

No. 10-16696

**In the United States Court of Appeals
For the Ninth Circuit**

**KRISTIN M. PERRY, *ET AL.*, Plaintiffs-Appellees,
CITY AND COUNTY OF SAN FRANCISCO, Plaintiff-Intervenor-Appellee**

v.

**ARNOLD SCHWARZENEGGER, *ET AL.*, Defendants
PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *ET AL.*,
Defendants-Intervenors-Appellants.**

*On Appeal from the United States District Court for the Northern District of
California, Case No. 09-02292 VRW
The Honorable Vaughn R. Walker, United States District Judge*

**BRIEF OF *AMICI CURIAE* BAY AREA LAWYERS FOR
INDIVIDUAL FREEDOM (“BALIF”), *ET AL.*
IN SUPPORT OF PLAINTIFFS-APPELLEES
*Supporting Affirmance***

Jerome C. Roth
Michelle Friedland
Mark R. Conrad
Miriam L. Seifter
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105-2907
Telephone: 415 512-4000
Facsimile: 415 512-4077
Attorneys for *Amici Curiae* BALIF, *et al.*

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	vii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. CLASSIFICATIONS THAT SERVE ONLY TO DISADVANTAGE THE BURDENED GROUP FAIL RATIONAL BASIS REVIEW.....	3
II. PROPOSITION 8 ESTABLISHES AN UNEQUAL, TWO-TIERED REGIME AND HARMS GAY AND LESBIAN INDIVIDUALS	4
A. The Legalistic Designation of Domestic Partnership Is Patently Inferior to the Revered Institution of Marriage.....	4
1. Marriage Is a Uniquely Revered Institution in American Society.....	5
2. Domestic Partnership Is a Legalistic Mechanism That Lacks the Significance, Stability, and Meaning of Marriage	8
B. Excluding Same-Sex Couples from Marriage Causes Harm and Perpetuates Discrimination Against Gay Men and Lesbians.....	12
1. Restricting Same-Sex Couples to Domestic Partnerships Stigmatizes Same-Sex Relationships.....	13
a. Excluding Same-Sex Couples from Marriage Expresses Government Disapproval of Same-Sex Relationships.....	13
b. The Stigma Created by Proposition 8 Causes Emotional and Physical Harm	16
c. The Stigma Created by Proposition 8 Perpetuates Discrimination Against Gay Men and Lesbians.....	17
2. Excluding Same-Sex Couples from Marriage Causes Economic Harm	19
3. Excluding Same-Sex Couples from Marriage Harms Children.....	21
CONCLUSION.....	22
Certificate of Compliance	25

TABLE OF CONTENTS
(continued)

	Page
Certificate of Service	26
APPENDIX: STATEMENTS OF AMICI.....	A-1

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954).....	2, 4, 15
<i>Brown v. Louisiana</i> , 383 U.S. 131 (1966).....	5
<i>City of Cleburne, Tex. v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	3
<i>Dep’t of Agric. v. Moreno</i> , 413 U.S. 528 (1973).....	3
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972).....	3, 4
<i>Gayle v. Browder</i> , 352 U.S. 903 (1956).....	4
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965).....	6
<i>Holmes v. City of Atlanta</i> , 350 U.S. 879 (1955).....	4
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	15, 18
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	3, 6
<i>Mayor & City Council of Balt. v. Dawson</i> , 350 U.S. 877 (1955).....	4
<i>New Orleans City Park Improvement Ass’n v. Detiege</i> , 358 U.S. 54 (1958).....	4, 5

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Perry v. Schwarzenegger</i> , No. C09-2292, slip op. (N.D. Cal. Aug. 4, 2010).....	<i>passim</i>
<i>Peterson v. City of Greenville</i> , 373 U.S. 244 (1963).....	5
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896).....	2
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	1, 2, 3, 23
<i>Strauder v. West Virginia</i> , 100 U.S. 303 (1879).....	15, 18
<i>Sweatt v. Painter</i> , 339 U.S. 629 (1950).....	5
<i>Turner v. Safley</i> , 482 U.S. 78 (1987).....	6
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	5, 23
<i>Williams v. North Carolina</i> , 317 U.S. 287 (1942).....	6

STATE CASES

<i>Goodridge v. Dep’t of Pub. Health</i> , 798 N.E.2d 941 (Mass. 2003).....	6, 14, 21
<i>In re Marriage Cases</i> , 183 P.3d 384 (Cal. 2008).....	<i>passim</i>
<i>Kerrigan v. Comm’r of Public Health</i> , 957 A.2d 407 (Conn. 2008).....	6, 13, 21
<i>Perez v. Lippold</i> , 198 P.2d 17 (Cal. 1948).....	6

**TABLE OF AUTHORITIES
(continued)**

	Page(s)
<i>Strauss v. Horton</i> , 207 P.3d 48 (Cal. 2009).....	9
<i>Varnum v. Brien</i> , 763 N.W.2d 862 (Iowa 2009).....	8

STATE STATUTES

Cal. Fam. Code § 297 (2005).....	5
----------------------------------	---

LEGISLATIVE MATERIALS

California Assembly Bill 205	9
Maine Department of Health and Human Services, Instructions and Information for the Domestic Partnership Registry, <i>available at</i> http://www.maine.gov/dhhs/boh/phs/odrvs/vital-records/order/domstcprtnrspge.html	10
Nevada Domestic Partnership Act, SB 283 (effective Oct. 1, 2009)	10
Office of the City Clerk, City of New York, Domestic Partnership Registration, <i>available at</i> http://www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml#disclaimer	10
The Legal, Medical, Economic and Social Consequences of New Jersey’s Civil Union Law, Final Report of New Jersey Civil Union Review Commission (Dec. 10, 2008)	12, 18, 22
Wisconsin Legislative Fiscal Bureau, Establishment of Domestic Partnership and Related Rights and Benefits, <i>available at</i> http://www.legis.wisconsin.gov/lfb/2009-11Budget/Budget%20 Papers/391.pdf	10

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Jeffrey M. Adams & Warren H. Jones, <i>The Conceptualization of Marital Commitment: An Integrative Analysis</i> 72 J. of Personality and Social Psychology 1177 (1997)	7
Nancy Cott, Public Vows: A History of Marriage and the Nation (2000)	23
Gregory M. Herek et al., <i>Correlates of Internalized Homophobia in a Community Sample of Lesbians and Gay Men,</i> 2 J. of the Gay and Lesbian Medical Association 17 (1997).....	17
Robin A. Lenhardt, <i>Understanding the Mark: Race, Stigma, and Equality in Context,</i> 79 N.Y.U. L. Rev. 803 (2004)	19
National Center for Lesbian Rights, <i>The Evolution of California’s Domestic Partnership Law</i> (Sept. 5, 2007), http://www.nclrights.org/site/DocServer/timeline- ab205_042307.pdf?docID=1265	9
James G. Pawelski et al., <i>The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children,</i> 118 Pediatrics 1 (2006).....	21
Marc R. Poirier, <i>Name Calling: Identifying Stigma in the “Civil Union”/ “Marriage” Distinction,</i> 41 Conn. L. Rev. 1425(2009)	19
Elizabeth S. Scott, <i>Social Norms and the Legal Regulation of Marriage,</i> 86 Va. L. Rev. 1901 (2000)	6

CORPORATE DISCLOSURE STATEMENT

None of *Amici Curiae* (identified in n.1, *infra*) has a parent corporation. No publicly held company owns more than 10% of stock in any of *Amici Curiae*.

STATEMENT OF INTEREST

Amici comprise 42 organizations, including national, metropolitan, local, and minority bar associations and national and local non-profit organizations.¹ Each organization supporting this *amicus* brief is dedicated to ensuring that its constituents and all others in this country, including gay men and lesbians, receive equal treatment under the law. *See* Appendix. All parties have consented to *Amici*'s submission of this brief, pursuant to Federal Rule of Appellate Procedure 29(a).

