No. 10-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,
Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS
DENNIS HOLLINGSWORTH, et al.,
Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 VRW
The Honorable Vaughn R. Walker

BRIEF OF *AMICI CURIAE* ACLU FOUNDATION OF NORTHERN CALIFORNIA, GAY AND LESBIAN ADVOCATES AND DEFENDERS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AND NATIONAL CENTER FOR LESBIAN RIGHTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *Amici Curiae* the ACLU Foundation of Northern California, Gay and Lesbian Advocates and Defenders, Lambda Legal Defense and Education Fund, Inc., and the National Center for Lesbian Rights (collectively "*Amici*") state that they all are non-profit corporations; that none of *Amici* has any parent corporations; and that no publicly held company owns any stock in any of *Amici*.

Dated: October 25, 2010 s/ Jennifer C. Pizer

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The ACLU Foundation of Northern California (ACLU-NC), Gay and Lesbian Advocates and Defenders (GLAD), Lambda Legal Defense and Education Fund, Inc. (Lambda Legal), and the National Center for Lesbian Rights (NCLR) are the nation's leading nonprofit legal organizations (and the affiliate of one) working to protect and advance the civil rights of lesbian, gay, bisexual and transgender (LGBT) people.

Together, the ACLU-NC, Lambda Legal, and NCLR were counsel in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (establishing right of same-sex couples to marry under California's constitution), and *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (interpreting Proposition 8). Lambda Legal also was counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003) (establishing right of liberty in intimate relationships regardless of sexual orientation).

GLAD was counsel in *Goodridge v. Dept. of Pub. Health*, 440 Mass. 309 (2003), and *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (establishing right of same-sex couples to marry under Massachusetts and Connecticut constitutions).

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Amici strongly agree with Plaintiffs-Appellees and Plaintiff-Intervenor-Appellee City and County of San Francisco (collectively, "Plaintiffs") that the District Court was correct in concluding that Proposition 8 unconstitutionally abridges lesbian and gay people's fundamental right to marry, and that Proposition 8 unconstitutionally discriminates based on the suspect grounds of sexual orientation and sex. *Amici* further agree with Plaintiffs that Proposition 8's proponents and proposed Defendant-Intervenor Imperial County both lack Article III standing to pursue this appeal. Those arguments, however, are addressed in other briefs.

Amici here offer three additional and independent reasons why the judgment in this case should be affirmed, if the appeal is not dismissed for lack of standing. These reasons flow from recognition that Proposition 8 is unique among state laws excluding same-sex couples from marriage. No other state has amended its constitution after its high court and legislature determined that same-sex and different-sex couples are similarly situated in all respects relevant to the state's regulation of marriage. No other state has stripped the right to marry from same-sex couples after the state constitution was found to require that they be afforded "the equal dignity and respect that is a core element of the constitutional right to marry." *Strauss v. Horton*, 207 P.3d 48, 72 (Cal. 2009). And in no other state

have voters amended their constitution to craft a "gay-only" exception to its protections in order to abolish same-sex couples' established right to marry, while maintaining a preexisting system providing those couples all the same state-law rights and responsibilities of marriage.

These factors, unique to California's elimination of same-sex couples' right to marry, establish that:

(1) Proposition 8 constitutes a per se violation of the Equal Protection Clause—i.e., a law that serves no purpose other than to mark one class of citizens as inferior to others—and is unconstitutional regardless of the applicable level of scrutiny;

(2) Proposition 8 also fails conventional rational basis review; and

(3) Wholly apart from Plaintiffs' equal protection claims, Proposition 8 fails the intermediate standard of review mandated by this Court's decision in *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008), for laws like Proposition 8 that intrude upon the rights of liberty and privacy in intimate relationships.

Accordingly, while the extensive trial record and the District Court's detailed factual findings amply warrant this Court's affirming the District Court's fundamental rights and strict scrutiny analysis, this Court also readily could strike down Proposition 8 without reaching those issues—which have broader implications—for any of the three reasons discussed below.

