No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,
v.
KRISTIN M. PERRY, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND GAY & LESBIAN ADVOCATES & DEFENDERS IN SUPPORT OF RESPONDENTS

GARY D. BUSECK
MARY L. BONAUTO
Gay & Lesbian Advocates & Defenders
30 Winter Street, Ste. 800
Boston, MA 02108
(617) 426-1350

JON W. DAVIDSON
Counsel of Record
JENNIFER C. PIZER
Lambda Legal Defense and Education Fund, Inc.
3325 Wilshire Blvd., # 1300
Los Angeles, CA 90010
(213) 382-7600
jdavidson@lambdalegal.org

(Additional counsel on reverse page)

Counsel for Amici Curiae

(Additional Counsel for *Amici Curiae*)

HAYLEY GORENBERG
SUSAN L. SOMMER
Lambda Legal Defense and
Education Fund, Inc.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585

CAMILLA B. TAYLOR
Lambda Legal Defense and
Education Fund, Inc.
105 West Adams, Ste. 2600
Chicago, IL 60604
(312) 663-4413

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

California Authorities

Foreign Authorities

Other Authorities

INTERESTS OF *AMICI CURIAE*

Amici Curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") and Gay & Lesbian Advocates & Defenders ("GLAD") (collectively, "*Amici*") are among the nation's leading nonprofit legal organizations working to protect and advance the civil rights of lesbian, gay, bisexual, and transgender people. *Amici* submit this brief in support of Respondents.[1]

Lambda Legal was one of the counsel for the principal plaintiffs in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), the case that established the right of same-sex couples to marry under the California Constitution. Lambda Legal also was one of the counsel for the principal petitioners in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), the case in which the California Supreme Court authoritatively interpreted Proposition 8, which amended the California Constitution to strip away that right and is the subject of the instant litigation.

Lambda Legal further was co-counsel for the plaintiffs who successfully challenged an antigay state initiative in *Romer v. Evans*, 517 U.S. 620 (1996), and was counsel for the defendants who successfully challenged Texas's sodomy law in *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court's two leading sexual orientation cases.

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

In addition, GLAD was counsel in *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), and *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008), and Lambda Legal was counsel in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), respectively establishing the right of same-sex couples to marry under the Massachusetts, Connecticut, and Iowa constitutions.

Amici have drawn upon their considerable expertise concerning the issues in this case in preparing this brief in support of, and to complement, the arguments of Respondents.

SUMMARY OF THE ARGUMENT

Amici submit this brief to explain why—regardless of the level of judicial scrutiny generally applicable to laws that discriminate based on sexual orientation—Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment, and to describe how that violation harms same-sex couples and their families.

Amici agree with Respondents that Proposition 8's proponents lack Article III standing to pursue this appeal. *Amici* also strongly agree with Respondents that Proposition 8 unconstitutionally abridges lesbians' and gay men's fundamental right to marry. *Amici* further agree with Respondents that Proposition 8 should be subjected to heightened scrutiny because it discriminates based on sex.

Furthermore, as Respondents compellingly have shown, all the considerations this Court has pointed to in cases concerning other classifications demonstrate that heightened scrutiny is warranted for laws that discriminate based on sexual

orientation. Lesbians and gay men have endured a long and painful history of discrimination, which continues to this day. In addition, sexual orientation bears no relation to the ability to perform or contribute to society. Gay people remain a politically vulnerable minority that most states still fail to protect against discrimination in any context and openly treat unequally in numerous ways. And, while not essential to trigger heightened scrutiny, sexual orientation is a core, defining trait that individuals should not be required to change—even if it were within their control—in order to be treated equally. *See generally* Brief of *Amici Curiae* Leadership Conference on Civil and Human Rights, *et al.*

There are important reasons to resolve the standard of review governing laws that discriminate based on sexual orientation. Until that issue is settled, it must be re-litigated in each case and government officials remain without guidance about the standards to which they must conform. In addition, keeping the issue open signals to some that ongoing antigay discrimination requires little explanation or defense. *Amici* therefore join Respondents in urging this Court to decide that laws discriminating based on sexual orientation should be subjected to heightened scrutiny and that Proposition 8 fails that test.

This brief focuses on two additional reasons why Proposition 8 violates the federal constitution's mandate that states provide equal protection of the law. The first flows from recognition that Proposition 8 expressly amended the equal protection clause of the California Constitution to strip lesbians and gay

men—and only them—of protection against what previously was held to be unequal treatment forbidden by California's then-governing equality guarantee. By creating a gay-only exception to the state charter's promise of equal treatment, Proposition 8 required the state to provide lesbians and gay men less protection against inequality than anyone else, which literally violates the mandate of the federal Equal Protection Clause.

Second, Proposition 8 fails rational basis review in light of its authoritative interpretation by California's high court. Unlike other states' marriage bans, Proposition 8 has been construed in binding fashion through the California Supreme Court's consideration of that state's registered domestic partnership laws, its statutes and case law concerning parental obligations and rights, legislative findings about the needs of same-sex couples and their dependents, the ballot pamphlet describing Proposition 8, and the remaining requirements of the California Constitution. Based on these multiple governing elements of state law, the California Supreme Court determined that same-sex and different-sex couples remain similarly situated with respect to the state's family law goals. The court also concluded that Proposition 8 had no purpose or effect except to mark same-sex couples and their relationships as inferior. Given the state high court's definitive construction of the measure, the various arguments now offered in its defense are foreclosed as a matter of law and Proposition 8 must be found to fail rational basis review. *Amici* join in and complement the argument of Respondent City and County of San Francisco on this point.

Finally, this brief details how Proposition 8's withdrawal of lesbians' and gay men's right to marry and its re-relegation of these couples to the second-class status of domestic partnership harms them and their families.

