No. 10-16696

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,

DENNIS HOLLINGSWORTH, et al.,
Defendants-Intervenors-Appellants.

On Appeal from the United States District Court
for the Northern District of California, No. 09-CV-2292 VRW
Hon. Chief District Judge Vaughn R. Walker

AMICUS CURIAE BRIEF OF NATIONAL GAY AND LESBIAN TASK FORCE FOUNDATION, HUMAN RIGHTS CAMPAIGN, AMERICAN HUMANIST ASSOCIATION, AND COURAGE CAMPAIGN INSTITUTE IN SUPPORT OF APPELLEES SUPPORTING AFFIRMANCE OF THE JUDGMENT

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I.

INTEREST OF AMICI CURIAE

The interest of amici curiae National Gay and Lesbian Task Force Foundation, Human Rights Campaign, American Humanist Association and Courage Campaign Institute (collectively "amici") is to demonstrate that the state's dual framework for recognizing relationships – marriage and domestic partnership – violates the United States Constitution's equal protection guarantee in two ways: (1) by denying same-sex couples access to marriage's unique social value; and (2) by expressing an impermissibly disfavoring message about the worth of same-sex couples relative to different-sex couples. Among the amici are the oldest and largest organizations in the country devoted to serving the interests of the lesbian, gay, bisexual and transgender community.

National Gay and Lesbian Task Force: Founded in 1973, the National Gay and Lesbian Task Force (Task Force) is the oldest national lesbian, gay, bisexual, and transgender ("LGBT") civil rights and advocacy organization. With members in every U.S. state, the Task Force works to build the grassroots political power of the LGBT community by training state and local activists and leaders; conducting LGBT-related research and data analysis; and organizing broad-based campaigns to advance pro-LGBT

legislation and to defeat anti-LGBT referenda. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including the full and equal participation of same-sex couples in the institution of civil marriage.

Human Rights Campaign: Human Rights Campaign (HRC), the largest national LGBT political organization, envisions an America where gay, lesbian, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Among those basic rights is equal access for same-sex couples to marriage and the related protections, rights, benefits and responsibilities. HRC has over 750,000 members and supporters, including nearly 150,000 in the State of California, all committed to making this vision of equality a reality.

American Humanist Association: The American Humanist Association (AHA), which was founded in 1941 and has 10,000 members and numerous chapters and affiliates throughout the United States, is committed to advancing equality for lesbian, gay, bisexual and transgender people and their families. AHA's LGBT Humanist Council seeks to improve the lives of LGBT individuals through education, public service and

outreach and serves as a resource for its members, the greater freethought community and the public on LGBT issues.

Courage Campaign Institute: The Courage Campaign ("Courage") is a leading multi-issue advocacy organization working to bring progressive change to California and full equality to America's LGBT citizens and families. Courage empowers more than 700,000 grassroots and netroots activists, including nearly 400,000 living in the Ninth Circuit. Courage Campaign Institute ("the Institute") is an affiliated organization of the Courage Campaign. Through a variety of groundbreaking public education campaigns, the Institute has played an integral role in keeping the public informed about *Perry vs. Schwarzenegger.*

II.
INTRODUCTION AND SUMMARY OF ARGUMENT

By reserving marriage to heterosexuals while providing a separate relationship status to lesbian and gay couples, Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment in two distinct ways. First, it denies same-sex couples access to the unique social value of marriage. Second, it expresses an impermissibly disfavoring message about

the worth of same-sex couples relative to their different-sex counterparts.[1]

As to the first point, the constitutional violation inheres in the state's role as gatekeeper of legally recognized marriage. Because the state has a monopoly on access to the legal status of marriage, and thus to marriage's unique social value, it may not constitutionally allocate that access differentially among similarly situated couples. Yet that is precisely what Proposition 8 commands: that some couples may access marriage's unique social value while others, identically situated except for sexual orientation, may not.

