

No. 10-16696

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

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

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants-Appellants.

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

**BRIEF OF THE
AMERICAN COLLEGE OF PEDIATRICIANS
IN SUPPORT OF APPELLANTS**

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FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae, American College of Pediatricians, has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. As it has no stock, there is no publicly held corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The members of the American College of Pediatricians (“the College”) devote their professional lives to promoting the health and wellbeing of children. As a medical association, the College has an interest in the broad spectrum of factors that impact the physical, mental and social development of the young patients in their care. This interest extends to family structure and environment, which drives many of the outcomes for pediatric patients across a variety of key developmental categories.

The collective membership of the College has observed firsthand the effect of varied and changing family structures on the wellbeing of pediatric patients, and it is also familiar with the significant academic analysis and sociological data that augment understanding of these issues. The College submits this brief to present to the Court its professional perspective concerning the effect of various parenting models and family structures on the development and wellbeing of the children under the care of America’s pediatricians.

This brief is filed pursuant to the consent of Counsel of Record for all parties.

SUMMARY OF ARGUMENT

The issues at the heart of the Proposition 8 dispute are important ones, raising strong feelings on all sides of the debate. Regardless of the outcome, the

College has an interest in ensuring that the courts do not arrive at a legal result by adopting flawed reasoning which, if sanctioned by the legal system, could trigger harmful collateral effects beyond the courtroom walls. Certain of the District Court’s “factual” findings with respect to parenthood and family structure are troubling in this regard, and these findings appear to reflect an incorrect and distorted understanding of the available data and professional consensus concerning parenting models and family structure. The explicit judgments and implicit assumptions reflected in these findings, if they were to gain broader cultural or societal acceptance due to their being embraced by the federal courts, could significantly undermine societal efforts to promote and encourage the parental choices that foster an optimal environment for the rearing of children.

Two of the District Court’s key findings with respect to parenting models and family structure are of particular concern. In finding 71, the District Court stated:

Children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted.

Dist. Ct. Op. at p. 95. In finding 72, the District Court stated:

The genetic relationship between a parent and a child is not related to a child’s adjustment outcomes.

Dist. Ct. Op. at p. 96. It is no exaggeration to say that these two findings reflect the District Court’s embrace of the following propositions: (a) the concepts of

fatherhood and motherhood are meaningless and archaic; (b) the universal natural biological attachment between parents and their children, or the absence of this attachment, has no impact on a child's wellbeing; and (c) in general, there is no reason for policymakers to prefer that a child be raised by its own mother and father as opposed to any two other adults.

Whatever this Court's view of the legal status of Proposition 8, this Court should have grave concern over any conclusion that can only be arrived at after accepting the counter-intuitive propositions embraced by the District Court. But these propositions are not merely incorrect and without scientific support. They are dangerous. Social science, within its operational limitations, strongly suggests that certain family structures and parenting models are more likely than others to lead to successful outcomes for children, and correspondingly, others are more likely in the aggregate to lead to negative outcomes. The District Court's stark rejection of the significance of biological family ties, were it to gain broader legal, political or cultural acceptance, could facilitate the increased occurrence of the very family structures that social science suggests are most likely to produce unique risks for young children. And the District Court's further rejection of the notion that mothers and fathers have anything unique to offer their children, were it to gain broader legal, political or cultural acceptance, would significantly

undermine the efficacy of efforts to promote fatherhood in communities where the absence of fathers has contributed to a variety of negative outcomes and social ills.

ARGUMENT

I. Compared To Alternative Family Structures, Children Raised By Their Married Biological Parents Benefit In Significant Ways

The claims of the District Court reflected in findings 71 and 72 are an adjunct to finding 70, in which the District Court found that “the gender of a child’s parent is not a factor in a child’s adjustment” and that “Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted.” The District Court also asserted that “[t]he research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.” Dist. Ct. Op. at 95.

There are several questionable aspects of the District Court’s analysis. First, even if the District Court’s characterizations with respect to the social science surrounding homosexual parenting were accurate, they would not be particularly relevant. The State’s interest in channeling responsible procreation through the institution of marriage is grounded in the reality that only opposite-sex relationships can produce children, and they often do so unintentionally. Children conceived in such situations do not have the option of being raised by two mothers or two fathers; the issue is whether the child will be raised by its mother and father, or by a single parent, usually the child’s mother. It is widely accepted, and the

District Court's opinion agrees, that a child reared by two parents is as a general rule better off than a child reared only by one. Accordingly, the District Court's abandonment of the notion that the State has an interest in having children reared by their own married biological mother and father cannot be justified by the District Court's belief that some gay couples are also successful parents.

