IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Karen L. Strauss, et al. v. Mark B. Horton, et al.	)	No. S168047
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Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

BRIEF OF AMICUS CURIAE JEWISH FAMILY SERVICE OF LOS ANGELES IN SUPPORT OF PETITIONERS IN THE PROPOSITION 8 CASES

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INTRODUCTION

Amicus respectfully submits this brief in the interest of children and families headed by same-sex couples in California. *Amicus* contends that the Court should invalidate a purported Constitutional amendment that attempts to remove an inalienable right of liberty guaranteed by Article 1, Section 1 of the Constitution. By denying same-sex couples the fundamental, equal and inalienable right to marry, Proposition 8 compromises the liberty and personal autonomy of such couples and eradicates their guarantee of equal protection under the Constitution. As such, this initiative abolishes inalienable and foundational rights at the essence of the Constitution, thereby altering basic principles of governance. The destruction of such fundamental rights under Proposition 8 results in such a qualitative restructuring of the core principles of the Constitution that it should be invalidated as an impermissible revision.

In its analysis and invalidation of Family Code Section 308.5 in *In re Marriage Cases*, this Court concluded that no compelling justifications supported the statute. Similarly, there is no compelling state need to justify the revocation of the right to marry from same-sex couples. On the contrary, *amicus* contends that there are many salutary effects from the

recognition and preservation of the marriage right for families headed by same-sex parents and that abrogating the right would cause a profoundly negative impact on the family as a unit and particularly on the children within it.

Revoking the rights of same-sex couples to marry would have a significant impact on the residents of this state. At present, there are more same-sex couples living in California than in any other state in the country and the number who are becoming parents is steadily rising.[1] According to 2005 census data, at least 70,000 California children were living in households headed by same-sex couples, and, given the reluctance of many individuals to self-identify as part of a same-sex couple in a government census, the number is likely much higher.[2] Indeed, some researchers estimate that about 20% of same-sex couples in the United States are raising children under the age of 18 and that one to six million children nationally are being raised by committed same-sex couples.[3] The largest portion of these families reside in California and their numbers are increasing rapidly, as evidenced by the fact that the number of female same-sex couples raising children increased by 72% since 1990 while the

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[1] Williams Institute, *Census Snapshot* (2007), *available at* http://www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf (last accessed Jan. 5, 2009).

[2] Williams Institute, *supra* note 1.

[3] Am. Academy of Pediatrics, *National Conference and Exhibition: Concurrent Seminar F340* (2005).

number of male same-sex couples raising children has quadrupled in that time.[4]

As the vast majority of research demonstrates, having two legally recognized parents is extremely beneficial to all children.[5] The marriage sanction gives same-sex parents a legal bond with their children. Moreover, leading scholars and professional organizations agree that children of same-sex parents develop equally well as those of opposite-sex parents. We will examine in more depth the impact of the marriage sanction on the families, their children and society.

[4] K. Sack, *Do Children of Gay Parents Develop Differently?*, L.A. Times (October 20, 2006).

[5] C.J. Patterson, *Children of Lesbian and Gay Parents*, 5 Ass'n for Pscyhol. Science 15 (2006).

ARGUMENT

I. PROPOSITION 8 SHOULD BE INVALIDATED AS AN IMPERMISSIBLE ABROGATION OF THE FUNDAMENTAL AND INALIENABLE RIGHTS TO MARRY AND TO ESTABLISH A FAMILY LEGALLY SANCTIONED BY MARRIAGE

a. This Court Has Long Recognized And Recently Reaffirmed That The Rights To Marry And To Form A Family Legally Sanctioned By Marriage Are Fundamental And Inalienable Rights

Article 1, Section 7(a) of the California Constitution provides that a person may not be deprived of life, liberty, or property without due process of law or deprived of equal protection of the law. Moreover, Article 1, Section 1 of the California Constitution provides a fundamental privacy right to all state citizens. Derived from this privacy right are the rights to marry and form a family legally sanctioned by marriage, rights that have long been recognized by this Court. Indeed, in the landmark decision of *Perez v. Sharp* (1948) 32 Cal.2d 711, 715, the court overturned sanctions against interracial marriage, explaining that "The right to marry is as fundamental as ... the right to have offspring." (*See Meyer v. Nebraska* (1923) 262 U.S. 390 [holding that the right to marry is an aspect of fundamental liberty].) As this court noted in *In re Marriage Cases*, "past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to *all persons* by the

California Constitution." ((2008) 43 Cal. 4th 757, 809 (hereafter, "*Marriage Cases*") (emphasis added).)

Moreover, the right to marry has other attendant civil liberties such as the rights "to establish a home, and bring up children." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 577.) The Supreme Court of the United States itself has recognized the fundamental right "to marry, establish a home and bring up children." (*Meyer v. Nebraska*, 262 U.S. at p. 399.) Petitioners thus have a right to form a family legally sanctioned by marriage.

Courts have repeatedly recognized the link between marriage and establishing "an officially recognized *family* relationship." (*Marriage Cases*, 43 Cal.4th at p. 813 (emphasis in original).) (*See De Burgh v. De Burgh* (1952) 39 Cal.2d 858 [in explaining "the public interest in the institution of marriage" the Court stated: "The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life"].) (*See Elden v. Sheldon* (1988) 46 Cal.3d 267, 275 ["marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."].) It is certainly clear that the right of same-sex couples to form legally recognized and protected families with the same rights as heterosexual couples is fundamental, and the historic designation of "marriage" gives these couples

and, by extension, their children the equal dignity and respect to which they are entitled. (*Marriage Cases*, 43 Cal.4th at pp. 783, 855.)

