

No. 12-144

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IN THE  
**Supreme Court of the United States**

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DENNIS HOLLINGSWORTH, ET AL.,  
*Petitioners,*

v.

KRISTIN M. PERRY, ET AL.,  
*Respondents.*

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On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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**BRIEF OF AMICI CURIAE AMERICAN  
ANTHROPOLOGICAL ASSOCIATION, AMERICAN  
ACADEMY OF PEDIATRICS, CALIFORNIA, AND ROBERT  
M. GALATZER-LEVY, M.D., IN SUPPORT OF  
RESPONDENTS AND AFFIRMANCE, ADDRESSING  
CALIFORNIA PROPOSITION 8'S STIGMATIZING  
EFFECTS**

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

This brief is submitted with the written consent of all parties pursuant to Rule 37.3(a).

This brief is submitted by several organizations dedicated to the advancement of the social sciences and the promotion of mental health, including the American Anthropological Association and the American Academy of Pediatrics, California, along with Dr. Robert M. Galatzer-Levy, a recognized expert on the psychological issues affecting gay and lesbian individuals. They submit this brief to present to the Court the perspective of these sciences on certain issues raised in this case. These *amici*, all of whom are independent of the parties to this action, have extensive experience with the subjects addressed in their *amicus curiae* brief – namely, the psychological and social ramifications of discrimination.

The American Anthropological Association is the world's largest professional organization of anthropologists and others interested in anthropology. Its membership includes all specialties within anthropology, including (among others) cultural anthropology, linguistics, and applied anthropology. In 2004, the American Anthropological Association adopted a Statement on Marriage and the Family, which provides:

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<sup>1</sup> Pursuant to Rule 37.6, counsel for *amici* certify that no counsel for any party had any role in authoring this brief in whole or in part, and that no person other than *amici curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief through letters of consent on file with the Clerk of this Court.

The results of more than a century of anthropological research on households, kinship relationships, and families, across cultures and through time, provide no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution. Rather, anthropological research supports the conclusion that a vast array of family types, including families built upon same-sex partnerships, can contribute to stable and humane societies.

The California District of the American Academy of Pediatrics (“AAP-CA”), representing the approximately 5,000 board-certified pediatrician members of the four California AAP regional Chapters, has a mission to attain optimal physical, mental, and social health and well-being for all infants, children, adolescents and young adults living in California. The AAP-CA believes that the physical growth, development, social and mental well-being of all children are supported by allowing parents a full range of parental legal rights, such as Social Security survivor benefits, health benefits for dependent children, and legally recognized consent for education and medical decisions. In order to protect and promote the best interests of the child, the AAP-CA supports equal access for all California children to the legal, financial and emotional protections of civil marriage for their parents, without discrimination based on family structure. In light of its focus on children’s health issues, the AAP-CA offers its expertise only on Sections I and III of this brief.

Robert M. Galatzer-Levy, M.D., is Clinical Professor of Psychiatry and Behavioral Neuroscience at the University of Chicago and is faculty at the Chicago Psychoanalytic Institute. He has served in various professional capacities, including four years as the nationally-elected Secretary of the American Psychoanalytic Association. Dr. Galatzer-Levy is a recognized expert on the psychological issues affecting gay and lesbian individuals. His work in this area has spanned more than three decades, and has culminated in a number of peer-reviewed publications, invited lectures, and a professional book.<sup>2</sup> This brief relies in part on Dr. Galatzer-Levy's empirical research and writings for social scientific evidence of the stigma suffered by gay and lesbian individuals.

### SUMMARY OF THE ARGUMENT

The evidence presented at trial before the District Court demonstrated that the State of California, having amended its Constitution to strip the right of same-sex couples to marry, is in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. This amendment, passed via Proposition 8 in November 2008, places the State's imprimatur on the relegation of gay men and women to an inferior legal status.<sup>3</sup> Such institutionalized discrimination stig-

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<sup>2</sup> See, e.g., Bertram Cohler and Robert Galatzer-Levy in *The Course of Gay and Lesbian Lives: Social and Psychoanalytic Perspectives* (2000).

<sup>3</sup> Proposition 8 added Article I, § 7.5 to the California Constitution. That provision states that "[o]nly marriage between a man and a woman is valid or recognized in California."

matizes these individuals and their relationships as inherently inferior.

In correctly ruling that Proposition 8 is unconstitutional, the District Court cited abundant record evidence concerning the stigmatization effects of institutionalized discrimination – and the resulting impacts of that stigma on the mental health and social standing of gay men and women and their families. On the basis of this evidence, the District Court determined that “Proposition 8 places the force of law behind stigmas against gays and lesbians, including [that] gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society.” (Pet. App. at 248a.) And in affirming the District Court, the Court of Appeals concluded that “Proposition 8 enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class.” (Pet. App. at 88a.)<sup>4</sup>

The record evidence upon which the District Court based its ruling—and the Court of Appeals its affirmance of that ruling—finds plentiful support in a wide array of social science research and analysis. As organizations and professionals dedicated to the advancement of the social sciences and the promo-

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<sup>4</sup> Citations to the relevant opinions of the United States District Court for the Northern District of California and of the United States Court of Appeals for the Ninth Circuit are in the format “Pet. App. at \_\_\_\_.” Citations to trial testimony are to the Joint Appendix in the format “JA at \_\_\_\_” when possible to do so. Where cited testimony is not in the Joint Appendix, the format “Trial Tr. at \_\_\_\_” is employed.

tion of mental health, *amici* file this brief to assist the Court in placing the record evidence in its appropriate scientific context. In so doing, *amici* confirm that the District Court's ruling was properly based on scientific conclusions drawn from decades of rigorous empirical research in each of their respective disciplines.