Second, the District Court's support for its findings is scant, consisting primarily of the adoption of sweeping characterizations offered by Plaintiffs' expert, psychologist Dr. Michael Lamb, concerning the social science data relating to parenting models and family structure. These characterizations fly in the face of common sense as well as an accumulated body of social science literature, including studies with large sample sizes and rigorous controls. These studies involve analysis of the comparative outcomes for children raised by their married biological parents vis-a-vis children raised in a variety of other family structures, including by single parents, biological and step-parent combinations, and adoptive parents. The studies strongly suggest, *contra* the District Court, that the ideal family structure for a child is a family headed by two opposite-sex biological parents in a low-conflict marriage.¹ The life outcomes measured by these studies,

¹ See, e.g., DIX124, Sara McLanahan and Gary Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* 1-78, 134-55 (1994); PX1305, Shelly Lundberg & Robert A. Pollack, *The American Family and Family Economics*, February 2007 at 5, 19; Christopher Carpenter, *Revisiting the Income Penalty for Behaviorally Gay Men: Evidence from NHANESII* (2007) ; DIX89, Pierre van den

a number of which involve broad national data sets, encompass a variety of behavioral, cognitive, psychological and financial results, further highlighting the depth of the scientific support for giving preference to married biological parenting in relation to other possible parenting models and family structures.²

Third, the District Court's findings overstate the limited significance of the comparatively inferior studies that purport to show equivalence between same-sex parenting and married biological parenting. These studies suffer from a host of

Berghe, *Human Family Systems* 33-60 (1979); DIX2, Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social and Emotional Well-being of the Next Generation*, 15 *Future Child*. 75, 89 (2005); DIX21, Wendy D. Manning and Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 *J. Marriage and Fam.* 876, 890 (2003); PX1100, Femmie Juffer & Marinus H. van Ijzendoorn, *Adoptees Do Not Lack Self-Esteem: A Meta-Analysis of Studies on Self-Esteem of Transracial, International, and Domestic Adoptees*, 133 *Psychological Bulletin* 1067-68 (2007) (“Many studies and several meta-analyses have shown that adopted children lag behind in physical growth, school performance, and language abilities; show more attachment and behavior problems; and are substantially overrepresented in mental health referrals and services for learning programs.). Even studies relied on by the plaintiffs confirmed this point. PX2299, Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress through School*, 47 *Demography* 755 (2010) (noting that “[s]tudies of family structure and children’s outcomes nearly universally find at least a modest advantage for children raised by their married biological parents”).² Married biological parenting has been shown to increase the probability of positive outcomes and decrease the risk of negative outcomes across a wide range of developmental categories and life outcomes. See, e.g., DIX107, Lorraine Blackman *et al.*, *The Consequences of Marriage for African-Americans: A Comprehensive Literature Review* 24, Inst. for Amer. Values (2005) (delinquency, self-esteem and school performance); DIX38, W. Bradford Wilcox *et al.*, Inst. for American Values, *Why Marriage Matters: 26 Conclusions from the Social Sciences* 32-33 (2d ed. 2005) (school performance, delinquency, smoking, and risk of suicide); DIX103, Paul R. Amato, *Parental Absence During Childhood and Depression In Later Life*, 32 *Soc. Q.* 543, 547 (1991) (risk of adult depression).

flaws, including insufficient sample sizes³, self-selecting participants⁴, premature conclusions based upon one-time self-reported snapshots rather than sustained temporal monitoring⁵, failure to control for pertinent variables⁶, a paucity of studies looking at gay fathers⁷, and politicized methodology that casts doubt on the validity of the conclusions presented by those who authored or managed the studies.⁸ *See generally* DIX131, Affidavit of Professor Steven Lowell Nock, *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ontario Sup. Ct. Justice 2001) (detailing flaws in same-sex parenting scholarship and studies) (hereinafter

³ Norval D. Glenn, *The Struggle for Same Sex Marriage*, 41 Soc’y 25, 26-27 (2004); Walter R. Schumm, *What Was Really Learned from Tasker & Golombok’s (1995) Study of Lesbian & Single Parent Mothers?*, 94 Psychol. Rep. 422, 423 (2004) (urging policymakers to exercise “extreme caution” in interpreting research on gays and family life (or research focused on any similarly small subset of a broader population)).

⁴ DIX734, Robert Lerner & Althea K. Nagai, *No basis: What the Studies Don’t Tell Us About Same-Sex Parenting*, Washington DC: Marriage Law Project (2001) at 6, (“We conclude that the methods used in these studies are so flawed that these studies prove nothing.”).

⁵ *Id.*

⁶ *Id.* at 29-34.

