No. 10-16751

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,
v.
ARNOLD SCHWARZENEGGER, et al.
Defendants.

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

BRIEF OF AMICI CURIAE CALIFORNIA PROFESSORS OF FAMILY LAW IN SUPPORT OF APPELLEES

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IDENTITY AND INTEREST OF AMICI

Amici, named below, are all law professors who teach and write in the area of family law in California. Amici are extremely familiar with California and national family law history, legislation, case law, and policy as they apply to this case. As specialists in California family law, Amici believe our knowledge with respect to these issues will contribute to the deliberations of this Court. This brief is being filed with the parties' consent.

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ARGUMENT

I. The Legal Issues

The central issue in this case is whether Proposition 8, a voter-enacted amendment to the California Constitution, Cal. Const. art I, § 7.5, deprives gay and lesbian individuals of due process and denies them equal protection of the laws under the Fourteenth Amendment of the U.S. Constitution by preventing them from marrying the person of their choice because that person is of the same sex. In resolving this issue, this Court must determine what the State seeks to accomplish when it enables people to marry and whether there is a constitutionally adequate basis, in light of these purposes, for making the sex of the partners a factor in providing access to marriage. Because of developments in California law, the Court also must decide a second question: are the registered domestic partnerships that same sex couples may now enter a satisfactory alternative to marriage from a constitutional perspective?

In this brief, Amici focus on three of the arguments proffered by those seeking to justify the constitutionality of denying same-sex couples the opportunity to marry: a) that special treatment is due heterosexual relationships because heterosexual individuals can procreate "by accident" and by limiting marriage to heterosexual couples the State is helping induce heterosexual couples who have children accidentally to marry; b) that the desire to preserve a "traditional" definition of marriage is an adequate justification for denying individuals the

opportunity to marry someone of the same sex; and c) that by providing same-sex couples the opportunity to enter domestic partnerships, a marriage-like status, California has satisfied the State's obligations under the Equal Protection Clause.

Amici, all professors of California family law, examine the constitutionality of Proposition 8 in the context of California law and policy**.** California law and policy make clear that there are 1) no reasonable justifications, relevant to the purposes of family law, for treating same-sex couples differently from opposite-sex couples with respect to marriage; and 2) domestic partnerships are not equal to marriage. Thus, Amici contend that the district court was correct in holding Proposition 8 unconstitutional, as a matter of both due process and equal protection.

II. The Nature and Purposes of Civil Marriage

A. Civil Marriage Is a State-Created Legal Status

In resolving the constitutional issues in this case, this Court must first determine the legal nature and purposes of marriage. In California, civil marriage always has been a legal status, created by the Legislature, which individuals may choose to assume. Cal. Fam. Code § 300. Civil marriage has always been separate from any form of religious marriage. The original California Constitution, former art. XI, § 12, provided: "No contract of marriage, if otherwise duly made, shall be

invalidated for want of conformity to the requirements of any religious sect." This later became Cal. Fam. Code § 420(c). Individuals can express their commitment to each other through religious vows, but without the State's sanction they cannot claim the legal status of being married.

B. Why the State Provides for Marriage

While civil marriage is a status arising out of a contract between individuals, California public policy has always regarded marriage as a special social institution, warranting public acknowledgment, regulation, support, and encouragement. *In re Estate of De Laveaga,* 75 P. 790, 794-95 (Cal. 1904); *In re Marriage Cases,* 183 P.3d 384, 423 (Cal. 2008) ("*Marriage Cases"*).

Historically, the State has supported marriage for a number of reasons. As discussed in more detail below, Section IV B 2, some of the original purposes for providing for the institution of marriage have been eliminated or become less salient over time. One historical purpose for marriage was to establish and further the division of labor by gender; this goal was evident throughout much of the 19th century. *See* Transcript 239:1- 249:15, 307:1-308:25, 340:14-342:18 (Testimony of Nancy Cott). This is no longer a purpose of marriage; the legal division of marital roles based on gender has been eliminated and public policies that would perpetuate these once prevalent gender-role distinctions have been abandoned or declared unconstitutional. *See Perry v. Schwarzenegger,* 704 F. Supp. 2d 921, 992-

93 (N.D.CAL. 2010) ("*Perry*"); *Marriage Cases*, 183 P.3d at 439-40 fn. 58, 448. Another purpose of marriage was to legitimate children and to prescribe the child support and custodial rights and obligations of their married fathers. This too has changed, as the State has eliminated the distinction between legitimate and illegitimate children and has increasingly prescribed and expanded the rights and obligations of fathers and mothers regardless of their marital status. Cal. Fam. Code § 7602.