Since marital and familial rights are so integral to an individual's liberty and personal autonomy, this Court has set the bar high for any effort at constraining them. In *Marriage Cases*, this Court held that they may not be eliminated by the legislature or the electorate through the statutory initiative process. (43 Cal.4th at p. 781.) In so finding, the Court sustained the procedural stipulations described in *Perez v. Sharp* sixty years earlier: "Marriage is thus something more than a civil contract subject to regulation by the state; it is a *fundamental right of free* men. There can be no prohibition of marriage except for an important social objective and by reasonable means." (*Perez v. Sharp,* 32 Cal.2d at p. 714 (emphasis added).) The Court further noted, "Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." (*Id.* at p. 715.) Proposition 8 has plainly failed to meet these procedural standards.

In finding a state law banning interracial marriages to be unconstitutional, the U.S. Supreme Court declared that, ""The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." (*Loving v. Virginia* (1967)

388 U.S. 1, 12.) The Court went on to hold that equal application of the law containing racial classifications did not allow that law to commit invidious racial discrimination and that there was no legitimate purpose for classification. Such is the case with Proposition 8, an initiative which attempts to write invidious discrimination into our state constitution without a compelling, or even legitimate, purpose.

b. **Proposition 8 Would Strip Same-Sex Couples Of Their Inalienable Rights Without Regard For Equal Protection Or The Rules Of Constitutional Revision**

Proposition 8, which declares that "[o]nly marriage between a man and a woman is valid or recognized in California," constitutes an act of discrimination against same-sex couples and is an unconstitutional revision of the Constitution because it revokes a fundamental and inalienable right already recognized and affirmed by this Court.

In 1996, the U.S. Supreme Court struck down a voter approved amendment to the Colorado constitution that revoked all legal protections specifically designed for gay and lesbian individuals. At the time, the Court determined that the amendment was "born of animosity toward the class of persons affected" and that it had no "rational relationship to a legitimate governmental purpose." (*Romer v. Evans* (1996) 517 U.S. 620, 634.)

Proposition 8 was clearly born of a similar animosity and achieves no legitimate purpose; it fails the standards of *Romer v. Evans.*

Nonetheless, this Court has made it clear that the protections of the United States Constitution and the California Constitution are not co-extensive. Rather, the California Constitution protects against sex-based discrimination more vigorously and extensively than the Federal Constitution. (*Compare Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3rd 1, 17 with *Craig v. Boren* (1976) 429 U.S. 190, 197-98.) Additionally, this Court has often taken a leading role, surpassing the U.S. Supreme Court, in establishing the Constitutional significance of marriage and striking down oppressive marital restrictions aimed at disfavored groups. (*See Perez v. Sharp*, 32 Cal.2d at p. 714; *Marriage Cases*, 43 Cal.4th at pp. 814-15.)

It can be no surprise, then, that standards set by this Court require that Proposition 8 receive even greater scrutiny than the U.S. Supreme Court would invite. This Court has deemed that discrimination against gay and lesbian citizens demands strict scrutiny under the suspect classifications of sex or gender. (*Marriage Cases*, 43 Cal.4th at p. 783 ["the applicable statutes properly should be viewed as an instance of discrimination on the basis of the suspect characteristic of sex or gender and should be subjected to strict scrutiny on that ground..."].) Thus, strict scrutiny applies to any discrimination against gay and lesbian individuals

and requires that there be a compelling state need. But, as will be discussed in depth in Section II, *infra*, there is no such compelling state need to revoke the right to marry from same-sex couples. Instead, removing this inalienable right from this defined group of citizens without demonstrating a state need will vitiate the power and force of the equal protection guarantee.

If Proposition 8 is affirmed, by those standards, any group could have its right to marry a member of a certain group withdrawn. Indeed, if Proposition 8 is validated, any group whose rights have been protected by the equal protection guarantee in the past could be similarly divested of their rights. Any disfavored group could have its basic civil liberties nullified, thereby rendering the so-called equal protection guarantee an empty repository of rights and the declaration of rights in the Constitution a hollow mockery of core foundational principles. If Proposition 8 had amended the Constitution to remove the clause "denied equal protection of the laws," there could be no doubt that such a result would constitute a fundamental restructuring and a qualitative revision of the Constitution, altering the basic principles of governance and that it would thus be held invalid. Yet, for same-sex couples and their children, that is precisely the effect of Proposition 8.

Such a fundamental revision cannot be achieved by popular referendum. It can only be accomplished by the deliberative process of a two-thirds vote of the state Legislature as required by Article XVIII, Sections 1 and 2 of the Constitution. While the Attorney General has argued that the change is not a revision of the Constitution, none of the cases cited in his brief are cases in which a right established to be fundamental and inalienable was stripped away by an amendment. None were cases that incorporated into the Constitution discrimination against a disfavored minority with regard to a fundamental right. Injecting such a discriminatory standard would be to introduce an infectious virus into the Constitution that would sap the vitality of the equal protection guarantee and ultimately destroy its essence. Petitioners and others will suffer irreparable injury and damage if Proposition 8 is enforced.

