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8
 9 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
 10

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11 KRISTIN M. PERRY, et al.,
 12 Plaintiffs,
 13 and
 14 CITY AND COUNTY OF SAN
 FRANCISCO,
 15 Plaintiff-Intervenor,
 16
 17 v.
 18 ARNOLD SCHWARZENEGGER, et al.,
 Defendants,
 19 and
 20 PROPOSITION 8 OFFICIAL PROPONENTS
 21 DENNIS HOLLINGSWORTH, et al.,
 22 Defendant-Intervenors.
 23
 24

CASE NO. 09-CV-2292 VRW
**BRIEF OF AMICUS CURIAE JUSTICE
 DONALD B. KING, RETIRED, IN
 SUPPORT OF PLAINTIFFS**
 Crtrm.: 6
 Judge: The Hon. Vaughn R. Walker

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I. STATEMENT OF INTEREST BY AMICUS CURIAE

The Honorable Donald B. King, a retired Justice of the California Court of Appeal, has worked indefatigably for more than three decades to improve the practice of family law in California. Appointed to the Superior Court in 1976, he initiated the practice of mediation to aid families in resolving child custody disputes and helped promulgate uniform family law rules for the San Francisco Bay Area county courts. He has co-authored the pre-eminent family law treatise in California, the California Practice Guide - Family Law (The Rutter Group) and has taught at several Bay Area law schools. He has received numerous awards, including the California State Bar Judicial Officer of the Year, later renamed after him, and the National Public Service Award of the American Academy of Matrimonial Lawyers.

Justice King seeks to appear as amicus curiae on behalf of plaintiffs in this action as part of his lifelong work in support of the institution of marriage, which he believes should not be denied to one class of people on the basis of sexual orientation. A motion for leave to file this brief is being filed concurrently.

II. INTRODUCTION

Proposition 8 is but one example of how a majority can trample upon the fundamental rights of a disfavored minority by stoking the public’s fears and prejudices. Constitutional protections become meaningless when they can be overturned by a mere majority vote because an individual’s inalienable and fundamental rights then only exist by a license that is revocable.

Marriage is among those fundamental rights that are protected for all people by the Due Process Clause of the Fourteenth Amendment. There is no rational reason for an exception to be carved out for how this fundamental right applies to gays and lesbians (“gays”), just as there was no rational reason for an exception to be carved for how this fundamental right applies to interracial couples. When a class of citizens seeks to preserve its constitutionally guaranteed liberties, the only proper inquiry is whether the Constitution guarantees that liberty interest for all. We do not redefine the liberty interest by asking whether it should apply to a particular class.

Plaintiffs in this case, like same-sex couples throughout the country, seek the same right to marry that already exists. They do not seek the right to “gay marry” any more than a religious couple

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1 seeks the right to “church marry,” or an interracial couple seeks the right to “interracially marry,” or a
2 prisoner seeks the right to “inmate marry.” This fundamental right applies to all of those classes of
3 citizens. The law may not discriminate against same-sex couples, or against any of them, unless there
4 is some compelling justification for it to do so.

5 There is no rational reason that gays should be precluded from establishing enduring
6 relationships that are ennobled by marriage’s obligations, protected by the law, and recognized by the
7 State in the same manner as are the relationships between heterosexual couples. Under California law,
8 the inherent differences between domestic partnerships and marriage are harmful to the stability of
9 same-sex relationships, retard the growth of family relationships, and are detrimental to the children of
10 same-sex couples. There is no rationale that can justify this disparate treatment. The reasons offered
11 by Defendants in this case are grounded in animus and are counter to the California Family Code.

12 **III. PROPOSITION 8 IS AN ILLEGITIMATE EXERCISE OF STATE POWER**

13 A same-sex couple who wants to preserve their loving relationship by marrying is
14 indistinguishable from an opposite-sex couple who wants to do the same thing. In both instances,
15 marriage is the couples’ “expression[] of emotional support and public commitment.” *Turner v.*
16 *Safley*, 482 U.S. 78, 95 (1987). In both instances, marriage provides the couples with a means to
17 preserve “the most important relation in life.” *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). In both
18 instances, marriage “is an association for as noble a purpose as any involved [in law].” *Id.* at 384.

