

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S168047

KAREN L. STRAUSS, *et al.*,

Petitioners,

v.

MARK B. HORTON, as State Registrar of Vital Statistics, *et al.*,

Respondents,

DENNIS HOLLINGSWORTH, *et al.*,

Intervenors.

Petition for Writ of Mandamus
Within Original Jurisdiction

APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICI CURIAE* CHILDREN'S LAW CENTER OF LOS ANGELES, FAMILY EQUALITY COUNCIL, GAY, LESBIAN, BISEXUAL, AND TRANSGENDER THERAPISTS ASSOCIATION, HUMAN RIGHTS CAMPAIGN, HUMAN RIGHTS CAMPAIGN FOUNDATION, KIDS IN COMMON, LEGAL SERVICES FOR CHILDREN, NATIONAL BLACK JUSTICE COALITION, NATIONAL CENTER FOR YOUTH LAW, NATIONAL GAY AND LESBIAN TASK FORCE FOUNDATION, PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS, INC., SAN FRANCISCO COURT APPOINTED SPECIAL ADVOCATES IN SUPPORT OF PETITIONERS.

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**APPLICATION FOR PERMISSION TO FILE
AMICUS CURIAE BRIEF**

TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE
AND THE HONORABLE ASSOCIATE JUSTICES OF THE
CALIFORNIA SUPREME COURT:

Children's Law Center of Los Angeles, Family Equality
Council, Gay, Lesbian, Bisexual, and Transgender Therapists
Association, Human Rights Campaign, Human Rights Campaign
Foundation, Kids in Common, Legal Services for Children, National
Black Justice Coalition, National Center for Youth Law, National Gay
and Lesbian Task Force Foundation, Parents, Families and Friends of
Lesbians and Gays, Inc., San Francisco Court Appointed Special
Advocates respectfully request permission to file a brief as *amici
curiae* in support of Petitioners Karen L. Strauss, *et al.*, in the above-
captioned matter.

Pursuant to the Court's order in this matter dated November 19,
2008, this application is timely having been filed on or before
Thursday, January 15, 2009. We have reviewed the briefs of the
parties on file with the Court, are thoroughly familiar with the issues
in this case, and believe that we can assist the Court by providing
additional briefing on the grave impact that initiative measure
designated on the November 4, 2008, general election ballot as

Proposition 8 and entitled “Eliminates the Right of Same-Sex Couples to Marry” (hereinafter “Proposition 8”) will have, if it is held to be valid, on the daily lives and welfare of several thousand of California’s children.

STATEMENT OF INTEREST

Amici curiae are the Children’s Law Center of Los Angeles, Family Equality Council, Gay, Lesbian, Bisexual, and Transgender Therapists Association, Human Rights Campaign, Human Rights Campaign Foundation, Kids in Common, Legal Services for Children, National Black Justice Coalition, National Center for Youth Law, National Gay and Lesbian Task Force Foundation, Parents, Families and Friends of Lesbians and Gays, Inc., San Francisco Court Appointed Special Advocates. All *amici* are actively engaged in efforts to protect the rights of children and promote strong lesbian, gay, bisexual and transgender (“LGBT”) families in California that are supported by and integrated in their communities. *Amici* have a special concern for children who have been or are being considered for adoption, and for children in the foster care system. Proposition 8 undermines efforts to achieve permanency and dignity for these children. It eliminates recognition and jeopardizes the legal rights and

family status of thousands of families headed by same-sex couples. Whether Proposition 8 is a valid amendment to the California Constitution and to what extent it affects the rights of married gays and lesbians and their children is thus of critical importance to all *amici curiae*.

Children’s Law Center of Los Angeles. Created in 1990 to serve as appointed counsel for Los Angeles County’s abused and neglected youth, Children’s Law Center of Los Angeles (“CLC”) is the largest representative of foster youth in California. It is a nonprofit, public interest law corporation whose attorneys represent close to 25,000 children and youth who are at risk of or have been abused or neglected. With its 230 person staff of lawyers, paralegals and investigator/social workers, it serves as the voice in the foster care system for the vast majority of children under the jurisdiction of the Los Angeles County dependency court. In its years of experience representing thousands of foster children, it has often been called upon to make recommendations to the court regarding the best placement for a child.

CLC has represented many children placed in same-sex couple foster or adoptive homes, and has also represented children born into

same-sex families. It has also represented many more children languishing in temporary foster homes or group homes waiting for appropriate families to be identified as permanent homes for these children. CLC has seen the significant benefits children enjoy by belonging to a loving, permanent and stable family regardless of the parents' sexual orientation. The thousands of children in California who are waiting and hoping to find a family are negatively impacted by any law, policy or custom that reduces the pool of loving and appropriate families willing to provide homes for these children. It is evident that the government's disavowal of a particular family structure detrimentally impacts children seeking families, as well as children currently living in families with same-sex parents, by stigmatizing those children; cutting off legal rights; and exposing the children to intrusive and discriminatory social welfare policies.

Family Equality Council. Founded in 1979, the Family Equality Council is a national organization working to ensure equality for all LGBT families by building community, changing hearts and minds, and advancing social justice for all families. Family Equality Council envisions a future where all families, regardless of creation or composition, will be able to live in communities that recognize,

respect, protect, and celebrate them, and in a country that celebrates a diversity of family constellations and respects individuals for supporting one another and sustaining loving families. The organization has more than 35,000 supporters in the U.S. and partnerships with over 200 local parents groups, including over a dozen in California. Family Equality Council serves as the national coordinator between LGBT-headed families and the local groups that support them. As such it has among the broadest experience among national organizations with issues facing same-sex families seeking to integrate and find respect in their communities. Family Equality Council and its membership are deeply concerned with turning the promise of full equality into a reality in California and across the nation, which must include such fundamental legal and social recognition and respect afforded by the freedom to marry.