ARGUMENT

I. PROPOSITION 8 IS UNIQUE AND UNPRECEDENTED.

Forty-five states currently do not allow same-sex couples to marry. Proposition 8's ban on same-sex couples marrying, however, differs from those other states' laws in at least two important respects. First, unlike the law in every other jurisdiction, Proposition 8 changed the California Constitution after lesbian and gay couples' equal right to marry had been conclusively held to be a component of that constitution's guarantee of equality, and it did so by creating an express "exception" to that constitution's equal protection clause only for gay people. Second, and again unlike every other state's restriction of marriage to heterosexual couples, Proposition 8 stripped from lesbians and gay men their right to the designation, status, and dignity of marriage, while leaving intact a lesser status through which same-sex couples may access all the legal rights and obligations the state provides to others through marriage. Both of these circumstances establish that the sole purpose and effect of Proposition 8 is to declare same-sex couples unequal to different-sex couples.

California law recognizes that lesbian and gay couples are similarly situated to heterosexual couples, and that the state has no constitutionally adequate reasons for affording them lesser protections or responsibilities. *In re Marriage Cases*, 183

P.3d 384, 410, n.17, 435, n.54, 452, n.72 (Cal. 2008). In *Strauss*, the California Supreme Court held that Proposition 8 did not alter that substantive law, including the recognition that same-sex couples are constitutionally entitled to equal treatment in all respects. 207 P.3d at 75-77, 102. Instead, it created a deliberate "exception" to the state constitutional requirement of equal protection to permit unequal treatment of gay and lesbian individuals and same-sex couples with respect to the designation, status and dignity of marriage. *Id*. at 78. Indeed, this exclusion of gay couples from equal access to the favored status of marriage, and reservation of that preferred status solely for heterosexual couples, was the sole purpose of Proposition 8. Similarly, the sole effect of Proposition 8 is to require that gay couples' formalized relationships be designated as unequal to the relationships of heterosexual couples who marry, even as the California Constitution requires that all of the same rights and obligations be provided to gay couples through the lesser vehicle of registered domestic partnership. *Id*. at 75-77, 102. These extraordinary and unprecedented aspects of what Proposition 8 did make clear that it is unconstitutional regardless of whether other marriage restrictions, adopted under other circumstances, also are unconstitutional.

In reaching its conclusion that the state's guarantee of equal protection required that same-sex couples be accorded the same right that California provides different sex-couples to enter into the relationship the state designates as marriage,

the California Supreme Court explained that the issue in the case differed from that presented in most previous marriage litigation:

> [T]he legal issue we must resolve is not whether it would be constitutionally permissible under the California Constitution for the state to limit marriage only to opposite-sex couples while denying same-sex couples any opportunity to enter into an official relationship with all or virtually all of the same substantive attributes, but rather whether our state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a "marriage" whereas the union of a same-sex couple is officially designated a "domestic partnership." The question we must address is whether, under these circumstances, the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution.

Id. at 398. *See also In re Marriage Cases* 183 P.3d at 402, 451-52.

The question presented here is similar, but even more stark: Once a state concludes its equal protection guarantee requires equal treatment of same-sex couples in all respects, including equal access to the status of marriage, may the state create an exception to that guarantee to re-impose inequality? Did creating an exception to California's Equal Protection Clause to deny same-sex couples the status, designation, and dignity of marriage, while still providing them all of the other rights and obligations of marriage, violate the federal constitution?[1]

[1] As the U.S. Supreme Court explained in *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967), federal courts examine the constitutionality of a measure in terms of its

The California Supreme Court ruled in *In re Marriage Cases* that same-sex couples and different-sex couples are similarly situated under California law,[2] and that California's equal protection clause did not permit treating these couples substantively the same but designating the relationships differently. Doing so inevitably imposed "a mark of second-class citizenship," *id.* at 445, and denied same-sex couples "the same dignity, respect, and stature as that accorded to all other officially recognized family relationships," *id.* at 434. In addition, the court found that relegating same-sex couples and their children to a separate status would expose them "to significant [practical] difficulties and complications," *id.* at 446, and "appreciable harm," *id.* at 401. The District Court here made similar findings that excluding same-sex couples from marriage is stigmatizing. (*See* ER 115 ("Domestic partnerships lack the social meaning associated with marriage"); ER 117 ("the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships"); ER 120

"historical context and the conditions existing prior to its enactment," and the measure's "immediate objective" and "ultimate effect," and must give careful consideration to state courts' views about a state measure's "purpose, scope and operative effect."