⁷ PX 1093 at 225. Fiona Tasker, *Lesbian Mothers, Gay Fathers and Their Children; A Review*, 26 Development and Behavioral Pediatrics 224, 225 (2005) (PX 1093) (admitting that “[s]ystematic research has so far not considered developmental outcomes for children brought up from birth by single gay men or gay male couples (planned gay father families), possibly because of the difficulty of locating an adequate sample.”).

⁸ DIX131, Nock Affidavit at 39-40; DIX734, Lerner & Nagai at 61-62, 67.

“Nock Affidavit”).⁹ Indeed, among the most glaring deficiencies of the gay parenting data is that not a single study upon which Dr. Lamb or the District Court relied utilized a control group of married biological parents and their children. *See* Trial Tr. 1161-84 (testimony of Dr. Lamb).¹⁰ These critical shortcomings are one reason why other courts have quite properly refused to allow the questionable “social science” reflected in these studies to drive public policy and constitutional interpretation. *See, e.g., Lofton v. Secretary of the Dep’t of Children and Family Servs.*, 358 F.3d 804, 825 (11th Cir. 2004) (criticizing homosexual parenting studies due to “significant flaws in the studies’ methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents.”).

⁹ Amicus urges this Court to review the Nock Affidavit in its entirety, as it provides the most thorough and comprehensive assessment of the shortcomings of the handful of studies repeatedly relied upon by Appellees and the District Court.

¹⁰ Dr. Lamb’s knowledge was incomplete. The one study that did include such a control group used non-representative sampling, recruiting both its lesbian families and its heterosexual control group through a lesbian-mother support group, ads in gay-themed publications, and the researchers’ friends and colleagues. David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 *Dev. Psych* 105 (1995), at 107. The resulting sample “was predominantly White, highly educated, and economically privileged.” *Id.* at 113. The sample was also tiny, consisting of a mere 15 lesbian families and 15 heterosexual families, and the sample did not include any children raised by gay male parents. *Id.* at 107. The sample was also limited to young children between the ages of 3 and 9, and thus sheds no light whatsoever on the comparative effect of different family structures on adolescents and young adults.

Fourth, the District Court glossed over one of the clearest conclusions to be drawn from the pertinent social science literature, and in so doing failed to recognize the implications of this conclusion for the debate relating to the value of married biological parenting. Across a wide range of studies spanning several decades, researchers have consistently found that the family structure presenting some of the greatest risks for children is that of a biological mother coupled with a stepfather. Researchers Martin Daly and Margo Wilson summarized the consensus by observing that “Living with a stepparent has turned out to be the most powerful predictor of severe child abuse yet.” Daly and Wilson, 1996, *Evolutionary Psychology and Marital Conflict: The Relevance of Stepchildren*, in *Sex, Power, Conflict: Evolutionary and Feminist Perspectives* 9-28 (Oxford University Press). “Studies have found that young children in stepfamilies are more than 50 times more likely to be murdered by a stepparent (usually a stepfather) than by a biological parent. One study found that a preschooler living with a stepfather was 40 times more likely to be sexually abused than one living with both of his or her biological parents.” DIX38, W. Bradford Wilcox *et al.*, Inst. for American Values, *Why Marriage Matters: 26 Conclusions from the Social Sciences* 32 (2d ed. 2005) (hereinafter “Wilcox, *Marriage Matters*”). Similarly, a study that utilized a random sample of 930 adult women in San Francisco “revealed that 17% or one out of every six women who had a stepfather as a principal figure in her childhood

years was sexually abused by him. The comparable figures for biological fathers were 2% or one out of approximately 40 women.” DIX133, Diana E. H. Russell, *The Prevalence & Seriousness of Incestuous Abuse: Stepfathers vs. Biological Fathers*, 8 *Child Abuse & Neglect* 15 (1984).

Similar phenomena exist with respect to the risk of other negative outcomes for children, including incarceration and teenage pregnancy. For instance, a recent longitudinal study addressing juvenile incarceration emphasized that “The adolescents who faced the highest incarceration risks, however, were those in stepparent families, including father-stepmother families . . . This study showed . . . that although children in father-absent households should be an important policy focus, marriage is not necessarily the answer to prevent incarceration unless it is between the two parents of the child; otherwise, children in single-parent households fare relatively better than those in stepparent households.” Cynthia C. Harper & Sara S. McLanahan, *Father Absence & Youth Incarceration*, 14 *J. Res. Adolescence* 369 (2004) at 369, 392. With respect to teenage pregnancy, “girls in stepfamilies are slightly *more* likely to have a teenage pregnancy compared to girls in single-parent families, and much more likely to have a teenage pregnancy than girls in intact, married families.” DIX38, *Marriage Matters* at 14.

