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

AMICUS CURIAE BRIEF OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, THE NORTHERN CALIFORNIA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, AND THE ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The interest of *Amici Curiae* in this case is the protection of children of same-sex couples who wish to marry. The American Academy of Matrimonial Lawyers ("AAML") is a national organization of nearly 1,600 family law attorneys in the fifty states. The AAML was founded in 1962 by highly-regarded family law attorneys "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." The AAML has undertaken many projects and published handbooks and articles in furtherance of marriage and parenting, including the *Model Parenting Plan*, *Making Marriage Last*, *Focus on Forever*, *The Voices of Children During Divorce: A Client Handbook*, and *Stepping Back from Anger: Protecting Your Children During Divorce*.

In 2004, the AAML adopted a resolution formally "support[ing] the legalization of marriage between same-sex couples and the extension to same-sex couples who marry and their children of all of the legal rights and obligations of spouses and children of spouses." In 2012, the AAML adopted a resolution in favor of the proposed Respect for Marriage Act of 2011 (S.598 and H.R. 1116) to repeal the Defense of

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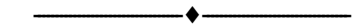
[1] This brief was prepared entirely by the listed authors, and no counsel for any party authored any part of it; nor was any financial contribution made by any party or counsel for any party. All parties have blanket consents with this court.

Marriage Act and to ensure respect for state regulation of marriage. The AAML has filed amicus briefs in support of marriage for same-sex couples in Maryland (*Conaway v. Deane*, 932 A. 2d 571 (Md. App. 2007)); Iowa (*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)); California (*In re Marriage Cases*, 183 P. 3d 384 (Cal. 2008)); and in the Ninth Circuit below in this case.

The Northern California Chapter of the AAML consists of 77 fellows of AAML who are California certified family law specialists and who practice family law in Northern California.

The Association of Certified Family Law Specialists ("ACFLS") is comprised of 614 members who are all certified by the California State Bar as specialists in family law. The purpose of the ACFLS is to promote excellence in the practice of family law, to promote and preserve the family law specialty within the California bar, and to provide a source of expertise for the improvement of the administration of justice and family law matters concerning the practice of family law for the bar, the courts and the legislature.



SUMMARY OF ARGUMENT

These Amici are family law attorneys whose focus is on the welfare of children. From that perspective, the procreation and parenting-based justifications offered by Petitioners not only do not justify a ban on same-sex couples marrying; these points

affirmatively serve to emphasize why their parents should be allowed to marry. Petitioners' notion that marriage exists primarily to channel irresponsible procreation into marriage demeans the institution of marriage. California law, which values the quality of the parent's relationship over mere biology, belies Petitioners' argument that the ban is justified because children are optimally reared by their biological parents. Petitioners correctly argue that marriage fosters stability for children – but this is a powerful reason to permit marriage for same-sex couples, not to ban it. When same-sex couples are denied the right to marry, their children suffer serious, tangible harm.

ARGUMENT

I. Petitioners do not Provide a Rational Basis for Depriving Same-Sex Couples of the Right to Marry

Even assuming, *arguendo*, that rational basis review is appropriate here (and *Amici* make no such concession), Petitioners cannot satisfy even that most lenient of standards. Petitioners' asserted rational basis for California's limitation of marriage to opposite-sex couples rests on a tripod of arguments: (1) that marriage promotes responsible procreation; (2) that children should be reared by their biological mother and father; and (3) that marriage promotes a stable environment for the rearing of children. As will be shown, none of these propositions can withstand the weight of analysis. The effect of limiting marriage is

to harm the children of same-sex unions and deprive them of the protections afforded by marriage.

A. Responsible Procreation does not Justify Limiting Marriage

1. Marriage is More than Mere Procreation

Marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); accord, *Elden v. Sheldon*, 758 P. 2d 582, 586 (Cal. 1988). It is "among the decisions that an individual may make without unjustified governmental interference[.]" *Zablocki v. Redhail*, 434 U.S. 374, 386 (1977). Marriage is "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." *Marvin v. Marvin*, 557 P. 2d 106, 122 (Cal. 1976).

