No. 12-144

IN THE Supreme Court of the United States

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

vs.

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

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF CONSTITUTIONAL LAW AND CIVIL PROCEDURE PROFESSORS ERWIN CHEMERINSKY AND ARTHUR MILLER IN SUPPORT OF PLAINTIFFS-RESPONDENTS URGING AFFIRMANCE

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INTERESTS OF AMICI CURIAE

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Amici have a common professional interest in issues relating to constitutional fact-finding and judicial review in constitutional cases. They seek to offer this Court their professional academic perspective on these issues as presented in this case.

SUMMARY OF ARGUMENT

Amici respectfully submit this brief in response to arguments of Proponents that overlook the district court's findings of fact based on the trial record. Proponents assert that Proposition 8 advances government interests in "responsible procreation," as well as California's interest in proceeding with caution in defining marriage. Proponents' arguments all but ignore the trial convened to examine evidence bearing on the central questions posed by this case. In addition, *Amici* respond to the Ethics and Public Policy Center (EPPC), which argues, as *amicus curiae* in support of petitioners, that the district court improperly authorized discovery and a trial to resolve questions of legislative fact. Contrary to Proponents and the EPPC's position, the district court's factual findings

are compelling and should be given significant weight.

The trial in this case produced, undoubtedly, the most detailed factual record ever assembled in a lawsuit challenging legislation targeting gay and lesbian individuals. After extensive discovery and related motion practice, the district court presided over a twelve-day bench trial. The district court considered the testimony of 19 witnesses and reviewed 900 exhibits. District Court Judge Vaughn Walker meticulously examined each party's factual assertions and evidence, and produced a 136-page opinion, concluding that Proponents "failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 931, 932 (N.D. Cal. 2010) (Order). The court also held that "the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect." Order at 997.

Proponents and the EPPC dismiss the role of evidentiary fact-finding in constitutional litigation and rely on countless assumptions and tautologies. Evidentiary proceedings, and especially trials, subject bare allegations to rigorous review, expert analysis, and cross-examination. They help to avoid the danger that courts will rely on preexisting assumptions that have little factual foundation. Regardless of how one categorizes the different kinds of factual findings trial courts make, judicial resolution of constitutional issues must be informed by facts. In our system, disputes over these facts are best resolved through adversarial proceedings before a trial court judge who can oversee the proper presentation of those facts.

Here, the district court's factual findings address the core questions that this Court must answer. Section I of this brief describes the trial

history. Section II shows that in numerous cases appellate courts have referred to the need to rely upon a strong factual record when considering questions of broad social import. Adversarial testing at trial combats decision-making based on bias and assumptions, especially in civil rights cases involving the treatment of minorities. Section III demonstrates that factfinding has a place even in the context of rational basis review. Courts frequently pay special attention to the evidentiary record in rational basis cases, particularly when the factual context supports an inference of possible animus. Section IV shows that the district court's fair and comprehensive approach supports the conclusion that its factfinding is entitled to significant respect and weight.

ARGUMENT

I. The Trial History

The district court oversaw a trial that was comprehensive in its inquiry and rigorous in its examination of the parties' evidence. The trial addressed the central constitutional questions presented by the parties. These questions included Proponents' argument that Proposition 8 was rationally related to California's interests in promoting responsible procreation and proceeding with caution in defining marriage, and Plaintiffs' arguments that gay men and lesbians are entitled to strict scrutiny, and that Proposition 8 fails even rational basis review. The court considered lay and expert testimony, as well as evidence from the Proposition 8 campaign and election records regarding Proponents' conduct in advancing the initiative's passage. The district court's factual findings bear on each of the key arguments the parties have raised.

A. The Evidence

The parties' vigorously litigated this case and received a full opportunity to develop and present evidence in support of their positions. Order at 931. The parties engaged in significant discovery, including third-party discovery. *Id.* Both before and after trial, in the district court and in the court of appeals, the parties and third parties litigated the boundaries of discovery. *Id.*

Plaintiffs presented eight lay witnesses, including the four plaintiffs, and nine expert witnesses. Plaintiffs' experts included prominent academicians at the University of California and Cambridge University, among other respected institutions. Though Proponents did not challenge the experts' qualifications, the district court issued detailed credibility determinations vetting their credentials, research, and methodologies. *Id.* at 940-44.

On Plaintiffs' behalf, historian Nancy Cott testified regarding the history and meaning of marriage, and the impact of same-sex marriage on the institution. *Id.* at 940. Cott opined, among other things, that marriage in the United States has always been secular in nature and the government's aim in recognizing marriage is "to create stable and enduring unions between couples." *Id.* at 940, 961. Psychologist Letitia Anne Peplau testified as to the numerous benefits associated with marriage, the similarities between same-sex and opposite-sex couples, and opined that permitting same-sex marriage will not harm opposite-sex marriages. *Id.* at 942. Peplau and Cott testified that registered domestic partnerships have less assigned social meaning and cultural value compared to marriage. *Id.* at 936.

In turn, historian George Chauncey testified about the widespread public and private

discrimination gays and lesbians faced in the twentieth century and the manner in which the Proposition 8 campaign echoed long-standing anti-gay sentiments and stereotypes. *Id.* at 9. Stanford political scientist Gary Segura testified as an expert on the political power of minority groups in the United States with a focus on gay and lesbian political power. He concluded that gay men and lesbians do not possess a meaningful degree of political power and they possess less power than groups granted judicial protection. *Id.* at 943.