SUMMARY OF ARGUMENT

Foundational to the Equal Protection Clause of the Fourteenth Amendment is the principle that “the Constitution ‘neither knows nor tolerates classes among citizens.’” *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting

¹ The organizations are: Bay Area Lawyers for Individual Freedom; Alameda County Bar Association; Bar Association of San Francisco; Los Angeles County Bar Association; Marin County Bar Association; Santa Clara County Bar Association; AIDS Legal Referral Panel; API Equality–LA; Asian American Bar Association of the Greater Bay Area; Asian Pacific American Bar Association of Los Angeles County; Asian Pacific Bar Association of Silicon Valley; Asian Pacific Islander Legal Outreach; Bay Area Association of Muslim Lawyers; California Employment Lawyers Association; California Women’s Law Center; East Bay La Raza Lawyers Association; Equal Justice Society; Family Equality Council; Filipino Bar Association of Northern California; Freedom to Marry; Impact Fund; Japanese American Bar Association of Greater Los Angeles; Korean American Bar Association of Northern California; Latina and Latino Critical Legal Theory, Inc.; Law Foundation of Silicon Valley; Lawyers’ Committee for Civil Rights of the San Francisco Bay Area; Legal Aid Society-Employment Law Center; Lesbian and Gay Lawyers Association of Los Angeles; Marriage Equality USA; Mexican American Bar Association; National Asian Pacific American Bar Association; National Lawyers Guild San Francisco Bay Area Chapter; People for the American Way Foundation; Queen’s Bench Bar Association; San Francisco Chamber of Commerce; San Francisco La Raza Lawyers Association; San Francisco Trial Lawyers Association; Santa Clara County Black Lawyers Association; Society of American Law Teachers; South Asian Bar Association of Northern California; Transgender Law Center; and Women Lawyers of Alameda County.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). In line with this principle, it has long been bedrock law that “separate but equal” treatment does not satisfy the federal Constitution. The very notion is a contradiction in terms: As the Supreme Court has emphasized since *Brown v. Board of Education*, the Constitution’s promise of true equality is necessarily breached by government-sponsored separation of a disfavored class.

Proposition 8 betrays these longstanding values. It excludes a class of people—gay men and lesbians—from the venerated institution of marriage, relegating them instead to the inherently unequal and legalistic apparatus of domestic partnership. It does so for no purpose other than to deny that class of people access to real marriage. Proposition 8 thus “classifies homosexuals not to further a proper legislative end, but to make them unequal to everyone else.” *Romer*, 517 U.S. at 635. Enacted solely “for the purpose of disadvantaging the group burdened by the law,” *id.* at 633, Proposition 8 cannot survive even rational basis review.

This brief explains the harm inflicted on gay men and lesbians as a result of Proposition 8’s pernicious classification. Because Proposition 8 excludes them from marriage, gay men and lesbians and their families are stigmatized, deprived of benefits enjoyed by their heterosexual counterparts, and exposed to increased discrimination. These effects are repugnant to the Constitution’s equality guarantee and in no way mitigated by access to the separate and inherently inferior mechanism of domestic partnership. *Amici* urge this Court to affirm the district court’s conclusion that Proposition 8 disadvantages gays and lesbians without any legitimate justification. *Perry v. Schwarzenegger*, No. C09-2292, slip op. at 135 (N.D. Cal. Aug. 4, 2010).

ARGUMENT

I. CLASSIFICATIONS THAT SERVE ONLY TO DISADVANTAGE THE BURDENED GROUP FAIL RATIONAL BASIS REVIEW

The Equal Protection Clause of the Fourteenth Amendment is “a commitment to the law’s neutrality where the rights of persons are at stake.” *Romer*, 517 U.S. at 623. The Clause “requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.” *Loving v. Virginia*, 388 U.S. 1, 10 (1967). Even under the most deferential review—the rational basis test—a state law must be “rationally related to a legitimate state interest.” *E.g.*, *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *Id.* at 446.

A law that classifies persons for no reason other than to confer disfavored legal status fails even rational basis review, for it serves no legitimate governmental purpose. *See Romer*, 517 U.S. at 633–35. As the Supreme Court has repeatedly explained, “if 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* governmental interest.” *Id.* at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Accordingly, in *Romer*, the Supreme Court struck down a Colorado constitutional amendment that prohibited governmental protection of gay and lesbian individuals. *Id.* at 636. The amendment, the Court found, was a “status-based enactment” that “impose[d] a special disability upon [gays and lesbians] alone.” *Id.* at 631, 635. It “inflict[ed] on [gays and lesbians] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.” *Id.* at 635; *see also Eisenstadt v. Baird*, 405 U.S. 438,

454–455 (1972) (law prohibiting distribution of contraceptives to unmarried individuals lacked a rational basis and violated the Equal Protection Clause).

So too here. The injuries that Proposition 8 visits upon gay men and lesbians, as *amici* explain below, “outrun and belie” any legitimate governmental purpose that might be claimed for it.

II. PROPOSITION 8 ESTABLISHES AN UNEQUAL, TWO-TIERED REGIME AND HARMS GAY AND LESBIAN INDIVIDUALS

Proposition 8’s overt discrimination against same-sex couples establishes a two-tiered regime in which same-sex couples hold second-class status: “Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.” *Perry*, slip op. at 135. As explained below, the availability of domestic partnerships—a plainly inferior option—does not cure Proposition 8’s constitutional deficiency. By excluding same-sex couples from marriage, Proposition 8 causes severe, actual harm to gay and lesbian individuals and their families.

A. The Legalistic Designation of Domestic Partnership Is Patently Inferior to the Revered Institution of Marriage

Time-honored precedent establishes that state-created, separate institutions for disfavored groups are inherently unequal. As the Supreme Court has repeatedly recognized since *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), such separate institutions offend the guarantees of the Equal Protection Clause. *See, e.g., Mayor & City Council of Balt. v. Dawson*, 350 U.S. 877 (1955) (public beaches and bathhouses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (public golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (public transportation); *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54

(1958) (public parks); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (restaurants); *Brown v. Louisiana*, 383 U.S. 131 (1966) (public libraries).

Even where separate institutions have the trappings of their more well-regarded counterparts, inequalities necessarily remain. Though the distinctions may be intangible, their social significance is real, and they remain constitutionally impermissible. *See Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (noting, in striking down Texas’s segregated law schools, that “the [all-white] Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school”); *United States v. Virginia*, 518 U.S. 515, 557 (1996) (holding that Virginia could not restrict women to a military program that lacked, among other features, the “prestige” of Virginia Military Institute).

The unequal separation wrought by Proposition 8 is blatant and pernicious. The resulting regime welcomes opposite-sex couples into the revered institution of marriage, yet shunts same-sex couples into the newly minted, legalistic apparatus of “domestic partnership.” *See Cal. Fam. Code § 297 (2005)*. As the record in this case makes clear, domestic partnership is far inferior to and less desirable than marriage. The availability of domestic partnership thus does not remedy the harm caused by exclusion from marriage, but rather pours salt in the wound. As in *Sweatt*, “[i]t is difficult to believe that one who had a free choice” between domestic partnership and marriage “would consider the question close.” *Sweatt*, 339 U.S. at 634.

1. Marriage Is a Uniquely Revered Institution in American Society

Marriage holds a hallowed status in our society. As courts have repeatedly recognized, marriage is an essential aspect of the human experience. Far more than a mere bundle of legal rights and responsibilities, marriage is “an

institution of transcendent historical, cultural and social significance,” *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008), “an institution more basic in our civilization than any other.” *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). Its significance to the couple involved is unparalleled; it is “intimate to the degree of being sacred.” *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Furthermore, marriage is a time-honored demonstration to family, friends, and the community of a loving commitment between two people—and implies a return promise by society to respect that commitment. *See Turner v. Safley*, 482 U.S. 78, 95 (1987) (recognizing that marriage is an “expression[] of emotional support and public commitment”). The institution is “a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.” *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003). The right to marry, accordingly, “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women]” and “fundamental to our very existence and survival.” *Loving*, 388 U.S. at 12; *see also Perez v. Lippold*, 198 P.2d 17, 18–19 (Cal. 1948) (“Marriage is . . . something more than a civil contract subject to regulation by the state; it is a fundamental right of free men.”). The enormous personal and social significance of marriage is, indeed, a core premise of appellants’ position. *See, e.g.*, Defendant-Intervenors-Appellants’ Opening Brief at 18 (describing marriage as a “bedrock social institution”).