In all households headed by two homosexual partners, the presence of children reflects either adoption by one or both partners, or a biological parent sharing

custody with a stepparent. See Margaret Somerville, *Children's Human Rights and Unlinking Child-Parent Biological Bonds With Adoption, Same-Sex Marriage and New Reproductive Technologies*, 13 J. Fam. Stud. 179, 181 (2007) (observing that establishing same-sex families “unavoidably takes away [a child’s] right to know and be reared within his own biological family.”). As described above, and despite the District Court’s claim to the contrary, a substantial body of social science research strongly suggests that neither of these family structures is equivalent to married biological parenting in terms of producing positive outcomes and avoiding negative outcomes for children. The disparity, of course, is less stark when comparing adoptive married heterosexual parents to married biological parents. This is not surprising, because adoptive parents, particularly those involved in private adoptions, are usually subject to heavy screening, and often incur significant financial costs as part of the adoption process. Such parents are disproportionately likely to be drawn from a wealthy and well-educated demographic pool, and the evidence suggests that these educational and financial advantages may partially offset the negative pressure exerted on family structure by the absence of any biological tie between adoptive parents and their children. Sara McLanahan and Gary Sandefur, *Growing Up With A Single Parent* (Cambridge, Harvard University Press, 1994); Duncan and Brooks-Gunn, *Consequences of Growing Up Poor* (New York: Russell Sage Foundation).

By contrast, there is no reason to believe that stepparent families, whether gay or heterosexual, will enjoy these same advantages. To the contrary, the comparative deficiencies and increased risks that appear to inhere in many stepparent families are well-documented. To the extent these negative outcomes derive in part from the relational asymmetry that exists when one parent has biological ties to a child, and the second parent lacks such ties, the risk of these negative outcomes can be expected to be equally present in gay stepparent families. Moreover, to the extent these negative outcomes are also a consequence in whole or in part of unique risks presented by men who lack a biological tie to their children, then gay male parenting may actually embody a family structure that presents a uniquely increased probability of the negative outcomes that social science has demonstrated are correlated with the presence of a stepfather in the home. In either event, the comparative problems associated with stepparent families, particularly families involving a stepfather, undermine the District Court's assertion that there is no empirical basis for the State to distinguish between married biological parenting and any of the various alternative family structures in which children may potentially be raised.

Indeed, some of the studies that purportedly showed that the children of same-sex parents did not suffer worse outcomes actually found that the children *did* suffer worse outcomes, and either ignored those differences or dismissed them as

statistically insignificant. See, e.g., Wainwright, J., *Delinquency, Victimization, and Substance Use Among Adolescents with Same Sex Parents*, 20 *Journal of Family Psychology* 526, 528 (table 1) (2006) (PX 778) (showing that the children of same-sex parents involved in the study became intoxicated and participated in binge drinking more frequently than the children of opposite-sex parents, and were more likely to (a) use marijuana; (b) engage in the risky use of drugs and alcohol; (c) have sexual relations under the influence of drugs and alcohol; and (d) engage in delinquent behavior, than children of opposite-sex parents); Susan Golombok, et. al, *Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 *Journal of Child Psychological Psychiatry* 783, 788 (1997) (finding that, “[c]hildren in father-absent families perceived themselves to be less cognitively competent ... and less physically competent ... than children in father-present families”); Fiona Tasker & Susan Golombok, *Growing up in a lesbian family; effects on child development* 133 (Gulliford Press 1997) (PX 1396) (finding that the women with lesbian mothers were more likely to engage in premarital promiscuous sex). These differences in outcomes were dismissed as statistically insignificant because of the miniscule sample sizes of the studies – these small samples merely underscore, however, the limitations of the same-sex parenting literature.

Of course, it is always important to remember that the evaluation of social science data involves averages, probabilities, and aggregate outcomes. At the individual level, it is undoubtedly true there are some single parent, adoptive, and stepparent families, both gay and heterosexual, in which the parent or parents have created a child-rearing environment that results in outcomes equal to or better than the average outcomes for children raised by married biological parents.

But as the District Court itself emphasized throughout its opinion, the labels and classifications that the law applies to various social arrangements can communicate powerful implicit and explicit normative judgments concerning those ideal social arrangements that are to be actively pursued and embraced, and those that instead simply reflect societal accommodation of the available alternatives in instances where the recognized ideal cannot be achieved. As the District Court also noted, the normative judgments communicated by political and legal institutions can have significant impact on mores and behavior outside of those institutions, because such judgments can create powerful cultural incentives for pursuing (or avoiding) participation in particular social arrangements. *See, e.g.*, Dist. Ct. Factual Findings 52-54.

