Kristin Perry, et al v. Arnold Schwarzenegger, et al Doc. 143

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,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

No. 10-16696

U.S. District Court
Case No. 09-cv-02292 VRW

PLAINTIFF-INTERVENOR-APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S RESPONSE BRIEF

On Appeal from the United States District Court
for the Northern District of California

The Honorable Chief District Judge Vaughn R. Walker

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INTRODUCTION

Excluding same-sex couples from marriage violates the equal protection and due process clauses of the federal Constitution, as Plaintiffs argue in their separate response brief, and the City and County of San Francisco joins fully in those arguments. But the City, which was granted permissive intervention in this case to present evidence and argument concerning the interests of the government with respect to Proposition 8, respectfully submits that the record also supports affirmance of the decision below on the grounds that Proposition 8 is not rationally related to legitimate government interests in light of California's particular constitutional and statutory guarantees.

Before the enactment of Proposition 8, California's Constitution provided an equal protection, privacy, and due process guarantee to <u>all</u> couples that their committed relationships would be honored as marriages by the State. In addition, the California Constitution guaranteed full equality to its gay and lesbian citizens in all aspects of economic, political and family life.

Against this backdrop, Proposition 8 had a peculiar effect: it removed only the honored stature of "marriage" from same-sex couples, yet altered none of their state constitutional rights to the traditional incidents of marriage, including the right to form a family and raise children. Indeed, the official ballot argument in support of Proposition 8 emphatically insisted that it removed no existing legal rights from gay and lesbian couples other than their right to the title "marriage." ER 1032. Describing its effect in this way may makes Proposition 8 seem like a trifle over a name. But no observer of the campaign to enact Proposition 8—which spent tens of millions of dollars to pass it, SER 353, and which its supporters claimed was necessary to preserve the sanctity of marriage itself, ER 1035—would call Proposition 8 a trifle. Indeed, in the eyes of its vocal proponents, Proposition

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8 was deadly serious, necessary to prevent "[t]he meaning and status of marriage [from being] completely lost." SER 612.

What is the governmental purpose advanced by such a scheme, the creation of a separate constitutional classification to remove a designation of honor but not the substantive rights traditionally accompanying that honor? As discussed below, the rationale that Proponents primarily advance for the classification, the "responsible procreation" justification, does not support it, for the basic reason that Proposition 8 had no effect on the legal regimes governing parentage and childrearing in California. Indeed, Proposition 8 undermines state interests embodied in laws that remain intact after its passage. The "responsible procreation" justification is so far removed from the actual effects of Proposition 8 that it cannot plausibly serve as a rational basis for the measure.

But the interest that is in fact advanced by Proposition 8 is not hidden. The official ballot argument in favor of Proposition 8 made plain its reason: to avoid having anyone, and especially children, view gay relationships as "okay" or as "the same" as heterosexual relationships. ER 1032. Proposition 8 was enacted specifically to strip gay and lesbian families of the honor of marriage and to remove the taint from marriage and the family that its proponents believed was etched by inclusion of same-sex couples in this institution.

The Equal Protection Clause does not tolerate creation of a hierarchy for its own sake. Because Proposition 8 advances no rationale other than to exclude gay and lesbian couples from the most honored relationship classification and relegate them to a separate designation, it denies them the equal protection of the law and must be struck down.

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ISSUES PRESENTED FOR REVIEW

In addition to the issues noted by Proponents in their opening brief, the following issue is presented:

1. Whether Proposition 8, a constitutional amendment adopted after a plebiscite campaign that played on fears and prejudices about lesbians and gay men, violates the Equal Protection Clause of the federal Constitution where its effect is to remove the honored title "marriage" but not the incidents of marriage from same-sex couples, and its purpose is to remove the taint that its supporters believed the inclusion of lesbian and gay couples worked on the institution of marriage.

ARGUMENT

I. PROPOSITION 8'S SOLE EFFECT WAS TO STRIP CALIFORNIA'S LESBIAN AND GAY CITIZENS OF THEIR EQUAL STATURE UNDER THE CALIFORNIA CONSTITUTION.

"The first step in equal protection analysis is to identify the defendants' classification of groups." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008) (internal quotation and alteration omitted). The Court is not required to defer to Proponents' "characterization of what classification they made." *Id.* (emphasis in original). Proponents characterize the Court's inquiry as follows: "At issue here is California's decision to reaffirm the traditional definition of marriage as a union 'between a man and a woman.' Cal. Const. art. I, § 7.5." Brief 1. This characterization is inaccurate. With Proposition 8, California did not create ab initio a category called marriage reserved to opposite-sex couples. Instead, it removed the title "marriage" from one group of couples only—yet left intact the State's constitutional guarantee to gay and lesbian couples that they had a right to form families on the same basis as other couples. The question for equal protection analysis, then, is whether it is rational for California to treat lesbian and

gay couples as identical to heterosexual couples in all other respects yet deny them the honored title "marriage."