As a result of the special significance of marriage in society, the institution has a critical “signaling” role, apart from the specific legal obligations it entails. Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901, 1917 (2000). The designation of marriage affects both how the two individuals in a married couple behave toward one another and how society behaves toward them.

First, married people understand how they are supposed to behave toward one another: they are to be emotionally and financially supportive, honest, and faithful. *See* Trial Tr. 201:9–14 (testimony of historian Nancy Cott). Although married couples may modify their expectations and behavior over time, they benefit by beginning with a common understanding of the marital relationship, gleaned from a lifetime of participating in society and observing married couples. *See* Jeffrey M. Adams & Warren H. Jones, *The Conceptualization of Marital Commitment: An Integrative Analysis*, 72 *J. of Personality and Social Psychology* 1177 (1997). This shared understanding assists married individuals in meeting their own and their spouse’s expectations and motivates them to work through temporary difficulties. *See* Trial Tr. 612:6–18 (testimony of psychologist Letitia Peplau) (marriage “enhances the likelihood that . . . commitments will, in fact, be acted upon and be enforceable,” and that marriage is associated with “a degree of seriousness and sort of gravitas that leads [married couples] to take those obligations seriously”).

The institution of marriage likewise provides common ground for others in society to understand a couple’s relationship. Because marriage is universally recognized, married couples are readily treated in a manner that reflects their legal and social status. *See* American Psychoanalytic Association Position Statement, PX0752 at 2 (noting that the “milestone of marriage moves a couple and its children into full citizenship in American society”). Spouses are immediately seen as family members. *See* Trial Tr. 1234:23–1237:22 (testimony of Helen Zia) (getting married helped Zia’s family understand her relationship; her mother now refers to Lia Shigemura as Zia’s “daughter-in-law,” and “people understand that”); *id.* at 1237:20–22 (“[I]n those most important moments in our lives, marriage made it very clear that I was family, that we are family, and where we stand.”). When a married couple opens a joint bank account, checks into a

hotel, applies for a credit card, attends a parent-teacher conference, or accompanies a child on a plane flight, there is no need for explanation or documentary proof of the relationship. *See* Trial Tr. 844:5–845:20 (testimony of Dr. Ilan Meyer, social psychologist); *see generally Varnum v. Brien*, 763 N.W.2d 862, 883–84 (Iowa 2009) (“Iowa’s marriage laws” are “designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways.”).

For these reasons and others, many people regard getting married as the most important day in their lives—“the principal happy ending in all of our romantic tales,” and “a destination to be gained by any couple who love one another.” Trial Tr. 207:9–208:6 (Cott testimony); *id.* at 88:19–21 (testimony of plaintiff Paul Katami) (“[W]hen you find someone who is not only your best friend but your best advocate and supporter in life, it’s a natural next step for me to want to be married to that person.”); *id.* at 145:12 (testimony of plaintiff Kristin Perry) (getting married was “as amazed and happy as I could ever imagine feeling”).

2. Domestic Partnership Is a Legalistic Mechanism That Lacks the Significance, Stability, and Meaning of Marriage

Domestic partnership plainly lacks the status, cultural significance, and social meaning of marriage. Unlike marriage, domestic partnership is not an effective marker of family relationships. And same-sex couples who have access only to domestic partnerships clearly are deprived of many of the tangible and intangible benefits that married couples enjoy.

First, the legal category of domestic partnership is novel and unstable. The category was invented recently,² and its meaning is ever-shifting. In California alone, its contours have recently and repeatedly changed.³ Domestic

² The City of West Hollywood enacted the first domestic partnership ordinance in the mid-1980s and San Francisco has operated its domestic partnership registry since 1990.

³ Both West Hollywood’s and San Francisco’s ordinances essentially permitted

partnership began in California as a term used in local ordinances that conferred few legal benefits. It is now the label for registered same-sex couples (and unmarried opposite-sex couples in which one individual is over the age of 62) who, according to the California Supreme Court, must receive the same substantive state-conferred legal entitlements as married couples. *See Strauss v. Horton*, 207 P.3d 48, 61–62 (Cal. 2009). *But see In re Marriage Cases*, 183 P.3d 384, 416 n.24 (Cal. 2008) (listing legal differences between domestic partnership and marriage).

Moreover, domestic partnership lacks consistent meaning across jurisdictions. In contrast to California, many states and municipalities afford domestic partners fewer rights. For example, Maine advises citizens to “remember that a registered domestic partnership is NOT the same as a marriage and does not entitle partners to rights other than those for which the registry was intended,” namely “rights of inheritance as well as the rights to make decisions regarding

public acknowledgement of the intent of two individuals, regardless of their gender, to commit to caring for one another and to be responsible for one another’s basic living expenses, with very little legal effect. In 1999, California established a statewide domestic partnership registry, which granted some benefits for certain state employees and permitted domestic partners to visit each other in the hospital. In 2001, the state expanded the list of benefits available to domestic partners, including the right to sue for wrongful death, the right to use sick leave to care for one’s partner, and the right to use stepparent adoption procedures. In 2002, the legislature passed a series of six bills aimed at expanding the rights of domestic partners. Finally, in 2003, the Legislature enacted Assembly Bill 205, which provided domestic partners with most of the rights and duties enjoyed by married couples. *See National Center for Lesbian Rights, The Evolution of California’s Domestic Partnership Law* (Sept. 5, 2007), http://www.nclrights.org/site/DocServer/timeline-ab205_042307.pdf?docID=1265. In 2009, the California Supreme Court noted that after Proposition 8, domestic partners in California retain “all of the constitutionally based incidents of marriage” except its label. *Strauss v. Horton*, 207 P.3d 48, 61 (Cal. 2009) (quoting *In re Marriage Cases*, 183 P.3d 384, 433–34 (Cal. 2008)). In contrast to the institution of marriage, whose very label instantly conveys the nature of the relationship, only students of domestic partnership law in California can determine what domestic partnership means at any given moment.

disposal of their deceased partners['] remains.”⁴ In New York City, domestic partners may enjoy, *inter alia*, visitation rights and city health benefits, but “cannot be considered spouses,” and therefore “do not benefit from state income tax advantages, the spousal privilege and confidential marital communications, the ability to take out insurance policies on the other spouse, and other benefits of marriage.”⁵ In some jurisdictions, domestic partnership is exclusively for same-sex couples; in others, it is available to cohabitating couples more broadly.⁶

Not surprisingly in light of its novel and uncertain stature, domestic partnership is not valued by society in a way that compares to marriage. As one expert witness put it: “young children do not aspire to be domestic partners.” Trial Tr. 826:24–827:16 (Meyer testimony). People do not associate the relationship with the stability and permanence that characterize marriage. This is evident in the way government treats domestic partnership. In 2004, for example, the State of California mailed a letter to registered domestic partners explaining how they could dissolve their partnerships in light of new legal responsibilities. *See* Letter from California Secretary of State Kevin Shelley, PX2265. It is unimaginable that the state would advise couples to consider divorce in similar circumstances. *See* Trial Tr. 2047:13–2048:13 (testimony of Dr. Gregory Herek).

⁴ *See* Maine Department of Health and Human Services, Instructions and Information for the Domestic Partnership Registry, *available at* <http://www.maine.gov/dhhs/boh/phs/odrvs/vital-records/order/domstcprtntspge.html>.

⁵ *See* Office of the City Clerk, City of New York, Domestic Partnership Registration, http://www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml#disclaimer.

⁶ *Compare, e.g.*, Wisconsin Legislative Fiscal Bureau, Establishment of Domestic Partnership and Related Rights and Benefits, *available at* <http://www.legis.wisconsin.gov/lfb/2009-11Budget/Budget%20Papers/391.pdf> (domestic partners in Wisconsin must be of the same sex) *with, e.g.*, Nevada Domestic Partnership Act, SB 283 (effective Oct. 1, 2009) (domestic partnership is available to same-sex and opposite-sex couples).