Psychologist Gregory Herek, an expert in social psychology with a focus on sexual orientation and stigma, testified that research indicates that sexual orientation for most individuals is consistent and a vast majority of lesbian, gay and bisexual individuals have no choice regarding their sexual orientation. *Id.* at 934-35, 966. In addition, he testified that structural stigma establishes a context and identifies certain members of society who are devalued, and Proposition 8 is an example of structural stigma. *Id.* at 974. Social epidemiologist Ilan Meyer, an expert in public health with a focus on social psychology and psychiatric epidemiology, opined that gays and lesbians experience stigma, Proposition 8 further burdened them with stigma, and such social stressors undermine their mental health. *Id.* at 935.

With regard to demographics and economic indicators, economist M.V. Lee Badgett gave expert testimony regarding gay men and lesbians and their children. Among other things, Badgett testified that allowing same-sex couples to marry would not adversely affect the institution of marriage or opposite-sex couples, same-sex couples are very similar to opposite-sex couples in most economic and demographic respects, and Proposition 8 has imposed economic losses on the State of California. *Id.* at 934. Edmund Egan, the chief economist in the

San Francisco Controller's Office, authored a study revealing that the same-sex marriage ban undermines the city's economy. *Id.* at 936.

Finally, psychologist Michael Lamb testified as an expert on the developmental psychology of children, including those raised by gay and lesbian parents. He opined that children raised by gay men and lesbians are just as likely to be well-adjusted as those raised by heterosexual parents, and children of gay and lesbian parents would benefit if their parents were able to marry. *Id.* at 935.

Proponents identified six expert witnesses in their pretrial witness list, but called only two to testify. December 7, 2009 Witness List, Docket No. 292,[2] Case No. 09-CV-2292 (N.D. Cal.); January 11, 2010 Witness List, Docket No. 398.

Plaintiffs entered into evidence the deposition testimony of two of Proponents' withdrawn witnesses, Katherine Young, PhD, and Paul Nathanson, PhD. Order at 944. Young, a professor of religious studies at McGill University, testified that same-sex couples have the same desire for love and commitment as opposite-sex couples and that several cultures around the world and across centuries have had variations of marital relationships for same-sex couples. *Id.* at 944-45. Nathanson, a researcher at McGill's Faculty for Religious Studies, testified that religion is the basis for anti-gay hostility, and that there is no evidence that children raised by same-sex couples fare worse than children raised by opposite-sex couples. *Id.* at 945.

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[2] Unless otherwise noted, all docket numbers refer to the district court Case No. 09-CV-2292 in the Northern District of California.

Before trial, Judge Walker ordered that the trial proceedings be broadcast via the Internet as part of a Ninth Circuit pilot project for broadcasting trials. Docket No. 355. On January 8, 2010, shortly before the first day of trial, Proponents moved to stay that order pending the resolution of their petition for a writ of mandamus from the Ninth Circuit. Docket No. 371. In their petition, Proponents stated that they sought "an emergency writ of mandamus or prohibition barring the district court from broadcasting the trial in this case." *Id.* at Ex. 1. On January 13, 2010, this Court issued a stay, granting Proponents' request. *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010).

On January 14, 2010, as the district court's "[f]irst order of business," Judge Walker informed the parties that in light of this Court's decision, he had communicated with Judge Kozinski of the Ninth Circuit and requested that the trial be withdrawn from the pilot project; Judge Kozinski agreed. Docket No. 464, Tr. 674:6-11. Later, Proponents asked for "clarification" as to whether the recording of the proceedings had been halted. *Id.* at Tr. 753:18-24. The court responded that the applicable local rule permitted recording for purposes other than public broadcasting; Proponents' counsel accepted that clarification. *Id.* at 754:15-755:6.

The following day, Proponents informed the court that their withdrawn witnesses "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever." Order at 944 (citing Tr. 1094). Proponents did not claim, much less explain, how a video recording would be materially different from a stenographic recording of the proceedings. *See* Docket Nos. 452, 464. Proponents' writ petition had never claimed that the mere recording of their testimony raised a safety threat. After the potential for live broadcast was removed, Proponents made no

effort to call their withdrawn witnesses. Order at 944.

Proponents' sole trial witness concerning the state's interest in Proposition 8 was David Blankenhorn, founder and president of a think tank established in 1987 to address "issues of marriage, family, and child well-being." *Id.* at 931, 945. Although Plaintiffs challenged Blankenhorn's expert qualifications, the district court permitted him to testify, and reserved ruling as to whether his testimony was admissible. *Id.* at 946. Blankenhorn opined that marriage is "a socially-approved sexual relationship between a man and a woman," and that its purpose is to "regulate filiation." *Id.* at 933. He opined that research supports the conclusion that children raised by their married, biological parents do better on average than children raised in other environments and that recognizing same-sex marriage will lead to the deinstitutionalization of marriage. *Id.* at 948. In a detailed ruling, the district court found that each of Blankenhorn's expert opinions failed the admissibility standards under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm*, 509 U.S. 579 (1993).[3] Order at 945-50.