[2] *In re Marriage Cases*, 183 P.3d at 435, n.54 (concluding that contention that same-sex and different-sex couples are differently situated with regard to the purpose of the state's marriage laws "clearly lacks merit"). The state legislature has agreed. Cal. Assem. B. No. 849 (2005–2006 Reg. Sess.) §3(j); Cal. Assem. B. No. 43 (2007–2008 Reg. Sess.) § 2(j). Although the state's governor vetoed these measures, he did so only to allow the issue to be decided by the courts. *See In re Marriage Cases*, 183 P.2d at 410, n.17.

("Proposition 8 places the force of law behind stigmas against gays and lesbians"); *see also* ER 121, 128-29.)

As authoritatively interpreted in *Strauss*,[3] Proposition 8 re-imposed an unequal status on same-sex couples by amending the state's constitution to craft an "exception" to the guarantee of equality for gay people, 207 P.3d at 61, 63, 78, 98,[4] so that same-sex couples and their families would once again be denied equal dignity and respect, and face the difficulties and harms that result from the second-class status of domestic partnership. (*See* ER 115-18, 120-22, 128-29.) The circumstances of Proposition 8's enactment and the measure's legal effect therefore make Proposition 8 unique among state laws that deny marriage to same-sex couples: Only Proposition 8 stripped couples of their previously-recognized state constitutional right to designate their relationships as marriages, and only Proposition 8 created a marriage exception to the state equal protection requirement, leaving intact a separate system with all of the other substantive rights

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[3] The U.S. Supreme Court has long held that state high court constructions of state laws are binding on federal courts. *See, e.g.*, *Rowan v. Runnels*, 46 U.S. 134, 139 (1847) (holding that the Supreme Court "will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws"); *see also Romer v. Evans*, 517 U.S. 620, 626 (1996) (finding state supreme court's construction of amendment to its state constitution "authoritative").

[4] *See also Strauss*, 207 P.3d at 78 ("Proposition 8 must be understood as creating a limited exception to the state equal protection clause").

and obligations of marriage and the state constitutional requirement of equal treatment in all other respects.

II. PROPOSITION 8 CONSTITUTES A PER SE VIOLATION OF THE EQUAL PROTECTION CLAUSE.

There are some forms of lawmaking that the Equal Protection Clause prohibits categorically and that constitute per se violations of the clause's guarantee. The government may not recognize that two groups of people are similarly situated with regard to the purposes of a law, but nonetheless have that law treat them differently merely to favor one group and disfavor the other. The government may not treat some people differently than others merely to declare them unequal. And the government may not permanently forbid itself from protecting a group against unequal treatment. Proposition 8 unconstitutionally does all these things.

A. The Court Need Not Apply Any Particular Level of Scrutiny To Conclude That Proposition 8 Is Unconstitutional.

In the typical challenge to government action that treats two groups of people differently, courts initially determine what level of scrutiny to apply to the decision to classify the groups for different treatment. Then, applying such scrutiny, courts determine whether the government has a legitimate and sufficiently strong reason for the different treatment, and whether an adequate relationship exists "between the classification adopted and the object to be attained." *Romer*,

517 U.S. at 632 (referring to this as the "conventional inquiry" undertaken in equal protection challenges). There are some cases, however, where the level of scrutiny does not matter and this conventional inquiry need not be pursued; in these cases, the unequal treatment is simply forbidden.

In *Romer*, the Supreme Court recognized that some laws not only fail to withstand the scrutiny applicable to them under a conventional equal protection inquiry, but violate the very premise of the Equal Protection Clause. The *Romer* Court struck down an amendment to the Colorado Constitution that permanently prohibited all branches of government in that state from protecting lesbian, gay, and bisexual individuals, and only them, against discrimination. *Romer*, 517 U.S. at 620. The Court explained that certain laws must be understood to violate the Fourteenth Amendment's equality guarantee because they deny equal protection of the laws "in the most literal sense." *Id.* at 633; *see also id.* at 635 (describing how state constitutional amendment failed this test "in addition" to the conventional inquiry). Proposition 8 violates the Equal Protection Clause in ways similar but not identical to the amendment in *Romer*. Unlike the Colorado amendment in *Romer*, Proposition 8 does not broadly deny gay people the right to seek government protections against unequal treatment. *Id.* at 632-33. Yet, like the amendment in *Romer*, Proposition 8 is the "rare" kind of law that unconstitutionally violates core equality principles because it so overtly imposes

unequal treatment for its own sake. *Id*. at 633. Indeed, as the California Supreme Court held in *Strauss*, the voters did not enact Proposition 8 based on a determination that same-sex couples are not entitled to equal treatment, or that same-sex couples differ from different-sex couples in any way related to the purposes of marriage. Rather, they did so to re-impose a deliberately unequal scheme, stripping same-sex couples of the designation, status, and dignity of marriage while leaving intact their entitlement to all of the other substantive protections of marriage.

