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8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA

11 KRISTIN M. PERRY, *et al.*,

12 Plaintiffs,

13 and

14 CITY AND COUNTY OF SAN
15 FRANCISCO,

Plaintiff-Intervenor,

16
17 vs.

18 ARNOLD SCHWARZENEGGER, *et al.*,

19 Defendants

20 and

21 PROPOSITION 8 OFFICIAL
22 PROPONENTS DENNIS
HOLLINGSWORTH, *et al.*,

23 Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

**BRIEF OF AMICI CURIAE
BAY AREA LAWYERS FOR
INDIVIDUAL FREEDOM (“BALIF”)
ET AL. IN SUPPORT OF PLAINTIFFS**

Judge: Hon. Vaughn R. Walker
Dept: Courtroom 6

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INTRODUCTION

1
2 Foundational to the Equal Protection Clause of the Fourteenth Amendment is the principle
3 that “the Constitution ‘neither knows nor tolerates classes among citizens.’” *Romer v. Evans*, 517
4 U.S. 620, 633 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J.,
5 dissenting)). In line with this principle, it has long been bedrock law that “separate but equal”
6 treatment does not satisfy the federal constitution. The very notion is a contradiction in terms: As
7 the Supreme Court has emphasized since *Brown v. Board of Education*, the Constitution’s
8 promise of true equality is necessarily breached by government-sponsored separation of a
9 disfavored class.

10 Proposition 8 betrays these longstanding values. It excludes a class of people—same-sex
11 couples—from the venerated institution of marriage, relegating them instead to the inherently
12 unequal and legalistic apparatus of domestic partnership. It does so for no purpose other than to
13 deny that class of people access to real marriage, creating a distinction that is as pernicious,
14 obvious, and emotion-laden as it is difficult to fully articulate. And this unjustifiable separation
15 of gay and lesbian couples, as *amici* explain below, inflicts profound injury upon them. Because
16 Proposition 8 sets them apart, gay men and lesbians and their families are deprived of critical
17 benefits enjoyed by their heterosexual counterparts; are subjected to debilitating stigma; and are
18 exposed to increased discrimination on the basis of their sexual orientation.

19 Proposition 8 cannot survive even rational basis review. *Amici* agree with Plaintiffs’
20 argument that Proposition 8 lacks any legitimate justification; it was enacted “for the purpose of
21 disadvantaging the group burdened by the law.” *Romer*, 517 U.S. at 635. The measure
22 “classifies homosexuals not to further a proper legislative end but to make them unequal to
23 everyone else,” *id.* at 635. *See* Plaintiffs’ and Plaintiff-Intervenors’ Trial Memorandum at 6–10;
24 *see also* Brief of *Amici Curiae* American Civil Liberties Union et al., at 1–7. *Amici* focus here on
25 describing in more detail Proposition 8’s harmful impact.

ARGUMENT**I. CLASSIFICATIONS THAT SERVE ONLY TO DISADVANTAGE THE BURDENED GROUP FAIL RATIONAL BASIS REVIEW.**

The Equal Protection Clause of the Fourteenth Amendment is “a commitment to the law’s neutrality where the rights of persons are at stake.” *Romer*, 517 U.S. at 623. The Clause “requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.” *Loving v. Virginia*, 388 U.S. 1, 10 (1967). Even under the most deferential review—the rational basis test—a state law must be “rationally related to a legitimate state interest.” *E.g.*, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1984). “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *Id.* at 446.

A “classification of persons undertaken for its own sake” fails even rational basis review, for it serves no legitimate governmental purpose. *Romer*, 517 U.S. at 635. As the Supreme Court has repeatedly explained, “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.* at 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)). Accordingly, in *Romer*, the Supreme Court struck down a Colorado constitutional amendment that prohibited governmental protection of gay and lesbian individuals. *Id.* at 636. The amendment, the Court found, was a “status-based enactment” that “impose[d]” a special disability on [gays and lesbians] alone.” *Id.* at 631, 635. It “inflict[ed] on [gays and lesbians] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.” *Id.* at 635. *See also Eisenstadt v. Baird*, 405 U.S. 438, 454–455 (1972) (law prohibiting distribution of contraceptives to unmarried individuals lacked a rational basis and violated the Equal Protection Clause).

