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 MASSACHUSETTS, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, ILLINOIS, IOWA, MAINE, MARYLAND, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OREGON, VERMONT AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici States Massachusetts, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Vermont and Washington[1] file this brief in support of Respondents Kristin M. Perry, et al. and Respondent the City and County of San Francisco as a matter of right pursuant to Sup. Ct. R. 37.4.

As States, the *Amici* have a strong interest in ensuring that citizens have equal opportunity to participate in civic society. To that end, each of the *Amici* States has sought to eliminate discrimination, including that based on sexual orientation. Each has laws prohibiting such discrimination in employment, housing, education, and the provision of government services and benefits.[2] In addition, each has removed restrictions preventing gays and lesbians from being foster parents, adopting children, and obtaining parental custody or visitation.[3] As a further step, many have ended the exclusion of same-sex couples from civil marriage.

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[1] The District of Columbia, which sets its own marriage rules, will be referred to as a state for ease of discussion.

[2] *See, e.g.*, Conn. Gen. Stat. §§ 46a-81a to 81q; Iowa Code § 216.6 et seq.; Mass. Gen. Laws ch. 151B, § 4 & ch. 272, §§ 92A, 98; 9 Vt. Stat. 4502(a); Wash. Rev. Code § 49.60.010-.040.

[3] *See, e.g.*, *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *Petition of K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *Adoption of M.A.,* 930 A.2d 1088 (Me. 2007); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In the Matter of Jacob*, 660 N.E.2d 397 (N.Y. 1995); Md. Code Regs. 07.05.03.09(A)(2), 07.05.03.15(C)(2).

The *Amici* States all license marriage to further important governmental interests. Accordingly, the *Amici* States have an interest in ensuring that marriage is strengthened by removing unnecessary and harmful barriers.

Based on our shared goals of promoting marriage and eliminating discrimination, we join in asking the Court to affirm the judgment of the Ninth Circuit invalidating Proposition 8.

SUMMARY OF ARGUMENT

Civil marriage in the United States is an enduring and important institution. Throughout our Nation's history, marriage has maintained its essential role in society and has been strengthened, not weakened, by removing barriers to access and by creating greater equality between spouses. Over the past decade, this evolution has been affirmed as same-sex couples have been permitted to marry. Against that history of greater inclusion and equality, Proposition 8 singles out same-sex couples and excludes them from the opportunity to marry.

Proposition 8's exclusion of same-sex couples from marriage is unconstitutional. Denying gays and lesbians the opportunity to wed the partner of their choosing does not advance any legitimate governmental interest. Since the Founding, states have sanctioned marriages to support families, strengthen communities, and facilitate governance. Because same-sex couples avail themselves of the benefits and abide by the obligations of marriage in precisely the same manner as different-sex couples, the states' interests in

marriage are furthered by allowing same-sex couples to marry.

Petitioners' attempts to justify Proposition 8 by recasting the states' interest in marriage as singularly focused on the procreative potential of different-sex couples are misguided. Neither the laws of the several states, nor this Court's jurisprudence, support such a narrow understanding of marriage. Moreover, there is no rational relationship between encouraging responsible procreation and excluding same-sex couples from marriage. In short, the ability or willingness of married couples to beget biological children never has been required for entry into marriage; there are a variety of ways in which two adults, including married couples, have and raise children; and excluding same-sex couples from marriage does not and cannot encourage different-sex couples to marry or to have children within a marriage.

Proposition 8 similarly cannot be justified by pure speculation as to the supposed detriment to civil marriage caused by allowing same-sex couples to marry. This Court rejected similar conjecture in *Loving v. Virginia*, 388 U.S. 1 (1967), and the *Amici* States' own experience refutes such speculation. None has experienced the adverse consequences that Proposition 8's proponents seek to avoid. Instead, the data indicate that eliminating marriage restrictions has had no negative effect on rates of marriage, divorce, or births to unmarried mothers. If anything, trends in these areas have improved since many of the *Amici* States have permitted same-sex couples to wed. Nor have equal marriage rights weakened the *Amici*

States' ability to impose reasonable restrictions on who may marry.

Proposition 8 codifies the second-class status – for its own sake – of gays, lesbians, and their families. Under any standard of Equal Protection analysis, it cannot survive review.[4]

ARGUMENT

I. CIVIL MARRIAGE HAS LONG ADVANCED MANY IMPORTANT STATE INTERESTS

Marriage is an institution of critical importance to civic life. While it has always been an anchor for an ordered society, civil marriage has never been a static institution. Societal changes have resulted in corresponding changes to marriage eligibility rules and to our collective understanding of the relative roles of persons within a marriage. Nevertheless, generations of Americans have consistently valued marriage as "a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003). States, too, have long valued marriage for its many benefits to both households and the community at large, and therefore have transformed the personal commitment inherent in

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[4] For the reasons set forth in greater detail in the brief of Respondents Kristin L. Perry, et al. (at 28-35), the *Amici* States submit that laws that discriminate on the basis of sexual orientation should be subject to heightened scrutiny.

marriage into publicly recognized rights and obligations.