19 The right to marry a person of one’s own choice is a fundamental liberty interest, protected by
20 the Due Process Clause of the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 12 (1965).
21 This right “is of fundamental importance for *all* individuals.” *Zablocki*, 434 U.S. at 384 (emphasis
22 added). It is protected from “unjustified governmental interference[.]” *Id.* at 385 (internal quotations
23 and internal citations omitted). Unfortunately, these fundamental guarantees may be only temporal
24 when they are put before a plebiscite.

25 **A. Proposition 8 was part of a continuing practice that discriminates**
26 **against gays and lesbians by making constitutional protections**
contingent upon a majority vote

27 Proposition 8 is only one of the most recent efforts in a long line of ballot initiatives that have
28 used prejudice against gays to enact discriminatory measures. The ballot box has been frequently

1 used to overturn legislative and judicial acts that were intended to prevent anti-gay discrimination.
2 This reflects that a pervasive prejudice remains in our society, which often relegates gays to a second-
3 class citizenship. In 1977, Anita Bryant convinced voters to overturn a Miami-Dade County
4 ordinance, which prohibited discrimination on the basis of sexual orientation. By its very name, her
5 “Save Our Children” campaign suggested that southern Florida’s children could be safe only if
6 discrimination against gays could continue.¹ While there have been numerous such local ballot
7 initiatives, voter animus has also been used in many campaigns that have amended state constitutions
8 to allow unequal treatment for gays:

- 9 • In 1988, Oregon voters passed “Measure 8,” which revoked employment protections for gays
10 who worked in the Executive Branch of state government. (*Oregon Goes Democratic!*,
11 Ellensburg (WA) Daily Record, Nov. 9, 1988, p. 11.)
- 12 • In 1992, the Colorado Constitution was amended through a voter initiative to repeal all
13 policies and legislation that protected homosexuals from discrimination, and to bar
14 homosexuals from using the political process to secure new protections. *See Romer v. Evans*,
15 517 U.S. 620, 623-31 (1996).
- 16 • In Florida, a ballot initiative amended the state constitution to ban not only same-sex
17 marriages, but also to ban civil unions between same-sex couples. John Cloud, *Why Gay*
18 *Marriage was Defeated in California*, Time Magazine, Nov. 5, 2008.
- 19 • In Arkansas, a ballot initiative amended the state constitution to invalidate an earlier ruling by
20 the Arkansas Supreme Court, which found that prohibitions against gays adopting children, or
21 having foster children, were in violation of the state’s constitution.² The Court had
22 determined those regulations were motivated solely by anti-gay bias. *Id.*
- 23 • In California, Proposition 8 amended the state constitution to effectively overturn a California

24 _____
25 ¹ Jean O’Leary, *Anita Bryant’s Crusade*, N.Y. Times, June 7, 1977, p. 35.

26 ² Arkansas Secretary of State Website. [http://www.votenaturally.org/electionresults/index.php?](http://www.votenaturally.org/electionresults/index.php?ac:show:contest_statewide=1&elecId=181&contestid=5)
27 [ac:show:contest_statewide=1&elecId=181&contestid=5](http://www.votenaturally.org/electionresults/index.php?ac:show:contest_statewide=1&elecId=181&contestid=5). *See also Homosexual Adoption Ban to*
28 *Appear on Ballot*, WorldNetDaily, Aug. 25, 2008. [http://www.wnd.com/index.php?fa=PAGE.](http://www.wnd.com/index.php?fa=PAGE.view&pageId=73411)
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1 Supreme Court decision, which found that laws relating to marriage applied equally to same-
2 sex couples as to opposite-sex couples. See *In re Marriage Cases*, 43 Cal.4th 757, 856-7
3 (2008) (describing that laws allowing marriage apply to same-sex couples under the due
4 process and equal protection clauses of the California Constitution).

