No. 10-16696

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

BRIEF OF *AMICI CURIAE*, PROFESSORS WILLIAM N. ESKRIDGE JR., REBECCA L. BROWN, BRUCE A. ACKERMAN, DANIEL A. FARBER, KENNETH L. KARST, AND ANDREW KOPPELMAN, IN SUPPORT OF APPELLEES

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STATEMENT OF *AMICI CURIAE*

Amici are professors of constitutional law who have studied and written on the history of equal protection rights under the U.S. Constitution. We urge this Court to affirm Judge Walker's decision on this narrow ground: voter-approved Proposition 8 (hard-wiring the state constitution to limit civil marriage to one man, one woman) is unconstitutional for the same reasons the Supreme Court invalidated Colorado's voter-approved Amendment 2 in *Romer v. Evans*, 517 U.S. 620 (1996). Like Amendment 2, Proposition 8 "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. '[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . .'" *Id.* at 635 (quoting *The Civil Rights Cases*, 109 U.S. 3, 24 (1883)).[1]

Against the historical background of anti-gay initiatives, we argue that Proposition 8 lacks the rational basis required by *Romer* for such initiatives. The Yes on 8 campaign was an open appeal for voters to recast gay people as second-class citizens, based on animus or sectarian morality (or both). *Romer* holds that

[1] Our reliance on *Romer* renders irrelevant Appellants' argument that this appeal is governed by *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing a same-sex marriage constitutional appeal that did not raise the *Romer* concerns with animus-inspired voter initiatives), and *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (similar).

anti-gay animus cannot constitutionally be the basis for state discrimination. 517 U.S. at 632. "Moral disapproval of a group [also] cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment) (quoting *Romer*, 517 U.S. at 633). Proposition 8 was sold to the voters as a measure to lower the legal status of gay and lesbian couples for reasons of morality or animus, and that violates the Equal Protection Clause.

This *amicus* brief is being filed with the parties' consent.

ARGUMENT

I. Save Our Children: Anti-Gay Initiatives, 1977-2008

Whether it is racism, anti-Semitism, or homophobia, prejudice or animus is typically a projection of one's own fears or hysterical emotions onto a minority group.[2] The prejudiced person tends to sexualize minorities and to view them as predatory threats; the longstanding stereotype about "homosexuals" is that they are child molesters,[3] "promiscuous recruiters and corrupters of children, who cannot

[2] *See* Elisabeth Young-Bruehl, *The Anatomy of Prejudices* 32-37, 157-58 (1996); Stephen Thomsen, *Violence, Prejudice, and Sexuality* 17-36 (2009).
[3] The child molester stereotype is completely false. *E.g.*, Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 Pediatrics 41 (1994).

have committed relationships." Angela Simon, *The Relationship Between Stereotypes and Attitudes Toward Lesbians and Gays*, in *Stigma and Sexual Orientation* 62-63 (Gregory M. Herek ed., 1998); *accord* ER 133 (district court's finding on this point); Gregory M. Herek, *Sexual Prejudice*, in *Handbook of Prejudice, Stereotyping, and Discrimination*, 439, 448-51 (Todd D. Nelson ed., 2009). Between 1972 and 2005, seventy-one percent of anti-gay ballot initiatives prevailed, an unprecedented rate of success for initiatives.[4] The success is explained by the proponents' open, as well as more discreet, appeals to animus and, to a lesser extent, anti-gay morality. ER 136 (district court describing religion-based condemnation of homosexual relationships).

The first major anti-gay initiative was Anita Bryant's 1977 "Save Our Children" campaign to overturn Dade County, Florida's ordinance barring discrimination against gay people. Bryant's campaign depicted homosexuals as predatory: because they could not "reproduce," these "vile beastly creatures" must "recruit" through "outright seduction and molestation."[5] Although early polls

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[4] Donald P. Haider-Markel et al., *Lose, Win, or Draw: A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304 (2007) (Trial Ex. PX0839); *accord* Barbara Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245 (1997) (similar success rate for 1959-93).

[5] Anita Bryant, *The Anita Bryant Story* 6 (1977); *see also* James T. Sears, *Rebels, Rubyfruits, and Rhinestones: Queering Space in the Stonewall South* 372 n. 63 (2001); *id.* at 119-30, 226-45 (describing the Bryant campaign).

indicated that voters were satisfied with the anti-discrimination ordinance, Save Our Children mobilized people's fears and prejudices to produce an overwhelming vote to repeal it in June 1977. The next day, the Florida Legislature barred lesbians and gay men from adopting children, based upon the same protect-the-family rationale. Fla. Stat. § 63.042(3). Because this law lacks a rational basis and was grounded in anti-gay animus, the Florida courts have ruled that it is an unconstitutional denial of equal protection.[6]

Throughout the twentieth century, California bombarded public culture with policies and messages endorsing anti-homosexual prejudice and stereotypes of gay people as anti-family. The state pathologized "homosexuals" as "moral or sexual perverts," 1909 Cal. Stat. 1093-94, and grouped them with child molesters and enemies of the people.[7] By persecuting "homosexuals," officials claimed they were purifying public culture, protecting children, and reaffirming family values.[8] Not surprisingly, the first statewide anti-homosexual initiative, Proposition 6,

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[6] The 1977 law was upheld against federal constitutional attack, *Lofton v. Sec'y, Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), but a state appellate court affirmed a trial court order invalidating it under the Florida Constitution, *see In re Adoption of X.R.G. & N.R.G.*, No. 3D08-3044 (Fla. Dist. Ct. App. Sept. 22, 2010). Florida is currently not enforcing the law.

