United States Court of Appeals

for the

Ninth Circuit

Docket No. 10-16696

KRISTIN PERRY, et al.,

Plaintiff-Appellees,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenors-Appellees.

— against —

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

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

AMICUS BRIEF OF JUSTICE DONALD B. KING (RET.) AND THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS (NORTHERN CALIFORNIA CHAPTER) IN SUPPORT OF PLAINTIFFS-APPELLEES

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FRAP RULE 26.1 DISCLOSURE STATEMENT

Neither *Amici Curiae* Donald B. King, Justice (Ret.), nor The American Academy of Matrimonial Lawyers (Northern California Chapter) are corporations that have issued shares to the public, and neither has a parent company, subsidiary, or affiliate that has issued shares.

I. STATEMENT OF AMICI CURIAE'S INTEREST IN THE CASE

The interest of Amici Curiae in this case is the protection of children of same-sex couples who wish to marry. Amicus Donald B. King, Justice (Ret.) of California's Court of Appeal for the First District, has worked indefatigably for more than three decades to improve the practice of family law in California. Appointed to the Superior Court of California in 1976, he initiated the practice of mediation to aid families in resolving child custody disputes, helped promulgate uniform family law rules for the San Francisco Bay Area courts, and served as Justice of the First Appellate District for 14 years. He co-authored California's pre-eminent family law treatise, the California Practice Guide – Family Law (The Rutter Group). He has received numerous awards, including the California State Bar Judicial Officer of the Year, later named after him, and the National Public Service Award of the American Academy of Matrimonial Lawyers.

The Northern California Chapter of the American Academy of Matrimonial Lawyers ("AAML") consists of 82 fellows of the AAML who are California certified family law practitioners and who practice family law in Northern California. There are more than 1,600 AAML fellows in the fifty states. At its 2004 annual meeting in Chicago, AAML approved, by overwhelming margins, two resolutions in support of the legalization of marriage between same-sex couples. The resolutions stated:

> BE IT RESOLVED that the American Academy of Matrimonial Lawyers supports the legalization of marriage between same-sex couples and the extension to same-sex couples who marry and their children of all the legal rights and obligations of spouses and children of spouses.
>
> and
>
> BE IT RESOLVED that the American Academy of Matrimonial Lawyers encourages the United States Congress and the legislatures of all states to achieve the legalization of marriage between same-sex couples and the extension to same-sex couples who marry and their children of all the legal rights and obligations of spouses and children of spouses.

The fellows the AAML are devoted to the protection of children and their families. Both Amici appear on behalf of Plaintiffs-Appellees as part of their work in support of the institution of marriage, which should not be denied to one class of people on the basis of sexual orientation.

For decades, Amici have been on the ground dealing with the real-world consequences of California's marriage laws. From this everyday experience, Amici have had a unique opportunity to view the practical effects of these laws on children in California. As set forth herein, Amici respectfully submit that Proposition 8 is harmful to California's children, and that Appellants' arguments to the contrary are incorrect.

Appellants' Opening Brief ("AOB") seeks to justify excluding same-sex couples from the fundamental right to marry – and, by extension, the children of

those couples from being part of a married family – by an irrational set of premises. Under both their Due Process and Equal Protection arguments, Appellants rely on stability of the family, procreation, and channeling biological drives as the asserted rational bases for Proposition 8. These Amici agree that stability of the family is one of the advantages of marriage, but we disagree that only heterosexual couples provide that stability. Appellants' assertion that a rational basis for the exclusion lies in fostering procreation is not only contrary to California's enunciated public policy, but it is entirely irrational and discriminatory. Finally, Appellants' reliance on channeling biological drives is an argument in favor of same-sex marriage – and an irrational basis for the exclusion.

ARGUMENT

II. RECOGNITION OF THE RIGHT TO MARRY FURTHERS THE INTERESTS OF CHILDREN.

Amici agree with part of Appellants' core premise, that marriage serves society's interest in maximizing the likelihood that children are reared in a stable, enduring family environment by two loving parents. (AOB 6, 58, 77) Marriage between children's parents promotes stability and assures their children that they have two legal parents; two sources of emotional and financial support; and two parents from whom they may inherit and receive health insurance, Social Security benefits, and a host of other economic benefits. Contrary to Appellants' argument,

the stability of children's homes is in fact a powerful argument *in favor of* allowing same-sex couples to marry.