Gay, Lesbian, Bisexual, and Transgender Therapists

Association. Originally established in 1988, the Gay, Lesbian, Bisexual, and Transgender Therapists Association (“Gaylesta”) was incorporated as a non-profit association in 1997 to serve as a professional association of LGBT psychotherapists in the Greater San Francisco Bay Area. With a membership of over 200 professionals,

Gaylesta is comprised of psychiatrists, psychologists, licensed marriage/family therapists, and licensed clinical social workers who provide mental health services to the LGBT community and the community at large. Gaylesta recognizes that its clients exist within a larger societal context and is acutely aware of the impact of the values, attitudes, beliefs, and laws of this context on the mental health of its clients.

For this reason, Gaylesta has an abiding interest in supporting and advocating a community milieu that fosters an environment of acceptance, respect, and dignity for all members of society. It also recognizes that any legal or institutional structures that marginalize any segment of the larger community and exclude its full participation in the rights, privileges, and dignified recognition of society have an adverse impact on the mental and emotional well-being of any such excluded segment. For this reason Gaylesta opposes the exclusions and denials of human dignity to the LGBT community that are inherent in the substance of Proposition 8. Denying any class or group of citizens the rights to full participation in the benefits and privileges of society creates a profound sense of marginalization and

alienation that has a direct influence on the mental and emotional health of families and children in that population.

Human Rights Campaign. The largest national lesbian, gay, bisexual and transgender political organization, Human rights Campaign (“HRC”) envisions an America where gay, lesbian, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Among those basic rights is equal access for same-sex couples to marriage and the related protections, rights, benefits and responsibilities for those couples and their children. HRC has over 750,000 members and supporters nationwide, all committed to making this vision of equality a reality. HRC has initiated innovative programs to unite LGBT couples with the thousands of children in foster care in order to provide secure and loving homes for these children. HRC thus has a basic interest in preventing discrimination against same-sex couples that will inevitably mean fewer children finding permanent families.

Human Rights Campaign Foundation. An affiliated organization of the Human Rights Campaign, the Human Rights Campaign Foundation’s (“The Foundation”) cutting-edge programs

develop innovative educational resources on the many issues facing lesbian, gay, bisexual and transgender individuals, with the goal of achieving full equality regardless of sexual orientation or gender identity or expression. The Foundation's Family Project is the most comprehensive and up-to-date resource for and about lesbian, gay, bisexual and transgender families. It provides legal and policy about families and provides public education in a range of areas, including marriage and relationship recognition.

Kids in Common. Founded in 1985, Kids in Common advocates for policies, partnerships and investments that improve children's lives in Santa Clara County. Kids in Common provides a voice for children, challenging leaders and decision-makers in our community to act on behalf of children. Kids in Common advocates for effective policies and sound investments for children; informs decision makers about best practices; and champions local implementation of those practices. Studies show that children do best in families with two loving and caring parents. When government disavows same gender marriages, it stigmatizes the children who live in those families. Kids in Common's experience shows that the disavowal of marriage between same-sex adults isolates youth who

identify as gay or lesbian. Gay youth are two to three times more likely to attempt suicide than other young people and may comprise up to 30 percent of (the estimated) 5,000 youth who successfully take their own lives each year.

Legal Services for Children. Legal Services for Children (“LSC”) was founded in 1975 as one of the first non-profit children’s law offices in the country. LSC provides free holistic legal and social services to children in the San Francisco Bay Area, representing young people in dependency, emancipation, guardianship, immigration, special education, and school discipline matters. LSC believes that every child deserves a safe, loving and stable family. Experience has shown that the gender or sexual orientation of a parent or caregiver has no bearing on that individual’s ability to provide a stable and permanent home. LSC opposes Proposition 8 because it promotes discrimination against same-sex couples; unfairly stigmatizes their children; and markedly increases the legal and social challenges our clients already face.

The National Black Justice Coalition. A non-profit, civil rights organization of black lesbian, gay, bisexual and transgender people and allies dedicated to fostering equality, the National Black

Justice Coalition (“NBJC”) has more than 10,000 members nationwide and advocates for social justice by educating and mobilizing opinion leaders, including elected officials, clergy and media, with a focus on black communities. Black communities have historically suffered from discrimination and have turned to the courts for redress. With this case, we turn to the courts again. The issues presented by the case has significant implications for the civil rights of black lesbians and gay men in this State—whether they will receive equal treatment under the law and the legal recognition and protections of marriage for their relationships and families. NBJC envisions a world where all people are fully empowered to participate safely, openly and honestly in family, faith and community, regardless of race, gender-identity or sexual orientation.

The National Center for Youth Law. A non-profit organization located in Oakland, California, the National Center for Youth Law (“NCYL”) has worked since 1970 to improve the lives of poor children nationwide. NCYL provides representation to children and adolescents in class action litigation and other cases which have broad impact. The Center also engages in legislative and administrative advocacy at the national and state levels. NCYL

provides support for the advocacy efforts of others through its legal journal and training programs, and by providing technical assistance to other advocates for youth nationwide. As part of the organization's child welfare agenda, NCYL works to ensure the safety, stability, and well-being of abused and neglected children. Because the Center works to promote policies and laws that protect children in foster care and that ensure the safety, stability and well-being of abused and neglected children, NCYL is deeply concerned with the additional legal and social disabilities Proposition 8 imposes on these children.