Abrogating the right of marriage from these devoted couples relegates both their relationship and their children to an inferior status. Doing so will "impose appreciable harm on same-sex couples and their children" by denying them rights accorded to opposite-sex couples. (*Marriage Cases*, 43 Cal.4th at p. 784.)

c. The Existence Of The Domestic Partnership Act Does Not Obviate Petitioners' Entitlement To The Rights To Marry And To Form A Family Legally Sanctioned By Marriage

While this Court has noted that the Domestic Partnership Act of California contained in Family Code Sections 297-299.6 provides committed same-sex couples with many of the benefits of marriage, there are some material differences that remain which make it clear that the two are not equal or perceived to be equal. As the Court restated in *Marriage Cases*, "We therefore conclude that although the provisions of the current domestic partnership legislation afford same-sex couples most of the *substantive elements* embodied in the constitutional right to marry, the current California statutes nonetheless must be viewed as potentially impinging upon a same-sex couple's constitutional right to marry under the California Constitution." (43 Cal.4th at p. 783 (emphasis added).)

One notable difference between marriages and domestic partnerships is that domestic partnerships are easier to dissolve than traditional marriages. In most cases, the dissolution of a marriage occurs after an extensive Court-adjudicated process in which a judge makes findings of fact regarding community and separate property, spousal support, and other related matters, and then renders the final judgment of dissolution. In contrast, domestic partnerships are terminable by the partners merely by jointly filing a Notice of Termination of Domestic Partnership with the

Secretary of State. The deliberative process of a dissolution proceeding is missing. (Cal. Fam. Code § 299, subds. (a)-(c).)

Moreover, the required contacts with the state of California are so minimal that a domestic partnership may be dissolved "even if neither domestic partner is a resident of, or maintains a domicile in, the state [of California] at the time the proceedings are filed" while a marriage dissolution may not be obtained unless one of the parties has been a resident of California for at least six months (Cal. Fam. Code §§ 299, subd. (d), 2320.) The clear implication is that domestic partnerships are less substantial, more transitory, and that the partners are less entitled to avail themselves of the judicial system.

Such a diminished view of domestic partnership status is also revealed in court decisions interpreting the statute. One California superior court has noted that "[a] Registered Domestic Partnership is not the equivalent of marriage. It is the functional equivalent of cohabitation." (*Garber v. Garber* (2007), Superior Ct. Orange County, No. 04D006519.) Other perceptions of inferior status are inherent in the statute. Couples seeking a domestic partnership must already be living together. Couples getting married, however, need not be living together and may be married before they live together. (Cal. Fam. Code § 297, subd. (b)(1).) These

differences in the law reflect differences in the perception and social standing of domestic partnerships as compared to marriages.

Moreover, marriage provides children with a legal relationship with both of their *de facto* parents, even in families that lack the means to complete a second-parent adoption. While California does presume that if a child is born into a domestic partnership then both partners are legal parents, should the family move from the state or be non-residents at the time the child is born, the presumption may not apply. And there is some uncertainty about how the law, which lacks substantially detailed provisions, will be interpreted. Thus, a number of gay advocacy associations advise same-sex parents to take further precautionary steps to protect their families. For example, the National Center for Lesbian Rights recommends that, "Regardless of a couple's state of residence, NCLR always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment."[6]

Thus, even with the Domestic Partnership Act in place, same-sex couples often take additional steps such as adoption or parentage judgments in order to ensure that their parental rights will be recognized by other states or the federal government. While same-sex couples could protect

[6] Nat'l Center for Lesbian Rights, *Legal Recognition of LGBT Families* (2008), *available at* http://www.nclrights.org/site/DocServer/Legal_Recognition_of_LGBT_Families_04_2008.pdf?docID=2861(last accessed January 6, 2009).

some legal interests by entering into agreements between themselves or creating other legal documents, this would place an additional burden on them and their families and there is no certainty that these arrangements would be enforced.

In short, while the Domestic Partnership Act on its face appears to give a number of benefits to same-sex couples, it clearly does not give them either the legal or social recognition that marriage provides. The very difference in designation between marriage and domestic partnership calls attention to the fact that same-sex couples are lesser than married couples. This Court has suggested the analogy that the Court in *Perez v. Sharp* would have found the statutory provision barring interracial marriage unconstitutional, even if an alternative legislative designation, such as "transracial union," were then available for interracial couples. (*Marriage Cases*, 43 Cal.4th at p. 831.) The very use by the state of a different designation for same-sex unions denigrates that family in the eyes of society. Polling data reflects the fact that the two institutions are viewed differently by the general public.[7] This Court must equally protect these same-sex couples from the discrimination embodied in Proposition 8 by according them equal rights, equal institutions, and the same marriage designation.

[7] Pew Forum on Religion and Public Life, *A Stable Majority: Most Americans Still Oppose Same-Sex Marriage* (2008).

II. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY REVOKING FROM SAME-SEX COUPLES THE RIGHTS TO MARRY AND TO ESTABLISH A FAMILY LEGALLY SANCTIONED BY MARRIAGE

The state must prove a compelling interest in order to revoke a basic, inalienable liberty guaranteed in the Declaration of Rights of the Constitution or to deny equal protection to a group of citizens. The rights to marry and to raise a family legally sanctioned by marriage are such fundamental and inalienable rights. In order to revoke these rights, there must be a compelling state interest, such as the prevention of substantial harm on the families and the children raised in such families and on society as a whole.

