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PROJECT OF CALIFORNIA RENEWAL

16 * Admitted *pro hac vice*

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

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

21 Plaintiffs,

22 v.

23 ARNOLD SCHWARZENEGGER, in his official
24 capacity as Governor of California; EDMUND
25 G. BROWN, JR., in his official capacity as
26 Attorney General of California; MARK B.
27 HORTON, in his official capacity as Director of
the California Department of Public Health and
28 State Registrar of Vital Statistics; LINETTE
SCOTT, in her official capacity as Deputy
Director of Health Information & Strategic

CASE NO. 09-CV-2292 VRW

**DEFENDANTS-INTERVENORS
PROPOSITION 8 PROPONENTS AND
PROJECTMARRIAGE.COM'S CASE
MANAGEMENT STATEMENT**

Date: August 19, 2009
Time: 10:00 a.m.
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

1 Planning for the California Department of Public
2 Health; PATRICK O'CONNELL, in his official
3 capacity as Clerk-Recorder for the County of
4 Alameda; and DEAN C. LOGAN, in his official
5 capacity as Registrar-Recorder/County Clerk for
6 the County of Los Angeles,

7 Defendants,

8 and

9 PROPOSITION 8 OFFICIAL PROPONENTS
10 DENNIS HOLLINGSWORTH, GAIL J.
11 KNIGHT, MARTIN F. GUTIERREZ, HAK-
12 SHING WILLIAM TAM, and MARK A.
13 JANSSON; and PROTECTMARRIAGE.COM –
14 YES ON 8, A PROJECT OF CALIFORNIA
15 RENEWAL,

16 Defendant-Intervenors.

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
CASE MANAGEMENT STATEMENT.....	1
I. A Trial is Not Necessary to Resolve this Case	3
A. There are dispositive legal issues that will resolve this case	3
B. Trial is not necessary to build a factual record sufficient to decide the case effectively and efficiently	4
II. Proposed Schedule	10
A. Cross-motions for summary judgment on dispositive legal issues.....	11
B. Discovery	11
C. Comprehensive briefs on remaining disputed issues	11
III. Factual Issues Identified in the Court’s June 30, 2009 Order.....	13
A. The Appropriate Level of Scrutiny Under the Equal Protection Clause	14
1. The history of discrimination gays and lesbians have faced.....	14
2. Whether the characteristics defining gays and lesbians as a class might in any way affect their ability to contribute to society.....	15
3. Whether sexual orientation can be changed, and if so, whether gays and lesbians should be encouraged to change it	15
4. The relative political power of gays and lesbians, including successes of both pro-gay and anti-gay legislation	15
B. Whether the Right Asserted by Plaintiffs Is Deeply Rooted in this Nation’s History and Tradition and thus Subject to Strict Scrutiny Under the Due Process Clause	16
C. Whether the Asserted State Interest Can Survive Plaintiffs’ Constitutional Challenge	16
1. The longstanding definition of marriage in California	17
2. Whether the exclusion of same-sex couples from marriage leads to increased stability in opposite sex marriage or alternatively whether permitting same-sex couples to marry destabilizes opposite sex marriage	17
3. Whether a married mother and father provide the optimal child-rearing environment and whether excluding same-sex couples from marriage promotes this environment.....	18

- 4. Whether and how California has acted to promote these interests in other family law contexts..... 18
- D. Whether or not Prop. 8 Discriminates on the Basis of Sexual Orientation or Gender or Both..... 18
 - 1. The history and development of California’s ban on same-sex marriage 18
 - 2. Whether the availability of opposite-sex marriage is a meaningful option for gays and lesbians..... 19
 - 3. Whether the ban on same-sex marriage meaningfully restricts options available to heterosexuals 19
 - 4. Whether requiring one man and one woman in marriage promotes stereotypical gender roles 19
- E. Whether Prop. 8 Was Passed with Discriminatory Intent..... 19
 - 1. The voters’ motivation or motivations for supporting Prop. 8, including advertisements and ballot literature considered by California voters..... 20
 - 2. The differences in actual practice of registered domestic partnerships, civil unions and marriage, including whether married couples are treated differently from domestic partners in governmental and non-governmental contexts..... 21

TABLE OF AUTHORITIES

CASES	<u>PAGE</u>
<i>Baker v. Nelson</i> , 409 U.S. 810 (1972)	3
<i>Carhart v. Gonzales</i> , 413 F.3d 791 (8th Cir. 2005), <i>rev'd</i> , 550 U.S. 124 (2007).....	5
<i>Daggett v. Commission on Governmental Ethics & Election Practices</i> , 172 F.3 104 (1st Cir. 1999) 6	6
<i>Drummond v. Fulton County Dep't of Family & Children's Serv.</i> , 563 F.2d 1200 (5th Cir. 1977)	6
<i>Dunagin v. Oxford</i> , 718 F.2d 738 (5th Cir. 1983)413 F.3d 791 (8th Cir. 2005)	7, 8
<i>Equality Found. v. City of Cincinnati</i> , 128 F.3d 289 (6th Cir. 1997), <i>cert. denied</i> , 525 U.S. 943 (1998).....	8
<i>Equality Found. v. City of Cincinnati</i> , 518 U.S. 1001 (1996)	8
<i>Equality Found. v. City of Cincinnati</i> , 54 F.3d 261 (6th Cir. 1995).....	8
<i>FCC v. Beach Commc'n</i> , 508 U.S. 307 (1993).....	16
<i>Free v. Peters</i> , 12 F.3d 700 (7th Cir. 1993).....	7
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	9
<i>Indiana H. B. R.R. Co. v. American Cyanamid Co.</i> , 916 F.2d 1174 (7th Cir. 1990).....	5, 7
<i>In re Marriage Cases</i> , 183 P. 3d 384 (Cal. 2008).....	17
<i>Landell v. Sorrell</i> , 382 F.3d 91 (2d Cir. 2002)	9
<i>Langevin v. Chenango Court, Inc.</i> , 447 F.2d 296 (2d Cir. 1971).....	5
<i>Lockhart v. McCree</i> , 476 U.S. 162 (1986).....	7
<i>Marshall v. Sawyer</i> , 365 F.2d 105 (9th Cir. 1966)	5
<i>NOW, Washington, D.C. Chapter v. Social Sec. Admin. of Dep't of Health & Human Serv.</i> , 736 F.2d 727 (D.C. Cir. 1984).....	6
<i>PDK Labs. Inc. v. United States DEA</i> , 362 F.3d 786 (D.C. Cir. 2004)	3
<i>Prentis v. Atlantic Coast Line Co.</i> , 211 U.S. 210 (1908).....	6
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	19, 20
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	9
<i>SASSO v. Union City</i> , 424 F.2d 291 (9th Cir. 1970).....	20
<i>State v. Erickson</i> , 574 P.2d 1 (Alaska 1978).....	4, 6