### ARGUMENT

In *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), the Supreme Court found that separating individuals from others solely because of their minority status “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” On the basis of this finding, the Court held that “[s]eparate educational facilities” for racial minorities “are inherently unequal.” 347 U.S. at 495.

Through its enactment of Proposition 8, the State of California has singled out gay men and women and has prevented them alone from participating in the institution of marriage. By separating this group, solely on the basis of their minority status, the State has done precisely what the Supreme Court condemned in *Brown*. The resultant stigmatizing impact on gay men and women is profound, because “it has the sanction of law” and because the State’s policy is “interpreted as denoting the inferiority” of members of the gay community. *Id.* at 494; see also *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (stigmatization “can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership



in a disfavored group” because it denotes them as “inherently inferior” and as “less worthy participants in the political process”).

Throughout history, state interference with the ability to marry has been a means of oppression and stigmatization of disfavored groups, serving to degrade whole classes of people by depriving them of the full ability to exercise a fundamental right. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967). Just as the anti-miscegenation laws of the past century established state-sponsored stigmatization on the basis of race, Proposition 8 does the same on the basis of sexual orientation.

Research demonstrates that the impact on same-sex couples of the degraded status to which the law relegates their relationships has exactly such adverse stigmatizing effects. Moreover, the substantial social and psychological effects of this stigmatization are borne not only by same-sex couples and individuals, but by their children as well.

# **I. THE STIGMA CREATED BY CALIFORNIA’S DIFFERENTIAL TREATMENT OF GAY MEN AND WOMEN HAS SEVERE PSYCHOLOGICAL AND SOCIAL IMPACTS.**

The concept of “stigma” refers to the phenomenon through which an individual with an attribute that is discredited by his or her society is devalued in society as a result of that attribute.<sup>5</sup> The concept has

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<sup>5</sup> JA at 526; Trial Tr. at 818-19 (Meyer); *see also* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2-3 (1963).

been the subject of numerous empirical studies and has achieved nearly universal acceptance by social scientists.<sup>6</sup> In modern usage, “stigmatization” refers to an invisible sign of disapproval that permits “insiders” to draw lines around “outsiders.” This demarcation permits “insiders” to know who is “in” and who is “out” and allows the group to maintain its solidarity by punishing those who deviate from accepted norms of conduct.<sup>7</sup>

Stigma is not inherent in any particular attribute; rather, it is the product of a collective social decision directed at individuals who possess an attribute. It has therefore been characterized as an “undesired differentness.”<sup>8</sup> Because stigma is a social construct, attributes subject to stigmatization will change over time and will evolve along with social norms and mores. Homosexuality in particular generates a type of stigma that remains deeply embedded in American society today. Indeed, studies have shown that a significant percentage of the American

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<sup>6</sup> See, e.g., John F. Dovidio et al., *Stigma: Introduction and Overview*, in THE SOCIAL PSYCHOLOGY OF STIGMA 1-28 (Heatherton et al. eds., 2000); Brenda Major & Laurie T. O’Brien, *The Social Psychology of Stigma*, 56 ANN. REVIEW PSYCHOLOGY 393, 394-412 (2005).

<sup>7</sup> GERHARD FALK, STIGMA: HOW WE TREAT OUTSIDERS 17-33, 339-40 (2001); see also Janet A. Funderburk et al., *Does Attitude Toward Epilepsy Mediate the Relationship Between Perceived Stigma and Mental Health Outcomes in Children with Epilepsy?*, 11 EPILEPSY AND BEHAVIOR 71, 71-72 (2007) (“stigma exists when elements of labeling, stereotyping, separation, status loss, and discrimination occur together in a power situation that allows them to unfold” [citation]).

<sup>8</sup> Trial Tr. at 2058 (Herek); Goffman, *supra*, at 5.

public continues to harbor negative feelings and hostility toward gay men and lesbians.<sup>9</sup> As Professor Gary Segura testified, “[t]here is simply no other person in society who endures the likelihood of being harmed as a consequence of their identity [more] than a gay man or lesbian.” (Trial Tr. at 1571.) The current reality of the prejudice directed toward gay men and women was captured in the trial testimony of Defendant-Intervenor Hak-Shing William Tam, who affirmed his belief that “homosexuals are twelve times more likely to molest children” than heterosexuals (JA at 780-81) – a proposition that is entirely without scientific or other empirical support.<sup>10</sup>

Stigma can be created and reinforced when the law imposes structural barriers on the ability of disfavored groups to gain access to society’s resources.<sup>11</sup> As Professor Gregory Herek testified, “stigma is manifested in the institutions of society,” such as when “the law . . . designate[s] certain groups as lacking certain resources relative to others.” (Trial Tr. at 2051.)<sup>12</sup> The State-sanctioned demarcation be-

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<sup>9</sup> JA at 756; Trial Tr. at 1563-64 (Segura); *see also* Field Research Corporation, *California Opinion Index, A Digest on How the Public Views Gay and Lesbian Rights Issues*, available at <http://field.com/fieldpollonline/subscribers/COI-06-Mar-Gay-Rights.pdf>.

<sup>10</sup> Similarly, Defendants’ expert Professor Kenneth Miller conceded on cross-examination that in society “there’s a view that homosexuals may certainly undermine traditional families.” (Trial Tr. at 2606.) This proposition also lacks any empirical basis.

<sup>11</sup> JA at 526-27 (Meyer testimony).

<sup>12</sup> Professor Ilan Meyer also testified about “structural stigmas,” which “determine the access that people have to [soci-

tween gay and straight relationships embodied in Proposition 8 creates precisely this kind of stigmatization. Proposition 8 restricts the ability of one group of individuals to participate in an institution that is loaded with social meaning and in which many members of society aspire to participate. (JA at 534-35 (Meyer testimony).)