Accordingly, if this appeal is not dismissed for lack of standing, *Amici* urge the Court to find that Proposition 8 unconstitutionally abridges the fundamental right of lesbian and gay Californians to marry and discriminates against them based on sex and sexual orientation for the reasons presented by Respondents. Alternatively, *Amici* urge the Court to find, at a minimum, that Proposition 8 denies equal protection for the reasons described below. Based on any and all of these grounds, the judgment should be affirmed.

ARGUMENT

I. PROPOSITION 8 IS UNIQUE.

Although *Amici* believe all 41 states that still deny lesbians and gay men the ability to marry violate the federal Equal Protection Clause, this Court need not address whether that is so in order to recognize Proposition 8's unconstitutionality. Likewise, although *Amici* believe this denial of equal protection is not cured by providing same-sex couples an alternative status that purports to confer the state's rights, benefits, and obligations of marriage but that marks them and their families as being in an inferior class, the Court also need not resolve whether that is necessarily the case to see that Proposition 8 is fatally defective. This case may be decided in a more limited fashion because Proposition

8 is distinctive in two ways that make its violation of equal protection particularly transparent.

Proposition 8 was a response to the California Supreme Court's ruling in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), which, among other things, held that the equal protection guarantee of Article I, section 7(a) of the California Constitution required allowing same-sex couples to marry. 183 P.3d at 435, 451-52. As the California Supreme Court held in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), Proposition 8 inserted a new Article I, section 7.5 into the California Constitution immediately after Article I, section 7, to "amend" the state constitution's previously universal promise of equal protection by crafting a gay-only exception to that guarantee when it comes to the right to marry. *Strauss*, 207 P.3d at 78 ("Proposition 8 must be understood as creating a limited exception to the state equal protection clause"); *see also id.* at 61, 63, 66, and 98.

This interpretation of the purpose and effect of Proposition 8 as amending California's constitution to limit the equality the state will provide to lesbians and gay men binds this Court. *See Rowan v. Runnels*, 46 U.S. 134, 139 (1847) (the Supreme Court "will always feel itself bound to respect the decisions of the State Courts and ... will regard them as conclusive in all cases upon the construction of their own constitution and laws"); *Romer v. Evans*, 517 U.S. 620, 626 (1996) (state supreme court's construction of amendment to its state constitution is "authoritative").

In addition to amending its charter to explicitly provide gay people less protection against discrimination than anyone else, Proposition 8 took

this step in the face of the California high court's conclusion that both same-sex and different-sex couples are similarly situated with regard to the purposes of marriage and that consigning lesbians and gay men to domestic partnerships rather than marriage stigmatizes them as second-class citizens and causes them practical problems. *See Marriage Cases*, 183 P.3d at 435, n.54 (contention that these groups are differently situated regarding purposes of marriage "clearly lacks merit"); *id.* at 401-02 (limiting same-sex couples to "a separate and distinct designation" for their relationships "may well have the effect of perpetuating [the] premise … that gay individuals and same-sex couples are in some respects 'second-class citizens' who may, under the law be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples"); *id.* at 446 ("the unfamiliarity of the term 'domestic partnership' is likely, for a considerable period of time, to pose significant difficulties and complications for same-sex couples, and perhaps most poignantly for their children").

These conclusions remain true notwithstanding Proposition 8's passage. As the California Supreme Court further authoritatively explained in *Strauss*, the "general state equal protection principles established in *Marriage Cases* are unaffected by the new section added to the California Constitution by Proposition 8"). 207 P.3d at 78; *see also id.* at 75-77, 102. Any arguments by Petitioners that the two groups are not similarly situated with regard to the purposes of marriage in California or are not stigmatized by the separate status it re-imposed accordingly are precluded.

The California Legislature similarly recognized in two bills passed prior to the decision in *Marriage Cases* that the state's interests in marriage are the same "regardless of the gender or sexual orientation of the partners," and that limiting same-sex couples to domestic partnerships rather than allowing them to marry stigmatizes and harms those couples and their families. Assem. B. 849 §§ 3(f), 3(i), and 3(j), 2005-2006 Reg. Sess. (Cal. 2005); Assem. B. 43 §§ 2(j), 2(k), and 2(l), 2007-2008 Reg. Sess. (Cal. 2007).[2] These legislative findings that same-sex couples are similarly situated to different-sex couples with regard to the purposes of California's marriage laws are entitled to deference by this Court. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("the initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the states.").

Both of these aspects of Proposition 8 are unique. No other state has amended its constitution explicitly to exempt itself from the obligation to provide equal treatment to lesbians and gay men with regard to the ability to marry *after* concluding that denying same-sex couples that right violated the state's equality guarantee. Likewise, no other state has withdrawn the right to marry and re-consigned same-sex couples to a parallel but distinct institution notwithstanding the conclusions of its judiciary and legislature that same-sex and different-sex couples are similarly situated with respect to the purposes of marriage and that relegating same-sex couples to such a different

---

[2] While both bills subsequently were vetoed, the Governor said he took this action only because he wanted the issue decided by the courts. *Marriage Cases*, 183 P.2d at 410, n.17.

status would stigmatize and harm them and their families.

As explained below, both of these aspects of Proposition 8 render it patently unconstitutional under fundamental tenets of the federal guarantee of equal protection.

II. PROPOSITION 8 DENIES LESBIANS AND GAY MEN EQUAL PROTECTION OF THE LAWS IN THE MOST LITERAL SENSE.

Although the standard of review is typically a threshold consideration in cases challenging governmental classifications, this is one of those rare instances where—as in *Romer v. Evans*—the level of scrutiny does not matter because the challenged law violates the very premise of the Equal Protection Clause.