[7] *See* 1945 Cal. Stat. 623 § 5500 (amending sexual psychopath law, originally protecting children, to include sodomy between consenting adults).

[8] *See* William N. Eskridge Jr., *Dishonorable Passions: Sodomy Law in America, 1861-2003*, at 73 (2008).

brought to the California voters by Senator John Briggs in 1978, invoked these traditional prejudices.[9]

Proposition 6 sought to bar schoolchildren from being exposed to either gay teachers or gay-friendly instruction. Following the Save Our Children strategy, Senator Briggs announced a pro-family crusade scapegoating sexual minorities. Thus, the Yes on 6 campaign argued that gay teachers would assault schoolchildren; in speeches and advertisements, Briggs and his allies associated "homosexuals" with adulterers, communists, murderers, rapists, child pornographers, and Richard Nixon.[10] Senator Briggs also made the recruitment argument: "They don't have any children of their own. If they don't recruit children or very young people, they'll all die away. . . . That's why they want to be teachers and be equal [in] status."[11]

Because many voters were persuaded that Proposition 6 would penalize *heterosexual* teachers who made gay-tolerant remarks, it did not prevail.[12] By targeting only *homosexuals*, virtually all anti-homosexual initiatives since 1978

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[9] *See* 1978 Cal. Ballot, Prop. 6 (barring persons who advocate or practice homosexual relations from teaching in public schools), discussed in Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695, 1702-06 (1993).
[10] Randy Shilts, *The Mayor of Castro Street: The Life and Times of Harvey Milk* 239 (1988).
[11] *Id.* at 230.
[12] *See* Dudley Clendinen & Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* (1999).

have won huge popular majorities. In 1992, Colorado voters adopted Amendment 2 to override several legal directives protecting gay people against discrimination. Proponents of Amendment 2 depicted "homosexuals" as promiscuous and predatory, seeking to invade decent straight people's schools and churches, take away their jobs, and recruit their children for homosexuality.[13] Like Anita Bryant and John Briggs, the Amendment 2 proponents understood their campaign as protecting the family,[14] but the *Romer* Court saw the matter otherwise and invalidated Amendment 2.

After *Romer*, proponents of anti-gay initiatives modernized their arguments, predicting dire public consequences if lesbians and gay men secure equal rights. These modernized arguments are often grounded upon unfair stereotypes that gay people are selfish, predatory, and anti-family—even anti-marriage. Thus, Congress enacted the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996), permanently excluding lesbian and gay couples from hundreds of federal benefits and rules based upon spousehood, 1 U.S.C. § 7, to "defend" marriage against inclusion of such couples. DOMA's sponsors adduced no evidence that excluding gay couples would actually help the institution of

[13] The Amendment 2 ballot materials are reprinted in Robert Nagel, *Playing Defense*, 6 Wm. & Mary Bill Rts. J. 167, 191-99 (1997).
[14] *See* Stephen Bransford, *Gay Politics vs. Colorado and America: The Inside Story of Amendment 2* (1994).

marriage and, instead, supported the law as a "moral disapproval of homosexuality," for "heterosexuality better comports with traditional (especially Judeo-Christian) morality."[15] Appealing to anti-gay prejudice, DOMA's House sponsor proclaimed that the country needed to reaffirm family values because the "flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundation of our society: the family unit."[16]

Many states adopted mini-DOMAs, barring recognition of same-sex marriages. California did so through a 2000 initiative, Proposition 22, introduced by Senator Pete Knight. His campaign argued that homosexuals are not normal and that their selfish agenda involves the "trash[ing]" of marriage.[17] Knight's positive message was this: "We must affirm the importance of Mom and Dad in our children's lives," which he thought could only be achieved by denying formal equality to gay people.[18] The defense-of-marriage argument tied opposition to gay rights to the larger public interest—but it rested on no evidence. Indeed, it was

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[15] H.R. Rep. No. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2920. *See* Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* (2002), for a critical examination of DOMA.

[16] 142 Cong. Rec. H17,070 (daily ed. July 12, 1996).

[17] Television Interview by Leon Worden with W.J. "Pete" Knight, Cal. State Senator, Santa Clarita, Cal. (Apr. 1, 2004), *available at* http://www.scvhistory.com/scvhistory/signal/newsmaker/sg042504.htm (marriage "is being deliberately trashed" by gay activists seeking same-sex marriage).