B. Proposition 8 Violates Core Equality Principles and Therefore Is Per Se Unconstitutional.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("all persons similarly circumstanced shall be treated alike"). Proposition 8 flouts this essential principle. Even though, as noted above, California has determined and continues to maintain that same- and different-sex couples are similarly situated with regard to the purposes of California's marriage laws,[5] Proposition 8 nonetheless requires different treatment of the two groups. In other words, unlike

[5] *See* footnotes 2 and 3, *supra*. *See also Plyler*, 457 U.S. 202 at 216 ("The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States.").

all other state restrictions on marriage for same-sex couples, Proposition 8 amended the state's constitution to treat same-sex relationships differently from different-sex relationships (providing lesbian and gay couples a status that is less respected and dignified), *while at the same time* continuing to recognize that same-sex couples are similarly situated to different-sex couples with regard to the purposes of marriage and continuing to govern their differently-designated relationships using the same substantive rules.

Like the state constitutional amendment invalidated in *Romer*, Proposition 8 thereby accomplishes nothing other than to "singl[e] out a certain class of citizens for disfavored legal status." 517 U.S. at 633. (*See* ER 121 ("Proposition 8 reserves the most socially valued form of relationship (marriage) for opposite sex couples."); ER 128 ("Proposition 8 singles out gays and lesbians and legitimates their unequal treatment."). By imposing this "mark of second class citizenship," *In re Marriage Cases*, 183 P.3d at 445, Proposition 8 violates the fundamental equal protection principle that "the Constitution neither knows nor tolerates classes among citizens." *Romer*, 517 U.S. at 623, quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). *See also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (equal protection prevents "governmental decisionmakers from treating differently persons who are in all relevant respects alike").

Further, Proposition 8's purpose and effect of declaring the relationships and families of lesbian and gay couples unequal to those of heterosexuals contravenes a second cardinal precept of the Equal Protection Clause: that government cannot treat groups of people differently simply to designate them unequal. *See, e.g.*, *Romer*, 517 U.S. at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."); *id.* at 633 (requiring some "independent" government objective that the differential treatment serves to "ensure that classifications are not drawn for the [improper] purpose of [simply] disadvantaging the group burdened by the law") (internal citation omitted); *U.S. Dep't. of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973) ("[I]f 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 government interest. As a result, '[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.'") (quoting district court opinion; brackets in original).

Laws like Proposition 8 adopted for the improper purpose of giving effect to private prejudice are so offensive to equal protection that they likewise violate the clause no matter the standard of review that otherwise might apply to the

classification at issue. For example, in *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Supreme Court struck down a lower court order granting sole custody to a father because his ex-wife, a white woman, was in a new relationship with a black man, which the lower court found would be damaging for the child due to negative reactions of third parties. *Id.* at 434. Because the family court's decision was based on an impermissible consideration—private racial bias—analysis of the governmental interest and its connection to the classification, even under the strict scrutiny usually applied to race classifications, was unnecessary. The classification simply fell. *Id.* at 433-34. This rule applies equally to classifications that otherwise receive lesser scrutiny. *See Kelo v. City of New London*, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring) ("a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications"); *see also Cleburne*, 473 U.S. at 446-47, 448-49; *Moreno*, 413 U.S. at 533-36.

Finally, like the constitutional amendment invalidated in *Romer* as a "literal violation" of the Equal Protection Clause, Proposition 8 accomplishes its purpose in a particularly pernicious way—by inserting a mandate of inequality into the equality guarantee itself. *See* Cal. Const., art. I, § 7.5 (adopted by Proposition 8), amending Cal. Const., art. I, § 7 (which provides that "A person may not be …

denied equal protection of the laws"). *Accord Reitman*, 387 U.S. at 380-81 ("Here we are dealing with a provision which does not just repeal an existing law" in that the amendment to the California Constitution in that case, as here, made "discriminat[ion] … one of the basic policies of the State."). By carving out a gay "exception" to the guarantee of equal protection in the California Constitution, *Strauss*, 207 P.3d at 78, Proposition 8 "literally" causes the California equal protection clause to provide less "protection" against inequality to lesbians and gay men than it accords everyone else when it comes to access to the status and designation of marriage.[6] Indeed, Proposition 8 could be considered even worse than the amendment struck down in *Romer*. That amendment repealed and barred *statutory* (and perhaps common law) protections of gay people against discrimination in employment, housing, education, public accommodations, and health and welfare services, *Romer*, 517 U.S. at 623, 628-29, whereas Proposition 8 repealed and bars state *constitutional* protection of equal status, respect and dignity for same-sex couples and their families, turning the state's equal protection clause, in effect, into a clause mandating *unequal* protection.