A. Prior To Proposition 8, All Couples In California Had Equal Substantive Rights And Equal Stature Under The Law.

Prior to Proposition 8, all couples in California—whether their members were of opposite sexes or the same sex—had two basic guarantees: they were guaranteed equal access to the incidents of marriage and equal stature through access to the designation "marriage." With respect to access to the incidents of marriage—including, as discussed below, the rights to bear and raise children—the state Constitution still guarantees the same rights to opposite sex couples who marry and same-sex couples who enter domestic partnerships.

California law requires the equal treatment of gay men and lesbians in public and private life. Neither government nor private entities may discriminate against them in education, employment, housing, public accommodations, insurance policies, or health care service plans. *See* Cal. Civ. Code § 51(b); Cal. Ed. Code § 200; Cal. Gov. Code § 11135; *id.* §§ 12920 *et seq.*; Cal. Health & Safety Code § 1365.5; Cal. Ins. Code §§ 1374.58, 10140; Cal. Lab. Code § 4600.6(g)(2); Cal. Stats. 1999, ch. 592; Cal. Code Regs., tit. 10, § 2632.4.

This guarantee of equal treatment extends to family life. In California, "[r]egistered domestic partners … have the same rights … and shall be subject to the same responsibilities … as are granted to and imposed upon spouses." Cal. Fam. Code § 297.5(a); *Marriage Cases*, 183 P.3d 384, 417 (Cal. 2008); *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1223 (Cal. 2005). Same-sex couples also possess the right to have and raise children on the same terms as opposite-sex couples. *See* Cal. Fam. Code § 297.5(d) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the

same as those of spouses."). Domestic partners may adopt each other's children, Cal. Fam. Code § 9000(g), and California law presumes that both domestic partners are parents of a child born to either partner during the relationship. *See Kristine M. v. David P.*, 37 Cal. Rptr. 3d 748, 751 (Ct. App. 2006). Whether they have entered into domestic partnership or not, lesbian and gay couples are permitted to become foster parents and adopt children on the same terms as opposite-sex couples. *See* Cal. Welf. & Inst. Code § 16013(a); *Sharon S. v. Superior Court*, 73 P.3d 554, 569-70 (Cal. 2003) ("any otherwise qualified single adult or two adults, married or not, may adopt a child"). Perhaps most significantly, California law recognizes that same-sex couples, whether domestic partners or not, have the capacity and inclination to procreate, and specifically permits them to do so.[1] *See*, *e.g.*, *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *see generally Marriage Cases*, 183 P.3d at 433 & n.50 (referring to "the numerous children in California … being raised by same-sex couples").

In *Marriage Cases*, 183 P.3d 384 (Cal. 2008), the California Supreme Court recognized that the laws ensuring equal treatment of lesbians and gay men are not merely dispensations of the Legislature but are rights guaranteed by the California Constitution. It issued three holdings. First, recognizing that "an individual's homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights," the Court interpreted the state Constitution to provide gay individuals the same basic due process and privacy rights as all

[1] When it adopted the Uniform Parentage Act's amendment governing artificial insemination, California removed language referring to a "married woman" thus making it possible for unmarried women, including lesbians, to have children and create families using this process. *See Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 285 n.7 (Ct. App. 1998). The UPA has been extended to apply to surrogacy as well. *Id*. at 284-88.

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others. *Id*. at 429-30. This guarantee of liberty includes "the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own—and, if the couple chooses, to raise children within that family." *Id.* at 399; *see also id*. at 418 n.27.

Second, and independently, the Court considered the entitlement of lesbian and gay couples to the designation "marriage." The Court held that the California Constitution guaranteed same-sex couples the right to have their relationships accorded the same designation as opposite-sex couples' relationships, *i.e.* the stature of marriage. *Id*. at 434-35, 452-53.

Finally, the Court held that under the equal protection clause of the California Constitution, "sexual orientation should be viewed as a suspect classification" and "statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny." *Id*. at 442; *see id*. at 442-44.

B. Proposition 8 Stripped Lesbian And Gay Couples Of Equal Stature By Removing A State Constitutional Guarantee From Them Alone But Did Not Alter Their Rights To The Incidents Of Marriage.

