No. 12-144

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,

Petitioners,

v.

KRISTIN M. PERRY, ET AL.,

Respondents.

On Writ Of Certiorari To
The United States Court of Appeals
For The Ninth Circuit

BRIEF OF *AMICI CURIAE* CALIFORNIA PROFESSORS OF FAMILY LAW IN SUPPORT OF RESPONDENTS

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IDENTITY OF *AMICI CURIAE* [1]

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[1]Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Further, pursuant to Rule 37.6, these *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief.

[2]Except where noted, *amici curiae* are Professors of Law.

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INTERESTS OF *AMICI CURIAE*

Amici curiae, all scholars of California family law who are faculty members at fourteen different California law schools, submit this brief to respond to Petitioners' characterization of what legitimate state interests they contend could permit Proposition 8 to withstand constitutional scrutiny. *Amici* wish to provide the Court with a reliable exposition of what California law, as expressed both in statutes and case law, has to say with regard to marriage, parentage, and children's well-being, topics that are central to the issues now before the Court.

SUMMARY OF ARGUMENT

By passing Proposition 8 in 2008, California's voters excluded same-sex couples from marriage while leaving in place laws affording same-sex couples the opportunity to become "registered domestic partners" and thereby obtain tangible rights and obligations roughly equivalent to marital rights and obligations. Recognizing that marriage confers significant and socially valued intangible benefits, Petitioners offer two purported justifications for Proposition 8's

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exclusion of same-sex couples and their children from obtaining these benefits. These are: first, that this exclusion serves to encourage opposite-sex couples to marry and thus provide a stable home for their often "accidentally procreated" biological offspring; and second, that the "optimal" environment for every child is to be reared by their married biological father and mother.

These propositions are in direct conflict with the entire body of California law related to marriage, parentage and child welfare. Insofar as marriage affects children, California promotes the institution in order to encourage a stable, nurturing, and enduring environment for all children regardless of how they were conceived. California has recognized that this goal is equally achievable by same-sex and opposite-sex couples.

Petitioners' primary claim is that the inclusion of same-sex couples in marriage will dissuade many opposite-sex couples from marrying and that the exclusion does no harm to same-sex couples. Both propositions are erroneous and cut totally against California's policies regarding same-sex couples and their children. It is not rational to assume that granting same-sex couples the right to marry will influence the behavior of opposite-sex couples. There is, however, no denying that the ultimate effect of excluding same-sex couples from marriage is to stigmatize their relationships by indicating that they are not worthy of admission to marriage.

This stigma affects not only same-sex couples but also the children they raise. Petitioners' proffered state interest in Proposition 8 reduces to the idea that same-sex couples and their children may be disadvantaged and stigmatized in order to induce better behavior by heterosexual couples. Both California and this Court have long recognized that it is not

constitutionally permissible to punish children in order to influence adult behavior.

In fact, Petitioners' "responsible procreation" theory bears a striking similarity to the rationales once used to support now-abandoned laws that branded children as "illegitimate." In addition to this negative label, children born to unwed mothers were deprived of important legal rights in order to shame their parents into marriage. California and this Court no longer permit treatment of some children as more deserving of care, support, and protection than other children. Similarly, if marriage provides benefits to children, then it contradicts California policy to provide these benefits to some children and not others.

Petitioners' responsible procreation theory also has no basis in logic or social experience. There is no reason to think, and certainly no evidence, that including same-sex couples in the institution of marriage would cause heterosexual couples to shun marriage. The long history of social support and esteem associated with marriage will continue to make marriage as attractive to heterosexuals as it is to same-sex couples whom Proposition 8 excludes. For this reason, Proposition 8 cannot be viewed as having a rational basis in encouraging heterosexual couples to marry.

Petitioners' emphasis on the significance of biological and genetic relationships between parents and children, and the need for parents of opposite sexes, also misstates California law, which does not view biology as the sole criterion for parentage and rejects the notion that the gender of parents is legally relevant. California law supports parenting by same-sex couples. With respect to biology, California law facilitates the adoption of non-biological children and supports procreation through assisted

reproduction with donated genetic material or gestational surrogacy and without regard to the marital status, gender, or sexual orientation of the intended parent or parents. Moreover, California views a child's social and emotional ties to parental caregivers as so important that they can trump biological connections.

Finally, Petitioners' single-minded focus on procreation and childrearing is inconsistent with California public policies supporting marriage. California recognizes that individuals enter into marriage for many reasons, including a desire for mutual economic and financial support and to have public acknowledgment and respect for their private choices to integrate their lives with someone they love. California neither limits marriage to those who can or want to have children, nor screens candidates for marriage based on their suitability to be parents. The only class of individuals excluded from marriage—and the only class Proposition 8 affects directly—is persons who wish to marry a person of the same sex.

In sum, the purported state interests that Petitioners and their *amici* rely on to justify disparate treatment of opposite-sex and same-sex couples do not reflect the policies that California law pursues regarding marriage, parentage and the best interests of children. Indeed, at trial and throughout this appellate litigation, Petitioners have not produced one shred of evidence from California law or policy, other than Proposition 8 itself, to substantiate their largely speculative claims. Viewed in the context of California's policies towards children and families, Petitioners' arguments make no sense. And, under the federal Constitution, Petitioners' theories do not provide a rational basis for denying same-sex couples the right to marry and relegating them to a separate

but not quite equal legal status denominated "registered domestic partner."

ARGUMENT

I.