Proponents also called political scientist Kenneth Miller to give expert testimony regarding gay and lesbian political power. Order at 950-51. Plaintiffs challenged the admissibility of his testimony and the district court found that while

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[3] In a June 22, 2012 New York Times opposite editorial, Blankenhorn retracted his opposition to same-sex marriage, stating his intent to "emphasize the good that it can do." http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html. He changed his mind, in part, because "much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus." *Id.*

Miller had significant experience with politics generally, he was not sufficiently familiar with gay and lesbian politics specifically to offer opinions on their political power; his testimony was entitled little weight and only to the extent amply supported by reliable evidence. *Id.* at 950-52. Among the factors that grounded the court's ruling was Miller's admission that Proponents' counsel provided him with most of the "materials considered" in his expert report, and, at the time of his deposition, he did not know the status of antidiscrimination provisions to protect gay and lesbian individuals at the state and local level. *Id.* In addition, Miller did not know whether gay men and lesbians have more or less political power than other minority groups because he had never researched the question and he had read little published by leading scholars of gay and lesbian political movements. *Id.* at 952.

In presenting their case, Proponents did not call a single official proponent of Proposition 8, *id.* at 944, and the justifications for the measure asserted at trial differed from those they put forth to voters. *See Id.* at 931, 1002. Plaintiffs called as an adverse witness one official proponent, Defendant-Intervenor Hak-Shing William Tam, who testified regarding his role in the campaign. *Id.* at 940. Tam stated that he was the secretary of the America Return to God Prayer Movement, which operated the website "1man1woman.net," encouraging support for Proposition 8 on the grounds that gay men and lesbians purportedly are significantly more likely to molest children and because, if the measure failed, "other states would fall into Satan's hand." *Id.* at 937. Tam signed an agreement with the Proposition 8 campaign, which provided that he would coordinate his messaging with the campaign, and the campaign enlisted his efforts to reach out to certain segments of voters. *Id.* at 937, 55.

B. The Factual Findings

Based on the extensive trial record, the district court made numerous factual findings that struck at the heart of Proponents' constitutional arguments. The factual findings established that the purpose of civil marriage is not procreative, and, instead, centers on a couple's choice to live together and support one another. Finding of Fact[4] (FF) 21, 34, 35. The court also found that, over time, the institution has shed gender restrictions, except for the same-sex marriage ban, and these changes have occurred without undermining marriage. FF 22-32, 61. The court determined that same-sex marriage does not negatively impact childrearing, the strength of opposite-sex marriages, or the First Amendment rights of those opposed to same-sex marriage. FF 55, 62, 69-73. The court found that the sexual orientation of an individual does not dictate whether that individual can be a good parent, and the children of same-sex couples benefit when their parents are able to marry. FF 56, 70.

In addition, the court determined gay men and lesbians, as a class, have suffered a long history of discrimination and continue to bear the brunt of public and private discrimination. FF 74-75. Proponents' assertion that sexual orientation cannot be defined was found contrary to the weight of the evidence; it is fundamental to a person's identity, is largely consistent, and is generally not a choice. FF 42-44, 46, 51.

Proposition 8 relied on anti-gay sentiments by stoking fears of gay and lesbian persons as child molesters, recruiters, and carriers of disease, and by

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[4] The district court set forth its factual findings on pages 953 through 991 of its Order. *Amici* refer to the findings by number.

invoking religious fervor against same-sex relationships. FF 76-80. The court found that Proposition 8 singles out and stigmatizes gays and lesbians, as well as devalues their relationships and legitimates their unequal treatment. FF 58-60, 67-68.

In turn, the district court applied equal protection doctrine to these established facts, holding that gay men and lesbians as a class merit judicial protection under the strict scrutiny standard, and that even under rational basis review Proponents failed to establish that Proposition 8 was rationally related to a legitimate government interest. *Id.* at 997-1003.

II. It Is Appropriate For Courts To Hold Trials To Resolve Legislative Fact Questions, Especially In Civil Rights Cases.

Although Proponents suggest that the trial record is largely irrelevant and *Amicus* EPPC contends that the trial was improper, the district court fulfilled its constitutional duty by conducting a thorough trial on the merits of this case. Lower courts can and frequently must hold trials in civil rights cases, including those with broad social impact. Trials enable lower courts to develop a comprehensive record of facts that helps answer the complex and important constitutional questions at the heart of such cases, even where such questions may be characterized as "legislative" questions.[5]

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[5] The distinction, which Proponents have not raised here, involves the difference between "legislative" and "adjudicative" facts. This arises from Federal Rule of Evidence 201, which addresses judicial notice of adjudicative facts. The advisory committee note refers to adjudicative facts as "simply the facts of the particular case," while legislative facts "are those which have relevance to legal reasoning and the lawmaking process." Fed. R. Evid. 201. *See also*, *Marshall v. Sawyer*, 365 F.2d 105,

"Difficult as it may be to determine legislative facts for making social and legal judgments about the constitutional rights of homosexuals, the courts have been asked to do so, they are obligated to do so, and they are as equipped as any institution to do so." *Dean v. Dist. of Columbia*, 653 A.2d 307, 330 (D.C. App. 1995), abrogated on other grounds as stated in *Jackson v. D.C. Bd. Of Elections & Ethics*, 999 A.2d 89 (D.C. App. 2010).

A. In Constitutional Cases, Appellate Courts Operate At Their Best When They Can Rely On A Robust Evidentiary Record.

Amicus EPPC fails to recognize that appellate courts operate best when they can confidently rely on the record from below, and when that record answers most, if not all, of the courts' factual questions. In this respect, constitutional cases do not differ from garden-variety litigation.