In *Romer*, this Court struck down an amendment to the Colorado Constitution that prohibited all branches of government within the state from providing antidiscrimination protections to lesbian, gay, and bisexual individuals—and them alone. *Romer*, 517 U.S. at 623-24. The Court explained that the measure denied equal protection of the laws "in the most literal sense," *id.* at 633, by violating the central principle of the "Constitution's guarantee of equal protection … that government and each of its parts remain open on impartial terms to all who seek its assistance" and by making it "more difficult for one group of citizens than for all others to seek aid from the government." *Id.*; *see also id.* at 635 (describing how the amendment failed this test "in

addition" to the conventional inquiry known as "rational basis" review).

The Colorado constitutional amendment at issue in *Romer* literally denied gay people equal protection by barring the government from having laws to protect them and them alone against discrimination. In a similar vein, Proposition 8's creation of a gay-only exception to the state's equal protection clause with respect to marriage, *see Strauss*, 207 P.3d at 78, denies gay people equal protection in the most literal sense by barring the government from protecting them and them alone against what the state has recognized as discrimination with regard to the ability to marry. After Proposition 8's passage, racial and ethnic minorities, religious minorities, people with disabilities, seniors, left-handed people, and even persons convicted of murdering a prior spouse remain protected under California's equal protection clause against denial of equal access to the institution of marriage. Only gay people are denied that protection.

Indeed, Proposition 8 could be considered to make an even more fundamental change than the amendment struck down in *Romer*. That amendment repealed and barred *statutory* (and perhaps common law) protections of gay people against discrimination in employment, housing, education, public accommodations, and health and welfare services. *Romer*, 517 U.S. at 623, 628-29. Proposition 8, by contrast, repealed and bars state *constitutional* protection of equal status, respect, and dignity for same-sex couples and their families. By making this change, Proposition 8 transformed the California Constitution's equal protection clause

itself into a clause that literally mandates *unequal* protection.

Proposition 8 thus did not just overturn the injunction affirmed in *Marriage Cases* that California stop denying same-sex couples the right to marry. Instead, it deprived lesbians and gay men of any way to seek relief from their inequality with regard to the "most fundamental of relationships," *Marriage Cases*, 183 P.3d at 445, from any branch of state government. Just as in *Romer*, this bar transgressed the federal Equal Protection Clause's central tenet "that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer*, 517 U.S. at 633.

In other words, rather than providing equal protection to all its citizens—as required by the Fourteenth Amendment—Proposition 8 mandated that California deny one group of people even-handed treatment. This Court's conclusion in *Reitman v. Mulkey*, 387 U.S. 369 (1967), is equally true about Proposition 8: "Here we are dealing with a provision which does not just repeal an existing law," but rather one that—in both Romer and the instant case—made "discriminat[ion] … one of the basic policies of the State." *Id.* at 380-81. Such a literal violation of the Equal Protection Clause is unconstitutional regardless of the level of scrutiny applicable to Proposition 8.

III. PROPOSITION 8 ALSO FAILS RATIONAL BASIS REVIEW.

Contrary to the arguments of Petitioners and their *amici*, this Court's precedents make clear that rational basis review provides a real and meaningful

check on the majority's use of law to deny historically targeted groups advantages it grants itself, particularly when significant rights or relationships are at stake. Examining Proposition 8's context—including the California Supreme Court's holdings about the objective and effect of the measure—establishes that it fails rational basis review regardless of whether the marriage bars in other states do as well.

A. Rational Basis Review is Attuned to Context.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne*, 473 U.S. at 439; *Plyler v. Doe*, 457 U.S. at 216; *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (equal protection prevents "governmental decision-makers from treating differently persons who are in all relevant respects alike"). In determining whether a law violates this fundamental mandate, federal courts examine the law in terms of its "historical context and conditions existing prior to its enactment," its "immediate objective," and its "ultimate effect," giving careful consideration to state courts' views about the measure's "purpose, scope, and operative effect." *Reitman*, 387 U.S. at 373-74.

When examining under rational basis review the constitutionality of laws that treat people differently with regard to their personal relationships and how they exercise liberty interests, this Court has not reflexively deferred to legislative choices as it has regarding lines drawn among classes of persons in economic and regulatory contexts. *See*, *e.g.*,

Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972) (closely analyzing and ultimately rejecting under rational basis review rationales offered for Massachusetts' ban on purchase of contraceptives by unmarried individuals); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17, 120 (1996) (employing "close consideration," on rational basis review, to overturn state requirement that indigent civil appellants prepay certain costs before appealing a termination of parental rights because of the "character and intensity of the interest at stake"); *Heller v. Doe*, 509 U.S. 312, 321-30 (1993) (extensively considering and ultimately upholding on rational basis review reasons offered for different standards of proof for involuntary commitment of mentally ill and developmentally disabled persons); *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 533-38 (1973) (carefully analyzing and ultimately rejecting on rational basis review grounds offered for federal ban on food stamps for households containing multiple unrelated adults); *compare FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (upholding economic regulation against equal protection challenge where "any reasonably conceivable state of facts [exists] that could provide a rational basis for the classification").

The Court also applies this more wary approach within rational basis review where laws single out and selectively burden disfavored groups. *See Romer*, 517 U.S. at 633 ("By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."); *see also Kelo v. City of New London*, 545 U.S.

469, 490-91 (2005) (Kennedy, J., concurring) (distinguishing between analysis applied to "economic regulation" and that applied to classifications "intended to injure a particular class of private parties"); *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (noting how the Court's precedents have applied rational basis review more carefully "[w]hen a law exhibits such a desire to harm a politically unpopular group"). After all, it is only "absent some reason to infer antipathy" that it can be presumed that the "democratic process" will correct "improvident decisions … and that judicial intervention is generally unwarranted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

When applying the rational basis test in these situations, courts go beyond the mere labels used for the purposes said to be advanced by law's classification to make sure the classification drawn in fact aims to advance a legitimate state interest. In so doing, the Court has looked as well to traditional sources of legislative intent to "illuminate the purposes" behind a law. *See Moreno*, 413 U.S. at 534 (considering legislative history of statute differentiating between households with related and unrelated persons); *see also Cleburne*, 473 U.S. at 447-50 (reviewing city council history); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.") (internal citations omitted).