PETITIONERS' ASSERTED STATE INTERESTS RELATED TO PROCREATION AND CHILD-REARING ARE NOT INTERESTS THAT CALIFORNIA FAMILY LAW PURSUES.

A. Petitioners' Responsible Procreation Theory Relies On An Impermissible Means To Achieve The Permissible End Of Encouraging Marriage And Is Not Rationally Related To Achieving That End.

1. Petitioners' Justification For Proposition 8 Relies On An Impermissible State Interest: Imposing Harms On Children To Influence Adult Behavior.

Petitioners contend that Proposition 8's denial of marriage to same-sex couples serves a legitimate state interest because sexual intercourse between men and women can lead to procreation (Pet. Br. 36), whereas "same-sex relationships cannot naturally produce offspring." Pet. Br. 38. Petitioners focus in particular on the theory that limiting marriage to opposite-sex couples addresses problems that would otherwise arise from "accidental" or unplanned pregnancies. According to Petitioners, "most children born outside of marriage reside with their mothers" and the "State has a direct and compelling interest in avoiding the public financial burdens and social costs too often associated with single motherhood." Pet. Br. 47 (citation and internal quotation marks

omitted). Petitioners go on to contend that "reserving to opposite-sex couples not only the name of marriage, but also the benefits and obligations traditionally associated with that institution, would provide additional incentives for such couples to marry and thereby further advance society's interest in steering procreation into marriage." Pet. Br. 46 (citation and internal quotation marks omitted).

Petitioners suggest that Proposition 8 helps achieve these goals by denying gay men and lesbians the right to marry, but Petitioners have not offered any explanation of how prohibiting marriage by same-sex couples would have *any* influence on the marital decisions of unwed parents. *See* Part I(A)(2), *infra*, pp.12-13. It is clear, however, that Proposition 8 does have a *substantial* direct effect on families headed by same-sex couples, particularly the tens of thousands of families that include children. *See* Trial Tr. 1348-50. Inevitably, denying same-sex couples the right to marry labels same-sex relationships as being less worthy of respect and recognition than opposite-sex relationships. As the California Supreme Court recognized, withholding a title with a "long and celebrated history" amounts to an official statement "that the family relationship of same-sex couples is not of comparable stature or equal dignity" to married couples. *In re Marriage Cases*, 43 Cal. 4th 757, 845 (2008). This stigma leads children to understand that the State considers their gay and lesbian parents to be somehow unworthy of participating in the institution of marriage and devalues their families compared to families that are headed by married heterosexuals. JA 342, 388-90, 486-91; *In re Marriage Cases*, 43 Cal. 4th at 783-85, 844-47; *see* JA 805 (Proposition 8 proponent Hak-Shing William Tam testimony that it "is very easy for

our children to understand" the difference between "domestic partner" and "marriage").

Proposition 8 thus functions in a way that is remarkably similar to the manner in which the offspring of unmarried women were formerly stigmatized under now-repudiated laws regarding "illegitimate" children. Under prior law, California—like many jurisdictions—saddled the children of unwed parents with the demeaning status of "illegitimacy" as a means of shaming their parents into marrying one another. *See* Melissa Murray, *Marriage As Punishment*, 112 COLUM. L. REV. 1, 33 n.165 (2012) (marriage was offered as a way to lead unwed mothers away "from vice towards the path of virtue"). California imposed a harsh legal cost on illegitimate children, excluding them from the protections enjoyed by children born to married couples, including the right to a relationship with and support from their fathers, intestate succession, and compensation for the wrongful death or injury of their father. *Estate of Woodward*, 230 Cal. App. 2d 113, 115-16 (1964) (illegitimate child not entitled to inherit from his father unless the father acknowledged paternity in writing, the parents subsequently married or the father publicly acknowledged the child); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1388 (6th ed. 2010) (illegitimate children not entitled to sue for wrongful death of father until 1971).

This practice ended in 1975, when California enacted the Uniform Parentage Act, 1975 Cal. Stat. ch. 1244, § 11 (codified as amended at CAL. FAM. CODE §§ 7000-7730) (hereafter "UPA").[9] The UPA

[9]Even prior to 1975, California courts and some legislative enactments mitigated the harshness of the common law rule that classified "illegitimate" children as "the sons of nobody." *In re Paterson's Estate*, 34 Cal. App. 2d 305, 309 (1939); *see*
(. . . continued)

"eliminate[d] the legal distinction between legitimate and illegitimate children." *Johnson v. Calvert*, 5 Cal. 4th 84, 88 (1993). It declared that "[t]he parent and child relationship extends equally to *every* child and to *every* parent, *regardless of the marital status of the parents*." CAL. FAM. CODE § 7602 (emphases added). California now imposes child support obligations on all parents regardless of their gender or marital status, and no longer denies custody or visitation rights to fathers of children born out of wedlock. *Id.* § 3900 ("the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances"); *Moss v. Superior Court*, 17 Cal. 4th 396, 405 (1998) ("The duty of a parent to support the parent's child or children is a fundamental parental obligation"); *Librers v. Black*, 129 Cal. App. 4th 114, 123 (2005) ("whenever possible, a child should have the benefit of *two* parents to support and nurture him or her") (emphasis in original); *Kristine M. v. David P.*, 135 Cal. App. 4th 783, 788-89 (2006) (the legislature has implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support).

California's abandonment of the concept of "illegitimate" children was part of a larger national trend that included this Court's decision in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). There, the Court wrote:

> 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.