A. The Law of the State of California Does Not Discriminate Based Upon How Children Are Conceived.

Appellants' emphasis on procreation is a false limiting factor in analyzing the fundamental right to marry. Their eugenic arguments regarding procreation are contrary to California's enunciated public policy. Appellants' asserted preference for procreated children simply has no foundation in California law on parentage or custody. California defines the parent and child relationship as "the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." Cal. Fam. Code § 7601.[1] The legal rights and obligations of parentage are applied under California law regardless of marital status (Section 7602), and regardless of whether children are adopted, born through surrogacy or other forms of assisted technology, or procreated through sexual intercourse. *See, e.g., Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (upholding surrogacy contract by which husband and wife were granted legal parentage over the assertions of woman who had given birth to child with sperm donated by the husband). California recognizes a husband – rather than the sperm donor – as the legal father

[1] All further citations to the California Family Code will be referenced by "Section".

of a child born through sperm donation to his wife. Section 7613. California's statutory recognition of assisted reproduction (Section 7606) gives the lie to Appellants' unfounded assertion that "only sexual relationships between men and women can produce children." AOB at 77.

California's parentage determinations are based only partly upon biology. They are also based upon the relationship between the two adults claiming parenthood, and they look to the relationship between the child and the adult(s) claiming parenthood. Biological relationship does not confer presumed parentage status on a father: California statutes look to whether there is a marriage (Section 7540) or attempted marriage between the parents (Sections 7611(a) and (b)); and whether the man asserting parentage has taken the child into his household and openly held out the child as his own. Section 7611(d). California case law determines parentage on the relationship of the parent figure to the child. *See, e.g., In re Nicholas H.*, 46 P.3d 932 (Cal. 2002) (recognizing child's attachment to a nonbiological father who took the child into his home and provided him financial support); *Brian C. v. Ginger K.*, 77 Cal.App.4th 1198 (2000) (declining to apply the conclusive presumption of paternity arising from marriage where biological father developed a substantial relationship with the child).

Proposition 8 thus cannot be justified by the assertion that California favors procreated children, because California law is to the contrary.

B. Proposition 8 is Inconsistent with All Other California Law, Which Does Not Discriminate Between Same-Sex and Opposite-Sex Parents.

Proposition 8 cannot be rationally justified by an asserted preference for opposite-sex parents over same-sex parents, as Appellants attempt to do. AOB at 78-82. California does not discriminate between same-sex parents and opposite-sex parents. Section 297.5(d) accords the same rights and obligations of parenthood with respect to a child of either registered domestic partner as for married couples. *See Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003), (upholds adoption between same-sex partners); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (applies the Section 7611(d) presumption of paternity arising from taking the child into one's household and holding oneself out as parent, to a lesbian couple). In *Elisa B.*, at 669, the California Supreme Court noted the compelling state interest in establishing parentage as a step toward providing children with child support, access to benefits such as social security, health insurance, survivors' benefits, military benefits and inheritance rights – and furthered this compelling state interest by noting the importance of two parents, regardless of the parents' gender or sexual orientation.

The notion that fathers and mothers play different gender-based roles in parenting has long ago been rejected as outdated by California's highest court. *In*

re Marriage of Carney, 598 P.2d 36, 42 (Cal. 1979). In *Carney*, the California Supreme Court emphasized that the essence of parenting "lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond." *Id.* at 44. "[T]he court's belief that there could be no 'normal relationship between father and boys' unless William engaged in vigorous sporting activities with his sons is a further example of the conventional sex-stereotypical thinking that we condemned in another context in *Sail'er Inn v. Kirby*, 485 P.2d 529 (Cal. 1971)." *Carney*, 598 P.2d at 42 (parallel citations omitted). The District Court below found the campaign statements in favor of Proposition 8 perpetuated stereotypic male and female parental roles in a way that runs completely counter to California law. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 975-976, 1000 (N.D. Cal. 2010). Appellants' professed concern for adverse outcomes for children with single parents and absentee fathers is more rationally addressed by recognizing two legal fathers or two legal mothers than by denying these parents the right to marry.

C. Even Assuming, *Arguendo*, the Accuracy of Appellants' Contention that the "Optimal" Environment for Child Development is for a Child to be Reared in a Home Headed by Her Biological Mother and Biological Father, That Would Not Provide Even a Rational Basis for Proposition 8.

