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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 KRISTIN M. PERRY, et al.,
17 Plaintiffs,
18
19 and
20 CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff-Intervenor,
21
22 v.
23 ARNOLD SCHWARZENEGGER, et al.,
24 Defendants,
25 and
26 PROPOSITION 8 OFFICIAL PROPONENTS
DENNIS HOLLINGSWORTH, et al.,
27 Defendant-Intervenors.
28

No. C 09-CV-2292 VRW

**BRIEF OF AMICUS CURIAE
NATIONAL GAY AND LESBIAN
TASK FORCE FOUNDATION IN
SUPPORT OF PLAINTIFFS**

Judge: Hon. Vaughn R. Walker
Dep't: Courtroom 8

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1 **I.**

2 **INTRODUCTION AND SUMMARY OF ARGUMENT**

3 By reserving marriage to heterosexuals while providing a separate relationship status to
4 lesbian and gay couples, Proposition 8 violates the Equal Protection Clause of the Fourteenth
5 Amendment in two distinct ways. First, it denies same-sex couples access to the unique social
6 value of marriage.¹ Second, it expresses an impermissibly disfavoring message about the worth
7 of same-sex couples relative to their different-sex counterparts.

8 As to the first point, the constitutional violation inheres in the state’s role as gatekeeper
9 of legally recognized marriage. Because the state has a monopoly on access to the legal status of
10 marriage, and thus to marriage’s unique social value, it may not constitutionally allocate that
11 access differentially among similarly situated couples. Yet that is precisely what Proposition 8
12 commands: that some couples may access marriage’s unique social value while others,
13 identically situated except for sexual orientation, may not.

14 Contrary to arguments advanced by proponents of Proposition 8, barring same-sex
15 couples from the social value of marriage while providing it to different-sex couples violates the
16 Constitution regardless of the extent to which the state created that social value. Thus, the
17 possibility that the state may not have given marriage all of its current social value – that history,
18 tradition, or other societal forces may have contributed to marriage’s special status – does not
19 render discriminatory marriage rules any less unconstitutional.

20 Amicus does not contend that gay and lesbian couples – or any couples, for that matter –
21 have a constitutional right to a particular social value or its benefits. *Cf. United States v.*
22 *Virginia*, 518 U.S. 515 (1996) (recognizing the greater social value of attending a prestigious,
23 male-only military school as compared to a less prestigious counterpart for women). But when
24

25 ¹ Although this brief endorses the argument, advocated in other briefs, that domestic
26 partnership and marriage do not provide equivalent *tangible* rights and benefits, it does not
27 restate those points here. Instead, amicus assumes (for the sake for argument only) that the two
28 statuses have equivalent tangible value and demonstrates that the distinction sought by
Proposition 8 is constitutionally infirm because of the state’s unequal allocation of access to the
social connotations of marriage.

1 the state wholly controls a status that confers such benefits, it cannot deny access to that status to
2 a class of its citizens merely because society may have played a role in giving that status its
3 unique value. *Cf. Dodds v. Commission on Judicial Performance*, 12 Cal. 4th 163, 176-77
4 (1995) (recognizing that constitutional due process protection reaches factors, such as concerns
5 with dignity and alienation, that derive their value from society rather than government).

6 Second, Proposition 8 inescapably and impermissibly denigrates same-sex couples by
7 denying them the right to marry and restricting them instead to a separate legal status, domestic
8 partnership, which replicates the functions – but not the social meaning – of marriage. It does so
9 by adopting a state-sanctioned distinction in the relationship-recognition rules accorded
10 different-sex and same-sex couples. At the same time, however, the state recognizes that the
11 couples are similarly situated, treating them as essentially indistinguishable for purposes of
12 rights and benefits. *See In re Marriage Cases*, 43 Cal. 4th 757, 779 & n.2 (2008) (noting that
13 domestic partners in California are accorded virtually all of the legal rights and responsibilities
14 accorded married couples in the state). There can be no plausible, non-arbitrary explanation for
15 creating a new legal relationship-recognition status that is the functional equivalent of the
16 existing status of marriage other than to express that same-sex couples are not worthy of the
17 status of marriage even if they are otherwise worthy of equal treatment. Well-settled equal
18 protection jurisprudence forbids precisely this sort of status denigration.