[6] For example, after Proposition 8's passage, racial and ethnic minorities, religious minorities, the disabled, seniors, left-handed people and even persons convicted of child abuse remain protected under California's equal protection clause against being denied equal access to the institution of marriage. Only gay people are denied that protection.

For all of these reasons, Proposition 8 constitutes a per se violation of the Equal Protection Clause that is invalid regardless of the level of scrutiny.[7]

III. PROPOSITION 8 ALSO FAILS CONVENTIONAL RATIONAL BASIS REVIEW.

As described above, Proposition 8 violates the Equal Protection Clause per se, and this Court therefore need not apply any particular level of scrutiny in affirming its unconstitutionality. For many of the same reasons, Proposition 8 also must fail even the lowest level of equal protection scrutiny—conventional rational basis review.

Proponents argue that, under rational basis review, Plaintiffs bear "the burden to negative every conceivable basis that might support" Proposition 8. (Defendants-Intervenors-Appellants' Opening Brief at 32-33).[8] While the

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[7] *Amici* agree with Plaintiffs that, given doctrinal developments since *Baker v. Nelson*, 409 U.S. 80 (1972), that decision does not preclude the equal protection claims presented here; that *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), which construed federal immigration law without deciding the parameters of Colorado's marriage law, does not apply; and that *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), no longer precludes application of strict scrutiny to sexual orientation classifications. Yet recognition of Proposition 8's invalidity as a per se denial of equal protection does not require this Court to reach those questions.

[8] Even were that a complete description of how conventional rational basis review applies, Plaintiffs have negated every conceivable basis that might support Proposition 8. But, as discussed below, the Supreme Court has explained that conventional rational basis review is more careful in cases such as this one.

Supreme Court defers almost completely to legislative choices about where to draw lines between classes of persons in economic and regulatory contexts, it is more careful in cases involving individual liberty and human dignity. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 446-55 (1972) (closely analyzing and ultimately rejecting under rational basis review rationales offered for Massachusetts' ban on purchase of contraceptives by unmarried individuals); *Moreno*, 413 U.S. at 533-38 (closely analyzing and ultimately rejecting on rational basis review rationales offered for federal ban on food stamps for households containing multiple unmarried adults); *Heller v. Doe*, 509 U.S. 312, 321-30 (1993) (closely analyzing and ultimately upholding on rational basis review rationales offered for different standards of proof for involuntary commitment of mentally ill and mentally retarded persons); *compare FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (upholding economic regulation against equal protection challenge where "any reasonably conceivable state of facts [exists] that could provide a rational basis for the classification").

The Court applies this more careful approach within conventional rational basis review particularly where laws single out and selectively burden disfavored groups. *See Romer*, 517 U.S. at 633 ("By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group

burdened by the law.").[9]

When applying the rational basis test carefully, courts go beyond the mere labels used for the purposes said to be advanced by a classification to make sure the classification in fact aims to advance a legitimate state interest. In other words, courts look at the *actual* purpose of a classification.[10] In addition, courts demand an intellectually respectable explanation of how the classification might be thought to advance its intended purposes. *See, e.g.*, *Moreno*, 413 U.S. at 533-38 (carefully considering whether an exclusion of unmarried persons really could be thought to prevent fraud); *Heller*, 509 U.S. at 321-30 (taking pains to see if it really was

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[9] *See also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); *see also Kelo*, 545 U.S. at 490-91 (Kennedy, J., concurring) (distinguishing between the analysis applied to "economic regulation" and that applied to classifications intended to injure a particular group).

[10] In so doing, the Supreme Court has looked as well to traditional sources of legislative intent to "illuminate the purposes" behind a law. *See Moreno*, 413 U.S. at 534 (reviewing legislative history to determine the purpose behind statute that differentiated between households with married persons and households with unmarried persons); *see also Cleburne*, 473 U.S. at 447-50 (reviewing city council records to determine purpose behind zoning ordinance differentiating between homes for the mentally disabled and other group homes); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.") (internal citations omitted).

possible to think that differences between mentally ill and mentally retarded persons could justify different standards of proof in commitment proceedings).