While these and other purposes have been eliminated or redefined, the core purpose of marriage has remained constant. That core purpose is to enable two individuals to choose to integrate their lives, legally and emotionally, and to express their commitment publicly, through marriage. California courts have long recognized that this integration benefits all of society, as well as the couple. *Elden v. Sheldon*, 758 P.2d 582, 586-87 (Cal. 1988) (noting that the State accords marriage a special place because marriage is "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime") (internal quotation omitted). The State favors marriage because marriage encourages stable family relationships, promotes economic interdependence and security for all members of the marital household, and can enhance the physical and emotional well-being of both the partners and any children they may have. *See*

Michael Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 Va. J. Soc. Pol'y & L. 291, 300-03 (2001).

Reflecting the fact that marriage involves the commitment of two adults to integrate their lives, California, like all states, has, over time, created a legal regime that supports this integration and protects the commitment married couples make to promote their joint well-being. *See In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 679-80 (Cal. Ct. App. 1995). Thus, under California law, marital partners have obligations of mutual support, a joint interest in assets acquired during the marriage, and a right to a share of their decedent spouse's estate.[1] These obligations flow from the fact of marriage. This is in sharp contrast to the obligations of each parent to her or his children, which now do not arise solely from marriage but remain the same whether the parents are married or divorced, or the children are born in or out of wedlock. *See* Section IV B 1 below.

C. Choice of Partners Is a Critical Aspect of Marriage

Given this core and consistent purpose of marriage, California has long regarded the choice of a partner as a central element of marriage, essential both to

[1] See Cal. Fam. Code §1620 (except as otherwise provided by law, a husband and wife cannot, by a contract with each other, alter their legal relations, except as to property); Cal. Fam. Code § 1612(c) (under some circumstances, couples cannot waive spousal support obligations in a premarital agreement); Cal. Fam. Code § 1100(e) (married couples cannot waive the statutory imposition of a fiduciary obligation in their management and control of community property and they cannot waive spousal support obligations under some circumstances.)

the personal decision to marry and to the societal benefits that follow from marriage. *Perez v. Sharp*, 198 P.2d 17, 19 (Cal. 1948) ("*Perez*"). Choice is central because the benefits of marriage come from the emotional bonds between the individuals and their commitment to a shared future. Today, California places almost no restrictions on marital choice;[2] virtually all adults are able to marry the person of their choice, without regard to their race, national origin, religion, income, fertility, or other characteristics.

The U.S. Supreme Court also has recognized the critical importance of choice of marital partners, elevating choice to a constitutionally protected right. The Court first held that a state may not restrict an individual's choice to marry someone of a different race. *Loving v. Virginia*, 388 U.S. 1,2,12 (1967) ("*Loving*"). Subsequently, in *Turner v. Safley*, 482 U.S. 78, 96 (1987) ("*Turner*"), the Court held that a state may not prevent a person from marrying someone who was in prison, because the state-imposed limitation, even though related to the important

[2] California prohibits bigamous and polygamous marriages. Cal. Fam. Code § 2201. These relationships are less susceptible to the emotional integration and stability that the State seeks to further through marriage and thus they are "potentially detrimental [to]…a sound family environment." *Marriage Cases*, 183 P.3d at 434 fn. 52. There also are a limited number of restrictions based on consanguinity. Finally, marriage must be entered into voluntarily and both participants must be capable of making that choice. To ensure that capability, each person must be at least 18 years old, or, if 16 or 17, must obtain parental consent and a court order allowing the marriage. Cal. Fam. Code §§ 301-03.

interest of regulating prisons, too substantially burdened the individual's right of choice in marriage.[3]

III. California Law Recognizes Same-Sex and Opposite-Sex Couples as Functionally Equivalent with Respect to the Purposes That Underlie Marriage Law

In assessing the constitutionality of Proposition 8**,** the Court must take account of the fact that California law clearly establishes that same-sex and opposite-sex couples are functionally equivalent with respect to all the purposes that underlie the State's creation and regulation of marriage. Over the past ten years, the Legislature has passed a number of laws expressing this conclusion.