The National Gay and Lesbian Task Force Foundation.

Founded in 1973, the National Gay and Lesbian Task Force Foundation (“Task Force”) is the oldest national LGBT civil rights and advocacy organization. With members in every U.S. state, the Task Force works to build the grassroots political power of the LGBT community by training state and local activists and leaders; conducting LGBT-related research and data analysis; and organizing broad-based campaigns to advance pro-LGBT legislation and to defeat anti-LGBT referenda. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including the full and equal

participation of same-sex couples and their families in the institution of civil marriage.

Parents, Families and Friends of Lesbians and Gays, Inc. A national, nonprofit family organization founded in 1973 by mothers and fathers of gay and lesbian children, Parents, Families and Friends of Lesbians and Gays, Inc. (“PFLAG”) has grown into a grassroots network of approximately 500 chapters nationwide (40 in California), with over 200,000 members and supporters (over 38,000 in California). PFLAG’s members and supporters are predominantly straight parents, family members and friends who are committed to working towards full equality for their gay, lesbian, bisexual, and transgender loved ones through support, education and advocacy. Our members have a strong and immediate interest in fighting efforts to make our friends, children, and cousins, along with the families they are building, into second-class citizens under the State’s constitution.

The San Francisco Court Appointed Special Advocate. A community-based organization, the San Francisco Court Appointed Special Advocate (“SFCASA”) recruits, screens, trains, and supervises culturally diverse volunteers to serve as advocates and mentors for abused and neglected children under the jurisdiction of

San Francisco's Juvenile Dependency Court. In 2007 SFCASA volunteers served 8,016 children in the state of California. SFCASA volunteers, sworn officers of the Court, provide judges with needed information to make sound decisions for children in their courts' care. SFCASA's mission is to provide well trained volunteers for abused and neglected children in the Dependency Court systems who are in need of special advocacy. SFCASA is dedicated to honoring, reflecting, and representing the diversity of the City and County of San Francisco, as well as of the communities it serves. The Program's ultimate goals are a safe and permanent home for every child and a strengthened social service and juvenile court system.

SFCASA is the only agency operating in San Francisco dedicated exclusively to providing comprehensive advocacy and mentorship to this client population. In San Francisco a large percentage of children who are adopted by non-relatives are adopted by gay and lesbian families. Children who have been dependents of the court have already experienced the stigma of being a foster child and they know the importance of the role of the court with relation to family recognition, acceptance and legal status. Allowing their parents to marry could only increase their feelings of security within

the family because they will be recognized in the same way as children with heterosexual parents. Eliminating this right would only heighten the threat to their self-image. Marriage equality would also increase the number of parents recruited state-wide that are available for our children. Both our job and our children's lives will be more difficult if Proposition 8 is allowed to stand.

BRIEF OF AMICI CURIAE

INTRODUCTION

Fifty-two thousand California children are cared for by same-sex parents. The children in these families are also among the state's most vulnerable.¹ Proposition 8 imposes additional direct and needless disabilities on these children. By preventing their parents from marrying, or by stripping away that critical form of recognition, Proposition 8 denies these children the important legal and social benefits that flow to the families of married couples. Perhaps more importantly, the initiative enshrines in the Constitution the stigma of living in a family expressly designated as less-than-equal. *Amici* thus join in Petitioners' argument that Proposition 8 is an invalid revision

¹ In its October 2008 Census Snapshot, UCLA School of Law's William Institute reported that more than 52,000 children lived in households headed by same-sex parents. Approximately 125,000 gay, lesbian, or bisexual individuals were raising children, either in a couple or as single parents. See Gary J. Gates and Christopher Ramos, *Census Snapshot: California Lesbian, Gay, and Bisexual Population*, at 2 (Williams Inst. Oct. 2008), available at <http://www.law.ucla.edu/williamsinstitute/publications/CA%20Snapshot%202008.pdf>; Because so many were adopted by non-biological same-sex parents, the children of same-sex couples are as a group more likely to have lived with physical disabilities, more likely to have lived in foster care, and more likely to have been victims of abuse before their adoptions than are their peers. See also U.S. Census Bureau, *Married-Couple and Unmarried-Partner*

rather than a valid initiative amendment. The voters were never presented with or asked to consider the destructive effect Proposition 8 would have on children, an effect which evidences the comprehensive change to equal protection under the California constitution that Proposition 8 would necessitate. Additionally, upholding Proposition 8 would directly and immediately harm thousands of children of already married same-sex couples. Therefore, *amici* join Petitioners' argument that, if held to be valid, under no circumstance can Proposition 8 be applied retroactively.

ARGUMENT

I. THE SIGNIFICANT HARM IT WOULD WORK ON CHILDREN AND FAMILIES IS EVIDENCE THAT PROPOSITION 8 WOULD NECESSITATE COMPREHENSIVE CONSTITUTIONAL CHANGE AND IS THUS AN INVALID REVISION.

Amici agree with Petitioners that Proposition 8 would effect a comprehensive change to the California constitution and thus amounts to an invalid revision rather than a valid initiative amendment.² *Amici* write separately to highlight for the Court the impact that

Households: 2000 (February 2003); Gary J. Gates and Jason Ost, *The Gay and Lesbian Atlas* (Urban Inst. 2004) at 45.

² (Amended Petition of Karen L. Strauss, *et al.*, at 14-43 (hereinafter "Am. Pet."); Reply Brief of Karen L. Strauss, *et al.* (hereinafter "Pet. Reply Br.") at 4-22.)