Contrary to Proponents' understanding, Proposition 8 did not "overrule" the Supreme Court's interpretation of the then-existing California Constitution. Brief 9. Instead, Proposition 8 "establishe[d] a new substantive state constitutional rule that took effect upon the voters' approval." *Strauss v. Horton*, 207 P.3d 48, 63 (Cal. 2009). In *Strauss*, the California Supreme Court authoritatively construed the scope of Proposition 8's new substantive rule. It found that Proposition 8 "carv[ed] out an exception" to the privacy and due process clauses of the California Constitution. *Id*. at 75. But that exception extended only to the right of gay men and lesbians to designate their relationships "marriage"; Proposition 8 did not repeal the other constitutional rights of same-sex couples recognized in the

Marriage Cases. *See Strauss*, 207 P.3d at 75, 102. Same-sex couples thus retain "the constitutional right to enter into an officially recognized and protected family relationship with the person of one's choice and to raise children in that family if the couple so chooses," *id*. at 102, and apart from the designation "marriage," any classification based on sexual orientation is subject to strict scrutiny. *Id*. at 78, 102. Interpreting Proposition 8 to effect a repeal of any rights other than to the designation "marriage," the Court held, would amount to an implied repeal of constitutional rights, which is disfavored. *Id* at 75-76. Finally, the Court held that, because it did not expressly state that it applied retroactively, Proposition 8 did not invalidate the approximately 18,000 marriages that same-sex couples entered into before it passed. *Id*. at 119-23.

Proposition 8 is therefore singular in that it regulates only <u>stature</u> and not the <u>substance</u> of family rights, and only for lesbians and gay men who would marry after November 4, 2008. It is also singular in the manner in which it does this work: by cutting away a portion of the due process, equal protection, and privacy guarantees for a minority class of Californians only, through a popular majority vote. As the Supreme Court noted in *Romer v. Evans*, 517 U.S. 620 (1996), "[d]iscriminations of an unusual character especially suggest careful consideration." *Id.* at 633 (quotation omitted). The peculiarity of Proposition 8 is similar to that of Amendment 2, the Colorado constitutional amendment denying lesbians and gay men the right to obtain statutory antidiscrimination protections from the State or local governments, which the Supreme Court invalidated in *Romer*, finding that "[i]t is not within our constitutional tradition to enact laws of this sort." *Id*.

Just as the Supreme Court did with Amendment 2, this Court should carefully evaluate Proposition 8's justifications in light of its singularity. But

Proposition 8 is also similar to Amendment 2 in that the justifications its proponents now offer for it are unrelated to its actual legal effects and should not be credited. *See id.* at 635 (Amendment 2 is "so far removed from these particular justifications that we find it impossible to credit them"). We turn now to those justifications.

II. PROPOSITION 8 IS PECULIARLY IRRATIONAL UNDER CALIFORNIA LAW.

Proponents urge "responsible procreation" as the justification for Proposition 8. But 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." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). Because Proposition 8 did not alter California's laws concerning having and rearing children, Proponents' asserted justification is too disconnected with Proposition 8 to be credited, and this Court must look elsewhere to find the basis for Proposition 8.

A. Proposition 8 Must Be Evaluated In The Context Of California's Other Laws And Policies.

Even under rational basis review, the State's justification for discriminatory government action "must find some footing in the realities of the subject addressed by the legislation," *Heller v. Doe*, 509 U.S. 312, 321 (1993), and the justification must be one that could "reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). The constitutionality of a law is not determined "by artificial standards" with the court confining review of legislation "within its four corners." *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479-80 (1932). Rather, the court "read[s] together" the challenged law with related enactments, *id.* at 480, and determines whether the state's action "taken in its totality, is within the State's constitutional power." *Id*. The Supreme Court has

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thus repeatedly looked to a State's other laws to determine whether its purported justification supplies a rational basis for a challenged law. *See, e.g., Romer*, 517 U.S. at 626-31 (assessing effect and purpose of challenged ballot measure in light of Colorado's and other jurisdictions' modern antidiscrimination laws); *Williams v. Vermont*, 472 U.S. 14, 15, 26 (1985) (Vermont's proffered justification for sales and use tax regime did not support the challenged law because it was contradicted by other Vermont sales tax provisions); *Eisenstadt v. Baird*, 405 U.S. 438, 449-50 (1972) (Massachusetts's law prohibiting distribution of contraceptives could not be justified as auxiliary to its ban on premarital sex where a conviction for distributing contraceptives carried a sentence 20 times longer than a conviction for fornication).

Thus, this Court must evaluate Proposition 8 in light of its effect and its context. If the Court concludes that, in light of the constitutional protections and statutes pertaining to gay people and gay families that Proposition 8 left untouched, the voters could not reasonably have conceived that Proposition 8 would accomplish the objectives Proponents assert, then the Court cannot uphold Proposition 8 on the basis of such implausible objectives.

B. Proponents' "Responsible Procreation And Childrearing" Rationale For Denying Marriage To Same-Sex Couples Is Unrelated To Proposition 8's Actual Effects On California Law.