Strauss v. Horton, 46 Cal. 4th 364 (Cal. 2009)..... 21

United States v. \$124,570 U.S. Currency, 873 F.2d 1240 (9th Cir. 1989) 5

United States v. Singleterry, 29 F.3d 733 (1st Cir. 1994)..... 7

United States v. Virginia, 518 U.S. 515 (1996) 9

Washington v. Glucksberg, 521 U.S. 702 (1997) 16

RULES

FED. R. EVID. 201 5, 6, 9

1 At the Court’s direction, *see* July 2, 2009 Tr. at 34:2-12, the Proposition 8 Official
2 Proponents and ProjectMarriage.com (“Proposition 8 Proponents”) respectfully submit this case
3 management statement.

4 **CASE MANAGEMENT STATEMENT**

5 The Proposition 8 Proponents share the Court’s goal of resolving the important issues
6 presented by this litigation in a “just, speedy and inexpensive” manner. *See* the Court’s June 30,
7 2009 Order, Doc. # 76 (“June 30 Order”) at 9. As we will explain, this end can best be achieved
8 through two stages of briefing—the first focused on dispositive or controlling legal issues, and the
9 second (if necessary) giving full airing to any remaining issues, including those identified by the
10 Court’s June 30 Order. *See* Doc. # 76. The parties discussed this plan, and other issues identified
11 by the Court, during a July 20 telephonic conference. In an effort to forge as much consensus as
12 possible and to sharpen for this Court’s benefit the remaining areas of disagreement, on August 5,
13 2009, the Proposition 8 Proponents and the Plaintiffs exchanged respective draft case management
14 statements and shared them with the other parties to this case. Unfortunately, the parties could not
15 agree on a preferred way forward, and thus are submitting separate case management statements
16 rather than a single, joint document.

17 The Court has asked the parties to “get down to the specifics of how we are going to
18 proceed” in this case. July 2, 2009 Tr. at 34:11-12. We submit that this Court should follow the
19 course set in each of the many gay marriage cases that have been litigated over the course of the
20 last decade. In not one of these cases has a trial been held. Rather, in most cases, the parties have
21 been afforded an opportunity to build a complete factual record on issues not controlled by binding
22 precedent. And then, the courts have resolved the cases on a set of comprehensive briefs drawing
23 upon the factual materials developed by the parties and the large volume of relevant pre-existing
24 literature. As we demonstrate below, the facts at issue here are legislative in nature so any disputes
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1 over them can be resolved on the briefs submitted at the close of discovery. Such an approach
2 would serve the goals of speed and efficiency: a massive trial, which could be conducted only
3 after comprehensive summary judgment briefing was complete and ruled upon by the court, would
4 be averted; and at the same time, the appellate courts would have a complete record which they
5 can, and will, review *de novo* since legislative facts are at issue in this case.
6

7 The process that we propose is materially indistinguishable from the one used by the
8 California courts in the *Marriage Cases*. The *Marriage Cases* involved many of the same players
9 as this case does. Notably, counsel representing several challengers to California’s marriage laws
10 included attorneys from the Lambda Legal Defense and Education Fund, the National Center for
11 Lesbian Rights, and the ACLU of Northern California—the same organizations (and many of the
12 same individual attorneys) representing Proposed Plaintiff-Intervenors Our Family Coalition,
13 Lavender Seniors of the East Bay, and Parents, Families, and Friends of Lesbians and Gays. *See*
14 Doc. # 79 at 1, Doc. # 111-2 at 2-3. They informed the Superior Court on behalf of their clients
15 that “for final disposition of these cases . . . there is no *need for the Court to hold an evidentiary*
16 *hearing* and make any factual findings because the only material facts in this action are those that
17 establish the Court’s jurisdiction to consider and resolve the pending legal claims.” Doc. # 111-3 at
18 5 (emphasis added); *see also id.* at 6-7 (“because . . . the legal question presented . . . may be
19 resolved as a matter of law, . . . there are no disputes of material fact requiring an evidentiary
20 hearing and corresponding factual “findings” by this Court.”). The California Superior Court
21 agreed; it did not hold a trial, but instead resolved the case as a matter of law on the legal
22 submissions of the parties. The closely similar issues presented by this case can likewise be
23 resolved as a matter of law.
24
25

26 Even if this Court believes that more factual development is needed, the City of San
27 Francisco’s approach in the *Marriage Cases* demonstrates how that development can take place
28