Amici agree with Plaintiffs that none of the laws across the nation that prohibit same-sex couples from marrying can meet this test. But the unique nature of Proposition 8 and its context provide additional and independent reasons for the measure's failure under conventional rational basis review. Because Proposition 8 did not change same-sex couples' ability to obtain California's substantive rights and obligations of marriage by entering a domestic partnership, *Strauss*, 207 P.3d at 76, it cannot be justified by reasons related to those rights and obligations. Proposition 8 likewise cannot be justified by any purported differences in parenting by same-sex and different-sex couples because Proposition 8 did nothing to change California law providing precisely the same substantive parenting rights and obligations to domestic partners and spouses, Cal. Fam. Code §§ 297.5(d), 9000(b), and otherwise treating parents in same-sex relationships identically to parents in different-sex relationships. *See, e.g.*, *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003); *Charisma R. v. Kristina S.*, 44 Cal. Rptr. 3d 332 (Cal. Ct. App. 2006); Cal. Welf. & Inst. Code § 16013(a).[11]

[11] The District Court's detailed findings confirming the consensus of social science professionals about the needs of children—specifically that successful child development is not a function of parental gender or sexual orientation, but that

Any justification tendered for Proposition 8 must explain why it continued to allow same-sex couples to receive all of the substantive rights and benefits of marriage, and to assume all of its obligations, yet be denied its preferred status. There is only one possible explanation: Those who enacted Proposition 8 did not want the relationships of same-sex couples to be considered as worthy of respect, and to have the same stature, as the relationships of different-sex couples. Why else create an "exception" to the state equal protection guarantee to withhold the designation that signifies equality? As the ballot arguments supporting Proposition 8 confirm and as the District Court found, the measure limited same-sex couples to the lesser status of domestic partnership rather than marriage in order to end the impression that same-sex relationships are "okay" and that there is "no difference" between same-sex relationships and different-sex relationships.[12] This, however, is nothing more than a "classification of persons undertaken for its own sake," which is "something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635. Under our system of government, laws cannot be adopted with the intent or effect of simply conveying that some people are not the equal of

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legal security of family relationships can be important—are consistent with California's settled law and policy of enforcing the rights and obligations of lesbian and gay parents. (*See, e.g.*, ER 113, 119, 129-31.)

[12] California General Election, *Tuesday, November 4, 2008, Official Voter Information Guide, Proposition 8, available at* http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm; *see also* ER 41-42, 1026.

others. *Id.* at 623, 633-34; *see also U.S. v. Virginia*, 518 U.S. 515, 557 (1996); *Moreno*, 413 U.S. at 534; *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). Such laws, by definition, do not advance any legitimate governmental objective and fail conventional rational basis review.[13]

IV. PROPOSITION 8 ALSO FAILS THE HEIGHTENED SCRUTINY MANDATED BY *WITT v. DEPARTMENT OF THE AIR FORCE*.

As noted above, *Amici* agree with the District Court's conclusions and Plaintiffs' arguments that Proposition 8 discriminates based on sex as well as sexual orientation; that sexual orientation classifications should be considered suspect; and that strict scrutiny is warranted in this case because Proposition 8 denies same-sex couples the fundamental right to marry. Independent of those conclusions and the other reasons for affirmance discussed above, Proposition 8 also is unconstitutional because it cannot meet the standard of review mandated by this Court's decision in *Witt*. 527 F.3d at 806.

In *Witt*, this Court held that, "when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the

[13] Again, recognizing Proposition 8's unconstitutionality on this ground does not require a decision as to the continuing vitality, or not, of *Baker v. Nelson*, 409 U.S. at 87, or *High Tech Gays*, 895 F.2d at 563, or the inapplicability of *Adams v. Howerton*, 673 F.2d at 1036.

intrusion must be necessary to further that interest." 527 F.3d at 819. Although *Witt* arose under the "Don't Ask, Don't Tell" law that bans openly gay people from military service, the same liberty interest found to be burdened in *Witt* is implicated by Proposition 8.