Contrary to arguments advanced by proponents of Proposition 8, barring same-sex couples from the social value of marriage while providing it to different-sex couples violates the Constitution regardless of the extent to which the state created that social value. Thus, the possibility that the state may not have given marriage all of its current social value – that history, tradition, or other societal forces may have contributed to marriage's special

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[1] Although this brief endorses the argument, advocated in other briefs, that domestic partnership and marriage do not provide equivalent *tangible* rights and benefits, it does not restate those points here. Instead, amici assume (for the sake for argument only) that the two statuses have equivalent tangible value and demonstrate that the distinction sought by Proposition 8 is constitutionally infirm because of the state's unequal allocation of access to the *social* connotations of marriage.

status – does not render discriminatory marriage rules any less unconstitutional.

Amici do not contend that gay and lesbian couples – or any couples, for that matter – have a constitutional right to a particular social value or its benefits. *Cf. United States v. Virginia*, 518 U.S. 515 (1996) (recognizing the greater social value of attending a prestigious, male-only military school as compared to a less prestigious counterpart for women). But when the state wholly controls a status that confers such benefits, it cannot deny access to that status to a class of its citizens merely because society may have played a role in giving that status its unique value. *Cf. Dodds v. Commission on Judicial Performance*, 12 Cal. 4th 163, 176-77 (1995) (recognizing that constitutional due process protection reaches factors, such as concerns with dignity and alienation, that derive their value from society rather than government).

On the second point, Proposition 8 inescapably and impermissibly denigrates same-sex couples by denying them the right to marry and restricting them instead to a separate legal status, domestic partnership, which replicates the functions – but not the social meaning – of marriage. It does so by adopting a state-sanctioned distinction in the relationship-recognition rules applicable to different-sex and same-sex couples. At the

same time, however, the state recognizes that the couples are similarly situated, treating them as essentially indistinguishable for purposes of rights and benefits. *See In re Marriage Cases*, 43 Cal. 4th 757, 779 & n.2 (2008) (noting that domestic partners in California are accorded virtually all of the legal rights and responsibilities accorded married couples in the state). There can be no plausible, non-arbitrary explanation for creating a new legal relationship-recognition status that is the functional equivalent of the existing status of marriage other than to express that same-sex couples are not worthy of the status of marriage even if they are otherwise worthy of equal treatment. Well-settled equal protection jurisprudence forbids precisely this sort of status denigration.

Only by providing the opportunity for the same legal recognition to both same-sex and different-sex couples can the state remedy these constitutional defects.

III.

ARGUMENT

Undoubtedly, the state has provided its same-sex couples with valuable benefits through domestic partnership. If all the Constitution required of the state were that California provide "virtually all of the same legal benefits and privileges" (*In re Marriage Cases*, 43 Cal. 4th at 779), and

"move closer to fulfilling the promises of . . . equality" (California Domestic Partner Rights and Responsibilities Act of 2003, Stats. 2003, ch. 421, § 1(a)), then perhaps Proposition 8 might survive the challenge at bar. But the United States Constitution does not have a "virtually Equal" Protection Clause; instead, it unqualifiedly forbids the states from "den[ying] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

By providing different-sex couples access to marriage and withholding marriage from same-sex couples, Proposition 8 directly contravenes this equal protection guarantee. Even if domestic partnership successfully granted all couples access to the same material benefits and obligations (which it does not, as Plaintiffs-Appellees (Plaintiffs) and other amici demonstrate), the distinction between domestic partnership and marriage is nonetheless unconstitutional. Proposition 8's placement of different-sex couples on one side of the marriage line and same-sex couples on the other denies same-sex domestic partners the unique, particular value of marriage and denigrates their worth relative to different-sex married couples. As Professor Nancy Cott put it, "there is nothing that is like marriage except marriage." (RT 208:16-17)

A. Because the State Wholly Controls Legal Entry to Marriage, It Is Constitutionally Liable for Excluding Same-Sex Couples from Access to Marriage's Unique Value.