1 absent a trial. Although the City did not seek an evidentiary hearing, it did request that the Court
 2 receive expert testimony and make factual findings. The City acknowledged that the case involved
 3 primarily questions of legislative fact, and that courts “have . . . been willing to derive such facts
 4 from a variety of sources.” Doc. # 111-1 at 4. The City sought to support its proposed legislative
 5 factual findings with declarations submitted by several experts. *See id.*; *see also* Doc. # 111 at 6
 6 (“The City submitted to the Superior Court the declarations of twelve expert witnesses.”). If the
 7 Court wishes, the parties to this case can similarly build a record without the necessity of trial to
 8 assist this Court in addressing any issues of legislative fact material to its decision.
 9

10 Our statement concludes by addressing with more specificity the factual issues the Court
 11 identified in the June 30 order.¹

12 **I. A Trial is Not Necessary to Resolve this Case**

13 **A. There are dispositive legal issues that resolve this case**

14 By dismissing the appeal in *Baker v. Nelson*, 409 U.S. 810 (1972), for want of a substantial
 15 federal question, the Supreme Court decided that the Fourteenth Amendment does not require the
 16 states to extend marriage to same sex couples. *See* Proposed Intervenors’ Opposition to Plaintiffs’
 17 Motion for Preliminary Injunction, Doc. # 36 at 2-6. It is therefore unnecessary for the Court to
 18 address the myriad issues presented by this case. At the very least, the Court should determine
 19 whether or not *Baker* controls before turning its attention to those issues. *Cf. PDK Labs. Inc. v.*
 20 *United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and
 21 concurring in the judgment) (“This is a sufficient ground for deciding this case, and the cardinal
 22 principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide
 23
 24
 25

26 ¹ The parties’ discussions have been limited to the facts identified by the Court’s June 30
 27 Order. By discussing them here, we do not intend to forego our ability to raise other
 28 factual matters as the case develops.

1 more—counsels us to go no further.”).

2 Apart from the dispositive effect of *Baker*, this case presents many other issues that may be
3 decided without significant factual development, either because they are controlled by binding
4 precedent or because they present questions largely legal in nature. These issues include whether
5 Proposition 8 discriminates on the basis of sexual orientation, the level of equal protection scrutiny
6 applied to laws that discriminate on the basis of sexual orientation, whether Plaintiffs’ alleged
7 liberty interest implicates the fundamental right to marry as recognized by controlling case law, the
8 reasonableness of certain interests that Proposition 8 advances, and the relevance of the subjective
9 intent of California’s voters.
10

11 An initial round of briefing on dispositive or controlling legal issues would yield several
12 advantages. First and foremost, such briefing might allow the Court to resolve the case, and thus
13 allow the case to move toward ultimate resolution more quickly. Second, the Court might resolve
14 certain issues in a way that streamlined future proceedings by making clear that certain issues were
15 legally irrelevant. In addition, under the schedule we propose, such briefing would not result in any
16 delay since fact discovery would be ongoing.
17

18 **B. Trial is not necessary to build a factual record sufficient to decide the case**
19 **effectively and efficiently**

20 Should the Court determine that extensive factual development is necessary to decide the
21 issues presented, a trial is not necessary. Given the number of experts that are likely to be retained
22 and the sheer volume of information that would be presented, a trial in this case would likely
23 stretch on for weeks if not months, consuming considerable time and resources. And the issues that
24 are likely to be contested at trial (for example, the relative political power of gays and lesbians)
25 may be presented fully and effectively—and much more efficiently—through the submission of
26 comprehensive briefs addressing a factual record complete with documentary evidence, expert
27 reports, depositions of experts, and scholarly and scientific studies. *Cf. State v. Erickson*, 574 P.2d
28

1 1, 5-6 (Alaska 1978) (“In cases such as this, however, there are literally hundreds of scientific
2 articles and numerous experts. An effort to present any substantial number of those experts in a
3 courtroom would be prohibitively expensive and unduly time-consuming. Moreover, in the final
4 analysis, it is questionable whether such an expanded hearing would reveal more reliable or higher
5 quality information than is available by referring to authorities submitted in briefs by both sides.”).

6
7 The legislative nature of the facts at issue in this case gives the Court considerable
8 flexibility in determining how to proceed. Legislative facts “are those which have relevance to
9 legal reasoning and the lawmaking process.” FED. R. EVID. 201, Advisory Committee Note. They
10 are in other words “facts relevant to shaping a general rule,” *Indiana H. B. R.R. Co. v. American*
11 *Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990) (Posner, J.), that “have salience beyond the
12 specific parties to [a] suit,” *Carhart v. Gonzales*, 413 F.3d 791, 799 (8th Cir. 2005), *rev’d*, 550 U.S.
13 124 (2007). Adjudicative facts, on the other hand, “are simply the facts of the particular case.”
14 FED. R. EVID. 201, Advisory Committee Note. They are “about the parties and their activities,
15 businesses, and properties, as distinguished from general facts which help the tribunal decide
16 questions of law and policy and discretion.” *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 300
17 (2d Cir. 1971) (Friendly, C.J.) (quotation marks and citation omitted). *See also United States v.*
18 *\$124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989) (Kozinski, J.) (“Because it must
19 consider the general, long-term implications of approving a new type of administrative search, the
20 court will focus on legislative facts—those applicable to the entire class of cases—rather than
21 adjudicative facts—those applicable only to the case before it.”); *Marshall v. Sawyer*, 365 F.2d
22 105, 111 (9th Cir. 1966) (“Adjudicative facts are facts . . . usually answering the questions of who
23 did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the
24 kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate
25 parties but are general facts which help the tribunal decide questions of law, policy, and
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1 discretion.”) (quotation marks omitted).