19 Only by providing the opportunity for the same legal recognition to both same-sex and
20 different-sex couples can the state remedy these constitutional defects.

21 II. 22 ARGUMENT

23 Undoubtedly, the state has provided its same-sex couples with valuable benefits through
24 domestic partnership. If all the Constitution required of the state were that California provide
25 “virtually all of the same legal benefits and privileges” (*In re Marriage Cases*, 43 Cal. 4th at
26 779), and “move closer to fulfilling the promises of . . . equality” (California Domestic Partner
27 Rights and Responsibilities Act of 2003, Stats. 2003, ch. 421, § 1(a)), then perhaps Proposition 8
28 might survive Plaintiffs’ challenge. But the United States Constitution does not have a “virtually

1 Equal” Protection Clause; instead, it unqualifiedly forbids the states from “den[ying] to any
2 person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

3 By providing different-sex couples access to marriage and withholding marriage from
4 same-sex couples, Proposition 8 directly contravenes this equal protection guarantee. Even if
5 domestic partnership successfully granted all couples access to the same material benefits and
6 obligations (which it does not, as Plaintiffs and other amici demonstrate), the distinction between
7 domestic partnership and marriage is nonetheless unconstitutional. Proposition 8’s placement of
8 different-sex couples on one side of the marriage line and same-sex couples on the other denies
9 same-sex domestic partners the unique, particular value of marriage and denigrates their worth
10 relative to different-sex married couples. As Professor Nancy Cott put it, “there is nothing that is
11 like marriage except marriage.” (RT 208:16-17)

12 **A. Because the State Wholly Controls Legal Entry to Marriage, It Is**
13 **Constitutionally Liable for Excluding Same-Sex Couples from Access**
14 **to Marriage’s Unique Value.**

15 Because the state has exclusive control over a couple’s legal ability to marry, the
16 question whether the state contributes to the valuable social benefit of marriage is, as a
17 constitutional matter, beside the point. Even if one makes the unreasonable assumption that the
18 state’s imprimatur has not added value to marriage,² the constitutional problem remains because,
19 under Proposition 8, the state is actively exercising complete, and impermissibly selective,
20 control over access to that socially valuable status.

21 Considering the state’s monopoly over the licensing function in a different context may
22 help to clarify. There should be no doubt that being a lawyer carries social value beyond the
23 lawyers’ rights and obligations as defined by the state. Yet the state cannot disclaim
24 constitutional accountability for its rules regarding allocation of licenses to practice law. So, too,

25 ² In fact, Plaintiffs adduced testimony to the contrary. For example, as Professor Nancy
26 Cott explained, “the fact that the state is involved in granting [certain] benefits and legitimacy to
27 the marital family tends to lend a prestige, a status to that institution that no informal marriage
28 has ever approximated.” (RT 225:4-7; *see also* RT 202:2-5 (“[M]arriage, the ability to marry, to
say, ‘I do,’ is a basic civil right. It expresses the right of a person to have the liberty to be able to
consent validly.”))

1 here. Even if marriage’s social value derives from sources other than state sanctification, the
2 state cannot avoid constitutional scrutiny when it puts itself in the position of allowing some
3 couples to marry, but not others. Suzanne B. Goldberg, *Marriage as Monopoly: History,*
4 *Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 Conn. L. Rev. 1397,
5 1413-15 (2009).