Proposition 8 would have on the 52,000 children of same-sex couples in California. From their experience serving children and families headed by same-sex couples throughout the State and the nation, *amici* have witnessed the type of profound legal and social harm Proposition 8 would inflict on California's children. That Proposition 8 would needlessly and directly harm this already-vulnerable demographic is further evidence that, if not invalidated, Proposition 8 would not simply "redefine" marriage, but would necessitate comprehensive constitutional change.

Parties on all sides of this debate agree that civil marriage exists for the purpose of strengthening families. As Justice Rehnquist once observed in a case involving the extension of benefits to illegitimate children under a state welfare statute, "ceremonial marriage . . . could quite reasonably be found to be an *essential* ingredient of the family unit" *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 622 (1973) (emphasis added).³

³ Federal courts substantively agree with the holdings of the Court regarding the unique legal rights associated with marriage. *See Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (finding no compelling reason why prisoners should not enjoy emotional support and public commitment, which are unique attributes of marriage); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (labeling marriage "the relationship that is the foundation of the family in our society");

Although *amici* do not claim that marriage is inherently better for children, they do believe that no good reason exists for the State to deny parents the choice and benefits of marriage. Indeed, such a denial only serves to destabilize families and threatens to bring shame upon their children. As Robert Llewellyn—a high-school student whose fathers adopted him and his twin sister Rosemary from Peru as infants—recounted late last year, the fact that his parents were previously denied the right to marry was extremely hurtful to him.⁴ He observed: “Their marriage is also important to me because it helps me know that our state recognizes that we are a ‘real’ family [...] Even though my parents are now married, a law keeping other couples like my parents from marrying would still make it seem like families like mine are second-class.”⁵ His words underscore for the Court how significant the choice to marry and the accompanying equal recognition are to a family’s dignity—and the powerful effect of taking this choice away. *Amici* agree that in California the elimination

Maynard v. Hill, 125 U.S. 190, 211 (1888) (marriage is “the foundation of the family and society, without which there would be neither civilization nor progress”).

⁴ Decl. of Robert C. Llewellyn in Supp. of Am. Pet. at ¶ 7 (“Llewellyn Decl.”).

⁵ *Id.*

of marriage equality constitutes not only the failure to recognize relationships equally. More significantly as a constitutional matter, the elimination of this choice represents an active and pernicious state intervention into these familial relationships.⁶

A. Proposition 8 Imposes The Greatest Disability On California's Most Vulnerable Children.

Studies show that in California, children of same-sex parents are more likely to belong to vulnerable demographic groups than the children of opposite-sex parents. For example, children of same-sex parents are more likely to be younger than five-years old, or adopted, or disabled, than children of married opposite-sex parents.⁷ The 2000 U.S. Census confirms that same-sex parents are more likely to adopt than are opposite-sex parents. Further, eight percent of children of

⁶ Prof. David Meyer argues that the denial of marriage rights to same-sex couples and their families should be construed not as merely non-recognition by the state, but as an active and damaging intervention that cannot survive any level of scrutiny. David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 Vill. L. Rev. 891, 898 (2006).

⁷ Lisa Bennett & Gary J. Gates, *The Cost of Marriage Inequality to Children and their Same-Sex Parents* (Human Rights Campaign Foundation Report April 13, 2004) at 6.

same-sex parents have a disability compared to 5.8 percent of opposite-sex married couples.⁸

Research indicates further that same-sex couples are an important source for recruiting parents of underserved and disadvantaged children.⁹ Indeed, survey data reveal that adoption agencies focused on placing special needs children are more likely to accept applications from same-sex couples and gay and lesbian individuals than are adoption agencies with other foci. But there are also strong indications that the marriage ban prevents more of these children from achieving permanency.¹⁰ Published data show that certain private adoption agencies in particular make inaccurate assumptions about gay and lesbian parents that present barriers to adoption.¹¹

⁸ *Id.*; U.S. Census Bureau, Census 2000 Summary File 1, *available at* <http://www.census.gov/Press-Release/www/2001/sumfile1.html>.

⁹ David M. Brodzinsky, *et al.*, *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes*, at 6 (Evan B. Donaldson Inst. Oct. 2003).

¹⁰ According to Dan Kelly of the San Francisco Department of Human Services, among California counties, of the foster children adopted by non-family members, the percentage adopted by same-sex couples is as high as 88%.

¹¹ *See Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007) (where plaintiffs, registered domestic partners in California, challenged an adoption service in Arizona that had a

Marriage, too, is sometimes a criterion for adoption agencies in defining their pool of their recruits, and therefore many same-sex couples who form a key group of prospective parents are never considered.¹² Given the enormous number of children from at-risk demographics awaiting adoption, *amici* can attest that the elimination of same-sex marriage will mean inevitably that many children will not find permanent homes or will wait longer for homes than should be necessary. Because same-sex couples so often adopt children out of the foster care system, marriage equality is thus vital to the welfare of children in foster care seeking permanency. This Court is intimately familiar with the devastating impact that impermanency has on California's foster children.¹³ Proposition 8 seeks inexplicably to exacerbate the impact.

“[heterosexual] married couples only policy”); *see also* scholarship cited in Gary J. Gates, *et al.*, *Adoption and Foster Care by Gay and Lesbian Parents in the United States* (Williams Inst. & The Urban Inst. March 2007) at 3.

¹² *See* Gary J. Gates, *et al.*, *Adoption and Foster Care by Gay and Lesbian Parents in the United States* (Urban Inst. March 2007) at 7, available at http://www.urban.org/UploadedPDF/411437_Adoption_Foster_Care.pdf.