Amici submit this brief to highlight the disfavored status and both tangible and intangible injuries visited upon gay and lesbian individuals by Proposition 8 and its prohibition on their being able to marry—effects repugnant to the Constitution’s equality guarantee and in no way mitigated by access to the separate and inherently inferior mechanism of domestic partnership.

1 As in *Romer*, these injuries “outrun and belie” any legitimate governmental purpose. *See*
 2 Plaintiffs’ and Plaintiff-Intervenors’ Trial Memorandum at 6–10 (refuting alleged purposes of
 3 Proposition 8). Proposition 8 cannot withstand even the most deferential constitutional scrutiny.

4 **II. PROPOSITION 8 DISADVANTAGES GAY AND LESBIAN INDIVIDUALS.**

5 **A. Time-Honored Precedent Establishes that Separate Is Inherently Unequal.**

6 State-created, separate institutions for disfavored groups offend the guarantees of the
 7 Equal Protection Clause. As the Supreme Court has repeatedly recognized since *Brown v. Board*
 8 *of Education*, such separate institutions are “inherently unequal.” 347 U.S. 483, 495 (1954). *See,*
 9 *e.g., Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches and
 10 bathhouses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (public golf courses); *Gayle v.*
 11 *Browder*, 352 U.S. 903 (1956) (public transportation); *New Orleans City Park Improvement*
 12 *Ass’n v. Detiege*, 358 U.S. 54 (1958) (public parks); *Peterson v. City of Greenville*, 373 U.S. 244
 13 (1963) (restaurants); *Brown v. Louisiana*, 383 U.S. 131 (1966) (public libraries).

14 Even where separate institutions have the trappings of their more well-regarded
 15 counterparts, inequalities necessarily remain, often arising from intangible but no less real and
 16 constitutionally impermissible distinctions. *See Sweatt v. Painter*, 339 U.S. 629, 634 (1950)
 17 (noting, in striking down Texas’s segregated law schools, that “the [all-white] Law School
 18 possesses to a far greater degree those qualities which are incapable of objective measurement but
 19 which make for greatness in a law school”); *United States v. Virginia*, 518 U.S. 515, 557 (1996)
 20 (holding that Virginia could not restrict women to a military program that lacked, among other
 21 features, the “prestige” of Virginia Military Institute).

22 **B. Forbidding Same-Sex Couples from Marrying Deprives Them of Meaningful**
 23 **Benefits.**

24 The effect of Proposition 8 is a two-tiered regime: opposite-sex couples may marry, while
 25 similarly-situated same-sex couples are barred from doing so; instead they may enter only into a
 26 new, legal creation known as “domestic partnership.” *See Cal. Fam. Code §297* (2005). Even to
 27 the extent that domestic partnership may confer the legal benefits of marriage, *Strauss v. Horton*,
 28 207 P.3d 48, 61–62 (Cal. 2009), the two-tiered regime is inherently unequal and deprives gay and

1 lesbian couples of critical advantages enjoyed by opposite-sex couples. *See id.* at 78 (“[B]y
2 incorporating into the California Constitution a specific provision that expressly restricts the
3 designation of ‘marriage’ to the union of a man and a woman, Proposition 8 must be understood
4 as creating a limited exception to the state equal protection clause as interpreted in the majority
5 opinion in the *Marriage Cases*.” (internal citations omitted)).

6 **1. Marriage Confers Upon Opposite-Sex Couples a Multitude of Benefits.**

7 It is unassailable that marriage holds a hallowed status in our society. Its importance is an
8 essential aspect of the human experience. That, after all, is the crux of proponents’ argument.
9 *See* Defendant-Intervenors’ Trial Memorandum at 1 (describing marriage as a “venerable and
10 bedrock social institution”). Far more than a mere bundle of legal rights and responsibilities,
11 marriage is “an institution of transcendent historical, cultural and social significance,” *Kerrigan v.*
12 *Comm’r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008)—“an institution more basic in our
13 civilization than any other.” *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). Its
14 significance to the couple involved is unparalleled; it is “intimate to the degree of being sacred.”
15 *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Furthermore, marriage is a time-honored
16 demonstration to family, friends, and the community of a loving commitment between two
17 people—and implies a return promise by society to respect that commitment. *See Turner v.*
18 *Safley*, 482 U.S. 78, 95 (1987) (recognizing that marriage is an “expression[] of emotional
19 support and public commitment”). The institution is “a highly public celebration of the ideals of
20 mutuality, companionship, intimacy, fidelity, and family.” *Goodridge v. Dep’t of Pub. Health*,
21 798 N.E.2d 941, 954 (Mass. 2003). The right to marry, accordingly, “has long been recognized
22 as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and
23 women]” and “fundamental to our very existence and survival.” *Loving*, 388 U.S. at 12.