In turn, the registration of a domestic partnership may be less meaningful to same-sex couples than getting married would be. For plaintiff Sandy Stier, a domestic partnership registration was “just a legal document” that “doesn’t have anything to do . . . with . . . the type of enduring relationship we want.” *Id.* at 170:12–171:14. The complex emotions people experience when they get married—as well as the joy and human closeness they feel when they attend a wedding—simply do not attach to the ministerial step of registering a domestic partnership. *See id.* at 1225:22–1227:7 (Zia and her wife did not notify friends or send invitations to the “anticlimactic” event of their registration as domestic partners); *id.* at 1281:1–1282:3 (Mayor Sanders’ daughter notified him of her domestic partnership via text message stating she had “got the DP taken care of”). Even when domestic partners celebrate their registration with a ceremony, the terrain is unfamiliar: Is the event a wedding? A commitment ceremony? Something else? The lack of a common vocabulary underscores the institution’s lack of societal stature, and serves as a reminder to same-sex couples of the choice that remains unavailable to them.

These reminders continue throughout the relationship. Even the simple act of referring to one’s “partner” can be wrought with embarrassment and misunderstanding: same-sex couples can be left searching for a manner to explain, no matter how uncomfortable the setting, whether they are referring to their *domestic* partner or their professional, athletic, or law partners. *See* Trial Tr. 1233:11–25 (Zia testimony) (when Zia and her wife were just domestic partners, they would tell people they were partners and would be asked, “Partner in what business?”); *id.* at 154:20–24 (Perry testimony) (“I don’t have access to the words that describe my relationship right now. I’m a 45-year-old woman. I have been in love with a woman for 10 years and I don’t have a word to tell anybody about that.

I don't have a word.”). Subsequently, same-sex couples must often explain the intricacies of state family law to friends and potentially hostile strangers alike.

Such ambiguities, and the resulting risk of differential treatment, would be less likely if same-sex couples could accurately refer to themselves as “married” and as husband or wife, a vocabulary that is universally understood. *See The Legal, Medical, Economic and Social Consequences of New Jersey's Civil Union Law, Final Report of New Jersey Civil Union Review Commission*, at 2, 16 (Dec. 10, 2008) (“New Jersey Commission Report”); Trial Tr. 89:1–12 (Katami testimony) (“Being able to call him my husband is so definitive, it changes our relationship It is absolute, and it comes with a modicum of respect and understanding that your relationship is not temporal, it's not new, it's not something that could fade easily.”).

In sum, marriage has a unique status in American society. No party to this case disputes that marriage means far more than inheritance rights, powers of attorney, or community property. It is, instead, “the definitive expression of love and commitment in the United States.” *Perry*, slip op. at 80. Domestic partnership is a patently inferior alternative. As trial witness Helen Zia explained, the difference between being in a domestic partnership and being married has been the difference of “night and day.” Trial Tr. 1251:6–1252:6. Put simply: “[T]here is nothing that is like marriage except marriage.” Trial Tr. 208:9–209:3 (Cott testimony).

B. Excluding Same-Sex Couples from Marriage Causes Harm and Perpetuates Discrimination Against Gay Men and Lesbians

Proposition 8 causes real harm to same-sex couples and their families. Even to the extent that domestic partnership may confer the legal benefits of marriage, the two-tiered regime disadvantages same-sex couples in numerous ways. First, barring same-sex couples from the valued institution of marriage

demeans and stigmatizes them. This stigma, in turn, affects their physical and emotional health and well-being and encourages further discrimination against gay and lesbian individuals. Second, barring same-sex couples from marrying causes economic harm. Third, the exclusion of same-sex couples from marriage harms their children.

1. Restricting Same-Sex Couples to Domestic Partnerships Stigmatizes Same-Sex Relationships

It demeans and stigmatizes same-sex couples to bar them from the valued institution of marriage. The two-tiered regime effected by Proposition 8 sends an unmistakable, government-backed message that same-sex relationships are less worthy than opposite-sex relationships. This official disapproval, and the concomitant stigma, is damaging: gay and lesbian individuals suffer “minority stress” that harms their physical and emotional well-being, and they face increased discrimination.

a. Excluding Same-Sex Couples from Marriage Expresses Government Disapproval of Same-Sex Relationships

The two-tiered regime that Proposition 8 establishes conveys official disapproval of same-sex relationships. As the California Supreme Court explained, “the statutory provisions that continue to limit access to [marriage] exclusively to opposite-sex couples—while providing only a novel, alternative institution for same-sex couples—likely will be viewed as an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples.” *In re Marriage Cases*, 183 P.3d at 452; *Kerrigan*, 957 A.2d at 474 (same). Indeed, “there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term ‘marriage’ is denied only to same-sex couples inevitably will cause the new parallel institution that has been made

available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship.” *In re Marriage Cases*, 183 P.3d at 445; *see also Goodridge*, 798 N.E.2d at 962 (statutory bar on same-sex marriage “confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect”).

Evidence adduced at trial reinforces the role of Proposition 8 as an expression of government disapproval of same-sex relationships. *See Perry*, slip op. at 93 (describing evidence that “Proposition 8 singles out gays and lesbians and legitimates their unequal treatment”); Trial Tr. 2054:7–11 (Herek testimony) (Proposition 8 is an instance of structural stigma in “a definitional sense,” because it is “part of the legal system” and “differentiates people in same-sex relationships” from “those in heterosexual relationships”); *id.* at 854:5–22 (Meyer testimony) (Proposition 8 “sends a strong message about the values of the state” and “sends a message that gay relationships are not to be respected”).

The government disapproval expressed through Proposition 8 is exacerbated by the clear animus behind the measure. As the district court found, the evidence at trial demonstrated that “the campaign to pass Proposition 8” was motivated substantially by “a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples.” *Perry*, slip op. at 133–34. Indeed, Proposition 8’s express purpose was to divest gay and lesbian individuals of a constitutional right, thereby imposing on them a unique disability. *See California Voter Information Guide*, PX0001 at 4 (Proposition 8 “[c]hanges California Constitution to eliminate the right of same-sex couples to marry”); *see also id.* at 7 (Proposition 8 “protects our children from being taught in public schools that ‘same-sex marriage’ is the same as traditional marriage”).

Furthermore, the Proposition 8 campaign and the Official Voter Guide stoked fear and anti-gay prejudice. *See* Trial Tr. 424:24–429:6 (testimony of historian George Chauncey); Video: “Stand up for Righteousness: Vote Yes on Proposition 8,” PX0401 (“The devil wants to blur the lines between right and wrong when it comes to family structure”; “If Prop. 8 fails, it opens up the door for all the other laws that the homosexual agenda wants to enforce on other people”; “We will see a further demise of the family”). Hak-Shing William Tam, an official proponent of Proposition 8 who testified about messages he disseminated during the Proposition 8 campaign, stated that he gets “very very upset” about the idea of children thinking about marrying people of the same sex, but he is reassured by knowing that gay couples are not allowed to get married, and that parents can explain to their children that the domestic partnership gay couples can enter “is not ‘marriage.’” Trial Tr. 1962:17–1963:8. He testified that “just changing the name of domestic partnerships to marriage will have this enormous moral decay,” and that “permitting gays and lesbians to marry” would mean “one by one other states would fall into Satan’s hand,” *id.* at 1960:1–9, 1928:6–13.

Proposition 8’s disapproval of same-sex couples is stigmatizing. In both judicial decisions and social science, it is well-established that government action singling out a group for disfavored treatment stigmatizes that group. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (stating that the “stigma” imposed by the Texas statute criminalizing “homosexual conduct” was “not trivial”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (describing the “feeling of inferiority” that inevitably accompanies differential treatment); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (noting that exclusion of non-white citizens from juries was “practically a brand upon them, affixed by the law, an assertion of their inferiority”); Trial Tr. 819:7–820:6, 826:2–20 (Meyer testimony discussing stigmatizing effects of discriminatory laws). In the same mold, the “dual system”

effected by Proposition 8 imposes “structural stigma” on gay and lesbian individuals: it sends the message that “if you are gay or lesbian, you cannot achieve” the “desirable and respected” goal of marriage. Trial Tr. 826:18–20, 984:21–985:13 (Meyer testimony).

b. The Stigma Created by Proposition 8 Causes Emotional and Physical Harm

The stigma resulting from Proposition 8’s two-tiered regime has harmful consequences. By virtue of the stigma attached to them, gay men and lesbians suffer “minority stress,” which manifests itself through “prejudice events”; expectations of rejection and discrimination; concealment of identity; and internalized homophobia. See Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay and Bisexual Populations: Conceptual Issues and Research Evidence*, PX1003; Trial Tr. 832:20–833:16.