Appellants argue that "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for

educating, socializing, and preparing its future citizens to become productive participants in civil society." AOB at 78, *quoting Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004). That may well be true, but there is a gaping hole in Appellants' logic. Even assuming, *arguendo*, that the "optimal social structure" for child development is for the child to be reared in a home with her biological father and biological mother (*see* AOB at 80-81) – itself a debatable proposition – Appellants fail to demonstrate how denying legal recognition to same-sex marriages does anything to "promot[e] [that] optimal social structure."

Indeed, Appellants' argument is based on the faulty assumption that if marriage for same-sex couples were banned, leaving marriage between opposite-sex couples as the only marriage available, homosexual Californians would simply ignore or reject their sexual orientation and choose to marry a person of the opposite sex, thereby increasing the number of environments asserted to be "optimal" for raising children. Respectfully, to state this argument is to refute it. For obvious reasons, Appellants have not even attempted to assert this point openly, much less to support it with competent evidence. But the assumption – too weak on its face to be asserted openly – undergirds and pervades virtually all of Appellants' arguments about how the need to rear children in an "optimal" environment somehow justifies disparate treatment regarding the right of two

consenting adults to marry. Put simply, a law that restricts marriage only to opposite-sex couples does not increase the number of opposite-sex households, nor does it decrease the number of same-sex households. Thus, even if the "optimal" environment for a child is to be reared in a home with her biological father and biological mother, Proposition 8 does nothing to increase the prevalence of such "optimal" households, and the law is therefore irrational.

Moreover, to recognize this irrationality, the Court need not revisit the supposed "controversy" about whether sexual orientation is an immutable characteristic. *See generally Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds*, *Thomas v. Gonzalez*, 409 F.3d 1177 (9th Cir. 2005). For illustration, consider if California's marriage restriction were based on an indisputably non-immutable trait, such as educational attainment. If the state could present ironclad studies concluding the optimal environment for a child is to be reared in a two-parent household in which at least one of the parents has received a college degree, would Appellants seriously argue that would provide a constitutionally-acceptable basis for the state to ban marriage between mere high school graduates? Surely not. As Appellants have already conceded, the existence of an "optimal" environment for a child does not mean that any other environment can be banned *merely* because it is believed to be "sub-optimal." *See* AOB at 84 n.44 ("Adoption is society's provision for caring for children who, for

whatever reason, *will not* be raised in this optimal environment."), *citing In re Guardianship of Santos*, 195 P. 1055, 1057 (Cal. 1921).

To assess the rationality of Proposition 8, the proper comparison is whether legal recognition of a supposedly "sub-optimal" environment would be better for the child *than what the actual alternative would be*. And here, the alternative is not that a child being reared by parents in a same-sex relationship is suddenly going to be swooped up and deposited into the "optimal" environment of the home of an opposite-sex married couple. The alternative is that, rather than having that child's household environment (two loving same-sex parents) being accorded full and legitimate status in the eyes of the law, that child instead will be reared in the very same home, but with Proposition 8's mark and brand of inferiority. *See* section III(B), *infra*. Accordingly, there is no need for this Court to determine whether children reared in families headed by two loving opposite-sex parents fare better than children reared in families headed by two loving same-sex parents. No matter the answer, Proposition 8 is irrational.

III. MARRIAGE EXISTS FOR PURPOSES INDEPENDENT OF PROMOTING PROCREATION.

Appellants' argument against same-sex marriage appears to be largely premised upon the false notion that the central purpose for marriage is to regulate "the unique procreative capacity" of sexual relationships between men and women. AOB, pp. 54-58. This assertion runs counter to established state and federal law,

and cannot be sustained by the evidence that Appellants presented below, in the District Court.

A. Marriage Serves Many Purposes.

While society has a vital interest in the institution of marriage, so too do the individuals who seek the official recognition and legal rights of marriage. *In re Marriage Cases*, 183 P.3d 384, 424 (Cal. 2008), *superseded by* Proposition 8. Marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *accord Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988). It is "among the decisions that an individual may make without unjustified governmental interference[.]" *Zablocki v. Redhail*, 434 U.S. 374, 386 (1977). Marriage is "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976). There are no distinguishing characteristics between same-sex couples and opposite-sex couples that could justify depriving one group of these vital interests, while granting them to the other.

It is well established that the fundamental right to marry a person of one's own choice is unrelated to the couple's natural, procreative abilities. As recognized by the Supreme Court, there are many independent purposes for marriage and an individual's right to marry is not dependent upon all of those

purposes being satisfied. *See Turner v. Safley*, 482 U.S. 78, 95 (1987) (finding that prison inmates have a right to marry because "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life."). Rather than having a unitary purpose which subsumes all others, marriage exists as a civil institution for many, varied purposes and these purposes are equally served by same-sex couples as by opposite-sex couples.