Proponents argue that Proposition 8 furthers the State's interest in "responsible procreation and childrearing." Brief 77-93. They are correct that society has a paramount interest in "providing status and stability to the environment in which children are raised." Brief 78. Indeed, California's laws concerning parent-child relationships treat as central the State's concern for the welfare and wellbeing of children. *See* Cal. Fam. Code § 3020(a) ("it is the public

policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children").

From there, however, Proponents' arguments and California law quickly diverge. California law distinguishes between marriage and parenting, treats lesbian and gay parents identically to heterosexual parents, recognizes that irresponsible procreation and childrearing are not limited to situations where children are conceived accidentally, and gives no preference to parents of different genders. As a constitutional amendment, Proposition 8 could have changed any or all of these laws. But it did not. Having left unchanged the state constitutional provisions and laws treating same-sex parents the same as opposite-sex parents, Proposition 8 cannot plausibly be construed as a measure designed to encourage opposite-sex parenting over same-sex parenting.

1. California Regulates Marriage Separately From Parentage.

Proponents' procreation and childrearing rationales have as their first premise that the law governing access to marriage is designed primarily or in significant part to regulate parenting—the having and raising of children. That premise is fundamentally flawed in California, where marriage does not depend on procreation, and the parentage laws, which govern who is deemed to be the parent of a minor child, do not distinguish between parents based on their marital status.

California does not condition marriage on either partner's ability to procreate, *Stepanek v. Stepanek*, 14 Cal. Rptr. 793, 794 (Ct. App. 1961) (lack of "fruitfulness" not ground for nullifying marriage),[2] or potential fitness as a parent. *See* Cal. Fam. Code §§ 300-303 (requirements for marriage), 2200-2201 (void

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[2] Inability to have sexual relations, if incurable, is grounds for annulment, but inability to procreate is not. Cal. Fam Code § 2210; *see also Stepanek v. Stepanek*, 14 Cal. Rptr. at 794 ("The law's test is simply the ability or inability for copulation, not fruitfulness").

marriages), 2210 (voidable marriages). Indeed, the California Constitution guarantees the right to marry to couples who have no intent or ability to have or raise children. *Marriage Cases*, 183 P.3d at 430-32. Conversely, California does not precondition its determination of parental status on marriage. "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Cal. Fam. Code § 7602.

The laws governing access to marriage in California are in fact distinct from the laws that regulate formation of parent-child relationships and parental rights and responsibilities. *Compare* Cal. Const. art. 1, § 7.5 & Cal. Fam. Code §§ 300-310 (marriage) *with* Cal. Fam. Code §§ 7540-7670 (parentage), §§ 7950-7952 (foster care), §§ 8500-9212 (adoption), §§ 7800-7895 (removal from parental custody and control), §§ 3000-3465 (child custody), §§ 3900-4253 (obligation of support), §§ 7500-7507 (parental rights and authority). If Proposition 8 were intended to affect who becomes a parent and how children are raised in this state, surely it would have revised the laws that actually address parent-child relationships. It did not.

2. California Treats Lesbian And Gay Parents Identically To Heterosexual Parents.

Proponents contend that "only sexual relationships between men and women can produce children" and thus that opposite-sex relationships implicate the government 's interest in children "in a way, and to an extent, that other types of relationships do not." Brief at 77; *see also id.* at 82-83. If this were an accurate account of California's interests, one would expect that California laws governing parentage and parent-child relationships would distinguish in at least some respects between same-sex couples and opposite-sex couples. But they did not do so before Proposition 8 was passed and they still do not.

As discussed *supra* in Section I, even after Proposition 8 the California Constitution guarantees same-sex couples the right to form families and to have and raise children within them on the same basis as opposite-sex couples. California statutes further guarantee these rights. And when same-sex couples have children, they have the same parental rights and obligations as any other parent. *Elisa B.*, 117 P.3d 660; *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *see also Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005).

Moreover, California's parentage laws do not privilege heterosexual couples or married couples in establishing parental rights and responsibilities. *See Elisa B.*, 117 P.3d at 664 (California adopted Uniform Parentage Act in part to eliminate distinctions between children born to married and unmarried parents). Indeed, to do so would be inconsistent with the California Constitution's protection of the autonomy of all persons in the realm of family matters, including decisions to have and raise children. *See Marriage Cases,* 183 P.3d at 399, 418 n.27. And it would be inconsistent with the overarching purpose of California's parentage statutes: to promote the welfare of all children whether they are born to a married couple or in any other setting. *Elisa B.*, 117 P.3d at 668-69. Toward that end, California law does favor providing children with two legal parents and stable family relationships. *Id.* at 669 ("[T]he Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support."); *Kristine H.*, 117 P.3d at 696 . But to the extent the existence of a marital relationship plays any role at all in matters relating to parenting, California law treats the domestic partnerships of same-sex couples identically to marriage. *See supra* Section I.A.