In *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), this Court determined that prison inmates had a Constitutionally protected right to marry for purposes that are wholly unrelated to natural procreation, such as "expressions of emotional support and public commitment. . . ." In *Griswold*, the Court found that the use of contraceptives by married couples is Constitutionally protected, effectively guaranteeing a right to marriage without procreation. 381 U.S. 479. In *Zablocki*, this Court described the fundamental right to marry as "the most important relation in

life," "the foundation of the family and society, without which there would be neither civilization nor progress." 434 U.S. at 384. The Court further noted in *Zablocki* that, if the right to procreate meant anything, it must imply a concomitant right to marry because Wisconsin at that time had a statute that prohibited sexual relations outside marriage. *Id*.

2. Society's Interest in "Responsible Procreation" Cannot Justify Limiting Marriage to Opposite-Sex Couples

Petitioners' reliance upon "responsible procreation" as a justification for depriving same-sex couples of the right to marry is misplaced because it ignores the fact that the law recognizes justifications for marriage that have absolutely nothing to do with procreation. "California, like every other state, has never required that individuals entering a marriage be willing or able to procreate." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 956 (N.D. Cal. 2010). Even worse, Petitioners' cramped focus on responsible procreation as a justification for marriage – and the concomitant notion that only heterosexual couples procreate irresponsibly – demeans the institution of marriage itself. They would deny same-sex couples all of spiritual and other benefits of marriage only to channel the irresponsible sexual behavior of some opposite-sex couples. Marriage is entitled to more dignity than Petitioners accord it.

To risk stating the obvious: Marriage of same-sex couples does not affect unintended pregnancies among opposite-sex couples, nor is marriage of same-sex couples rationally related to the "irresponsible" procreative activities that opposite-sex couples commit outside of marriage. The link that Petitioners assume simply does not exist.

It is beyond cavil that society has a strong interest in promoting the conception and responsible rearing of future children. However, the methods by which children are conceived, or whether they were adopted, is far less important than the benefits that children receive when they are raised by two parents in a stable and loving home. *Amici* agree with Petitioners that state recognition of the relationship between two adults "powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring" and that marriage provides "a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." Br. 34-35. Petitioners fail to realize that these values provide compelling reasons to *encourage* same-sex marriage – not outlaw it.

Petitioners are flat wrong when they assert (Br. 38) that same-sex relationships do not implicate the State's interest in childrearing in the same way that opposite-sex relationships do. The California Supreme Court has directly ruled to the contrary in applying

paternity presumptions to grant parent status to a lesbian couple:

> There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to social security, health insurance, survivors' benefits, military benefits, and inheritance rights. . . . By recognizing the value of determining paternity, the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public.

Elisa B. v. Superior Court, 117 P. 3d 660, 669 (Cal. 2005). Any linkage of the right to marry to responsible parenthood is an argument *in favor of* recognition of marriage for same-sex couples.

B. California does not Elevate Biology over Parenting Behavior

The second leg of Petitioners' tripod is that children should be reared by their biological mother and father. If California's limitation of the right to marry were based on such rationale, one might reasonably expect that California family law would echo such preference for biological over non-biological parents. Yet this is not the case. California parentage law

emphasizes the connection of childbirth to marriage and elevates responsible commitment to parenting over mere biology.

For married couples, a child born of the marriage, unless the husband is impotent or sterile, is conclusively presumed to be a child of the marriage. Cal. Fam. Code § 7540. A child of a same-sex couple who have registered as domestic partners is recognized as a child of the couple. Cal. Fam. Code § 297.5(d). If a child born during marriage is demonstrated to be a biological child of another man, the stability provided to the child by the marriage outweighs the interests of the biological father. *Dawn D. v. Superior Court*, 952 P. 2d 1139 (Cal. 1998). Indeed, this Court itself has upheld California's preference for legal relationship over biology in determining paternity. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) ("[E]xcluding inquiries into the child's paternity that would be destructive of family integrity and privacy."). These cases demonstrate that irresponsible procreation occurs both inside and outside of marriage, and that laws protecting parentage relate to the marriage, rather than to biology.[2]

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[2] For unmarried persons, parentage is determined according to the Uniform Parentage Act ("UPA"), which California adopted at Cal. Fam. Code § 7611. The criteria for qualifying as a presumed parent are: (a) marriage; (b) and (c) attempt to marry in a solemnized ceremony in apparent compliance with the law; and (d) receiving the child into his home and openly holding out the child as his natural child. "The UPA distinguishes between 'alleged,' 'biological,' and 'presumed' fathers. (citation)

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"The paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family." *In re Jesusa V.*, 85 P. 3d 2, 20 (Cal. 2004), quoting *In re Salvador M.,* 111 Cal. App. 4th 1353, 1357-1358, 4 Cal. Rptr. 3d 705, 708 (2003). California law has long held that an alleged parent's commitment to the child's upbringing is far more important than his (or her) biological connection to that child. See *In re Nicholas H.*, 46 P. 3d 932 (Cal. 2002). The rule on parentage in cases of artificial insemination likewise favors the relationship over biology. Cal. Fam. Code § 7613.