6 **1. Marriage Has Immense Social Value.**

7 Little ink need be spilled establishing marriage’s immense social value, as attested to by
8 many of the witnesses at trial. *See, e.g.*, RT 252:18-23 (Prof. Nancy Cott); 574:21-577:145
9 (Prof. Letitia Peplau); 827:3-4 (Prof. Ilan Meyer); 1251:6-1252:11 (Helen Zia); 2744:19-
10 2746:12, 2790:1-9 (David Blankenhorn). It has been described as “an institution of transcendent
11 historical, cultural and social significance.” *Kerrigan v. Commissioner of Pub. Health*, 957 A.2d
12 407, 418 (Conn. 2008). The California Supreme Court likewise acknowledged “the long and
13 celebrated history of the term ‘marriage’”; “the widespread understanding that this term
14 describes a union unreservedly approved and favored by the community”; and the “considerable
15 and undeniable symbolic importance to this designation.” *In re Marriage Cases*, 43 Cal. 4th at
16 845-46. Indeed, it is the effort to preserve the social value of marriage for heterosexual couples
17 – and the concomitant fear that allowing same-sex couples to marry will diminish that value –
18 that lies at the heart of Proposition 8’s proponents’ arguments. As Defendants’ expert Kenneth
19 Miller described it: “[T]here’s a view that homosexuals may certainly undermine traditional
20 families” and that “if certain events occur with respect to the recognition of same-sex marriage,
21 that that would undermine traditional families.” (RT 2606:9-19)

22 **2. The State, by Exercising Monopoly Authority Over Legal**
23 **Marriage, Wholly Controls Access to Marriage’s Social Value.**

24 In California, the decision to marry is left largely to private ordering. But marriage itself
25 is not. Marriage is a legal status, administered by the state. As the Family Code establishes,
26 “[c]onsent alone does not constitute marriage. Consent must be followed by the issuance of a
27 license and solemnization as authorized by this division.” Cal. Fam. Code § 300. Among other
28

1 legal requirements, couples must obtain a license in advance of their marriage ceremony (*id.*
2 § 350), and go to court to challenge a marriage’s validity (*id.* § 309).

3 As a result of these and related rules, “marriage” is available only to those authorized by
4 the state.³ The state’s monopolistic role as the gatekeeper of marriage thus puts California in
5 control of access not only to marriage’s state-sponsored benefits but also to the uniquely
6 valuable social connotations associated with marriage.

7 **3. Because the State Controls Access to Marriage and, Therefore,**
8 **to Marriage’s Social Value, Attributing That Value to Society**
9 **or “Tradition” Does Not Provide a Rational Basis on Which to**
10 **Deny Same-Sex Couples the Right to the Status of “Marriage.”**

11 One argument sometimes advanced by proponents of Proposition 8 to avoid
12 constitutional challenge is that the social significance of marriage is not created by the state.
13 *See, e.g.*, RT 2790:5-9 (testimony of David Blankenhorn). But under well-settled law, the state
14 cannot avoid constitutional liability solely because societal traditions and private actors have
15 helped shape the background conditions against which a party’s injury has occurred.

16 As the United States Supreme Court has repeatedly made clear, history and tradition
17 cannot justify retention of a discriminatory or exclusionary rule. *See Pacific Mut. Life Ins. Co. v.*
18 *Haslip*, 499 U.S. 1, 18 (1991) (“Neither the antiquity of a practice nor the fact of steadfast
19 legislative and judicial adherence to it through the centuries insulates it from constitutional
20 attack.”) (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970)); *Walz v. Tax Comm’n of N.Y.*,
21 397 U.S. 664, 678 (1970) (“It is obviously correct that no one acquires a vested or protected right
22 in violation of the Constitution by long use, even when that span of time covers our entire
23 national existence and indeed predates it.”). Accordingly, Proposition 8 cannot escape constitu-
24 tional scrutiny on the ground that it is directed at a status with traditional social value beyond
25 that conferred by the state. Indeed, as the Connecticut Supreme Court explained in reviewing

26 ³ This exclusive monopoly over the entry into, incidents of, and dissolution of marriage
27 demonstrates the existence of state action. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-60
28 (1978) (describing the link between state action and exclusive governmental control over
particular public functions).

1 the state’s marriage law in *Kerrigan v. Commissioner of Public Health*, 957 A.2d at 418, “[t]o
2 say that the discrimination is ‘traditional’ is to say only that the discrimination has existed for a
3 long time.”