California law thus is flatly inconsistent with the idea that the State's interests in childbearing and childrearing are somehow different with respect to

opposite-sex and same-sex couples. It neither privileges nor burdens one type of couple differently than the other when it comes to childbearing or parenting.

3. California Seeks To Identify Responsible Parents For All Children, No Matter How They Were Conceived.

Proponents contend the State needs to offer marriage as an incentive to opposite-sex couples to encourage them to have and raise children only in the context of a marital family rather than through "casual sexual behavior" that may unintentionally produce children. See Brief at 78, 84-86 (Proposition 8 seeks to "channel potential procreative conduct into relationships" that "further society's interest in responsible procreation and childrearing.").

To the extent this argument can be credited at all, it must be taken a step further than Proponents are willing to admit: Because Proposition 8 does not <u>bestow</u> an honor on opposite-sex couples but instead <u>removes</u> an honor from same-sex couples, this "incentives" justification can be credited only if it is rational to believe that opposite-sex couples will be less likely to raise children in a marital family if the stature of marriage is also available to same-sex couples. In fact, as discussed *infra* in Section III., this is the actual justification that Proposition 8's Proponents relied on in their campaign to enact it: that the inclusion of same-sex couples somehow sullied marriage itself and devalued it in the eyes of heterosexual couples. Yet Proponents produced not a shred of evidence that any opposite-sex couple in California would be less likely to marry if same-sex couples could as well. More importantly, as Plaintiffs set out in Section IV.B of their response brief, the state's creation of a separate relationship classification to accommodate private biases is not a legitimate state interest. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Reitman v. Mulkey*, 387 U.S. 369, 378-79 (1967).

Even taken on its own terms, Proponents' justification falls short. Irresponsible procreation and childrearing can occur whether or not a couple conceives a child intentionally or as a result of "casual sexual behavior," and California courts have repeatedly observed that the State's interest in identifying two responsible parents is equally strong for <u>all children</u> regardless of when, why or in what context a parent shirks his or her obligations. *See People v. Sorensen*, 437 P.2d 495, 499 (Cal. 1968) (ex-husband responsible for child born through artificial insemination of his wife with his consent using another man's sperm); *Marriage of Buzzanca,* 72 Cal. Rptr. 2d at 282, 291 (child conceived through surrogacy was the lawful child of husband and wife who divorced before her birth: "for all practical purposes [the husband] caused [the child's] conception every bit as much as if things had been done the old-fashioned way"); *Marriage of Ayo*, 235 Cal. Rptr. 458 (Ct. App. 1987) (adoptive father who subsequently divorced child's biological mother was required to pay support, and this obligation could not be waived by the other parent). Sadly, same-sex couples as well as opposite-sex couples sometimes attempt to avoid their parental responsibilities, and California's interest in providing children with two parents where possible is the same for both. *See Elisa B.*, 117 P.3d 660 (woman who participated in bringing children into the world through artificial insemination of her partner with intent to raise them together was their legal parent and could not later deny parenthood and avoid her support obligation); *see also K.M.*, 117 P.3d 673; *Kristine H.*, 117 P.3d 690; *Sharon S.*, 73 P.3d 554.

In short, if the prestige and honor of marriage provide an incentive for parents to raise their children together, it is equally important for that incentive to be available to <u>all</u> parents who bring children into the world—whether they do so "in the old-fashioned way" or through other methods—and to parents who adopt.

Enacting a constitutional provision to exclude one group of parents from marriage in no way furthers and instead undercuts the government's interest in ensuring responsible procreation and parenting.

4. California Law Expresses No Preference For Opposite-Sex Or Biological Parents.

Proponents finally contend that the State reserves marriage to opposite-sex couples to encourage the raising of children by two parents of different genders, each of whom has a "biological connection" with the child. Brief at 80-81, 89. But—consistent with the social science that, as discussed in Section IV.B.1.a. of Plaintiffs' response brief, refutes the idea that being raised by "biological" parents or by opposite-sex parents is better for children—California has explicitly disavowed these rationales and expresses no preference for households headed by opposite-sex or biological parents.

California's parentage statutes apply in a gender-neutral manner to recognize the parentage of two persons who jointly bring a child into the world, whether they are a same-sex or opposite-sex couple. *Elisa B*., 117 P.3d at 667-71 (applying presumed father statute to find woman was presumed mother of child); *K.M.*, 117 P.3d at 677-78 (applying paternity statute to find woman was mother of child). The adoption statutes similarly apply without regard to sexual orientation. *Sharon S*., 73 P.3d at 570. There is no suggestion in any of the California statutes or cases governing parentage that same-sex couples are any less fit to be parents than opposite-sex couples or any policy preference for opposite-gendered parenting. Indeed, the California Supreme Court has specifically rejected the notion that parents of different genders fulfill different gender roles in parenting. *Carney v. Carney*, 24 Cal. 3d 725, 736-37 (1971).