A. State Interests In Marriage Are Furthered By Ending The Exclusion Of Same-Sex Couples From The Institution.

States recognize and regulate civil marriage to serve several interests, including to facilitate governance, create economic benefit, create stable households, create legal bonds between parents and children, assign providers to care for dependents (including the very young, the very old, and the disabled) and thus limit the public's liability to care for the vulnerable, and facilitate property ownership and inheritance. JA 408-412 (Cott). What these interests have in common is the recognition that civil marriage provides stability for individuals, families, and the broader community. *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999).

For example, the stability and security of marital relationships create a critical private safety net, ensuring that members of the family are not alone in a time of crisis, and less likely to rely on the state when problems arise. *In re Marriage Cases*, 183 P.3d 384, 423-424 (Cal. 2008). Marriage also allows couples to make decisions about education and employment knowing that, if one spouse provides the primary economic support, the other spouse will be protected, even in the event of divorce or death. JA 699-700 (Badgett). As a result, married couples can specialize their labor and invest in one another's education and career development, which has long-term benefits for

the couple and for the states in which they live. JA 699-700 (Badgett).

The importance of marriage as a lasting, legal commitment between two adults is also reflected in the fact that many of the rights and obligations that states bestow upon marriage concern primarily the relationship between the two spouses. For example, states guarantee, among other protections, the right not to testify against one's spouse, the right to inherit in the absence of a will, the right to tenancy by the entirety, the right to share and continue health insurance coverage, the right to alimony under certain circumstances, and the right to seek wrongful death compensation.

Marriage also furthers the well-being of spouses, which in turn benefits the states. Pet. App. 223a-225a. Research has established that married people enjoy greater physical and psychological health and greater economic prosperity than unmarried persons. JA 511-512, 521-522 (Peplau). In addition, recent studies demonstrate that gays and lesbians, in particular, benefit when marriage is made available to them.[5]

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[5] Gays and lesbians living in states with protective policies are significantly less likely to suffer from psychiatric disorders than their counterparts living in states without such policies. Mark L. Hatzenbuehler, et al., *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, Am. J. Pub. Health, Dec. 2009. A related study found that gay men experienced a statistically significant decrease in medical care visits, mental health care visits, and mental health care costs following the legalization of same-sex marriage. Mark L. Hatzenbuehler et al., *Effect of Same-Sex Marriage Laws on Health*

Beyond the married couple, marriage improves the quality of children's lives in many ways:

> [M]arital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumption of one's parentage.

Goodridge, 798 N.E.2d at 956-957. Most notably, marriage improves children's well-being by strengthening their families through, for example, enhanced access to medical insurance, tax benefits, estate and homestead protections, and the application of predictable custody, support, and visitation rules. *Id.* at 956. Children whose parents are married simply have a better chance of living healthy, financially secure, and stable lives.

In sum, the states favor – and therefore encourage – marriage over transient relationships because marriage promotes stable family bonds, fosters economic interdependence and security for members of the marital household, and enhances the physical and emotional well-being of both the partners to the

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Care Use and Expenditures in Sexual Minority Men: A Quasi-Natural Experiment, Am. J. Pub. Health, Feb. 2012.

marriage and any children they may raise. Michael Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 Va. J. Soc. Pol'y & L. 291, 300-303 (2001); *see also Goodridge*, 798 N.E.2d at 954. All of these interests are furthered by ending the exclusion of same-sex couples from the institution.

Thus, this is *not* a case where the "inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robinson*, 415 U.S. 361, 383 (1974). Instead, this is a case where the exclusion of a similarly-situated group undermines the important governmental interests states promote through marriage. Given that the touchstone of the Equal Protection Clause is that the government must treat all similarly-situated people alike, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)), Proposition 8 fails the most basic of Equal Protection inquiries.

B. The History Of Civil Marriage Is Not Solely, Or Even Primarily, About Promoting Procreation.

The argument that the government's sole interest in recognizing and regulating marriage is the natural capacity of different-sex couples to produce children not only ignores the many state interests furthered by marriage, but it also distorts history.

Petitioners and their *amici* seek to elevate procreation to the sole, or even primary, purpose of marriage because it "singles out the one unbridgeable difference between same-sex and opposite-sex couples,

and transforms that difference into the essence of a legal marriage." *Goodridge*, 798 N.E.2d at 962. Their argument stands at odds with the full history of marriage in our country. While states have, at times, used marriage to encourage couples to produce children, procreation has never been the government's principal interest in recognizing and regulating marriage.[6] JA 413-414 (Cott); *see also In re Marriage Cases*, 183 P.3d at 432.