As Professor Herek has previously stated in summarizing his independent research on this issue:

Denying same-sex couples the label of marriage – even if they receive all other rights and privileges conferred by marriage – arguably devalues and delegitimizes these relationships. It conveys a societal judgment that committed intimate relationships with people of the same sex are inferior to heterosexual relationships and that the participants in a same-sex relationship are less deserving of society’s recognition than are heterosexual couples. It perpetuates power differentials whereby heterosexuals have greater access than nonheterosexuals to the many resources and benefits bestowed by the institution of marriage. These elements are the crux of stigma. Such

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ety’s] institutions.” (JA at 526-27.) Proposition 8 is an example of a “structural stigma,” because it operates as “a block or a gate toward [the institution of marriage].” (JA at 532-33 (Meyer testimony).) Accordingly, “Proposition 8, in fact, says that if you are gay or lesbian, you cannot achieve this particular goal.” (JA at 533.)

stigma affects all homosexual and bisexual persons, not only the members of same-sex couples who seek to be married.<sup>13</sup>

An extensive amount of psychiatric, psychological, psychoanalytic, and sociological research literature has demonstrated the severe adverse psychological and social effects of stigma.<sup>14</sup> This issue was addressed at trial in the testimony of Professor Meyer concerning the relationship between stigma and what is known as “minority stress.”<sup>15</sup>

For example, experiences that highlight the otherness of a stigmatized individual impart an added and adverse social meaning to that individual relative to non-stigmatized individuals.<sup>16</sup> That is, if they

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<sup>13</sup> Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States - A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607, 617 (2006).

<sup>14</sup> See, e.g., STIGMA AND GROUP INEQUALITY: SOCIAL PSYCHOLOGICAL PERSPECTIVES (Shana Levin & Collette van Laar eds., 2006) (exploring many different effects of stigma); JOHN DOLLARD, CASTE AND CLASS IN A SOUTHERN TOWN 61-96 & generally (3d ed. 1957) (African Americans); B.J. Limandri, *Disclosure of Stigmatizing Conditions: The Discloser's Perspective*, 3 ARCHIVES OF PSYCHIATRIC NURSING 69, 69-74 (1989) (survivors of domestic violence and individuals with HIV or AIDS).

<sup>15</sup> JA at 535-36, 561-64; Trial Tr. at 828-34, 892-93, 975-83 (Meyer testimony). Professor Meyer testified that the term “minority stress” identifies stress that stems from social arrangements such as “prejudice, stigma, and discrimination.” (Trial Tr. at 832.) There is a strong relationship between minority stress and adverse mental health outcomes in gay and lesbian populations. (JA at 561-64; Trial Tr. at 898-99 (Meyer testimony).)

<sup>16</sup> Trial Tr. at 838-42 (Meyer testimony).

call to the fore the attribute that is the source of the stigmatization, even ostensibly minor events – such as filling out a form that requests marital status information – can be evocative of past and present feelings of social disapproval, rejection, and disrespect.<sup>17</sup> Thus, otherwise insignificant events take on outsized mental health consequences because they reinforce the larger stigmatization suffered by gay men and women.

Research confirms that this type of stigma can significantly lower the self-esteem of stigmatized individuals, leading to social withdrawal, decreased expectation for oneself, avoidance of attempts at high achievement, and angry resentment.<sup>18</sup> Stigmatized individuals are known to suffer from expectations of rejection and discrimination, harboring a stressful

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<sup>17</sup> Trial Tr. at 842-43 (Meyer testimony); JA at 389-90 (Stier testimony).

<sup>18</sup> See Anna Scheyett, *The Mark of Madness: Stigma, Serious Mental Illnesses, and Social Work*, 3 SOCIAL WORK IN MENTAL HEALTH 79, 80, 84, 88 (2005) (society's "negative valuation" of the stigmatized individual "is integrated into the individual's sense of self-worth and identity, and result[s] in an inability to exert power or believe in one's ability to participate in society"); Limandri, *supra*, at 69-74 (stigmatized individuals experience shame). The negative impacts of stigma are extended, not just to the individuals who have the stigmatized characteristic, but also to those who are associated with them. C.K. Sigelman et al., *Courtesy Stigma: The Social Implications of Associating with a Gay Person*, 131 J. SOCIAL PSYCHOLOGY 45, 45-55 (1991); R.M. Puhl & J.D. Latner, *Stigma, Obesity, and the Health of the Nation's Children*, 133 PSYCHOLOGICAL BULL. 557, 567 (2007) (citing study).

sense of anticipation that their disapproved-of attribute will trigger an adverse reaction in others.<sup>19</sup>

In the context of same-gender sexual orientation, the deep and pervasive impacts of stigma are well documented.<sup>20</sup> The best data available demonstrate substantially increased psychological distress among gay men and women.<sup>21</sup> In addition to the stigmatization-related stressors described above, gay men and women experience elevated psychological distress because they are often forced to actively conceal their sexual identity.<sup>22</sup> This is stressful both because it takes active effort to engage in concealing behavior and because the very process of concealment may prevent such individuals from obtaining the positive benefits of, for example, social support services targeted toward gay populations.

Based in part on the sound and comprehensive empirical research that has been conducted on the adverse effects of stigmatization, numerous prominent social sciences organizations have issued position statements supporting same-sex marriage and

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<sup>19</sup> JA at 471-72 (Chauncey testimony); 542-45 (Meyer testimony); 641-43 (Zia testimony).

<sup>20</sup> See, e.g., Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOLOGICAL BULL. 674, 674-85 (2003); Linda D. Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. INTERPERSONAL VIOLENCE 366, 369-70 (1990).

<sup>21</sup> Meyer, *Prejudice*, *supra*, at 683-85.