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Nor do California's laws governing parentage and childrearing reflect any preference for biological parents over parents who beget children through means whereby one or both are not biologically connected to the child, or over parents who adopt. California's parentage statutes define the "parent and child relationship" to mean "the legal relationship existing between a child and the child's natural or adoptive parents." Cal. Fam. Code § 7601. "[N]atural parent" does not necessarily mean biological parent; rather, it means someone other than an adoptive parent, including persons deemed parents by operation of the presumptions set forth in the parentage statutes. *See* Cal. Fam. Code § 7610; *Johnson v. Calvert*, 5 Cal. 4th 84, 93 n.9, 95 (1993); *Elisa B.*, 117 P.3d at 671. Under the parentage statutes, marriage (or domestic partnership) to the natural mother of a child results in a presumption of parenthood, which if not rebutted within two years of the child's birth is conclusive. Cal. Fam. Code §§ 7540, 7541; *see id.* § 297.5(d). This is so regardless of biological connection, because the law embodies a determination that "integrity of the family" is considered more important to the child's welfare than biological connection. *See Estate of Cornelious*, 35 Cal. 3d 461, 464-65 (1984). Indeed, biological connection does not even allow a putative father standing to obtain a blood test of the child in order to challenge the husband's paternity and establish his own. *Dawn D. v. Superior Court*, 17 Cal. 4th 932, 937-38 (1998).

Another statutory presumption presumes parentage by a person who "receives the child into his [or her] home and openly holds out the child as his [or her] natural child"—whether or not that person has a biological connection to the child. Cal. Fam. Code § 7611(d). The presumption of paternity or maternity that flows from establishing a stable and supportive parental relationship with a child is not necessarily rebutted by a showing that another person is the biological father or

mother. *See, e.g., Elisa B.*, 117 P.3d at 667-68. Rather, California law recognizes that a person who has lived with a child and held the child out as a son or daughter has developed a relationship with the child that is "much more important" to the child than biological parentage. *Id.* at 668. Courts apply these parentage presumptions to protect established parent-child relationships even in the face of competing claims by biological parents because doing so "promotes the state's interest in the child's welfare." *Susan H. v. Jack S.*, 30 Cal. App. 4th 1435, 1442 (1994).

Proposition 8 did not revise these presumptions to rank opposite-sex parents or biological parents above other factors in establishing parent-child relationships. Its failure to do so belies Proponents' post hoc rationale.

C. Proponents' "Proceed With Caution" Rationale Is Belied By The Same California Law And Policies.

Proponents also argue that the State should proceed with caution in modifying the definition of marriage, for fear that allowing same-sex couples to marry will contribute to the "deinstitutionalization" of marriage, breaking the links between marriage and childrearing. Brief at 98. Yet as discussed above, California already treats opposite-sex and same-sex couples alike with respect to parentage, childrearing, foster parenting, and adoption. Proponents offer no explanation for how access to the honorific title of "marriage" may deinstitutionalize it when access to the incidents of marriage have not. Nor, for that matter, have they explained how denying marriage to same-sex couples who would seek to marry after November 4, 2008 will deinstitutionalize marriage, when leaving intact the marriages of approximately 18,000 same-sex couples who married in California before that date has not. Moreover, to the extent Proponents implicitly rely on the rationale that opposite-sex couples will be less likely to

marry if same-sex couples are permitted to marry, then this rationale is an effectuation of private biases that is illegitimate for the State to adopt. *See also* Section IV.B.2. of Plaintiffs' response brief.

D. Proposition 8 Is Irrational In Light Of The Harm It Causes.

In evaluating the justification for a measure, the Supreme Court has considered not only whether the relationship between the proffered objectives and the challenged measure is too attenuated but also whether the law's secondary costs are so high that it undermines the plausibility of the asserted rationale. *See Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) ("In light of [the] countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State."). The trial record in this case demonstrated conclusively that relegating lesbian and gay couples to an inferior relationship status has tremendous human costs, which underscore its irrationality under California's statutory and constitutional scheme.