In addition, particularly in these settings, any proffered explanation for how treating one group of individuals worse than others advances a legitimate government end must "find some footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321; *see, e.g., Moreno*, 413 U.S. at 533-38 (carefully considering whether exclusion of households with unrelated persons from food stamp eligibility truly could be thought to prevent fraud); *Heller*, 509 U.S. at 321-30 (taking pains to consider whether differences between mentally ill and developmentally disabled persons could justify different standards of proof in commitment proceedings).

B. Proposition 8's Termination of Same-Sex Couples' Ability to Marry in California and Its Relegation of Those Couples Back to an Inferior Status Cannot Survive Rational Basis Review.

The Ninth Circuit correctly ruled that any justification tendered for Proposition 8 must explain why it did what it did. Pet.App.53a, 74a. As discussed above, this explanation must take into account the California Supreme Court's authoritative construction of Proposition 8 in *Strauss*. That means any purported justification must explain why Proposition 8 withdrew marriage's full dignity and preferred status from same-sex couples even though it had been held both that (i) same-sex and different-sex couples are similarly situated with regard to marriage's purposes in California and (ii) the status to which Proposition 8 re-consigned same-sex couples and their families was harmfully inferior. *See*

Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966) ("[t]he Equal Protection Clause requires more of a state law" than affirmation of the rule it established; it requires justification for why a disfavored class has been "singled out"); *see also Schweiker v. Wilson*, 450 U.S 221, 230 (1981) (a law must classify "the persons it affects" in a manner that rationally furthers legitimate government ends).[3]

None of the rationales advanced by Petitioners meet this test.

1. As the Ninth Circuit correctly ruled, Proposition 8 cannot be justified based on the argument that encouraging different-sex couples to marry will lead to more children born to those couples being raised within marriage. That goal was equally well served before Proposition 8 passed. *See* Pet.App.71a-75a; *see also* Pet.App.245a. Ending same-sex couples' ability to marry does not rationally further that goal, nor does limiting same-sex couples and their children to what had been held to be a lesser, parallel status.

---

[3] *Johnson v. Robison*, 415 U.S. 361 (1974), is not to the contrary. That case did not radically reformulate rational basis analysis in the way Petitioners suggest. Pet.Br. at 8, 40. Rather than merely asking whether certain education benefits help military veterans and stopping there, *Johnson* carefully analyzed whether conscientious objectors were in fact similar situated to military veterans with regard to those benefits, and found they were not. 415 U.S. at 382. But, here, because same-sex couples *have* conclusively been found to be similarly situated to different-sex couples with regard to marriage in California, rational basis review requires explanation of why Proposition 8 eliminates their right alone to marry.

2. Proposition 8 likewise cannot be justified by any reasons relating to the notion that having two parents of different sexes is better than having two parents of the same sex. *See* Pet.App.76a. No child will end up with a different set of parents as a result of Proposition 8 again barring same-sex couples from being able to marry in California. Moreover, Proposition 8 did nothing to change California law providing precisely the same substantive parenting rights and obligations under law to domestic partners and spouses, Cal. Fam. Code §§ 297.5(d), 9000(b), and otherwise treating parents in same-sex relationships identically to parents in different-sex relationships. *See*, *e.g.*, *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003); *Charisma R. v. Kristina S.*, 44 Cal. Rptr. 3d 332 (Cal. Ct. App. 2006); Cal. Welf. & Inst. Code § 16013(a).

3. Indeed, because Proposition 8 did not change same-sex couples' legal ability to obtain all the substantive rights and obligations of marriage under California law by entering a domestic partnership, *Strauss*, 207 P.3d at 76, it cannot be justified by *any* purported justification related to those rights and obligations.

As a result, like the state constitutional amendment invalidated in *Romer*, Proposition 8's withdrawal of lesbian and gay people's right to marry and relegation of them back to a status that was established as marking them and their families as unequal in "dignity, respect, and stature," *see Marriage Cases*, 183 P.3d at 43, accomplished nothing other than to "singl[e] out a certain class of citizens for disfavored legal status." *Romer*, 517 U.S.

at 633. *See* Pet.App.250a ("Proposition 8 reserves the most socially valued form of relationship (marriage) for opposite sex couples."); Pet.App.260a ("Proposition 8 singles out gays and lesbians and legitimates their unequal treatment."); Pet.App.316(a) ("The evidence shows that Proposition 8 does nothing more than to enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples."); *see also* Pet.App.84a ("Proposition 8's only effect … was to withdraw from gays and lesbians the right to employ the designation of 'marriage' to describe their committed relationships and thus to deprive them of a societal status that affords dignity to those relationships.").

By accomplishing nothing beyond the intentional re-imposition of a "mark of second-class citizenship," *Marriage Cases*, 183 P.3d at 445, Proposition 8 violates the fundamental equal protection principle that "the Constitution neither knows nor tolerates classes among citizens." *Romer*, 517 U.S. at 623, quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); *see also Cruzan v. Mo. Dep't of Health,* 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (the Equal Protection Clause "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

Laws like Proposition 8 that subordinate one group of people to everyone else to create a social underclass are particularly at odds with the Fourteenth Amendment. In introducing the Amendment on the Senate floor, Sen. Jacob Howard explained that the core purpose of the Equal Protection Clause was to abolish "all class legislation

in the States." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). This Court's earliest interpretations of the clause likewise recognized that it provides protection against laws that discriminate in ways that imply "inferiority in civil society." *Stauder v. West Virginia*, 100 U.S. 303, 308 (1880). That principle has been central to many of the Court's leading equal protection precedents. *See*, *e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (finding segregated schools unconstitutional not only because of material inequalities, but because placing children in separate schools based on their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"); *Plyler*, 457 U.S. at 213 ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."); *United States v. Virginia*, 518 U.S. 515, 534 (1996) ("classifications may not be used … to create or perpetuate the legal, social and economic inferiority of women.").