¹³ The California Judicial Council's Blue Ribbon Commission on Children in Foster Care has collected data, and reports on, the approximately 80,000 California children in foster care. *See* Facts

B. Proposition 8 Stigmatizes LGBT Families.

Proposition 8 literally deprives same-sex families of the equal protection of the laws. This Court has long recognized the privileged status that marriage has in society and under the law and it has employed that status to enhance equal protection. *Perez v. Sharp* (1948) 32 Cal. 2d 711. As a result, the Court has drawn the conclusion that the dignity and public commitment unique to marriage are legal rights in themselves. *See In re Marriage Cases* (2008) 43 Cal. 4th 757, 781 (hereinafter “*Marriage Cases*”) (identifying the “legal rights and attributes traditionally associated with marriage” as “integral to an individual’s liberty and personal autonomy”). The Court has held therefore that the “exclusion of same-sex couples from the designation of marriage works a real and appreciable harm” upon the children of same-sex couples by generating structural stigma — i.e., the “mark of second-class citizenship” — for same-sex parents and their families. *Marriage Cases*, 43 Cal. 4th at 855.¹⁴

About Foster Care, <http://www.courtinfo.ca.gov/jc/tflists/bluerib-facts.htm> (last accessed Jan. 14, 2009).

¹⁴ *Accord* William Meezan and Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America’s Children*, 15 *Marriage and Child Wellbeing* 97, 109 (2005), available at www.futureofchildren.org/usr_doc/06_FOC_15-2_fall05_Meezan-Rauch.pdf.

Amici's experience shows that the children of same-sex parents who have been denied the special dignity of marriage often internalize that denial as shame. *Amici* involved in direct services to children observe that even very young children understand and experience the qualitative distinctions inherent in differential recognition and status accorded their same-sex parents' relationships. When they do so, the effect on their self-esteem and self-worth can be profound and devastating. These children understand marriage as something normal in society that is affirmatively being denied to their family. Because their parents suffer from stigma, many children of same-sex couples who are not allowed to marry experience the implicit ostracism that extends from this as well. *Amici*'s experience is supported by significant authority: Children who are associated with stigmatized individuals are likely to experience "a similar devaluing, a phenomenon referred to as a courtesy stigma, or stigma by association."¹⁵

¹⁵ (Br. of Amicus Curiae The American Psychological Association, et al., *In re Marriage Cases*, No. S147999 ("APA Amicus Br."), at 47 (citing E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs) (1963) and S.L. Neuberg, et al., *When we observe stigmatized and "normal" individuals interacting: Stigma by association*, 20 *Personality and Social Psychology Bulletin* 196-209 (1994)).)

The structural stigma that Proposition 8 creates tracks most closely with the legal and social burdens once placed on children born to unwed parents. Today, courts throughout the nation uniformly condemn discrimination based on the once-common designation of “illegitimacy.”¹⁶ By adopting the Uniform Parentage Act, California has acted to remove any such stigma by rendering illegitimacy legally insignificant. Fam. Code § 7602. Writing in 1972, Justice Powell observed that “imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. [. . .] Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the *Equal Protection Clause* does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.” *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 176 (1972); *see also Plyler v. Doe*, 457 U.S. 202, 238 (1982) (Powell, J., concurring) (children “can affect neither their

¹⁶ Irwin J. Schiffres, *Discrimination on basis of illegitimacy as denial of constitutional rights*, 38 A.L.R. 3d. 613 (1971); Walter Wadlington, 58 Va. L. Rev. 188 (1972) (reviewing H. Krause, *Illegitimacy: Law and Social Policy* (1971)).

parents' conduct nor their own status. Our review in a case such as these [involving children who have been assigned a legal status due to the status of their parents] is properly heightened.”) (internal citations omitted). In *Weber*, circumstances beyond his control had prevented the father of his children from marrying their mother, thus marking them as invariably illegitimate. The Court remarked, “The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them.” *Weber*, 406 U.S. at 171.

Like illegitimate children, both the children and the parents in same-sex families are wholly innocent of wrong-doing. Proposition 8 imposes disabilities on these families for a status that they are powerless to change. The State will be required to actively deny same-sex parents the opportunity to enter into a marital union and thereby purposefully deny children, and future children, of those men and women the social, legal and economic benefits conferred by marriage.

Proposition 8 thus defeats the purpose of marriage. Courts universally agree with social scientific determinations that the act of marriage benefits children in families by securing the durability and

stability of parental relationships.¹⁷ Marriage confers on children crucial benefits that do not necessarily result from domestic partnership, among the most important being universal social recognition of the term “marriage” and enhanced social acceptance of and support for same-sex families.¹⁸

Scholars have noted the many “less tangible social benefits that attend civil marriage and benefit marital families,” aside from property rights already available to domestic partnerships, are benefits that children of same-sex parents will be deprived.¹⁹ For example, increased access to extended-family flows from the social and legal recognition of marital relationships. Social scientists have recognized that marriage facilitates closer and more formal relationships with in-laws and grandparents.²⁰ Evidence and experience show that these relationships directly benefit children and correlate with more stable

¹⁷ Meezan & Rauch, 15 *Marriage and Child Wellbeing* at 108.

¹⁸ *See Id.* at 97.

¹⁹ Vivian E. Hamilton, *Family Structure, Children, and Law*, 24 *Wash. U. J.L. & Pol’y* 9, 11 (2007).

²⁰ *See* Charlotte J. Patterson, et al., *Families of the Lesbian Baby Boom: Children’s Contact with Grandparents and Other Adults*, 68 *American Journal of Orthopsychology* (July 1998) at 390-99 (marriage facilitates closer and more formal relationships with in-laws and grandparents).

families. Barred from marrying, families headed by same-sex parents are relegated to a second-class status.