Unfortunately, as discussed at length above, the District Court's recognition of its power to send a message was coupled with an exercise of that power in a manner likely to result in significant social harm. Specifically, findings 70-72 of

the District Court, taken together, convey an unmistakable normative judgment that the federal courts believe there is no legitimate empirical or societal basis to prefer married biological parenting over any of the possible alternatives, including the demonstrably risky alternative of stepparent families comprised of a biological mother and a stepfather. The implication is that it is repugnant to the United States Constitution for any public institution to act with the actual or perceived intent of steering societal choice towards married biological parenting and away from any one of the sundry two-parent alternatives.

The exact nature and magnitude of the harm should this message come to be broadly embraced by the federal courts is impossible to predict. Likewise, the relevance of social science data to the resolution of the legal disputes at the heart of this case is an issue of law for this Court to decide. But to the extent this Court believes that social science should inform its analysis of the issues presented in this case, this Court should recognize that the State has a legitimate interest in promoting the family structure that has proven most likely to foster an optimal environment for the rearing of children. In light of the comparatively increased risk of juvenile incarceration, teenage pregnancy, physical abuse, and sexual abuse presented by stepparent families in relation to married biological parenting, the State also has a compelling interest in maintaining a recognized distinction between married biological parenting and the alternative of stepparent families,

and the District Court's flawed findings are not an adequate basis for ignoring or discounting that interest.

II. Children Benefit From Having A Father And A Mother

The fact that it is even necessary for the preceding heading to appear in connection with an appeal of the District Court's decision is a sign that something went seriously awry in the District Court's analysis. But the District Court's message in findings 71 and 72 is unmistakable: Children do not benefit from having a mother and a father, and indeed they receive no particular benefit from having any connection to or relationship with their biological parents. In the District Court's view, the only thing that matters is the presence of two reliable caregivers as opposed to merely one.

The District Court's view is contradicted by the social science data discussed in Section I above, which strongly suggests that, on average, children derive a host of unique benefits from being raised by their married biological parents. The District Court's view is also contradicted by common sense. Plaintiffs' own expert Dr. Lamb, whose testimony is the sole record support cited by the District Court for findings 71 and 72, acknowledged at trial a wide variety of differences between men and women. Trial Tr. at 1057-58 (acknowledging gender differences relating to factors such as (a) propensity for aggression and violence; (b) health challenges and health outcomes; (c) life expectancy; (d) distribution of cognitive abilities; and

(e) earning capacity); Trial Tr. at 1064 (admitting prior statement that in regards to parenting men and women are not “completely interchangeable with respect to skills and abilities”); Trial Tr. 1065 (admitting that gender “is one of those variables that can have ripple effects in a variety of different ways on the way in which people behave, and can in a variety of ways affect the way they behave with their children”). Dr. Lamb also acknowledged the existence of significant support for the widely-held understanding that fathers and mothers often make unique contributions to the rearing of their children, and that these unique contributions in turn can have a significant positive impact across a range of developmental categories. *See, e.g.*, Trial Tr. at 1068 (acknowledging prior authorship of statement that “[t]he data suggests that the differences between maternal and paternal behavior are more strongly related to either the parents’ biological gender or sex roles, than to either their degree of involvement in infant care or their attitudes regarding the desirability of paternal involvement in infant care”); Trial Tr. at 1082 (admitting that mothers and fathers are different in a number of respects, that those differences may be the result of their different genders, and that being raised by people with such differences is beneficial for children).

Dr. Lamb’s acknowledgments mirror a broader body of social science data that highlights the unique contributions made by mothers and fathers, and the distinct ways in which separate maternal and paternal contributions promote positive child

development outcomes. Distinctive maternal contributions are numerous and significant. The natural biological responsiveness of a mother to her infant fosters critical aspects of neural development and capabilities for interactivity in the infant brain.¹¹ Mothers are also able to extract the maximum return on the temporal investments of both parents in a two-parent home, because mothers provide critical direction for fathers on routine caretaking activities, particularly those involving infants and toddlers. See Sandra L. Hofferth et al., *The Demography of Fathers: What Fathers Do*, in *Handbook of Father Involvement: Multidisciplinary Perspectives* 81 (Catherine Tamis-Lamonda and Natasha Cabrera eds., 2002); Scott Coltrane, *Family Man* 54 (New York: Oxford, 1996). This direction is needed in part because fathers do not share equally in the biological and hormonal interconnectedness that develops between a mother and a child during pregnancy, delivery and lactation.