Proposition 8's established purpose and effect of declaring the relationships and families of lesbians and of gay men unequal to those of heterosexuals also contravenes a related cardinal precept of the Equal Protection Clause: government cannot treat groups of people differently simply to designate them as unequal. *See*, *e.g.*, *Romer*, 517 U.S. at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."); *id.* at 633 (requiring some "independent" government objective that the differential treatment serves, to "ensure that

classifications are not drawn for the [improper] purpose of [simply] disadvantaging the group burdened by the law") (internal citation omitted); *Moreno*, 413 U.S. at 534-35 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a legitimate government interest. As a result, '[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.'") (quoting district court opinion; brackets in original); *see also Cleburne*, 473 U.S. at 446-49.

There is only one explanation for Proposition 8's enactment: Those who enacted Proposition 8 did not want the relationships formed by lesbians and by gay men to be considered as worthy of respect, and to have the same stature, as relationships of different-sex couples. As the ballot arguments supporting Proposition 8 confirm, and the District Court found, Proposition 8 limited same-sex couples to the lesser status of domestic partnership rather than marriage in order to end the impression—in the words of the official ballot pamphlet—that same-sex relationships are "okay" and there is "no difference" between same-sex relationships and different-sex relationships. California Secretary of State, *California General Election, Tuesday, November 4, 2008, Official Voter Information Guide, Proposition 8*, http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm; *see* Pet. App.312a-313a ("Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples"); Pet.App.314a ("Proposition 8 enacts a moral view

that there is something 'wrong' with same-sex couples"); *see also* Pet.App.92a ("Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of their relationships, by taking away the official designation of 'marriage,' with its societally recognized status.").

This is nothing more than a "classification of persons undertaken for its own sake," which is "something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635. Under our system of government, laws cannot be adopted with the intent or effect of simply conveying that some people are not the equal of others. *Id.* at 623, 633-34; *see also United States v. Virginia*, 518 U.S. at 557; *Moreno*, 413 U.S. at 534; *Brown v. Bd. of Educ.*, 347 U.S. at 494. Such laws, by definition, do not advance any legitimate governmental objective and fail any standard of review. Thus, independent of whether other state laws barring marriage also are unconstitutional (as *Amici* believe) and whether heightened scrutiny should be applied to Proposition 8 (as *Amici* also believe), Proposition 8 must be found to violate the Equal Protection Clause.

IV. BY ENDING THE RIGHT OF LESBIAN AND GAY PEOPLE TO MARRY AND ENSHRINING THEM AS A LESSER CLASS IN CALIFORNIA'S CONSTITUTION, PROPOSITION 8 INFLICTS PERNICIOUS HARMS.

A. The California Supreme Court Has Determined That Limiting Same-Sex Couples to Registered Domestic Partnership Harms Them and Their Families.

A state constitutional provision retracting same-sex couples' right to marry while otherwise keeping them subject to the same family law rules inflicts a profound injury that cannot be rectified other than by restoring equal access to marriage. Petitioners attempt to rationalize Proposition 8's harms by pointing out that California still offers lesbian and gay couples through domestic partnership registration "*virtually* all of the benefits and responsibilities traditionally associated with marriage." Pet.Br.57 (emphasis added). It is true that domestic partners now may file their state income tax returns jointly, subject themselves to the state's community property rules, and change either or both of their names through the registration process. *Marriage Cases*, 183 P.3d at 414-16; Cal. Fam. Code § 297.5. But the Fourteenth Amendment does not guarantee just "virtual" equality. And, most pertinently here, this Court does not recognize marriage merely as a handy packet of rights and rules. It is far more.

For two people who have found joy in each other, marriage is a definitive expression of love, devotion, and dedication. It is a singular institution through which each of us may demonstrate publicly how deeply we cherish the one other we have chosen. The act of joining in marriage often serves as a rite of passage from one phase of life to the next. For many, the rituals convey core beliefs and shared values that join a couple with their communities. Our marital status shapes how we are perceived by neighbors, colleagues, and our government, as well as by our relatives, children, and even ourselves. Eliminating the right to marry forecloses what can be life's most rewarding of personal decisions and most effective way to show one's beloved that she or he is uniquely precious and utterly irreplaceable. Proposition 8 deliberately took away all that marriage is and means only from lesbians and gay men.

Any categorical exclusion from marriage indelibly marks gay people as second-class. It suffocates their own dreams and declares that the families they build are inferior and unworthy of inclusion in family networks in the usual way. By withdrawing the right to marry and intentionally relegating same-sex couples back to a second-rate status, however, Proposition 8 sends a particularly cutting message.

Following Proposition 8's adoption, California continues to recognize that lesbian and gay couples and their children have the same needs as heterosexual couples and their children, and continues to allow same-sex couples to take on the same substantive legal rights and obligations as married couples. But, because they have been deemed unworthy, same-sex couples no longer may

enter that family law system through the front door. Instead of being ushered in with a state-approved ceremony honoring their solemn commitment, they again have been directed to the back door—the signing of a form before a notary and mailing it to Sacramento. *See* Cal. Fam. Code § 298(c). Thereafter, each time they are asked their marital status, they must confront and reveal the badge of inferiority with which Proposition 8 has deliberately marked them.

Notwithstanding the California Supreme Court's authoritative decisions about this system, Respondents maintain that same-sex couples are different in relevant ways from different-sex couples, and that Proposition 8's re-segregation of these groups therefore does not harm lesbians and gay men. Pet.Br.63. But in the state marriage litigation, the California Supreme Court considered the precise arguments Petitioners make now to this Court and concluded that, given California law, these arguments "lack[] merit." *Marriage Cases*, 183 P.3d at 432-33.

