judicial notice of Proponents Opening Brief and Reply Brief in the companion action.

judges have applied rational basis review to laws limiting marriage to opposite-sex couples and have concluded, almost universally, that legitimate government interests are served by limiting marriage to opposite sex couples.[21]

D. Proposition 8 Does Not Discriminate Based Upon Sex.

Proposition 8 defines "marriage" by stating that "[o]nly marriage between a man and a woman is valid or recognized in California". Cal. Const. art I, § 7.5 (2008). Plaintiffs argue that because Proposition 8 establishes "gender roles" and does not allow persons of the same sex to marry, the legislation is a sex-based classification warranting intermediate scrutiny. (Aplees' Merits Br. 71-73.) To the contrary, Proposition 8, does not single out men or women as a discrete class for unequal treatment. Proposition 8 applies equally to both men and women and prohibits each sex from marrying the same sex. Neither gender is being treated differently, nor can a discriminatory purpose be discerned on the basis of sex. Therefore, Proposition 8 does not classify according to gender, and the Plaintiffs are not entitled to heightened scrutiny under this theory. *See Baker I*, 191 N.W.2d at 186; *Baker*, 409 U.S. at 810 (*summarily aff'g prior case*); *Wilson v. Ake*, 354 F.

[21] *See Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 460-61 (2003); *Citizens*, 455 F.3d at 866; *Conaway*, 932 A.2d at 635; *Hernandez*, 855 N.E.2d at 379; *Andersen*, 138 P.3d at 990; *Baker I,* 191 N.W.2d at 313; *Kandu*, 315 B.R. at 146; *In re Marriage of J.B. and H.B.*, __ S.W.3d __, 2010 WL 3399074, 19 (Tex. App. 2010).

Supp. 2d 1298, 1307-08 (N.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 143 (W.D. Wash 2004) ("*Kandu*"); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974); *In Re Marriage Cases*, 183 P.3d 384, 436 (Cal. 2008); *Hernandez*, 855 N.E.2d at 6; *Andersen v. King Cnty.*, 138 P.3d 963, 988-90 (Wash. 2006) (plurality); *Baker v. Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999).

E. Under Strict Scrutiny Review, Proposition 8 Is Constitutional.

Strict scrutiny is not applicable because no Supreme Court case, including *Romer* and *Lawrence*, has applied strict scrutiny to classifications based on sexual orientation. Further, the great majority of courts, including the Ninth Circuit, have held that strict scrutiny is not applicable and a classification based on sexual orientation is subject to rational basis review. *See, supra*, footnote 2 and footnote 4. Nevertheless, even if this Court were to determine that Plaintiffs are entitled to strict scrutiny despite applicable precedent, Proposition 8 satisfies the standard in light of the many state interests implicated when discussing an institution of such fundamental importance as marriage.

Generally, laws subjected to strict scrutiny will be "sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). While strict scrutiny is an exacting standard, the Supreme Court has determined in several cases that the government's interest is compelling enough that if the action is narrowly tailored to further that

interest the laws should be upheld. *See Grutter v. Bollinger*, 539 U.S. 306 (2003) ("*Bollinger*"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) ("*Adarand*"); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). Similar to the analysis reflected in *Bollinger*, Proposition 8 satisfies strict scrutiny.

In *Bollinger*, an unsuccessful applicant to Michigan Law School challenged the Law School's policy of including race as a factor in admissions. *Bollinger*, 539 U.S. at 316-17. The Law School's "asserted interest in obtaining the educational benefits that flow from a diverse student body" was analyzed in order to determine if it was compelling and, if so, whether its actions were narrowly tailored to serve that interest. *Id*. at 316. Ultimately, the *Bollinger* Court stated that diversity was a compelling government interest and the Law School took actions narrowly tailored to accomplish that purpose. *Id*. at 327 and 335.

"Strict scrutiny is *not* 'strict in theory, but fatal in fact.' Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Bollinger*, 539 U.S. at 326-27 (quoting *Adarand*, 515 U.S. at 237)(emphasis added); *See e.g*., *Rutherford v. City of Cleveland*, 179 Fed. Appx. 366 (6th Cir. 2006) (upholding the Cleveland Police Department's "temporary race-based hiring plan" because the City had a compelling interest in remedying its history of racial discrimination and the plan was narrowly tailored); *Smith v. Univ. of Wash*., 392 F.3d 367, 382 (9th Cir. 2004) ("In conclusion, the [University of Washington] Law

School's narrowly tailored use of race and ethnicity in admissions decisions during 1994-96 furthered its compelling interest in obtaining the educational benefits that flow from a diverse student body."); *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003) (holding that the Chicago Police Department's affirmative action program passed strict scrutiny because the Department "had a compelling interest in diversity" and the procedures used "minimize[ed] harm to members of any racial group"); *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (holding that, under *Bollinger*, the University of Texas's policy considering race as factor in admissions survived strict scrutiny).

As in *Bollinger*, Proposition 8 has a compelling government interest and the action taken by over 7 million California voters was narrowly tailored to achieve those interests. As fully set forth in the County's Opening Brief, the following are just some of the compelling government interests in the passage of Proposition 8: public health and welfare of the citizenry, responsible procreation, and biological parenting. (County's Br. 54-60.) Just as the State has in interest in encouraging racial diversity, the people have an equally compelling interest in protecting and encouraging the most important social institution known to man – marriage. If it means limiting marriage to opposite-sex couples to promote public health and welfare, responsible procreation and biological parenting, then the people can take such action. Not all laws subject to strict scrutiny are invalidated by it, and

Proposition 8 withstands constitutional scrutiny regardless of the level of scrutiny applied.

Finally, in stark contrast to Amendment 2 in *Romer*, Californians seeking to protect the historical definition of marriage between a man and a woman passed a constitutional amendment to achieve that end alone. Homosexuals have a myriad of rights, protections, and benefits both in the private sector and government. Proposition 8 was narrowly tailored to assure marriage is consistently defined, as it has been since the California Constitution was enacted and long before, and achieved the many interests previous asserted.

CONCLUSION

Plaintiff's conclusion references the recent tragedies of young Americans that have taken their own lives as a result of bullying because of their sexual orientation. As a governmental entity, as Americans, and as human beings, each of us must condemn the terrorizing behavior and educate others about the importance of kindness and compassion. However, forcing the electorate of California to adopt a controversial public policy stance through the creation of a constitutional right will not erase the need for compassion amongst differences, regardless of the differences.

The voters of California should not be forced to adopt same-sex marriage, and this Court should declare Proposition 8 constitutional pursuant to current

precedent. Further, this Court should grant Imperial County's intervention in light of the significant protectable interests of the County.

Respectfully submitted,

ADVOCATES FOR FAITH AND FREEDOM

Date: November 1, 2010

s/ Jennifer L. Monk

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CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULE 32-2

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Respectfully submitted,

ADVOCATES FOR FAITH AND FREEDOM

Date: November 1, 2010

s/ Jennifer L. Monk

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CERTIFICATE OF SERVICE

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

☒ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 1, 2010.

MOVANTS-APPELLANTS' REPLY BRIEF

Executed on November 1, 2010, at Murrieta, California.

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

s/ Jennifer L. Monk

Email: jmonk@faith-freedom.com