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 PROJECT OF CALIFORNIA RENEWAL

17 * Admitted *pro hac vice*

18 **UNITED STATES DISTRICT COURT**
 19 **NORTHERN DISTRICT OF CALIFORNIA**

20 KRISTIN M. PERRY, SANDRA B. STIER, PAUL
 21 T. KATAMI, and JEFFREY J. ZARRILLO,

22 Plaintiffs,

23 CITY AND COUNTY OF SAN FRANCISCO,

24 Plaintiff-Intervenor,

25 v.

26 ARNOLD SCHWARZENEGGER, in his official
 27 capacity as Governor of California; EDMUND G.
 BROWN, JR., in his official capacity as Attorney
 28 General of California; MARK B. HORTON, in his

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS
 DENNIS HOLLINGSWORTH, GAIL
 J. KNIGHT, MARTIN F. GUTIERREZ,
 MARK A. JANSSON, AND
 PROTECTMARRIAGE.COM'S
 MOTION FOR STAY PENDING
 APPEAL**

Chief Judge Vaughn R. Walker

Date: October 21, 2010
 Time: 10 a.m.
 Location: Courtroom 6, 17th Floor

1 official capacity as Director of the California
2 Department of Public Health and State Registrar of
3 Vital Statistics; LINETTE SCOTT, in her official
4 capacity as Deputy Director of Health Information
5 & Strategic Planning for the California Department
6 of Public Health; PATRICK O'CONNELL, in his
7 official capacity as Clerk-Recorder for the County
8 of Alameda; and DEAN C. LOGAN, in his official
9 capacity as Registrar-Recorder/County Clerk for
10 the County of Los Angeles,

11
12
13 Defendants,

14 and

15 PROPOSITION 8 OFFICIAL PROPONENTS
16 DENNIS HOLLINGSWORTH, GAIL J.
17 KNIGHT, MARTIN F. GUTIERREZ, HAK-
18 SHING WILLIAM TAM, and MARK A.
19 JANSSON; and PROTECTMARRIAGE.COM –
20 YES ON 8, A PROJECT OF CALIFORNIA
21 RENEWAL,

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23 Defendant-Intervenors.
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1 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). These factors all point to the same
2 conclusion: This Court should “suspend[] judicial alteration of the status quo” on the important
3 issues at stake in this litigation by staying its judgment pending appeal. *Nken v. Holder*, 129 S. Ct.
4 1749, 1758 (2009) (quotation marks omitted).

5 **I. Proponents Will Likely Succeed on the Merits on Appeal.**

6 For all the reasons explained throughout this litigation, including in our summary judgment
7 briefing and argument, Doc ##172-1 & 213; trial memorandum, Doc #605; response to amicus
8 submissions, Doc #604; answers to the Court’s questions for closing argument, Doc #687; and
9 arguments made during trial, Proponents are likely to succeed on appeal should this Court rule that
10 Prop 8 is unconstitutional. Indeed, Plaintiffs’ claims run up against binding authority at every turn.

11 *First*, any determination that the fundamental right to marry includes the right to marry a
12 person of the same sex—and, indeed, any determination that the United States Constitution requires
13 a State to redefine marriage to include same-sex couples—is foreclosed by *Baker v. Nelson*, 409
14 U.S. 810 (1972). When the *Baker* court summarily “dismissed for want of substantial federal
15 question” a same-sex couple’s appeal from a Minnesota Supreme Court decision holding that there
16 is no fundamental right to marry a person of the same sex, *see Baker*, 409 U.S. at 810; *Baker v.*
17 *Nelson*, 191 N.W.2d 185 (Minn. 1971), the fundamental right to marry was already well
18 established, *see Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma*, 316 U.S. 535, 541
19 (1942). Furthermore, the Supreme Court’s cases addressing the fundamental right to marry all
20 arose in the context of marriage defined as a union of a man and a woman and plainly acknowledge
21 the abiding connection between marriage and the potentially procreative nature of opposite-sex
22 relationships. *See, e.g., Loving*, 388 U.S. at 12 (“Marriage is ... fundamental to our very existence
23 and survival.”); *Skinner*, 316 U.S. at 541 (“Marriage and procreation are fundamental to the very
24 existence and survival of the race.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (The right to
25 “marry, establish a home and bring up children ... [is] essential to the orderly pursuit of happiness
26 by free men.”). This Court would stand alone among the Nation’s judiciary in ruling that the
27 United States Constitution protects a fundamental right to marry a person of the same sex.