5 A temporal expression of the majoritarian will cannot be sufficient to disadvantage a class
6 of citizens under the law. See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (rejecting the notion
7 that a majority can use the power of the State to enforce its views in violation of the Constitution).
8 However, Proposition 8, like other voter initiatives, presents a very real danger that constitutional
9 protections for unpopular groups can be removed anytime the public’s passions and prejudices are
10 swayed at an election. This danger is particularly acute in California, where the State Constitution
11 can be amended with a bare majority of the voters’ assent in any given election. Cal. Const. art.
12 XVIII, § 1.

13 Throughout the history of our country, an independent judiciary has been the ultimate
14 protector of the Constitution. Proposition 8 violates a centuries-old American maxim, that the courts
15 of our nation have a duty to protect “the rights of minorities against abuse at the hands of the
16 majority[.]” *United States v. Patillo*, 817 F.Supp. 839, 843 (C.D. Cal. 1993).

17 **B. Proposition 8 was an irrational expression of voter prejudice**

18 Proposition 8 seized upon society’s prejudice and fear, convincing voters that they and their
19 families needed to prevent same-sex marriage in order to remain protected from homosexuals. See
20 *Lawrence*, 539 U.S. at 571 (for the proposition that “for centuries there have been powerful voices to
21 condemn homosexual conduct as immoral.”). In addition to the television commercials and
22 advertisements supporting Proposition 8 that are presently in evidence before this Court, the
23 Defendant-Intervenors’ (“Defendants’”) own filings in this case seem to acknowledge that Proposition
24 8 is predicated upon irrational prejudice. Among these, Defendants claim that:

- 25 • Gays possess so potent a taint, the vital institution of marriage would be weakened merely by
26 recognizing their equal rights to marry. Defendant-Intervenors’ Trial Memorandum (“Trial
27 Memo”), Doc. No. 295 at 6.

28 ///

- 1 • Same-sex marriage could detract from heterosexual men’s parenting abilities, “likely resulting
- 2 in fewer men believing it is important for them to be active, hands-on parents of their
- 3 children[;]”
- 4 • Same-sex marriage could inspire widespread belief in “polyamory and polygamy”, leading to
- 5 them becoming “judicially enforceable legal entitlement[s;]”
- 6 • Same-sex marriage would weaken the connection of heterosexual fathers to their children by
- 7 sending “a message to men that they have no significant place in family life[;]”
- 8 • Same-sex marriage would harm religion and citizenship by forcing “Americans to choose
- 9 between being a believer and being a good citizen[;]”
- 10 • Same-sex marriage could even “pos[e] a risk to children and the demographic continuity of
- 11 society.”

12 Trial Memo. Doc. No. 295 at 12-14.³

13 Of course, Defendants fail to describe any causative nexus between the occurrence of same-
 14 sex marriage and their forecasted harms. Such broadly unsubstantiated claims of extreme harm seem
 15 to rely upon a belief that this class of citizens is so despicable, society could falter by merely allowing
 16 their equal existence. *See Romer*, 517 U.S. at 632 (The “sheer breadth [of a discriminatory
 17 amendment] is so discontinuous with the reasons offered for it that the amendment seems inexplicable
 18 by anything but animus toward the class that it affects[.]”).

19 Whether society’s prejudices against homosexuals result from personal notions of tradition and
 20 morality, instead of malice, does not affect their lack of legal merit. *See U.S. Dep’t. of Agriculture v.*
 21 *Moreno*, 413 U.S. 528, 534 (1973) (a desire to harm a politically unpopular group cannot be a
 22 legitimate government interest). Prejudice and bigotry against a class do not become constitutionally
 23 ennobled by simply adding “immoral” to the list of contumelies that are used against them. *See*
 24 *Lawrence*, 539 U.S. at 578 (“[T]he fact that the governing majority in a State has traditionally viewed

25 _____

26 ³ We do not challenge Defendants’ contention that same-sex marriage would cause increasing
 27 “complaint[s] that the legal and practical benefits of marriage properly belong to everyone.” Trial
 28 Memo. Doc. No. 295 at 15. That is precisely our point.