24 As a result of the special significance of marriage in society, the institution has a critical
25 “signaling” role, apart from the specific legal obligations it entails. Elizabeth S. Scott, *Social*
26 *Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901, 1917 (2000). The signals
27 sent by the fact that two individuals are married alters how they see themselves, how they behave
28 toward one another, and how society behaves toward them.

1 First, married people understand how they are supposed to behave toward one another:
2 they are to be emotionally and financially supportive, honest, and faithful. Although married
3 couples may modify their expectations and behavior over time, and any particular married couple
4 may not live up to its own ideals, they benefit by starting out with a common understanding of the
5 core of a marital relationship, gleaned from a lifetime of observation of and experience with
6 others who are married and from everything that human culture and history teaches them about
7 marriage. See J.M. Adams and W.H. Jones, *The Conceptualization of Marital Commitment: An*
8 *Integrative Analysis*, 72 J. of Personality and Social Psychology 1177 (1997). Married
9 individuals' shared understanding of their responsibilities toward each other allows them more
10 easily to meet their own and their spouse's expectations. The shared ideal of marriage as a
11 lifetime commitment also helps married couples to try to work through temporary difficulties. In
12 addition, the significance of the institution leads friends and family to encourage and support a
13 married couple through difficulties. See *id.* at 1192.

14 Marriage also affects society's behavior toward the couple. Because marriage is
15 universally recognized, married couples are readily treated in a manner that reflects their legal
16 and social status. Spouses are immediately seen as family members. When a married couple
17 goes into a bank to open a joint account, or checks into a hotel, or applies for a credit card or a
18 telephone number, or jointly attends a parent-teacher conference, or accompanies a child on a
19 plane flight, there is no need for explanation or documentary proof of the relationship. See
20 generally *Varnum v. Brien*, 763 N.W.2d 862, 883–84 (Iowa 2009) (“Iowa’s marriage laws” are
21 “designed to bring a sense of order to the legal relationships of committed couples and their
22 families in myriad ways.”).

23 For these reasons and others, many heterosexuals regard getting married as “[t]he most
24 important day of your life.” Andrew Sullivan, *Why the M Word Matters to Me: Only Marriage*
25 *Can Bring a Gay Person Home*, 163 Time 104 (Feb. 16, 2004). On that day, “all your friends and
26 all your family got together to celebrate the most important thing in life: your happiness—your
27 ability to make a new home, to form a new but connected family, to find love that put everything
28 else into perspective.” *Id.*

1 **2. Domestic Partnership Does Not Provide the Same Benefits as**
 2 **Marriage.**

3 Domestic partnership plainly lacks the status, cultural significance, and social meaning of
 4 marriage. Unlike marriage, domestic partnership is not an effective marker of family
 5 relationships. Legal entitlements aside, same-sex couples who enter into domestic partnerships
 6 are deprived of many of the benefits that married couples enjoy.

7 First, domestic partnership is a recent and localized invention with which many people are
 8 unfamiliar. There is no universal meaning for the term; its significance varies between
 9 jurisdictions. While in California domestic partnership may afford couples the state-conferred
 10 legal entitlements of marriage, *see Strauss*, 207 P.3d at 61–62, laws in many states and
 11 municipalities afford domestic partners fewer rights. *See, e.g.*, Consequences of New Jersey’s
 12 Civil Union Law, Final Report of New Jersey Civil Union Review Commission, at 42 (Dec. 10,
 13 2008) (citing New Jersey’s Domestic Partnership Act, N.J.S.A. 26:8A-1 (2004)).¹ In some
 14 localities, domestic partnership is exclusively for same-sex couples; in others, it is available to
 15 cohabitating couples more broadly. *Compare, e.g.*, Wisconsin Legislative Fiscal Bureau,
 16 Establishment of Domestic Partnership and Related Rights and Benefits, *available at*
 17 <http://www.legis.wisconsin.gov/lfb/2009-11Budget/Budget%20Papers/391.pdf> (describing
 18 requirement that domestic partners in Wisconsin must be of the same sex) *with, e.g.*, Nevada
 19 Domestic Partnership Act, SB 283, (effective Oct. 1, 2009) (making domestic partnership
 20 available to unmarried same-sex and opposite-sex couples).