In this regard, *amicus* believes it is useful to examine social science research regarding the effect of marriage on these families as a unit, on the children raised by same-sex parents, and on society as a whole. *Amicus* believes that the research demonstrates that in all these respects, the effects of marriage are salutary and positive. Thus, there is no compelling state interest to justify such a deprivation of rights.

a. **Same-Sex Couples Form Families In The Face Of Great Obstacles, Demonstrating That These Children Are Wanted And Actively Sought**

Same-sex couples must overcome significant financial and social obstacles in order to become parents.[8] The children of same-sex couples are always planned and are strongly desired.[9] In a national poll conducted by Kaiser Family Foundation, 49% of gay men and lesbians who were not parents said they would like to have or adopt children.[10] Nonetheless, in order for same-sex couples to have children, they must pursue a limited set of options for expanding their family, most of which are costly and time-consuming. Some same-sex families rely on artificial reproduction, surrogacy, and more complicated arrangements with others. The American Association of Pediatrics has noted that:

> Lesbians and gay men undertaking parenthood face additional challenges, including deciding whether to conceive or adopt a child, obtaining donor sperm or arranging for a surrogate mother (if conceiving), finding an accepting adoption agency (if adopting), making legally binding arrangements regarding parental relationships, creating a substantive role for the nonbiologic or nonadoptive parent, and confronting emotional pain and restrictions imposed by heterosexism and discriminatory regulations.[11]

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[8] J. Stacey, *Gay Parenthood and the Decline of Paternity as We Knew It*, 9 Sexualities 27, 28 (2006).

[9] *Id.*

[10] L.A. Peplau & A.W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 Ann. Review of Psych. 405, 414 (2007).

[11] E.C. Perrin & Committee on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341 (2002).

The difficulty of forming a family is especially true for gay men, and for many years the vast majority of same-sex parents were lesbians. The majority of gay male parents find children through adoption or foster care programs. Other options are biologically difficult or not financially viable. For example, gestational surrogacy, a complex procedure requiring extensive medical assistance, is really only an option for affluent couples.[12] One leading scholar in the area followed 50 gay men in Los Angeles over a period of four years.[13] Many of these men "have always known that they wished to be a parent," but did not have the financial or other resources to proceed to parenthood.[14] This study noted that "contemporary openly gay paternity, which by definition is never accidental, requires the determined efforts of at least one gay man whose passion for parenthood is unequivocally predestined."[15]

Prior to *Marriage Cases*, many gay couples endured additional complications to protect their rights as parents. A "second parent adoption" is most common, in which only the biological parent is viewed as the true parent until the other parent goes before the Court and asks to be named parent and guardian. Thus, for those couples not registered as domestic

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[12] Stacey, *supra* note 8, at 30 (2006).

[13] *Id.*

[14] *Id.* at 33.

[15] *Id.* at 48.

partners or non-residents, the relationship between the child and the second parent is not recognized by the state until that point in Court. This is an extra burden placed on gay couples that would reappear with the revocation of marital rights.

Families of gay and lesbian parents are typically the product of great effort and great devotion. They merit the protection and support of the state that comes with legally sanctioned marriage.

b. Social Science Research Confirms The History Of Legal Pronouncements That There Is No Difference In Adjustment Or Well-Being Between Children Raised By Same-Sex Parents And Those Raised By Opposite-Sex Parents

In terms of legal pronouncements, this Court has heretofore acknowledged that same-sex couples are equally capable of raising children as opposite-sex couples. This Court has stated that "an individual's capacity... to care for and raise children does not depend upon the individual's sexual orientation." (*Marriage Cases*, 43 Cal.4th at 782.) Moreover, in citing many examples of civil codes which bar discrimination based on sexual orientation, the Court also found that "gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children." (*Id.* at 821-822.) Clearly, these strong and loving families are entitled to continued legal recognition.

Social science research also makes clear that there is no harm to children in being raised in a same-sex household and so no public policy calls out for the revocation of these families' legal status.

Indeed, the vast majority of research and leading scholars agree that the sexual orientation of parents does not affect the development of their children.[16] The conclusions reached by this research are accepted and acknowledged by major organizations such as the American Bar Association, the American Psychological Association ("APA"), the American Academy of Pediatrics, the American Medical Association, the American Psychiatric Association, and numerous child welfare groups.

For example, the APA voted unanimously for the resolution that "research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."[17]

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[16] More than two decades of research has failed to reveal important differences in the adjustment or development of children. In summarizing the findings of these studies, amicus refers to several reviews of the empirical literature published in respected, peer-reviewed journals and academic books.

[17] Am. Psychol. Ass'n, *Resolution on sexual orientation, parents, and children* (2004), *available at* http://www.apa.org/pi/lgbc/policy/parentschildren.pdf (last accessed December 4, 2008).

Similarly, the American Academy of Pediatrics ("AAP") issued the statement that "the AAP recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual."[18]

Social science researchers have found that the experiences of children who live with gay and lesbian couples "are comparable to children of heterosexual parents on measures of psychological well-being, self-esteem, cognitive abilities, and peer relations."[19] A leading scholar in the field, Charlotte J. Patterson, reviewed over two decades of research and found that "(t)here were no significant differences between teenagers living with same-sex parents and those living with other-sex parents on self-reported assessments of psychological well-being, such as self-esteem and anxiety; measures of school outcomes, such as grade point averages and

[18] Am. Academy of Pediatr., E.C. Perrin & Committee on Psychosocial Aspects of Child and Family Health, *Coparent or Second Parent Adoption by Same-Sex Parents*, 109 Pediatrics 339 (2002).