<sup>22</sup> JA at 545-52 (Meyer testimony).

opposing discrimination on the basis of sexual orientation.<sup>23</sup>

For example, the American Psychoanalytic Association's official position is that discrimination against gay men and women "is having a significant adverse impact on the psychological and social well-being and stability of gay and lesbian couples, their children and families."<sup>24</sup> This position was supported by an empirically based "Review of Research Relevant to Same-Sex Marriage," which concluded that "[d]iscrimination's detrimental impact on mental health has . . . been well documented in lesbian and gay populations. 'Minority stress' contributes to psychiatric problems and gay and lesbians who report greater levels of stigma and discrimination are more likely to seek psychological treatment."<sup>25</sup>

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<sup>23</sup> At trial, defense witness David Blankenhorn attempted to characterize these position statements as mere "policy statements." (Trial Tr. at 2921.) Although these statements do reflect the policies of the organizations that made them, they are grounded in extensive empirical research.

<sup>24</sup> American Psychoanalytic Association, *Position Paper on Gay Marriage* (2008), available at [http://www.apsa.org/About\\_APsaA/Position\\_Statements/Gay\\_Marriage.aspx](http://www.apsa.org/About_APsaA/Position_Statements/Gay_Marriage.aspx) (citing over twenty references); See also, e.g., American Psychiatric Association, *Position Statement: Support of Legal Recognition of Same-Sex Civil Marriage* (2005), available at <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200502.aspx> ("Same-sex couples therefore experience several kinds of state-sanctioned discrimination that can adversely affect the stability of their relationships and their mental health").

<sup>25</sup> American Psychoanalytic Association, *supra* note 24 (citing Joanne DiPlacido, *Minority Stress Among Lesbians, Gay*



The American Psychological Association has also issued numerous evidence-based position statements relevant to gay and lesbian mental health issues.<sup>26</sup> Its official position holds that “the evidence clearly supports the position that the social stigma, prejudice, discrimination, and violence associated with not having a heterosexual sexual orientation and the hostile and stressful social environments created thereby adversely affect the psychological, physical, social and economic well-being of lesbian, gay, and bisexual individuals.”<sup>27</sup>

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*Men, and Bisexuals: A Consequence of Heterosexism, Homophobia, and Stigmatization*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 138-59 (Gregory M Herek ed., 1998); Meyer, *Prejudice*, *supra*, at 674-97).

<sup>26</sup> See, e.g., American Psychological Association, *Resolution on Opposing Discriminatory Legislation & Initiatives Aimed at Gay, Lesbian, and Bisexual Persons* (2007), available at <http://www.apa.org/about/governance/council/policy/discriminatory-legislation.aspx> (“legislation and initiative actions [aimed at gay populations] can also result in psychological distress for lesbians, gay men, and bisexual people. Immediate consequences include fear, sadness, alienation, anger, and an increased in internalized homophobia. In addition, these actions can increase the degree to which lesbians, gay men, and bisexuals are affected by minority stress”).

<sup>27</sup> American Psychological Association, *Policy Statement: Sexual Orientation & Marriage* (2004), available at <http://www.apa.org/about/governance/council/policy/marriage.aspx> (citing over forty references, including BADGETT, MONEY, MYTHS, AND CHANGE, *infra* note 31; S.D. Cochran, J.G. Sullivan, & V.M. Mays, *Prevalence of Mental Disorders, Psychological Distress, and Mental Health Service Use Among Lesbian, Gay, and Bisexual Adults in the United States*, 71 J. CONSULT-

The heightened levels of psychological distress demonstrated by these comprehensive research findings are especially evident during adolescence.<sup>28</sup> This concept was addressed at trial by Plaintiff Jeffrey Zarrillo, who testified about “how he felt growing up in society with the stereotypes and hate that existed.” (JA at 332-33; Trial Tr. at 78-79.) Mr. Zarrillo testified that he felt heightened stress as a teenager, resulting from feeling distanced from his heterosexual friends in matters such as dating and sports and from observing the rejection of gay youth in popular culture. (*Id.*) One of the consequences of experiences such as these is that gay adolescents have, among other things, a materially greater suicide attempt rate than their peers. This results from the pain of being stigmatized and, ironically, the self-hatred associated with internalizing the social values that led to the stigmatization in the first place.<sup>29</sup> By

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ING & CLINICAL PSYCHOLOGY 53-61 (2003); G.M. Herek, J.R. Gillis, & J.C. Cogan, *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 945-51 (1999); Meyer, *Prejudice, supra*, at 674-97).

<sup>28</sup> See, e.g., Trial Exhibit No. PX2338 (JUST THE FACTS COALITION, JUST THE FACTS ABOUT SEXUAL ORIENTATION AND YOUTH: A PRIMER FOR PRINCIPALS, EDUCATORS, AND SCHOOL PERSONNEL (2008)).

<sup>29</sup> JA at 556-57, 563-64, 567 (Meyer testimony); see also Meyer, *Prejudice, supra*, at 684-85; Richard A. Isay, *On the Analytic Therapy of Homosexual Men*, 40 PSYCHOANALYTIC STUDY OF THE CHILD 235, 250-52 (1985); Richard A. Isay, *The Development of Sexual Identity in Homosexual Men*, 41 PSYCHOANALYTIC STUDY OF THE CHILD 467, 474, 487 (1986); Jack Drescher, *Psychoanalytic Therapy & the Gay Man* 257-91 (1998); Garnets, *supra*, at 369-70.

perpetuating the stigma through its segregation of gay couples into a separate form of legal relationship, the State contributes materially to these harmful, and sometimes tragic, outcomes.