21 Moreover, the meaning of domestic partnership is ever-shifting. In California alone, its
 22 contours continuously morph. Domestic partnership began in the state as a term used by local
 23 ordinances that conferred few legal benefits. It is now the label for same-sex couples (and
 24 unmarried opposite-sex couples in which one individual is over the age of 62) who, according to
 25 the California Supreme Court, must receive the same state-conferred legal entitlements as married
 26 couples. *See Strauss*, 207 P.3d at 61–62.²

27 ¹ The New Jersey Civil Union Review Commission is an independent body consisting of ex-
 officio government members and public members.

28 ² The City of West Hollywood enacted the first domestic partnership ordinance in the mid-1980s

1 In addition to lacking a fixed meaning, domestic partnership lacks cultural significance.
2 Its shaky social stature begins at the inception: Friends and family of most same-sex couples
3 have no experience celebrating or supporting domestic partnerships. The complex emotions
4 people experience when they get married—as well as the joy and human closeness they feel when
5 they see others getting married—is impossible to compare with exposure to the ministerial step of
6 “registration” of a domestic partnership, a legalistic relationship defined principally by a list of
7 rights scattered through the statute books.

8 Because domestic partnership lacks the stature and familiarity of marriage, domestic
9 partners often confront discrimination and confusion. At the outset, even the simple act of
10 referring to one’s “partner” is often wrought with embarrassment and misunderstanding: same-
11 sex couples can be left searching for a manner to explain, no matter how awkward the occasion,
12 whether they are referring to their *domestic* partner or their professional, athletic, or law partners.
13 Subsequently, same-sex couples must often explain the intricacies of state family law to friends
14 and potentially-hostile strangers alike.

15 The consequences of confusion can be significant. Hospitals may refuse to allow a same-
16 sex partner to be by a loved one’s side at the moment when the couple needs to be together most.
17 Though they may be legally required to do so, doctors may not understand that a domestic partner
18 is permitted to make medical decisions on behalf of an incapacitated partner. Indeed, the New

19 and San Francisco has operated its domestic partnership registry since 1990. These essentially
20 permit public acknowledgement of the intent of two individuals, regardless of their gender, to
21 commit to caring for one another and to be responsible for one another’s basic living expenses,
22 with very little legal effect. In 1999, California established a statewide domestic partnership
23 registry, which granted some benefits for certain state employees and permitted domestic partners
24 to visit each other in the hospital. In 2001, the state expanded the list of benefits available to
25 domestic partners, including the right to sue for wrongful death, the right to use sick leave to care
26 for one’s partner, and the right to use stepparent adoption procedures. In 2002, the legislature
27 passed a series of six bills aimed at expanding the rights of domestic partners. Finally, in 2003,
28 the legislature enacted Assembly Bill 205, which provided domestic partners with most of the
rights and duties enjoyed by married couples. *See* National Center for Lesbian Rights, *The
Evolution of California’s Domestic Partnership Law* (Sept. 5, 2007), [http://www.nclrights.org/
site/DocServer/timeline-ab205_042307.pdf?docID=1265](http://www.nclrights.org/site/DocServer/timeline-ab205_042307.pdf?docID=1265). In 2009, the California Supreme Court
noted that after Proposition 8, domestic partners in California retain “all of the constitutionally
based incidents of marriage” except its label. *Strauss*, 207 P.3d at 61 (Cal. 2009) (quoting *In re
Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008)). In contrast to the institution of marriage,
whose very label instantly conveys the nature of the relationship, only students of domestic
partnership law in California can determine what domestic partnership means at any given moment.

1 Jersey Civil Union Review Commission received testimony that couples who were legally
2 entitled to hospital visitation rights were delayed in gaining access to their hospitalized partners.
3 For example, a woman whose partner was admitted to the emergency room with a potentially
4 fatal cardiac arrhythmia was temporarily prevented from getting information about her partner's
5 condition because the doctor was unfamiliar with civil unions. New Jersey Commission Report,
6 at 1; *see also id.* at 14-15 (providing additional examples).