1 a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the
2 practice[.]”).

3 **IV. THE FUNDAMENTAL RIGHT OF MARRIAGE APPLIES TO EQUALLY**
4 **TO SAME-SEX AND OPPOSITE-SEX COUPLES**

5 **A. Constitutionally protected fundamental rights, like the right to marry,**
6 **are not statically defined**

7 The liberty interests that are protected by the Due Process Clause of the Fourteenth
8 Amendment “[are] not a series of isolated points pricked out” in the precise terms of specifically
9 enumerated guarantees. *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (internal
10 quotations omitted). Rather, they include “a rational continuum” which. . . includes a freedom from
11 all substantial arbitrary impositions and purposeless restraints. . . .” *Id.*

12 Given that the Due Process Clause does not make any distinctions between how it treats the
13 liberty interests of homosexuals and the liberty interests of heterosexuals with regard to sodomy, there
14 is no discernable reason for the Due Process Clause to make distinctions between how it treats the
15 liberty interests of same-sex couples and the liberty interests of opposite-sex couples with regard to
16 the fundamental right to marry. *See Lawrence*, 539 U.S. at 601 (J. Scalia, dissenting) (noting that the
17 majority opinion “leaves on pretty shaky grounds state laws limiting marriage to opposite-sex
18 couples.”). Plaintiffs in this case are same-sex couples seeking the right to marry; not same-sex
19 couples seeking the right to “gay marry.”

20 **B. The traditional definitions of marriage do not preclude same-sex**
21 **marriage**

22 Our history demonstrates that the definition of marriage is not a static thing, constrained by its
23 historical antecedents. While marriage has always been a relationship between two committed people
24 that is specially recognized by the law, its other characteristics have changed with time. “Traditional
25 marriage” did not explicitly apply to people of different races, prison inmates, nor to men who had
26 child support obligations for issue not in their custody. *See Loving v. Virginia*, 388 U.S. 1 (1967)
27 (regarding inter-racial couples); *Turner v. Safley*, 482 U.S. 78 (1987) (regarding prison inmates);
28 *Zablocki v. Redhail*, 434 U.S. 374 (1977) (regarding child support). However, modern law has
recognized all of these groups as having a constitutionally protected right to marry. *See id.*

1 An ability to procreate is not a factor that can rationally exclude same-sex couples from the
 2 fundamental right to marry because it is not a condition precedent for marriage between opposite-sex
 3 couples. Infertile couples, octogenarians, incarcerated prisoners, and people with an unwavering
 4 devotion to the use of contraceptives can all marry without distinction under the law. *See Turner*, 482
 5 U.S. 78 (1987) (regarding prison inmates); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (regarding
 6 contraceptives).

7 It is sophistic to suggest that same-sex marriage is a different institution than opposite sex
 8 marriage due to the fact that same-sex couples were not explicitly mentioned in laws relating to
 9 marriage. It appears that “the concept of the homosexual as a distinct category of person did not
 10 emerge until the late 19th century.” *Lawrence*, 539 U.S. at 568. Prior to 1973, the American
 11 Psychiatric Association had homosexuality misclassified as a mental disorder. *Petition of Hill*, 775
 12 F.2d 1037, 1039 (9th Cir. 1985).

13 It is outside the realm of reason to expect that a group would have been explicitly mentioned in
 14 marriage laws at a time when that group was not known to exist, or during a period when that group
 15 was classified as being mentally ill. Earlier misunderstandings about homosexuality cannot remove
 16 same-sex marriage from the scope of constitutional protection any more than earlier
 17 misunderstandings about race could remove interracial marriage from constitutional protection. *See*
 18 *Loving v. Virginia*, 388 U.S. 1 (1967). In both situations, the freedom to marry is a vital personal right
 19 that is protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 12.