In short, Petitioner's notion that children should be reared by their biological mother and father does not square with California law or policy. Because California parentage law favors marriage rather than biology, and does not discriminate whether the parents are of same or opposite sex, biological parentage cannot be a legitimate rationale for limiting marriage to opposite-sex couples.

Presumed father status ranks highest." *In re D.A.,* 204 Cal. App. 4th 811, 826 Cal. Rptr. 3d 222 (2012). These criteria have been adopted by over 20 states, either through adoption of the 1973 version or the 2002 version of the UPA. California applies section 7611(d) to women in same-sex relationships in similar manner as to opposite-sex couples. *Elisa B. v. Superior Court, supra.* The relationship of the man to the child trumps biology. *In re Jesusa V.*, 85 P. 3d 2 (Cal. 2004), Cal. Fam. Code § 7648.

C. That Marriage Promotes a Stable Environment for Children Cannot Justify Limiting Marriage to Opposite-Sex Couples

The third leg of Petitioners' argument is that marriage promotes a stable environment for the rearing of children. Amici agree that marriage promotes a stable environment for children; it is exactly why these Amici seek to be heard in this matter. This public policy benefitting children is *thwarted* when the right of marriage is denied to same-sex couples. Same-sex couples are already the parents of children, and these children need and deserve the same stability as children born to opposite-sex couples.[3] As set forth in section II below, these children are harmed by their parents' inability to marry.

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[3] A significant and growing number of same-sex persons are affected. During 2008, approximately 18 percent of same-sex couples in California were raising children, with 37,300 of those children then being under the age of eighteen. *Perry*, 704 F. Supp. 2d at 968-9. The 2010 Census reports 125,516 same-sex households in California, of whom 27,829 (approximately 21.7 percent) are persons living with their own children under the age of 18; the comparable national figures are 901,997 same-sex households, of whom a total of 204,443 (22.6 percent) are with their children. http://www.census.gov/hhes/samesex/files/ss-report.tables.xls. See also Gary J. Gates, The Williams Institute, "LGBT Parenting in the United States," Feb. 2013, http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

D. Petitioners' Notion of Optimal Parenting Cannot Justify Marriage Discrimination

Petitioners further argue that Proposition 8's separate and unequal treatment is justified because "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society." Brief of Petitioners ["Br."] 37 (citation omitted). That may well be true, but there is a gaping hole in Petitioners' logic. Even assuming, *arguendo*, that the "optimal social structure" for child development is for the child to be reared in a home with her biological father and biological mother, Petitioners fail to demonstrate how denying legal recognition to same-sex marriages does anything to promote that optimal social structure. If marriage for same-sex couples were banned, leaving marriage between opposite-sex couples as the only marriage available, homosexual Californians would not simply abandon their sexual orientation and choose to marry a person of the opposite sex, thereby increasing the number of environments asserted to be "optimal" for raising children. A law that restricts marriage only to opposite-sex couples does not increase the number of opposite-sex households rearing children, nor does it decrease the number of same-sex households with children. Even if the "optimal" environment for a child were to be reared in a home with her biological father and biological mother, Proposition 8 does not increase the prevalence of such "optimal" households.

The proper comparison is whether legal recognition of a supposedly "sub-optimal" environment would be better for the child than what the *actual alternative would be for that child.* And here, the alternative is not that a child being reared by parents in a same-sex relationship is suddenly going to be swooped up and deposited into the assertedly "optimal" environment of the home of an opposite-sex married couple. The alternative is that, rather than having that child's household environment (two loving same-sex parents) being accorded full and legitimate status in the eyes of the law, that child instead will be reared in the very same home, but with Proposition 8's indelible mark of inferiority. Accordingly, there is simply no need for this Court to determine whether children reared in families headed by two loving opposite-sex parents fare better than children reared in families headed by two loving same-sex parents. Either way, Proposition 8 is irrational.[4]