This Court has repeatedly emphasized that it must rely on trial level factfinding to avoid deciding constitutional questions based on conjecture. For example, in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), the Court considered a First Amendment challenge to The Child Online Protection Act, 47 U.S.C. § 231,

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111 (9th Cir. 1966) (stating that adjudicative facts are those "about parties and their activities, businesses, and properties, usually answering the questions of who did what, where, how, why and with what motive.") (quoting Kenneth Culp Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 199 (1956)). The advisory note presents the view, followed in many decisions, that judges are free to resolve legislative facts without use of trial evidence and can even look outside the record. Here, *Amici* do not argue that the Court may not consider extra-record evidence. Instead, *Amici* argue that the Court should consider and place significant weight on the district court's factual findings and the underlying evidence.

which criminalized the posting, for a commercial purpose, of internet materials that are harmful to minors. *Id.* at 662. After upholding the district court's grant of a preliminary injunction, the Court remanded to the district court for a trial on the First Amendment elements—i.e., "constitutional," or "legislative," factfinding:

> [T]here is a serious gap in the evidence as to the effectiveness of filtering software. For us to assume, without proof, that filters are less effective than COPA would usurp the District Court's factfinding role. [By] remanding for trial, we require the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so.

Id. at 671. The Court further emphasized that a trial would develop a current, timely factual record. *Id.* at 672.

Similarly, in *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997), the Court addressed a statute's constitutionality after remand to the district court for further factfinding. The Court stressed that:

> On our earlier review, we were constrained by the state of the record to assessing the importance of the Government's asserted interests when "viewed in the abstract." The expanded record now permits us to consider whether the [law was] designed to address a real harm, and whether those provisions will alleviate it in a material way.

Id. at 195.

Most recently, in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), although the Justices disagreed about the meaning and import of the trial court record, none believed that it should be *ignored*. Justice Stevens criticized the majority for deciding the case based on facial invalidity, when the parties had tried the question of validity as-applied.

> The problem goes still deeper, for the Court does all of this on the basis of pure speculation. Had Citizens United maintained a facial challenge … the parties could have developed, through the normal process of litigation, a record about the actual effects of § 203, its actual burdens and its actual benefits, on all manner of corporations and unions.

Id. at 933 (Stevens, J., dissenting). The majority did not state that lower-court factfinding can be freely disregarded; rather, it justified its review by the existence of a thorough record in another case examining the same issue.

> That inquiry into the facial validity of the statute was facilitated by the extensive record, which was over 100,000 pages long, made in the three-judge District Court. It is not the case, then, that the Court today is premature in interpreting § 441b "on the basis of [a] factually barebones recor[d]."

Id. at 894 (citing *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (internal citations omitted). Thus, both the dissent and the majority acknowledged that the Court should not delve into statutory review without a record developed "through the normal process of litigation." *Id.* Indeed, the majority cited to findings

of legislative facts by the trial court in *McConnell* to bolster its own findings. *Id.* at 911, 916

In another landmark constitutional decision, *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992), the Court repeatedly grounded its constitutional analysis on the trial court's factfinding related to legislative questions. *See id.* at 885-86, 888-92 (relying on the trial record, including medical and sociological evidence, and the district court's factual findings, when considering whether a state law posed an undue burden on a woman's right to choose to terminate a pregnancy).

These are but a few examples of this Court's emphasis on the essential role of trial court factfinding, including factfinding that could be characterized as "legislative," in grounding constitutional analysis. *See also Turner v. Safley*, 482 U.S. 78, 99 (1987) (citing district court finding that "the Missouri prison system operated on the basis of excessive paternalism" and holding that prison marriage regulation was unconstitutional); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 437-39 (1985) (citing district court's bench trial findings, including that the statute at issue "operates to exclude persons who are mentally retarded from the community," to reject government's proffered justifications for statute as not rationally related to classification).

B. Trials Enable Courts To Make Important Decisions Based On Evidence Presented Openly Rather Than Untested Assumptions.

Trials enable courts to make decisions based on evidence presented in formal adversarial proceedings, complete with cross-examination and objective evidentiary standards, rather than on untested assumptions. *See* Kenneth L. Karst, Legislative Facts in Constitutional Litigation, 1960

Sup. Ct. Rev. 75, 86 (1960) ("[W]e need not abandon hope for 'effective scrutiny' of whatever factual elements there are in [a constitutional] question . . . [T]he judge necessarily decides these questions of legislative fact whether or not he subjects them to scrutiny, effective or not.").

Presentation of legislative facts at trial through expert witnesses can also "focus the court's attention on the most relevant concerns, present the range of informed opinion on the subject, and both identify and critique the most probative literature," resulting in the court's "sharpened, presumably reliable insight into complicated matters that, without such help, would be much more difficult for the judge to understand." *Dean*, 653 A.2d at 327-28.

There is a heightened value to evidence regarding legislative facts that has been tested through adversarial proceedings and, in particular, trial, in an age where the availability of information and data through the Internet has grown exponentially, and, frequently, is not subject to any review for accuracy or methodology. *See* Allison Orr Larsen, Confronting Supreme Court Fact Finding, 96 Va. L. Rev. 1255 (2012) (discussing the associated risks of justices relying on facts obtained outside the adversarial process).