In 1999, the California Legislature created the first "domestic partnership" registry, with the goal of recognizing the critical importance of same sex relationships to the State. A.B. 26, 1999 Gen. Assem., Reg. Sess. (Cal 1999) (Stats. 1999, ch. 588, § 2 [adding Fam. Code §§ 297-299.6.]). The legislation defined "domestic partners" as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." Cal. Fam. Code § 297(a). The legislation granted domestic partners hospital visiting privileges and health benefits to the domestic partners of some state employees. In the next few years, many additional rights were provided by A.B. 25, 2001 Gen. Assem., Reg.

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[3] As the Supreme Court indicated in *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965), the constitutional right to marry also may be understood as constituting a subset of the right of intimate association, to which choice is obviously critical.

Sess. (Cal. 2001) ("A.B. 25") and by A.B. 2216, 2002 Gen. Assem., Reg. Sess. (Cal. 2002).

In 2003, the Legislature enacted a comprehensive domestic partnership statute, the Domestic Partner Rights and Responsibilities Act of 2003, Cal. Stats. 2003, ch. 421 ("A.B. 205"), which became effective on January 1, 2005. This statute makes it clear that the State considers committed same-sex couples' relationships to be the functional equivalent of marriage relationships. *See* Grace G. Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV 1555, 1616 (2004).

For example, in the findings, the Legislature explained that, despite substantial obstacles, same-sex couples can, and do, integrate their lives by forming stable, deep, emotional relationships. *See* A.B. 205 § 1(b) ("despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships"). The Legislature also found that, as is true with regard to opposite-sex couples, extending legal protections to and imposing legal obligations on the individuals in these relationships "further[s] the state's interests in promoting stable and lasting family relationships." *Id.* at 1(a). In addition, A.B. 205, A.B. 25, and other legislative developments, and a long line of case law, make clear that California

views lesbian and gay people as equally capable of having and raising children as heterosexuals. For example, in 2001 the California Legislature provided that registered domestic partners could utilize the more streamlined stepparent adoption procedures previously available only to married couples. Cal. Fam. Code § 9000. Most importantly, A.B. 205 provided that all of the parenting rights and obligations of heterosexual married spouses must be extended equally to same-sex registered domestic partners. Cal. Fam. Code § 297.5(a)(d).

Consistent with these legislative findings, and other established California law and policy, the California Supreme Court, citing earlier precedent, held "[i]t is clear from both the language of section 297.5 and the Legislature's explicit statements of intent that a chief goal of the Domestic Partner Act is to equalize the status of registered domestic partners and married couples." *Marriage Cases*, 183 P.3d at 804.

The Supreme Court has determined that the passage of Proposition 8 did not alter any of the legislative and judicial determinations regarding the functional equivalence of same-sex and opposite-sex partnerships. *Strauss v. Horton* 207 P.3d 48, 78 (Cal. 2009). California law continues to recognize that same-sex partners are equal to opposite-sex partners with respect to the goals of family law, especially child-rearing. It is in the context of these legislative and judicial determinations that that the constitutionality of Proposition 8 must be assessed.

IV. There Is No Constitutionally Adequate Basis for Denying Same-Sex Couples Access to the Institution of Marriage

A. The Legal Standard

The opportunity to marry is unquestionably a fundamental right. *Loving*, 388 U.S. at 12. Even where a suspect classification under the equal protection clause was not at issue, the Supreme Court concluded that a statutory classification that significantly interferes with the exercise of the fundamental right to marry "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) ("*Zablocki*"). In light of the purposes Appellants articulate for excluding same-sex couples from the marriage relationship, *Zablocki* is particularly instructive because the statute at issue, which precluded adults with unfulfilled child support obligations from marrying absent court permission, was intended to protect the interests of children. Yet the Supreme Court concluded that only "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Id*. at 386. In *Turner*, the Court again emphasized the importance of marriage as a fundamental right and that any restrictions limiting this right must be narrowly tailored.