[18] League of Women Voters, *Nonpartisan In-Depth Analysis of Proposition 22* (2000) (statement supporting Proposition 22, by its sponsors), *available at* http://ca.lwv.org/lwvc.files/mar00/id/prop22.html.

inconsistent with evidence from countries (like Denmark) that legally recognized lesbian and gay partnerships yet saw marriage among straight people make a rebound,[19] and is further refuted by subsequent evidence from Massachusetts, where marriage has made a modest comeback since 2003, when gay marriage was legalized. *See infra* Part II.C.2. The California Supreme Court rejected defense-of-marriage arguments in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). Ruling that lesbian and gay couples had state constitutional equality entitlements to the fundamental right to marry and to be free of arbitrary discrimination, the Court invalidated Proposition 22, for it perpetuated the stigma that "gay individuals and same-sex couples are in some respects 'second-class citizens.'" *Id.* at 402.

The foregoing history forms the backdrop to the Proposition 8 campaign to override the result of the *Marriage Cases*. The campaign was nothing short of a religious crusade; organizers saw it as "God's way of bringing believers closer together" to "fight" for a legal regime where lesbian and gay unions are marked as inferior, the message they derived from the Bible. Karla Dial, *Golden State Warriors*, Focus on the Family: Citizen, Sept. 2008, at 18, 23 (the origins of

[19] William N. Eskridge Jr. & Darren R. Spedale, *Gay Marriage: For Better or for Worse? What We've Learned from the Evidence* 173-75, 190-92 (2006) (Trial Ex. PX2342) (Denmark, the first modern state to give virtually all marriage rights and duties to lesbian and gay couples (in 1989), saw its marriage rates go up and divorce rates go down in the two decades after 1989).

Proposition 8). The official ballot materials distributed to the voters announced the proponents' three main arguments for Proposition 8:[20]

> [1] "*It restores the definition of marriage*," to exclude lesbian and gay couples, consistent with "what the vast majority of California voters already approved";
>
> [2] "*It overturns the outrageous decision of four activist Supreme Court justices*," who "ignored the will of the people";
>
> [3] "*It protects our children* from being taught in public schools that 'same-sex marriage' is the same as traditional marriage."

Exhibits and other evidence relating to the Yes on 8 campaign in the trial court record confirm that these were the arguments made by ProtectMarriage.com and other proponents of Proposition 8. Many of the materials explicitly invoked religious scripture[21] or lurid anti-gay stereotypes identical to those of Anita Bryant's Dade County campaign.[22] *See* ER 140-44.

The third argument, the only argument that purported to be consequentialist rather than status-based, was a factually questionable, irrational appeal to anti-gay

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[20] ER 1032 (California Voter Information Guide listing arguments in favor of Proposition 8, signed by its sponsors). The official Yes on 8 campaign materials repeated these three arguments almost as a mantra. *E.g.*, ER 1035 (ProtectMarriage.com "Questions & Answers About Proposition 8").

[21] *E.g.*, ProtectMarriage.com, "Restoring and Protecting Marriage" (opening with Genesis 2:24) (Trial Ex. PX0012).

[22] SER 609 (Tam Hak Sing, "The Harm to Children from Same-Sex Marriage" (translation from Chinese)).

prejudice. "[T]here were limits to the degree of tolerance that Californians would afford the gay community," boasted the Yes on 8 publicists, SER 352, and the protect-our-children theme was the time-tested means for mobilizing people's anti-gay impulses, as the publicists confirmed through focus groups. *Id.*

State Senator Dennis Hollingsworth (an official proponent of Proposition 8) laid out the argument in a ProtectMarriage.com flyer. When public schools teach health education, the law requires that the instruction "shall teach respect for marriage." Cal. Educ. Code §§ 51890(a)(1)(D), 51933(b)(7). "But if gay marriage becomes permanent, the anti-discrimination laws will force educators to teach young children there is no difference between gay marriage and traditional marriage." Letter from Dennis Hollingsworth 2 (Oct. 9, 2008) (Trial Ex. PX0009); *see* Cal. Educ. Code § 51500 (barring instruction reflecting a "discriminatory bias"). His letter went on to say, "We should not accept a court decision that forces public schools to teach our kids that gay marriage is okay. But that is exactly what will happen if Proposition 8 fails. In fact, it has already happened in Massachusetts where same-sex marriage is currently legal." Letter from Dennis Hollingsworth, at 2 (emphasis in original). The letter cited the experience in Massachusetts, *see Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), where parents unsuccessfully sought a constitutional right to withdraw their children from

instruction valuing same-sex marriage. (In California, however, parents have a statutory right to remove their children from public school "instruction that conflicts with [their] religious training and beliefs." Cal. Educ. Code § 51240(a).)