In addition to affirmatively stigmatizing them, the State's refusal to permit gay men and women to marry persons of their choice deprives them of a critical source of affirmation of their lives. Beginning in earliest infancy and continuing throughout one's entire life, the experience of being affirmed by external sources of power and respect promotes psychological well-being.<sup>30</sup> The absence of such affirmation is associated with emotional pain and may lead to significant psychological difficulties.<sup>31</sup>

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<sup>30</sup> DANIEL N. STERN, *THE INTERPERSONAL WORLD OF THE INFANT: A VIEW FROM PSYCHOANALYSIS AND DEVELOPMENTAL PSYCHOLOGY* 72-76, 101-11, 138-61 (1985); ROBERT M. GALATZER-LEVY & BERTRAM J. COHLER, *THE ESSENTIAL OTHER: A DEVELOPMENTAL PSYCHOLOGY OF THE SELF* 61-63, 136-37, 189-95 (1993); THOMAS J. COTTLE, *A SENSE OF SELF: THE WORK OF AFFIRMATION* 166 & generally (2003); Anna Ornstein, *A Developmental Perspective on the Sense of Power, Self-Esteem, and Destructive Aggression*, 25 ANN. PSYCHOANALYSIS 145, 150 (1997).

<sup>31</sup> Heinz Kohut, *Forms and Transformations of Narcissism*, 14 J. AM. PSYCHOANALYTIC ASSN. 243, 245-48 (1966); Heinz Kohut, *The Psychoanalytic Treatment of Narcissistic Personality Disorders: Outline of a Systematic Approach*, 23 PSYCHOANALYTIC STUDY OF THE CHILD 86, 88-89 (1968); Ornstein, *supra*, at 150. Affirmation has been shown to buffer the effects of negative attitudes toward oneself that may stem from a homosexual orientation. Vincent F. Bonfitto, *The Formation of Gay and Lesbian Identity and Community in the Connecticut River Valley of Western Massachusetts, 1900-1970*, 33 J. HOMOSEX. 69, 88-93 (1997).

At trial, numerous witnesses testified to their personal experiences with the absence of affirmation for themselves and their relationships. Plaintiff Kristin Perry stated that the State's disapproval of same-sex marriage confirmed her sense that "when you're gay, you think you don't really deserve things." (JA at 364.) Similarly, Plaintiff Jeffrey Zar-rillo testified that California's actions have "rele-gate[d him] to a level of second class citizenship." (JA at 336.) The de facto consequence of the State's failure to give gay men and women the same positive affirmation it affords to heterosexuals is that such individuals are left with a harmful sense of un-worthiness vis-à-vis other members of society. In ef-fect, the withholding of affirmation itself reinforces the overall stigmatization imposed upon and felt by members of the gay population.

The impact of this deprivation is, again, particu-larly acute for younger people. Like all children, youngsters who have a gay or lesbian predisposition spend considerable time imagining what their lives will be like when they "grow up." These psychologi-cally important ideas include images of the stable romantic relationships and families they will create as adults. Such ideas are important to the mental health of children, because they help establish a pos-itive personal identity and serve to motivate socially adaptive behaviors (such as doing well at school) and to facilitate turning these dreams into realities.<sup>32</sup> As

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<sup>32</sup> Janet W. Astington, *Narrative and the Child's Theory of Mind*, in NARRATIVE THOUGHT AND NARRATIVE LANGUAGE 151-71 (Bruce Britton & Anthony Pellegrini eds., 1990); Bertram Cohler & M. Freeman, *Psychoanalysis and the Developmental Narrative*, in THE COURSE OF LIFE 126-27, 146, 153-56 (George

Professor Meyer testified at trial, “[g]ay and lesbian youth ha[ve] a harder time projecting to the future because they have learned [the] kind of negative attitudes” associated with internalized homophobia. (JA at 560.)

These children, like their heterosexually oriented peers, dream of marriage (and are encouraged by society to do so) but under the current legal regime they cannot see concrete models of how this dream can be actualized. The unavailability of marriage consistent with their sexual orientation thus enhances the psychological burden borne by gay youth. During the trial, this general proposition was given personal meaning by Plaintiff Kristin Perry. When asked why the institution of marriage was important to her, Ms. Perry replied, “I have never really let myself want it until now. Growing up as a lesbian, you don’t let yourself want it, because everyone tells you you are never going to have it.” (JA at 359.)

Overall, the severe social and psychological consequences of the stigma placed upon gay men and women by society were emphasized time and again throughout the trial by the testimony of individuals who experienced those effects. These witnesses used words and phrases such as: “ashamed;” “relegated to a corner;” “demoniz[ed];” “fear;” “community . . . threat;” “second class citizen;” “not good enough;” “mocked and made fun of and disparaged;” “outraged

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Pollock & Stanley Greenspan eds., vol. 5 1993); PEGGY J. MILLER ET AL., *Narrative Practices and the Social Construction of Self in Childhood*, 17 AM. ETHNOLOGIST 292, 304-06 (1990); PAUL RICOEUR, HERMENEUTICS & THE HUMAN SCIENCES 274-96 (John Thompson ed., 2006).

and hurt . . . and humiliated;” object of “pity;” lack “of inclusion;” and “invalidated . . . as human beings.” (JA at 336, 345, 348, 353, 365, 368, 383, 390, 653.) These are verbal embodiments of the stigma placed on gay men and women in our society – a stigma that is reinforced and enhanced when the government itself discriminates against them.

Through the constitutional embodiment of discrimination established by Proposition 8, the State of California has sent a message to members of the gay community that they must continue to wear a State-sponsored badge of dishonor. As a result, members of this population will remain stigmatized and will continue to endure the psychological and social burdens of that stigmatization.