Proposition 8 denies individuals who wish to marry a person of the same sex the opportunity to do so, while virtually any two individuals of the opposite sex may marry. This Court must decide whether there is a constitutionally permissible

State interest for making the sex of the partners a determinative factor in providing access to marriage and whether denying a person the opportunity to choose a partner of the same sex sufficiently furthers any such interest. While Amici agree with Appellees that Proposition 8 should be subject to evaluation under a heightened scrutiny standard, we submit that, in light of the relevant California law and policy, there is not even a rational basis for denying individuals the right to marry someone of the same sex.

B. Claimed Rationales

Appellants rely primarily on two arguments: 1) reserving marriage for heterosexual couples encourages responsible procreation and child rearing among heterosexuals by channeling "potentially procreative conduct" into stable family units (Brief 77-93); and 2) California should be permitted to proceed with caution in considering changes to a vitally important social institution (Brief 93-104). These rationales are as deficient as were the other rationales rejected by the U. S. Supreme Court in previous cases regarding access to marriage.

1. Appellants' claim based on "responsible procreation" is both factually unsupportable and counter to important family law interests.

Appellants argue that that by restricting marriage to opposite-sex couples the State provides an incentive necessary to channel *accidental* procreation, and more particularly, the sexual impulses of heterosexual males, into stable family

relationships that will benefit children. A similar incentive is allegedly not required for same-sex couples because they cannot produce children accidentally. Appellants also claim that only by restricting marriage to opposite-sex couples will heterosexual males marry and stay married to their children's mothers, and play an active role in parenting their children.

California certainly is concerned with increasing the likelihood that children are raised in stable and enduring family units. However, the "responsible procreation" argument rests on a faulty premise and relies on faulty logic. *See Marriage Cases* 183 P.3d at 432.

Most critically, the "responsible procreation" argument undermines the exact policy it seeks to further – the stability of families raising children. As everyone in this case acknowledges, children benefit when their parents are able to marry. California law strongly supports the choice of lesbians and gay men to form families by having or adopting children. Proposition 8 directly harms the children of same-sex couples by depriving their families of the stability and protection of marriage. As Appellants own expert witness stated at trial, permitting same-sex couples to marry "would be likely to improve the well-being of gay and lesbian households and their children." Transcript 2803:13-15. *See also id*. at 2839:22-24.

Both California and federal law clearly reject the principle that it is permissible to impose harms upon, or deny legal protection to, children in order to

influence the sexual behavior of their parents. *See, e.g., Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) ("[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual-as well as an unjust-way of deterring the parent.").

Consistent with this principle, in 1975, California enacted the Uniform Parentage Act, 1975 Cal. Stat. 3196-3204 (codified now at Cal. Fam. Code § 7600 et seq.), the purpose of which is "to eliminate the legal distinction between legitimate and illegitimate children." *Johnson v. Calvert*, 851 P.2d 776, 778-79 (Cal. 1993). The UPA expressly provides that: "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. In applying the parentage presumptions of the UPA, as well as other family and adoption laws, California courts have been extremely responsive and sensitive to the changing circumstances of children. California imposes child support obligations on all parents regardless of their gender or marital status, and no longer denies custody and visitation rights to fathers of children born out of wedlock. Cal. Fam. Code § 3900; § 7570 et seq.; *Moss v. Superior Court*, 950 P.2d 59, 64 (Cal. 1998); *Elisa B. v. Superior Court*, 117 P.3d 660, 664 (Cal. 2005).

These changes in California family law directly affect the rights and obligations of heterosexual men who father or may father children. While, taken together, these changes remove some incentives for unmarried heterosexual couples to marry, California has recognized that these changes are crucial to ensuring that all children are provided with the legal rights and protections they need and deserve. California law and policy try to facilitate all children's well-being, regardless of the means of conception, and regardless of whether a parent is wed or unwed, biological or adoptive, heterosexual or homosexual.