In *Witt*, the plaintiff, Major Margaret Witt, was suspended from duty as an Air Force reservist nurse because she had a relationship with a civilian woman. *Id.* at 809. Major Witt challenged her suspension, arguing that, because her discharge was based on her same-sex relationship, the Supreme Court's decision in *Lawrence* required examination of the discharge under a heightened form of review. *Id.* at 814. This Court agreed, rejecting the government's argument that rational basis review applied. *Id.* at 816 ("We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review.").[14]

Like "Don't Ask, Don't Tell," Proposition 8 disadvantages those who are in same-sex relationships because they are in same-sex relationships. In *Strauss*, the

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[14] Following a trial conducted per this standard, the District Court concluded that the government had failed to show that the military would be harmed by Major Witt's presence and held that her discharge was unconstitutional. *Witt v. U.S. Dep't of the Air Force*, Case No. 06-5195RBL, 2010 U.S. Dist. LEXIS 100781 (W.D. Wash. Sept. 24, 2010). More recently, in *Log Cabin Republicans v. United States*, Case No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 108647 (C.D. Cal., Oct. 12, 2010), also following trial, the District Court applied heightened scrutiny to the plaintiffs' due process claim as mandated by *Witt*, and found the "Don't Ask, Don't Tell" law facially unconstitutional.

California Supreme Court held that, in addition to creating an exception to the California Constitution's equal protection requirement, Proposition 8 also created an exception to the California Constitution's requirements of privacy and due process by reserving the designation of "marriage" for different-sex couples. *Strauss*, 207 P.3d at 102. As the California Supreme Court found in *In re Marriage Cases*, prohibiting same-sex couples from designating their relationships as marriages denies each one's family relationship "respect and dignity equal to that accorded the family relationships of opposite-sex couples." *In re Marriage Cases*, 183 P.3d at 445.[15] That court further found that being excluded from the designation of marriage and required to use a different designation deprives individuals in same-sex relationships of the "ability to invest in and rely upon a loving relationship with another adult in a way that may be crucial to the individual's development as a person and achievement of his or her full potential." *Id.* at 424 (explaining that marriage provides a unique expectation of permanence).

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[15] *See also In re Marriage Cases*, 183 P.3 at 426 (noting that the right to marry includes "an individual's right to be free from undue governmental intrusion into (or interference with) integral features of this relationship—that is the right of marital or familial privacy"), and at 446 (concluding that "the existence of two separate family designations—one available only to opposite-sex couples and the other to same-sex couples—impinges upon" the right of privacy by requiring disclosure of one's sexual orientation when answering "in everyday social, employment and governmental settings" that one is in a domestic partnership rather than a marriage, "and may expose gay individuals to detrimental treatment by those who continue to harbor prejudices" against gay people).

Withholding marriage while offering the same rights and obligations through a registration system also penalizes persons in same-sex relationships by limiting their ability to gain the support of extended family and preventing them from exercising "an important element of self-expression that can give special meaning to one's life." *Id.* at 425. Proposition 8 reinstated this selective deprivation of privacy and due process only on those in same-sex relationships, once again depriving lesbian and gay Californians of the protections and support provided by marriage and exposing them to the intrusions and burdens that necessarily follow from relegation to a different, lesser family status. *Strauss*, 207 P.3d at 102.

The District Court appropriately made similar findings about Proposition 8 based upon each plaintiff's testimony about experiencing the deprivation of the status of marriage as harmful in distinct and varied ways. The District Court found, for example, that "domestic partnership does not provide gays and lesbians with a status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships." ER 117 (citing testimony of Plaintiffs and experts). The court further found that "Proposition 8 places the force of the law behind stigmas against gays and lesbians, including: gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as

heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society." (ER 120.)

Indeed, Proposition 8 strikes closer to the heart of the right identified in *Lawrence* than "Don't Ask, Don't Tell" because, like the "sodomy" law at issue in *Lawrence*, Proposition 8 seeks to impose a disadvantage on the relationship itself. Like Texas, *see Lawrence*, 539 U.S. at 575, 578, California seeks to "demean" the relationships of gay persons and to impose a stigma because they have entered into family relationships that are legally identical in rights and obligations to those of heterosexuals but that are with persons of the same sex. Like Texas, California seeks to impose that stigma on the relationship itself, burdening it with the "mark of second-class citizenship." *In re Marriage Cases*, 183 P.3d at 445. *See also Strauss*, 207 P.3d at 102 (holding that Proposition 8 deprived lesbians and gay men of "significant" privacy and due process protections afforded by designation of marriage). This the state cannot do unless imposing such burdens is necessary to significantly further important state interests in a way that would justifiy the damage done to individual liberty.