California's Constitution and laws in many ways recognize the equality of lesbians and gay men. Proposition 8 contradicts this recognition by institutionalizing a form of discrimination against lesbians and gay men, signaling to society at large that they are different and inferior. As shown at trial, this contradiction has tremendous costs to the State and its citizens. Gregory M. Herek, a professor of psychology, testified that Proposition 8 inflicts a structural stigma, or stigma expressed through institutions rather than by individuals, on lesbians and gay men because of the way it differentiates people in same-sex relationships from those in opposite-sex relationships. Transcript 2054:7-11. This kind of stigma isolates gay men and lesbians from others in society, according to testimony from psychiatric epidemiologist Ilan Meyer, and is a source of psychological injury to them. Transcript 821:22-822:5, 832:1-18, 846:22-847:12. Moreover, according to

Dr. Meyer, a law like Proposition 8 sends a message that gay relationships are not to be respected, and it "encourage[s] or at least is consistent with holding prejudicial attitudes." SER 156; *see also* Transcript 1276:11-13 (testimony of San Diego Mayor and former Police Chief Jerry Sanders that "if government tolerates discrimination against anyone for any reason, it becomes an excuse for the public to do exactly the same thing"); *People v. Garcia*, 92 Cal. Rptr. 2d 339, 348 (Ct. App. 2000) (for government to allow use of peremptory challenges to prospective jurors based on sexual orientation would send message that gay people are presumed unqualified to decide important questions). The net effect of discrimination against lesbians and gay men in society, according to Dr. Meyer, is a disproportionate incidence of mental and physical health problems, substance abuse, depression and suicide. Transcript 870:23-872:21.

Moreover, the costs of sexual orientation discrimination are not merely borne by the individuals who experience it daily. The trial record demonstrates that school districts collectively lose tens of millions of dollars from absences resulting when students are bullied because of their sexual orientation. PX810. Students who drop out of school mean lost productivity to the state's economy. Transcript 704:20-705:8. The health costs associated with institutional and social stigma against gay people are likewise borne by governments, as the health care providers of last resort. Transcript 699:16-702:7; see also Cal. Welf. & Inst. Code § 9103(a) (finding lesbian and gay seniors' "lifelong experiences of marginalization place [them] at high risk for isolation, poverty, homelessness, and premature institutionalization"). California also sees hundreds of sexual-orientation based hate crimes every year, requiring state and local governments to spend resources investigating and prosecuting these crimes, PX 711, and causing loss of productivity to the state. And these measurements do not quantify the crushing

human costs of discrimination. *See, e.g.*, Transcript 409:13-16 (historian George Chauncey describing, as an example of hostility affecting gay people, a 15-year-old boy in California who was shot because he told another boy he was attracted to the boy); Transcript 1277:17-1278:4 (Mayor Sanders describing hate crime in San Diego where a gay man was beaten almost to death with a baseball bat); Transcript 1506:21-1514:14 (Ryan Kendall describing fellow junior high school students taunting him with names like "faggot," "queer" and "homo"; his mother telling him he would "burn in hell," was "disgusting" and "repulsive" and that "she wished she had an abortion instead of a gay son"; therapist his parents sent him to telling him being homosexual was "dirty and bad"; and how his life "fell apart" and he became "suicidal and depressed.")

III. PROPOSITION 8 WAS ENACTED TO BRAND LESBIAN AND GAY RELATIONSHIPS AS DIFFERENT AND INFERIOR, AN IMPERMISSIBLE STATE PURPOSE.

Try as they may to construct a benign rationale for Proposition 8, Proponents are unable to identify one that is even remotely plausible in light of California's laws governing family and relationships. The relationship between access to marriage and the constitutional and statutory provisions governing parent-child relationships are far too attenuated to make the procreation rationale anything but pretextual. *Cf. Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 945-46 (9th Cir. 2004) (describing equal protection test for pretext in selective enforcement case). The dearth of any plausible benign rationale, coupled with the peculiar nature of Proposition 8 as a popular constitutional amendment that stripped away existing constitutional rights only from a minority group, leads to the inference that Proposition 8's true purpose was not benign. *See Romer*, 517 U.S. at 634.

But inference is not necessary here, as demonstrated by the official ballot argument in favor of Proposition 8, which assured voters that domestic partners

would continue to have "'the same rights, protections and benefits' as married spouses" and that Proposition 8 would not "take away" those rights. ER 1032. It would only take away the title of "marriage." *Id.* But according to the ballot argument, removing the title of "marriage" from gay and lesbian couples was essential to "preserving marriage" itself. Thus, the title "marriage" must be reserved for opposite-sex couples to signal that their relationships are "traditional," "ideal," and "an essential institution of society," in stark contrast to gay and lesbian couples, who were marked with repeated demeaning references to "the gay lifestyle." ER 1032-33.[3] Indeed, according to the ballot argument, if lesbians and gay men were allowed access to the title "marriage," then children would be taught that "gay marriage is okay" and that "there is <u>no difference</u> between gay marriage and traditional marriage." ER 1032 (emphasis in original). That was the harm to be remedied: the elimination of difference between opposite-sex and same-sex couples.