2 With these principles in mind, it is not difficult to separate the legislative facts in this case
3 from the adjudicative ones. Examples from the latter category include the plaintiffs’ assertions that
4 they are “involved in long-term, serious relationships with individuals of the same sex” and “desire
5 to marry those individuals,” “but were denied [marriage licenses] because they are [] same-sex
6 couple[s].” Complaint, Doc. # 1-1 at 7. By contrast, fact issues such as the relative political power
7 of gays and lesbians and whether or not sexual orientation is mutable “hinge on social, political,
8 economic, or scientific facts,” and thus fall into the former category. *Erickson*, 574 P.2d at 5-6.

9 Courts treat legislative facts differently than adjudicative facts in several different respects.
10 *First*, issues of legislative fact are rarely decided through formal trial proceedings, and they need
11 not be submitted to a jury. *See Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 227 (1908)
12 (Holmes, J.) (“A judge sitting with a jury is not competent to decide issues of fact; but matters of
13 fact that are merely premises to a rule of law he may decide.”). Rather, in accessing legislative
14 facts, “the judge is unrestricted in his investigation and conclusion. He may reject the propositions
15 of either party or of both parties. He may consult the sources of pertinent data to which they refer,
16 or he may refuse to do so. He may make an independent search for persuasive data or rest content
17 with what he has or what the parties present.” FED. R. EVID. 201, Advisory Committee Note
18 (quotation marks omitted); *see also Daggett v. Commission on Governmental Ethics & Election*
19 *Practices*, 172 F.3d 104, 112 (1st Cir. 1999) (Boudin, J.) (“[S]o-called ‘legislative facts’ . . . usually
20 are not proved through trial evidence but rather by material set forth in the briefs.”); *NOW*,
21 *Washington, D.C. Chapter v. Social Sec. Admin. of Dep’t of Health & Human Serv.*, 736 F.2d 727,
22 738 n. 95 (D.C. Cir. 1984); *Drummond v. Fulton County Dep’t of Family & Children’s Serv.*, 563
23 F.2d 1200, 1210-11 (5th Cir. 1977). (“Trials are seldom desirable either on legislative facts or on
24 broad factual issues.”) (quotation marks omitted). The information that informs judicial decisions
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1 on such matters is typically contained in books, scholarly journals, and other written sources. The
2 back-and-forth of examination and cross-examination in a courtroom setting is often not
3 particularly useful for analyzing this type of information. *See Indiana H. B. R.R. Co.*, 916 F.2d at
4 1182 (Posner, J.) (“[T]rials are to determine adjudicative facts rather than legislative facts. The
5 distinction is between facts germane to the specific dispute, which often are best developed through
6 testimony and cross-examination, and facts relevant to shaping a general rule, which, as the
7 discussion in this opinion illustrates, more often are facts reported in books and other documents
8 not prepared specially for litigation or refined in its fires.”).

9
10 *Second*, appellate courts give *de novo* consideration to findings of legislative fact. *See*
11 *United States v. Singleterry*, 29 F.3d 733, 740 (1st Cir. 1994) (“The clear error standard does not
12 apply . . . when the fact-finding at issue concerns ‘legislative’ . . . facts.”); *Free v. Peters*, 12 F.3d
13 700, 706 (7th Cir. 1993) (Posner, J.) (“The district judge announced a rule; and appellate review of
14 rules, and therefore (it follows) of the social scientific or other data on which the rules are based, is
15 plenary.”); *Dunagin v. Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983); *cf. Lockhart v. McCree*, 476
16 U.S. 162, 170 n.3 (1986). Unlike adjudicative facts, legislative facts underlie broad legal rulings
17 that are binding in future cases. Deferring to such findings could thus result in important issues of
18 law for an entire circuit (or the entire federal judiciary) turning upon a single trial court’s
19 determination of a contested issue of science, sociology, or economics. *See Dunagin*, 718 F.2d at
20 748 n.8 (“There are limits to which important constitutional questions should hinge on the views of
21 social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a
22 sociologist who has found no link between alcohol abuse and advertising, while another trial judge
23 sitting in another state believes a psychiatrist who has reached the opposite conclusion. . . . Should
24 identical conduct be constitutionally protected in one jurisdiction and illegal in another?”).

25
26
27 Thus, it makes little sense to devote the enormous amount of resources necessary to conduct
28

1 a trial on such issues. Such trials might assist the Court in making credibility determinations
2 among experts, but in the context of deciding legislative facts, no deference will be given to such
3 determinations. The appellate courts will instead review the entirety of the paper record, as well as
4 any other sources of information that bear on the legislative issue, whether in the record or not (as
5 discussed below). We submit that this Court should take the same approach.
6

7 An example of an appellate court's treatment of such issues is provided by *Equality*
8 *Foundation v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995). There, the plaintiffs challenged an
9 amendment to Cincinnati's city charter providing that "no special class status may be granted based
10 upon sexual orientation, conduct or relationships." *Id.* at 264. The district court conducted a bench
11 trial "which generated extensive expert testimony reflecting the social, political, and economic
12 standing of homosexuals throughout the nation." *Id.* On the basis of its factual findings on these
13 matters, the district court held that homosexuals were a quasi-suspect class. *Id.*
14

15 On appeal, the Sixth Circuit reversed this determination and upheld the challenged law.²
16 The Sixth Circuit reviewed the district court's findings *de novo*. While acknowledging that courts
17 typically review factual findings for clear error, it explained that "where ostensible 'findings of
18 fact' are, in reality, findings of 'ultimate' facts which entail the application of law, or constitute
19 sociological judgments which transcend ordinary factual determinations, such 'findings' must be
20 reviewed *de novo*." *Id.* at 265. The court thus subjected the district court's factual determinations
21 to "plenary review." *Id.*
22

23 *Third*, when addressing legislative facts, appellate courts are not limited by the record
24 below. *See Dunagin*, 718 F.2d at 748 n.8 (explaining, and collecting cases supporting conclusion,
25

26 ² The Supreme Court granted, vacated and remanded the Sixth Circuit's decision in light of
27 *Romer*. *See Equality Found. v. City of Cincinnati*, 518 U.S. 1001 (1996). On remand, the
28 Sixth Circuit again upheld the challenged law. *See Equality Found. v. City of Cincinnati*,
128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998).