In comparison to fathers, mothers generally maintain more frequent and open communication and enjoy greater emotional closeness with their children, in turn fostering a sense of security in children with respect to the support offered by

¹¹ See C.A. Nelson and M. Bosquet, *Neurobiology of fetal and infant development: Implications for infant mental health*, in *Handbook of Infant Mental Health* 37-59, 2d ed., ed. C.H. Zeanah Jr. (New York: Guilford Press, 2000); M. DeWolff and M. van Ijzendoorn, *Sensitivity and attachment: A meta-analysis on parental antecedents of infant attachment*, 68 *Child Development* 571-91 (1997); M. Main and J. Solomon, *Discovery of an Insecure-disorganized Disoriented Attachment Pattern*, in *Affective Development in Infancy* 95-124 (T.B. Brazelton and M.W. Yogman eds., 1986).

the family structure. Ross D. Parke, *Fatherhood* 7 (Developing Child Series, Jerome Bruner *et al.* ed., Harvard University Press) (1996) (hereinafter “Parke, *Fatherhood*”). Mothers’ typical mode of parent-child play is predictable, interactive, and geared toward joint problem-solving, which helps children to feel comfortable in the world they inhabit. Eleanor Macoby, *The Two Sexes* 266-67 (Cambridge, MA: Harvard University Press 1998) (hereinafter “Macoby, *The Two Sexes*”); Parke, *Fatherhood* 5; Kyle D. Pruett and Marsha Kline Pruett, *Partnership Parenting: How Men and Women Parent Differently – Why It Helps Your Kids and Can Strengthen Your Marriage* 18-19 (D.A. Capo Press 2009). Mothers also impose more limits and discipline more frequently, albeit with greater flexibility when compared to fathers. Macoby, *The Two Sexes* 273.

Mothers uniquely play a greater role in cultivating the language and communication skills of their children. Parke, *Fatherhood* 6. Mothers help children to understand their own feelings and respond to the feelings of others, in part by encouraging open discussion of feelings and emotions within the family unit. See Suzanne A. Denham *et al.*, *Prediction of Externalizing Behavior Problems From Early to Middle Childhood: The Role of Parental Socialization and Emotion Expression*, in *Development and Psychopathology* 23-45 (Cambridge University Press 2000); Macoby, *Two Sexes* 272. Active maternal influence and input is vital to the breadth and depth of children’s social ties, and mothers play a

central role in connecting children to friends and extended family. Paul Amato, *More Than Money? Men's Contributions to Their Children's Lives?*, in *Men in Families, When Do They Get Involved? What Difference Does It Make?* 267 (Alan Booth and Ann C. Crouter, eds. 1998).

Fathers also make distinctive contributions to the upbringing of their children, and positive paternal contributions play a key role in avoiding a variety of negative outcomes that arise with greater frequency in homes where a father is not present. In two-parent households, despite the demographic changes in workforce participation in recent decades, fathers provide the larger share of household income. See Bureau of Labor Statistics, *Women in the Labor Force: A Databook* (Washington, DC: U.S. Dept. of Labor, 2008), at Table 24. The comparatively higher contribution that fathers make to household income may in part be due to the documented greater earning power of men in the workplace, and there is no dispute that an increase in household financial resources correlates with an increase in positive outcomes for children in areas such as education, physical health, and the avoidance of juvenile delinquency. Sara McLanahan and Gary Sandefur, *Growing Up With A Single Parent* (Cambridge, Harvard University Press, 1994); Greg Duncan and Jeanne Brooks-Gunn, *Consequences of Growing Up Poor* (New York: Russell Sage Foundation 1999).

Fathers engage proactively in spontaneous play with their children, and “children who roughhouse with their fathers . . . quickly learn that biting, kicking, and other forms of physical violence are not acceptable.” David Popenoe, *Life Without Father* 144 (The Free Press, Simon & Schuster, 1996); *see also* Linda Carroll, “Dads Empower Kids to Take Chances”, MSNBC, June 18, 2010 (available at <http://www.msnbc.msn.com/id/37741738>). A recent study conducted by developmental psychologist Daniel Paquette found that fathers are also more likely to supervise children at play while refraining from intervention in the child’s activities, a pattern that stimulates “exploration, controlled risk-taking, and competition.” Daniel Paquette and Mark Bigras, *The Risky Situation: A Procedure for Assessing the Father-Child Activation Relationship*, 180 *Early Childhood Dev. and Care* 33, 33-50 (2010).

Paternal modes of play activity are only one example of the ways in which fathers encourage their children to take risks. Compared to mothers, fathers are more likely to encourage children to try new things and to embrace novel situations and challenges. *See* Parke, *Fatherhood* 6. One study summarized this aspect of paternal input and observed that “Fathers, more than mothers, conveyed the feeling that they can rely on their adolescents, thus fathers might provide a ‘facilitating environment’ for adolescent attainment of differentiation from the family and consolidation of independence.” *See* Shmuel Shulman and Moshe M. Klein, 1993

Distinctive Role of the Father in Adolescent Separation - Individuation 41, 53 (Issue 62) (1993).