(Continued . . .)

also Estate of Garcia, 34 Cal. 2d 419, 422 (1949) ("The trend of legislation governing the rights of persons born illegitimate is to give them the same status as those born legitimate").

> Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. (*Id.* at 175)

These changes in California family law directly affected the rights and obligations of heterosexual men who father or may father children. While, taken together, they may remove some incentives for unmarried heterosexual couples to marry, California has recognized that these changes are crucial to ensure that all children are provided with the legal rights and protections they need to thrive.

Petitioners' argument that Proposition 8 can be justified as an effort to discourage out-of-wedlock births by making marriage exclusively available to heterosexuals (and thereby supposedly more appealing to male-female couples who experience an unplanned pregnancy) is fundamentally at odds with California's strong policy of equal treatment for all children. Other children—those raised by same-sex couples—pay the price. This is a legally unacceptable result for the same reasons that led to the changes in the prior treatment of "illegitimacy."

In addition to the problems related to stigma, excluding same-sex couples from being able to marry denies children living in families headed by same-sex couples the benefits other children enjoy from the marriage of their parents, especially stability. The institution of marriage carries with it an historic meaning of commitment. The status of "spouse" or "husband" or "wife" is distinctly different from the status of "partner" or even "domestic partner," terms that apply to many types of relationships and do not connote the same degree of commitment. Being married elicits support from the couples' families and from the community; this support helps produce stability. Elizabeth M. Scott, *Marriage, Cohabitation*

and Collective Responsibility for Dependency, 2004 U. CHI. LEGAL F. 225, 241 (2004). Same-sex couples and their children would benefit to the same degree as opposite-sex couples from this kind of family and social acceptance and support.

Moreover, the children of same-sex couples are not able to use simple, widely understood terms to describe the relationships of their family members. Children of same-sex couples cannot simply refer to their parents as married; they have to distinguish themselves from other children when describing their families. "The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning. . . . [Its] . . . meanings depend[] on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love." Ronald M. Dworkin, *Three Questions for America*, N.Y. REVIEW OF BOOKS, Sept. 21, 2006, at 30.

California law "declares that it is in the best interests of children to be raised in a permanent, safe, stable, and loving environment." CAL. PROB. CODE § 1610(a); *see also* CAL. FAM. CODE § 3020(a) (the "health, safety, and welfare of children shall be the court's primary concern in determining the best interest of the children"). The negative effect of Proposition 8 on children is substantial. Petitioners' own expert witness stated at trial that permitting same-sex couples to marry "would be likely to improve the well-being of gay and lesbian households *and their children*." JA 903 (emphasis added); *see also* JA 910. As noted, California law does not support benefitting some children at the expense of others and California law does not single out some

children for preferential treatment, as Petitioners would have it. Under California law, depriving the children of same-sex couples of what they need to thrive in order to influence the behavior of adults cannot be a permissible state interest.

2. No Evidence Supports Petitioners' Implausible Claim That Limiting Marriage To Opposite-Sex Couples Would Reduce Out-Of-Wedlock Births.

As explained *supra*, Part I(A)(1), Petitioners' "responsible procreation" argument relies on an impermissible means to achieve a permissible end. In addition, Petitioners' theory of causation has no basis in reality. A critical component of Petitioners' argument is that heterosexual couples will be less likely to marry if same-sex couples are also permitted to marry. In other words, for Petitioners' argument to make any sense, there must be something about permitting same-sex couples to marry that would make marriage less appealing to opposite-sex couples, particularly in the wake of an unplanned pregnancy. But as was stated so well by the Court of Appeals in this case, "[i]t is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman." *Perry v. Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012).

Petitioners produced no evidence at trial to the contrary. They also failed to supply any logical reason why excluding same-sex couples from marriage would increase the chance that any heterosexual couple would marry, much less the heterosexual couples on whom Petitioners focus: those who experience an unplanned pregnancy. Petitioners' counsel

insisted that "you don't have to have evidence of this point." *See* Trial Tr. 3039:24-25; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 999 (N.D. Cal. 2010) (the "proponents presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage"). Petitioners are implicitly arguing that California would risk the well-being of children living with same-sex parents on totally speculative and illogical claims regarding the behavior of heterosexual couples. This is an insufficient basis upon which to deny a class of people access to a critical right and is contrary to the entire thrust of California family law.

For all of these reasons, the Court of Appeals was entirely correct when it concluded that

> California . . . has demonstrated through its laws that Proponents' first rationale (responsible procreation) cannot 'reasonably be conceived to be true by the governmental decision-maker[.]' We will not credit a justification for Proposition 8 that is totally inconsistent with the measure's actual effect and with the operation of California's family laws both before and after its enactment. (*Perry*, 671 F.3d at 1087 (citation omitted))

B. California Rejects The Optimal Child-Rearing Claim That Petitioners And Their *Amici* Assert.

At trial, Petitioners argued that it is permissible to limit marriage to heterosexual couples because families headed by two married biological parents of different genders provide the optimal environment in which to raise children. Pet. App. 149a-50a. Before this Court, Petitioners have recast their argument somewhat. They now say that "[t]he animating

purpose of [reserving marriage for heterosexuals] is not to prevent gays and lesbians from forming families and raising children" but to further society's interest in increasing the likelihood that children "will be born to and raised by the mothers and fathers who brought them into the world in stable and enduring family units." Pet. Br. 36. A number of Petitioners' *amici* continue not only to press the claim that heterosexual, biological parents provide the optimal environment for rearing children, but also to assert that parenting by same-sex couples is sub-optimal.