7 Furthermore, employers are often less understanding of an employee's taking leave to care
8 for a domestic partner, and even family members may not understand either the level of
9 commitment expected of a domestic partner towards the couple's child, or the degree of
10 attachment of the child to a domestic partner. Such ambiguities, and the resulting risk of
11 differential treatment, would be far less likely if same-sex couples could accurately refer to
12 themselves as "married" and as husband or wife, a vocabulary that is universally understood. *See*
13 *id.* at 2; *see also id.* at 16 ("Same-sex marriages provide stability for couples in terms of public
14 acknowledgement of their commitment" (quoting testimony of Marshall Forstein, M.D.)).

15 In sum, marriage has a unique status. Anyone who has lived in human society, who has
16 been married or has known someone married, and who has observed the special, accommodating
17 way in which society reacts to married couples, understands that marriage is not just about
18 inheritance rights, powers of attorney, or community property. As in *Sweatt*, "[i]t is difficult to
19 believe that one who had a free choice" between domestic partnership and marriage "would
20 consider the question close." *Sweatt*, 339 U.S. at 634.

21 **C. The Two-Tiered Regime Created by Proposition 8 Demeans and Stigmatizes**
22 **Same-Sex Couples and Perpetuates Discrimination Against Gay Men and**
23 **Lesbians.**

24 The Supreme Court has long recognized that state-condoned discrimination and separate-
25 but-unequal institutions inflict injuries even beyond the deprivation of the intangible benefits
26 described above. First, barring one group from a valued institution demeans its members by
27 officially designating them as inferior. *See, e.g., Strauder v. West Virginia*, 100 U.S. 303, 308
28 (1879) (noting that exclusion of non-white citizens from juries was "practically a brand upon

1 them, affixed by the law, an assertion of their inferiority). Second, exclusion of an unpopular
2 group leads to stigmatization of that group. *See, e.g., Brown*, 347 U.S. at 494 (describing the
3 “feeling of inferiority” that inevitably accompanies differential treatment). *Cf. Lawrence v.*
4 *Texas*, 539 U.S. 558, 575 (2003) (stating that the “stigma” imposed by the Texas statute
5 criminalizing “homosexual conduct” was “not trivial”). Third, exclusion of the disfavored group
6 leads to further discrimination against that group. *See, e.g., Strauder*, 100 U.S. at 308 (exclusion
7 of non-white citizens from juries was “a stimulant to . . . race prejudice”). As detailed below, the
8 exclusion effected by Proposition 8 follows the same pattern: In addition to depriving gay and
9 lesbian individuals of many benefits of marriage, Proposition 8 demeans same-sex couples,
10 creates social stigma, and encourages discrimination against gay men and lesbians.

11 **1. Restricting Same-Sex Couples To Domestic Partnerships Expresses**
12 **Government Disapproval of Same-Sex Relationships.**

13 First, the two-tiered regime that Proposition 8 creates is demeaning; it amounts to a
14 expression of government disapproval of same-sex couples. “[B]ecause of the long and
15 celebrated history of the term ‘marriage’ and the widespread understanding that this word
16 describes a family relationship unreservedly sanctioned by the community, the statutory
17 provisions that continue to limit access to this designation exclusively to opposite-sex couples—
18 while providing only a novel, alternative institution for same-sex couples—likely will be viewed
19 as an official statement that the family relationship of same-sex couples is not of comparable
20 stature or equal dignity to the family relationship of opposite-sex couples.” *In re Marriage*
21 *Cases*, 183 P.3d 384, 452 (Cal. 2008); *Kerrigan*, 957 A.2d at 474 (same). Indeed, “particularly in
22 light of the historic disparagement of and discrimination against gay persons, there is a very
23 significant risk that retaining a distinction in nomenclature with regard to this most fundamental
24 of relationships whereby the term ‘marriage’ is denied only to same-sex couples inevitably will
25 cause the new parallel institution that has been made available to those couples to be viewed as of
26 a lesser stature than marriage and, in effect, as a mark of second-class citizenship.” *In re*
27 *Marriage Cases*, 183 P.3d at 445. *See also Goodridge*, 798 N.E. 2d at 962 (statutory bar on
28 same-sex marriage “confers an official stamp of approval on the destructive stereotype that same-

1 sex relationships are inherently unstable and inferior to opposite-sex relationships and are not
2 worthy of respect”); *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass.
3 2004) (“The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it
4 is a considered choice of language that reflects a demonstrable assigning of same-sex, largely
5 homosexual, couples to second-class status.”).