Trial testimony revealed the prevalence of each form of minority stress. Individuals experience “prejudice events” daily. Even filling out a form in a doctor’s office can become a source of stress and shame. As plaintiff Stier testified, forms that ask whether an individual is single, married, or divorced require domestic partners to cross out the existing text and write in their status. See Trial Tr. 175:5–17. This evokes a feeling of rejection: “I’m gay and I’m not accepted here”; “I’m not equal to . . . most people who fill [out] this form.” *Id.* at 841:17–844:11, 845:7–10, 850:10–851:14 (Meyer testimony). Similarly, expectations of rejection are a constant issue for gay and lesbian individuals. See Trial Tr. 152:3–11 (Perry testimony) (“[T]he decision every day to come out or not come out at work, at home, at PTA, at music, at soccer, is exhausting.”). The resulting exhaustion often leads gay and lesbian individuals to conceal their identity. See Trial Tr. 1506:1–19 (witness Kendall kept his homosexuality a secret because he knew his family and community did not approve). Plaintiffs’ testimony

revealed that such repeated experiences often cause gay and lesbian individuals to internalize homophobia. *See* Trial Tr. 146:15–147:14 (Perry testimony) (“[W]hen you’re gay, you think you don’t really deserve things,” so her reaction to the court’s invalidation of her 2004 marriage was that “I really didn’t deserve to be married.”).

Such stresses negatively affect the mental health and well-being of gay and lesbian individuals. Trial Tr. 832:23–835:24 (Meyer testimony); 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*, PX1471 at 9–10. Effects may include “anxiety disorders, mood disorders, such as depression, substance use disorders, . . . [and] excess in suicide attempts,” as well as more subtle diminishment of well-being. Trial Tr. 870:13–872:10 (Meyer testimony); *see also id.* at 898:11–899:8. Internalized homophobia, for example, can lead to lowered self-esteem, anxiety, substance abuse, and depression. Gregory M. Herek et al., *Correlates of Internalized Homophobia in a Community Sample of Lesbians and Gay Men*, 2 J. of the Gay and Lesbian Medical Association 17 (1997). And “[y]ears of psychological research and experience” indicate that concealment takes an “extensive mental toll” on gay and lesbian individuals. American Psychoanalytic Ass’n Position Statement, PX0752 at 3.

c. The Stigma Created by Proposition 8 Perpetuates Discrimination Against Gay Men and Lesbians

By making sexual orientation a legally salient characteristic, Proposition 8 also encourages and provides cover for those who seek to treat gay men and lesbians differently based on their sexual orientation. Indeed, Proposition 8 sends the message “that [it] is very highly valued by our Constitution to reject gay people, to designate them a different class of people.” Trial Tr. 862:11–863:6

(Meyer testimony). Because the state provides for separate and lesser treatment of gay men and lesbians, individuals may logically conclude that it is permissible to treat them as inferior. *See id.* 1277:5–1279:8 (testimony of Mayor Sanders regarding recent anti-gay hate crimes in San Diego) (“I think that when a city, when leadership talks in disparaging terms about people, or denies the rights that everybody else have, the fundamental rights, then I think some people in the community feel empowered to take action in hate crimes and in other ways.”); *cf. Lawrence*, 539 U.S. at 575 (criminalizing sexual conduct between same-sex couples was “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres”); *Strauder*, 100 U.S. at 308 (exclusion of non-white citizens from juries was “a stimulant to . . . race prejudice”).

Moreover, designating same-sex couples as different can trigger unintentional discrimination. Due to confusion regarding legal requirements, hospitals may refuse to allow a same-sex partner to be by a loved one’s side during a medical emergency, and doctors may not permit domestic partners to make medical decisions on behalf of an incapacitated partner. In an analogous context, the New Jersey Civil Union Review Commission received testimony that gay and lesbian individuals who were legally entitled to hospital visitation rights were delayed in gaining access to their hospitalized partners. For example, a woman whose partner was admitted to the emergency room with a potentially fatal cardiac arrhythmia was temporarily prevented from getting information about her partner’s condition because the doctor was unfamiliar with civil unions. *See New Jersey Commission Report*, at 1; *see also id.* at 14–15 (providing additional examples). Furthermore, employers may be less understanding of an employee’s taking leave to care for a domestic partner. Even family members may not understand either the level of commitment expected of a domestic partner towards the couple’s child, or the degree of attachment of the child to a domestic partner.

Moreover, by segregating gay men and lesbians, the State causes society to focus on sexual orientation to the exclusion of other characteristics. As with segregation on the basis of race, separating gay men and lesbians based on their sexual orientation causes that aspect of their identity to eclipse other attributes. *See* Robin A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 818–19 (2004). Thus, when gay men or lesbians disclose that they are in a domestic partnership, others are likely to see them *only* as gay—and treat them accordingly—rather than viewing them as full persons entitled to the same respect and dignity given to other members of society. *See generally* Marc R. Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/ “Marriage” Distinction*, 41 Conn. L. Rev. 1425, 1429–30, 1479–89 (2009) (describing the way in which the nomenclature distinction perpetuates bias and facilitates discrimination).

2. Excluding Same-Sex Couples from Marriage Causes Economic Harm

In addition, by barring same-sex couples from the institution of marriage, Proposition 8 causes actual economic harm to gay men and lesbians. *See generally* Trial Tr. 1330:14–16 (testimony of economist Lee Badgett) (Proposition 8 has “inflicted substantial economic harm on same-sex couples and their children who live here in California.”). Because they are not married, same-sex couples may be denied employment-related benefits. *See* Trial Tr. 692:4–25 (testimony of economist Edmund Egan) (individuals in same-sex partnerships may not be covered by their partners’ healthcare plan); Cal. Employer Health Benefits Survey, PX1261 at 7 (only 56% of California firms offered health insurance to unmarried same-sex couples in 2008); Report by the Council on Science and Public Health, PX0188 at 9 (“Survey data confirm that same-sex households have less access to health insurance.”); *see also* American Medical Association Resolution, PX0189 at

2 (“[E]xclusion from civil marriage contributes to health care disparities affecting same-sex households.”).

A recent decision of the National Elevator Industry (“NEI”) is illustrative. The NEI decided that, under its health plan, married spouses—whether same-sex or opposite-sex—are eligible for benefits. Domestic partners, however, are not. *See* Letter from Director, Pension and Eligibility Operations, NEI (Dec. 30, 2009), PX2260. The result is that same-sex couples who legally married in California prior to Proposition 8’s enactment are eligible for employer-provided healthcare benefits, while couples in domestic partnerships must muster the funds for separate coverage. *See also* Report by the Council on Science and Public Health, PX0188 at 9 (finding that same-sex households who do have health insurance “pay more than married heterosexual workers, and also lack other financial protections”).

More generally, marriage confers numerous economic benefits that stem from the unique commitment it represents. *See* Trial Tr. 1331:12–14 (Badgett testimony). Domestic partnership does not confer comparable economic benefits. *See id.* at 1337:14–25. For example, marriage fosters greater specialization of labor, which can increase a couple’s income and the time available for family. *See id.* at 1331:15–21, 1333:2–13. Marriage also tends to reduce a couple’s transaction costs: as a married couple’s economic fortunes change, the commitment and stability inherent in marriage permit spouses to avoid “renegotiat[ing] whatever deal they might have had as unmarried partners.” *Id.* at 1333:17–1334:2. Furthermore, married individuals may enjoy greater employment-related economic gains, whereas same-sex couples who cannot marry face discrimination that may adversely affect their work performance and related economic rewards. *See id.* at 1335:25–1336:15. Though difficult to quantify,

these economic benefits of marriage are well-known and acknowledged in the field of economics. *See id.* at 1336:20–22.