As with the accidental procreation contention that Petitioners advance, their contentions about optimal parenting conflict fundamentally with California law. There is nothing in California law, including Proposition 8, that reflects or implements Petitioners' views about the allegedly "optimal" environment for raising children. As a result, "optimal parenting" cannot provide a legitimate state interest sufficient to justify Proposition 8's exclusion of same-sex couples from marriage.

1. California Treats Heterosexual And Homosexual Parents Equally, Except In Denying Gays And Lesbians Access To Marriage.

California law and policy do not consider being raised by opposite-sex parents as superior to being raised by same-sex parents. With the sole exception of Proposition 8's exclusion of same-sex couples from marriage, California law fully supports and facilitates the choice of same-sex couples to have children. *See, e.g.*, *In re Marriage Cases*, 43 Cal. 4th at 821-22 ("This state's current policies and conduct . . . recognize that gay individuals are fully capable of . . .

responsibly caring for and raising children"). Through a combination of statutory provisions and case law, California facilitates the creation of many different kinds of families through various parentage presumptions, alternative reproductive technologies, and surrogacy arrangements, without regard to the marital status, gender or sexual orientation of the parents. *See, e.g.*, CAL. FAM. CODE §§ 7611-7613, 7962. Individual decisions to procreate are protected in California regardless of marital status, gender or sexual orientation. CAL. CIV. CODE § 51 (the Unruh Civil Rights Act); *N. Coast Women's Care Med. Group, Inc. v. Superior Court*, 44 Cal. 4th 1145 (2008) (rights of religious freedom and free speech do not permit physicians to discriminate based on sexual orientation in providing infertility and reproductive health services).

a. California Law And Policy Do Not Treat Same-Sex Couples Differently Than Opposite-Sex Couples In Establishing Parenthood.

Registered domestic partners are afforded the same rights and charged with the same responsibilities with respect to their children as are opposite-sex married couples. CAL. FAM. CODE § 297.5(a), (d). As with opposite-sex married couples, children born to one member of a registered domestic partnership couple are presumed to be the children of both partners, and partners may adopt each other's children, thereby recognizing a non-biological parent as a legal parent. *Id.* § 9000(g). Registered domestic partners are also permitted to put both partners' names on a child's birth certificate. CAL. GOV'T CODE § 14771(a)(14).

Even in families where a child is raised by a same-sex couple who are not registered domestic

partners, the State provides the same means for such couples to become the child's legal parents as are available for an unmarried opposite-sex couple. When one man or woman is the biological or adoptive parent of a child, the other half of the couple (male or female) may become the second legal parent through California's second-parent adoption procedures. California permits any two adults, married or not, to adopt a child. *See Sharon S. v. Superior Court*, 31 Cal. 4th 417, 440 (2003) ("any otherwise qualified single adult or two adults, married or not, may adopt a child").

b. California Does Not Prefer Heterosexual Couples Over Same-Sex Couples In Custody And Adoptions.

California laws and guidelines regarding child custody, adoption and foster care do not give a preference to heterosexuals. In these areas, the State often is involved in choosing between parents, or choosing new parents for a child. In custody disputes, a court must exercise discretion in choosing a parenting plan that resolves issues such as the child's physical and legal custody in order to advance the child's best interest. CAL. FAM. CODE §§ 3011, 3020. While Petitioners claim Proposition 8 addresses problems that arise when mothers raise children on their own, California courts have long warned against using gender-role stereotypes as a basis for custody determinations between two parents. *See In re Carney*, 24 Cal. 3d 725, 736-37 (1979) (condemning "conventional sex-stereotypical thinking" shown by court in making custody determination). *See also* CAL. FAM. CODE §§ 3011, 3020 (requiring courts to determine best interests of the child). Similarly, California courts have declared sexual orientation irrelevant in child-custody

determinations. *In re Marriage of Fingert*, 221 Cal. App. 3d 1575, 1581 (1990) (abuse of discretion to decide child custody based on parent's sexual orientation).

In adoption proceedings, where a state agency may have to choose among competing prospective adoptive parents, state law prohibits agencies from considering an applicant's sexual orientation as a disqualifying factor. CAL. FAM. CODE §§ 3040, 9000(b), (g). And "California's adoption statutes have always permitted adoption without regard to the marital status of prospective adoptive parents." *E.g.*, *Sharon S.*, 31 Cal. 4th at 433.[10] Finally, California law grants gays and lesbians the same rights as heterosexuals to become foster parents for dependent or maltreated children who are in state custody. CAL. WELF. & INST. CODE § 16013(a).

2. California Does Not Rely Exclusively On Biology To Determine Parentage.

Petitioners' argument that Proposition 8 furthers California's legitimate state interest in children being raised by their biological parents is inaccurate. In determining a child's parentage, California views social connections as equal to or, on occasion, more important for children than, biological or genetic ties. While a child's unmarried biological parents are usually presumed to be the legal parents (CAL. FAM.

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[10]It is settled law in California that adoption statutes must be liberally construed to fulfill their underlying purposes and policies to promote the welfare of the child. *In re Adoption of Barnett*, 54 Cal. 2d 370, 378 (1960) ("The rule of strict construction of our adoption statutes in favor of the natural parents . . . is disapproved"); *see also Dep't of Social Welfare v. Superior Court*, 1 Cal. 3d 1, 6 (1969) (the "main purpose" of the adoption statutes is "the promotion of the welfare of children") (citing *Barnett*, 54 Cal. 2d at 377).