Because the state has exclusive control over a couple's legal ability to marry, the question whether the state contributes to the valuable social benefit of marriage is, as a constitutional matter, beside the point. Even if one makes the unreasonable assumption that the state's imprimatur has not added value to marriage,[2] the constitutional problem remains because, under Proposition 8, the state is actively exercising complete, and impermissibly selective, control over access to that socially valuable status.

Considering the state's monopoly over the licensing function in a different context may help to clarify. There should be no doubt that being a lawyer carries social value beyond the lawyers' rights and obligations as defined by the state. Yet the state cannot disclaim constitutional accountability for its rules regarding allocation of licenses to practice law. So, too, here. Even if marriage's social value derives from sources other

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[2] In fact, Plaintiffs adduced testimony to the contrary. For example, as Professor Nancy Cott explained, "the fact that the state is involved in granting [certain] benefits and legitimacy to the marital family tends to lend a prestige, a status to that institution that no informal marriage has ever approximated." (RT 225:4-7; s*ee also* RT 202:2-5 ("[M]arriage, the ability to marry, to say, 'I do,' is a basic civil right. It expresses the right of a person to have the liberty to be able to consent validly.")

than state sanctification, the state cannot avoid constitutional scrutiny when it puts itself in the position of allowing some couples to marry, but not others. Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 Conn. L. Rev. 1397, 1413-15 (2009).

1. Marriage Has Immense Social Value.

Little ink need be spilled establishing marriage's immense social value, as attested to by many of the witnesses at trial. (*See*, *e.g.*, RT 252:18-23 (Prof. Nancy Cott); 574:21-577:145 (Prof. Letitia Peplau); 827:3-4 (Prof. Ilan Meyer); 1251:6-1252:11 (Helen Zia); 2744:19-2746:12, 2790:1-9 (David Blankenhorn)) Marriage has been described as "an institution of transcendent historical, cultural and social significance." *Kerrigan v. Commissioner of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008). The California Supreme Court likewise acknowledged "the long and celebrated history of the term 'marriage'"; "the widespread understanding that this term describes a union unreservedly approved and favored by the community"; and the "considerable and undeniable symbolic importance to this designation." *In re Marriage Cases*, 43 Cal. 4th at 845-46. Indeed, it is the effort to preserve the social value of marriage for heterosexual couples – and the concomitant fear that allowing same-sex couples to marry will diminish

that value – that lies at the heart of Proposition 8's proponents' arguments. As Defendants' expert Kenneth Miller described it: "[T]here's a view that homosexuals may certainly undermine traditional families" and that "if certain events occur with respect to the recognition of same-sex marriage, that that would undermine traditional families." (RT 2606:9-19)

2. The State, by Exercising Monopoly Authority Over Legal Marriage, Wholly Controls Access to Marriage's Social Value.

In California, the decision to marry is left largely to private ordering. But marriage itself is not. Marriage is a legal status, administered by the state. As the Family Code establishes, "[c]onsent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division." Cal. Fam. Code § 300. Among other legal requirements, couples must obtain a license in advance of their marriage ceremony (*id.* § 350), and go to court to challenge a marriage's validity (*id.* § 309).

As a result of these and related rules, "marriage" is available only to those authorized by the state.[3] The state's monopolistic role as the

[3] This exclusive monopoly over the entry into, incidents of and dissolution of marriage demonstrates the existence of state action. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-60 (1978) (describing the link between state action and exclusive governmental control over particular

gatekeeper of marriage thus puts California in control of access not only to marriage's state-sponsored benefits but also to the uniquely valuable social connotations associated with marriage.

3. Because the State Controls Access to Marriage and, Therefore, to Marriage's Social Value, Attributing That Value to Society or "Tradition" Does Not Provide a Rational Basis on which to Deny Same-Sex Couples the Right to Marry.