4 Nor can the state aid in the commission of purportedly private discrimination. As the
5 Supreme Court explained in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), “[t]he Constitution
6 cannot control . . . prejudices but neither can it tolerate them. Private biases may be outside the
7 reach of the law, but the law cannot, directly or indirectly, give them effect.” So, too, in
8 *Anderson v. Martin*, 375 U.S. 399, 402 (1964), the Court rejected a state’s use of its power to
9 “induce[] . . . prejudice” among private individuals at the polls. Likewise, in *United States*
10 *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), the Court reinforced that
11 individuals’ desires to harm a politically unpopular group do not immunize the government from
12 constitutional liability for actions whose purpose is to deprive that group of a public benefit.⁴
13 See also *United States v. City of Hayward*, 36 F.3d 832, 835-36 (9th Cir. 1994) (citing *Palmore*
14 and holding that “we cannot attach value to unlawful discrimination. The Supreme Court has
15 suggested that the law should not sanction private biases”).

16 In this case, the fact that views about marriage’s social value may be privately held or
17 rooted in “tradition” cannot save Proposition 8 from its constitutional infirmity. Nor can the
18 state adopt discriminatory policies based on such views and then claim that it is constitutionally
19 unaccountable for its role in effecting illegal discrimination.

26 ⁴ Imagine, for example, that the state had authorized interracial domestic partnerships but
27 not interracial marriages after *Perez v. Lippold*, 32 Cal. 2d 711 (1948). See William N. Eskridge,
28 Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 Alb. L. Rev.
853, 870-71 (2001).

1 **B. The Only Plausible Explanation for the Parallel Relationship-**
2 **Recognition Bureaucracy Created by Proposition 8 Is to Signal the**
3 **Inferiority of Same-Sex Couples’ Relationships.**

3 **1. Same- and Different-Sex Couples Are Similarly Situated**
4 **Under California Law, Yet Proposition 8 Accords Each a**
5 **Distinct Relationship Status.**

5 As noted, under California law, same-sex and different-sex couples have “virtually all of
6 the same substantive legal benefits and privileges” and “virtually all of the same legal
7 obligations and duties.” *In re Marriage Cases*, 43 Cal. 4th at 779. Nonetheless, the state treats
8 these similarly situated couples differently by granting a different relationship status to each:
9 with limited exceptions,⁵ the state’s statutes establish domestic partnerships solely for same-sex
10 couples (*see* Cal. Fam. Code § 297(b)(5)(A)), while restricting marriage solely to different-sex
11 couples (*see id.* § 300). Obviously, this marriage/domestic partnership distinction cannot be
12 explained on the basis of any functional difference between the couples. To the contrary, as the
13 California Supreme Court has expressly acknowledged, Proposition 8 creates an “*exception* to
14 the state equal protection clause.” *Strauss v. Horton*, 46 Cal. 4th 364, 411 (2009) (emphasis
15 added).

16 **2. History Teaches That Separation Is Usually Undertaken**
17 **Impermissibly to Denote Inferiority.**

18 History teaches that the separation of a group from a larger community of citizens is
19 almost invariably undertaken to “denote the inferiority of the group set apart” (Kenneth L. Karst,
20 *Law’s Promise, Law’s Expression* 185 (1993) [hereinafter Karst, *Law’s Promise*]) and, when
21 done for that reason, is impermissible.

22 The most salient illustration in American history is, of course, racial segregation, which
23 was not a neutral, administrative scheme but, rather, a means to signal the inferiority of the
24 minority group at issue. *See Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J.,
25 dissenting) (describing segregation as premised on the belief that “colored citizens are so inferior
26 and degraded that they cannot be allowed to sit in public coaches occupied by white citizens”),

27 ⁵ Some different-sex couples may also enter into a domestic partnership if one of the
28 partners is over the age of 62. *See* Cal. Fam. Code § 297(b)(5)(B).

1 *overruled by Brown v. Board of Education*, 347 U.S. 483 (1954); *cf. Loving v. Virginia*, 388 U.S.
2 1, 7 (1961) (characterizing the state’s miscegenation law as an “obvious[] . . . endorsement of the
3 doctrine of White Supremacy”). Sex segregation was likewise used to reinforce perceptions of
4 women’s lesser status relative to men. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458
5 U.S. 718, 725 & n.10 (1982) (describing the history of gender-based discrimination as rooted in
6 the idea that women were “innately inferior”).