Fathers also utilize a different discipline style than mothers, in that they discipline with less frequency, but greater predictability and less flexibility in terms of deviating from pre-determined consequences for particular behavior. *See* Thomas G. Powers et al., *Compliance and Self-Assertion: Young Children's Responses to Mothers Versus Fathers*, 30 *Developmental Psychology* 980-89 (1994). Children respond differently to paternal discipline, and are comparatively more likely to resist maternal commands and comply with paternal requests. Macoby, *The Two Sexes* 274-75. This may be one reason why a number of studies have found that paternal influence and involvement plays an outsize role in preventing adolescent boys from breaking the law, and lowering the odds that a teenage girl will become pregnant. *See, e.g.*, Paul R. Amato and Fernando Rivera, *Paternal Involvement and Children's Behavior Problems*, 61 *Journal of Marriage and Family* 375-84 (1999) (finding that paternal involvement is linked to lower levels of delinquency and criminal activity, even after controlling for maternal involvement); Mark D. Regnerus and Laura B. Luchies, *The Parent-Child Relationship and Opportunities for Adolescents' First Sex*, 27 *Journal of Family Issues* 159-83 (2006) (study of 2000 adolescents finding that father-daughter relationship, rather than mother-daughter relationship, was key predictor of

whether and when adolescent girls transitioned to sexual activity); *see also* Wilcox, *Marriage Matters* 14, 17-18 (discussing evidence suggesting that female sexual development is slowed by early childhood exposure to pheromones of biological father, and accelerated by regular early childhood exposure to pheromones of adult male who is not child's biological father).¹²

The distinctive maternal and paternal contributions to the optimal childrearing environment highlight what should be obvious: the District Court lacked a legitimate empirical basis for its claim that there is no difference between a family structure where a mother and father are present, and a family structure where by definition children are deprived of either maternal or paternal influence. Even in the absence of a detailed examination of social science data, common sense would suggest that children, like adults, benefit from balanced exposure to the diverse approaches reflected in the typical maternal and paternal parenting models.

In the educational context, the Supreme Court has recognized the indispensable benefits that are attained by an environment that incorporates significant levels of diversity, and indeed has held that promotion of such diversity

¹² It should be noted that any lack of consensus concerning the source of gender differences is of little relevance. The source of the gender-based variances in parenting style observed in the literature and studies discussed above may be biological difference, cultural pressure, an outgrowth of evolutionary adaptation, or some combination thereof. The State may legitimately recognize the existence of gender differences, and account for their existence when fashioning policy, without endorsing every cultural, social or biological input that may have given rise to the differences in the first place.

is a compelling state interest sufficient to justify differential treatment that might otherwise be thought to run afoul of the Equal Protection Clause. *See Grutter v. Bollinger*, 539 U.S. 306, 329-33 (2003). The home in many ways is the primary educational environment for children, particularly in their most formative pre-adolescent years. The State plainly has a legitimate interest, even a compelling one, in making special provision for family structures and parenting models that will facilitate the diverse and balanced childrearing environment that on average offers the greatest probability for successful developmental outcomes, and is most likely to avoid the negative outcomes associated with either maternal or paternal deprivation.

The lack of factual support for the District Court's findings with respect to the supposed irrelevance of married biological parenting is a sufficient basis for disregarding those findings in the course of resolving the legal issues at the heart of the Proposition 8 dispute. But this Court should also recognize that if the federal courts place a judicial stamp of approval on the notion that fatherhood and motherhood have no meaning, the effect of such approval cannot be confined to the judicial system.

Some of the negative impacts will be formal and relatively predictable. Mothers share natural emotional bonds with their children that arise in part as a result of the biological bonds formed in gestation. Fathers lack this gestational

connection. Thus, in response to the relatively common occurrence of young unmarried heterosexual couples confronting an unplanned pregnancy, a variety of government programs that focus specifically on unmarried fathers have expended considerable public resources in attempts to persuade fathers that they have an obligation to step forward and embrace the responsibilities that active fatherhood entails.¹³ A number of these programs have met with considerable success.¹⁴ Yet if there is no legitimate or compelling governmental interest in specifically promoting “fatherhood” and “motherhood,” as opposed to the gender-neutral concept of “parenthood,” one can easily imagine the host of legal and political hurdles that will threaten the future survival of such programs.

Other effects will be comparatively informal, but no less harmful in terms of their negative impact on societal efforts to persuade young unmarried fathers to assume the burdens and responsibilities that accompany actively engaged

¹³ Los Angeles Times, *Obama Pledges to Support Responsible Fatherhood*, June 22, 2010, <http://articles.latimes.com/2010/jun/22/nation/la-na-obama-fathers-20100622>.