28 *Second*, any determination that gays and lesbians constitute a suspect class or quasi-suspect

1 class under the equal protection clause of the Fourteenth Amendment would be contrary to a long
2 line of binding Ninth Circuit authority. *See, e.g., Witt v. Dep't of the Air Force*, 527 F.3d 806, 821
3 (9th Cir. 2008); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th
4 Cir. 1990). It would also conflict with the judgment of every circuit court that has considered the
5 matter, all of which have rejected heightened equal protection scrutiny for gays and lesbians. *See*
6 *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir.
7 1996) (en banc); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Equality Found. v.*
8 *City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th
9 Cir. 1989); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Rich v.*
10 *Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Secretary of the Dep't of*
11 *Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684
12 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).
13 The unanimity of these decisions is borne of the fact that gays and lesbians clearly fail two of the
14 requirements for heightened equal protection scrutiny—immutability and political powerlessness—
15 as the evidence in this case clearly demonstrated.

16 *Third*, any determination that the definition of marriage as a union of a man and a woman
17 constitutes sex discrimination under the equal protection clause would run counter to binding
18 authority and be erroneous. *See Baker v. Nelson*, 409 U.S. 810 (1972); *see also Wilson v. Ake*, 354
19 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005); *In re Kandau*, 315 B.R. 123, 143 (Bankr. W.D. Wash.
20 2004); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974). Simply put, defining marriage
21 as the union of a man and a woman “does not discriminate on the basis of sex because it treats
22 women and men equally.” *Wilson*, 354 F. Supp. 2d at 1307-08. Indeed, in rejecting the same
23 argument under the California Constitution, the California Supreme Court held that “[i]n light of the
24 equality of treatment between genders,” California’s marriage laws “plainly do[] not constitute
25 discrimination on the basis of sex as that concept is commonly understood.” *In re Marriage Cases*,
26 183 P.3d 384, 436 (Cal. 2008).

27 *Fourth*, any conclusion that the age-old definition of marriage is *irrational* would also
28 contravene binding authority. In *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), the Ninth

1 Circuit held that denying marital status to same-sex couples satisfies rational basis review,
2 recognizing that same-sex relationships, unlike opposite-sex relationships, “never produce
3 offspring.” 673 F.2d at 1042-43. There are numerous rational bases supporting Prop 8, but this
4 distinction goes to the heart of the matter. Because only the relationship of a man and a woman can
5 “produce offspring,” such relationships uniquely implicate the vital societal interest in increasing
6 the likelihood that children will be born to and raised by both their natural parents in stable,
7 enduring family units. Same-sex relationships, by contrast, neither advance nor threaten this
8 interest in the way that opposite-sex relations do. And when “the inclusion of one group promotes a
9 legitimate governmental purpose, and the addition of other groups would not, [courts] cannot say
10 that the statute’s classification ... is invidiously discriminatory.” *Johnson v. Robison*, 415 U.S. 361,
11 383 (1974).

12 Furthermore, Prop 8 allows California to proceed with caution when considering
13 fundamental changes to a vitally important social institution. Not only would redefining marriage
14 to include same-sex couples eliminate California’s ability to provide special recognition and
15 support to those relationships that uniquely further the vital procreative interests marriage has
16 traditionally served, it would indisputably change the public meaning of marriage. *See, e.g.*, Trial
17 Tr. 313 (Cott) (so conceding). And such a redefinition of marriage will likely result in its further,
18 and perhaps complete, deinstitutionalization. It is surely rational for the people of California to
19 hesitate before embracing changes that may weaken the vital institution of marriage or its ability to
20 further the important interests it has traditionally served.