The adversarial trial process helps prevent decision-making based on unfounded inferences and is therefore especially valuable in cases that implicate due process and equality principles and longstanding assumptions about a minority group. The trial examination of legislative facts helps protect the constitutional rights of minorities from majoritarian animus. For instance, where a legislature lacks "political courage" to schedule hearings to explore the potentially discriminatory impact of certain policies, courts can nevertheless do so through the trial process, to "assure constitutional due process and equal protection of the laws for

minorities, without fear of electoral consequences." *Dean*, 653 A.2d at 330.

Facilitating such adversarial testing is of course central to the district court's institutional role, and district courts are in the best position to carry out this function. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."). For example, at trial Plaintiffs revealed a key weakness in Proponent's purported expert evidence. On cross-examination, Mr. Blankenhorn admitted that while he relied on sociologist Kingsley Davis's writings as to the meaning of marriage, he could not recall whether Davis's studies addressed the issue of same-sex marriage. Tr. 2749-2750.

The risks associated with relying on assertions untested by trial are also apparent when one considers the attempts by certain amici in support of petitioners to rely on the research of Lisa Diamond. *Amici* Dr. Paul McHugh and David Benkof, among others, cite her research in support of the proposition that sexual orientation is not immutable. However, in *Windsor*, when the Bipartisan Legal Advisory Group relied on the same articles to make identical assertions in its motion for summary judgment, Dr. Diamond submitted a declaration attesting that the BLAG misconstrued her research. Declaration of Lisa M. Diamond at ¶¶ 4-5, Case No. 10-CV-8435 (S.D.N.Y. 2012), Docket No. 74.

Judicial review may be even more critical in the context of voter initiatives, which are enacted without any formalized hearing or debate (other than through political advertising). As Plaintiffs' expert Professor Gary Segura explained during trial, ballot initiatives can succeed by "inflam[ing] momentary passions," and gay men and lesbians have been targeted more than any other minority

group by such initiatives. Tr. 1552-53. *See also* Philip P. Frickey, The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere, 34 Willamette L. Rev. 421 (1998) (the referendum process "allows each citizen to follow her preconceptions anonymously and unaccountably").

Accordingly, judicial examination of ballot propositions, including thorough consideration of so-called legislative facts, is entirely appropriate. Proponents' own expert Kenneth Miller has asserted that judicial review of ballot initiatives "is nothing unusual." Kenneth Miller, Courts as Watchdogs of the Washington State Initiative Process, 24 Seattle U. L. Rev. 1053, 1085 note 12 (2001) (noting that "52% of initiatives passed in California, Oregon, Colorado, and Washington from 1960 to 2000 were challenged in court, and 54% of those saw part or all of the ballot proposition struck down"). *See, e.g., Reitman v. Mulkey*, 387 U.S. 369, 388 (1967) (striking down Proposition 14, a California ballot measure approved by 65 percent of voters, which overturned state statutes barring racial discrimination in housing).[6]

III. Even In Conducting Rational Basis Review, Courts Must Consider Evidence Of State Interest, Fit, And Animus.

Though rational basis scrutiny affords a high degree of deference to the legislative decision-makers, Article III judges have a constitutional responsibility to analyze whether the statute meets

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[6] Notably, this Court stated, "Only by sifting facts and weighing circumstances on a case-by-case basis can a nonobvious involvement of the State in private [discriminatory] conduct be attributed its true significance." *Reitman v. Mulkey*, 387 U.S. 369, 378 (U.S. 1967) (internal citation omitted)

the test.[7] That analysis must be based on an adversarial process that allows challengers an opportunity to prove that the statute does not pass constitutional muster. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463 (1988) ("[t]hose challenging the legislative judgment must convince us that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker"). It is a "heavy burden", *id.*, but it is not impossible, and it has been discharged many times.

A. The Supreme Court Routinely Examines Evidence In Rational Basis Cases.

This Court has never shied away from evaluating the facts to ensure that a legislative or voter enactment is rationally related to a legitimate government interest. For example, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court held that "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Id.* at 632. *Romer* considered a voter initiative banning anti-discrimination laws that addressed sexual orientation. *Id.* The Court looked at the justifications proffered by the State, as well as the practical effect the initiative would have on other civil rights laws and on homosexuals. *Id.* at 623-35. Indeed, in *Romer* the Court had the benefit of a substantial trial record and the trial court's detailed analysis of the evidentiary support for the asserted state interests in the ballot initiative. *See Evans v.*

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[7] By asserting this argument, *Amici* do not contend that this Court should forgo reviewing Proposition 8 under the strict scrutiny standard.

Romer, No. 92-CV-9223, 1993 WL 518586, at *4-13 (Dist. Ct. of Colo., Denver Cnty. Dec. 14, 1993) (discussing the testimony of twenty witnesses, including nine witnesses presented by proponents of the ballot measure). The Court held, consistent with the trial court's ruling, that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." 517 U.S at 635.

As with the voter enactment in *Romer*, the Court has not hesitated to strike down congressional enactments when the evidence shows that the law has no rational relationship to a legitimate government purpose. In *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), cited with approval in *Romer*, 517 U.S. at 634-35, the Court held that the Food Stamp Act "create[d] an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment." *Id.* at 532-33. The Act prohibited households containing unrelated individuals from participating in the food stamp program. *Id.* at 529. The Court first considered the purposes of the Act as expressed in the congressional record, and found that "[t]he challenged statutory classification … is clearly irrelevant to the stated purposes of the Act." *Id.* at 534. The Court then asked if the law might further some other legitimate interest, and found that even if it accepted the reasons offered by the Government at trial (prevention of fraud), "the challenged classification simply does not operate so as rationally to further the prevention of fraud." *Id.* at 537. Because the facts contradicted the Government's justification for the law, the Court concluded that "the classification here in issue is not only 'imprecise', it is wholly without any rational basis." *Id.* at 538.