This argument rested upon several false propositions. Nothing in the *Marriage Cases* says what schools must or must not teach, nor would marriage equality interact with California law to "force" gay marriage upon the children of unwilling parents. The Education Code does not require participating school districts to say anything about gay marriage; what it requires is that if schools teach health education, they must teach respect for "marriage and committed relationships," including domestic partnerships. Cal. Educ. Code §§ 51890(a)(1)(D), 51933(b)(7). Exactly what schools teach about marriage is a matter of their discretion, so long as it is neutral. Thus, before the *Marriage Cases*, and after Proposition 8, schools could teach that domestic partners ought to be admired just as much as married couples, or they could say nothing about gay (or straight) couples and just talk about the virtues of committed relationships. Before the *Marriage Cases* and after Proposition 8, a teacher probably could not, consistent with the anti-discrimination provisions of Cal. Educ. Code § 51500, tell the students that man-woman marriage is a serious commitment but woman-woman partnership or marriage is not. As a formal matter, the *Marriage Cases* did

not change instructional requirements under California law, and there is no rational argument that Proposition 8 "protected" children from hearing about the virtues of lesbian marriages, partnerships, and civil unions. Its lack of factual foundation underscores the true purpose and effect of Proposition 8: to arouse irrational fear and to mobilize anti-gay stereotypes.

The legal fact that the *Marriage Cases* did not "force" gay marriage upon the schoolchildren of unwilling parents did not make a difference in the 2008 election.[23] A sufficient number of parents were likely afraid that marriage equality would lead to brainwashing their children in public schools, and their votes likely made a difference in the 52% to 48% electoral victory of Proposition 8. A generation after Anita Bryant had pioneered the strategy, Save Our Children once more prevailed. As the California Supreme Court ruled in *Strauss v. Horton*, 207 P.3d 48, 61-63, 78, 98 (Cal. 2009), Proposition 8 creates an "exception" to California's constitutional guarantee of equal protection to all citizens. Does Proposition 8 justify a similar "exception" to the Equal Protection Clause of the U.S. Constitution?

[23] The Yes on 8 publicists believed that a school field trip to see a lesbian wedding negated any effect the legal technicalities had on public perception of a causal link between marriage equality and state instruction over parental objections. *See* SER 354.

II. Proposition 8 Is Inconsistent with the Equal Protection Clause, as Construed in *Romer v. Evans*.

Amici submit that Proposition 8 is inconsistent with the Equal Protection Clause, as construed in *Romer v. Evans*. There is room for argument as to precisely how broadly *Romer* should be read. At the very least, however, *Romer* applies to cases whose facts are close to the *Romer* facts: (1) novel, ad hoc legal barriers erected by voter initiatives discriminating against lesbians and gay men (2) cannot stand if tainted by a bare desire to lower the status of this minority (whether for reasons of anti-gay animus or religious morality) (3) rather than a rational connection to a neutral public interest. As we shall demonstrate, Proposition 8 fits *Romer* snugly.

Are there not differences between *Romer*'s Amendment 2 and Proposition 8? Yes. But the big differences may cut *against* the validity of Proposition 8. One difference is that Amendment 2 denied lesbians and gay men a range of legally enforceable rights and benefits, while Proposition 8 left lesbian and gay couples with the legal rights and duties associated with marriage but labeled "domestic partnerships." Thus, Amendment 2 denied gay people some legal rights, while Proposition 8 is completely symbolic. In one respect, the latter is a more serious equal protection concern: the proponents of Proposition 8 spent millions of dollars simply to deny lesbian and gay couples the symbolic equality associated with full

(civil) marriage recognition. Certainly, no one would doubt the insult of allowing marriages only between same-race partners while affording different-race partners a parallel institution called "domestic partnerships." The deliberate insult is just as obvious here. Carving out a class of citizens from a core civil or political status is unprecedented in our constitutional system; it is highly suspect, and perhaps a per se constitutional violation, under *Romer*.

Another difference between *Romer* and this case is that the record here is replete with open appeals to sectarian morality, to anti-gay prejudice, and to the stereotype that "homosexuals" are predators "recruiting" "innocent children." The *Romer* Court inferred animus from the poor fit between the sweep of Amendment 2 and the "rational" purposes attributed to it; in this case, there is just as poor a fit—but the record in this appeal is also saturated with direct evidence of animus (anti-gay prejudice, stereotypes, and sectarian disapproval).

A. Proposition 8 is an unprecedented "exception" to the state constitutional guarantee of fundamental equality, which raises an "inevitable inference" of animus.

Quoting the dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), *Romer* opened with an admonition that "the Constitution 'neither knows nor tolerates classes among citizens.'" 517 U.S. at 623. The Court understood that state constitutions and laws have wide latitude to "discriminate" in many respects—but the Equal Protection Clause does not allow the state to entrench one "class" of

citizens as "second-class." *Accord Marriage Cases*, 183 P.3d at 402. The *Romer* Court found that Amendment 2 did precisely that, because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Romer*, 517 U.S. at 627. The "change in legal status" effected by the law was "[s]weeping." *Id.* The Court was uncertain as to precisely which rights to relief against discrimination gay people retained after Amendment 2, *see id.* at 630-31, but it found it significant that Amendment 2 "imposes a special disability upon those persons alone," *id.* at 631; that the rights denied to this "unpopular group" by Amendment 2 were "protections taken for granted by most people either because they already have them or do not need them," *id.*; and that Amendment 2 was "unprecedented in our jurisprudence," *id.* at 633.