20 Regardless of sexual orientation, “[w]hen sexuality finds overt expression in intimate conduct
 21 with another person, the conduct can be but one element in a personal bond that is more enduring.”
 22 *Lawrence*, 539 U.S. at 567. “[P]ersonal decisions relating to marriage” are “among the decisions that
 23 an individual may make without unjustified governmental interference[.]” *Zablocki*, 434 U.S. at 385
 24 (internal quotations and internal citations omitted). Same-sex couples do not possess any
 25 characteristic that could rationally justify depriving them of this most important relation in life. *See*
 26 *Id.* at 384 (declaring that marriage is the most important relation in life). Once the state provides the
 27 legal rights and protections of marriage to some, it cannot withhold those rights and protections from
 28 others based upon arbitrary distinctions. *See Lawrence*, 539 U.S. at 583 (stating that moral

1 disapproval of a group cannot justify discriminatory laws).

2 The ability of opposite-sex couples to procreate and establish parentage does not establish a
3 justification for denying same-sex couples the fundamental right to marry because California does not
4 rely upon biology to establish parentage. *See In re Jesusa V.*, 32 Cal.4th 588 (2004) ; *In re Nicholas*
5 *H.*, 28 Cal.4th 56 (2002). Instead, a presumption of parentage arises when a person “receives the child
6 into his [or her] home and openly holds out the child as his [or her] natural child.” Cal. Fam. Code §
7 7611(d). Further, California law has sought to remove any distinctions in how the children of
8 domestic partnerships and the children of married couples are treated. “The rights and obligations of
9 registered domestic partners with respect to a child of either of them shall be the same as those of
10 spouses.” Cal. Fam. Code § 297.5(d); *see also* Cal. Fam. Code § 9000. Unfortunately, it does not
11 follow that children of same-sex couples are unharmed by their parents’ inability to marry.

12 **V. CHILDREN IN PARTICULAR ARE HARMED BY THEIR PARENTS’ NOT**
13 **BEING ALLOWED TO MARRY**

14 **A. Legal parentage for children of same-sex couples is more precarious**
15 **than for children of marriage**

16 Enactment of the California Domestic Partnership Rights and Responsibilities Act was
17 intended to secure to eligible couples and their children all of the same rights and responsibilities as
18 exist for married couples. Cal. Stats. 2003 Ch. 421 (AB 205) §15 and Cal. Fam. Code §§ 297-299.6.
19 However, children of registered domestic partners⁴ are not yet vested with all of the legal rights of
20 children of marriage. They are also subject to considerable uncertainty as to the legal stability of their
21 parentage. The parentage of children of same-sex couples who were either born prior to their parents’
22 registration as domestic partners, or born to couples who do not register is far more uncertain.

23 ⁴ There are tens of thousands of children being raised in households with same-sex parents who are
24 adversely affected by discriminatory marriage laws. The number of same-sex households across the
25 United States totaled 594,391 in the U.S. Census 2000. U.S. Census Bureau, Census 2000 Summary
26 File 1. www.census.gov/prod/2003pubs/censr-5.naf. In the 2000 Census, California had 92,138
27 same-sex unmarried households – more than any other state in the nation; and, of these households,
28 20.2 percent (18,612) of the male partners and 34.3 percent of the female partners (31,603) –
collectively 54.5 percent (50,215) of all same-sex households - included their own and/or unrelated
children. U.S. Census, *supra*. Seventy-four percent (74%) of same-sex couples want to be legally
married. “*Same-Sex Marriage: Mental Health Perspectives*,” Psychiatric Times, August 1, 2006.