One argument sometimes advanced by proponents of Proposition 8 to avoid constitutional challenge is that the social significance of marriage is not created by the state. (*See*, *e.g.*, RT 2790:5-9 (testimony of David Blankenhorn)) But under well-settled law, the state cannot avoid constitutional liability solely because societal traditions and private actors have helped shape the background conditions against which a party's injury has occurred.

As the United States Supreme Court has repeatedly made clear, history and tradition cannot justify retention of a discriminatory or exclusionary rule. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("Neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from

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public functions).

constitutional attack.") (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970)); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."). Accordingly, Proposition 8 cannot escape constitutional scrutiny on the ground that it is directed at a status with traditional social value beyond that conferred by the state. Indeed, as the Connecticut Supreme Court explained in reviewing the state's marriage law in *Kerrigan v. Commissioner of Public Health*, 957 A.2d at 418, "[t]o say that the discrimination is 'traditional' is to say only that the discrimination has existed for a long time."

Nor can the state aid in the commission of purportedly private discrimination. As the Supreme Court explained in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), "[t]he Constitution cannot control . . . prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." So, too, in *Anderson v. Martin*, 375 U.S. 399, 402 (1964), the Court rejected a state's use of its power to "induce[] . . . prejudice" among private individuals at the polls. Likewise, in *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), the Court reinforced that individuals' desires to harm

a politically unpopular group do not immunize the government from constitutional liability for actions whose purpose is to deprive that group of a public benefit.[4] *See also United States v. City of Hayward*, 36 F.3d 832, 835-36 (9th Cir. 1994) (citing *Palmore* and holding that "we cannot attach value to unlawful discrimination. The Supreme Court has suggested that the law should not sanction private biases").

In this case, the fact that views about marriage's social value may be privately held or rooted in "tradition" cannot save Proposition 8 from its constitutional infirmity. Nor can the state adopt discriminatory policies based on such views and then claim that it is constitutionally unaccountable for its role in effecting illegal discrimination.

B. The Only Plausible Explanation for the Parallel Relationship-Recognition Bureaucracy Created by Proposition 8 Is to Signal the Inferiority of Same-Sex Couples' Relationships.

By separating same- and different-sex couples into two different, duplicative statuses when the state otherwise treats them as similarly

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[4] Imagine, for example, that the state had authorized interracial domestic partnerships but not interracial marriages after *Perez v. Lippold*, 32 Cal. 2d 711 (1948). *See* William N. Eskridge, Jr., *Equality Practice*: *Liberal Reflections on the Jurisprudence of Civil Unions*, 64 Alb. L. Rev. 853, 870-71 (2001).

situated, the state impermissibly signals that same-sex couples' relationships are of lesser worth than those of their different-sex counterparts.

1. Same- and Different-Sex Couples Are Similarly Situated Under California Law, Yet Proposition 8 Accords Each a Distinct Relationship Status.

As noted, under California law, same-sex and different-sex couples have "virtually all of the same substantive legal benefits and privileges" and "virtually all of the same legal obligations and duties." *In re Marriage Cases*, 43 Cal. 4th at 779. Nonetheless, the state treats these similarly situated couples differently by granting a different relationship status to each: with limited exceptions,[5] the state's statutes establish domestic partnerships solely for same-sex couples (*see* Cal. Fam. Code § 297(b)(5)(A)), while restricting marriage solely to different-sex couples (*see id.* § 300). Obviously, this marriage/domestic partnership distinction cannot be explained on the basis of any functional difference between the couples. To the contrary, as the California Supreme Court has expressly acknowledged, Proposition 8 creates an "*exception* to the state equal

[5] Some different-sex couples may also enter into a domestic partnership if one of the partners is over the age of 62. *See* Cal. Fam. Code § 297(b)(5)(B).

protection clause." *Strauss v. Horton*, 46 Cal. 4th 364, 411 (2009) (emphasis added).