Likewise, Proposition 8 is novel, fundamental, status-based "class legislation" that was the core concern of the Equal Protection Clause's framers, *see Plessy*, 163 U.S. at 559 (Harlan, J., dissenting); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 176-78 (1988); Melissa Lamb Saunders, *Equal Protection, Class Legislation, and Color-Blindness*, 96 Mich. L. Rev. 245, 271-93 (1997), and of the Supreme Court in *Romer*. Some scholars have opined that such class legislation is a per se violation of the Equal

Protection Clause. *See* Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as *Amici Curiae* in Support of Respondents, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039). Our analysis here supports that broad argument, as well as a narrower argument, that Proposition 8 (like Amendment 2) is unprecedented class legislation which, in this particular case, raises the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer,* 517 U.S. at 634 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

The argument advanced in this *amicus* brief does not ask this Court to determine whether gays are a suspect class or whether the fundamental right to marry extends beyond heterosexual unions. Rather, this argument appeals to the most basic and time-honored principle of our constitutional traditions: the guarantee that no one, and no group, will be singled out for unfavorable treatment unless for demonstrable public necessity.

This traditional principle is recognized in California's Declaration of Rights, which not only provides that "[a] person may not be . . . denied equal protection of

the laws," Cal. Const. art. I, § 7(a), but also provides that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens," *id.* § 7(b). For California's Constitution, equal treatment is the fundamental baseline, just as it is for the U.S. Constitution. *See* Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (1989). Consistent with such an *equality baseline*, every adult citizen of California enjoys fundamental rights and privileges to speak freely, to engage in associational and political activity, to vote, to serve on juries, to raise children, to enjoy a public education, to have access to the state's courts for adjudication of disputes—and to marry. This was the point of the *Marriage Cases*.

The equality baseline means that every socially significant social group in California has access to all of the foregoing fundamental rights, subject to compelling public interests. Some social groups long stigmatized by prejudice and stereotyping had to engage in a constitutional struggle to secure these rights. Thus, African, Asian, and Latino Americans were barred from marrying European Americans for much of the state's history, but the California Supreme Court invalidated that bar to different-race marriages in *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948). Lesbian and gay citizens suffered under many legal discriminations for much of the twentieth century, but the state courts, governors, and legislatures

chipped away at the exclusions until there was only one left, the exclusion from marriage. Ruling that lesbians and gay men enjoyed the same "fundamental" right to marry enjoyed by all other social groups, the *Marriage Cases* ended that exclusion. For the first time, lesbian and gay Californians were full and equal citizens in that state.

Proposition 8 created an "exception" to the equality baseline. *Strauss*, 207 P.3d at 61-63, 78, 98. After Proposition 8, the California Declaration of Rights effectively has been revised to mean that "[a] person may not be . . . denied equal protection of the laws," Cal. Const. art. I, § 7(a), *except for* gay persons, who can be denied the fundamental right to marry. "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens," *id.* § 7(b), *except for* straight persons, who enjoy the exclusive privilege of civil marriage. Proposition 8 represented the first time in California history that there had been a significant retrogression of the officially recognized fundamental constitutional status of a minority group. We are not aware that the U.S. Supreme Court has ever seen a case where fundamental constitutional equality rights were fully extended to a minority long subject to prejudice-based discrimination, and then withdrawn through a popular vote. The closest case is *Reitman v. Mulkey*, 387 U.S. 369 (1967), where the Court looked behind the formal rules created by a

California constitutional initiative to find a retrogressive race-based discriminatory effect, which the Court struck down as a violation of equal protection.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928), *quoted in Romer*, 517 U.S. at 633. "[L]aws singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Romer*, 517 U.S. at 633. Such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. That "inevitable inference," moreover, is confirmed by the animus-based arguments run by the Yes on 8 campaign and by the inability of the current defenders of Proposition 8 to link it with a public-regarding reason that is not a cover for anti-gay prejudice, stereotyping, or religious morality.

B. The campaign in favor of Proposition 8 was dominated by prejudice-based or morals-based appeals to return gay people to second-class status.

Unlike the record in *Romer*, the record in this appeal is replete with open as well as discreet appeals to anti-gay morality, prejudice, and stereotypes. Reminiscent of Anita Bryant's Save Our Children crusade, the Yes on 8 crusade treated lesbians and gay men as godless, selfish predators intent on recruiting children for homosexuality. *Romer* bars state electorates from adopting class

legislation where one social group is permanently deemed to be a subordinate group—and even more so does it bar state electorates from demonizing the subordinate class of citizens as pariahs.[24]

After receiving extensive evidence, the district court found that "[t]he Proposition 8 campaign relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian." ER 140. The district court also found that the campaign "relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships." ER 143. Those findings of fact are not only amply supported by the record evidence, but they understate the extent to which the campaign invited voters to vote based upon fears, prejudice, and stereotypes. One of the official proponents of Proposition 8 made this argument to the Asian-American community: "Since most of them lead an indulgent life, many gay men die because of AIDS and other serious illnesses. They need to recruit new blood to become homosexuals. Also, the objects of play for many homosexuals are youth and children." SER 609.