In *Turner v. Safley*, the Court determined that prison inmates had a Constitutionally protected right to marry for purposes that are wholly unrelated to natural procreation.[2] The Court enumerated a list of attributes of marriage that prevent the state from intruding upon an individual's right to marry: First, marriage provides for "expressions of emotional support and public commitment . . . ." which "are an important and significant aspect of the marital relationship." *Id.* at 95-96. Second, marriage is a potential "exercise of religious faith as well as an expression of personal dedication." *Id.* at 96. Third, the Court noted the

[2] While the Court did allow that inmates could be deprived of the right to marry when they are serving a life sentence, that restriction did not rely upon the fact that the inmate would not have an opportunity to naturally procreate with his spouse. Rather, people who are incarcerated for life can be deprived of the right to marry because that is "*part of the punishment for the crime.*" *Turner,* 482 U.S. at 96 (emphasis added). What crime prevents gays and lesbians from marrying?

expectation that many inmate marriages would eventually be consummated.[3] *Id.* at 96. Finally, the Court recognized that marriage "often is a precondition to the receipt of government benefits." *Id.* at 96. Clearly, the Court's ruling in *Turner* did not depend upon the notion that prisoners could engage in procreation with their spouses after they are released because, "as non-prisoners, they would then undeniably have a right to marry . . . ." *Hernandez v. Robles*, 855 N.E.2d 1, 31 (N.Y. 2006) (Kaye, C.J. dissenting).

The *Turner* Court's opinion is consistent with a line of cases that have found the right to marry is not dependent upon procreation. In *Griswold v. Connecticut*, the Court found that the use of contraceptives by married couples is Constitutionally protected, effectively guaranteeing a right to marriage without procreation. *Griswold*, 381 U.S. at 485-486. "[T]he decision to marry has been placed *on the same level of importance* as decisions relating to procreation, childbirth, child rearing, and family relationships." *Zablocki*, 434 U.S. 374, 386 (1978) (emphasis added). It is not inferior to those rights.

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[3] Consummating a marriage does not refer to procreation, but to the act of sexual intercourse. *See Lutwak v. United States*, 344 U.S. 604, 609 (1953) (describing consummation of a marriage as "living together as husband and wife"). Marriages may be consummated even when procreation is not a purpose for intercourse. *See Poe v. Ullman*, 367 U.S. 497, 547-548 (1961) (a pre-*Griswold* case, noting possibility that law could be changed to exclude "contraceptive relations" from acts that would consummate a marriage).

Appellants conflate the fundamental right to marry with the independent right to procreate. AOB at 70. *Zablocki* described the fundamental right to marry in terms of "the most important relation in life," the "foundation of the family and society, without which there would be neither civilization nor progress," and the right to "marry, establish a home and bring up children," all as part of the Due Process Clause. *Zablocki*, 434 U.S. at 384 (internal quotation omitted). Separately, it referred to the right of privacy, including the right of procreation. *Id.* at 384, 385, 386. The *Zablocki* Court recognized the concomitant right not to procreate rather than bring a child into the world to suffer the "myriad social, if not economic, disabilities that the status of illegitimacy brings." *Id.* at 386. The Court did note that if the right to procreate meant anything, it must imply a concomitant right to marry because Wisconsin at that time had a statute that prohibited sexual relations outside marriage. *Id.* *Zablocki* clearly excludes procreation as an indispensible part of civil marriage.

Appellants' focus upon natural procreation as a means to discriminate against same-sex couples being allowed to marry is not only counter to the law, but it is refuted by the evidence that was presented to the District Court below, which demonstrated that:

- Marriage is not now and never has been predicated upon a willingness or ability to procreate, *Perry*, 704 F.Supp.2d at 956-957;

- The State has many purposes in licensing marriage, some of which benefit the married persons, *id.* at 961;
- Marriage creates significant benefits and obligations affecting, *inter alia*, immigration, citizenship, property, inheritance, government benefits, economic support, health, emotional well-being, life expectancy, and the benefits that flow to the married couple's children, *id.* at 961-964;
- Approximately 18% of same-sex couples in California are raising children, *id.* at 968-969, and;
- "The children of same-sex couples benefit when their parents can marry[,]" *id.* at 973.