7 But inferences of inferiority from group-based classifications are not limited to race and
8 gender distinctions. Legally authorized distinctions based on mental retardation and sexual
9 orientation have also triggered judicial suspicion about the operation of “irrational prejudices”
10 against a target group. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985)
11 (finding the separation of people with mental retardation from others rested on fears of and
12 discomfort with that population); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (identifying animus
13 in an amendment that imposed separate political rules on gay men and lesbians); *cf. Akhil R.*
14 *Amar, Attainder and Amendment 2: Romer’s Rightness*, 95 Mich. L. Rev. 203, 224 (1996)
15 (arguing that “the laws at issue in both *Plessy* and *Romer* are about [the] untouchability and
16 uncleanness” of the target group); Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans*
17 *and the Politics of Equal Protection*, 45 UCLA L. Rev. 453, 487-88 (1997) (arguing that the
18 Constitution “bar[s] the state from making a general pronouncement that gays and lesbians are
19 ‘unequal to everyone else’”).

20 Since Reconstruction, courts have repeatedly held that legal separations, for purposes of
21 diminishing a group’s stature or otherwise implying group members’ inferiority, violate
22 constitutional guarantees of equality, even without regard to distribution of tangible benefits.
23 *See United States v. Virginia*, 518 U.S. at 532 (“[N]either federal nor state government acts
24 compatibly with the equal protection principle when a law or official policy denies to women,
25 simply because they are women, full citizenship stature.”). As the United States Supreme Court
26 explained in *Heckler v. Mathews*, 465 U.S. 728, 739 (1984), “[t]he right to equal treatment
27 guaranteed by the Constitution is not coextensive with any substantive rights to the benefits
28 denied the party discriminated” against; it also includes a right to be free from stigma and

1 “archaic and stereotypic notions.” *See also Strauder v. West Virginia*, 100 U.S. (10 Otto) 303,
2 307-08 (1880); *Brown v. Board of Education*, 347 U.S. at 494.

3 **3. Because the State Recognizes that Same- and Different-Sex**
4 **Couples Are Functionally Indistinguishable, Their Different**
5 **Relationship-Recognition Status Necessarily Connotes That**
6 **They Are Not of Equal Worth.**

6 “To understand the claim that a law harms a constitutionally protected interest, a court
7 must pay attention to the environment in which a law operates.” Karst, *Law’s Promise, supra*, at
8 182. Moreover, “[d]iscriminations of an unusual character especially suggest careful consider-
9 ation to determine whether they are obnoxious to the [Equal Protection Clause].” *See Romer v.*
10 *Evans*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38
11 (1928)).

12 The discrimination here can easily be classified as of an “unusual character”: The state
13 duplicated an existing relationship-recognition bureaucracy, then recognized the unconstitutional
14 harm inherent in that duplication. Still, the defenders of Proposition 8 maintain that the
15 distinction is one without a difference.

16 The only possible explanation for retaining separate relationship-recognition rules for
17 same- and different-sex couples – other than complete and impermissible arbitrariness – can be
18 concerns about equalizing the status of the two classes of couples. As the United States Supreme
19 Court recognized in *United States v. Virginia*, 518 U.S. at 542-43, a common, albeit invalid,
20 rationale for maintaining separate status is the fear that the “traditional” institution’s status will
21 suffer if newcomers are admitted. *See also* David B. Cruz, *The New “Marital Property”: Civil*
22 *Marriage and the Right to Exclude?*, 30 Cap. U. L. Rev. 279, 286-87 (2002) (arguing that
23 maintaining a distinction between civil unions and marriage “deems [gays and lesbians’] lives so
24 fundamentally inferior to or different from [heterosexuals’] that it would be deceptive or
25 degrading to [heterosexuals] to have to participate in the same relationship institution”).