California's high court explained that its conclusion that lesbians and gay men must be permitted to marry did not imply a position on the importance of biological connections between parents and children. *Id.* at 433. Instead, the conclusion about marriage "simply confirms that a stable two-parent family relationship, supported by the state's official recognition and protection, is *equally as important* for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples

(whether they are biological parents or adoptive parents)." *Id.* (emphasis added).

Withdrawal of that equal recognition hurts those families for no valid reason because, as explained above, Proposition 8 did not change the state's interest in the welfare of all children within its borders, whether they came to their parents through sexual intercourse, with medical assistance, via adoption, or in a new blending of families after divorce. *See Strauss,* 207 P.3d at 102 (authoritatively concluding that, notwithstanding Proposition 8, "same-sex couples continue to enjoy the same substantive core benefits … as those enjoyed by opposite-sex couples – including … to raise children in that family"). Thus, even if Petitioners' arguments about the government's purported interests might draw consideration in other states, they have been entirely taken off the table in California.

Petitioners also contend that Proposition 8 cannot be seen to demean or dishonor lesbian and gay people unless one imputes to California voters ill will and an intention to inflict such harm. Pet.Br.64. Here again, the California Supreme Court already has rejected this notion as a matter of state law in the context of the earlier litigation. *Marriage Cases*, 183 P.3d at 451-52. That court observed, "if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or

appreciated by those not directly harmed by those practices or traditions." *Id.*

When Petitioners assert that Proposition 8 cannot be harmful because those who approved it acted in "good faith," Pet.Br. 64, they misperceive the constitutional guarantee of equality. Even if state lawmakers were to believe in good faith, for example, that women should study home economics rather than science or teach kindergarten rather than law school, the Constitution would not permit such restriction of individual opportunities and choices. *Accord United States v. Virginia*, 518 U.S. at 534; *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 725 and fn.10 (1982). The same is true regarding even a good faith belief that a woman should marry a man, not another woman.

The California Supreme Court confirmed as much, ruling in *Marriage Cases* that—regardless of the subjective good or bad faith of those who passed the prior marriage ban—the class system imposed denied lesbians and gay men "the same dignity, respect, and stature as that accorded to all other officially recognized family relationships." 183 P.3d at 434. In addition, the state high court found that relegating same-sex couples and their children to a separate status exposed them "to significant [practical] difficulties and complications," *id.* at 446, and "appreciable harm," *id.* at 401. This is the very class system Proposition 8 reinstituted.

B. Plaintiffs' Trial Testimony Showed How Proposition 8's Reinstated Caste System Inflicts Harm.

The testimony of plaintiffs and others in this case poignantly illustrated how Proposition 8 adversely affects them. For example, Respondent Kris Perry explained that Proposition 8 denied her recognition, respect, and support when it eliminated her freedom to marry the woman she loves because it placed beyond her reach a core part of being married: "you are honored and respected by your family. Your children know what your relationship is. And when you leave your home and you go to work or you go out in the world, people know what your relationship means." J.A.359-60.

Similarly, Respondent Paul Katami described the emotional impact of being told, "Well, marriage is not for you people anyway." J.A.344-45. In his words, "regardless of how proud you are … you still feel a bit ashamed. And I shouldn't have to feel ashamed. Being gay doesn't make me any less American. It doesn't change my patriotism. It doesn't change the fact that I pay my taxes, and I own a home, and I want to start a family. But, in that moment, being gay means I'm unequal. I'm less than. I am undesirable. I have been relegated to a corner." *Id.*

Respondent Sandy Stier emphasized her concerns about Proposition 8's impact on their children, explaining, "I want [them] to feel proud of us. I don't want them to feel worried about us or in any way, like, our family isn't good enough." J.A.390. If Proposition 8's withdrawal of her right to marry were lifted, she would worry less about whether they feel "shame or [a] sense of not belonging." J.A.392-93.

Respondent Kris Perry put it pointedly, "There's something so humiliating about everybody knowing that you want to make that decision and you don't get [to] do that, you know, it's hard to face the people at work and the people even here right now. And many of you have this, but I don't." J.A.377.

As Respondent Jeff Zarillo explained, language matters. If he could use the nomenclature of marriage, it would reduce the "awkwardness" he and Paul Katami experience in daily life when others are confused about whether their "partnership" is personal or professional. In his words, "It would just be a lot easier to describe the situation … by being able to say, 'My husband and I are here to …open a bank account.'" J.A.377.

Witness Helen Zia recounted that the language of marriage has been especially important to her immigrant mother and her mother's Chinese-language-speaking friends. When she and her wife were just domestic partners, her mother lacked words to explain their relationship. But after Zia married, "it changed. And she would say, … 'This is my daughter-in-law.' And they would get it. And whether they approved or disapproved, it didn't matter. They got it." J.A.656.

The above testimony illustrates how Proposition 8 wounded same-sex couples by restricting them from the one universally understood and accepted status of marriage. Petitioners' claim that doing so serves a public interest in preventing negative consequences from other people's unplanned pregnancies defies credulity. The state would inflict a somewhat similar injury were it to inform seniors that they cease to be eligible to marry once they exceed their childbearing

years, after which they may only become "domestically partnered." But, Proposition 8's withdrawal of equal treatment from lesbians and gay men and its message that their relationships no longer have equal dignity was especially hurtful due to the history of discrimination against those in the lesbian and gay community, the antigay messages they still face regularly from some in society, and the fact that—for them and only them—Proposition 8 permanently re-closed the door to marriage for their entire lives.

Following trial in this case, the District Court made findings similar to those of the California Supreme Court that excluding same-sex couples from marriage is impermissibly stigmatizing. *See* Pet.App.243a ("the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships"); Pet.App.248a ("Proposition 8 places the force of law behind stigmas against gays and lesbians"); *see also* Pet.App.240a, 251a, 260a-263a. The Ninth Circuit agreed, concluding that, "By withdrawing the availability of the recognized designation of 'marriage," Proposition 8 enacted nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class." Pet.App.88a.