## **II. SINGLING OUT GAY MEN AND WOMEN AS INELIGIBLE FOR THE INSTITUTION OF MARRIAGE INVITES THE PUBLIC TO DISCRIMINATE AGAINST THEM.**

Decades of research have confirmed that stigmatized people are ostracized, devalued, rejected, scorned, and shunned, experiencing discrimination, insults, attacks, and even murder.<sup>33</sup> This is particu-

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<sup>33</sup> See, e.g., Dovidio, *supra*, at 1-24; Falk, *supra*, at 17-35; Dollard, *supra*, at 61-96; see also Scheyett, *supra*, at 87 (citing studies demonstrating links between stigma and discrimination in housing, the workplace, and the criminal justice system); M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 9 (2001) (describing economic impact of being seen as member of disfavored group); Gregory Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. CONSULTING AND CLINICAL PSYCHOLOGY 945, 947-48 (1999).

larly true for gay men and women, a stigmatized group that has suffered a well-documented history of ostracization, discrimination, and violence.<sup>34</sup>

By establishing and perpetuating a regime in which separate treatment of same-sex couples is not only condoned, but enshrined as a matter of California constitutional law, the government encourages disparate treatment of gay men and women by the broader society and fosters a climate in which such treatment thrives.<sup>35</sup> As San Diego Mayor Jerry Sanders testified, “if government tolerates discrimination against anyone for any reason, it becomes an excuse for the public to do exactly the same thing.” (JA at 676.) The District Court concurred, finding that “Proposition 8 singles out gays and lesbians and legitimates their unequal treatment [and] perpetuates” stereotypes against them. (Pet. App. at 260.)

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<sup>34</sup> JA at 438-39 (Chauncey testimony); *see also* Meyer, *Prejudice*, *supra*, at 680; Herek, *Legal Recognition*, *supra*, at 617; Kevin T. Berrill & Gregory M. Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes*, 5 J. INTERPERSONAL VIOLENCE 401, 410 (1990); Gregory M. Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism*, 5 J. INTERPERSONAL VIOLENCE 316, 323-26 (1990).

<sup>35</sup> *See* Gregory M. Herek, *Hate Crimes Against Lesbians and Gay Men*, 44 AM. PSYCHOLOGIST 948, 949 (1989) (describing antigay hate crimes as a “logical outgrowth” of a climate of government intolerance, which “fosters” violent behavior); Meyer, *Prejudice*, *supra*, at 680 (stating that abuses against gay men and women are “sanctioned by governments and societies through formal mechanisms such as discriminatory laws and informal mechanisms, including prejudice”); Gregory M. Herek, *The Psychology of Sexual Prejudice*, 9 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 19, 21 (Feb. 2000).

The reason that government action affects private behavior is clear: “laws send cultural messages; they *give permission*.”<sup>36</sup> As noted by Professor Herek, when they operate as “structural stigma,” laws “identif[y] which members of society are devalued [and give] a level of permission to attack or denigrate particular groups.” (Trial Tr. at 2053.) The result is that the State is a “major factor in creating [the] social environment that [is] prejudicial or stigmatizing.” (JA at 569 (Meyer testimony).) Writing in support of Petitioners in this case, *amicus curiae* The Lighted Candle Society makes this very point, stating that “all laws, especially those seen as carrying a moral imperative, have an educational effect—teaching all citizens, including children, what conduct is proper.”<sup>37</sup>

It follows that when California separates same-sex couples, it gives the public permission to view gay men and women as separate and different, fueling prejudice and discrimination against them. *See Lawrence v. Texas* 539 U.S. 558, 575 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).

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<sup>36</sup> Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 879 (2000) (emphasis in original); *see also* Limandri, *supra*, at 70 (“Societal messages that some behaviors or conditions are taboo become[ ] manifested in discrimination”).

<sup>37</sup> Brief of The Lighted Candle Society *Amicus Curiae* in Support of Petitioners at 3.



As Professor George Chauncey testified at trial, the “most significant” aspect of the long history of anti-gay actions on the part of governments is that such actions have given “the imprimatur of . . . government officials to . . . images of stereotypes of homosexuals.” (Trial Tr. at 405.)

By giving same-sex committed relationships a different legal status, segregated from that enjoyed by opposite-sex relationships, the State conveys a message that relationships with people of the same sex are different and, implicitly, inferior.<sup>38</sup> The public listens to this message and understands that gay men and women are not, in the eyes of the government, worthy of equal participation in all of society’s institutions. Professor Meyer touched on this issue when he testified that, in addition to sending the message that “gay relationships . . . are of secondary value,” Proposition 8 “sends a strong message about the values of the State,” which “would . . . encourage or at least is consistent with holding prejudicial attitudes.” (JA at 546.) In other words, Proposition 8 sends a State-sponsored “message” that “it is okay to reject” gay individuals and same-sex relationships.

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<sup>38</sup> Compare Herek, *Legal Recognition*, *supra*, at 617, with Brief for the High Impact Leadership Coalition as *Amicus Curiae* in Support of Petitioners (“HILC Brief”). The HILC Brief argues—erroneously—that California’s domestic partnership law “does not have the purpose of degrading or oppressing a minority group” because it “was crafted by and celebrated by LGBT advocates.” (HILC Brief at 7.) HILC, of course, ignores the fact that *some* legal recognition is better than *no* legal recognition. It remains the case that *some* legal recognition (domestic partnership) is inferior to *full* legal recognition (marriage) from the perspective of equality.