26 A measure that separates one class from another but then purports to attach no meaning
27 to that separation can be explained only as a message about the relative worth of groups on either
28 side of the state-drawn line. Not surprisingly, the public commentary of Proposition 8’s

1 supporters reinforces that the measure’s advocates intended to exclude same-sex couples from
2 marriage precisely to avoid the message of full and equal inclusion in society – *the* great promise
3 of equal protection – that would flow from granting lesbian and gay couples non-discriminatory
4 access to marriage. The Argument in Favor of Proposition 8 included in the Official Voter
5 Information Guide for the November 4, 2008 General Election makes this clear:⁶

6 [W]e need to pass this measure as a constitutional amendment to RESTORE THE
7 DEFINITION OF MARRIAGE as a man and a woman.

8 Proposition 8 is about preserving marriage

9 *It restores the definition of marriage to what . . . human history has understood*
10 *marriage to be. . . .*

11 It protects our children from being taught in public schools that “same-sex
12 marriage” is the same as traditional marriage. . . .

13 [W]hile gays have the right to their private lives, *they do not have the right to*
14 *redefine marriage* for everyone else.

15 (Emphasis in original.) *See also* Pete Winn, *Legal Experts Say Calif. Proposition 8 Decision is*
16 *Mostly ‘Sunny’ With One ‘Little Dark Cloud,’* cnsnews.com (May 27, 2009)⁷ (quoting a leading
17 Proposition 8 supporter in reference to the California Supreme Court’s decision to uphold
18 existing same-sex marriages as saying that “[a]n arm and a leg have been cut off the natural
19 institution of marriage in California”); Family Research Council, *The Slippery Slope of Same-*
20 *Sex ‘Marriage’ 2* (2004)⁸ (claiming to show that “[g]ay marriage threatens the institutions of
21 marriage and the family”).

22 The message of Proposition 8 is especially pernicious and inescapable. Because same-
23 sex couples had the state-sanctioned right to marry prior to the initiative’s passage, the only
24 possible conclusion from the withdrawal of that right effected by Proposition 8 is that same-sex
25 couples are “second-class citizens” unworthy of that status. *See In re Marriage Cases*, 43 Cal.
26 4th at 784-85 (noting that “retaining the designation of marriage exclusively for opposite-sex

26 ⁶ <http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm>.

27 ⁷ <http://www.cnsnews.com/public/content/article.aspx?RsrcID=48650> (accessed Jan. 30,
28 2010).

⁸ <http://www.frc.org/get.cfm?i=BC04C02> (accessed Jan. 30, 2010).

1 couples and providing only a separate and distinct designation for same-sex couples” may
2 impermissibly “perpetuate a more general premise . . . that gay individuals and same-sex couples
3 are in some respects ‘second-class citizens’ who may, under the law, be treated differently from,
4 and less favorably than, heterosexual individuals or opposite-sex couples”); cf. Elizabeth S.
5 Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa.
6 L. Rev. 1503, 1525 (2000) [hereinafter Anderson & Pildes, *Expressive Theories*] (arguing that an
7 interpretation of law must “must make sense in light of the community’s other practices, its
8 history, and shared meanings”).

9 As Professor Ilan Meyer aptly described it:

10 [I]n my mind, the Proposition 8, in its social meaning, sends a message that gay
11 relationships are not to be respected; that they are of secondary value, if of any
12 value at all; that they are certainly not equal to those of heterosexuals. . . . [I]t also
13 sends a strong message about the values of the state; in this case, the Constitution
itself. And it sends a message that would, in my mind, encourage or at least is
consistent with holding prejudicial attitudes.