1 Despite California's good intentions to treat children of registered domestic partners in the
 2 same manner as it treats children of spouses, as set forth in Cal. Fam. Code § 297.5(d), one cannot
 3 simply read that code section and understand it, without knowing the entirety of the Family Code. No
 4 one who is not an expert in California family law can possibly understand what rights are conveyed by
 5 Cal. Fam. Code § 297.5. Even for those who are expert in California family law, substantial
 6 uncertainty and potential disparity remain in determining parentage for the children of such
 7 partnerships. This uncertainty and disparity would be substantially eliminated if same-sex partners
 8 were allowed to marry.

9 By application of Cal. Fam. Code §§ 297.5(d) and 7540, a child born during a registered
 10 domestic partnership should be recognized as a child of both partners. However, these sections could
 11 be undercut by Cal. Fam. Code § 7541, which allows blood tests to disprove the 'conclusive'
 12 presumption of parentage, provided in Cal. Fam. Code § 7540. These statutes have been construed for
 13 married couples, where the biological father is not the husband, in a way to promote the stability of
 14 the family unit. *Dawn D. v. Superior Court*, 17 Cal.4th 932 (1998). However, it is unclear whether
 15 registered domestic partners (for whom one partner is virtually always not a biological parent) will be
 16 treated the same as married partners in this analysis.

17 While the registered domestic partnership has created many opportunities that did not
 18 previously exist for same-sex couples, the different category of family created by the Act creates an
 19 added layer of statutory interpretation, and an added layer of confusion. As a result of this, many
 20 family lawyers shy away from representing domestic partners because the law is too new, too complex
 21 and too confusing. See, e.g., Roberta Bennett and David Gamblin, "*Domestic Partnership: Not*
 22 *Enough*," Los Angeles Daily Journal, July 27, 2007, www.dailyjournal.com.

23 There are other inequities for determining parentage of registered domestic partners, which do
 24 not exist for married couples. In a marital dissolution proceeding, a trial court may determine the
 25 parentage of children born before the marriage. Cal. Fam. Code § 2330.1. However, the criteria for
 26 determining parentage in a domestic partnership dissolution have not been fully articulated. In
 27 previous cases, the California Supreme Court has stopped short of endorsing a pre-birth or post-birth
 28 adjudication of parentage for same-sex partners who wish to obtain a judgment establishing joint

1 parentage. *Kristine H. v. Lisa R.*, 37 Cal.4th 156 (2005). The Court created a different criterion for
 2 children born of an ova donation from one same-sex partner to the other than the criterion provided by
 3 the Family Code for children born to married couples of artificial insemination. *K.M. v. E.G.*, 37
 4 Cal.4th 130 (2005).

5 Maintaining parentage becomes a complex issue for a family when its members move from
 6 one state to another.⁵ While no one thinks to question the parentage of children born to opposite-sex
 7 married couples, regardless of where they married, the issue is quite otherwise for children of same-
 8 sex partners, even registered domestic partners. “[U]like a marriage, domestic partnership will not
 9 automatically be recognized in other states. Therefore, if the domestic partners move out of
 10 California, the rights bestowed by our state’s domestic partnership may well become illusory.” *Knight*
 11 *v. Superior Court*, 128 Cal.App.4th 14, 33-34 (2005). As also noted by the court in *Knight, supra*,
 12 domestic partners do not have the same freedom to travel without losing the benefits of their union as
 13 married persons. This disparity burdens same-sex couples and their children when traveling or
 14 relocating to another state and those burdens can be significant.⁶

15 The burdens of interstate recognition of parentage for children of same-sex couples can be
 16 vexing, as one out-of-state case makes clear. A lesbian couple separated with one partner residing in
 17 Vermont and the other in Virginia. Dissolution of the couple’s civil union and determining custody of
 18 their child consumed four years of litigation and required decisions by both the Vermont Supreme
 19 Court and the Virginia Intermediate Appellate Court. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d
 20 330, 49 Va.App. 88 (Va.Ct.App. 2006); *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78 (912 A. 2d 951)
 21 (2006). The economic and emotional costs of such prolonged litigation cannot but harm the children

22
 23 ⁵ When California registered domestic partners move to another state, the recognition by that state of
 24 their dual parentage is uncertain. This uncertainty destabilizes the long-term family relationship. As a
 25 result of this, California registered domestic partners who want to move to another state are being
 advised to take redundant measures and obtain a decree of adoption for the non-birth parent or obtain
 (if they can) an adjudication that the non-birth parent is a co-parent before they relocate.