[19] Peplau & Fingerhut, *supra* note 10, at 414. Similar findings have been reached by C.J. Patterson, *Children of Lesbian and Gay Parents*, Psychological Perspectives on Lesbian, Gay, and Bisexual Experiences (2003) and F. Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 J. Dev. Behav. Pediatri. 224 (2005).

trouble in school; or measures of family relationships, such as parental warmth and care from adults and peers."[20]

Another major study looked at twenty-one psychological studies between 1981 and 1998, finding that there is no difference on any measure between heterosexual and homosexual parents regarding parent styles, emotional adjustment, and sexual orientation of children.[21] According to the vast majority of research, "parental sexual orientation per se has no measureable effect on the quality of parent-child relationships or on children's mental health or social adjustment."[22] More specifically, the argument that same-sex parents increase the likelihood of homosexuality in children fails because studies show that children are not statistically more likely to self-identify as bi-sexual, lesbian, or gay under such circumstances.[23]

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[20] Patterson, *supra* note 5, at 242. Patterson cites previous studies done by her and other scholars that reached the same conclusion, including J.L. Wainwright, S.T. Russell, & C.J. Patterson, *Psychosocial adjustment and school outcomes of adolescents with same-sex parents*, 75 Child Development 1886 (2004); J.L. Wainwright & C.J. Patterson, *Deliquency, victimization, and substance use among adolescents with female same-sex parents*, 20 Journal of Family Psychol. 526 (2006).

[21] J. Stacey & T. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Review 159 (2001).

[22] *Id.* at 176.

[23] *Id.* at 177. *See also* Am. Psychol. Ass'n and C.J. Patterson, *Lesbian and Gay Parenting* (2005) ("the great majority of offspring of both lesbian mothers and gay fathers described themselves as heterosexuals.").

In sum, the empirical research to date has consistently found that children raised by two gay or lesbian parents are equally well adjusted as children raised by heterosexual parents and that children's interests are best served by having two willing, capable, and loving parents.[24]

i. Retaining The Legal Right To Marry Of Same-Sex Couples Increases Family Stability And Benefits The Children In These Families

Rather than serving a compelling state interest, Proposition 8 would create a substantial harm for the children of same-sex couples and their families. The important link between marriage and family has been established by numerous courts. Specifically, marriage legitimizes families. For example, the Court in *De Burgh v. De Burgh* stated that "family... ensures the care and education of children in a stable environment... Since the family is the core of our society, the law seeks to foster and preserve marriage." (*Marriage Cases*, 43 Cal.4th at 757, 813 (quoting *De Burgh* (1952) 39 Cal.2d 858, 863-864.)

Social science research establishes that the marriage of the parents provides a more secure and stable environment for the children than does their cohabitation.[25] In general, marriage provides for more stable child

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[24] G.M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 Am. Psychol. 607, 614 (2006).

[25] W. Meezan & J. Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 The Future of Children 97, 108 (2005).

rearing, permanency, and security within the family. Families of both same-sex and opposite-sex couples are equally vital to children and should thus be equally protected under the law.[26]

The stability provided by two parents is invaluable, regardless of parental sexual orientation. In 2002, the American Academy of Pediatrics issued a statement supporting adoption by gay parents and pointing out that the best interests of the children are served by having two legally recognized parents.[27] The Association pointed to the fact that the presence in the family of two legally recognized parents is in the best interest of the children. The AAP recognizes that "(d)enying legal parent status through adoption to coparents or second parents prevents these children from enjoying the psychological and legal security that comes from having two willing, capable, and loving parents."[28]

Not only is there no compelling state interest to justify the abrogation of the fundamental right to marry from same-sex couples, but removing that right also harms the children in these families by sending the message that they are part of a lesser and inferior family and that their

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[26] *Id.*

[27] Am. Academy of Pediatr. & Committee on Psychosocial Aspects of Child and Family Health, *Coparent or Second Parent Adoption by Same-Sex Parents*, 109 Pediatrics 339 (2002).

[28] *Id.* at 339.

family does not merit respect as families with the legal sanction of marriage.

Retaining the right of same-sex parents to marry will strengthen the emotional and legal bonds of their family. This Court noted the "security that comes from the knowledge that his or her parental relationship will be afforded protection by the government against the adverse actions or claims of others" and that "the government will enforce the mutual obligations between the partners (and to their children) that are an important aspect of the commitments upon which the relationship exists." (*Marriage Cases*, 43 Cal.4th at pp. 818, 820.)

Studies have shown that factors important to family stability do not include the sexual orientation of the parents. As noted in one study, "parental sexual orientation is less important than the qualities of family relationships."[29] Moreover, the quality of a marital relationship is the most powerful type of social support in determining effective parenting.[30] Thus, the quality of the family itself is much more important to children than the gender or sexual orientation of each of their parents.

If this Court permits the removal from the Constitution of the fundamental liberty of same-sex couples to marry, the children of those

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[29] Patterson, *supra* note 5, at 243.