1 that “[t]he writings and studies of social science experts on legislative facts are often considered
2 and cited by the Supreme Court with or without introduction into the record or even consideration
3 by the trial court”); *see also Landell v. Sorrell*, 382 F.3d 91, 205 (2d Cir. 2002) (Winter, J.,
4 dissenting), *rev’d*, 548 U.S. 230 (2006) (“[I]f my colleagues believe that further findings of
5 legislative fact are needed, they can request briefing of the relevant issues by the parties, rather than
6 returning questions of law to the district court only to have us later resolve them *de novo*.”). This is
7 demonstrated by the Supreme Court’s frequent consideration of information presented by amici.
8 *See, e.g., Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 330-32
9 (2003); *United States v. Virginia*, 518 U.S. 515, 544-45 & nn.13-15 (1996). Thus, findings of a
10 district court are not final in this context since the record is not static and will undoubtedly expand
11 as additional amici weigh in during the appellate process.
12

13
14 *Fourth*, legislative facts are not subject to the rules of judicial notice. *See* FED. R. EVID.
15 201. This stems from the “fundamental differences” between legislative and adjudicative facts.
16 *Id.*, Advisory Committee Note. The factual underpinnings necessary for deciding a broad rule of
17 law—such as the constitutional contours of the fundamental right to marry or the proper level of
18 judicial scrutiny for distinctions based on sexual orientation—may rarely satisfy the rules for
19 judicial notice. And judges making such consequential decisions, decisions whose precedential
20 effect reaches far beyond the parties to a particular case, should not face any “limitation in the form
21 of indisputability, any formal requirements of notice other than those already inherent in affording
22 opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at
23 any level.” *Id.*
24

25 Beyond these considerations which counsel in favor of a resolution on a paper record, there
26 is a final consideration that counsels in favor of our approach: speed. Under our proposal, there
27 will be a single round of briefing at the end of whatever period of discovery the Court allows,
28

1 followed by any oral argument that the Court may order. The case would then be submitted for
2 decision. But under plaintiffs' proposal for a trial, the course of proceedings in this Court will be
3 drawn out for many more months, at immensely greater expense to the parties. Proceeding to a
4 trial will entail a round of summary judgment motions, motions in limine, exchanges of witness
5 lists and exhibit lists, other pre-trial motions practice and then a trial with numerous experts
6 testifying to some of the most volatile and hotly disputed issues in American culture today. Make
7 no mistake, such a trial would take weeks and weeks—and quite possibly months. The trial would
8 then be followed by post-trial briefing, which would engender further delay. The additional delay
9 and expense of trial, we submit, would not be justified in the context of disputes over legislative
10 facts.
11

12 Plaintiffs are now strongly in favor of resolving this case through a live trial on the merits.
13 At the July 2 hearing, they took quite a different stance, explaining that “we believe that an
14 affirmative, powerful case can be made that the constitution is being violated . . . based upon facts
15 that are in the declarations of the plaintiffs, based upon matters of which the Court can take judicial
16 notice, based upon facts that have been determined by the California Supreme Court and
17 recognition that has occurred by the United States Supreme Court.” July 2, 2009 Tr. at 23:11-18.
18 While Plaintiffs have not explained this apparent change in position, we believed then, and
19 continue to believe now, that a powerful legal case for Proposition 8's constitutionality can be
20 made without further discovery or fact development. Even if the Court disagrees, any outstanding
21 issues can be resolved on the briefs.
22
23

24 **II. Proposed Schedule**

25 The foregoing demonstrates that this case naturally breaks down into two stages. Stage one
26 brings to the Court's attention, through initial cross-motions for summary judgment, the dispositive
27 and controlling legal issues governing the outcome of this case. Even if the Court decides that
28

1 these issues do not suffice to resolve the case, its decisions may nonetheless serve to shape and
2 narrow the subsequent proceedings. Stage two, following a full round of discovery, provides the
3 parties the opportunity to build a complete record for the Court's use in determining any remaining
4 disputed issues. The parties will present this information through a second set of cross-motions
5 which will address all outstanding issues.
6

7 **A. Cross-motions for summary judgment on dispositive legal issues**

- 8 • Motions filed by September 25, 2009
- 9 • Responsive briefs filed by October 30, 2009
- 10 • Oral argument held as soon thereafter as the Court's schedule permits

11 **B. Discovery**

- 12 • Fact discovery commences on August 20, 2009
- 13 • Fact discovery complete by January 14, 2010
- 14 • Plaintiffs' expert reports submitted by February 12, 2010
- 15 • Depositions of Plaintiffs' experts completed by March 19, 2010
- 16 • Defendants' expert reports submitted by April 16, 2010
- 17 • Depositions of Defendants' experts completed by May 21, 2010

18 **C. Comprehensive briefs on remaining disputed issues**

- 19 • Opening Briefs filed by June 4, 2010
- 20 • Responsive briefs filed by July 1, 2010
- 21 • Oral argument held as soon thereafter as the Court's schedule permits

22 We note, however, that if the Court grants the pending motions to intervene, a significant
23 elongation of the schedule above would be necessitated. As putative intervenors' motions make
24 clear, they will inject a significant measure of additional complexity and a multiplicity of expert
25 witnesses. Fundamental fairness would dictate that the Proposition 8 Proponents have sufficient
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1 time to answer the proposed intervenors' additional theories and claims.