2. History Teaches That Separation Is Usually Undertaken Impermissibly to Denote Inferiority.

History teaches that the separation of a group from a larger community of citizens is almost invariably undertaken to "denote the inferiority of the group set apart" (Kenneth L. Karst, *Law's Promise, Law's Expression* 185 (1993) [hereinafter Karst, *Law's Promise*]) and, when done for that reason, is impermissible.

The most salient illustration in American history is, of course, racial segregation, which was not a neutral, administrative scheme but, rather, a means to signal the inferiority of the minority group at issue. *See Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) (describing segregation as premised on the belief that "colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens"), *overruled by Brown v. Board of Education*, 347 U.S. 483 (1954); *cf. Loving v. Virginia*, 388 U.S. 1, 7 (1967) (characterizing the state's miscegenation law as an "obvious[] . . . endorsement of the doctrine of White Supremacy"). Sex segregation was likewise used to reinforce perceptions of women's lesser status relative to men. *See*, *e.g.*, *Mississippi*

Univ. for Women v. Hogan, 458 U.S. 718, 725 & n.10 (1982) (describing the history of gender-based discrimination as rooted in the idea that women were "innately inferior").

But inferences of inferiority from group-based classifications are not limited to race and gender distinctions. Legally authorized distinctions based on mental retardation and sexual orientation have also triggered judicial suspicion about the operation of "irrational prejudices" against a target group. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (finding the separation of people with mental retardation from others rested on fears of and discomfort with that population); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (identifying animus in an amendment that imposed separate political rules on gay men and lesbians); *cf.* Akhil R. Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203, 224 (1996) (arguing that "the laws at issue in both *Plessy* and *Romer* are about [the] untouchability and uncleanness" of the target group); Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. Rev. 453, 487-88 (1997) (arguing that the Constitution "bar[s] the state from making a general pronouncement that gays and lesbians are 'unequal to everyone else'").

Since Reconstruction, courts have repeatedly held that legal separations, for purposes of diminishing a group's stature or otherwise implying group members' inferiority, violate constitutional guarantees of equality, even without regard to distribution of tangible benefits. *See United States v. Virginia*, 518 U.S. at 532 ("[N]either federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature."). As the United States Supreme Court explained in *Heckler v. Mathews*, 465 U.S. 728, 739 (1984), "[t]he right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated" against; it also includes a right to be free from stigma and "archaic and stereotypic notions." *See also Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 307-08 (1880); *Brown v. Board of Education*, 347 U.S. at 494.

3. Because the State Recognizes that Same- and Different-Sex Couples Are Functionally Indistinguishable, Their Different Relationship-Recognition Status Necessarily Connotes That They Are Not of Equal Worth.

"To understand the claim that a law harms a constitutionally protected interest, a court must pay attention to the environment in which a law operates." Karst, *Law's Promise*, *supra*, at 182. Moreover,

"[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [Equal Protection Clause]." *See Romer v. Evans*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

The discrimination here can easily be classified as of an "unusual character": The state duplicated an existing relationship-recognition bureaucracy, then recognized the unconstitutional harm inherent in that duplication. Still, the defenders of Proposition 8 maintain that the distinction is one without a difference.

The only possible explanation for retaining separate relationship-recognition rules for same- and different-sex couples – other than complete and impermissible arbitrariness – can be concerns about equalizing the status of the two classes of couples. As the United States Supreme Court recognized in *United States v. Virginia*, 518 U.S. at 542-43, a common, albeit invalid, rationale for maintaining separate status is the fear that the "traditional" institution's status will suffer if newcomers are admitted. *See also* David B. Cruz, *The New "Marital Property": Civil Marriage and the Right to Exclude?*, 30 Cap. U. L. Rev. 279, 286-87 (2002) (arguing that maintaining a distinction between civil unions and marriage "deems [gays and lesbians'] lives so fundamentally inferior to or different from

[heterosexuals'] that it would be deceptive or degrading to [heterosexuals] to have to participate in the same relationship institution").