In addition to the deprivations outlined above, Proposition 8 adds burdensome legal uncertainty to the lives of same-sex couples and their children, thereby constitutionalizing stigma. Legal recognition of marriage endows the relationships within the family presumptive recognition by the community.²¹ Without the constitutionally secured dignity of marriage, same-sex parents cannot be as certain, for example, that the death of one “natural parent,” under the definition of *Elisa B. v. Superior Court* (2005) 37 Cal. 4th 108, could not leave the child an orphan. As another example, if a child travels to a different state, the status of marriage is the surest way of enabling two fathers or two mothers seeking to visit that child

²¹ To this end, courts in California and beyond have come to recognize the dignity and public commitment unique to marriage as legal rights in themselves. *See Marriage Cases*, 43 Cal. 4th at 781 (identifying the “legal rights and attributes traditionally associated with marriage” as “integral to an individual’s liberty and personal autonomy”); *Perez*, 32 Cal. 2d 711 (striking down a restriction on interracial marriage, stating, “A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.”); *Elisa B. v. Superior Court* (2005) 37 Cal. 4th 108, 123 (“the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support”).

in the hospital to be recognized as “family” and to gain access.²² *A fortiori* this is also an issue for international travel. This Court has already recorded the discrete set of legal distinctions that exist between marriage and other forms of legal recognition, and under Proposition 8 those distinctions would remain. *See Marriage Cases*, 43 Cal. 4th at 805 n.24 (delineating six distinctions).

This uncertainty about their legal future would be foisted solely upon same-sex couples and their families. Proposition 8 replaces a constitutional protection with the “good will” of the people and the vicissitudes of statutory changes. The proposition, in actively removing a constitutional right, places the children of same-sex parents in an uncertain legal and social limbo, where their status is viewed by the State is nothing but second-class.

C. Without Any Compelling Reason To Do So, Proposition 8 Contravenes The State’s Historical Interest In Marriage To Promote The Welfare Of Children.

On the one hand, the State has long justified its involvement in marriage by finding a compelling interest in promoting the welfare of

²² *See* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143 (2005).

families and children.²³ On the other hand, Proposition 8 would create a discriminatory classification that harms families and children.

Proposition 8 supporters adduced no credible connection between the state's interest in marriage and the proposed discriminatory classification. Without a compelling reason for the denial of a fundamental right, the stricture is unconstitutional.

One possible justification for Proposition 8 cited in voter materials and advertisements during the campaign process was to “protect[] our children from being taught in public schools that ‘same-sex marriage’ is the same as traditional marriage.”²⁴ Proponents warned that the state sanction for same-sex marriage would lead to “teaching gay marriage in schools.” There is, however, no credible evidence that marriage equality would cause “gay marriage” to

²³ “[T]he public interest in the institution of marriage” is derived from the understanding that “[t]he family is the basic unit of society, the center of the personal affections that ennoble and enrich human life. [. . .] Since family is the core of our society, the law seeks to foster and preserve marriage.” *DeBurgh v. DeBurgh* (1952) 39 Cal. 2d 858. *See also, Weber*, 406 U.S. at 175 (“the state interest in legitimate family relationships is not served by the statute [denying workmen’s compensation benefits to illegitimate children]”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *cf. Baker v. State*, A.2d 864, 881-883 (Vt. 1999).

become a subject of instruction. Whether same-sex couples and their children enjoy the equal protection of the laws bears no relationship to any potential revision in the State's educational curricula. If Proposition 8's supporters' arguments are to be believed, Proposition 8 is necessary to prevent any possibility that same-sex marriage may be labeled as "legitimate" in schools. But Proposition 8 does nothing actually to effect such a change in curriculum and is therefore dramatically overbroad because it renders all same-sex families illegitimate in the eyes of the State without even achieving that purpose. The measure's means and ends have a wholly illusory relationship.

When courts are unable to discern any reasonable reason for a classification, it suggests a more pernicious intent may be involved. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) ("Some objectives—such as 'a bare...desire to harm a politically unpopular group' are not legitimate state interests.") (citing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *Perez*, 32 Cal. 2d at 714 ("Marriage is thus something more than a civil contract subject to

²⁴ Ballot Pamphlet, Official Voter Info. Guide, Gen. Election (Nov. 4, 2008), *Argument in Favor of Proposition 8*, available at <http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt8.htm>.

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.”). *Amici* do agree with opponents of same-sex marriage regarding the profound social and legal significance of marriage:²⁵ “Marriage is in fact a cross-cultural institution; it is not a mere plaything of passing ideologies but in fact the word for the way that, in virtually every known human culture, society conspires to create ties between mothers, fathers, and the children their sexual unions may produce.”²⁶ *Amici* also concur when opponents of same-sex marriage announce the universality of the practice and the potential benefits for children if there were equal

²⁵ At the same time, *Amici* note that alternative family structures are legitimate and we do not intend to marginalize these families in the course of our argument.

²⁶ *Why Marriage Matters: The Case for Normal Marriage: Hearings before the U.S. Senate Subcommittee on the Constitution, Civil Rights, and Property Rights Hearing: “What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?”*, 108th Cong. (September 4, 2003) (testimony of Maggie Gallagher before Senate Comm. on the Judiciary), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=906&wit_id=2540.

recognition.²⁷ However, these observations do not support Proposition 8.