In the United States, marriage has always been an institution authorized and regulated by civil law. Pet. App. 210a. The colonists intentionally ended the authority of the church over marriage, viewing marriage as being largely about property and mutual consent – matters properly regulated by local governments as part of their police powers. Since that time, and throughout our history, marriage has been understood as an institution that is at the same time public and private, legal and intimate. *See, e.g.*, Pet. App. 221a (marriage facilitates governance while creating private sphere for couples). On the public side, marriage has served both political and economic ends. In early America, the "household" created by marriage was understood as a governable, political subgroup (organized under male heads), and therefore a form of efficient governance. JA 408-409 (Cott). As a political unit, the household included not only the married couple and their children, but also extended family. Later, households took on particular

[6] As Professor Nancy Cott testified, marriage rules in the United States have been directed more consistently at supporting children than producing them. JA 408-409.

significance as economic sub-units of state governments, functioning as support systems for all household members, not only the biological children born of the marriage. Thus, the states historically have encouraged couples to choose committed relationships, regardless of whether they result in children, because these private relationships assist in maintaining public order. *Goodridge*, 798 N.E.2d at 954; JA 413-414, 423 (Cott).

It is certainly true that marriage traditionally has been between a man and a woman. That tradition is based, at least in part, on presumptions of a division of labor along gender lines, and not only procreative abilities. Pet. App. 215a-216a. Men were viewed as suitable for certain types of work (providing for the family) and women for others (caretaking), both of which were required for the survival of the household. *Id.* However, these views are outdated, to say the least, particularly to the extent that they presume women's abilities to be limited or inferior to men's.

In any event, the fact that the states traditionally have defined marriage as being between one man and one woman, does not itself justify the continued exclusion of same-sex couples. Tradition alone is not enough to justify a discriminatory law. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (discriminatory classification must serve an "independent and legitimate legislative end"). Moreover, in many ways, marriage in this country has been characterized as much by change as it has by tradition. *Goodridge*, 798 N.E.2d at 966-967 ("As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm."). The direction of change

consistently has been toward removing restrictions on who can marry and promoting equality of the spouses. JA 414-426 (Cott).

Indeed, many of the features of marriage that we take for granted today would have been unthinkable at our Nation's Founding. For example, for centuries (and until relatively recently) men and women were treated unequally, with wives ceding their legal and economic identities to their husbands upon marriage. *See, e.g., United States v. Yazell*, 382 U.S. 341, 342-343 (1966) (applying law of coverture to promissory note provided by Small Business Administration). Marriage between persons of different races was prohibited, nullified, and even criminalized for parts of three centuries. Divorce was difficult, if not impossible, in early America. Pet. App. 217a. That civil marriage has endured as a core institution is a testament to both the value of the institution and its ability to evolve in concert with social mores and constitutional principles.

II. PROPOSITION 8 IS NOT RATIONALLY RELATED TO INTERESTS IN PROCREATION AND CHILDREARING BY DIFFERENT-SEX COUPLES

The chief argument advanced in support of Proposition 8 is that California, like all states, has a legitimate interest in promoting marriage between two people who may produce children, intentionally or not, through sexual intercourse, thereby ensuring that those two people will raise the children together. Refusing to recognize marriages between same-sex couples does not advance this interest.

Rational basis review is not toothless, particularly when a disfavored group is singled out for disparate treatment. *Romer*, 517 U.S. at 633. Instead, the asserted justifications for governmental action "must find some footing in the realities of the subject addressed . . . ." *Heller v. Doe*, 509 U.S. 312, 321 (1993). While laws need not be perfect in their tailoring, rational legislation must be reasonably tethered to its purported interests. *Id.*; *see also Cleburne*, 473 U.S. at 446. Courts look for this link, or rational basis, "to ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

Proposition 8 cannot survive even rational basis review. Excluding same-sex couples from marriage does not further the well-being of *any* children. In fact, it does just the opposite. The reality is that same-sex couples are raising children. Not only do they parent those children equally as well as different-sex couples, but denying the significant benefits and protections afforded by marriage actually harms these families. In addition, the notion of using procreative abilities to limit access to marriage is inconsistent with our legal tradition, as the desire or ability to procreate has never been a prerequisite for marriage. Moreover, drawing the line at same-sex couples – as opposed to other couples who cannot or will not procreate – makes little sense.[7]

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[7] Petitioners' reliance on these theories to support Proposition 8 is unsurprising, given the success these theories have enjoyed in the past. In fact, some of the *Amici* States advanced these theories in prior litigation involving state constitutional challenges to their marriage laws. Most of the *Amici* States now recognize marriage

A. Excluding Same-Sex Couples From Marriage Does Not Further The Well-Being Of Children.

All states share a paramount interest in the healthy upbringing of children and the formation of stable households. However, the exclusion of same-sex couples from marriage works against this interest.