2 Plaintiffs' proposed discovery schedule (at least as it stood on the date when we exchanged
3 draft case management statements) is patently unrealistic. For one, they have suggested allowing
4 less than two months for fact discovery. In addition to deposing Plaintiffs' fact witnesses, we
5 intend to pursue discovery from States that have experience with recognizing same-sex
6 relationships as marriages, including California (due to the marriages recognized pursuant to the
7 *Marriage Cases*) and Massachusetts. It will undoubtedly take months for the States to provide the
8 necessary data to assess the impact of same sex marriage that our experts will require. And it will
9 take several more months to analyze that data and prepare expert reports. Plaintiffs' suggestion that
10 the answers for written discovery be due in 14 days cannot be squared with the breadth of issues
11 that will be covered in discovery and the need to allow third parties adequate time to respond.
12

13 The most unrealistic feature of Plaintiffs' proposals, however, is the time table for expert
14 discovery. First, they suggest a period of less than eight weeks from the August 19 case
15 management conference for exchanging expert reports. As noted, it is unlikely that the third parties
16 will have produced relevant evidence within this timeframe, and it will be impossible for our
17 experts to have analyzed this data in such a short period. Moreover, the expert reports that we
18 produce will be the product of hundreds of hours of work researching the underlying issues,
19 identifying potential experts, meeting with and selecting experts from the candidates we identify,
20 and providing needed assistance in the report-development process. *See* Doc. # 111 at 6 (reporting
21 that City of San Francisco attorneys and their co-counsel in the *Marriage Cases*, in the process of
22 developing a record that included twelve expert declarations, "spent hundreds of hours doing
23 research to understand the issues and identify individuals with expertise on the subjects relating to
24 them, interviewing potential experts about the issues, selecting the experts, working with the
25 experts to develop their declarations, reviewing the declarations proffered by Proposition 22 and
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1 Thomasson, and working with our expert witnesses to respond to them with additional
2 declarations”).

3 Second, Plaintiffs’ schedule provides only fourteen days from the date expert reports are to
4 be exchanged to the close of expert discovery. This is a wholly unrealistic pace that will deprive
5 defendant-intervenors of the ability to adequately prepare for such depositions. We plan to depose
6 each expert that proffers a report on behalf of the Plaintiffs, and Plaintiffs have indicated that they
7 plan to present expert testimony on most (if not all) of the fourteen factual issues identified by the
8 Court. Even if each of their experts tackles two such issues, that would still require us to depose
9 one of them every two days (including weekends) from the day we are given the reports, while
10 simultaneously defending Plaintiffs’ depositions of our own experts and, for good measure,
11 working furiously to meet the ten-day window for developing rebuttal expert reports.
12

13 In addition, the briefing schedule proposed by Plaintiffs is unreasonable. It provides for
14 only a week between the end of expert discovery and the filing of dispositive motions. The parties
15 should be given more time to carefully consider the fruits of discovery so that they can be presented
16 in a way that is helpful to the Court. A minimum of 30 days should be allowed to draft briefs that
17 cover all the materials unearthed in fact and expert discovery. Rushing the briefing will make the
18 Court’s task more complicated, and may ultimately delay the resolution of the case. In addition,
19 Plaintiffs make no provision for responsive briefs. Such briefing, however, will aid the Court and
20 will expedite the ultimate resolution of the case.
21

22 In the final analysis, the breakneck pace Plaintiffs’ suggest is ill-suited to this Court’s
23 interest in building a comprehensive, carefully constructed record.
24

25 **III. Factual Issues Identified in the Court’s June 30, 2009 Order**

26 As the discussion below will demonstrate, the parties dispute many of the factual issues
27 identified by the Court’s June 30, 2009 Order. Stipulations may be possible on objective, discrete
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1 facts that underlay these broader factual disputes, but the parties remain divided on the ultimate
2 conclusion to be drawn with respect to the vast majority of the issues identified by the Court.

3 Moreover, we continue to maintain that this case is controlled by legal questions and it can—and
4 should—be resolved without resolving any of the factual issues below. Thus, we are not conceding
5 the relevance of any of these issues.
6

7 Because such significant disagreement persists, it is clear that the parties will pursue more
8 discovery than we originally anticipated. At a minimum, we will likely depose the Plaintiffs and
9 the Plaintiffs' fact and expert witnesses. Additionally, we may seek documentary materials and
10 other information from California and from other States that extend marriage to same-sex couples.

11 **A. The Appropriate Level of Scrutiny Under the Equal Protection Clause**

12 Before addressing the specific factual issues identified by the Court, it bears noting that a
13 logical antecedent to determining whether sexual orientation is a suspect classification is defining
14 sexual orientation. The Proposition 8 Proponents plan to present evidence that sexual orientation
15 has no settled definition, and that it is a concept whose definition is inherently elusive and
16 subjective. This fact alone counsels against treating sexual orientation as a suspect legal
17 classification, *see Equality Foundation*, 54 F.3d at 267; at a minimum, it is incumbent upon the
18 parties and the Court to establish a clear definition of sexual orientation for purposes of this
19 litigation.
20

21 **1. The history of discrimination gays and lesbians have faced**

22 We do not dispute that, as a historical matter, gays and lesbians have faced discrimination
23 on account of their sexual conduct. Plaintiffs, however, have indicated that they do not wish to
24 resolve this matter by stipulation. Depending upon the nature of the evidence Plaintiffs adduce on
25 this score, the Proposition 8 Proponents may present evidence (including expert opinion) on the
26 nature of discrimination gays and lesbians experienced in the past. Also, we plan to present
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1 evidence demonstrating that such discrimination has decreased significantly in recent years, both in
2 governmental and non-governmental contexts.