With regard to children, Proposition 8 employs the same *non sequitur* illogic of its supporters: Marriage, they argue, is fundamentally about two parents in a stable relationship that promotes the well-being of their children. Inexplicably, opponents then add that same-sex marriage is dangerous because it does not involve a woman and a man.²⁸ These claims bear no relation to one another. There is every indication that children benefit as much from same-sex as opposite-sex parents, and that these children's basic development is not markedly different.²⁹ And *amici* know of no credible scholarly evidence showing that marriage between same-sex versus opposite-sex parents is either better *or* worse for children.³⁰ Although *amici*

²⁷ See *Id.*; Kristen Anderson Moore, et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?* (Child Trends Research Brief June 2002), available at www.childtrends.org/files/MarriageRB602.pdf.

²⁸ See e.g., Maggie Gallagher, *What Marriage Is For*, Weekly Standard, Aug. 4 / Aug. 11, 2003, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/939pxiqa.asp>.

²⁹ See American Psychological Association, *Resolution on Sexual Orientation, Parents & Children* (July 2004), available at <http://www.apa.org/pi/lgbcpolicy/parents.html>.

³⁰ Meezan & Rauch, 15 *Marriage and Child Wellbeing* at 104.

strongly support placing children with same-sex parents regardless of their ability to marry, there is no disagreement that marriage has long been considered a supportive and stable environment for children when compared to other forms of cohabitation with lesser state and social recognition. *See Marriage Cases*, 43 Cal. 4th at 60 n.40.

Therefore, the claim that marriage equality might modify undesirably a particular traditional definition of marriage has little to do with the actual welfare of children. Indeed, *amici* agree with the scholarship which shows that, if anything, intentionally weakening the bonds of same-sex parents serves no constructive State interest. This deprivation certainly is not in the interests of California's children. In any case, the state interest in marriage to promote the interest of children is applicable to children in same-sex and opposite-sex families equally. *See Marriage Cases*, 43 Cal. 4th at 826.

Whether proponents of the measure fear for children and seek to undermine same-sex families because those unions are aberrant in their eyes; or whether alternatively they seek to cling to tradition, their justifications implicate illegitimate goals. Their crude comparison to polygamy misses the point entirely and bears no relation to the State's interest in securing stable families for children. Indeed proponents of

the measure echo the arguments raised by opponents of inter-racial marriage. Forty years ago, judicial dissenters in *Perez v. Sharp* contended that inter-racial marriage was “unnatural” — a contention that similarly has not withstood the scrutiny of time, the law, or social mores. *Perez*, 32 Cal. 2d at 750 (Shenk, J. dissenting).

II. PROPOSITION 8 SHOULD NOT APPLY RETROACTIVELY, AS DOING SO WOULD DIRECTLY HARM THE CHILDREN OF EXISTING MARRIAGES.

Amici agree with Respondent Attorney General and Petitioners that Proposition 8 should not be applied retroactively to existing same-sex marriages entered into before the November 2008 election.³¹ As a matter of law, Proposition 8’s plain language lacks the express and unequivocal manifestation of such intent this Court has long required for retroactive application. *See Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1194; *id.* at 1207-08. The strong presumption against retroactivity applies here where application of Proposition 8 would necessarily deny married same-sex parents the constitutional guarantees of equal protection and due process with respect to their vested marriage rights.³² Additionally, *amici* strongly

³¹ (Att’y Gen. Br. at 65-75; Pet. Reply Br. at 37-68.)

³² (*See* Pet. Reply Br. at 52-65.)

urge the Court to consider the grave impact that the retroactive application of Proposition 8 would have on the children of married same-sex couples.

A. Proposition 8 Threatens The Welfare Of Thousands Of Children.

The issue of retroactive application is not a theoretical one for the children of married same-sex parents. Petitioners have told the Court explicitly how its decision will affect their children—Macairo, the toddler son of Petitioner Sierra North, and Robert and Rosemary, the teenage children of Richard Llewellyn and Christopher Caldwell.³³ Should the Court’s decision reach the issue of retroactivity, it will affect thousands more children like them. The recent study by the Williams Institute confirms *amici*’s real-world experience—Robert, Rosemary, and Macairo, are but three of an estimated 16,458 adopted children (and 52,000 children in total) living with gay and lesbian parents in California.³⁴ Retroactive application of Proposition 8

³³ (Decls. of Sierra North and Robert C. Llewellyn in Supp. of Am. Pet. (“North Decl.” and “Llewellyn Decl.” respectively).)

³⁴ See Gary J. Gates, et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States* 7 (Urban Inst. March 2007), available at http://www.urban.org/UploadedPDF/411437_Adoption_Foster_Care.pdf; Br. of Amicus Curiae M.V. Lee Badgett and Gary J. Gates, *In re Marriage Cases*, No. S147999 (“Badgett Amicus Br.”), at 14.

would directly affect the lives and welfare of thousands of those children.

According to the most recent available statistics, the 2000 federal Census, 28.4% of California households with a same-sex partner reported that they were raising their own children (i.e., biologically-related, stepchildren, or adopted), while 32.2% of all same-sex California households reported having children under the age of eighteen living at home with them.³⁵ Thus, almost a decade later, it is fair to estimate that no less than a third—or over 3,600—of the same-sex couples married before the passage of Proposition 8 are families which include minor children.³⁶

B. Retroactive Application Would Devastate The Children Of Existing Marriages.

As stated above, this Court already concluded, after lengthy analysis, that the prospective “exclusion of same-sex couples from the designation of marriage works a real and appreciable harm” upon the

³⁵ Gates, *Adoption and Foster Care by Gay and Lesbian Parents in the United States* 5; Badgett Amicus Br. at 14.