3. Excluding Same-Sex Couples from Marriage Harms Children

It is widely recognized that “the ban on same sex marriage is likely to have an especially deleterious effect on the children of same sex couples.” *Kerrigan*, 957 A.2d at 474. “A primary reason why many same sex couples wish to marry is so that their children can feel secure in knowing that their parents’ relationships are as valid and as valued as the marital relationships of their friends’ parents.” *Id.* Indeed, entities and individuals from all corners of the Proposition 8 debate recognize that children suffer when their parents cannot marry. *See, e.g.*, American Psychological Association, Professional Association Policies, PX0767 at 2–4, 6 (noting that children of same-sex couples are deprived of the benefits of marriage); Trial Tr. 1964:17–1965:2 (testimony of William Hak-Shing Tam) (agreeing that it is important to children of same-sex couples that their parents be able to marry).

Barring same-sex couples from marrying harms their children. “Excluding same-sex couples from civil marriage” prevents their children “from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which the children will be reared, educated, and socialized.” *Goodridge*, 798 N.E.2d at 964. Whereas “[c]hildren who are raised by civilly married parents benefit from the legal status granted to their parents,” children of same-sex couples whose parents are not permitted to marry may suffer psychological harm. James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 Pediatrics 349, 358, 361 (2006). As the President of the New Jersey Psychological Association attested, children of same-sex relationships whose

parents are not permitted to marry must cope with stigma, lack of social support and acceptance, and teasing in school or from peers. New Jersey Commission Report, at 16 (testimony of Judith Glassgold, Psy.D.).

A corollary to these negative consequences is that children of same-sex couples would benefit if their parents were able to marry. *See Perry*, slip op. at 84 (finding that “[t]he children of same-sex couples benefit when their parents can marry”); Trial Tr. 1042:12–1043:16 (testimony of psychologist Michael Lamb) (the ability of same-sex couples to get married can improve the likelihood that their child will achieve a good adjustment outcome). As the record in this case reflects, a study of married same-sex couples in Massachusetts found that almost all of the parents who were raising children agreed that, for a variety of reasons—from having a family that looks like other families to the ease of dealing with healthcare providers and teachers—their children were better off after marriage. *See* PX1267 at 1 (report by Christopher Ramos, et al.). And appellants’ expert firmly agreed that permitting same-sex couples to marry would benefit the children of same-sex couples. *See* Trial Tr. 2803:13–15 (testimony of David Blankenhorn) (“I believe that adopting same-sex marriage would be likely to improve the well-being of gay and lesbian households and their children.”); *id.* at 2839:22–24 (“I do believe it is almost certainly true that gay and lesbian couples and their children would benefit by having gay marriage.”); *id.* at 2848:24–2849:5 (agreeing that marriage “would improve the happiness and well-being of many gay and lesbian individuals, couples, and family members”).

CONCLUSION

At odds with time-honored constitutional commands, Proposition 8 creates a separate and unequal regime for a disfavored class of individuals. By excluding same-sex couples from the hallowed institution of marriage, Proposition 8 inflicts profound injury upon gay and lesbian individuals and their children.

Because of Proposition 8, gay men and lesbians and their families are deprived of meaningful benefits; suffer from state-sanctioned stigma; and are exposed to further discrimination on the basis of their sexual orientation. There is no doubt that Proposition 8 imposes “immediate, continuing, and real injur[y]” on gay and lesbian individuals. *Romer v. Evans*, 517 U.S. 620, 635 (1996). The patently separate-but-unequal regime effected by Proposition 8 fails any level of judicial scrutiny.

Marital regulations have long been a way of “draw[ing] lines among the citizenry” and “defin[ing] what kinds of sexual relations and which families will be legitimate.” Nancy Cott, *Public Vows: A History of Marriage and the Nation* 4 (2000). Numerous racial and religious minorities have, at one time, faced restrictions on their privilege to marry. *See id.* But “[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.” *United States v. Virginia*, 518 U.S. 515, 557 (1996). Continuing to exclude, demean, and stigmatize gay and lesbian individuals is inconsistent with that constitutional tradition. *Amici* urge this court to affirm that Proposition 8 is unconstitutional.

Respectfully submitted,

DATED: October 25, 2010

MUNGER, TOLLES & OLSON LLP
JEROME C. ROTH
MICHELLE FRIEDLAND
MARK R. CONRAD
MIRIAM L. SEIFTER

By: s/ Jerome C. Roth
JEROME C. ROTH

Attorneys for *Amici Curiae*
Bay Area Lawyers for Individual
Freedom, *et al.*

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,969 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point Times New Roman.

DATED: October 25, 2010

MUNGER, TOLLES & OLSON LLP
JEROME C. ROTH
MICHELLE FRIEDLAND
MARK R. CONRAD
MIRIAM L. SEIFTER

By: s/ Jerome C. Roth
JEROME C. ROTH

Attorneys for Amici Curiae
Bay Area Lawyers for Individual
Freedom, *et al.*

Certificate of Service

I hereby certify that 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 on October 25, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: October 25, 2010

MUNGER, TOLLES & OLSON LLP
JEROME C. ROTH
MICHELLE FRIEDLAND
MARK R. CONRAD
MIRIAM L. SEIFTER

By: /s/ Jerome C. Roth
JEROME C. ROTH

Attorneys for Amici Curiae
Bay Area Lawyers for Individual
Freedom, *et al.*

APPENDIX: STATEMENTS OF *AMICI*

Amici respectfully submit the following statements regarding their interests in this matter:

Bay Area Lawyers for Individual Freedom (“BALIF”) is the nation’s oldest and largest bar association of lesbian, gay, bisexual, and transgender persons (“LGBT”). BALIF serves to take action on questions of law and justice that affect the LGBT community, strengthen ties among LGBT legal professionals, build coalitions to combat discrimination, and provide a forum for members of the LGBT legal community.

Alameda County Bar Association (“ACBA”), established in 1877, is a nonprofit voluntary membership organization of 2,100 attorneys in Alameda County. ACBA has a strong interest in having courts ensure equal protection under the law for all people. One of the core tenets of the ACBA mission is to promote the fair and equitable administration of justice. Through the work of its Board of Directors, committees, sections, and public service programs, the ACBA strives to promote access to justice for all people, and the fair and equitable administration of justice.

The **Bar Association of San Francisco** (“BASF”) is a nonprofit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of more than 7,500 individuals, law firms, corporate legal departments, and law schools. Through its board of directors, committees, volunteer legal services programs, and other community efforts, BASF has worked to promote and achieve equal justice for all and oppose discrimination in all its forms, including, but not limited to, discrimination based on race, sex, disability, and sexual orientation.

With more than 27,000 members, the **Los Angeles County Bar Association** (“LACBA”) is the largest local voluntary bar association in the country. For more than 130 years, LACBA has represented the interests of its membership, encouraged legal reform, and promoted the administration of justice in California. LACBA opposes discrimination and supports the protection of fundamental rights. LACBA joined amicus briefs in support of marriage equality in *In re Marriage Cases* and *Strauss v. Horton*, and opposed the passage of Proposition 8.

The **Marin County Bar Association** (“MCBA”) is a voluntary organization of almost 700 attorney members practicing in Marin and surrounding counties. A primary mission of the MCBA is to promote the sound administration of justice, which includes supporting an independent judiciary and educating the public on the importance of the judicial system. The importance of the civil rights issues raised by Proposition 8 prompted MCBA to adopt a formal position in opposition to the proposition, a position approved both by board action and a full membership vote.

Founded in 1917, the **Santa Clara County Bar Association** (“SCCBA”) is a nonprofit membership association of approximately 3,400 legal professionals. The SCCBA is committed to promoting full and equal access to the legal system by all individuals, and is a leader in opposing discrimination against gay men and lesbians. The SCCBA, through its formal resolutions and commitment to amicus briefs in prior relevant litigation, opposes Proposition 8 as an unconstitutional infringement of the inalienable, fundamental right of all citizens to marry the person of their choosing, regardless of gender.