(JA at 555 (Meyer testimony).) The resulting stigma attaches, not only to same-sex couples who seek to be married, but to all gay men and women, regardless of their relationship status or desire to marry.<sup>39</sup>

Conversely, as Defendants' expert David Blankenhorn admitted at trial, placing same-sex relationships on equal legal footing with heterosexual relationships would undermine this broad sense that gay men and women are unequal. Mr. Blankenhorn agreed that "[s]ame-sex marriage would signify greater social acceptance of homosexual love and the worth and validity of same-sex intimate relationships." (JA at 913.) Moreover, Mr. Blankenhorn agreed that "[g]ay marriage might contribute over time to a decline in anti-gay prejudice. . . ." (Trial Tr. at 2851.) Mr. Blankenhorn also conceded his belief that "today the principle of equal human dignity must apply to gay and lesbian persons. In that sense, insofar as we are a nation founded on this principle, we would be *more* American on the day we permitted same-sex marriage than we were on the day before."<sup>40</sup> Indeed, since testifying on behalf of Petitioners at trial, Mr. Blankenhorn has taken the public position that "the time for denigrating or stigmatizing same-sex relationships is over."<sup>41</sup>

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<sup>39</sup> Herek, *Legal Recognition*, *supra*, at 617.

<sup>40</sup> Trial Exhibit No. DIX0956 (DAVID BLANKENHORN, THE FUTURE OF MARRIAGE (2007) (emphasis in original)); *see also* JA at 905 (Blankenhorn testimony).

<sup>41</sup> David Blankenhorn, Op.-Ed., "How My View on Gay Marriage Changed," N.Y. Times, June 22, 2012.

The long history of official government harassment and discrimination directed at gay men and women – and of the parallel discrimination inflicted by private parties – was discussed at length at trial and in other briefs to this Court and need not be repeated here.<sup>42</sup> Significantly, the link between the State’s policy of segregation of gay couples and discriminatory private conduct continues today, even though in virtually every context other than the one at issue here, California law condemns discrimination against gay men and women.<sup>43</sup> Yet, by treating gay men and women differently in the area of marriage – an area both sides in this case agree to be of tremendous significance – the State continues to perpetuate and compound the historical stigma against them, sending the public the message that at least some discrimination is still acceptable. Such a mixed message inherently undercuts the antidiscrimination policy that the State of California otherwise actively pursues.

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<sup>42</sup> See, e.g., Trial Testimony of Prof. George Chauncey, JA at 438-95; Trial Tr. at 357-442.

<sup>43</sup> See, e.g., Cal. Civ. Code, § 51 (equal accommodation in business establishments); *id.*, § 51.7 (violence based on sexual orientation); Cal. Code Civ. Proc., § 204 (jury service); Cal. Ed. Code, § 220 (State-funded educational institutions); *id.*, § 32228 (hate violence in schools); Cal. Gov. Code, § 11135 (State-funded programs); *id.*, §§ 12921, 12940 (employment); *id.*, §§ 12921, 12955 (housing); Cal. Health & Saf. Code, § 1365.5 (contract availability or terms); *id.*, § 1586.7 (adult day care centers); Cal. Ins. Code, § 10140 (life and disability insurance); Cal. Lab. Code, § 1735 (contractors); *id.*, § 4600.6 (workers’ compensation); Cal. Pen. Code, §§ 422.55, 422.6 (hate crimes); Cal. Welf. & Inst. Code, § 9103.1 (services provided under Older Americans Act); *id.*, § 16001.9 (foster children’s access to services).

Moreover, the State's failure to permit same-sex couples to marry provides a structure that affirmatively enables private discrimination against same-sex couples. The fact that same-sex couples are not married may even give "cover" to private parties who discriminate on the basis of sexual orientation.<sup>44</sup>

Proposition 8 thus stands as the latest example in a long history of government-sponsored discrimination against gay men and women. This discriminatory policy, now embodied in the very Constitution of the State of California, fosters and encourages a continued public sentiment that gay individuals and same-sex relationships are of inherently lesser value than society's heterosexual majority and opposite-sex relationships.

### **III. DEPRIVING SAME-SEX COUPLES OF THE ABILITY TO MARRY HAS ADVERSE EFFECTS ON THEIR CHILDREN.**

The State's refusal to permit same-sex couples to marry does not merely affect the couples themselves; it also affects their children. This was a core opinion offered by Professor Michael Lamb in trial, where he stated that the "adjustment of [children of same-sex couples] would be promoted were their parents able

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<sup>44</sup> One arguable example of this is *North Coast Women's Care Medical Group v. Superior Court*, 137 Cal. App. 4th 781 (2006), in which two doctors refused to perform an artificial insemination procedure for a woman in a domestic partnership, claiming as their reason, not the fact that she is a lesbian, but rather that she is not married. Regardless of whether or not this explanation was a pretext for discrimination based on her sexual orientation, permitting the couple to marry would have removed the doctors' ability to offer it.

to get married.” (Trial Tr. at 1010.) Indeed, this opinion was readily confirmed by Defendants’ proffered expert, David Blankenhorn, who expressed his belief that “it is almost certainly true that gay and lesbian couples and their children would benefit by having gay marriage.” (JA at 910-11.)

One reason for this conclusion is that parental marriage “allows . . . children to benefit from some of the advantages that accrue to marriage, including the fact that [it is] a recognized social institution.” (JA at 604 (Lamb testimony).) This view is confirmed by a recent study funded by the American Academy of Pediatrics, which concluded that, in families headed by same-sex parents, “[c]ivil marriage can help foster financial and legal security, psychosocial stability, and an augmented sense of societal acceptance and support. . . . Children who are raised by civilly married parents benefit from the legal status granted to their parents.”<sup>45</sup> Thus, children raised by same-sex couples would benefit from the greater stability and security that would characterize their parents’ relationship if that relationship were recognized as a marriage.<sup>46</sup>

The positive benefits children accrue from being raised by civilly married parents are independent of those parents’ sexual orientation. In the consensus

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<sup>45</sup> James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 PEDIATRICS 349, 361 (2006).