21 *Finally*, any attempt to base a finding of irrationality on the purported subjective
22 motivations of voters is foreclosed by Ninth Circuit case law clearly prohibiting such a “futile” and
23 “impracticable” endeavor. *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984)
24 (quotation marks omitted). The question of voter motivation is simply “not ... an appropriate one
25 for judicial inquiry.” *Southern Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291, 295
26 (9th Cir. 1970).

27 **II. Irreparable Harm Will Result Absent a Stay.**

28 “[I]t is clear that a state suffers irreparable injury whenever an enactment of its people ... is

1 enjoined.” *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *see also New*
 2 *Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)
 3 (“[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of
 4 its people, it suffers a form of irreparable injury.”). Further, absent an immediate stay of any ruling
 5 invalidating Prop 8, same-sex couples would be permitted to marry in the counties of Alameda and
 6 Los Angeles (and possibly throughout California). Same-sex marriages would be licensed under a
 7 cloud of uncertainty, and should Proponents succeed on appeal, any such marriages would be
 8 invalid *ab initio*. Indeed, in 2004, the City and County of San Francisco issued marriage licenses to
 9 same-sex couples, resulting in approximately 4,000 purported same-sex marriages in about one
 10 month’s time. *See Lockyer v. City and County of San Francisco*, 95 P.3d 459, 465, 467 (Cal. 2004).
 11 The California Supreme Court held that San Francisco lacked authority for its actions, and ordered
 12 that “all same-sex marriages authorized, solemnized, or registered by the city officials must be
 13 considered void and of no legal effect from their inception.” *Id.* at 495.²

14 Repeating that experience would inflict harm on the affected couples and place
 15 administrative burdens on the State.³ Indeed, the Attorney General (no friend of Prop 8), opposed
 16 Plaintiffs’ unsuccessful motion for a preliminary injunction for these reasons, arguing that the Court
 17 “should factor in the potential harm to a broad section of the general public from subsequent
 18

19 ² In *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009), the California Supreme Court held that
 20 Prop 8 did not retroactively invalidate same-sex marriages entered between that Court’s decision in
 21 *In re Marriage Cases* and Prop 8’s enactment. *Id.* at 119-22. Those marriages, however, were
 entered on the basis of the California Supreme Court’s substantive interpretation of Prop 8, not a
 subsequently reversed trial court decision addressing the validity of that provision.

22 ³ *See, e.g., Strauss*, 207 P.3d at 122 (reasoning that retroactive application of Prop 8 would
 23 “disrupt thousands of actions taken in reliance on the *Marriage Cases* by these same-sex couples,
 24 their employers, their creditors, and many others, throwing property rights into disarray, destroying
 25 the legal interests and expectations of thousands of couples and their families, and potentially
 26 undermining the ability of citizens to plan their lives”); *Lockyer*, 95 P.3d at 498 (ordering San
 27 Francisco to: “(1) identify all same-sex couples to whom the officials issued marriage licenses,
 28 solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that
 this court has determined that same-sex marriages that have been performed in California are void
 from their inception and a legal nullity, and that these officials have been directed to correct their
 records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples
 an opportunity to demonstrate that their marriages are not same-sex marriages and thus that the
 official records of their marriage licenses and marriages should not be revised, (4) offer to refund,
 upon request, all marriage-related fees paid by or on behalf of same-sex couples, and (5) make
 appropriate corrections to all relevant records.”).

1 invalidation of possibly thousands of marriages, as well as the ongoing uncertainty about their
2 validity that would undoubtedly persist until a *final determination by an appellate court.*” Doc #34
3 at 13 (emphasis added).

4 **III. A Stay Will Not Subject Plaintiffs to Substantial Harm.**

5 In contrast, a stay would at most subject Plaintiffs to a period of additional delay pending a
6 final determination of whether they may enter a legally recognized marriage relationship. During
7 this time Plaintiffs will have access to the rights and responsibilities of marriage through domestic
8 partnership, *see* CAL. FAM. CODE § 297.5—a status Plaintiffs Stier and Perry already enjoy, *see*
9 Trial Tr. 153:4-6.