These cases are not outliers, especially in the equal protection context. This Court has time and

again shown itself willing to examine whether, *in fact*, the challenged law is rationally related to a legitimate government interest. *See*, *e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (relying on extensive legislative factfinding from below, including expert testimony on mental health issues, to hold that an ordinance requiring a permit for homes for mentally disabled people did not withstand rational basis scrutiny), *superseded by statute*, Fair Housing Act, 42 U.S.C. § 3604; *Safley*, 482 U.S. at 78 (examining trial record and concluding that prison correspondence regulation was "reasonably related to legitimate security interests," but prison marriage regulation was not); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (stating "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation," and citing no fewer than eight books on psychiatry and mental health, as well as legal and scientific journal articles, in upholding the classification).

B. Laws That Present An Inference Of Discriminatory Animus Are Particularly Appropriate For Careful Judicial Review.

"[I]f the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534; *cf. City of Cleburne*, 473 U.S. at 448 ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause . . . 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'") (citations omitted). The very purpose of equal protection review of legislative enactments is "to ensure that classifications are not drawn for the

purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. Therefore, even in the rational basis context, courts must take extra care to scrutinize the factual basis for a legislative classification where an inference of animus exists. *See id.* ("[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.").

When considering whether the Food Stamp Act's distinction between related and unrelated households furthered any legitimate government interest, the Court found the distinction so "clearly ***irrelevant to the stated purposes of the Act" that it needed to examine the record more carefully. *Moreno*, 413 U.S. at 534. The legislative record showed that the Act was intended to prevent "hippies" from participating in the program. *Id.* When the Government offered another purpose for the law – to prevent food stamp fraud – the Court rejected it based on the facts before it. The Court found that "in practical operation, the [Act] excludes from participation, not those who are 'likely to abuse the program,' but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements." *Id.* at 538. Thus, the evidence of antipathy towards a group of people necessitated a review of the "practical operation" of the law, to determine whether it in fact gave effect to the government's proffered purpose or to the impermissible antipathy suggested by the evidence. Because the Court found the latter to be true, the law did not pass rational basis scrutiny. *Id.*

Similarly, in addressing the voter enactment banning homosexuals from inclusion in anti-discrimination laws, the *Romer* Court found that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."

Romer, 517 U.S. at 634. The Court evaluated the State's proffered purposes for the law, and concluded that the facts did not support them. "It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interest; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 635.

As in *Romer*, the arguments presented to voters in support of Proposition 8 raise an inference of antipathy towards homosexuals. The district court invited both sides to present evidence on the motivations of Proposition 8's proponents and the ends purportedly served by the law. *See*, Order at 936-938, 944. Plaintiffs presented extensive evidence, including testimony by experts and lay witnesses, that Proposition 8 was motivated by animus towards homosexuals. *Id.* at 936-38. Proponents, by contrast and as recounted above, called not a single official proponent of Proposition 8 and largely restricted their presentation of expert evidence that had been developed through discovery. *Id.* at 944. Nonetheless, the court thoroughly reviewed proponents' six proffered purposes behind the law, and found none of them to be supported by the evidence. *Id.* at 938, 998-1003. "In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples." *Id.* at 1002. The court correctly applied the rule that moral disapproval alone cannot be a legitimate government interest, and found that Proposition 8 therefore violated the equal protection clause of the Fourteenth Amendment. *Id.* at 1003.

The Supreme Court cases cited above make clear that, far from being irrelevant, evidence of

animus meant that the court needed to carefully review the factual context of Proposition 8 to determine whether it had any rational relationship to a *legitimate* government interest, and not merely to privately held biases. The cases cited by Proponents acknowledge that a classification raising an inference of animus calls for a more thorough review than other rational-basis cases. *See*, *e.g.*, *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, *absent some reason to infer antipathy*, even improvident decisions will eventually be rectified by the democratic process . . .") (emphasis added); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1997) (same). It was Judge Walker's constitutional obligation to exercise such an exacting and precise review of the factual context surrounding Proponents' asserted justifications for Proposition 8, given the inference of impermissible animus raised by the record.

IV. In Light Of The Process That Produced Them, This Court Should Adopt The Findings Made By The District Court.

Amici submit the proceedings demonstrate the utmost procedural fairness. Under any standard of review, this Court should credit and adopt the trial court's findings because they result from rigorous and exacting application of the Federal Rules of Evidence, and are supported by reliable research and by the unanimous consensus of mainstream social science experts.

A. The District Court Gave All Parties A Full Opportunity To Present Evidence And Made Appropriate Evidentiary Determinations.