Second, even if the underlying premise of this argument was supportable as a matter of law, there is no evidence supporting the claim that excluding same-sex couples from marriage will affect the behavior of any adults in opposite-sex relationships. Appellants produced no evidence at trial or in their briefs supporting their claims or providing any logical reason to believe that excluding same-sex couples from marriage will induce more heterosexual men to marry and remain with the women who bear their children. *See* Transcript 3037:25 (Appellants' counsel insisted that "you don't have to have evidence of this point."); *Perry*, 704 F. Supp. 2d at 999 (district court concludes that the "proponents presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage."). Indeed, it strains credulity to assert that heterosexual men, whose sexual behavior the state is constitutionally

prohibited from seeking to influence by burdening their own children, would be influenced by the exclusion of same-sex couples from marriage. Appellants would thus risk the well-being of children living with same-sex parents on totally speculative claims of societal benefit.[4] Not surprisingly, the State defendants in the *Marriage Cases* never relied on such claims, choosing instead to rest their defense of the marriage exclusion on the state interest in maintaining the traditional definition of marriage as requiring one man and one woman.

Finally, as a matter of policy, marriage has never been restricted to individuals capable of and desiring to procreate and, as a matter of law, the constitutional right to marry has never been viewed as the sole preserve of individuals who are physically capable of having children or who desire to have children. Indeed, in *Griswold*, the Supreme Court upheld a married couple's right to use contraception to prevent procreation. *Griswold*, 381 U.S. at 485-86. Similarly, in *Turner*, the Court held that the constitutional right to marry extends to an individual confined in state prison — even a prisoner who has no right to conjugal visits with his would-be spouse — emphasizing that "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . [including the] expressions of emotional support and public

[4] In this regard, it is significant that the law struck down in *Zablocki*, which limited a parent's right to marry if the parent had outstanding child support obligations, might well have encouraged "deadbeat" parents to pay support thus benefitting their children. Nonetheless, the Court struck it down.

commitment [that] are an important and significant aspect of the marital relationship." *Turner*, 482 U.S. at 95-96.[5]

2. The desire to preserve a "traditional" definition of marriage is not an adequate or acceptable claim.

Appellants also argue that it is acceptable to establish two different marital regimes — marriage and domestic partnerships — because there is a legitimate societal value in preserving a "traditional" definition of marriage. Even assuming it was correct as a matter of law to say that this interest is at least a legitimate state interest, the underlying premise is faulty as a matter of fact. As Professor Nancy Cott's testimony at trial established with respect to the history of marriage in this country since the late 18th century, there is no single form or definition of "traditional marriage." Here, we demonstrate that this assertion is also faulty in the context of California law and policy.

While only opposite-sex couples were permitted to marry in California until the *Marriage Cases* decision, the legal meaning of marriage has evolved

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[5] The "responsible procreation" claim also reflects gender stereotypes regarding women's dependence on men that have long been rejected as a matter of both family law and constitutional equal protection principles. The district court correctly concluded that Proposition 8 undermines the substantial state interest in "equality, because it mandates that men and women be treated differently based only on antiquated and discredited notions of gender." *Perry*, 704 F. Supp. 2d at 998.

considerably since the beginning of California's Statehood. Basic elements, including who may marry, the roles of the spouses, the management and control of marital assets, and the duration of the marital entity have been totally altered to reflect changes in societal views about the purposes of marriage. These changes have been brought about both by shifts in the Legislature's conception of the elements needed to achieve the goals of marriage and by court decisions requiring equal treatment of married spouses in their family status. Since Statehood, the only constant element has been the goal of facilitating the decision of two people to integrate their lives into a single entity called marriage.