26 ⁶ For a thoughtful discussion generally of the problems of interstate recognition, see Andrew
 27 Koppelman, “*Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for*
 28 *Judges*,” 153 U. Pa. L. Rev. 2143 (2004-2005)

1 involved.

2 Such fragile rights of parentage is unthinkable for married couples, but it is a harsh reality for
3 same-sex parents, including those who have registered as domestic partners. A child whose second
4 parent is not recognized may be involuntarily separated from that parent and forced into foster care, in
5 the event of the recognized parent's death or disability. This violates California's public policy of
6 fostering stability for children and it would seem to be against the rational interests of all conceivable
7 parties. See, *e.g.*, Cal. Fam. Code § 7800 and Prob. Code § 1610(a).

8 Children of same-sex parents are also financially harmed. Although California recognizes a
9 parent's "first and principal obligation is to support his or her minor children according to the parent's
10 circumstances and station in life" (Cal. Fam. Code § 4053(a)), a child whose second parent is not
11 recognized is deprived of support from that person. This is in addition to the deprivation of the
12 financial support and attendant benefits such as health and life insurance and Social Security benefits
13 that harms the child.

14 This vulnerability would be substantially lessened if the partners were simply accorded the
15 right of every other adult in society to marry the person of his or her choice. *Perez v. Sharp*, 32 Cal.2d
16 711 (1948). Marriage is universally recognized, and children of a married couple – even if the couple
17 is same-sex rather than opposite-sex – are more likely to have both their parents recognized as such
18 than children of registered domestic partners.

19 **VI. THE RIGHT TO MARRY *PER SE* CREATES BENEFITS THAT SHOULD
20 BE AVAILABLE TO SAME-SEX PARTNERS AND THEIR CHILDREN**

21 Because California has attempted to provide as many as possible of the rights and
22 responsibilities of spouses to registered domestic partners, the question is purely posed before this
23 Court of whether denial of the right to marry *per se* discriminates against same-sex partners and their
24 children. Civil marriage by itself– the status and the title – conveys benefits to couples that are not
25 replicated by registered domestic partnership. Marriage is an expression of emotional support and
26 public commitment, with spiritual significance; these features are by themselves sufficient to form a
27 constitutionally protected status. *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (granting prisoners the
28 constitutional right to marry).

1 Marriage is universally recognized, understood, and respected. “Marriage commands greater
 2 respect from popular opinion and implies a greater commitment than ‘living together.’ The position
 3 of legal marriage above comparable relationships resists toppling. Contestation over same-sex
 4 marriage has, ironically, clothed the formal institution with renewed honor.” Nancy F. Cott, *Public*
 5 *Vows: A History of Marriage and the Nation* (2000) Harvard University Press. By contrast to
 6 marriage, registered domestic partnership is little-known, not well understood and not accorded the
 7 sanctity, *gravitas* or social respect of marriage. As discussed above, the petitioners in this action and
 8 their children, as well as their families, recognize registered domestic partnership as an institution
 9 inferior to marriage, as indeed it is.

10 [S]tigmatization of homosexuality is perpetuated by discrimination in
 11 marriage denial and that, in turn, perpetuates a vicious circle. Because
 12 they are not being allowed to marry, same-sex couples often
 13 experience commitment ambiguity marked by uncertainty about the
 14 extent of mutual obligations in the relationship; uncertainty about the
 15 recognition of the partnership by family, friends, and others; and
 16 uncertainty about when the relationship is over.⁷

17 “What gay couples cannot get is legal and social recognition of their relationships.”⁸
 18 Marriage, like no other institution, creates kinship. Granted, anyone can declare that any other person
 19 is a member of his or her family; but nothing unites two unrelated families as does a marriage.
 20 Weddings are public events that pull together not only the individuals to be married, but also their
 21 extended relatives. Weddings thus introduce the newly-created families and announce to the
 22 community the couple’s deep commitment to each other.