In short, Appellants do not (and cannot) show that the state's legitimate interests in marriage are somehow related to traits that are unique to opposite-sex couples. This State has long recognized that stability of the family, and "channeling biological drives" are among the purposes for promoting marriage. *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952). However, neither California, nor any other state, has *ever* treated marriage as an institution limited to couples who are willing and able to procreate. *Perry*, 704 F.Supp.2d at 956. Absent that distinction, there can be no rational basis by which to discriminate against same-sex couples who seek the to provide their families with the protections afforded by marriage. "The State's interest in a stable society is rationally advanced when

families are established and remain intact irrespective of the gender of the spouses." *Hernandez*, 855 N.E.2d at 32 (Kaye, C.J. dissenting).

B. Appellants' Singular Focus on the Procreative Aspect of Marriage is Reminiscent of Some of the Arguments Rejected More than A Half-Century Ago by the California Supreme Court in *Perez v. Sharp.*

As just demonstrated, Appellants are simply incorrect in the cramped view that the "central" and "animating" purpose of marriage "always and everywhere" is to increase the likelihood that children will be born to and raised by the [married] couple[] . . . ." AOB at 77. But it is true that a singular focus on the procreative aspect of marriage and the presumed impact on children has been used before as a cudgel by those seeking to restrict who may exercise the right to marry.

Sixty-two years ago, the California Supreme Court invalidated California's legislative decree that "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void." *Perez v. Sharp*, 32 Cal.2d 711, 712 (Cal. 1948). The California official defending that odious provision, without any apparent acknowledgment of many core aspects of marriage—love, affection, and partnership between two adults—instead presented a variety of procreation-based justifications for the law, among them:

- "[C]ertain races are more prone than the Caucasian to diseases such as tuberculosis" and that such diseases might "endanger a marital partner or offspring." *Id.* at 718;

- "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full blood of either race." *Id.* at 720, *quoting Scott v. State*, 39 Ga. 321, 324 (1869);
- "It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments." *Id*. at 720 n.2, *quoting State v. Jackson*, 80 Mo. 175, 179, 1883 WL 9519 (Mo. 1883);
- "[P]ersons wishing to marry in contravention of race barriers come from the 'dregs of society' and that their progeny will therefore be a burden on the community." *Id.* at 724, and;
- "[E]ven if the races specified in the statute are not by nature inferior to the Caucasian race, the statute can be justified as a means of diminishing race tension and preventing the birth of children who might become social problems." *Id.*

These rationales are of course deeply offensive and repugnant to every modern American ear, and certainly no responsible litigant in today's world would espouse such unvarnished bigotry. But there are faint, disquieting echoes in some of the "burden on the community" arguments presented by Appellants here, and in their steadfast refusal to view marriage as anything other than a prelude to traditional, opposite-sex procreation. *E.g.*, AOB at 77-78-79, 86. As William Faulkner wrote: "The past is never dead. It's not even past." REQUIEM FOR A NUN, Act I, Sc. 3 (Random House 1951).

Lastly, it is remarkable that Appellants, when discussing the judicial invalidation of anti-miscegenation laws, think it necessary to note that "[regarding marriage's] central procreative purposes, anti-miscegenation laws were affirmatively *at war* with those purposes, for by prohibiting interracial marriages, they substantially *decreased* the likelihood that children of mixed-race couples would be born to and raised by their parents in stable and enduring family units. It is thus not surprising that the Supreme Court held that such laws violated the fundamental right to marry in *Loving*." AOB at 66 (emphases in original). With all due respect, what is most surprising here is that Appellants apparently do not realize that their own core argument is eviscerated if the reader simply replaces in that sentence the words "Proposition 8" for "anti-miscegenation laws" and replaces the words "same-sex" for "interracial" or "mixed-race."

IV. DENYING MARRIAGE TO SAME-SEX COUPLES HARMS THEIR CHILDREN AND DENIES THEM EQUAL PROTECTION OF LAW.

A. Denying Marriage to Same-Sex Couples Discriminates Against Their Children.

Depriving same-sex couples of the right to marry harms their children because marriage confers unique benefits and protections for children, which do not otherwise exist. Children of married couples enjoy civil protections, economic and other benefits that children of unmarried, same-sex couples do not. This disparate treatment constitutes a violation of children's rights under the Equal Protection Clause of the Fourteenth Amendment. *See Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968) (finding that children enjoy the protections of the Equal Protection Clause and that parental status alone cannot justify disparate legal treatment); *accord Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 165 (1972). "It is invidious to discriminate against [children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done [by the parent]." *Levy*, 391 U.S. at 72 (footnotes omitted).