(a) Marital Roles

Under California's initial marital regime in 1850, the husband was given a dominant role in the family. Although California adopted a community property regime, the husband was the sole owner and manager of the community property estate during the marriage. *Van Maren v. Johnson*, 15 Cal. 308, 311 (1860). Over the years, the Legislature and courts totally altered this construction of marriage. In 1866, the Legislature granted the wife power to control the disposition of her separate property at her death. Act of March 20, 1866, ch. 285, § 1, 1865-66 Cal. Stat. 316. In 1872, it granted her management of her separate property. 1 CODES AND STATUTES OF CALIFORNIA § 5162, at 595 (T. Hittell ed. 1876). Beginning in 1891, the Legislature further equalized the legal status of

husbands and wives by enacting various statutes restricting the husband's power over the community property. GRACE G. BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 78-79 (5th ed. 2007). California courts interpreted these statutes in ways that benefited the wife's property interests, thereby paving the way for even further equalization of the status of husbands and wives. *Shaw v. Bernal*, 124 P. 1012, 1013 (Cal. 1912); *Dunn v. Mullan*, 296 P. 604, 606-07 (Cal. 1931). These changes culminated in 1975 when California conferred on either spouse equal powers of management and control over the community real and personal property. Act of Oct. 1, 1973, ch. 987, 1973 Cal. Stat. 1897-1905.

California has also abolished gender-based laws regarding child custody, Cal. Fam. Code § 3040(a) (1) and created equal obligations of spousal support during marriage, Cal. Fam. Code § 4300. As a result of both legislative enactments and court decisions, almost all of the gender-based requirements that were once a core aspect of the marital relationship have been eliminated, except for the genders of the marital partners themselves.

(b) Marital Dissolution Reforms

Initially, California greatly limited the right of spouses to dissolve their relationship. California's 1872 divorce statute recognized only fault-based grounds for divorce, permitting courts to dissolve marriages only upon a showing of the commission of specific acts by an offending spouse. In 1952, the California

Supreme Court instituted the first major change with respect to marriage dissolution. In *DeBurgh v. DeBurgh*, 250 P.2d 598, 603-07 (Cal. 1952), the Court, led by Justice Traynor, abolished the rule disallowing divorce if both parties were "at fault." In 1969, California became the first state to enact a no-fault divorce law in which all the fault-based grounds for divorce were abolished and only two no-fault grounds, "irreconcilable differences which have caused the irremediable breakdown of the marriage" and "incurable insanity" remained available. Former Cal. Civ. Code, § 4506 now Cal. Fam. Code § 2310.

The adoption of a no-fault system reflected the legislative judgment that marriage should be viewed as a means of supporting relationships where the parties are committed to integrating their lives and choosing to stay married. It reflects the Legislature's understanding that the benefits of marriage, to the adults and children, depend upon a relationship that is based on the continuing choice of one's partner. The Legislative changes rejected traditional elements of marriage when the tradition was no longer perceived as furthering the societal purposes for supporting marriage.

(c) Access to Marriage

While most of the changes in the definition of marriage came through the Legislature, one element, of direct relevance here, was altered by the judiciary. California law once prohibited individuals from marrying someone of another race

or nationality. This limitation was struck down by the California Supreme Court in *Perez*. When the Court declared the anti-miscegenation statute unconstitutional, the majority of the Legislature and public strongly believed that the need for racial separation outweighed the importance of marital choice. Yet, the Court realized that stereotypical beliefs about racial mixing could not withstand scrutiny under the U. S. Constitution's Fourteenth Amendment Equal Protection Clause, when they were embodied in laws that restricted an individual's opportunity to marry a person of her or his choice, even though the restrictions were long-standing.

The above discussion not only shows that the "traditional" marriage of which Appellants speak no longer exists, it also shows that the elements of the marital relationship thought to be necessary to achieve the State's purposes in authorizing and encouraging marriage have evolved over time in response to changing legislative, judicial, and societal views about the functions of marriage. The core element of marriage that has remained constant over time is the understanding of marriage as an institution that enables two consenting adults to integrate their lives. This legal and social meaning carries with it substantial intangible benefits for the marriage partners. It is the opportunity to participate in this tradition and to enjoy its intangible benefits that same-sex couples seek.

Many of the changes in California marriage law were implemented over strong opposition, with opponents often claiming that the changes would fatally

impair the institution of marriage. However, both the Legislature and the courts adopted these changes in order to promote and protect equality and fairness, as well as to further the goals of the State in providing for marriage. Far from harming the institution of marriage, the elimination of gendered roles and discriminatory restrictions on marriage has strengthened its vitality and importance in California. For similar reasons, it now clearly is discriminatory to deny marital status to same-sex couples.