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[4] To recognize this irrationality, the Court need not revisit the supposed "controversy" about whether sexual orientation is an immutable characteristic. Consider, for example, if California's marriage restriction were based on an indisputably non-immutable trait, such as educational attainment. Assuming the state could present ironclad studies concluding the optimal environment for a child is to be reared in a two-parent household in which at least one of the parents has received a college degree, would Petitioners seriously argue this would provide a constitutionally-acceptable basis for California to ban marriage between mere high school graduates? Certainly not. Can it ban marriage for other groups of people who may perhaps be deemed

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Petitioners complete their illogical "optimal child-rearing" journey by arguing that disparate treatment is constitutionally permissible because "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Br. 39 (citation omitted). And just how are loving same-sex couples "different in fact or opinion" from opposite-sex couples, according to Petitioners? Because, Petitioners assert, opposite-sex couples are more likely to produce unwanted pregnancies than are same-sex couples. According to that bizarre line of thinking, a state could enact disparate marriage rights based on individuals' particular levels of fertility or impotency.

In the final analysis, Petitioners' obsessive focus on accidental pregnancies is not merely illogical – it is insulting. It demeans a hallowed, ancient institution to say that the core purpose of marriage is to provide the opportunity for shotgun weddings. For a group proclaiming that its goal is merely to "defend" and "protect" and "honor" the institution of marriage, Petitioners certainly present an undignified view of it.

II. Children are Harmed When Their Same-Sex Parents are not Allowed to Marry

Under California law, domestic partnerships are intended for same-sex couples as an institution that

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"sub-optimal" – the poor, the disabled, those who fail to pay their child support?

is separate from marriage, but its legal equivalent. Cal. Fam. Code § 297.5. However, this separate institution is inherently unequal, partly because it subjects same-sex couples and their children to economic burdens that other families do not suffer. Moreover, the law stigmatizes the children of same-sex couples by depriving their families of the recognition and legal protections that other families enjoy.

Same-sex couples suffer economic burdens that result from their inability to marry.[5] Under federal law alone, there are 1,138 statutory provisions that consider marital status in determining the award of various benefits, rights, and privileges. *Perry*, 704 F. Supp. 2d at 962.

The economic burdens imposed upon same-sex couples also burden their children. *Id.* at 973. For example, these children are harmed by the unequal estate tax treatment given to their parents because, as compared to families headed by married, opposite-sex

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[5] For example: (1) Married couples enjoy advantages under Social Security that are not available to same-sex couples. *Perry*, 704 F. Supp. 2d at 962. Social Security benefits may pass to a worker's spouse, and even to a worker's divorced spouse, but not to a same-sex couple, even if they are registered domestic partners. See 20 C.F.R. § 404.301 (describing family members who are eligible to receive benefits). (2) Same-sex couples do not enjoy joint property ownership as do married couples. Thus, same-sex couples must use more costly and complicated transactions in order to guarantee certain basic legal protections, like ensuring that their estates will pass to the surviving partners at death. *Perry*, 704 F. Supp. 2d at 978.

couples, higher estate taxes leave less assets for the children's support.[6] The children of same-sex couples are also harmed by the inferior benefits that are typically offered by an employer where the employee's parentage is not recognized.[7] This harm could be far greater when the deprivation of benefits restricts the children's access to healthcare.[8]

Perhaps even more pernicious is the stigma that attaches to children when their parents' relationship receives only diminished recognition from the

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[6] A married decedent's estate may benefit from an unlimited tax deduction for any property that is transferred to the surviving spouse. 26 U.S.C. § 2056. However, same-sex couples have no such benefit, regardless of the length of their relationship, the degree of their commitment, or their mutual contribution in building the value of that estate. In one study of this differential treatment, each same-sex couple affected would pay an average of more than $3.3 million in estate taxes that their married counterparts would not pay. *Perry*, 704 F. Supp. 2d at 979.

[7] Same-sex couples are typically not granted the same employee benefits that are granted to married couples. *Perry*, 704 F. Supp. 2d at 978. Even when employers do grant benefits to the same-sex partner of an employee, those benefits are taxed as income. *Id.* Thus, families that are headed by same-sex couples are burdened by less employee benefits and then, when those benefits are granted, the families are again burdened by having to pay income tax on those benefits.