While it is true, as the Supreme Court noted, that *Lawrence* did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," 539 U.S. at 578, the Court did not say its decision had *no* implications for rules governing marriage. And, in fact, the

discussion of the right protected—and its emphasis on the duty of government not to "demean the dignity" of gay people—makes clear that the case *does* have implications for how states may and may not offer legal recognition to the family relationships couples form, whatever their sexual orientation. In any event, *Amici* do not argue here that *Lawrence* generally compels allowing same-sex couples to marry (although they agree with Plaintiffs on this point). Rather, the argument offered here is simply that *Lawrence* prohibits California from demeaning those of its citizens who form an adult family relationship with someone of the same sex, by using one set of family law rules for same- and different-sex couples alike, but marking as inferior those who exercise their liberty and privacy rights by forming a relationship with a same-sex partner rather than a different-sex partner. Doing so denies gay people "equal dignity and respect," *In re Marriage Cases*, 183 P.3d at 400, which is inconsistent with the protections for individual dignity, 539 U.S. at 567, and "respect for [one's] private [life]," *id*. at 578, that *Lawrence* promises to lesbians and gay men, as to others. Because Proposition 8 creates an "exception" to the California Constitution's requirements of privacy and due process and reinstates a regime that the California Supreme Court expressly found to be demeaning to the relationships of same-sex couples and their families, Proposition 8 "intrude[s] upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*," *Witt*, 527 F.3d at 819. Therefore,

any interests proffered to justify its intrusive and demeaning impact on the privacy and dignity of persons in same-sex relationships, and its related burdens on the ability of gay individuals to live free, full, and satisfying personal lives, must survive at least the intermediate level of scrutiny mandated by *Witt*.[16]

The District Court's findings after consideration of the trial testimony and documentary evidence make clear that this test cannot be met in this case. Proposition 8 does burden and intrude upon the intimate relationships of same-sex couples by relegating them to an institution of lesser dignity and respect, and this burden on their family life does not significantly further, and is not necessary to advance, *any* government interest, let alone any important interest. Independent of and in addition to the other reasons why Proposition 8 is unconstitutional,

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[16] As noted in *In re Marriage Cases*, 183 P.3d at 401-02, 446, one of the faults of Proposition 8's imposition of a hierarchy of relationships is that it exposes same-sex couples and their children to practical harms and perpetuates the false premise that gay individuals and couples may be treated less favorably under the law than heterosexual individuals and couples. *See Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("as we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions'' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982), can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.") (internal citations omitted); ER 128 ("Proposition 8 perpetuates the stereotype that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents."). *See also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (expressing concern about stigma that flows from laws that target gay people).

therefore, the measure is unconstitutional under the controlling precedent this Court established in *Witt.*

CONCLUSION

In California, the pre-Proposition 8 history and authoritative pre- and post-ballot decisions of the California Supreme Court establish that there are no open legal questions about the constitutional position of the state's lesbian and gay citizens. In contrast with *Romer*, where there were questions of motive and the Court had to infer intent from the irrationality of all the proffered state interests, the California legislature and courts already have answered all the pertinent legal questions: same- and different-sex couples are similarly situated; their separate, inferior family status inflicts constitutionally cognizable harm; and there is no legitimate, let alone important and necessary, reason for these harms. And in this context, the majority voted to eliminate equality of protection and liberty rights of those who form same-sex relationships simply because they wished to and could. That action constitutes a facial violation of equal protection. Without need for further analysis, and in particular without need to inquire into motive or consider standards of review, the literal violation of equal protection is apparent.

Furthermore, Proposition 8 obviously fails conventional rational basis equal protection review and certainly cannot meet the heightened scrutiny test for diminutions of liberty and privacy enunciated by this Court in *Witt*.

Accordingly, *Amici* respectfully submit that Proposition 8 is unconstitutional for these reasons in addition to and independent of its violations of the fundamental right to marry and of the sound principle that all laws prohibiting same-sex couples from marrying violate equal protection. The judgment of the District Court should be affirmed.

DATED: October 25, 2010

ACLU FOUNDATION OF NORTHERN CALIFORNIA
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
NATIONAL CENTER FOR LESBIAN RIGHTS

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: October 25, 2010 s/ Jennifer C. Pizer

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2010.

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