Amici States reject the suggestion that the "optimal" setting for raising children necessarily includes both a biological mother and father. Indiana Br. 23-25; Michigan Br. 10-12. This view is disconnected from the "changing realities of the American family." *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality) (recognizing that "[t]he composition of families varies greatly from household to household"). The fact is that both different-sex and same-sex couples become parents in a variety of ways. For example, many couples become parents through assistive technology, surrogacy, or adoption. Moreover, excluding same-sex couples from the legal protections, dignity and benefits of marriage does not encourage more different-sex couples to marry or raise children.

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between same-sex couples, whether as a result of judicial decision, legislation, or popular referendum. *See, e.g.*, Ch. 95, § 2, 2011 McKinney's N.Y. Laws 749; 2012 Wash. Sess. Laws Ch. 3, as approved by Referendum Measure No. 74 (Wash. 2012); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Based on our evolved understanding of the importance of marriage for all families – and for many *Amici*, our experience licensing marriages of same-sex couples – all of the *Amici* States agree that the theories advanced in support of Proposition 8 are unpersuasive and without basis.

Thus, rather than advance the proffered rationale (encouraging both biological parents to raise their children together), laws like Proposition 8 only impede same-sex couples in their efforts to provide their children with stable family environments.[8] *See Goodridge*, 798 N.E.2d at 963-964 ("[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."); *see also Baker*, 744 A.2d at 882; *Andersen v. King Cnty.*, 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting) ("children of same-sex couples . . . actually do and will continue to suffer by denying their parents the right to marry").

Parties on both sides of this case have acknowledged that children benefit when their parents are able to marry. Petitioners' own expert witness testified 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 (Blankenhorn); *see also* JA 910-911 (Blankenhorn). A statewide survey conducted by the Massachusetts Department of Public Health confirmed this conclusion, finding that the children of married same-sex couples "felt more secure and protected" and saw "their families as being validated or legitimated by society or the

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[8] According to the 2010 Census, 17% of same-sex households (over 111,000) include at least one child. The Williams Institute, *United States Census Snapshot*: *2010*, at 3, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf. (last visited Feb. 26, 2013). Many of these families live in states that offer no legal recognition to the couples. *See, e.g.*, Sabrina Tavernise, *Parenting by Gays More Common in the South, Census Shows*, N.Y. Times, Jan. 19, 2011, at A1.

government." Christopher Ramos, et al., *The Effects of Marriage Equality in Massachusetts: A Survey of the Experiences and Impact of Marriage on Same-Sex Couples*, The Williams Institute, May 2009, at 9, http://williamsinstitute.law.ucla.edu/experts/lee-badgett/effects-marriage-equality-masurvey/.

Proposition 8 deprives the children of same-sex couples of the benefits of being raised in a secure, protected family unit with two married parents. In doing so, it works against the states' efforts to "strengthen the modern family in its many variations." *Goodridge*, 798 N.E.2d at 963 (collecting examples in Massachusetts). Proposition 8 does not promote the well-being of children; it does just the opposite.

B. Same-Sex Parents Are As Capable As Different-Sex Parents Of Raising Healthy, Well-Adjusted Children.

The implication that same-sex couples are somehow less suitable parents is contrary to the experience of the *Amici* States and scientific consensus. A similar argument was advanced, and rejected, in *Loving*, where Virginia defended its anti-miscegenation law based on its concern for the well-being of children "who become the victims of their intermarried parents." Brief for Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931, at *47-48. The argument likewise should be rejected here.

The overwhelming scientific consensus based on decades of peer-reviewed research establishes that children raised by same-sex couples fare as well as children raised by different-sex couples. JA 583-584,

598-599 (Lamb); *see also Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79, 87 (Fla. Dist. Ct. App. 2010) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise."); *Varnum v. Brien*, 763 N.W.2d 862, 899 n.26 (Iowa 2009). In fact, the scientific research that has directly compared gay and lesbian parents with heterosexual parents has consistently shown gay and lesbian parents to be equally fit and capable. JA 598-599 (Lamb). Numerous organizations representing mental health and child welfare professionals and physicians have repeatedly confirmed that same-sex parents are as effective as different-sex parents at raising psychologically healthy and well-adjusted children and adolescents.[9]

In addition, there is no basis for the assertion that children need the traditional male and female role models described by Petitioners, or that children need mothers and fathers to perform distinct roles in their lives.[10] JA 587 (Lamb). Moreover, this Court has

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[9] These organizations include the most well-respected psychological and child-welfare groups in the nation: the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the Psychological Association, the American Psychoanalytic Association, the National Association of Social Workers, the Child Welfare League of America, and the North American Council on Adoptable Children.