CODE §§ 7611-7612), those presumptions are rebuttable due to California's policy that a child's ties to a person functioning as a parent can be "much more important" than a biological relationship. *Elisa B. v. Superior Court*, 37 Cal. 4th 108, 120-21 (2005); *see also In re Nicholas H.*, 28 Cal. 4th 56, 66 (2002) (the presumption under California Family Code Section 7611(d) that a man who receives a child into his home and openly holds the child out as his natural child is the "natural father" is not necessarily rebutted when he admits he is not the child's biological father); *In re Jesusa V.*, 32 Cal. 4th 588, 604 (2004) ("[California Family Code Section 7612] did not contemplate a reflexive rule that biological paternity would rebut the section 7611 presumption in all cases, without concern for whether rebuttal was 'appropriate' in the particular circumstances"); *Neil S. v. Mary L.*, 199 Cal. App. 4th 240, 248 (2011) (over the last three decades, California courts have increasingly considered a child's social relationships to be more important than their biological relationships when determining the best interest of the child).[11]

Consistent with those principles, California law provides that a strong parenting relationship that is not based on biology can override a competing presumption that a biological parent is entitled to be recognized as a child's legal parent. *See, e.g.*, *Steven W. v. Matthew S.*, 33 Cal. App. 4th 1108, 1116

[11] *See also In re Salvador M.*, 111 Cal. App. 4th 1353, 1357 (2003) (even though Section 7611(d) of the Family Code refers to a "man" who "holds out" a child as his "natural child," the "legal principles concerning the presumed father apply equally to a woman seeking presumed mother status"); CAL. FAM. CODE § 7611(d) (a man is presumed to be the "natural father" of a child if "[h]e receives the child into his home and openly holds out the child as his natural child") (citing *Barnett*, 54 Cal. 2d at 377).

(1995) ("in applying paternity presumptions, . . . the extant father-child relationship is to be preserved at the cost of biological ties"); *Susan H. v. Jack S.*, 30 Cal. App. 4th 1435, 1442-43 (1994) (state has an "interest in preserving and protecting the developed parent-child . . . relationships which give children social and emotional strength and stability") (citation and internal quotation marks omitted).

California courts have also applied the "holding out" parentage presumption in Section 7611(d) of the Family Code to recognize the parental rights and obligations of a non-biological parent who has resided with and jointly raised a child with the child's biological or adoptive parent. *Elisa B.*, 37 Cal. 4th at 119 (there is "no reason why both parents of a child cannot be women"); *Charisma R. v. Kristina S.*, 140 Cal. App. 4th 301, 378-80, 388 (2006) (former lesbian partner of biological mother may be able to establish parentage under the UPA); *S.Y. v. S.B.*, 201 Cal. App. 4th 1023, 1037 (2011) (recognizing two women as parents of a child promotes public policy in favor of children having two parents).

California's marital presumption, which has been embedded in State law since the 1850s, further demonstrates that social bonds and concerns about child support can sometimes prevail over biological ones. For opposite-sex married couples, the law presumes the husband to be the father of any child his wife bears, even over the objection of the child's biological father. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (upholding the constitutionality of California's marital presumption and noting the "historic respect . . . traditionally accorded to the relationships that develop within the unitary family"); *see also Estate of Cornelious*, 35 Cal. 3d 461, 464-65 (1984) (the marital presumption embodies a determination that the "integrity of the family" is

considered more important to the child's welfare than biological connection). While this presumption is no longer as conclusive as in the past,[12] it remains strong and often allows the marital relationship to trump biological parentage. *Dawn D. v. Superior Court*, 17 Cal. 4th 932, 935 (1998) (alleged biological father had "no constitutionally protected liberty interest defeating California's statutory presumption favoring the husband"); *Lisa I. v. Superior Court*, 133 Cal. App. 4th 605, 609-10 (2005) (biological father not allowed to challenge legal paternity of mother's former husband even though child was born after mother's divorce). In fact, the marital presumption has even been applied to estop a non-biological presumed parent from denying that he is the child's parent. *See People v. Sorensen*, 68 Cal. 2d 280, 285 (1968) (former husband responsible for child born through artificial insemination of his wife with his consent, using another man's sperm).

The marital presumption is not limited to husbands in opposite-sex marriages. California Family Code Section 7650 provides that the provisions used to determine a father-child relationship shall be used to determine a mother-child relationship "[i]nsofar as practicable." CAL. FAM. CODE § 7650. Accordingly, courts have applied the marital presumption to establish both maternity and paternity when a couple has had a child through artificial insemination or surrogacy. In *Johnson v. Calvert*, 5 Cal. 4th 84 (1993), for example, the California Supreme Court used the UPA paternity provisions to distinguish the genetic mother from the biological mother, and then

[12] After *Michael H.*, the marital presumption was amended to allow presumed fathers, in addition to mothers and husbands, to challenge the marital presumption, within two years of the child's birth. *See* CAL. FAM. CODE § 7541.

concluded that the woman "who intended to bring about the birth of a child that she intended to raise as her own—is the natural [*i.e.*, legal] mother under California law." *Id.* at 93; *see also In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1418 (1998) (if a surrogate, rather than the wife, is artificially inseminated, both the wife and the husband are "treated in law" under California Family Code Section 7613(a) as if they were the "natural" parents of the child even though neither is biologically or genetically related to the child).[13] These cases are evidence of California's recognition that it is sometimes more beneficial for children to have their parentage depend on their parents' marital status rather than on biogenetic ties. And, as noted earlier, these marital presumptions apply equally to registered domestic partners. *See supra*, p.15.