[30] S.M. Johnson & E. O'Connor, *The Gay Baby Boom: The Psychology of Gay Parenthood* (2002) 17, citing J. Belsky, *The Determinants of Parenting: a Process Model*, 55 Child Development 83 (1984).

couples will be denied the social recognition as well as all of the benefits enjoyed by children of opposite-sex couples. Organizations such as the American Psychological Association have recognized this: "Discrimination against lesbian and gay parents deprives their children of benefits, rights, and privileges enjoyed by children of heterosexual married couples."[31]

ii. Removing the Fundamental Right To Marry And The Legal Sanction Of Marriage From A Family Headed By Same-Sex Parents Would Subject Children To Discrimination And Stigmatization

Children of loving and devoted families should not be forced to bear the burden of others' discrimination. As aptly put by one advocate, "All children deserve to know that their family is worthy of respect in the eyes of the law... that respect comes with the freedom to marry."[32] As this Court noted in *Marriage Cases*, denying marriage to a class of people labels them as "second-class citizens." (43 Cal.4th at pp. 784-785.) Taken one step further, such a denial also creates entire second-class families, a result that should be firmly avoided by this Court.

Because same-sex couples have the right to marry, their children and families now have been granted greater legitimacy in the eyes of both the law and society. The subsequent revocation of that right would belittle

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[31] Am. Psychol. Ass'n, *Resolution on sexual orientation, parents, and children* (2004), *available at* http://www.apa.org/pi/lgbc/policy/parentschildren.pdf (last accessed December 4, 2008).

[32] E. Wolfson, *Why Marriage Matters* (2004) 96-97.

their family structure and would result in a heightened stigma for their children.

As the U.S. Supreme Court noted when overturning the Texas sodomy law in *Lawrence v. Texas*, criminalizing same-sex sexual activity gave support to the widespread stigmatization of gay men and women: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination, both in the public and in the private spheres." ((2003) 539 U.S. 558, 575.) Similarly, revoking the right to marry from same-sex couples will cast a stigma over same-sex families.

As the Massachusetts Supreme Judicial Court explained: "the state's action [of basing marital rights on procreation] confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect." (*Goodridge v. Department of Public Health* (2003) 798 N.E.2d 941, 961.)

Prior to the legalization of gay marriages, one daughter of gay parents put her situation this way: "I'm nowhere near as oppressed as my mom, but I feel I can understand that oppression because we as children of gay parents have been silenced our whole lives, too. We know what it's like... Something to be studied, not loved or embraced or thought of as

humans."[33] When same-sex parents do not have rights and legal recognition equal to those of opposite-sex parents, their children are perceived and treated as "others."

When holding that the Massachusetts Constitution upheld the right of same-sex couples to marry, the Massachusetts Supreme Judicial Court stated, "Marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to non-marital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child." (*Goodridge v. Department of Public Health*, 798 N.E.2d at pp. 956-957.)

Preserving the right of same-sex parents to marry is an important step toward undoing the discrimination and stigmatization to which these couples and their children are exposed. One researcher noted that "the very existence of same-sex marriage may reduce the stigmatization or perceived peculiarity of same-sex families, which would presumably reduce the social pressure on the children."[34] Thus, *amicus* believes the legal recognition of same-sex unions will itself begin to alleviate the stigma associated with

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[33] A. Garner, *Families Like Mine: Children of Gay Parents Tell It Like It Is* (2005) 19.

[34] Meezan & Rauch, *supra* note 25, at 109.

homosexual relationships. Doing so will also benefit children in such families by lending their families more legitimacy and stability.

Finally, the very distinction created by setting up a different set of legal benefits and legal recognition for same-sex and opposite-sex couples in the form of domestic partnerships and marriage structurally perpetuates the homophobic stigma that same-sex couples and their families are inferior to and not equal to opposite-sex couples.

c. Protecting the Right Of Same-Sex Couples to Marry Produces Families With More Open-Minded Youth And Confers Benefits Upon Society At Large

In addition to promoting family stability and the benefits to the children, protecting the right of same-sex parents to marry presents society and the state with benefits. Not only is the institution of marriage expanded, but, in addition, there is significant evidence that children raised by gay or lesbian parents are more open-minded towards people who differ from them. Additionally, because there is less gender-stereotyping in their families, they grow up believing in and supporting gender equality and equality across sexual orientations.

Preserving the marriage right for same-sex couples and retaining their equal protection guarantee will help to strengthen the viability and the visibility of marriage as an institution for future generations. As noted by one researcher:

> Gay children, of course, benefit directly from knowing that their future holds the prospect of marriage, with all the blessings that go with it... Straight children benefit when they look all around and see marriage as the norm... [T]hat sends a positive and reassuring message to children about both the importance of marriage and the stability of their community.[35]

Children of gay families will also help to make those future generations more open-minded and gender-neutral. Researchers have observed that children with gay parents are generally more-open minded than those with opposite-sex parents.[36] A leading scholar has found that "being in families that challenged societal norms often means that children in LGBT families grow up to be more open-minded and more empathetic toward people who are different from them."[37] Moreover, children of gay parents are open to the idea of being in a same-sex relationship.[38] This is not an indicator of their own sexual orientation. Rather, this reveals that they are more accepting and understanding (and obviously less homophobic). Such understanding can be expanded by protecting the right of same-sex couples to marry.

Social science research also indicates that children of same-sex parents display less gender-stereotyped behavior. This further implies

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[35] J. Rauch, *Family's Value: Why Gay Marriage Benefits Straight Kids*, The New Republic (May 30, 2005).

[36] M. Harris & P. Turner, *Gay and Lesbian Parents*, 12 Journal of Homosexuality 101 (1986).

[37] Garner, *supra* note 33, at 34.