[10] Even if it were true, California (like many other states) allows same-sex (and different-sex) couples to raise children without

repeatedly rejected gender-based stereotyping by the government. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729-730 (2003) (finding that government action based on stereotypes about women's greater suitability or inclination to assume primary childcare responsibility is unconstitutional); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (rejecting "overbroad generalizations of the different talents, capacities, or preferences of males and females" as justifying discrimination) (citations omitted); *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972) (striking down a statute that presumed unmarried fathers to be unfit custodians).

Nor is there any basis for the suggestion that children necessarily benefit from being raised by two biological parents. JA 601-602 (Lamb). The three most important factors predicting the well-being of a child are (1) the relationship of the parents to one another, (2) the parents' mutual commitment to their child's well-being, and (3) the social and economic resources available to the family. JA 587-588 (Lamb); *see also* Pet. App. 263a. These factors apply equally to children of same-sex and different-sex parents, and they apply whether one, both, or neither of these parents are biological parents.[11]

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being married. Thus, barring same-sex couples from marriage does nothing to advance the purported interest in ensuring traditional gender role models.

[11] Of course, many children raised by same-sex parents are raised by one biological parent and his or her partner. Refusing to allow these parents to marry will not make it more likely that the

As a result, Proposition 8 impedes the very interest in children that Petitioners purport to serve. Equal access to marriage for same-sex couples, instead, promotes the factors most determinative of a child's well-being by strengthening the relationship between parents who wish to marry and enriching the social and economic resources available to the family.

C. Promoting Responsible Procreation Does Not Justify Restricting Marriage To Different-Sex Couples Only.

By singling out responsible procreation as the states' only legitimate interest, Petitioners seek this Court's recognition, for the first time, of a restriction on marriage that is based on the ability to procreate. This argument is antithetical to our legal tradition. Never before has the ability or desire to procreate been a prerequisite for entry into marriage. Pet. App. 211a (citing *In re Marriage Cases*, 183 P.3d at 431); *see also Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (recognizing purposes of marriage that have no connection to procreation, including the "expression[] of emotional support and public commitment," "exercise of religious faith," "expression of personal dedication," and even "the receipt of government benefits").

While states have long allowed parties to void marriages where one spouse is physically incapable of intercourse, *e.g., Martin v. Otis*, 124 N.E. 294, 296

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biological parent will instead marry his or her donor or surrogate, for example.

(Mass. 1919); *Ryder v. Ryder*, 28 A. 1029, 1030 (Vt. 1894), the inability to produce children has not been grounds for annulment, *e.g.*, *Lapides v. Lapides*, 171 N.E. 911, 913 (N.Y. 1930) ("inability to bear children" does not justify an annulment under New York law).[12] Similarly, some states expressly presume infertility after a certain age for purposes of disposing of property, but do not presume that these individuals are not qualified to marry. *E.g.*, N.Y. Est. Powers & Trusts Law § 9-1.3(e) (women over age 55); Il. St. Ch. 765 § 305/4(c)(3) (any person age 65 or older). Individuals who may not have the opportunity to procreate (because they are incarcerated, for example) still have the right to marry. *Turner*, 482 U.S. at 94-99. Even parents who are "irresponsible" about their obligations to their children and their procreative activities have the right to marry. *Zablocki v. Redhail*, 434 U.S. 374, 389-391 (1978).

It is certainly true that states have an interest in ensuring that couples make responsible choices about having children, as we all want children to be raised by loving, capable parents. However, that is not what Petitioners mean by "responsible procreation," and Proposition 8 is not rationally related to the interest as they describe it. Petitioners argue that the sole

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[12] Some courts have permitted annulment after one spouse knowingly misrepresented her ability to procreate as an inducement to marry. *See, e.g., Vileta v. Vileta,* 128 P.2d 376 (Cal. 1943). This precedent is not inconsistent with the distinction between sexual capability and infertility drawn above, as fraud in the inducement has historically been a separate grounds for the voiding of marriages. *See, e.g., Reynolds v. Reynolds*, 85 Mass. 605 (1862).

purpose of marriage is to protect the children who may be produced by different-sex couples engaging in sexual intercourse. Considering this purpose, Proposition 8's refusal to recognize same-sex marriages does not merely create an "imperfect fit between means and ends," *Heller*, 509 U.S. at 321, but rather pursues the supposed objective of promoting responsible procreation in a manner that is "so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Romer*, 517 U.S. at 633 (invalidating discriminatory law because it is "at once too narrow and too broad").

Many different-sex couples either cannot procreate or choose not to, yet Proposition 8 is concerned with none of them. For instance, Proposition 8 does not restrict from marriage the many different-sex couples who are infertile.[13] Proposition 8 does not restrict the elderly or the incarcerated from marrying, either. In addition, Proposition 8 fails to account for the myriad ways in which couples of all kinds are having children, whether through fertility treatments, surrogacy, or adoption. Yet, only same-sex couples who have children in these manners are subject to disparate treatment. If it is the case that states only recognize marriages to further the interest in protecting the children born out of sexual intimacy among different-sex couples, as Petitioners suggest, then it makes no

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[13] The Centers for Disease Control and Prevention estimate that about 10% of American women ages 15-44 have difficulty getting pregnant or staying pregnant. Centers for Disease Control and Prevention, *Infertility FAQ's*, http://www.cdc.gov/reproductivehealth/infertility/ (last visited Feb. 26, 2013).

sense to recognize marriages where one or both spouses are incapable or unwilling to bear children.