C. Social Science Research and Government Tribunals Have Determined That Exclusion From Marriage Harms Lesbians and Gay Men.

These judicial determinations are consistent with social science research and the findings of multiple

government tribunals that have considered the stigmatizing effects and other harms of excluding lesbian and gay couples from marriage. To begin with, social science research confirms, on the one hand, that antigay social stigma such as that caused by Proposition 8 has negative health consequences and, on the other hand, that equal access to marriage (which Proposition 8 precludes) has positive effects for same-sex couples. These negative and positive effects matter not only to gay people and their families but also to their employers and the vitality of the community as a whole.

As a general matter, and as Respondents' expert Dr. Ilan Meyer testified, laws that discriminate against lesbian, gay, and bisexual ("LGB") persons cause social stigma with negative health effects. J.A.526-69. *See also* Mark Hatzenbuehler, *Social Factors as Determinants of Mental Health Disparities in LGB Populations: Implications for Public Policy*, 4 Social Issues & Policy Rev. 31-62 (2010) (discussing why antigay laws and social policies are associated with negative psychological outcomes); Mark Hatzenbuehler, *et al., State-level Policies and Psychiatric Morbidity in LGB Populations*, 99 Am. J. Pub. Health 2275–81 (2009). The stress that comes from social exclusion and stigma can lead to serious mental health problems, including depression, anxiety, substance use disorders, and suicide attempts. J.A.562-67; Ilan Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, Psychological Bulletin, Vol. 129, No. 5, 674-97 (2003); Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among*

Lesbian, Gay, and Bisexual Adults in the United States, 19 Am. J. Pub. Health 1869-76 (2001); Ilan Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. of Health & Soc. Behav. 38 (1995).

Exclusion of same-sex couples from marriage in particular is correlated with negative health consequences for lesbian and gay people. Gregory Herek, *Legal Recognition of Same-Sex Relationships in the United States, A Social Science Perspective*, 61 Am. Psych. 607, 615-617 (Sept. 2006) (surveying studies); Gilbert Herdt & Robert Kertzner, *I Do, but I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States*, Sexuality Research & Soc. Policy, Vol. 3, No. 1, 33-49 (March 2006). Moreover, antigay political campaigns and public debates concerning whether same-sex couples should be able to marry also appear to have demonstrable adverse health effects. Sharon Rostosky, *et al.*, *Marriage amendments and psychological distress in lesbian, gay and bisexual (LGB) adults*, J. of Counseling Psych., Vol. 56, No. 1, 56-66 (Jan. 2009) (respondents in national survey of LGB adults from states in which bans on marriage for same-sex couples were imposed by popular vote reported highest levels of minority stress, with increased stress correlated to negative campaigning). *See also* Gregory Herek, *Anti-equality marriage amendments and sexual stigma,* 67 J. of Social Issues 413-26 (2011) (explaining stigmatizing effects of marriage bans and exacerbating effects of stigma and stress caused by antigay campaigns); Glenda Russell, *Voted out: The psychological consequences of anti-gay politics* (NYU Press, 2000).

Based on research such as this, the major medical and mental health organizations in the United States have called for ending the exclusion of same-sex couples from marriage as a key step to reduce antigay stigma and related health disparities. *See, e.g.*, American Medical Association, *H-65.973 Health Care Disparities in Same-Sex Partner Households*, https://ssl3.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fresources%2fdoc%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-65.973.HTM; American Psychiatric Association, *Position Statement on Support of Legal Recognition of Same-Sex Civil Marriage* (2005), http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2005_SameSexMarriage.pdf; American Psychological Association, *Resolution on marriage equality for same-sex couples* (2011), http://www. apa.org/about/policy/same-sex.pdf.

An emerging, consistent body of research confirms that lesbian, gay and bisexual people experience positive mental health effects when in legally recognized relationships. Ellen Riggle, *et al., Psychological Distress, Well-Being, and Legal Recognition in Same-Sex Couple Relationships*, 24 J. of Family Psych. 82-86 (2010) (survey of LGB people finding those with a legal status reported less stress and internalized homophobia, fewer depressive symptoms, and more meaning in life than those simply in committed relationships). When they can marry, same-sex couples gain increased support from their families and friends and achieve greater commitment to each other. M.V.L. Badgett, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*, J. Social Issues,

Vol. 67, No. 2, 316-334 (2011). For similar reasons, adolescents and young adults with LGB parents report that they want marriage available to same-sex couples to reduce harms from the lack of both symbolic and legal benefits. Abbie Goldberg & Katherine Kuvalanka, *Marriage (In)equality: The Perspectives of Adolescents and Emerging Adults With Lesbian, Gay, and Bisexual Parents*, 74 J. of Marriage & Family 34-52 (Feb. 2012).

Finally, being married appears to boost emotional health to a significantly greater extent than being in a legally recognized domestic partnership or civil union. Dr. Richard Wight of UCLA's Fielding School of Public Health saw this correlation in his study of older gay men. Richard Wight, *et al.*, *Stress and Mental Health Among Midlife and Older Gay-Identified Men*, 102 Am. J. Pub. Health 503 (March 2012); *see also* M.V.L. Badgett, *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* 57-63 (NYU Press, 2009) (couples in the Netherlands—where both marriage and registered partnership have been available to same-sex couples for longest time anywhere—see partnership as less valuable because it lacks rich social and emotional meaning of marriage, sounds like mere business arrangement, and is perceived as marker of second-class citizenship; studies in France, Sweden, and U.S. report similar findings).[4]

---

[4] Professor Badgett and her colleagues analyzed how same-sex couples in the United States have responded to the various options states now offer for formalizing their legal status. Data provided by government bodies in states that allow same-sex couples to marry, enter a civil union, or register as domestic