[38] S. M. Johnson & E. O'Connor, *For Lesbian Parents: Your Guide to Helping your family grow up happy, healthy and proud* (2001).

greater equality between the sexes in general. A leading scholar in the field, Judith Stacey, has found that "lesbian parenting may free daughters and sons from a broad and uneven range of traditional gender prescriptions."[39]

Stacey cites additional research that indicates that "lesbian mothers reported that their children, especially daughters, more frequently dress, play, and behave in ways that do not conform to sex-typed cultural norms."[40] In that study, 53% of the daughters of lesbians desired careers such as a doctor, lawyer, engineer, and astronaut, compared to only 21% of the daughters of heterosexual mothers.[41] One daughter of gay parents, now grown, noted that "because I lived with a house full of women, I saw women taking on various roles and responsibilities – running a business, mowing the lawn, cooking dinner, paying bills, etc. I saw women as having unlimited potential."[42] Likewise, researchers have found that children of lesbian parents' play preferences are often gender neutral.[43] Not

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[39] Stacey & Biblarz, *supra* note 21, at 168.

[40] R. Green, J.B. Mandel, M.E. Hotvedt, J. Gray, L. Smith, *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 Archives of Sexual Behavior 167 (1986).

[41] *Id.*

[42] Garner, *supra* note 33, at 32.

[43] B. Hoeffer, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 Am. Journal of Orthopsychiatry 536 (1981).

as much research exists on the gender roles of children raised by gay men.[44] Still, the research dedicated to lesbian mothers points to a greater equality between sexual orientations and sexes which would benefit society as a whole.

Studies of same-sex parents' patterns of household labor conclude that same-sex parents more equally divide household labor.[45] Generally, in heterosexual couples, women perform the bulk of household and child-rearing duties.[46] In contrast, same-sex parents do not necessarily divide the workload along gender lines.[47] This research demonstrates that lesbian parents often divide household and family labor evenly and report satisfaction with their relationship.[48] Likewise, gay fathers have been shown to divide child-care evenly and report that they are happy with their

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[44] Less empirical research has been conducted on gay fathers than lesbian mothers. For a review of the relevant studies, *see* C.J. Patterson, *Gay Fathers, in the Role of the Father in Child Development* 397, 413 (2004). Still, a lack of research does not indicate that gay fathers are any less fit to parent. In fact, children raised by single fathers develop just as well as those by a single mother. D.B. Downey et al., *Sex of Parent and Children's Well-Being in Single-Parent Households*, 60 J. of Marriage and Family 878-893 (1998).

[45] Peplau & Fingerhut, note 10, at 408.

[46] R.W. Chan, R.S. Brooks, B. Raboy, & C.J. Patterson, *Division of Labor Among Lesbian and Heterosexual Parents: Associations with Children's Adjustment*, 12 J. of Fam. Psychol. 402 (1998); C.P. Cowan & P.A. Cowan, *When Partners Become Parents: The Big Life Change for Couples* (1992); A.R. Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (1989).

[47] Cowan & Cowan, *supra* note 46.

[48] Am. Psychol. Ass'n and C.J. Patterson, *Lesbian and Gay Parenting* (2005); P. Blumstein & P. Schwartz, *American Couples* (1983); L. Kurdek, *The Allocation of Household Labor in Gay, Lesbian and Heterosexual Married Couples*, 49 J. of Social Issues 127 (1993).

relationship.[49] Having these parents as role models will foster a greater commitment to gender equality and sexual orientation equality among their children and their children's peers.

This Court can promote the salutary benefits to the families, their children, and society as a whole, by preserving the right of same-sex parents to marry, form legally sanctioned families, and solidify the familial relationships in those families.

[49] Am. Psychol. Ass'n and C.J. Patterson, *supra* note 48.

III. EVEN IF PROPOSITION 8 IS FOUND TO BE CONSTITUTIONAL, ITS APPLICATION WOULD ONLY BE PROSPECTIVE, RATHER THAN RETROACTIVE

This Court should conclude, as the Attorney General has argued, that Proposition 8 is merely prospective, and does not affect marriages entered into before the November 2008 election. Legal same-sex marriages entered into after this Court's decision in *Marriage Cases* on June 16, 2008 and before the passage of Proposition 8 on November 4, 2008 should continue to be recognized by the state. By disallowing a retroactive application, the Court would protect the interests of thousands of families who relied on this Court's decision that officially recognized and confirmed the right of same-sex couples to marry.

a. Proposition 8 Does Not Affect Marriages Performed Between June 16, 2008 And Election Day Because Legislation Is Presumed To Be Prospective, Unless It Explicitly Indicates Retroactivity (Which Proposition 8 Does Not)

An established canon of statutory interpretation provides that legislation does not apply retroactively "unless it is clearly made to appear that such was the legislative intent." (*Aetna Casualty & Surety Co. v. Industrial Accident Com.* (1947) 30 Cal.2d 388, 393; accord, *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 844 ["[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication

that the Legislature intended retroactive application."].) This principle also applies to voter initiatives. (*See Rosasco v. Commission on Judicial Performance* (2008) 82 Cal.App.4th 315, 323 ["Initiative measures are subject to the same rules and canons of statutory construction as ordinary legislative enactments."].)