The California laws that facilitate the use of alternative reproductive technologies and surrogacy to have a child further refute Petitioners' assertion of a state preference for children being raised by their heterosexual biological parents. The principles in *Johnson* and *Buzzanca* have been applied to many different situations where "intended parents" arrange to have a child who is not biologically or genetically related to them. California statutes on assisted reproduction and surrogacy facilitate the designation of the "intended parent or parents" as a child's legal parents and permit the termination of all parental rights and responsibilities for the biological or genetic parents and gestational

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[13]When *In re Buzzanca* was decided, Section 7613 of the Family Code addressed only the artificial insemination of a wife with semen donated by a man not her husband. The statute was subsequently amended to apply to *in vitro* fertilization as well as artificial insemination. *See* CAL. FAM. CODE §7613 (2013).

surrogates who do not intend to be the child's legal parent. CAL. FAM. CODE § 7613 (sperm donation under certain conditions terminates all parental rights and obligations of biological father); 2012 Cal. Legis. Serv. ch. 466, at 4395-98 (A.B. 1217) (codified at CAL. FAM. CODE §§ 7960, 7962) (adding definition of "gestational carrier" to statutory provisions on surrogacy, and regulating assisted reproduction agreements with gestational carriers).

These rules do not turn on the marital status, gender or sexual orientation of the intended parent or parents and apply equally to gay men and lesbians.[14] *See, e.g.*, *Elisa B.*, 37 Cal. 4th at 120 (applying "holding out" presumption of parentage (CAL. FAM. CODE § 7611(d)) to a woman with no genetic connection to children born to her female partner whom she jointly intended to raise with her partner); *K.M. v. E.G.*, 37 Cal. 4th 130, 144 (2005) ("A woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause that woman to relinquish her parental rights").

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[14]Same-sex couples becoming parents through assisted reproductive technology are not limited to lesbians. Male couples are increasingly using surrogacy to father children. *See* Arlene Istar Lev, *Gay Dads: Choosing Surrogacy*, 7 LESBIAN & GAY PSYCHOLOGY REVIEW, 72, 72 (2006) ("gay men are also taking charge of their own biological potential and becoming fathers in unprecedented numbers through surrogacy arrangements"); Susan Donaldson James, *More Gay Men Choose Surrogacy to Have Children*, ABC News, *available at* http://abcnews.go.com/Entertainment/OnCall/story?id=4439567 &page=1 (last accessed Feb. 21. 2013) (recognizing growing trend of male couples having children through surrogates and noting that "'[j]ust because your son is gay, doesn't mean you can't be a grandparent'").

3. California Does Not Limit Marriage To Those Who Are Good Candidates For Parenthood.

As just discussed, California law considers same-sex couples to be completely equal to opposite-sex couples as parents. Moreover, the denial to same-sex couples of the respect and dignity of marriage cannot be justified on the basis of parental characteristics, because in California the suitability of potential marriage partners to be parents is not a factor in access to marriage. Marriage is open to virtually everyone, except gay and lesbian people, regardless of their potential qualifications as a parent. For that reason, Proposition 8 cannot be viewed as serving a legitimate state interest in optimal child-rearing by heterosexual couples raising their own biological children.

The claim that gay and lesbian parents are inferior also is contradicted by scientific studies. The testimony and other evidence introduced at trial regarding the welfare of children of same-sex couples shows that the gender of a child's parents is not a factor in a child's adjustment. Pet. App. 263a-64a. "Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted." Pet. App. 263a. The trial court judge found claims about "optimal parenting" to be unsubstantiated. *Id.*; *see also* Pet. App. 226a, 247a (finding that the "benefits of marriage flow" to a married couple's children regardless of whether the couple is opposite-sex or same-sex).

II.

PETITIONERS' SOLE FOCUS ON PROCREATION IGNORES THE MULTIPLE PURPOSES OF MARRIAGE UNDER CALIFORNIA LAW.

In offering supposed legitimate state interests to justify Proposition 8, Petitioners and their *amici* focus almost exclusively on the aspect of marriage that concerns having and rearing children. They ignore that, as a matter of California law and policy, marriage has never been restricted to individuals capable of and desiring to procreate. *In re Marriage Cases*, 43 Cal. 4th at 834 ("Men and women who desire to raise children with a loved one in a recognized family but who are unable physically to conceive a child with their loved one never have been excluded from the right to marry"). Likewise, infertility, which is common among opposite-sex couples,[15] is not a basis for invalidating a marriage. *See, e.g.*, *id.* at 826 n.48 ("no case has suggested that an inability to have children—when disclosed to a prospective partner—would constitute a basis for denying a marriage license or nullifying a marriage"). Under California marriage and divorce law, the inability to have sexual relations, if incurable, is grounds for annulment, but inability to procreate is not. CAL. FAM. CODE § 2210; *Stepanek v. Stepanek*, 193 Cal. App. 2d 760, 762 (1961) ("The

[15]Data from 2002 show that approximately seven million women and four million men suffer from infertility. Michael L. Eisenberg, M.D. et al., *Predictors of not pursuing infertility treatment after an infertility diagnosis: examination of a prospective U.S. cohort*, 94 FERTILITY AND STERILITY 2369, 2369 (2010). Approximately two million married couples are infertile. AMERICAN PREGNANCY ASS'N, *Statistics, available at* http://www.americanpregnancy.org/main/statistics.html.

law's test is simply the ability or inability for copulation, not fruitfulness").