3 **2. Whether the characteristics defining gays and lesbians as a class might in any**
4 **way affect their ability to contribute to society**

5 We do not dispute the ability of gay and lesbian individuals to contribute to society with one
6 exception: the procreative nature of opposite-sex relationships gives them a different ability to
7 impact society. Plaintiffs, however, have not agreed to resolve this issue by stipulation. The nature
8 of the evidence presented by the Plaintiffs may therefore make it necessary for the Proposition 8
9 Proponents to present evidence on this matter as well.

10 **3. Whether sexual orientation can be changed, and if so, whether gays and**
11 **lesbians should be encouraged to change it**

12 We will dispute Plaintiffs' claim that sexual orientation is immutable. The precise contours
13 of our argument will depend upon the definition of sexual orientation adopted by the Court, but at
14 any rate we plan to present evidence in the form of references to scientific and other scholarly
15 literature, and if Plaintiffs seek to introduce expert opinion on this issue, so shall we. We do not
16 believe that the question whether gays and lesbians should be encouraged to change their sexual
17 orientation is relevant to the legal issues in this case, and we therefore do not plan to address it.

18 **4. The relative political power of gays and lesbians, including successes of both**
19 **pro-gay and anti-gay legislation**

20 We will present evidence that gays and lesbians wield substantial political power. Many
21 underlying facts relevant to gauging the political power of gays and lesbians are not subject to
22 dispute. For example, the parties should be able to agree that a governing body passed a certain
23 law on a certain date. We anticipate, however, that whether any particular law (or other piece of
24 evidence) is properly construed as reflecting the political power of gays and lesbians, and its
25 relevant weight to the political-power inquiry, will often be disputed.
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1 **B. Whether the Right Asserted by Plaintiffs Is Deeply Rooted in this Nation's**
2 **History and Tradition and thus Subject to Strict Scrutiny Under the Due**
3 **Process Clause**

4 The Plaintiffs assert a constitutional right to State recognition of same-sex unions as
5 marriages. That this right is not “deeply rooted in this Nation’s history and tradition” is not subject
6 to serious dispute. Proposition 8 is thus not subject to strict scrutiny under the Due Process Clause.
7 *See Washington v. Glucksberg*, 521 U.S. 702 (1997).

8 While the Plaintiffs will disagree with this characterization of the right they assert, the
9 Court can resolve the matter without holding a trial. The proper construction of an asserted right is
10 ultimately a question of law. The factual issue the Court has identified as relevant to its
11 judgment—“the history of marriage and whether and why its confines may have changed over
12 time,” *see* June 30 Order at 7—is legislative in nature, and largely informed by matters not
13 reasonably subject to dispute. (Examples include the near-universal nature of marriage as an
14 opposite-sex union as an historical matter and the persistence of this traditional understanding of
15 marriage, reflected by the laws of the vast majority of the States, the federal government, and
16 nations around the globe.) Moreover, should the Court desire more factual development regarding
17 the history of marriage, the parties can build such a record through references to works of history,
18 expert reports, and deposition testimony of such experts.

19 **C. Whether the Asserted State Interests Can Survive Plaintiffs’**
20 **Constitutional Challenge**

21 We contend that, as a matter of law, rational basis scrutiny governs review of Proposition 8
22 under binding Ninth Circuit precedent. Under this type of review, the justification for California’s
23 choice to preserve the traditional institution of marriage “may be based on rational speculation
24 unsupported by evidence or empirical data” and the burden is on the Plaintiffs “to negative every
25 conceivable basis which might support it.” *FCC v. Beach Commc’n*, 508 U.S. 307, 315 (1993)
26 (quotation marks omitted). It is unnecessary for the Court to hold a trial to determine that the
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1 Plaintiffs fail to meet this demanding standard—they essentially must prove that it is inherently
2 irrational to maintain the bedrock social institution of marriage in the form it has always taken.
3 And the facts related to the State’s interests are legislative in nature and thus need not be resolved
4 at trial.

5
6 **1. The longstanding definition of marriage in California**

7 “From the beginning of California statehood, the legal institution of civil marriage has been
8 understood to refer to a relationship between a man and a woman,” *In re Marriage Cases*, 183 P.
9 3d 384, 407 (Cal. 2008)—excluding, of course, the brief period of time between the California
10 Supreme Court’s decision in *In re Marriage Cases* and the passage of Proposition 8. We do not
11 expect the Plaintiffs to challenge this fact, although they have expressed a plan to present
12 contextual evidence related to instances in which California has reaffirmed its longstanding
13 definition of marriage. Depending upon the nature of this evidence, Proposition 8 Proponents may
14 present evidence related to these issues.
15

16 **2. Whether the exclusion of same-sex couples from marriage leads to increased**
17 **stability in opposite sex marriage or alternatively whether permitting same-sex**
18 **couples to marry destabilizes opposite sex marriage**

19 Phrased either way, the Proposition 8 Proponents contend that this question is not relevant
20 to the Court’s rational basis review of Proposition 8. Rather, the Court’s inquiry is limited to
21 whether California’s decision to preserve the traditional definition of marriage as the union of one
22 man and one woman rationally serves the State’s legitimate interests, such as its interests in
23 promoting responsible procreation and child rearing. It is Plaintiffs’ burden to prove that there is
24 no conceivable, rational basis for distinguishing between opposite-sex unions and same-sex unions
25 with respect to such state interests. It is not necessary, therefore, for the State to demonstrate, for
26 example, that “permitting same-sex couples to marry destabilizes opposite-sex marriage.” June 30
27 Order at 7. Depending on Plaintiffs’ evidence, however, the Proposition 8 Proponents may offer
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1 evidence on this latter issue.