<sup>46</sup> Herek, *Legal Recognition*, *supra*, at 616; Raymond W. Chan et al., *Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEVELOPMENT 443, 455 (1998).

view of the field of developmental psychology of children, the traits of an effective parent do not depend on the gender of that parent.<sup>47</sup> This is because the factors that most affect child development – the quality of the relationship between the parent and child, the quality of the relationship between the individuals raising the child, and the circumstances in which the child is raised – have nothing to do with parental gender or sexual orientation.<sup>48</sup>

These *amici* and others have issued statements, based on sound empirical data, which are consistent with Professor Lamb’s testimony on these issues. According to the official position of the American Psychoanalytic Association, the “[a]ccumulated evidence suggests the best interest of the child requires attachment to committed, nurturing and competent parents. Evaluation of an individual or couple for these parental qualities should be determined without prejudice regarding sexual orientation.”<sup>49</sup> In a similar vein, the American Psychological Association has concluded that “beliefs that lesbian and gay

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<sup>47</sup> JA at 586-89 (Lamb testimony).

<sup>48</sup> Pet. App. at 263a (finding that “[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology”); JA at 586-88, 598-99; Trial Tr. at 1010-11 (Lamb testimony).

<sup>49</sup> Trial Exhibit No. PX0767 (2002 Position Statement of the American Psychoanalytic Association).

adults are not fit parents have no empirical foundation.”<sup>50</sup> Indeed,

[n]ot a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by lesbian and gay parents are as likely as those provided by heterosexual parents to support and enable children’s psychosocial growth.<sup>51</sup>

These findings comport with those of the American Anthropological Association, which, on the basis of extensive research, has taken the official position that families headed by same-sex parents are just as

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<sup>50</sup> American Psychological Association, *Position Statement: Sexual Orientation, Parents, & Children* (2004), available at <http://www.apa.org/about/governance/council/policy/parenting.aspx> (citing C.J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 JOURNAL OF MARRIAGE & FAMILY 1052 (2000); C.J. Patterson, *Lesbian and Gay Parents and Their Children: Summary of Research Findings*, in LESBIAN AND GAY PARENTING : A RESOURCE FOR PSYCHOLOGISTS (American Psychological Assn. 2004); E.C. Perrin & The Committee on the Psychological Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002)).

<sup>51</sup> American Psychological Association, LESBIAN & GAY PARENTING 15 (2005), available at <http://www.apa.org/pi/lgbt/resources/parenting-full.pdf> (comprehensively reviewing research literature on lesbian and gay parenting and citing well over 100 pieces of scholarship in this area).

capable of being stable and well-adjusted as any other type of family:

The results of more than a century of anthropological research on households, kinship relationships, and families, across cultures and through time, provide no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution. Rather, anthropological research supports the conclusion that a vast array of family types, including families built upon same-sex partnerships, can contribute to stable and humane societies.<sup>52</sup>

Permitting same-sex couples to marry would also alleviate the stigma suffered by their children.<sup>53</sup> According to a research review conducted by the Ameri-

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<sup>52</sup> Trial Exhibit Nos. PX0754, PX0767 (American Anthropological Association, *Statement on Marriage and the Family* (2004)); see also JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1995); GILBERT HERDT, THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY (1994); JAMES NEILL, THE ORIGINS AND ROLE OF SAME-SEX RELATIONS IN HUMAN SOCIETIES (2009); WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA (2000); DAVID SCHNEIDER, A CRITIQUE OF THE STUDY OF KINSHIP (1984); Allan Tulchin, *Same-Sex Creating Households in Old Regime France: The Uses of the "Affrèrement,"* J. MODERN HISTORY (Sept. 2007).

<sup>53</sup> The general impact of stigmatization on children has been well documented. Richard Milich et al., *Effects of Stigmatizing Information on Children's Peer Relations: Believing Is Seeing*, 21 SCHOOL PSYCHOLOGY REVIEW 400, 400-09 (1992).



can Psychoanalytic Association, “[c]hildren of same-sex couples are accorded a stigmatized status of being ‘illegitimate.’”<sup>54</sup> But the same research review also concluded that “[t]o the extent that legal marriage fosters well-being in couples, it will enhance the well-being in their children who benefit most when their parents are financially secure, physically and psychologically healthy and not subjected to high levels of stress.”<sup>55</sup>

More generally, children of school age and in early to mid-adolescence have a strong desire to conform to the norms of their community, to be like other kids and not to stand out from their peers.<sup>56</sup> Coming from a family that is perceived as “ordinary” or “normal” is extremely important to many children. Given social disapproval of same-sex couples that persists in many communities, the children of such couples may suffer stigma and resulting distress regardless of the State’s official attitude toward their parents’ relationship, but such distress is enhanced if the State itself labels their parents’ relationship as “different” and implicitly of lesser standing.

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<sup>54</sup> American Psychoanalytic Association, *supra* note 24.

<sup>55</sup> *Id.* (citing Chan, *supra* note 46; C.J. Patterson, *Families of the Lesbian Baby Boom*, 4 JOURNAL OF GAY AND LESBIAN PSYCHOTHERAPY 91 (2001)).

<sup>56</sup> KENNETH H. RUBIN ET AL., PEER INTERACTIONS, RELATIONSHIPS, AND GROUPS, IN HANDBOOK OF CHILD PSYCHOLOGY 641-44, 653-54, 658 (William Damon ed., vol. 3, 5th ed. 1998).

## CONCLUSION

By singling out same-sex couples for elimination of the right to use the official designation of “marriage” for their relationships, the State of California enshrines the stigmatization of gay men and women. This Court should accordingly affirm the judgment of the United States Court of Appeals for the Ninth Circuit that Proposition 8 violates the Equal Protection Clause of the Constitution of the United States.

Respectfully submitted,

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