23 Marriage confers status: to be married, in the eyes of society, is to be
 24 grown up. Marriage creates stakes: someone depends on you.
 25 Marriage creates a safe harbor for sex. Marriage puts two heads
 26 together, pooling experience and braking impulsiveness. Of all the
 27 things a young person can do to move beyond the vulnerability of early
 28 adulthood, marriage is far and away the most fruitful. We all need

24 ⁷ *Same-Sex Marriage: Mental Health Perspectives*, *Psychiatric Times*, August 1, 2006. See also
 25 Gilbert Herdt and Robert Kertzner, “*I Do, But I Can’t: The Impact of Marriage Denial on the Mental*
 26 *Health & Sexual Citizenship of Lesbians and Gay Men in the United States*,” 3 *J. Sexuality Res. &*
 27 *Soc. Pol’y.* 33 (2006).

28 ⁸ Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier,*
Healthier, and Better Off Financially (2000), Doubleday.

1 domesticating, not in the veterinary sense but in a more literal, human
 2 sense: we need a home. We are different people when we have a
 3 home: more stable, more productive, more mature, less self-absorbed,⁹
 4 less impatient, less anxious. And marriage is the great domesticator.

5 Marriage provides “a critical form of social insurance,”¹⁰ in that it creates a duty of each married
 6 partner to care for the other when ill, which in turn lessens the duty of the State to do so.

7 The argument that gays or lesbians can marry a person of the opposite sex affords them only
 8 the opportunity to form a sham marriage. This argument dishonors the institution of marriage itself
 9 and discredits the fundamental issue of choice. Anyone advancing that argument need only ask
 10 himself what it would feel like to be able to marry only someone he would never choose to marry. As
 11 demonstrated above, marriage *per se* (as distinguished from the attendant legal rights and
 12 responsibilities or a relationship of some other name, such as domestic partnership) confers unique
 13 benefits.

14 The ability to make the commitment of marriage, even when one or both of the spouses cannot
 15 consummate the marriage or otherwise live together as a married couple, is constitutionally protected.
 16 *Turner v. Safely, supra*. The fundamental component of choosing one’s marital partner is part of this
 17 constitutional protection. *Perez v. Sharp*, 32 Cal.2d 711, 725 (1948) (recognizing the importance of
 18 an individual being able to marry the person “of his choice and that person to him may be
 19 irreplaceable”).

20 VI. CONCLUSION

21 Marriage is a fundamental right that applies to same-sex couples equally as it applies to
 22 opposite-sex couples. The right to marry cannot be denied because, not only does the State lack any
 23 compelling interest that can be served by denying gays and lesbians this fundamental right, but there is
 24 not any rational reason to support this disparate treatment by the law.

25 ///

26 ⁹ Jonathan Rauch, *Gay Marriage* (2004) Times Books, Henry Holt and Company, LLC.

27 ¹⁰ Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 Va. J. Soc.
 28 Policy & L. 291 (Fall 2001).

1 Everyday throughout this country, people meet, they fall in love, and they design a life
2 together based upon the legal protections, stability, and public recognition that marriage offers for
3 them. Everyday, gays and lesbians are harmed because these things are denied to them. Everyday in
4 California, the children of same-sex couples are harmed because they are stigmatized by the lack of
5 recognition for their families, and their relationships with their same-gender parents do not have the
6 same protections of law that are provided for other children in this state. The inequalities and harms
7 that result from denying same-sex couples the legal right to marry are unjustified and cannot be
8 sustained.

9 For all of the foregoing reasons, this Court should assert the judiciary’s traditional role in
10 guarding the constitutional rights for all citizens by restoring the rights of same-sex couples to marry.

11
12 DATED: February 3, 2010

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