6 **2. Excluding Same-Sex Couples From Marriage Stigmatizes Gay Men**
7 **and Lesbians.**

8 Second, the government-created, second-class status for same-sex couples stigmatizes
9 lesbians and gay men, just as government-sponsored segregation has stigmatized other groups in
10 the past. *See, e.g.,* Ellen D.B. Riggle et al., *The Marriage Debate and Minority Stress*, 38
11 Political Science & Politics 221 (2005). As an expert in public health testified at trial in this case,
12 the “dual system” effected by Proposition 8 imposes “structural stigma” on gay and lesbian
13 individuals: it sends the message that “if you are gay or lesbian, you cannot achieve” the
14 “desirable and respected” goal of marriage. *Perry v. Schwarzenegger*, Trial Tr., Jan. 14, 2010, at
15 826–827, 985 (testimony of Dr. Ilan Meyer). *See also id.* at 827 (“It is, I think, quite clear that
16 the young children do not aspire to be domestic partners.”).

17 Social scientists have found that the stigmatization of a group occurs in four phases. First,
18 a particular characteristic is identified and used to distinguish individuals. This trait becomes
19 associated with negative stereotypes, which are then used to justify the separation of individuals
20 with that trait from the rest of society. Once the group is separated, the dominant group can
21 discriminate against the separated group on the basis of the trait and the accompanying
22 stereotypes. *See* Bruce Link and Jo Phelan, *Conceptualizing Stigma*, 27 Annual Review of
23 Sociology 363 (2001).

24 Sociologists have cataloged numerous harmful effects of stigma and stereotypes. For
25 instance, many minorities may feel “belonging uncertainty,” in which “members of socially
26 stigmatized groups are more uncertain of the quality of their social bonds and thus more sensitive
27 to issues of social belonging.” Gregory M. Walton and Geoffrey L. Cohen, *A Question of*
28 *Belonging: Race, Social Fit, and Achievement*, 92 J. of Personality and Social Psychology 82, 82

1 (2007). Belonging uncertainty causes members of the stigmatized group to question their ability
2 to fit in with the rest of society, and may cause them to view problems and frustrations as being
3 caused by their stigmatized status rather than a part of common experience. This in turn leads to
4 lesser academic and professional achievement. *Id.* at 94.

5 In addition, sociologists have observed that minorities who feel stigmatized with respect
6 to a particular characteristic show higher levels of “performance pressure” in situations where the
7 stigma seems relevant. Ryan P. Brown and Eric A. Day, *The Difference Isn’t Black and White:
8 Stereotype Threat and the Race Gap on Raven’s Advanced Progressive Matrices*, 91 J. of Applied
9 Psychology 979, 979 (2006). For instance, women may perform worse on mathematics tests
10 because of a belief that women are generally bad at math, while African-American test takers
11 may do poorly on verbal tests because of stereotypes that they are less intelligent than their white
12 counterparts. *Id.* (citing numerous studies). When told that the same test does not implicate the
13 stereotype or stigma (*i.e.*, that it is not diagnostic of ability, or that men and women have
14 performed equally well), women and minorities tend to perform the same as their white, male
15 counterparts. *Id.*; *see also* Claude M. Steele, *Thin Ice, “Stereotype Threat” and Black College
16 Students*, *The Atlantic Monthly*, Aug. 1999, at 44 (describing research). Stigmatized groups may
17 respond to this stereotype threat by accepting or even embracing the negative consequences of the
18 stigma, or by dismissing as insignificant the characteristic being measured (*i.e.*, believing
19 intelligence to be unimportant, or proficiency in mathematics not to be a worthwhile skill);
20 disassociating from the group, which “oblige[s] one to abandon previously valued aspects of
21 identity and sources of self-esteem”; or selectively disidentifying with those aspects of one’s
22 personality that are stigmatized. *See* Emily Pronin et al., *Identity Bifurcation in Response to
23 Stereotype Threat: Women and Mathematics*, 40 J. of Experimental Social Psychology 152, 153
24 (2003).