Even the most sanitized of the Yes on 8 arguments were, in effect, appeals to degrade the status of gay people. Recall ProtectMarriage.com's three arguments in the ballot materials: Proposition 8, they contended, is needed in order (1) to restore

[24] *See* Daniel A. Farber & Suzanna Sherry, *The Pariah Principle*, 13 Const. Comm. 257 (1996).

traditional marriage, (2) to rebuke four "activist judges" who ruled for marriage equality, and (3) to protect children against "forced" instruction that gay marriage is just as good as straight marriage. To begin with, all three arguments are status-based and retrogressive: they invite voters to reject the equality baseline and return gay people to the previous regime, where gay is officially disparaged.

After the California Supreme Court recognized a baseline of complete legal equality for gay people, the proponents advanced Proposition 8 with the announced goal of returning gay people to a legal regime where their "partnerships" are treated differently from "marriages." Although the domestic partnership law affords the rights and duties of marriage, it is a second-best institution, which treated gay people as "second-class citizens." *Marriage Cases*, 183 P.3d at 402. If the restore-traditional-marriage and rebuke-activist-judges arguments do not make that apparent, the third argument—"innocent children" will be corrupted because schools will "force" gay marriage into their vulnerable souls—clinches the intended message of second-class citizenship. In the world Proposition 8 seeks to recreate, "homosexuals" are a permanent underclass, "activist judges" will be on notice not to treat their relationships as legally equivalent to straight marital relationships, and schoolchildren will be protected from messages that gay marriage might be just as good as straight marriage. The entire point of

Proposition 8 was that the state *must* endorse (and schoolchildren *must* learn about) sectarian or prejudiced views that lesbian and gay relationships are not as good as straight ones.

Moreover, all three arguments exploit anti-gay stereotypes. For a century, the state drilled into public consciousness the notion that "homosexuals" are anti-family, namely, that members of this sexualized minority are promiscuous, unlikely to form serious relationships, and predatory rather than nurturing toward children. These are harmful and inaccurate stereotypes, yet they form the bedrock of even the sanitized arguments of ProtectMarriage.com: the state's most sacred institution has always been off-limits to this despised minority, and Proposition 8 re-establishes the norm that lesbians and gay men, even when coupled and raising children, are not pro-family in the way that even the most dysfunctional straight couples can be. The third argument directly invokes the idea that gay people seek to "recruit" innocent children and urges parents to mobilize to "Save Our Children" from predatory homosexuals working through the public school system.

C. The post-hoc justifications for Proposition 8 are so under- and over-inclusive that they confirm the inference that Proposition 8 was motivated by animus rather than by a rational basis.

Appellants' Brief largely ignores the justifications for Proposition 8 emphasized during the 2008 campaign and, instead, argues that marriage discrimination serves other public-regarding goals. At the outset, we reject

Appellants' advancement of sectarian morality as a public interest. "Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring in the judgment); *accord id.* at 571-74 (opinion for the Court, making the same point for the Due Process Clause).

Appellants also treat rational basis review as satisfied if the judicial mind can seize upon any conceivable basis for a discrimination. However rational basis review operates for economic legislation, it operates differently under the circumstances of this case. "When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Id.* at 580 (O'Connor, J., concurring in the judgment). When a popular initiative targets a minority group in this way, *Romer* demands a reasonable fit between an asserted public interest and the discrimination against the minority. 517 U.S. at 633. Each of Appellants' asserted public goals is so dramatically under- or over-inclusive (or

both) as to confirm the inference of impermissible animus or morals-based disapproval of lesbian and gay unions.

1. Encourage procreation and child-rearing within marriage

Appellants' main argument is that "the traditional definition of marriage reflected in Proposition 8 bears at least a rational relationship to the State's vital interest in increasing the likelihood that children will be born and raised in stable family units by the couples who brought them into the world because it provide[s] special recognition and support to those relationships most likely to further that interest." Appellants' Br. at 16-17*; see also id.* at 77-78. The implausibility of this argument, combined with the fact that Appellants have found nothing better to emphasize, is evidence that some other motivation must have been driving support for Proposition 8.

At the outset, it is hard to say that that there is *any* causal connection, much less a rational one, between the state's channeling "potentially procreative conduct" into marital relationships, *id.* at 77, and its discrimination against lesbian and gay families. *See* ER 44-45 (district court summarizing the difficulty Appellants' counsel had in articulating exactly how anti-gay discrimination encourages responsible procreation). After twenty years of the responsible-procreation-within-marriage argument, no heterosexual has yet been identified who

felt encouraged toward responsible family formation *because* lesbian couples were excluded from marriage while enjoying all the legal benefits of marriage under the cover of "domestic partnership."