The **AIDS Legal Referral Panel** (“ALRP”) is a non-profit organization that helps people living with HIV/AIDS maintain or improve their health by resolving their legal issues. ALRP was founded in 1983 and has handled

more than 50,000 legal matters for its clients over the last 27 years. ALRP's goals are to provide counsel and representation on legal issues for a community of individuals who might otherwise not be able to afford or obtain legal assistance, and to leverage the resources of the private bar for the public good. ALRP is dedicated to addressing discrimination against people with HIV/AIDS and members of the LGBT community, including working to ensure their marriage rights.

API Equality – LA (“APIELA”) is a coalition of organizations and individuals who are committed to working in the Asian/Pacific Islander (“API”) community in the greater Los Angeles area for equal marriage rights and the recognition and fair treatment of LGBT families through community education and advocacy. APIELA recognizes that the long history of discrimination against the API community, especially California's history of anti-miscegenation laws and exclusionary efforts targeted at Asian immigrants, parallels the contemporary exclusion of gays and lesbians from marriage in California.

The **Asian American Bar Association of the Greater Bay Area** (“AABA”) represents the interests of Asian Pacific American attorneys in the Greater San Francisco Bay Area. It is one of the largest Asian Pacific American bar associations in the nation and one of the largest minority bar associations in the State of California. From its inception in 1976, AABA has been actively involved in civil rights issues and has advocated on issues regarding minority communities, diversity, and equal protection. Among other things, AABA filed an amicus brief in the *Bakke* affirmative action case in the United States Supreme Court in 1977 and in *In re Marriage Cases* in the California Supreme Court in 2007.

The **Asian Pacific American Bar Association of Los Angeles County** (“APABA-LA”) is a membership organization comprised of over 700 attorneys, judges and law students. Since its formation in 1998, APABA-LA has

advocated on issues that impact the APA community and has demonstrated a commitment to civil rights, racial justice, and equal opportunity. APABA-LA has, and continues to, oppose initiatives designed to deprive immigrants, people of color, and other minorities of their civil rights, including initiatives that discriminate based upon sexual orientation. APABA-LA strives to address all issues relevant to the equal treatment of those in the APA community.

The **Asian Pacific Bar Association of Silicon Valley** (“APBA-SV”) was formed over twenty years ago and is a forum for Asian American attorneys in the Silicon Valley to take positions on issues affecting Asian Americans and to empower Asian Americans in the Valley. Asian American attorneys in the Valley practice in every legal field (firms of all sizes, large and small corporations, academia, government, courts, legislature, and public interest) and enrich our legal and civic communities. One of the central missions of the APBA-SV is to promote justice and equality for all and oppose discrimination in all its forms, including, but not limited to, discrimination and injustices targeted towards race, gender, disabilities and sexual orientation.

Asian Pacific Islander Legal Outreach (“API Legal Outreach”) is a community-based, social justice organization serving the Asian and Pacific Islander communities of the Greater Bay Area. Founded in 1975, its mission is to promote culturally and linguistically appropriate services for the most marginalized segments of the API community. API Legal Outreach’s work is currently focused in the areas domestic violence, violence against women, immigration and immigrant rights, senior law and elder abuse, human trafficking, public benefits, and social justice issues. API Legal Outreach has been fighting against all forms of discrimination, especially against the LGBTQ community, for many years.

The **Bay Area Association of Muslim Lawyers** (“BAAML”) represents the interests of Muslim-American attorneys in the Greater San Francisco

Bay Area. BAAML was founded to address the backlash against Arab, Middle Eastern, Muslim, and South Asian communities in the wake of 9/11. BAAML has a strong interest in protecting and promoting equal protection for all those living in the United States and ensuring that they are protected from invidious discrimination, especially when it comes to ensuring civil rights and civil liberties.

The **California Employment Lawyers Association** (“CELA”) is an organization of approximately 925 attorneys who represent primarily plaintiffs in civil rights and other civil cases arising in the workplace. CELA helps its members protect and expand the legal rights of working women and men through litigation, education, and advocacy.

Founded in 1989, the **California Women’s Law Center** (“CWLC”) is dedicated to addressing the comprehensive and unique legal needs of women and girls. Through systemic change, CWLC seeks to ensure that opportunities for women and girls are free from unjust social, economic, and political constraints. CWLC is committed to eradicating invidious discrimination, including eliminating laws that stigmatize non-traditional gender roles.

The **East Bay La Raza Lawyers Association** (“EBLRLA”) is the county bar association of Latina/Latino lawyers in Alameda and Contra Costa counties. Dedicated to expanding legal access, the EBLRLA provides annual scholarships to Latina/Latino law students, supports Latina/Latino attorneys with a local professional network, and advocates for increased Latina/Latino representation in the judiciary. Through its board of directors, committees, and membership, the EBLRLA opposes all forms of invidious discrimination and promotes respect for human dignity, equal protection of the law and the fundamental rights of all persons, including marriage rights.

The **Equal Justice Society** (“EJS”) is a national organization of scholars, advocates, and citizens that seeks to promote equality and enduring social

change through law, public policy, public education, and research. The primary mission of EJS is to combat the continuing scourge of racial discrimination and inequality in America. Consistent with that mission, EJS works to confront all manifestations of invidious discrimination and second-class citizenship. Such threats to dignity spring from a common source and endanger everyone, no matter the context in which they arise.

Family Equality Council, founded in 1979, is a national organization working to achieve social and legal equality for LGBT families by providing direct support, educating the American public, and advancing policy reform that ensures full recognition and protection under the law. Family Equality Council has more than 50,000 supporters, thousands of which are located in California. As a national organization, Family Equality Council has broad experience protecting the rights of LGBT-headed families and serving the over 200 local parents' groups that support them.

The **Filipino Bar Association of Northern California** ("FBANC") is an association of Filipino and Filipino American attorneys, students, and legal professionals in Northern California. It is our mission to support, educate, encourage, and empower the members of our association to excel and succeed in their educational and professional endeavors. It is further our mission to guard against injustices affecting our community.

Freedom to Marry is the campaign to end marriage discrimination nationwide. Freedom to Marry works with partner organizations and individuals to win the right to marry in more states, solidify and diversify the majority for marriage, and challenge and end federal marriage discrimination. Freedom to Marry is based in New York, and has participated as amicus curiae in several marriage cases in the United States and abroad.

Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. It is a State Bar Legal Services Trust Fund Support Center, providing services to legal services projects across California. The Impact Fund is counsel in a number of major civil rights class actions and is lead counsel in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), the largest employment discrimination class action in history.

The **Japanese American Bar Association of Greater Los Angeles** (“JABA”) is one of the oldest Asian Pacific American bar associations in the country and consists of a diverse membership of nearly 200 attorneys, judicial officers, and law students of Japanese and Asian Pacific Islander ancestry in the greater Los Angeles area and beyond, including gay and lesbian individuals. With a deep appreciation of the unique history of Japanese Americans in the United States and the failure of constitutional protections that led to their internment during World War II, JABA has a proud history of actively advocating and devoting resources to issues of civil rights and social justice, especially for those members of society who continue to suffer from discrimination and unequal treatment.

The **Korean American Bar Association of Northern California** (“KABA-NC”) has served Korean American lawyers and the local Korean American community since the mid-1980s and was founded to encourage and promote the professional growth of Korean-American lawyers and law students in Northern California; to foster networking, support, and the exchange of ideas and information among its members and with the local Korean-American community; and to work with other Asian, minority, and community organizations on matters of common concern. KABA-NC joins this *amicus* brief to further the protection of minority rights, including those of gays and lesbians.