Evidence going to sociological or legislative facts requires uniform and objective scrutiny of its reliability. The district court conducted the appropriate degree of scrutiny by drawing from the

most frequently applied and effective standards available when it evaluated the trial material presented by both the Plaintiffs and the Proponents: the standards set forth in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[8]

Based on the district court's conscientious approach, the parties received an equal and fair opportunity to present reliable evidence. With respect to expert witnesses, for example, the court detailed the educational history and scholarship of the Plaintiffs' experts, each of whom hold doctoral degrees in their field and/or are professors at major universities, noting their degrees, courses taught, and peer-reviewed scholarship directly relevant to the experiences of gays and lesbians. *See* Order at 940-44. Proponents did not challenge the qualifications of these witnesses. *Id.* at 938. Based on those qualifications, as well as the content and demeanor of the witnesses' trial presentations, the court credited their testimony. *Id.*

The court applied the same criteria to Proponents' witnesses, noting that Proponents' main witness, David Blankenhorn, does not hold a higher degree in the fields of sociology, psychology or anthropology that were relevant to his proposed testimony, and that his publications had not been subject to peer review. *Id.* at 946-47. Nonetheless, the court allowed Mr. Blankenhorn to testify at trial. *Id* at 946.

The district court's ultimate conclusions regarding expert testimony were fully consistent

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[8] Proponents did not object at trial to the application of the Federal Rules of Evidence and the *Daubert* standard. Proponents *relied on* these standards throughout their pretrial motion *in limine* regarding expert evidence. *See* Mem. in Opp. to Pls.' Mot. to Exclude Expert Evidence, Docket No. 302.

with Rule 702, *Daubert*, and other relevant case law. The court found that Mr. Blankenhorn's testimony regarding the definition of marriage, the detrimental impact of same-sex marriage on children, and the damage same-sex marriage could do to marriage as an institution had no basis in peer-reviewed methodologies, unlike the conclusions offered by Plaintiffs' witnesses. *Id.* at 947-49.

Proponents and their *Amici* cannot claim that the district court deprived them of the opportunity to present evidence to support alternative fact-finding.[9] Rather, throughout the trial, Proponents failed to present probative and reliable evidence in support of Proposition 8 other than that grounded in moral condemnation.

B. The District Court's Findings Are Based On A Fair And Impartial Reading Of The Trial Record.

As the court correctly observed during summary judgment proceedings, resolution of the central question of the government's interest in Proposition 8 required a more developed factual record. Summ. J. Hr'g Tr. 81, Docket No. 227. The court acknowledged that, in resolving that question, legislative fact questions might arise, but "embedded within such legislative facts are certain assumptions about human behavior and relationships that have simply not been developed in the record that is now before the Court" and they are "essential" to the resolution of that legal question. *Id.* The court's subsequent conclusion that Proposition 8 discriminates against same-sex couples in violation of the Equal Protection Clause is properly based

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[9] The EPPC's claim that Proponents were unable to present testimony due to witness intimidation is belied by their witnesses' deposition testimony, the trial record and the willingness of various experts to participate as amicus curiae.

upon factual findings, well-grounded in the ultimate trial record, including findings related to the meaning of marriage, FF 19-41, and the potential consequences of allowing same-sex marriage to continue, FF 33, 55, 64-66.

In lieu of evidence presented at trial, Proponents rely on anthropological literature by Claude Levi-Strauss and Branislaw Malinowski, dictionary definitions of marriage dating back to 1828, and snippets of quotations from Blackstone, Locke, and various other historians and scholars. Proponents' Br. 33-34. As discussed below, this material fails to overcome the court's findings about the meaning of marriage.

First, the district court did not ignore historical evidence about the meaning and scope of marriage. *See* FF 19 ("Marriage in the United States has always been a civil matter...."); FF 22 ("When California became a state in 1850, marriage was understood to require a husband and a wife."); FF 26 ("Under coverture, a woman's legal and economic identity was subsumed by her husband's upon marriage. The husband was the legal head of household."); FF 27 ("Marriage between a man and a woman was traditionally organized based on presumptions of a division of labor along gender lines.").

The district court appropriately considered factors other than historical practice, however, in determining the meaning of marriage as it relates to this case. This reasoning is justified because recognizing that most people have historically understood marriage as taking place between a man and a woman says virtually nothing about whether such an understanding ought to constrain the present and future practice of legal marriage in California. The historical explanations of marriage that Proponents cite took place in a world in which same-sex relationships occurred in secret, under

penalty of criminal prosecution, or (more often) were repressed entirely. It is no surprise for example, that Joel Prentice Bishop's Commentaries on the Law of Marriage and Divorce, *see* Proponents' Br. 32, would have discussed the legal obligations of marriage in terms of opposite sex persons, because it was first published in 1852 with the purpose, according to Bishop, of providing an "elementary treatise" on the law of marriage and divorce *at that time*. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE iv (1882). Archaic societal assumptions in this and other historical sources do not inform how marriage is or must be understood during a time in which open and life-long romantic relationships between same-sex couples who are raising children together are increasingly common.

Other sources upon which Proponents rely do not support their position. The Proponents cite Claude Levi-Strauss's work, *The View From Afar*, in support of the point that it is universal across societies for marriage to occur between a man and a woman. Proponents' Br. 32. But this volume - indeed, the very same page Proponents cite - also explains that from the perspective of the modern fieldworker, "married couples . . . were closely united by *sentimental bonds*, by *economic cooperation in every case*, and by *a common interest in their children*." Claude Levi-Strauss, *The View from Afar* 40 (1985) (emphasis added). This description accords with the court's finding that marriage is the "state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents." FF 34. Mining works of anthropology or philosophy for generic references to marriage does not justify a rejection of the district court's findings about the meaning of marriage.