Moreover, the responsible-procreation-within-marriage argument is highly under-inclusive. If California voters really want to encourage responsible procreation and child-rearing within the marital relationship, there are many public policies they could adopt, through the initiative process, including the following:

- *Criminalize procreative sex or artificial fertilization methods outside of marriage;*
- *Penalize sexual cohabitation;*
- *Restrict adoption and encourage biological parents to raise their own children;*
- *Limit marriage to couples who are likely to have children (e.g., no older couples);*
- *Impose more stringent parental obligations;*
- *Eliminate or restrict divorce, if there are children in the household.*

All of these policies would directly help children under Appellants' theory (*e.g.*, Appellants' Br. at 78-81) that the state should be encouraging heterosexuals to procreate and rear children within one man, one woman marriages. Why have Californians not expressed tangible interest in *any* of these policies, and why have Appellants themselves not proposed initiatives along these lines? The obvious

answer is that *straight* Californians would lose some freedom under any of these proposals. The protect-the-marital-family proposals that have the most popular traction are those that single out lesbians and gay men to bear the burden of popular anxieties about the decline of marriage because of expanded choices available to straight couples. The minority denied rights is thus scapegoated for problems created by the majority. Appellants' primary state interest is further evidence of the anti-gay animus underlying Proposition 8.

Appellants' argument is also highly over-inclusive: it rejects marriages that would be good for thousands of California children. As the district court found, eighteen percent of California's lesbian and gay couples are currently raising children within their relationships. ER 113. Those children would benefit from their parents' marriage. ER 119. Proponents' own witnesses conceded that children flourish in lesbian and gay households and would benefit from recognition of marriage equality. ER 82-83. Just like Amendment 2, Proposition 8 "is at once too narrow and too broad," *Romer*, 517 U.S. at 633, if its purpose were encouragement of responsible procreation and child-rearing within a marital household.

2. Protect marriage against further decline

At trial and on appeal, Appellants argue that marriage is a valuable social institution in decline and that "gay marriage" will deepen the decline. *E.g.*, Appellants' Br. at 98-102. Appellants claim that civil marriage has changed from an institution focused on mutual commitments to a more consumerist (contractual) arrangement involving more choices, including whether to marry or to stay together. As Appellants' witness David Blankenhorn put it, in *The Future of Marriage* 205 (2007), "adopting same-sex marriage would be likely to contribute over time to a further social devaluation of marriage, as expressed primarily in lower marriage rates, higher rates of divorce and nonmarital cohabitation, and more children raised outside of marriage and separated from at least one of their natural parents." ER 782.

As before, we doubt that there is *any* causal link between expanding marital *commitments* to include lesbian and gay couples, and the longstanding trend toward consumer *choices* by straight couples. The best study was conducted by Laura Langbein and Mark A. Yost Jr. SER 656. Based upon sophisticated regression and other analyses to screen out other variables, the authors found no causal relationship between gay marriage recognition and marriage or divorce rates. We are aware of no rigorous empirical study to the contrary. It is much

more likely that expanding marriage to include more committed couples would strengthen the institution—a notion supported by the post-2003 marriage and divorce rate evidence from Massachusetts.

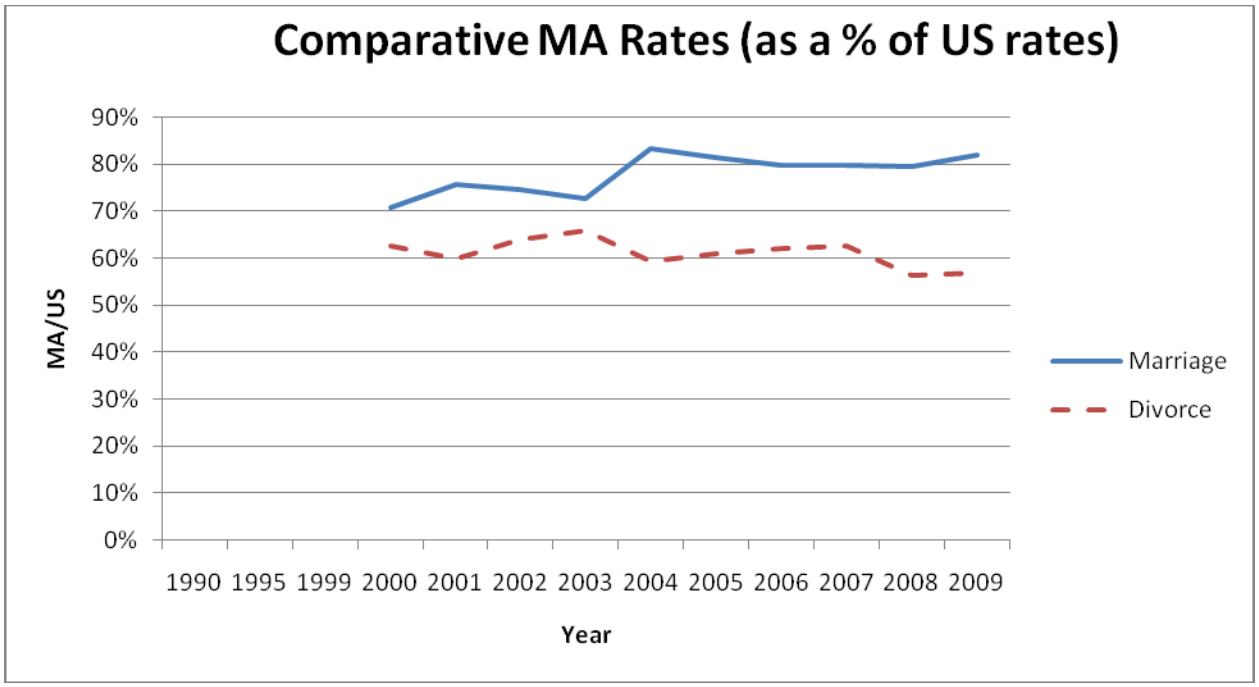
Table: Massachusetts' Marriage and Divorce Rates (Per 1000) as Compared with National Rates[25]