¹⁴ National Fatherhood Initiative, *Boyz2Dads CD-ROM Pre-Post Pilot Evaluation Results Summer 2007*, <http://www.fatherhood.org/Document.Doc?id=39> (describing positive results from a pilot program designed to promote more responsible attitudes about fatherhood in teen and pre-teen males); National Fatherhood Initiative, *Summary of Formative Evaluation Findings: Doctor Dad Pilot Test*, Center for Social Work Research, University of Texas at Austin, Spring 2004, <http://www.fatherhood.org/Document.Doc?id=52> (describing positive results from a pilot program designed to improve the awareness of young fathers as to health and safety issues with raising young children).

fatherhood. As discussed above, much of the District Court's opinion turns on the idea that distinctions drawn within the legal system can determine the ways that particular cultural institutions are perceived by society at large. To the extent there is any truth to this idea, it is obvious that judicial endorsement of the notion that children receive no unique benefit from being raised by their biological parents, and indeed no unique benefit from even having a mother and a father, will undermine societal efforts to persuade young unmarried fathers that they have an indispensable role to play in their lives of their children. Indeed, as expert trial witness David Blankenhorn testified, the logical endpoint of the rationale reflected in findings 70-72 of the District Court is that "simply saying publicly that a child needs and deserves her father will . . . go to being viewed as simply inappropriate public speech, . . . as offensive, as divisive, as mean-spirited." Trial Tr. 2783.

This Court will of course reach its own conclusions concerning the validity of the findings in which the District Court essentially consigned the distinct concepts of fatherhood and motherhood to legal and empirical irrelevance. But no one should be naïve enough to believe that these findings, if broadly endorsed by the federal courts, will not undermine the legal, political, cultural and societal support for fatherhood and motherhood in the world beyond the courtroom walls.

III. Caution Is Appropriate When Using Social Science Data To Inform Judicial Decision-making

The foregoing discussion reflects an attempt to present to the Court pertinent social science data concerning parenting models and family structure. But caution should be used when interpreting and relying upon such data in the course of resolving a legal dispute. Social science involves assessments of averages, probabilities, and aggregate outcomes, usually in connection with complex aspects of human behavior where it is difficult to identify, let alone control for, all of the pertinent variables that might affect the outcomes under review. *See, e.g.,* Jim Manzi, *What Social Science Does – and Doesn't – Know: Our Scientific Ignorance of the Human Condition Remains Profound*, City Journal, Summer 2010. Social science cannot predict with certainty the effect of changes to complex societal institutions such as the family unit, marriage and parenthood. Indeed, the questionable track record of social science influence on the development of family law in the United States is well-established.¹⁵

This unpredictability is especially pronounced when assessing gay parenting, civil unions, and gay marriage, all of which are practices of relatively recent

¹⁵ *See, e.g.,* Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. Cal. Interdisc. L.J. 631, 674-84 (1994); Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era*, 59 U. Miami. L. Rev. 1, 81 (2004); Martha L. Fineman, *Custody Determination at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality*, 3 Can. J. Women & L. 88 (1989).

vintage. See DIX131, Nock Affidavit at 40-42; PX2878, Timothy J. Biblarz and Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. of Marriage and Family 3, 17 (2010) (“Because legal access to same-sex marriage is so new and rare, we do not yet have research that compares the children of married same-sex and different-sex couples.”). This Court should also not ignore the role of politics in this field. Two supporters of redefining marriage admit: “[T]he political stakes of this body of research are so high that the ideological ‘family values’ of scholars play a greater part than usual in how they design, conduct, and interpret their studies.” Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?* 66 American Sociology Review 159, 161 (2001) (PX1394).

In light of the inherent limitations of the social science enterprise, this Court should be particularly reluctant to accept the District Court’s cavalier dismissal of the longstanding legal and cultural recognition of married biological parenting as the family structure that on average embodies the optimal childrearing environment for the next generation of our nation’s children.

CONCLUSION

This Court, in resolving the pending appeal, should give no deference to findings 70-72 of the District Court concerning parenting models and family structure. This Court should also refuse to embrace any rationale that would contradict societal support for married biological parenthood, or that would

undermine critical legal, political and cultural support for the unique contributions that fathers and mothers make to the successful upbringing of their children.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

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I, Abram J. Pafford, certify that this brief is identical to the version submitted electronically on September 24, 2010, except that it includes the corrected page 32, which was an attachment to the Errata that was electronically filed on September 28, 2010 (Docket Nos. 111-1 and 111-2).

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