Latina and Latino Critical Legal Theory, Inc. (“LatCrit, Inc.”) is a non-profit organization dedicated to (1) the production of critical and interdisciplinary “outsider jurisprudence”; (2) the promotion of substantive social transformation; (3) the expansion and interconnection of antistatist struggles; and (4) the cultivation of community and coalition among outsider scholars. LatCrit’s membership includes primarily academics and advocates based in the United States. LatCrit’s theory seeks to elucidate intra-and inter-group diversities across multiple identity axes, including those based on perspective and discipline, to ensure that African American, Asian American, Native American, Feminist, Queer, and other OutCrit subjectivities are considered under the law. LatCrit’s interest in constitutional jurisprudence on marriage equality is fundamentally related to its central mission.

Founded in 1974, the **Law Foundation of Silicon Valley** is a private nonprofit corporation in San Jose that sponsors five free legal services and advocacy programs. Its mission is to secure justice and protect human rights by providing legal advocacy, counseling, and access to the legal system for those who would otherwise be underrepresented. The Law Foundation has a strong interest in

protecting the equal protection rights of our clients and members of the communities that we serve, and assuring that they are protected from discrimination, particularly as to their fundamental rights.

The **Lawyers' Committee for Civil Rights of the San Francisco Bay Area** ("LCCR") is affiliated with the national Lawyers' Committee for Civil Rights Under Law, established in 1963 at the urging of President John F. Kennedy. LCCR was formed to support the rights of minority and low-income persons by offering free legal assistance in civil matters and by litigating cases on behalf of the traditionally underrepresented. In addition, LCCR monitors judicial proceedings and legislation that affect the traditionally disadvantaged and frequently files *amicus* briefs in cases challenging discriminatory policies and practices. Because advancing the rights of LGBT individuals is integral to any civil rights agenda, LCCR's *amicus* work has encompassed these issues as well.

The **Legal Aid Society–Employment Law Center** ("LAS-ELC") is a non-profit public interest law firm whose mission is to protect, preserve, and advance workplace rights of individuals from traditionally underrepresented communities. Since 1970, LAS-ELC has represented plaintiffs in employment cases, particularly those of special import to communities of color, women, recent immigrants, individuals with disabilities, and LGBT individuals.

The **Lesbian and Gay Lawyers Association of Los Angeles** ("LGLA") is a non-profit voluntary membership bar association of attorneys, law students, and legal professionals in the greater Los Angeles area. LGLA is an affiliate of the Los Angeles County Bar Association. Founded in 1979, LGLA continues its mission of providing a strong leadership presence of and for lesbian, gay, bisexual, and transgendered persons in the legal profession and in the community at large, through education, legal advocacy, and participation in civic

activities and social functions. LGLA has fought for equal justice for all persons without regard for their sexual orientation for almost thirty years.

Marriage Equality USA (“MEUSA”) is a national, not-for-profit, all-volunteer corporation that leads a nonpartisan, grassroots educational effort to secure legally recognized civil marriage equality at the federal and state level without regard to gender identity or sexual orientation. MEUSA employs educational and outreach programs, media presentations, partnerships with other organizations that support equality, and a strong membership that engages in local events, including asking for marriage licenses for same-sex couples on Valentine’s Day. MEUSA has a strong presence in California, with 23 chapters, as well as chapters in Arizona, Florida, Iowa, New Hampshire, Ohio, Pennsylvania, and Indiana.

The **Mexican American Bar Association** (“MABA”) is a non-profit professional membership organization of Latino attorneys and others involved in the legal profession. MABA is committed to the advancement of Latinos in the legal profession and the empowerment of the Latino community through service and advocacy. MABA is also committed to promoting constitutional principles of equal protection and fundamental rights, and to opposing discrimination in all forms.

The **National Asian Pacific American Bar Association** (“NAPABA”) is the national association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA represents the interests of over 40,000 attorneys and 62 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the areas of civil rights. Equal access to the fundamental right to

marry is one such right which Asian Pacific Americans were long denied through anti-miscegenation laws, and NAPABA joins *amici* to continue the defense of equal access to the fundamental right to marry.

The **National Lawyers Guild San Francisco Bay Area Chapter** is a progressive bar association that works for human rights generally. It has an active Queer Committee that seeks equality and justice for the LGBT community and supports law student interns who commit their work to furthering LGBT rights.

People For the American Way Foundation (“PFAWF”) is a nonpartisan citizens’ organization established to promote and protect civil and constitutional rights. Founded in 1981, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been involved in litigation and other efforts nationwide to combat discrimination and promote equal rights and regularly has supported litigation to secure the right of same-sex couples to marry. PFAWF joins this brief to vindicate the constitutional right of same-sex couples in California to equal protection of the law.

Queen’s Bench Bar Association is a non-profit voluntary membership organization made up of judges, lawyers, and law students in the San Francisco Bay Area. Established in 1921, Queen’s Bench is one of the oldest women’s bar associations in the country. Queen’s Bench seeks to advance the interests of women in law and society, and to serve the professional needs of women lawyers, judges, and law students. Queen’s Bench has a strong and demonstrated interest in the preservation of the Constitutional right to equal protection of the laws.

Founded in 1850, the **San Francisco Chamber of Commerce** (“Chamber”) is the oldest business organization in California, representing 1,500 San Francisco businesses of all sizes from every industry. These businesses employ over 200,000 persons in San Francisco, representing half of the city’s

workforce. Chamber has a long history of supporting workplace diversity and equal rights. Chamber believes ending marriage discrimination against same-sex couples would improve the ability of California businesses to recruit and retain talented employees, a key to increased business development and economic growth.

Founded in 1971, **San Francisco La Raza Lawyers Association** was the first Latino Bar Association founded in the country. La Raza's mission is to serve the public interest by promoting the science of jurisprudence; promoting reform in the law and facilitating the administration of justice. La Raza has a long history of advocating for equality under the law. La Raza continues this tradition in signing this *amicus* brief.

San Francisco Trial Lawyers Association ("SFTLA") is a professional membership organization of trial attorneys from a broad range of backgrounds. SFTLA has a strong mission statement embracing and promoting diversity within the organization. SFTLA's interest in having courts ensure equal protection under the law is central to its mission. Through its Board of Directors, community outreach, legal and social events, publications, and continuing education programs, SFTLA has worked to promote the core constitutional principles of equal protection and fundamental rights, and to oppose discrimination in all forms.

Santa Clara County Black Lawyers Association is an advocate for equal opportunity and justice for all citizens of the United States of America. The right to marry and choose one's spouse is a fundamental right that all citizens must be guaranteed without regard to race, gender, or sexual orientation.

The **Society of American Law Teachers** ("SALT") is an association of law faculty, administrators, and legal education professionals from over 170 law schools. Incorporated in 1974, SALT was founded by a group of leading law

professors dedicated to improving the quality of legal education by making it more responsive to societal concerns. SALT has worked within the legal academy to develop a jurisprudence to end discrimination of historically underrepresented groups, including discrimination based on sexual orientation and has appeared as *amicus curiae* in federal and state courts to further these claims to equal access to education, employment, and to full participation in civic life.

The **South Asian Bar Association of Northern California** (“SABA-NC”) was founded in 1993 to promote the South Asian bar and to focus on the legal needs of the South Asian community. Since its inception, SABA-NC has worked diligently to safeguard the civil rights and civil liberties of South Asians in California through education, advocacy, and awareness. South Asians are no strangers to the stigmatization and isolation felt by minority communities that is especially true for gay and lesbian South Asians who suffer from discrimination based on both their ethnicity and sexual orientation. SABA-NC believes that all individuals, regardless of sexual orientation, deserve equal treatment under the law, including the right to marry.

The **Transgender Law Center** (“TLC”) is a civil rights organization advocating for transgender communities. We connect transgender people and their families to technically sound and culturally competent legal services, increase acceptance and enforcement of laws and policies that support transgender communities, and work to change laws and systems that fail to incorporate the needs and experiences of transgender people. TLC has an interest in protecting minorities from being denied their civil rights, including the right to marriage.

Women Lawyers of Alameda County (“WLAC”), founded in 1980, is a voluntary bar association of attorneys, legal professionals, and law students who live or work in Alameda County. WLAC is an affiliate of California Women Lawyers, and its mission is to be a voice for women in the law by working to

promote equality and diversity, combat gender bias, and oppose all forms of discrimination.