To save Proposition 8's misfit justification, Petitioners and their *amici* argue that extending marriage to different-sex couples who lack the ability or desire to procreate nonetheless promotes responsible procreation by "modeling" the optimal family structure. Indiana Br. 18-19; Michigan Br. 10-12. It defies reason to conclude that allowing same-sex couples to marry will diminish the example that married different-sex couples set for their unmarried counterparts. Both different- and same-sex couples model the formation of committed, exclusive, romantic relationships, and both establish stable families, with shared resources, based on mutual love and support. At best, this "modeling" theory is so attenuated that the distinction it supposedly supports is rendered arbitrary and irrational. *Cleburne*, 473 U.S. at 446. At worst, the theory is a poorly disguised attempt to codify discriminatory views as to what constitutes an ideal family.

III. SPECULATION ABOUT THE EROSION OF MARRIAGE CAUSED BY ALLOWING SAME-SEX COUPLES TO MARRY IS DEMONSTRABLY FALSE

Speculation that removing state restrictions on marriage between same-sex couples will erode the institution, as measured by the markers cited by Petitioners – marriage rates, divorce rates, and the percentage of nonmarital births – does not justify Proposition 8. Nor does allowing same-sex couples to marry preclude states from otherwise limiting who may

enter into a civil marriage. The experience of the *Amici* States who recognize civil marriage for same-sex couples demonstrates that Petitioners' concerns about the future of marriage are unfounded, and that the states can and do continue to impose reasonable restrictions on who may marry.[14]

A. The Institution Of Marriage Remains Strong In States That Allow Same-Sex Couples To Marry.

The *Amici* States' experience with equal marriage rights controverts the Petitioners' and their *amici*'s dire predictions about the future of the institution of marriage. That experience should carry substantially more weight than surmise and conjecture in the constitutional analysis of Proposition 8. *See, e.g.*, *Plyler*, 457 U.S. at 228-229 (rejecting hypothetical justifications for law excluding undocumented children as unsupported). The *Amici* States' experience proves that Petitioners' hypothetical justifications for excluding same-sex couples from civil marriage are entirely implausible. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("[P]arties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational[.]") (citation omitted).

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[14] Although the data from states that allow same-sex couples to marry cover only a relatively short period of time, there is nothing to suggest that these data are inaccurate or that trends reflected in these data are likely to change.

1. *Marriage Rates*: Marriage rates in states that permit same-sex couples to marry have generally improved. Despite a pre-existing national downward trend in marriage rates, the most recent data available (from 2011) indicate an increase – or, at a minimum, a deceleration in the downward trend – in all seven states with marriage equality at the time (Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York and Vermont).[15]

Typically, states have seen a significant increase in marriage rates during the first, and sometimes, second year after legalizing same-sex marriage. For example, the marriage rate in Massachusetts jumped from 5.6 to 6.5 marriages per thousand residents (a 16.1% increase) in 2004, the first year same-sex couples were permitted to marry, and remained at 6.2 in 2005. In Vermont, the marriage rate increased from 7.9 to 8.7 in the first year, and then rose again to 9.3. In the District of Columbia, the marriage rate jumped from 4.7 to 7.6 (a 61.7% increase) in 2010, the first year marriage licenses were issued to same-sex couples.[16]

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[15] Centers for Disease Control and Prevention, National Vital Statistics System, *Marriage Rates by State: 1990, 1995, and 1999-2011*, http://www.cdc.gov/nchs/data/dvs/marriage_rates_90_95_99-11.pdf (last visited Feb. 26, 2013) [hereinafter, CDC Marriage Rates].

[16] CDC Marriage Rates, *supra* note 15; Centers for Disease Control and Prevention, National Vital Statistics System, *Divorce Rates by State, National Marriage and Divorce Rate Trends 2000-2011*, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited Feb. 26, 2013) [hereinafter, CDC National Trends]; Chris Kirk & Hanna Rosin, *Does Gay Marriage Destroy Marriage? A Look at the Data*, Slate.com, May 23, 2012, http://www.slate.com/