[8] Same-sex households have less access to health insurance than married households have, with "[o]nly 56% of California firms offe[ring] health insurance to unmarried same-sex couples in 2008." *Perry*, 704 F. Supp. 2d at 978. According to the American Medical Association, excluding same-sex couples from civil marriage contributes to health-care disparities in the same-sex households. *Id.*

State. "Domestic partnerships lack the social meaning associated with marriage, and marriage is widely regarded as the definitive expression of love and commitment in the United States." *Perry*, 704 F. Supp. 2d at 970. Further compounding this stigma is the widely-varied understanding of what the term "domestic partnership" means in the states that have adopted it. Even in the district court below, Petitioners, represented by able counsel, were unable to specify which states actually recognize California domestic partnerships. *Id.* at 971.

There is a crazy-quilt of mismatched and inconsistent laws that leave same-sex couples without any means to declare permanent family relationships that might survive even so much as an excursion over state lines. Where domestic partners in California have rights and obligations to the other domestic partner's children that are identical to those for married couples, Cal. Fam. Code § 297.5(d), one domestic partner in Wisconsin has no rights or obligations to the children of the other domestic partner, Wis. Stat. §§ 770.001-770.18. In California, "[d]omestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." Cal. Fam. Code § 297(a). But in Colorado, same-sex couples who wish to solemnize their relationship may only enter into a "Designated Beneficiary Agreement" through which they have certain limited rights, such as hospital visits to an ailing partner; the right to make funeral arrangements for the designated beneficiary; the ability to hold joint

title in property; and the right to share in certain benefits. Colo. Rev. Stat. § 15-22-105. And, for even more stark examples are states that refuse to grant any legal status to families headed by same-sex couples, see, *e.g.,* Texas Const. Art. I, § 32 (prohibiting the state from recognizing for same sex couples "any legal status identical or similar to marriage"), or states that refuse to recognize paternity that had been established in another jurisdiction through same-sex marriage, see *Damon v. York,* 680 S.E. 2d 354, 359 (Va. Ct. App. 2009) (holding that Appellant "could not directly or indirectly qualify as having either a familial or stepparent relationship with the child by virtue of [Appellant's] void marriage to the child's mother.").

Under this patchwork of dissonant laws, a California child of two loving, registered domestic partners could find herself with only one legal parent in Wisconsin or Virginia, or with parents whose relationship has no more legal significance than a business contract in Colorado, or with essential family relationships dissolved in Texas. A Californian in a registered domestic partnership even needs to consider the risk of his child getting sick while on a trip through a state that does not recognize his parentage, leaving him potentially unable to direct that child's medical care. Families should not have to worry that the mutual dependence arising from their most important relationships could be compromised solely because they are headed by two people of the same gender.

There are presently ten U.S. states (including the District of Columbia) and eleven foreign countries

that recognize the marriages of same-sex couples. What are married same-sex parents in these jurisdictions to do when one spouse is offered her dream job, or his admission to a world-class university in California? For the brilliant electrical engineer in Iowa offered the opportunity to pursue groundbreaking research at the Lawrence Livermore Labs; for the gifted musical composer in Massachusetts offered the chance to collaborate on the musical score for a major motion picture in Hollywood; for the college valedictorian in New Hampshire granted acceptance to Stanford Law School – what are they to do? Too many Americans will simply decide not to make the move at all, foregoing the opportunity to achieve their dreams. In all these ways, Proposition 8 acts as a deterrent to the free flow of human capital across our States.[9]

[9] The problems may be even worse when both parents are not U.S. citizens, and one or both parents may have to leave the United States because the non-citizen does not qualify for a green-card as the citizen's spouse. See, *e.g.*, "With No Shortcut to a Green Card, Gay Couples Leave U.S.," *New York Times* (Feb. 18, 2013), available online at http://www.nytimes.com/2013/02/18/us/with-no-shortcut-to-a-green-card-gay-couples-leave-us.html?_r=0. This immigration problem exists regardless of whether the parents are registered domestic partners or spouses under state law, because federal law does not presently recognize them as spouses. As a consequence, children may be split up, may lose contact with one of their parents, or may be removed from their familiar environment and transplanted elsewhere – all because federal laws do not give them the same privileges as heterosexual families to obtain a green card for a spouse.

CONCLUSION

Marriage offers a host of emotional, spiritual, legal and financial benefits to those allowed to participate in it. It provides as well a stable and nurturing environment for the rearing of children. These bases for marriage compel that its protections be afforded to same-sex couples. The procreation-related reasons offered by Petitioners to limit marriage to opposite-sex couples cannot pass Constitutional muster. For the sake of children, this Court should invalidate Proposition 8.

Dated: February 27, 2013

Respectfully submitted,

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