In California, marriage has always been seen as serving multiple emotional and economic purposes. *See, e.g.*, CAL. FAM. CODE §§ 760, 4300; CAL. LAB. CODE § 233. At its core, marriage enables two people to join together in a committed relationship that has the support of the State and the community. *See In re Marriage Cases*, 43 Cal. 4th at 781 (describing the "core substantive rights" of marriage to include "the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own"). By extending public recognition and protection to the private decision of two individuals to integrate their lives based on their love and commitment to each other, California has always benefitted from the social stability and cohesion that marriage provides. Over time, California has created a legal regime that supports this integration and protects the commitment married couples make to promote their joint well-being. *See, e.g.*, *In re Marriage of Haines*, 33 Cal. App. 4th 277, 288-89 (1995) (discussing historical development of California's community property system). Significantly, the California legislature regularly has modified many of the elements of this regime to reflect changing social norms and the evolving needs of families.

In the sections below, we discuss some of the purposes of marriage recognized in California law, other than procreation and childrearing.

A. Emotional Support.

The State favors marriage even for those who are childless because marriage can enhance the physical and emotional well-being of both the partners. *See,*

e.g., *In re Marriage Cases*, 43 Cal. 4th at 813 ("The family is . . . the center of the personal affections that ennoble and enrich human life . . .") (citation and internal quotation marks omitted). Many statutes recognize and facilitate the emotional integration of marital partners. These include, for example, the privileged nature of communications between spouses (CAL. EVID. CODE § 980) and the right to use one's own sick leave to care for an ill spouse (CAL. LAB. CODE § 233(a)).

The importance of the emotional component has been given greater weight over the years. Initially, marriage was considered a lifetime commitment not only from an emotional standpoint but also from a legal one. To that end, California formerly limited the ability of spouses to part ways. California's 1872 divorce statute recognized only fault-based grounds for divorce, permitting courts to dissolve marriages only upon a showing of the commission of specific acts by an offending spouse. Act of Apr. 17, 1850, ch. 103, § 12; *see* GRACE GANZ BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 60-61 & n.8 (6th ed. 2012) ("BLUMBERG") (discussing history of California divorce statutes). While lifetime commitment remains an important emotional and social aspect of marriage, California law in the mid-twentieth century extended the concept of spousal choice to include the freedom to end a marriage without a finding of fault.

In 1952, in *DeBurgh v. DeBurgh*, 39 Cal. 2d 858 (1952), the California Supreme Court, led by Justice Traynor, took the first major step in this regard, abolishing a rule that disallowed divorce if both parties were "at fault." *Id.* at 863. In 1969, California became the first state to enact a no-fault divorce law in which all the fault-based grounds for divorce were abolished and only two no-fault grounds,

"irreconcilable differences, which have caused the irremediable breakdown of the marriage" and "[i]ncurable insanity" remained available. CAL. FAM. CODE § 2310 (former CAL. CIV. CODE § 4506).

The adoption of a no-fault system reflected the legislative judgment that marriage should be viewed as a means of supporting relationships where the parties remain committed to integrating their lives and choosing to stay married. It demonstrated the Legislature's understanding that the benefits of marriage, to the adults and children, depend upon a relationship that is based on the continuing choice of one's partner. These Legislative purposes are furthered by the statutory requirement of the existence of an "irremediable breakdown of the marriage" as one basis to seek marital dissolution. CAL. FAM. CODE § 2310.

B. Mutual Financial Support.

The State also has historically favored marriage because marriage promotes economic interdependence and security for all members of the marital household. *DeBurgh*, 39 Cal. 2d at 863-64. California benefits from the economic integration of spouses because "the legal obligations of support that are an integral part of marital and family relationships relieve society of the obligation of caring for individuals who may become incapacitated or who are otherwise unable to support themselves." *In re Marriage Cases*, 43 Cal. 4th at 815-16.

California currently treats marital partners as equals in a single economic entity. Both spouses have obligations of mutual support, "present, existing, and equal" interests in assets acquired during the marriage (CAL. FAM. CODE § 751), and a right to a share of their decedent spouse's estate. Many of

these rights and obligations are considered so important that they are non-waivable during marriage. *See id.* § 1620 (except as otherwise provided by law, a husband and wife cannot, by a contract with each other, alter their legal relations, except as to property); *id.* § 1612(c) (under some circumstances, couples cannot waive spousal support obligations in a premarital agreement).

Given the integration of their financial interests, each spouse owes a fiduciary duty to the other as exemplified by their joint obligations to manage and control their marital community property. CAL. FAM. CODE §§ 1100-1103. This legislation made concrete a pre-existent general duty of good faith. Thus Section 1101(h) of the California Family Code provides that in cases involving oppression, fraud, or malice, remedies for the breach of the fiduciary duty "shall include, but not be limited to, an award to the other spouse of 100 percent" of any asset undisclosed or transferred in breach of the duty. *See In re Marriage of Rossi*, 90 Cal. App. 4th 34, 41-43 (2001) (applying this section to require wife who had deliberately concealed lottery winnings from her husband during the dissolution of their marriage to pay him 100 percent of the winnings). In addition, marital partners can sue for the wrongful death of their spouse. *See Elden v. Sheldon*, 46 Cal. 3d 267, 277-78 (1988) (discussing loss of consortium cause of action).