While California has attempted to place the rights of children of registered domestic partners on par with the rights of children of legally married couples (Section 297.5(d)), it is unclear whether those rights are always coextensive, or whether they would apply across the state-line, if the families were to move, or require protection of law while traveling out-of-state. Domestic partners are not

"married" under California law, their partnerships are not recognized by the federal government, and they may not be recognized in other states. *Perry*, 704 F.Supp.2d at 970. There are many disparities that exist in how the law treats the children of same-sex couples, who cannot marry, and the children of married couples. Among these:

- Children of married couples benefit from the mutual obligations for familial support that exist between married spouses. *See See v. See*, 450 P.2d 776, 780 (Cal. 1966) (finding that husbands and wives have a mutual obligation to provide support for their spouse and family).
- Children of unmarried, same-sex couples lack the same protections of health insurance, and a host of federal benefits that children of married couples have. *See Perry*, 704 F.Supp.2d at 978-979 (describing harms inflicted upon children of same-sex couples by depriving their parents' of the right to marry).

B. Denying Marriage to Parents of Children in Same-sex Households Stigmatizes Those Children and Perpetuates a Brand of Inferiority Upon Them.

Proposition 8's damaging real-world effect on many California children stands starkly at odds with Appellants' repeatedly-professed concern about the welfare of children. According to the 2000 Census, there are over 50,000 children in California living in same-sex households. U.S. Census Bureau, Census 2000

Summary File 1, available online at www.census.gov/prod/2003pubs/censr-5.naf. Given typical population growth trends and the ever-emerging acceptance of homosexual relationships, this year's decennial Census undoubtedly will show a substantially higher number.

For those tens of thousands of California's children, what does Proposition 8 say to them? That they are being reared in a second-class household. As noted above, despite the good intention embodied in Cal. Fam. Code § 297.5(d) — that children of registered domestic partners are to be treated in the same manner as children of spouses — children of registered domestic partners in fact do not have the same assurance of benefits and privileges. But even if the substantive rights were identical, the public brand that Proposition 8 imposes on children — that their parents are not entitled to share in society's exalted status of marriage — is pernicious. Children of same-sex couples ask "Why can't my parents get married?" Under Proposition 8, the only truthful answer is: "Because your family is considered inferior."

In its landmark *Brown v. Board of Education* decision, the Supreme Court noted the harm that children suffer when stigmatized by a form of second-class citizenship:

> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the

> community that may affect their hearts and minds in a way unlikely ever to be undone. . . . The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (internal citation and brackets omitted).

To be sure, Proposition 8 does not affect any physical separation as racially-segregated schools did. But it nevertheless creates a public hierarchy among families, with only families headed by opposite-sex couples able to attain that status which is historically most cherished.

Appellants argue that "there is no empirical evidence whatsoever that these children would obtain any incremental benefits through marriage above and beyond those which they receive through domestic partnership." AOB at 85 n.45. But this Court does not a need a *Brandeis* brief to know that, while societal acceptance of homosexuality is (thankfully) growing, there remains significant public hostility to—and most tragically, occasional violence upon—gays, lesbians, and their loved ones. And considering that domestic partnership in California is still in its relative infancy, Appellants' demand for some sort of longitudinal study comparing the long-term success of children of same-sex couples in domestic

partnerships to that of children of opposite-sex couples who are married sounds vaguely like an entreaty that this Court should move "with all deliberate speed" in rectifying unlawful discrimination—meaning with no speed at all.[4] That is an entreaty this Court should reject. For the tens of thousands of California children who are currently enduring a state-imposed badge of inferiority and who seek true equality, time cannot wait.

[4] *See generally* Charles J. Ogletree, Jr., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION, p. xv (W.W. Norton & Co. 2004) ("We must address the problems of inequality and, in many respects, resegregation in America that the 'all deliberate speed' approach to racial inequality has left unsolved and replace that approach with an unequivocal commitment—at the highest levels of government, in private industry, and in our personal lives—to full racial equality, and we must do it now.").

V. CONCLUSION

For all of the foregoing reasons, these Amici Curiae respectfully request that this Court affirm the judgment of the District Court and find that the fundamental right to marry the person of one's choice belongs equally to same-sex couples as to opposite-sex couples.

Respectfully submitted,

/s/ Diana E. Richmond

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