A measure that separates one class from another but then purports to attach no meaning to that separation can be explained only as a message about the relative worth of groups on either side of the state-drawn line. Not surprisingly, the public commentary of Proposition 8's supporters reinforces that the measure's advocates intended to exclude same-sex couples from marriage precisely to avoid the message of full and equal inclusion in society – *the* great promise of equal protection – that would flow from granting lesbian and gay couples non-discriminatory access to marriage. The "Argument in Favor of Proposition 8" included in the Official Voter Information Guide for the November 4, 2008 General Election makes this clear:

> [W]e need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE as a man and a woman.
>
> Proposition 8 is about preserving marriage . . . .
>
> *It restores the definition of marriage* to what . . . human history has understood marriage to be. . . . .
>
> It protects our children from being taught in public schools that "same-sex marriage" is the same as traditional marriage. . . .
>
> [W]hile gays have the right to their private lives, *they do not have the right to redefine marriage* for everyone else.

http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm (emphasis in original). *See also* Pete Winn, *Legal Experts Say Calif. Proposition 8 Decision is Mostly 'Sunny' With One 'Little Dark Cloud,'* cnsnews.com (May 27, 2009), http://www.cnsnews.com/public/content/article.aspx?RsrcID=48650 (accessed Jan. 30, 2010) (quoting a leading Proposition 8 supporter in reference to the California Supreme Court's decision to uphold existing same-sex marriages as saying that "[a]n arm and a leg have been cut off the natural institution of marriage in California"); Family Research Council, *The Slippery Slope of Same-Sex 'Marriage'* 2 (2004), http://www.frc.org/get.cfm?i=BC04C02 (accessed Jan. 30, 2010) (claiming to show that "[g]ay marriage threatens the institutions of marriage and the family").

Evidence adduced at trial confirmed this as well. *See* PX0401 (campaign advertisement warning that if Proposition 8 does not pass, "it opens up the door for all the other laws that the homosexual agenda wants to enforce on other people" and "we will see a further demise of the family"); PX1867 (simulcast promoting Proposition 8 entitled "ABCs of Protecting Marriage" in which Pastor Jim Garlow explains that he is working to pass Proposition 8 "to turn back the tides of evil"); PX1868 (simulcast promoting Proposition 8 entitled "Love, Power and a Sound Mind" in which a reverend

states, "I think about the damage done to our children and our children are going to be taught in the schools that gay marriage is not just a different type of marriage; they're going to be taught that it's a good thing. And, of course, we're destroying the pillar of our society."); PX0506 at 12 (simulcast promoting Proposition 8 entitled "The Fine Line" warning that if gays and lesbians are permitted to marry, "then pedophiles would have to be allowed to marry 6-7-8 year olds. The man from Massachusetts who petitioned to marry his horse after marriage was instituted in Massachusetts. He'd have to be allowed to do so. Mothers and sons, sisters and brothers, any, any combination would have to be allowed.").

The message of Proposition 8 is especially pernicious and inescapable. Because same-sex couples had the state-sanctioned right to marry prior to the initiative's passage, the only possible conclusion from the withdrawal of that right effected by Proposition 8 is that same-sex couples are "second-class citizens" unworthy of that status. *See In re Marriage Cases*, 43 Cal. 4th at 784-85 (noting that "retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples" may impermissibly "perpetuate a more general premise . . . that gay individuals and same-sex couples are in some respects 'second-class citizens' who may, under the law,

be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples"); c*f.* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503, 1525 (2000) [hereinafter Anderson & Pildes, *Expressive Theories*] (arguing that an interpretation of law must "must make sense in light of the community's other practices, its history, and shared meanings").

As Professor Ilan Meyer aptly described it:

> [I]n my mind, the Proposition 8, in its social meaning, sends a message that gay relationships are not to be respected; that they are of secondary value, if of any value at all; that they are certainly not equal to those of heterosexuals. . . . [I]t also sends a strong message about the values of the state; in this case, the Constitution itself. And it sends a message that would, in my mind, encourage or at least is consistent with holding prejudicial attitudes.