In Massachusetts, where marriage equality has been the law for nearly a decade (almost twice as long as any other state), the marriage rate stabilized following the legalization of same-sex marriage, but remained higher than the national trend would otherwise predict. From 2005 to 2007, the average annual marriage rate in Massachusetts (6.0) was higher than the average rate for the three years preceding the extension of marriage rights to same-sex couples (5.9). Massachusetts's marriage rates for 2009 and 2010 were the same as the rate for 2003, the year before same-sex couples could marry. And, in six of the seven states that permitted same-sex couples to marry as of 2011, the marriage rate remained at or above the level it was the year prior to when same-sex couples could marry. Meanwhile, the national average marriage rate declined steadily from 7.8 in 2005 to 6.8 in 2011. Thus, contrary to Petitioners' predictions, in states allowing same-sex couples to marry, there appears to be a general *improvement* in marriage rates or at least a deceleration of the national downward trend.[17]

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articles/double_x/doublex/2012/05/does_gay_marriage_affect_marriage_or_divorce_rates_.html [hereinafter, Kirk & Rosin].

[17] Kirk & Rosin, *supra* note 16; CDC Marriage Rates, *supra* note 15. *See also* Jonathan Eggleston, *Does the Legalization of Same-Sex Marriage or Civil Unions Affect Divorce Rates?*, July 2011 (Working Paper), http://people.virginia.edu/~jse4fp/Eggleston%20Does%20Same-Sex%20Marriage%20Affect%20Divorce%20Rates.pdf (concluding that legalization of same-sex marriage had no negative effect on marriage or divorce rates).

2. *Divorce Rates*: Similarly, the *Amici* States' experience directly contradicts Petitioners' suggestion that allowing same-sex couples to marry leads to increased rates of divorce. In four of the seven states that allowed same-sex couples to marry as of 2011, divorce rates for the years following legalization stayed at or below the divorce rate for the year preceding it, even as the national divorce rate increased.[18] In Massachusetts, the divorce rate decreased from 2.5 per thousand residents in 2003 to as low as 2.0 in 2008, four years after Massachusetts began giving marriage licenses to same-sex couples. Connecticut's divorce rate dropped from 3.4 in 2008 to 2.9 in 2010, a change of 14.7%. Similarly, Iowa, New Hampshire, and Vermont all saw significant drops in their divorce rates during the first year in which same-sex couples could marry. Iowa, for example, saw its lowest number of divorces since 1970.[19]

Moreover, as of 2011, six of the seven jurisdictions that permitted same-sex couples to marry (Connecticut, the District of Columbia, Iowa, Massachusetts, New York and Vermont) had a divorce rate that was at or below the national average. In fact, four of the ten states with the lowest divorce rates in the country were states that allowed same-sex couples to marry. Iowa

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[18] Kirk & Rosin, *supra* note 16.

[19] Centers for Disease Control and Prevention, National Vital Statistics System, *Divorce Rates by State: 1990, 1995, and 1999-2011*, http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf (last visited Feb. 26, 2013) [hereinafter, CDC Divorce Rates]; Rod Boshart Lee, *Marriages Up, Divorces Down in Iowa*, Sioux City Journal, July 23, 2010.

and Massachusetts had the lowest and third-lowest rates respectively.[20]

In direct contrast, states that have affirmatively excluded same-sex couples from marriage have some of the highest divorce rates in the country. While divorce rates declined in many states between 2003 and 2008, that decline was largely confined to states that had not passed a constitutional ban on marriage for same-sex couples. Divorce rates increased by 0.9% in states with constitutional bans during that five-year period, while states without bans witnessed an 8.0% decrease in their divorce rates.[21] As of 2011, states with bans on marriage between same-sex couples comprised nineteen of the twenty-four states (79%) with the highest divorce rates in the country.[22]

3. *Nonmarital Births*: Petitioners' suggestion that allowing same-sex couples to marry will lead to an increase in nonmarital births is likewise unsupported by the facts. Massachusetts's nonmarital birth rate has been well below the national average for years, and that did not change after same-sex couples began to marry. In fact, as of 2011, the most recent year for which nonmarital birth data are available, five of the

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[20] CDC Divorce Rates, *supra* note 19; CDC National Trends, *supra* note 16; Kirk & Rosin, *supra* note 16.

[21] Nate Silver, *Divorce Rates Higher in States with Gay Marriage Bans*, N.Y. Times, FiveThirtyEight Blog, Jan. 12, 2010, http://www.fivethirtyeight.com/2010/01/divorce-rates-appear-higher-in-states.html.

[22] *See* CDC Divorce Rates, *supra* note 19.

seven states that allowed same-same couples to marry (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) had nonmarital birth rates below the national average.[23]

The total number of births to unmarried women nationally increased from 1940 through 2008. Notably, it has declined since. The drop from 2010 to 2011 was the third consecutive decline, totaling 11% since 2008. During that same time period, seven states (including California) extended marriage to same-sex couples. There is simply no correlation between extending marriage to same-sex couples and an increase in nonmarital births. In fact, in Iowa, the percentage of women having children outside of marriage actually decreased from 35.2% in 2009, the first year same-sex couples could marry, to 34.2% the following year. The rate decreased again in 2011 to 33.8%.[24]

More fundamentally, Petitioners' position is illogical. According to 2010 census data from Massachusetts, there are 8,863 same-sex couples who identify as married. Of those couples, 26% are raising

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[23] *See* Brady E. Hamilton, Joyce A. Martin, & Stephanie J. Ventura, *National Vital Statistics Reports, Birth: Preliminary Data for 2011*, Vol. 61, No. 5, Table I-1, Oct. 3, 2012 http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_05_tables.pdf.