10 It is not even clear that Plaintiffs would opt to marry if given the choice while appeal of this
11 case is pending. Both Perry and Stier and Katami and Zarrillo could have gotten married before
12 Prop 8 was enacted in 2008, but both couples chose not to. *See* Trial Tr. 80:2-3 (Zarrillo: He and
13 Katami have been in a relationship for nine years.); Trial Tr. 169:16-170:11 (Stier: explaining why
14 she and Perry did not get married in 2008). Indeed, Plaintiff Stier has admitted that she did not get
15 married in 2008 because she did not “want any possibility of [marriage] being taken away from us”
16 and thus told Perry to “wait until we know for sure that we can be permanently married.” Trial Tr.
17 170:4-6. Such certainty, of course, will not be available in this case until all avenues for appeal
18 have been exhausted. Further confirming their lack of urgency, Plaintiffs consented to this Court’s
19 decision not to grant their preliminary injunction motion, *see* July 2, 2009 Tr. of Hr’g at 12, and
20 have been content to let more than a year go by while the parties conducted discovery, participated
21 in trial, and awaited this Court’s decision.

22 **IV. The Public Interest Weighs in Favor of a Stay.**

23 “The State of California and its citizens have already confronted the uncertainty that results
24 when marriage licenses are issued in a gender-neutral manner prior to the issuance of a final,
25 judicial determination of legal and constitutional issues. The State and its citizens have a profound
26 interest in not having to confront that uncertainty again.” Administration’s Opposition to Plaintiffs’
27 Motion for Preliminary Injunction, Doc #33 at 2. Indeed, in denying Plaintiffs’ request for a
28 preliminary injunction, this Court recognized the wisdom of not “inject[ing] still further uncertainty

1 in [this] important area of concern and interest to the state and its citizens.” Doc #76 at 5.
2 Likewise, such “uncertain[ty] ... weigh[s] very heavily” in favor of staying a judgment invalidating
3 Prop 8 pending appeal. July 2, 2009 Tr. of Hr’g at 10, *see also id.* at 12 (“[T]his case is only
4 touching down in this court [W]hat happens here, in many ways, is only a prelude to what is
5 going to happen later.”).

6 Further, by enacting Prop 22 in 2000 and Prop 8 in 2008, the people of California have
7 declared clearly and consistently that the public interest lies with preserving the definition of
8 marriage as the union of a man and a woman. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140
9 (9th Cir. 2009) (“[T]he district court should give due weight to the serious consideration of the
10 public interest in this case that has already been undertaken by the responsible state officials in
11 Washington, who unanimously passed the rules that are the subject of this appeal.”); *Golden Gate*
12 *Rest. Ass’n*, 512 F.3d at 1126-1127 (“[O]ur consideration of the public interest is constrained in this
13 case, for the responsible public officials in San Francisco have already considered that interest.
14 Their conclusion is manifested in the Ordinance that is the subject of this appeal.”). And while it is
15 always “in the public interest that federal courts of equity should exercise their discretionary power
16 with proper regard for the rightful independence of state governments in carrying out their domestic
17 policy,” *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (quotation marks omitted), such
18 considerations are particularly weighty here, as “it is difficult to imagine an area more fraught with
19 sensitive social policy considerations” than regulation of marriage, *Smelt v. County of Orange,*
20 *California*, 447 F.3d 673, 681 (9th Cir. 2006). The people of California have expressed their
21 “concerns and beliefs about this sensitive area” and “have defined what marriage is”: “a
22 consensual, contractual, personal relationship between a man and a woman, which is solemnized.”
23 *Id.* at 680 (quotation marks omitted). There is no basis for this Court to second-guess the people of
24 California’s considered judgment of the public interest.

25 CONCLUSION

26 For the foregoing reasons, if the Court rules in favor of Plaintiffs, its judgment should be
27 stayed pending appeal. Should the Court disagree, Proponents in the alternative request a limited
28 seven-day stay of the Court’s judgment to permit them to seek a stay pending appeal from the Ninth

1 Circuit and, if necessary, the Supreme Court.
2
3

4 Dated: August 3, 2010

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By: /s/Charles J. Cooper
Charles J. Cooper