V. Marriage Is a Unique Legal, Social, and Cultural Status That Provides Advantages That Cannot Be Matched By a Domestic Partnership

The fact that California permits same-sex couples to enter into registered domestic partnerships with many of the tangible rights and responsibilities that inhere in marriage does not eliminate the existing constitutional violation. While domestic partnerships provide many advantages to same-sex couples and their children, the two statuses are far from equal and cannot be equalized. By denying same-sex couples the opportunity to marry, the State devalues their unions both symbolically and practically. *See* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1775 (2005). Even if all the economic and other legal benefits associated with marriage were provided to domestic partners, being married is a unique status, with attendant social and cultural meanings that provide considerable and irreplaceable advantages to married couples. By prohibiting

individuals from marrying someone of the same sex, California has effectively denied same-sex partners the opportunity to experience and benefit from the large array of intangible benefits enjoyed by married couples. No alternative to, or substitute for, marriage can be constitutionally adequate.

For the vast majority of individuals in our society, marriage is probably the single most important social, as well as legal, institution. A substantial majority of all adults will marry at some point in their lives. *See* Matthew Bramlett & William Mosher, Centers for Disease Control, *Advance Data from Vital and Health Statistics, First Marriage, Dissolution, Divorce, and Remarriage*: United States (2001).

Even if the legal and economic benefits that come with marriage were repealed, people still would marry because marriage has profound personal meaning and social significance. No other institution provides a comparable opportunity for the personal expression of mutual commitment. By preventing same-sex couples from marrying "the State deprives [them] of the critical emotional support to be found in the formalized and symbolic relation itself." *Johnson v. Rockefeller,* 365 F. Supp. 377, 382 (S.D.N.Y. 1973) (Lasker, J., concurring & dissenting), *aff'd sub nom. Butler v. Wilson,* 415 U.S. 953 (1974); *See also Turner,* 482 U.S. at 95-96. For many couples, no other state-recognized relationship can have the same spiritual significance.

The difference is more than just spiritual, as important as that is. Marriage combines legal privileges and duties with an extralegal, socially understood set of conventions that affect the impact of marriage on the individuals themselves, on their children, and on the ways in which married couples are treated by others. Leading researchers from many disciplines and differing value perspectives agree that formal marriage, both in its meaning to the couple and its treatment by the broader society, contributes to the quality and stability of the relationship. *See* Steven Nock, *Marriage as a Public Issue,* 15 THE FUTURE OF CHILDREN 13, 17-21 (2005). Substantial research indicates that the status of being married is a universal concept that conveys multiple messages to the community prompting the community to support the marriage. Married couples are treated differently from single individuals or those cohabiting. Their relationships generally receive affirmation and support from extended family, employers, and the community-at-large. As Professor Elizabeth Scott has written "[m]arriage is an institution that has a clear social meaning and is regulated by a complex set of social norms that promote cooperation between spouses-norms such as fidelity, loyalty, trust, reciprocity, and sharing. They are embodied in well-understood community expectations about appropriate marital behavior that are internalized by individuals entering marriage." Elizabeth M. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency,* 2004 U. CHI. LEGAL F. 225, 241 (2004).

These expectations cannot just be transferred to a new institution. Domestic partnerships lack the historic prestige of marriage. Excluding same-sex couples from marriage deprives them of the unique public validation and understanding that only marriage provides. *See, e.g.*, *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 507-08 (Cal. 2004) (Kennard, J., concurring & dissenting) (discussing "the public validation that only marriage can give"); *Knight v. Superior Court*, 128 Cal.App.4th 14, 31 (Cal. App. 2005) ("[M]arriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership").