25 Moreover, minority groups are prone to internalize societal disapproval, leading to
26 feelings of inadequacy. “[M]ost victims of stigma . . . tend to accept the version of their identities
27 imposed by the stigma”—that they are less valued by society than those who are granted full legal
28 rights. Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the*

1 *Fourteenth Amendment*, 91 Harv. L. Rev. 1, 7 (1977). For gay men and lesbians, social scientists
2 refer to these feelings as “internalized homophobia,” which often accompanies the perception of
3 stigma associated with being identified as gay or lesbian. See Michael W. Ross and B.R. Simon
4 Rosser, *Measurement and Correlates of Internalized Homophobia: A Factor Analytic Study*, 52 J.
5 of Clinical Psychology 15 (1996).

6 Internalized homophobia can lead to a range of effects, including lowered self-esteem,
7 anxiety, substance abuse, and depression. Gregory M. Herek et al., *Correlates of Internalized*
8 *Homophobia in a Community Sample of Lesbians and Gay Men*, 2 J. of the Gay and Lesbian
9 Medical Association 17 (1997); see also New Jersey Commission Report, at 2 (“[S]econd-class
10 citizenship, now institutionalized in some states in the form of civil unions, contributes to
11 increased rates of anxiety, depression, and substance-use disorders in marginalized populations”
12 (quoting testimony of associate professor of psychiatry at Harvard Medical School)).

13 The stigmatization that results from the exclusion of gay men and lesbians from the
14 institution of marriage is not limited to those same-sex couples who wish to marry. Rather, it is
15 felt by all gay men and lesbians who see how people who share their sexual orientation are
16 treated, and by families of same-sex couples.

17 Notably, “the ban on same sex marriage is likely to have an especially deleterious effect
18 on the children of same sex couples.” *Kerrigan*, 957 A.2d at 474. “A primary reason why many
19 same sex couples wish to marry is so that their children can feel secure in knowing that their
20 parents’ relationships are as valid and as valued as the marital relationships of their friends’
21 parents.” *Id.* Whereas “[c]hildren who are raised by civilly married parents benefit from the
22 legal status granted to their parents,” children of same-sex couples whose parents are not
23 permitted to marry may suffer psychological harm. James G. Pawelski et al., *The Effects of*
24 *Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of*
25 *Children*, 118 Pediatrics 349, 358, 361 (July 2006). “Excluding same-sex couples from civil
26 marriage . . . does prevent children of same-sex couples from enjoying the immeasurable
27 advantages that flow from the assurance of a stable family structure in which the children will be
28 reared, educated, and socialized.” *Goodridge*, 798 N.E.2d at 964.

1 As the President of the New Jersey Psychological Association attested:

2 “Children of same-sex relationships must cope with the stigma of
3 being in a family without the social recognition that exists through
4 marriage. . . . Such stigma may be indirect such as the strain due to
5 lack of social support and acceptance. Also, some children may be
6 targeted due to teasing in school or from peers.”

7 New Jersey Commission Report, at 16 (quoting testimony of Judith Glassgold, Psy.D.).

8 **3. Barring Same-Sex Couples from Marrying Encourages Discrimination
9 Against Domestic Partners as Couples and Gay and Lesbian
10 Individuals.**

11 Third, the State’s relegation of same-sex couples to an institution apart from marriage
12 encourages further discrimination against lesbians and gay men, as couples and as individuals.
13 This discrimination adds to the pervasive discrimination that lesbians and gay men have
14 historically suffered. *See In re Marriage Cases*, 183 P.3d, at 442 (“Outside of racial and religious
15 minorities, we can think of no group which has suffered such pernicious and sustained hostility
16 . . . as homosexuals.” (quoting *People v. Garcia*, 77 Cal.App.4th 1269, 1279 (2000)); *Kerrigan*,
17 957 A.2d at 432 (“Gay persons have been subjected to and stigmatized by a long history of
18 purposeful and invidious discrimination that continues to manifest itself in society.”)).