In the United States, government bodies in multiple states have investigated whether it is possible to provide equal treatment to same-sex couples through a separate family status distinct from marriage that entails the same legal protections, rights, and obligations. In Hawaii, Vermont, and New Jersey, commissions charged to study this question solicited evidence, held hearings, and all concluded that alternate, non-marriage statuses do not provide equality in form or practice and the only way to provide same-sex couples equal treatment is to provide equal access to marriage. *See* Hawaii Commission on Sexual Orientation and the Law, Chapter 4, *Findings and Recommendations* (Dec. 1995), http://hawaii.gov/lrb/rpts95/sol/soldoc.html; N.J. Civ. Union Rev. Comm., *The Legal, Medical, Economic, & Social Consequences of New Jersey's Civil Union Law* 27 (Dec. 10, 2008), http://www.state.nj.us/lps/dcr/downloads/CURC-Final-Report-.pdf; Office of Leg. Council, *Report of the Vermont Commission on Family Recognition and Protection* (Apr. 21, 2008), http://hrc.vermont.gov/sites/hrc/files/pdfs/ss%20marriage/VCFRP%20report%20and%20appendices.pdf.

Like these official commissions, courts of multiple states have considered these same questions and

---

partners show that same-sex couples avail themselves of marriage at a notably higher rate (30 percent of residents on average in the first year) than they enter the lesser statuses (18 percent on average in the first year), even when the legal protections are comparable. M.V.L. Badgett & Jody Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States*, 1-2, 10-15 (*Nov. 2011),* http://williamsinstitute.law.ucla.edu/headlines/latest-data-married-registered-same-sex-couples.

concluded, as did the California Supreme Court, that offering a separate status for same-sex couples instead of marriage only furthers the stigmatized status of that excluded group. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 417 (Conn. 2008); *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569-70 (Mass. 2004).[5]

The findings of these courts and administrative tribunals of other states, mental health and other social science researchers, the state marriage litigation in California, and the lower court decisions in this case all point to a conclusion made plain by this Court's equality precedents: Proposition 8 did not impose a trivial semantic parsing when it eliminated marriage for lesbians and gay men. It relegated this long disfavored group again to a subordinate caste. It declared them "less than" as

---

[5] The courts of our neighbors to the north and south both have reached the same conclusion. The Mexican Supreme Court ruled on February 18, 2013 that same-sex couples are guaranteed an equal right to marry under that country's constitution and an alternate status for them is insufficient. The court cited with approval *Loving v. Virginia*, 388 U.S. 1 (1967), *Brown v. Board of Education*, 347 U.S. 483 (1954), and the Ninth Circuit's decision in this case, and specifically noted the error represented by *Plessy v. Ferguson*, 163 U.S. 537 (1896). Amparo en Revisión 581/2012, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], pp. 41-48 and n. 35, Dec. 5, 2012 (Mex.), http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=143969. The Canadian courts held to the same effect. *See, e.g., Halpern v. Canada* (2003), 65 O.R.3d 161 (Can. Ont. C.A.); *EGALE Canada, Inc. v. Canada* (2003), 225 D.L.R.4th 472 (Can. B.C. C.A.); *Hendricks v. Quebec* (2002), R.J.Q. 2506 (Can. Que. Sup. Ct.). The Canadian Parliament approved this principle thereafter. Civil Marriage Act, S.C. 2005, c. 33 (Can).

individuals and their relationships unworthy of equal respect. And it enshrined this demeaning message in the state's charter. In so doing, a small majority of voters deliberately ended for lesbian and gay Californians their too-brief taste of inclusion and equality. By any standard of review, Proposition 8 violates the U.S. Constitution.

CONCLUSION

The pre-Proposition 8 history and authoritative pre- and post-ballot decisions of the California Supreme Court establish that there are no open legal questions about the constitutional position of the state's lesbian and gay citizens. Given the particular circumstances of the state, there was no more cause to re-label same-sex couples as only "registered domestic partners" instead of spouses than there would be to label those among them raising children "registered domestic caregivers" instead of parents, or to call the emotion that binds them into families "certified nurturing" instead of love.

In contrast with *Romer*, where there were questions of motive and the Court had to infer intent from the irrationality of all the proffered state interests, the California legislature and courts already have answered all the pertinent legal questions: same- and different-sex couples are similarly situated; limiting same-sex couples to the separate, inferior family status of domestic partnership inflicts significant harm; and there is no legitimate—let alone important—reason for what Proposition 8 does. Despite all this, the majority voted to prohibit the state from continuing to provide

equal protection with regard to marriage to those who form same-sex relationships.

Amending California's equal protection clause to eliminate the state's otherwise universal guarantee of equality with respect to marriage only for lesbians and gay men, and withdrawing only their access to the courts and legislature to seek it again, literally violates the Fourteenth Amendment's mandate that states provide *all* people equal protection of the laws. Moreover, Proposition 8 clearly fails equal protection rational basis review. Proposition 8 is unconstitutional for these reasons in addition to and independent of its violation of the fundamental right to marry and its failure to satisfy the heightened scrutiny that properly should be applied to it. The decision below should therefore be affirmed.

Respectfully submitted,

GARY D. BUSECK
MARY L. BONAUTO
Gay & Lesbian Advocates & Defenders
30 Winter Street, Ste. 800
Boston, MA 02108
(617) 426-1350

HAYLEY GORENBERG
SUSAN L. SOMMER
Lambda Legal Defense and Education Fund, Inc.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585

JON W. DAVIDSON
Counsel of Record
JENNIFER C. PIZER
Lambda Legal Defense and Education Fund, Inc.
3325 Wilshire Blvd., # 1300
Los Angeles, CA 90010
(213) 382-7600
jdavidson@lambdalegal.org

CAMILLA B. TAYLOR
Lambda Legal Defense and Education Fund, Inc.
105 West Adams, Ste. 2600
Chicago, IL 60604
(312) 663-4413

Attorneys for Amici Curiae

February 28, 2013