³⁶ Dan Morain, *Same-sex marriage total at 11,000*, L.A. times, Oct. 7, 2008, at B1, available at <http://articles.latimes.com/2008/oct/07/local/me-gaymarriage7> (reporting that an estimated 11,000 same-sex couples married between June 17 and September 17, 2008).

children of same-sex couples. *Marriage Cases*, 43 Cal. 4th at 855.

But the harm to children that will result from retroactively stripping their families of that designation will be far greater. Not only will the legal structure and stability of their families be substantially weakened;³⁷ the children of formerly-married same-sex couples will be immediately and openly stigmatized.

Amici have noted the uniquely vulnerable class of children that Proposition 8 impacts. Because of their status, such children are sensitive to social slights, stigma, and opprobrium. But all children of currently married same-sex parents, not just those who were adopted or are foster children, would suffer particular injury as a result of the retroactive application of Proposition 8. As this Court has recognized, the “official statement that the family relationship of same-sex parents is not of comparable stature or equal dignity to [that] of opposite-sex couples” generates structural stigma—i.e., the “mark of second-class citizenship”—for same-sex parents and their families. *Id.*³⁸ And

³⁷ *See* (Pet. Reply Br. at 64-66 (citing likely difficulties in apportioning community property, threats to spousal and dependent health care insurance coverage, uncertainty surrounding wills and survivorship, loss of legal parentage)).

³⁸ (*Accord* APA Amicus Br. at 43 (“The State’s distinction between same-sex and different-sex couples is stigmatizing even when same-

significant authority supports the Court’s conclusion: all children who are associated with stigmatized individuals are likely to experience “a similar devaluing, a phenomenon referred to as a courtesy stigma, or stigma by association.”³⁹

Again, the mark of such second-class citizenship is not theoretical. If Proposition 8 retroactively eliminates the marriage rights of their parents, thousands and thousands of California’s children will experience the consequences of express ostracism. Consider again, for example, the situation of Robert Llewellyn. Having already suffered the pain of such discrimination against his parents, Robert fears its return.⁴⁰ Now a senior in high school, Robert has lived for almost his entire life—since he was five weeks old until last October when his parents were married—with the shame of living in a state which officially devalued his family. His parents’ marriage was a crucial watershed for Robert because it lifted that stigma, ensuring that, in the State’s eyes, the only family he has ever known

sex parents are granted some or all of the legal benefits and obligations conferred by marriage. Irrespective of such benefits, the ‘differentness’ of domestic partnerships and civil unions is evident.”.)

³⁹ *Id.* at 47.

⁴⁰ Llewellyn Decl. ¶ 7.

was a “‘real’ family just like every other family . . . not inferior to families where the parents are a mother and a father.”⁴¹

CONCLUSION

Upholding Proposition 8 would inscribe inequality for same-sex couples and their children into our state Constitution in an unprecedented way. It inflicts grave and immediate harm on those couples and children in contravention of the state’s oft-articulated interest in regulating marriage: the promotion of stable families. *Marriage Cases*, 43 Cal. 4th at 431; *Perez*, 32 Cal. 2d at 713-14; *Weber*, 406 U.S. at 173. *Amici* therefore cannot agree with Interveners that it is “wildly inaccurate and grossly unfair” to say that Proposition 8 does not touch on fundamental interests of the people and the state.⁴² To the contrary, Proposition 8 dramatically alters core constitutional principles that touch directly on the fundamental interests of thousands of California families. Stripping these families of the equal protection of the laws and the same dignity as other Californians represents a profound and unjustified departure from our constitutional tradition. Therefore, *amici* respectfully join Respondent

⁴¹ *Id.*

⁴² (Int. Response at 15.)

Attorney General and Petitioners in asking this Court to declare
Proposition 8 null and void in its entirety.

Dated: January 15, 2009

FARELLA BRAUN + MARTEL LLP

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WORD COUNT CERTIFICATE

In accordance with Rule 8.204(c) of the California Rules of Court, I verify that this brief contains 7745 words, exclusive of the Cover Sheet, Table of Contents, Table of Authorities, Signature Block, Certificate of Service, and this Word Count Certificate, according to the word count function of Microsoft Word.

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PROOF OF SERVICE

Case Name: **Karen L. Strauss, et al., v. Mark B. Horton, et al.,**

Case No.: **S168047**

I, Trudie Buchanan declare:

I am employed in the County of San Francisco, State of California. I am 18 years of age or older and not a party to this matter. My business address is 235 Montgomery Street, 17th Fl., San Francisco, CA, 94104.

On January 15, 2009, I caused to be served the attached:

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CURIAE CHILDREN'S LAW CENTER OF LOS
ANGELES, FAMILY EQUALITY COUNCIL, GAY,
LESBIAN, BISEXUAL, AND TRANSGENDER
THERAPISTS ASSOCIATION, HUMAN RIGHTS
CAMPAIGN, HUMAN RIGHTS CAMPAIGN
FOUNDATION, KIDS IN COMMON, LEGAL
SERVICES FOR CHILDREN, NATIONAL BLACK
JUSTICE COALITION, NATIONAL CENTER FOR
YOUTH LAW, NATIONAL GAY AND LESBIAN
TASK FORCE FOUNDATION, PARENTS,
FAMILIES AND FRIENDS OF LESBIANS AND
GAYS, INC., SAN FRANCISCO COURT
APPOINTED SPECIAL ADVOCATES, IN
SUPPORT OF PETITIONERS**

on the interested parties in said action by depositing true copies, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail, addressed as follows:

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There is delivery by United States mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 15, 2009 at San Francisco, California.

Trudie Buchanan