The district court correctly evaluated the evidence presented at trial in determining that same-sex marriage will not have future adverse effects on society or the institution of marriage. In support of that finding, the court relied in part upon statistics from Massachusetts showing that marriage and divorce rates there had remained stable during the period after same-sex marriage became legal. Proponents argue that Dr. Nancy Cott's testimony on cross-examination, stating that same-sex marriage will have "real world consequences," supports their contention that there are "reasonable grounds for concern" that same-sex marriage will "necessarily entail a significant risk of adverse consequences" to the institution of marriage. Proponents' Br. 51.

Even if this unremarkable recitation of trial testimony amounted to significant counter-evidence, which it does not, Proponents fail to note that the district court's rejection of the notion that same-sex marriage would be detrimental to the institution of marriage is squarely supported by evidence in addition to the Massachusetts statistics, including the undisputed facts that (1) eliminating the doctrine of coverture has not deprived marriage of its vitality in spite of evidence that "the primacy of the husband as the legal and economic representative of the couple . . . was seen as absolutely essential to what marriage was", FF 33(a)-(c) (citing the testimony of Professor Nancy Cott); and (2) eliminating racial restrictions on marriage has not damaged the institution of marriage or reduced its popularity in spite of evidence that there was widespread societal alarm that removal of racial restrictions would degrade and devalue marriage, FF 33(d)-(f).

In comparison, Proponents offered not one affidavit or allegation that any California resident was or would be less likely to get married or would

value his or her marriage less as a result of marriage equality in California. With these facts in mind, the district court correctly rejected the assumption, unsupported by data, that same-sex marriage would weaken the institution of marriage for everyone else or would otherwise harm society, and excluded such considerations from its analysis of whether a legitimate government interest supports Proposition 8.

C. The District Court's Findings Are Consistent With The Findings Of Other Courts That Have Reviewed Similar Evidence.

Far from reflecting bias, the district court's findings echo those made by other courts that have considered related sociological and psychological data, particularly data regarding whether same-sex marriage and parenting harm child development.

In *Howard v. Child Welfare Agency Review Board*, No. 1999-cv-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004), *aff'd, Dep't of Human Services v. Howard*, 238 S.W.3d 1 (Ark. 2006), the court held a bench trial to consider the validity of a regulation restricting foster parent eligibility based on sexual orientation. *Id.* at *1. The court considered expert evidence - including testimony offered by Dr. Lamb, who was also Plaintiffs' expert in the trial court here - on the question of whether the sexual orientation of parents is a predictor of healthy child development. *Id.* at *5. Dr. Lamb testified that a parent's sexual orientation is not one of the predictors of child development and that there is no basis for the statement that heterosexual parents can better guide children through adolescence than gay parents. *Id.* at *5-*6.

According to the *Howard* court, of the eight expert witnesses testifying at trial, "[t]he most

outstanding of the expert witnesses was Dr. Michael Lamb." *Id.* at *8. The trial court explained:

> Of all of the trials in which the court has participated, whether as a member of the bench or of the bar, Dr. Lamb may have been the best example of what an expert witness is supposed to do in a trial, simply provide data to the trier of fact so that the trier of fact can make an informed, impartial decision.

Id. Like the district court in this case, and after review of similar evidence, the *Howard* court issued various factual findings concluding that being raised by gay parents does not pose a detriment to children. *Id.* at *13. The court then held that the regulation was not in accordance with the Child Welfare Agency's role to promote the health, safety, and welfare of children and therefore violated the Separation of Powers doctrine. *Id.* at *13.

In affirming that ruling, the Arkansas Supreme Court relied upon lengthy excerpts from the trial court decision, including factual findings supporting the conclusion that being raised by gay parents does not harm child development. *Howard*, 238 S.W.3d at 6-7. *See also id.* at 10 (Brown, J., concurring) ("[B]eing raised by gay and lesbian parents does not increase adjustment problems for children. There is no rational basis in the form of studies or empirical data that sustains the regulation.").

Likewise, in *In re Adoption of Doe*, 06-cv-33881, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd, In re Adoption of Doe*, 08-cv-3044 (Fla. Dist. Ct. App. Sept. 22, 2010), the trial court evaluated evidence offered by Dr. Lamb and other experts when considering the validity of a law restricting adoption to heterosexual parents. *Id.* at *8-*10. The court detailed the expert evidence as to

whether adoption by gay parents could harm children, particularly Dr. Lamb's expert testimony, and observed that "the assumption that children raised by gay parents are harmed is not a reliable finding. In fact, it is contrary to the consensus in the field." *Id.* at *9. The court ruled that Florida's adoption law had no rational basis and thus violated the Florida Constitution. *Id.* at *29.

In this case, through Dr. Lamb's testimony, the district court considered studies "showing that adopted children or children conceived using sperm or egg donors are just as likely to be well-adjusted as children raised by their biological parents." *Perry*, 704 F.Supp.2d at 935. The district court's factual findings regarding the impact of same-sex marriage or parenting on children are consistent with mainstream scientific thought and with other courts' analysis, and reflect a fair and close analysis of the trial evidence.

There is no indication whatsoever that the court's remaining findings arise from bias or an outcome-oriented approach; they stand out for their careful attention to the facts within an extensive trial record, and are entitled to weight upon this Court's review.

CONCLUSION

For the foregoing reasons, this Court should adopt the district court's factual findings and affirm the judgment that Proposition 8 is unconstitutional.

Respectfully submitted,

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Dated: February 26, 2013

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