The consequences of being married are pervasive and often subtle. For example, the language associated with marriage conveys clear meanings to the general public. There are no domestic partnership analogues to the verb "to marry" or the adjective "married." The status of "spouse" or "husband" or "wife" is distinctly different from the status of "partner" or even "domestic partner," terms that apply to many types of relationships and do not connote the same degree of commitment. Children of same-sex couples cannot simply describe their parents as married. "The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning. . . [Its] . . . meanings depend on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now

create a substitute for poetry or for love." Ronald M. Dworkin, *Three Questions for America*, N.Y. REVIEW OF BOOKS, Sept. 21, 2006, at 30; *Kerrigan v. Comm'r. of Public Health*, 957 A.2d 407, 418 n.15 (Conn. 2008). Granting individuals of the same sex the opportunity to marry will not guarantee that they will get the support of all members of the public, but it is a necessary precondition for garnering that support.

The challenges domestic partners face in being recognized as the equivalent of married couples are exacerbated by the differences in the statutory entry and exit requirements for married spouses and domestic partners. *See Marriage Cases*, 183 P.3d at 416 n.24. The legislative structure implies that a domestic partnership is a less permanent, less committed relationship than is a marriage. These differences send a message — to the couple as well as to their relatives, friends, colleagues, and the general public — that domestic partnership is a less weighty, less substantial, and less esteemed institution than marriage. In addition, because the legal rights and obligations of domestic partners are not clear, individuals entering these relationships endure considerable uncertainty and complexity in managing both the internal and external aspects of their partnership, especially with respect to recognition by employers and other third-parties. From a legal, as well as a social, perspective, the surest way to provide same-sex couples with the

status and benefits of marriage is to allow them to marry. Any other approach will necessarily make their legal status subject to a range of uncertainties.

Finally, by consigning lesbian and gay couples to a marriage substitute, the State signals that their relationships are inferior and less worthy, regardless of any intentions to the contrary. As Chief Justice George of the California Supreme Court explained:

> One of the core elements of this fundamental right (to marry) is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships. The current statutes — by drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same sex couples only the new and unfamiliar designation of domestic partnership —pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.

Marriage Cases, 183 P.3d at 830-31.

The separate status for same-sex couples can cause substantial harms. *See* Gilbert Herdt and Robert M. Kertzner, *I Do, But I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbian and Gay Men in the United States*, 3 J. SEXUALITY RES. SOC. POL'Y 33 (2006). The fact that domestic partnerships are provided the legal elements of marriage but denied the right to access the symbolic benefits of the name

marriage highlights the devaluation of the relationships of same-sex couples, which in turn may undermine the benefits to relationships that the legal institution of marriage is meant to further. Their children may suffer from the perception that their parents are being singled out for a separate and lesser status. The exclusion of same-sex couples from marriage is all the more significant because, as a matter of family law policy, virtually everyone else is welcomed into the marital circle.

As discussed above, the exclusion of same-sex couples from marriage also disadvantages their children. As the California Supreme Court explained, "a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples…." *Marriage Cases,* 183 P.3d at 828. This conclusion was fully supported by the scientific evidence presented at trial.

CONCLUSION

The historic tradition of limiting marriage to opposite-sex couples cannot be a constitutionally sound justification for maintaining the exclusion of same-sex couples. The exclusion of these couples is irrational in light of the changes in the legally established elements of marriage over time and the recognition in California law of the value and importance of same sex couple partnerships. In

contrast, the historic social meaning associated with marriage, namely the societal recognition of the mutual commitment and interdependence of two consenting adults, is a tradition that remains critical to our contemporary and ongoing veneration of marriage. This social meaning is of great importance to the partners and their children. Being excluded from this tradition limits the ability of same-sex couples and their children to participate fully in the cultural fabric of our society. We ask this Court to rectify this denial of Appellees' fundamental right to participate in the tradition and values of marriage and to the equal protection of the law and affirm the decision of the district court.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. The foregoing **Brief of Amici Curiae California Professors of Family Law** complies with the type-volume limitation of Fed. R. App. P. 32 and this Circuit's Rule 29-2(c)(3) because this brief contains **6,903** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus falls below the limit of 7,000 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a double-spaced, 14-point, proportionally spaced font (Times New Roman for Word).

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I hereby certify that I electronically filed the foregoing **Brief of Amici Curiae California Professors of Family Law** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2010.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class mail, postage prepaid, to the following non-CM/ECF participants on the attached Service List:

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