Even if Proposition 8 is found to be constitutional, it should only be applied prospectively because the proposition itself does not expressly provide for retroactivity (as required by the above canon of statutory construction). The text of the measure states that "[o]nly marriage between a man and a woman is valid or recognized in California." No express grant of retroactivity is mentioned. Moreover, retroactivity cannot be inferred from that language. (*See Myers* v. *Philip Morris Companies, Inc.,* 28 Cal.4th at p. 843 [ambiguity is required for statute to be read as unambiguously prospective].)

Likewise, retroactivity cannot be inferred from the extrinsic ballot materials. For example, the Official Title and Summary of the voter guide simply stated that the measure would eliminate the right of same-sex couples to marry in California. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008), Official Title and Summary for Proposition 8, RJN Exh. 14, p. 54.) The title and summary did not mention that the measure would have any effect upon marriages performed between June 16, 2008 and election day. *(Ibid.)*

Finally, if the proponents of Proposition 8 had intended the measure to apply retroactively, they could have inserted express language stating as much. (*See Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 ["[I]t appears rather clear that the drafters of Proposition 51, in omitting any provision with regard to retroactivity, must have recognized that the statute would not be applied retroactively."].) The proponents' failure to provide any express language further supports the presumption against retroactivity as stated above. Thus, the legal marriages performed after this Court's decision in *Marriage Cases* and before the passage of Proposition 8 should remain valid, regardless of the proposition's constitutionality.

b. **Applying Proposition 8 Retroactively Will Unfairly Deprive Same-Sex Couples Who Married During The Legal Period Of Their Vested Right And Will Negatively Affect Their Families**

The U.S. Supreme Court has explained the reasoning behind the above canon of statutory interpretation: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." (*Landgraf v. USIFilm Products* (1994) 511 U.S. 244, 265.) Applying legislation retrospectively can even lead to a violation of due process. (*See In re Marriage of Fabian* (1986) 40 Cal.3d

440, 447 "[retrospective legislation . . . may not be applied where such application impairs a vested property right without due process of law."].)

As discussed above, the right to marry is a fundamental right guaranteed to all citizens. (*See Meyer v. Nebraska* (1923) 262 U.S. at 349.) Retroactive application of Proposition 8 would unconstitutionally deprive same-sex couples of a vested right to marry – a right that has been recognized and protected.

Beyond the life-altering decision to wed, these couples have also decided upon family matters, such as child-rearing and property ownership, in reliance on this Court's holding in June 2008. Approximately 18,000 same-sex couples relied on the law as determined by this Court in *Marriage Cases* and legally married.[50] Many of these couples have children who are affected by their marital status. In California, about 32% of same-sex couples are raising children under the age of 18. [51] Thus, one may extrapolate that as many as 32% of the 18,000 couples who married before the passage of Proposition 8 have families. Therefore, about 5,760 families with children will be severely harmed if the marital status of their parents is revoked. Such a decision would disrupt the family stability which is so precious to the healthy development of children. (*See* Section II(c) *supra*).

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[50] L. Left, *Prop 8 Sponsors Seek to Nullify 18K Gay Marriages*, Associated Press (Dec. 20, 2008).

[51] Williams Institute, *Census Snapshots: Same-Sex Couples and Same-Sex Couples Raising Children in California: Data from Census 2000* (2004).

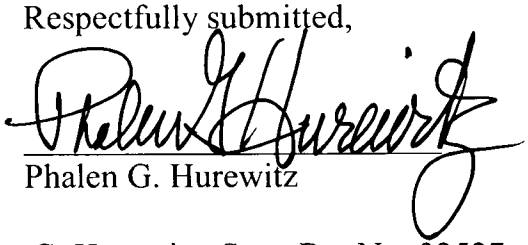
Thus, nullifying the marital status of these same-sex couples would not only impact the individuals who wed but also the children who are part of their family unit. Granting and then revoking these legal marriages would be both unjust and cruel.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to invalidate Proposition 8 as an impermissible attempt to remove from same-sex couples and their families a fundamental and inalienable right guaranteed by Article I, Section 1 of the California Constitution, the right to marry and to raise a family legally sanctioned by marriage. This right is so essential to the principles of governance that it cannot be removed by an initiative. Such a restructuring of the Constitution would constitute a revision that can only be accomplished through the procedure set forth in Article XVIII, Sections 1 and 2. Should this Court determine that Proposition 8 may be implemented, the implementation should be on a prospective and not a retroactive basis.

Dated: January 13, 2009

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

Pursuant to Rule 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has a typeface of 13 points, and contains 7,953 words as counted by the Microsoft Word 2007 word processing program used to generate the brief.

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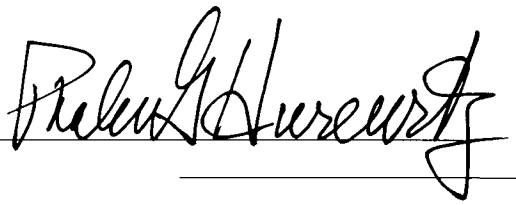

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PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:
I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 8484 Wilshire Boulevard, Suite 850, Beverly Hills, California 90211. On January 13, 2009, 1 served a true copy of the following documents:

Application to File Amicus Curiae Brief
in Support of Petitioners in the Proposition 8 Cases
and
Brief of Amicus Curiae Jewish Family Service of Los Angeles
in Support of Petitioners in the Proposition 8 Cases

on the following parties in said action:

Please see attached service list.

□ **BY UNITED STATES MAIL:** By enclosing the document in a sealed envelope or package addressed to the person(s) at the address below and depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on January 13, 2009, in Beverly Hills, California.

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