14 (RT 854:10-20)

15 **C. Well-Settled Law Forbids the State From Signaling a Status**
16 **Difference Between Same- and Different-Sex Couples.**

17 In the equal protection context, courts have long rejected governmental efforts to
18 signal a group’s inequality. This body of law includes instances when the classification
19 itself – rather than inequality in tangible benefits – was the driving concern. As the
20 Supreme Court stressed in *Brown v. Board of Education*, intangible harms themselves
21 can trigger an equal protection violation. *Brown*, 347 U.S. at 493 (finding that, even
22 when all tangible factors are made equal, segregated schools nonetheless violate the
23 Constitution); see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 729 (holding
24 that continuation of women-only nursing program harmed women because it perpetuated
25 stereotypes about women’s work); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. at
26 473 (Marshall, J., concurring) (noting that denying equal housing opportunities to people
27 with mental retardation reflected “a bare desire to treat the retarded as outsiders, pariahs
28 who do not belong in the community”).

1 This concern with impermissible messaging as a consequence of government action can
2 be seen in a variety of contexts. For example, in *Shaw v. Reno*, 509 U.S. 630 (1993), the Court
3 rejected a state redistricting plan in part because the plan reinforced racial stereotypes and
4 signaled to elected officials that they represented only a particular racial group. Likewise, in
5 *McCreary County v. ACLU*, 545 U.S. 844, 860 (1984), the Court barred a Ten Commandments
6 display because of its “message to . . . nonadherents that they are outsiders, not full members of
7 the political community.” *Cf. Regents of the University of California v. Bakke*, 438 U.S. 265,
8 357-58 (1978) (Brennan, J., concurring and dissenting) (invoking the “cardinal principle that
9 racial classifications that stigmatize – because they are drawn on the presumption that one race is
10 inferior to another or because they put the weight of government behind racial hatred and
11 separatism – are invalid without more”).

12 The underlying concern in these cases is with *expressive* harm – that is, harm “that results
13 from the ideas or attitudes expressed through a governmental action, rather than from the more
14 tangible or material consequences the action brings about.” Richard H. Pildes & Richard G.
15 Niemi, *Expressive Harms, Bizarre Districts, and Voting Rights: Evaluating Election-District*
16 *Appearances After Shaw*, 92 Mich. L. Rev. 483, 506-07 (1993). Even when these laws “inflict
17 no material injuries on the target group,” they are constitutionally infirm because they are “legal
18 communications of status inferiority [that] constitute their targets as second-class citizens.” *See*
19 *Anderson & Pildes, Expressive Theories, supra*, 148 U. Pa. L. Rev. at 1533, 1544; Richard A.
20 Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 567
21 (2003) (arguing that *Brown* “turned at least in part on the anti-egalitarian social meanings of the
22 practices at issue”).

23 Excluding lesbians and gay men from marriage is emblematic of precisely this type of
24 symbolic denigration. As Kenneth Karst has observed, proposals to legalize marriage for same-
25 sex couples “are both supported and opposed primarily because of their expressive aspects as
26 symbols of governmental acceptance of gay and lesbian relationships.” Karst, *Law’s Promise,*
27 *supra*, at 14; *see also Lewis v. Harris*, 188 N.J. 415, 467 (2006) (Poritz, J., concurring and
28 dissenting) (“Labels set people apart as surely as physical separation on a bus or in school

1 facilities. Labels are used to perpetuate prejudice about differences that, in this case, are
2 embedded in the law.”). By granting “domestic partnerships” to gays and lesbians rather than
3 “marriage,” the state has effectively labeled gays and lesbians as outsiders who are not worthy
4 of, deserving of, or fit for full inclusion in the community of citizens united in marriage.

5 **IV.**

6 **CONCLUSION**

7 Justice Holmes long ago observed that “[w]e live by symbols.” Oliver Wendell Holmes,
8 *John Marshall, in Collected Legal Papers* 270 (1920). By “preserving” marriage for
9 heterosexuals, while limiting gay and lesbian couples to a status that accords the same benefits
10 via a different name, Proposition 8 reinforces an impermissible message of difference and
11 unequal worth between gay and non-gay people in California. For this reason, as well as the
12 other reasons addressed above and in the briefs of Plaintiffs’ and their other supporting amici,
13 amicus respectfully requests that this Court invalidate Proposition 8 as unconstitutional and
14 declare that the state, through Proposition 8, may not maintain different relationship-recognition
15 rules for same- and different-sex couples.

16 Dated: February 3, 2010

17 Respectfully submitted,

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