[24] Hamilton, et al., *supra* note 23, at 3*;* Brady E. Hamilton, Joyce A. Martin, & Stephanie J. Ventura, *National Vital Statistics Reports, Birth: Preliminary Data for 2009*, Vol. 59, No. 3, Table I-2, Dec. 21, 2010, http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_03.pdf.

at least one child.[25] The data are similar for Connecticut and Iowa, for example, where a respective 26% and 27% of married same-sex couples are raising children.[26] Therefore, extending marriage to same-sex couples only results in *more* children being raised by married parents.

B. Allowing Same-Sex Couples To Marry Does Not Threaten States' Ability To Regulate Marriage.

It is not true that "once the natural limits that inhere in the relationship between a man and a woman can no longer sustain the definition of marriage," it becomes virtually impossible for states to limit entry into marriage in any meaningful way. Indiana Br. 36. Rather, as *Loving* instructs, states simply may not circumscribe access to marriage based on a personal trait that itself has no bearing on one's qualification or ability to consent to a marriage. Other limitations remain appropriate and constitutionally permissible.

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[25] The Williams Institute, *Massachusetts Census Snapshot*: *2010*, at 2-3, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Massachusetts_v2.pdf (last visited Feb. 26, 2013).

[26] The Williams Institute, *Connecticut Census Snapshot*: *2010*, at 3, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Connecticut_v2.pdf (last visited Feb. 26, 2013); The Williams Institute, *Iowa Census Snapshot*: *2010*, at 3, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Iowa_v2.pdf (last visited Feb. 26, 2013).

In *Loving*, this Court characterized Virginia's anti-miscegenation laws as "rest[ing] solely upon distinctions drawn according to race," and proscribing "generally accepted conduct if engaged in by members of different races." 388 U.S. at 11. Proposition 8 similarly restricts the right to marry by drawing distinctions according to gender and by using that personal characteristic to define an appropriate category of marital partners.[27] When viewed this way, the suggestion that the argument in favor of recognizing same-sex marriage "contains no limiting principle for excluding other groupings of individuals," is clearly wrong. Indiana Br. 3.

Removing gender from spousal restrictions does not result in all groupings of adults having an equal claim to marriage. In furtherance of the interest in maintaining the mutuality of obligations between spouses and administrative efficiency, states may continue to lawfully limit the number of spouses one may have at any given time. Unlike race or gender, the fact of being married is not an inherent trait, as marital status can be changed. States similarly may continue to lawfully prohibit marriages between certain relatives in order to guard against a variety of public health outcomes. Consanguinity itself is not a personal trait, but rather defines the nature of the relationship between particular people. Finally, in

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[27] It is not necessary, for purposes of this analysis, to accept that Proposition 8 and similar laws involve suspect classifications. The point is not that these laws draw suspect lines, but that they draw upon a personal characteristic, unrelated to one's qualification for marriage (*i.e.*, ability to consent or current marital status), to define an individual's marriage choices.

order to protect children against abuse and coercion, states may regulate entry into marriage by establishing an age of consent. Age likewise is not an intrinsic trait, as it is constantly changing and the restriction therefore is temporary. Thus, even after gender is removed from consideration, other state regulations continue to advance important governmental interests and remain valid.

It is no defense for Petitioners and their *amici* to argue that Proposition 8 and similar laws do not discriminate based on gender or sexual orientation because, in theory, gays and lesbians have the same right to marry as heterosexual men and women. Opponents of same-sex marriage are not the first to argue that symmetry in a law's restrictions precludes a finding of invidious discrimination. In *Loving*, Virginia argued that because its anti-miscegenation laws punished people of different races equally, those laws, despite their reliance on racial classifications, did not constitute discrimination based on race. 388 U.S. at 8. In reality, anti-miscegenation laws in Virginia and elsewhere were designed to deprive a targeted minority of the full measure of human dignity and citizenship by denying them the freedom to marry the partner of their choice. Whatever their motives, Petitioners and their *amici* would achieve the same result here.

The argument that Proposition 8 does not discriminate fails to acknowledge the actual and symbolic significance of marriage, including the paramount importance of choice in one's partner. Quite simply, Proposition 8 prevents gays and lesbians from fully realizing what this Court has described as

"one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. This result is in clear conflict with our Constitution.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Ninth Circuit.

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