(RT 854:10-20)

C. Well-Settled Law Forbids the State From Signaling a Status Difference Between Same- and Different-Sex Couples.

In the equal protection context, courts have long rejected governmental efforts to signal a group's inequality. This body of law includes instances when the classification itself – rather than inequality in tangible benefits – was the driving concern. As the Supreme Court stressed in *Brown v. Board of Education*, intangible harms themselves can trigger an equal protection violation. *Brown*, 347 U.S at 493 (finding that, even when

all tangible factors are made equal, segregated schools nonetheless violate the Constitution); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. at 729 (holding that continuation of women-only nursing program harmed women because it perpetuated stereotypes about women's work); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. at 473 (Marshall, J., concurring) (noting that denying equal housing opportunities to people with mental retardation reflected "a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community").

This concern with impermissible messaging as a consequence of government action can be seen in a variety of contexts. For example, in *Shaw v. Reno*, 509 U.S. 630 (1993), the Court rejected a state redistricting plan in part because the plan reinforced racial stereotypes and signaled to elected officials that they represented only a particular racial group. Likewise, in *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005), the Court barred a Ten Commandments display because of its "message to . . . nonadherents that they are outsiders, not full members of the political community." *Cf. Regents of the University of California v. Bakke*, 438 U.S. 265, 357-58 (1978) (Brennan, J., concurring and dissenting) (invoking the "cardinal principle that racial classifications that stigmatize – because they are drawn on the presumption that one race is inferior to another or because

they put the weight of government behind racial hatred and separatism – are invalid without more").

The underlying concern in these cases is with *expressive* harm – that is, harm "that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, Bizarre Districts, and Voting Rights: Evaluating Election-District Appearances After Shaw*, 92 Mich. L. Rev. 483, 506-07 (1993). Even when these laws "inflict no material injuries on the target group," they are constitutionally infirm because they are "legal communications of status inferiority [that] constitute their targets as second-class citizens." *See* Anderson & Pildes, *Expressive Theories*, *supra*, 148 U. Pa. L. Rev. at 1533, 1544; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 567 (2003) (arguing that *Brown* "turned at least in part on the anti-egalitarian social meanings of the practices at issue").

Excluding lesbians and gay men from marriage is emblematic of precisely this type of symbolic denigration. As Kenneth Karst has observed, proposals to legalize marriage for same-sex couples "are both supported and opposed primarily because of their expressive aspects as symbols of

governmental acceptance of gay and lesbian relationships." Karst, *Law's Promise*, *supra*, at 14; *see also Lewis v. Harris*, 188 N.J. 415, 467 (2006) (Poritz, J., concurring and dissenting) ("Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law."). By granting "domestic partnerships" to gays and lesbians rather than "marriage," the state has effectively labeled gays and lesbians as outsiders who are not worthy of, deserving of, or fit for, full inclusion in the community of citizens united in marriage.

IV.
CONCLUSION

Justice Holmes long ago observed that "[w]e live by symbols." Oliver Wendell Holmes, *John Marshall*, *in Collected Legal Papers* 270 (1920). By "preserving" marriage for heterosexuals, while limiting gay and lesbian couples to a status that accords the same benefits via a different name, Proposition 8 reinforces an impermissible message of difference and unequal worth between gay and non-gay people in California. For this reason, as well as the other reasons addressed above and in the briefs of Plaintiffs and their other supporting amici, Amici respectfully request that this Court affirm the decision below invalidating Proposition 8 as unconstitutional and

declare that the state, through Proposition 8, may not maintain different relationship-recognition rules for same- and different-sex couples.

Dated: October 25, 2010

Respectfully submitted,

/s/ Suzanne B. Goldberg

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because the brief contains 5,266 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii).

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