2 **3. Whether a married mother and father provide the optimal child-rearing**
 3 **environment and whether excluding same-sex couples from marriage promotes**
 4 **this environment**

5 We believe the first of these questions should be rephrased: whether a child's married,
 6 biological mother and father ordinarily provide the optimal child-rearing environment. While we
 7 do not believe that it is necessary for us to prove that a child's married, biological mother and
 8 father provide the optimal child-rearing environment in order to prevail in this case, we may
 9 present social science literature and perhaps expert opinion data to demonstrate this fact if it is
 10 disputed. We believe the second question is irrelevant, for the reasons stated in Part III.C.2 above.

11 **4. Whether and how California has acted to promote these interests in other**
 12 **family law contexts**

13 The parties dispute whether California has acted to promote its interest in having children
 14 raised by their married, biological parents in other contexts. While we do not grant that the
 15 question is relevant under rational basis review, we are prepared to demonstrate that California
 16 continues to promote biological parenting in other contexts. We anticipate that our case will be
 17 largely legal in nature. The Plaintiffs, however, have indicated that they plan to present expert
 18 testimony on this issue, which we may decide to counter with our own expert evidence.

19 **D. Whether or not Prop. 8 Discriminates on the Basis of Sexual Orientation or**
 20 **Gender or Both**

21 **1. The history and development of California's ban on same-sex marriage**
 22

23 The history of California's marriage laws is largely a matter of objective fact. The parties
 24 should be able to stipulate to these facts. For instance, that California's definition of marriage as
 25 the union of a man and a woman has a legal pedigree as old as the State itself is not a matter that
 26 can reasonably be disputed. The sequence of events leading to the passage of Proposition 8 should
 27 likewise be suitably resolved by stipulation. Of course, the parties will likely disagree about the
 28

1 significance of certain facts and about how those facts inform an inquiry into the purpose of
 2 Proposition 8.

3 **2. Whether the availability of opposite-sex marriage is a meaningful option for**
 4 **gays and lesbians**

5 Our case does not depend on an argument that opposite-sex marriage is a meaningful option
 6 for gays and lesbians. But it is an undeniable fact that some gays and lesbians do get married to
 7 members of the opposite sex. If the Plaintiffs do not agree to stipulate to this fact, we plan to offer
 8 evidentiary support for this claim.

9 **3. Whether the ban on same-sex marriage meaningfully restricts options available**
 10 **to heterosexuals**

11 The Proposition 8 Proponents do not believe that this question is relevant to the legal issues
 12 in the case, and therefore do not plan to address it.

13 **4. Whether requiring one man and one woman in marriage promotes**
 14 **stereotypical gender roles**

15 The Proposition 8 Proponents contend that Proposition 8, as a matter of law, does not
 16 classify individuals on the basis of gender, and that this question is therefore irrelevant to the legal
 17 issues in the case. While we do not expect the Plaintiffs to agree with us, they have indicated that
 18 they do not intend to rely heavily on a contrary claim to prove their case. We thus do not anticipate
 19 developing an extensive record on this point, although should the Court request otherwise we will
 20 certainly do so.

21 **E. Whether Prop. 8 Was Passed with Discriminatory Intent**

22 The Plaintiffs attempt to liken Proposition 8 to the Colorado constitutional amendment
 23 struck down by the Court in *Romer*. This is a false analogy, but for present purposes what is
 24 important is the manner in which the Court addressed the issue of intent. The case concerned an
 25 amendment to the Colorado Constitution (“Amendment 2”) enacted by a statewide referendum.
 26 See *Romer v. Evans*, 517 U.S. 620, 623 (1996). The Court ultimately concluded that Amendment 2
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1 was “inexplicable by anything but animus toward” homosexuals. *Id.* at 632. In reaching this
2 conclusion, it considered the objective design of Amendment 2 (“making a general announcement
3 that gays and lesbians shall not have any particular protections from the law”), its effect on gays
4 and lesbians (“inflict[ing] . . . immediate, continuing, and real injuries” upon them), and the
5 relationship of this effect to legitimate government interests (the “injuries. . . outrun and belie any
6 legitimate justifications” that could be claimed for the law, and the “breadth of the Amendment
7 [was] so far removed from [the offered government] justifications that [the Court found] it
8 impossible to credit them”). *Id.* at 635. On the basis of these considerations, the Court concluded
9 that Amendment 2 did not bear a rational relationship to a legitimate government interest, and was
10 therefore left with “the inevitable inference that the disadvantage imposed is born of animosity
11 toward the class of persons affected.” *Id.* at 634. Notably, the Court did not direct its attention
12 toward determining the subjective motivation of Colorado’s voters. Its conclusion that Amendment
13 2 was motivated by animus toward homosexuals followed from its finding that the amendment bore
14 no rational relationship to any conceivable legitimate government interest. This Court should take
15 the same approach here. Proposition 8, like Colorado’s Amendment 2, should stand or fall on the
16 law’s relationship to legitimate governmental interests. An independent probe into the subjective
17 motivation of California’s voters, complete with discovery aimed at those voters, is both legally
18 impermissible, *see SASSO v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970), and is unnecessary.

21
22 **1. The voters’ motivation or motivations for supporting Prop. 8, including**
23 **advertisements and ballot literature considered by California voters**

24 As we have noted, the Court need not and cannot properly conduct an inquiry into the
25 subjective motivations of California’s voters. Should the Court nonetheless deem such information
26 relevant, we will likely be able to agree with Plaintiffs on such factual questions as whether
27 particular ads were run in support of and in opposition to Proposition 8, and whether certain
28 language was included in the ballot literature distributed to California’s voters.