This rationale was emphasized not merely in the voter pamphlet but throughout the Yes on 8 campaign. "[I]f we have same-sex marriage legalized, it's … an affirmation that it's just as good. And then we're going to have this society that eventually is going to come to believe it …." SER 552-53; *see also* SER 622 ("Public schools will teach the fully equal status of homosexual and heterosexual conduct based, in substantial part, on state marriage law."); SER 556 (presenting married gay couples as equal to married heterosexual couples "is a radically anti-

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[3] In asserting in the ballot argument that "Proposition 8 is <u>not an attack on the gay lifestyle</u>," Proponents protested too much. ER 1032 (emphasis in original). The very characterization of gay relationships as a "lifestyle" is a stereotype that not only calls up images of gay people as sexually deviant that were prevalent until very recently, but would never be tolerated if used for any other minority group, such as with reference to an African-American or Jewish lifestyle.

human thing to say"); ER 1036 (campaign materials warning that allowing gay and lesbian couples to marry "destroys the sanctity of marriage").[4]

In short, voters were told that if Proposition 8 does not pass, "[t]he meaning and status of marriage will be completely lost" through the according of equal stature to gay and lesbian couples. SER 612. The purpose of Proposition 8 was made plain: it was simply to ensure that lesbian and gay couples could not taint marriage, in its supporters' eyes, by claiming this stature.

Proposition 8 thus finds its justification not in its effects on procreation or parentage but instead in honoring opposite-sex relationships and commensurately dishonoring same-sex relationships—even while the California Constitution guarantees that substantive incidents of both relationships are the same. Its constitutionality must therefore rise or fall on whether this is a legitimate state purpose. It is not.

Under the federal Equal Protection Clause, "[b]eneficence [cannot] be distributed arbitrarily," *Williams*, 472 U.S. at 27, nor can California create a hierarchy of relationships simply "to make [lesbians and gay men] unequal to everyone else." *Romer*, 517 U.S. at 635. "'A purpose to discriminate against [a disfavored group] cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify'" the classification. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (quotation marks omitted; alteration in original). And the extent to which this hierarchy is based on private moral beliefs does not remove the equal protection violation but only confirms it,

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[4] At times, the difference between same-sex couples and opposite-sex couples was merely asserted, as if it were self-evident. At other times, Proposition 8 campaign messages resorted to expressly moral or religious terms to justify the same conclusion. *See, e.g.,* SER 326-28; *see also* PX0168; PX 0390; PX2842 (all available at https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html).

because moral disapproval is not a legitimate state interest. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Nor is a purpose to discriminate cured if it is based on something less than hatred; prejudice may be caused "by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

Here, there can be no doubt that the "beneficence" that Proposition 8 denies to lesbian and gay couples is no trifle. A dignitary harm is of constitutional dimension, as the Supreme Court has recognized in other cases where parallel institutions have been created in order to separate disfavored classes of people from the majority. *See Sweatt v. Painter*, 339 U.S. 629 (1950); *cf. United States v. Virginia*, 518 U.S. 515 (1996) ("*VMI*"). Denial of access to the "reputation," "standing in the community" and "traditions and prestige" of the University of Texas Law School on the basis of race could not be tolerated under the Equal Protection Clause and was not ameliorated by access to a lesser institution. *Sweatt*, 339 U.S. at 634; *see also VMI*, 518 U.S. at 551 (separate institution was no substitute where it lacked the "history" and "prestige" of VMI).

In this case, no one has argued that domestic partnership has the same "reputation," "standing in the community," or "traditions and prestige" as the institution of marriage. Indeed, the trial record demonstrates conclusively that even with the tangible rights, benefits and obligations that state law confers on domestic partners, same-sex couples and their children are stigmatized and harmed by denial of the right to enter into marriage itself. *See* Plaintiffs' brief Section III.D.; *supra* Section II.C; Transcript 1273:10-17 (San Diego Mayor Sanders testifying that he realized his prior support for civil unions over marriage reflected prejudice: "I was saying that one group of people did not deserve the same dignity

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and respect, did not deserve the same symbolism about marriage."); PX0186. And the importance of the title and stature of marriage is amply demonstrated by the $40 million that Proponents spent on a ballot measure just to "preserve" it from the taint of gay people and their relationships. Thus, there can be no question that the designation "marriage," which is unique in its history, traditions, meaning and prestige, is—by itself and even apart from the tangible rights and benefits associated with it—a right of constitutional importance.

Proposition 8 stripped the right to the honor of "marriage" only from same-sex couples, and enshrined that inequality in the California Constitution. Yet under California law, same-sex couples and opposite-sex couples continue to be similarly situated in every respect that is relevant to intimate and family relationships. Proposition 8 serves no state interest other than to demean lesbian and gay relationships and classify them simply to make them unequal to everyone else. It cannot be sustained under the Equal Protection Clause.

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