19 Proposition 8 stimulates discrimination against domestic partners as couples by
20 designating them as different. A recent decision of the National Elevator Industry (“NEI”) is
21 illustrative. The NEI decided that, under its health plan, married spouses—whether same-sex or
22 opposite-sex—are eligible for benefits. Domestic partners, however, are not. *See* Letter from
23 Director, Pension and Eligibility Operations, NEI (Dec. 30, 2009) (on file with court as PX 2260).
24 The result is that same-sex couples who legally married in California prior to Proposition 8’s
25 enactment are eligible for benefits, but domestic partners must work second jobs to cover
26 healthcare expenses.

27 Furthermore, the current marriage regime perpetuates discrimination against gay men and
28 lesbians as individuals. Proposition 8 makes sexual orientation a legally salient characteristic and
provides “cover” for those who seek to treat gay men and lesbians differently based on their
sexual orientation. Because the state provides for separate and lesser treatment of gay men and

1 lesbians, individuals may logically conclude that it is permissible to treat them as inferior. *Cf.*
 2 *Lawrence*, 539 U.S. at 575 (criminalizing sexual conduct between same-sex couples was “an
 3 invitation to subject homosexual persons to discrimination both in the public and in the private
 4 spheres”). As the California Supreme Court explained, “providing only a separate and distinct
 5 designation for same-sex couples may well have the effect of perpetuating a more general
 6 premise . . . that gay individuals and same-sex couples . . . may, under the law, be treated
 7 differently from, and less favorably than, heterosexual individuals or opposite-sex couples.” *In re*
 8 *Marriage Cases*, 183 P.3d at 402.

9 Moreover, by segregating gay men and lesbians, the State causes society to focus on
 10 sexual orientation to the exclusion of other characteristics. As with segregation on the basis of
 11 race, when gay men and lesbians are separated, and hence stigmatized, then an individual’s sexual
 12 orientation,

13 and all the negative connotations generally imputed to it—
 14 eventually overshadows or ‘eclipses all other aspects’ of his or her
 15 self, becoming all that anyone sees. [Sexual orientation] becomes a
 16 sort of mask, a barrier that both makes it impossible for the
 stigmatized person’s true self to be seen and fixes the range of
 responses that others will have to that person.

17 Robin A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U.
 18 L. Rev. 803, 819 (2004). Thus, whenever gay men or lesbians disclose that they are in a domestic
 19 partnership, others are likely to see them *only* as gay—and treat them accordingly—rather than
 20 viewing them as full persons entitled to the same respect and dignity given to other members of
 21 society. There is no doubt that the effect of Proposition 8 is “immediate, continuing, and real
 22 injur[y]” to gay and lesbian individuals. *Romer*, 517 U.S. at 635.

23 CONCLUSION

24 At odds with time-honored constitutional commands, Proposition 8 creates a separate and
 25 unequal regime for a disfavored class of individuals. By excluding same-sex couples from the
 26 hallowed institution of marriage, Proposition 8 inflicts profound injury upon gay and lesbian
 27 individuals. Because of Proposition 8, gay men and lesbians and their families are deprived of
 28 meaningful benefits; suffer debilitating stigma; and are exposed to further discrimination on the

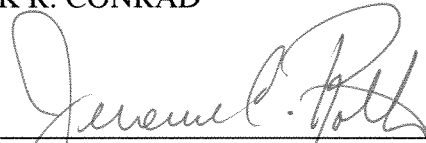
1 basis of their sexual orientation. The patently separate-but-unequal regime effected by
2 Proposition 8 fails any level of judicial scrutiny.

3 Marital regulations have long been a way of “draw[ing] lines among the citizenry” and
4 “defin[ing] what kinds of sexual relations and which families will be legitimate.” Nancy Cott,
5 *Public Vows: A History of Marriage and the Nation* 4 (2000). Native Americans, African
6 Americans, and Asian Americans have all, at one time, faced restrictions on their privilege to
7 marry. *Id.* But “[a] prime part of the history of our Constitution . . . is the story of the extension
8 of constitutional rights and protections to people once ignored or excluded.” *United States v.*
9 *Virginia*, 518 U.S. at 557. Continuing to exclude, demean, and stigmatize gay and lesbian
10 individuals is inconsistent with that constitutional tradition. *Amici* urge this court to hold that
11 Proposition 8 is unconstitutional.

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