Year	MA Marriage Rate	USA Marriage Rate	Comparative MA Marriage Rate as % of USA Rate	MA Divorce Rate	USA Divorce Rate	Comparative MA Divorce Rate as % of USA Rate
2000	5.8	8.2	**71%**	2.5	4.0	**63%**
2001	6.2	8.2	**76%**	2.4	4.0	**60%**
2002	5.9	7.9	**75%**	2.5	3.9	**64%**
2003	5.6	7.7	**73%**	2.5	3.8	**66%**
2004	6.5	7.8	**83%**	2.2	3.7	**59%**
2005	6.2	7.6	**82%**	2.2	3.6	**61%**
2006	5.9	7.4	**80%**	2.3	3.7	**62%**
2007	5.83	7.3	**80%**	2.25	3.6	**63%**
2008	5.64	7.1	**79%**	1.97	3.5	**56%**
2009	5.57	6.8	**82%**	1.93	3.4	**57%**

This table and the chart below (plotting the above rates) demonstrate not only that same-sex marriage in Massachusetts is not correlated with any downward trend in marriage rates or escalation of divorces, but the marriage rate in that state

[25] To control for complex nationwide trends, "comparative rates" were calculated by dividing the Massachusetts rate by the USA rate (*e.g.*, 2004 MA marriage rate was 83% of national rate). Centers for Disease Control, *Detailed State Tables*, *available at* http://www.cdc.gov/nchs/mardiv.htm#state_tables; National Vital Statistics Reports, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.pdf; U.S. Census Bureau.

compared with the national rate *improved significantly* after 2003 and has since remained constant at that level. And the divorce rate in Massachusetts compared with the national rate has *declined* since 2003.



Moreover, the gay-discriminatory means chosen by Appellants to advance their goal is vastly under-inclusive. If the policy goal is to save marriage from too much consumer choice, and to reinvigorate the lifetime commitment features of marriage, the obvious state policies are the following:

- *Restore marriage's monopoly for sexual intercourse by criminalizing or penalizing sex outside of marriage;*
- *Override court decisions enforcing quasi-contractual rights within cohabiting relationships, such as financial support obligations;*
- *Make divorce harder to secure.*

As before, these are policies no Appellant has advanced in the legislature or in an initiative petition because they would deprive straight couples of precious freedoms they take for granted. The group most explicitly excluded from marriage, and least responsible for its decline, is the group blamed for marriage's problems. This is nothing short of scapegoating.

Conversely, the reinvigorate-commitment-in-marriage justification is dramatically over-inclusive, for Proposition 8 disrespects thousands of lesbian and gay couples who are eager to make the lifetime commitment that increasing numbers of straight couples are not. Just like Amendment 2, therefore, Proposition 8 "is at once too narrow and too broad," *Romer*, 517 U.S. at 633, and these features confirm its animus-based nature.

3. Delay marriage equality so that California can study the matter

Finally, Appellants claim that "Proposition 8 preserves the traditional definition of marriage while California studies the effects of nascent experiments in other jurisdictions with same-sex marriage, thus furthering the State's interest in proceeding with caution when considering fundamental changes to a bedrock social institution that still serves vital societal interests." Appellants' Br. at 18; *see also id.* at 93-104. This argument rings false when the only thing at stake is whether to stigmatize some citizens as inferior. The Supreme Court has never

accepted such a delay-while-we-deliberate-further justification for discriminating against a minority group. *E.g.*, *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (rejecting city's "go slowly" defense of its referendum requirement for anti-discrimination laws). Indeed, a similar delay-while-we-deliberate-further argument was made (and rejected) in *Romer*. The state characterized Amendment 2 as a measured response to the "deeply divisive issue of homosexuality" and urged the Court to allow the state leeway for the issue to be handled calmly over time. Brief for Petitioners at 47, *Romer*, 517 U.S. 620 (No. 94-1039). The Supreme Court rejected that argument out of hand.

Under the U.S. Constitution, the baseline is equal treatment—and the burden is on the state to prove that it needs to discriminate. If Californians subsequently discover that marriage equality does in fact have significant costs for the polity, then there would be a rational basis for a future initiative to revoke marriage equality.

CONCLUSION

Proposition 8 "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Romer*, 517 U.S. at 635. This the voters of California cannot do. The judgment below should be affirmed.

DATED: October 25, 2010

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CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 10-16696

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STATEMENT OF RELATED CASES

Other than the related appeal by Imperial County (No. 10-16751), *amici curiae* Professors William N. Eskridge Jr. et al. state that they are aware of no related cases pending before this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2010.

I further certify that not all participants in the case are registered CM/ECF users; service will be accomplished by the appellate CM/ECF system for those who are so registered and service via First-Class Mail, postage prepaid, to those upon the below service list.

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