As with the emotional component of marriage, there have been a number of important changes in California law and policy that reflect changing conceptions of family financial relations. Under California's initial marital regime put in place shortly after statehood, the husband was given a dominant role in the family to provide for the economic needs of other members of the marital household. Although California adopted a community

property regime, the husband was the sole owner and manager of the community property estate during the marriage, and the wife's interest was characterized as a "mere expectancy." *Van Maren v. Johnson*, 15 Cal. 308, 311 (1860).

Over the years, the Legislature and courts completely altered this construction of marriage. In 1866, the Legislature granted the wife power to control the disposition of her separate property at her death. Act of March 20, 1866, 1865-66 Cal. Stat. ch. 285, § 1. In 1872, it granted her management of her separate property. 1 THEODORE H. HITTEL, CODES AND STATUTES OF CALIFORNIA § 5162, at 595 (1876). Beginning in 1891, the Legislature further equalized the legal status of husbands and wives by enacting various statutes restricting the husband's power over the community property. BLUMBERG, at 53, 55. California courts interpreted these statutes in ways that benefited the wife's property interests, thereby paving the way for even further equalization of the status of husbands and wives. *See, e.g.*, *Dunn v. Mullan*, 211 Cal. 583, 588-89 (1931); *Shaw v. Bernal*, 163 Cal. 262, 266-67 (1912).

These changes became effective in 1975, when California conferred on each spouse equal powers of management and control over the community real and personal property. Act of Oct. 1, 1973, 1973 Cal. Stat. ch. 987. Thus, although California initially did not place husbands and wives in a position of equal partnership with respect to all aspects of their marital property, by the mid-1970s California's community property law had adopted gender equality as a defining feature of marriage.

Petitioners' conception of marriage as an institution with a single purpose, immutable over time, is not consistent with the history of California law and policy. California has always viewed marriage as

serving multiple purposes, and the State's marital regime has evolved over time in relation to changing conceptions of those purposes.

III.

THE RIGHT TO MARRY THE PERSON OF ONE'S CHOICE IS CENTRAL TO THE MEANING OF MARRIAGE.

California law recognizes that to fulfill the goals of marriage, it must be open to all individuals who seek to enjoy the right to marry the person they love and with whom they to wish to build a family life. Choice is central because the benefits of marriage come from the emotional bonds between the individuals and their commitment to a shared future. In addition, California law recognizes, as this Court indicated in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), that the constitutional right to marry also may be understood as constituting a subset of the right of intimate association, to which choice is obviously critical. *In re Marriage Cases*, 43 Cal. 4th at 818-19. Today, California places no restriction on the right of individuals to marry based on their race, national origin, religion, income, fertility, or other characteristics, except for their sexual orientation.[16]

[16]There also are a limited number of restrictions that do not discriminate against a class of persons, such as those based on consanguinity. CAL. FAM. CODE § 2200. Also, marriage must be entered into voluntarily and both participants must be capable of making that choice. To ensure that capability, each person must be at least 18 years old, or, if 16 or 17 years old, must obtain parental consent and a court order allowing the marriage. *Id.* §§ 301-303. In addition, California prohibits bigamous and polygamous marriages. *Id.* § 2201. These relationships are less susceptible to the emotional integration and stability that the State seeks to further through marriage and thus they are "potentially detrimental [to] . . . a sound

(. . . continued)

California has long regarded the choice of a partner as a central element of marriage, essential both to the personal decision to marry and to the societal benefits that follow from marriage. That is why the California Supreme Court, in a decision years before this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), held that it was a violation of the Equal Protection Clause of the United States Constitution to deny an individual the right to marry based on the race of the partners. *Perez v. Sharp*, 32 Cal. 2d 711, 731-32 (1948).

Similarly, the California Supreme Court held in *In re Marriage Cases* that it was a violation of the California Constitution to deny an individual the right to marry based on the sexual orientation of the partners. *In re Marriage Cases*, 43 Cal. 4th at 857. However, Proposition 8's amendment to the California Constitution overruled that judicial determination. Proposition 8 thereby distorts California's existing marriage policy, so that one class of individuals may not marry the person they would choose. We fully concur with Respondents' contention that Proposition 8 violates the federal Constitution. If this Court so holds, California's marriage policy valuing the right to all individuals to marry the person of their choice will once again be consistently applied.

CONCLUSION

California law and policy have always envisioned marriage as an institution that serves multiple purposes, for the individuals in the marriage, their

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(Continued . . .)
family environment." *In re Marriage Cases*, 43 Cal. 4th at 829 n.52.

children, and for all society. It is a caricature of marriage to propose that its essential function is to reign in and regulate heterosexual sex. As the California Supreme Court has recognized on many occasions, marriage is not critical to society solely because it channels sex; it is critical because it channels human relations into an institution that enhances the couple's well-being and thereby the well-being of society as a whole. "Marriage is accorded [a special] degree of dignity in recognition that [t]he joining of the man and the woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." *Elden*, 46 Cal. 3d at 274-75 (citation and internal quotation marks omitted). These identical interests are at stake for same-sex couples as well.

Today, it is the policy of the State of California that same-sex and opposite-sex couples are functionally equivalent with respect to all of the purposes underlying the State's creation of the institution of marriage. Given this legislative determination, and all of the other elements of California law, none of the rationales proposed by Petitioners and their *amici* provide adequate justification for establishing

two different marital regimes—marriage and domestic partnerships—organized solely on the basis of the sex of the two partners.

Respectfully submitted,

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February 28, 2013.