

1 W. Ruel Walker (SBN 103892)
2 Kelly Kay, *Of Counsel* (SBN 107691)
3 THE LAW OFFICES OF RUEL WALKER
4 6116 Taft Ave.
5 Oakland, CA 94618
6 Telephone: (510) 653-3099
7 Facsimile: (510) 653-3070
8 E-mail: ruelwalker@gmail.com

9 Attorneys for *Amici Curiae*
10 THE AMERICAN ASSOCIATION FOR MARRIAGE &
11 FAMILY THERAPY, CALIFORNIA DIVISION;
12 THE CALIFORNIA ASSOCIATION OF MARRIAGE AND
13 FAMILY THERAPISTS (“CAMFT”);
14 CAMFT-EAST BAY CHAPTER; CAMFT-LOS ANGELES CHAPTER;
15 CAMFT-MARIN COUNTY CHAPTER; CAMFT-SAN FRANCISCO CHAPTER;
16 THE AMERICAN FAMILY THERAPY ACADEMY;
17 GAYLESTA, INC; THE LESBIAN AND GAY PSYCHOTHERAPY
18 ASSOCIATION OF SOUTHERN CALIFORNIA, INC.;
19 THE WOMEN'S THERAPY CENTER; CALIFORNIA THERAPISTS
20 FOR MARRIAGE EQUALITY; and
21 THE GOTTMAN INSTITUTE

22
23 **UNITED STATES DISTRICT COURT**
24 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

25 KRISTIN M. PERRY, *et al.*,

26 Plaintiffs, and

27 CITY AND COUNTY OF SAN
28 FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants, and

PROPOSITION 8 OFFICIAL
PROponents DENNIS
HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

Civil Case No.: 09-2292-VRW

**BRIEF *AMICUS CURIAE* OF THE
AMERICAN ASSOCIATION FOR
MARRIAGE & FAMILY THERAPY,
CALIFORNIA DIVISION;
THE CALIFORNIA ASSOCIATION
OF MARRIAGE AND FAMILY
THERAPISTS (“CAMFT”);
CAMFT-EAST BAY; CAMFT-LOS
ANGELES; CAMFT-MARIN
COUNTY; CAMFT-SAN
FRANCISCO; THE AMERICAN
FAMILY THERAPY ACADEMY;
GAYLESTA, INC.; THE LESBIAN
AND GAY PSYCHOTHERAPY
ASSOCIATION OF SOUTHERN
CALIFORNIA, INC.; THE WOMEN'S
THERAPY CENTER; CALIFORNIA
THERAPISTS FOR MARRIAGE
EQUALITY; and
THE GOTTMAN INSTITUTE, IN
SUPPORT OF THE
UNCONSTITUTIONALITY OF
PROPOSITION 8**

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INTERESTS OF *AMICI CURIAE*

The organizations submitting this brief *amicus curiae* are professional associations of psychotherapists and mental health professionals—the large majority of their collective membership consists of licensed psychotherapists who work closely with couples, families, and children: the American Marriage & Family Therapist Association, California Division; the California Association of Marriage and Family Therapists (“CAMFT”); CAMFT-East Bay Chapter; CAMFT-Los Angeles Chapter; CAMFT-Marin County Chapter; CAMFT-San Francisco Chapter; the American Family Therapy Academy; GAYLESTA, Inc. (the Gay, Lesbian, Bisexual, Transgender Therapist Association of the San Francisco Bay Area); the Lesbian and Gay Psychotherapy Association of Southern California, Inc. (“LAGPA”); the Women’s Therapy Center; California Therapists for Marriage Equality; and The Gottman Institute. Collectively, they represent more than 85,000 marriage and family therapists and other mental health professionals. Descriptive statements for each of the *amici* are contained in the accompanying Motion for Leave to File Amicus Brief.

Mental health professionals serving a range of couples and families see firsthand the benefits of marriage, social support, and supportive family law for the clients they serve—and they also see the harmful effects of societal discrimination. Because *amici* and their members are so deeply engaged in counseling couples, families and children, they offer this Court a particularly useful clinical and scientific perspective in resolving two issues presented in this litigation: (a) whether Proposition 8 can be sustained on the ground that it promotes the state’s legitimate interest in the welfare of children, and (b) whether same-sex couples and their families experience stigma from being deprived of an equal right to marry.

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INTRODUCTION

One of the central issues facing this Court is whether Proposition 8 and its discriminatory impact on same-sex couples and families advances a legitimate state interest sufficient to meet the requirements of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution. The primary justification for Proposition 8 offered by Defendant-Intervenors is that eliminating the right to marry of same-sex couples protects the state’s interest in the welfare of children, supposedly by *encouraging* heterosexual committed relationships that promote a child being raised by a married father and mother. This justification ultimately rests on the argument that heterosexual couples are more effective as parents than same-sex couples. *Amici* demonstrate below that this purported legitimate state interest for Proposition 8 is contrary to both logic and the empirical scientific record, and thus provides no support for its constitutionality.

Amici also submit that there is overwhelming evidence that same-sex couples and families suffer stigma from being denied equal access to marriage, as demonstrated in the brief *amicus curiae* submitted to this Court by the American Anthropological Association; the American Psychocoanalytic Association; the National Association of Social Workers; the National Association of Social Workers, California Chapter; and the American Academy of Pediatrics, California.

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DISCUSSION

I.

BOTH AMICUS COLLECTIVE CLINICAL EXPERIENCE AND THE RELEVANT SCIENTIFIC RESEARCH SUPPORT THE CONCLUSION THAT PROPOSITION 8 HAS NO RATIONAL BASIS IN THE STATE’S INTEREST IN PROTECTING THE WELFARE OF CHILDREN

A. Proposition 8 Violates the Fourteenth Amendment Unless It Is Rationally Related To A Legitimate State Interest, At The Least

In 1973, the American Psychiatric Association recognized that homosexuality “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.”¹ The American Psychological Association publicly adopted the same conclusion in 1975.² Thus, it should not be surprising that gays and lesbians, with the same degree of mental health and the same aspirations and values as other human beings, form lasting and rewarding couple relationships and family relationships. In fact, the 2000 U.S. Census showed that there are more than 594,000 households in the U.S. headed by same-sex couples, about 92,100 of them in California.³ This case is about whether the State of California should be allowed to strip those same-sex couple and family relationships of the right to civil marriage, along with the benefits and social acceptance that heterosexual couples gain through access to that institution.

The determinative question, of course, is whether the exclusionary line drawn by Proposition 8, allowing heterosexuals to marry but relegating gays and lesbians to the less-

¹ Am. Psychiatric Ass’n, *Position Statement on Homosexuality and Civil Rights* (1973) printed in 131 Am. J. Psychiatry 497 (1974).

² Am. Psychol. Ass’n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975).

³ T. Simmons & M. O’Connell, *Married-Couple and Unmarried Partner Households: 2000*, at 4 (U.S. Census Bureau 2003) (Tables 1 and 2).

1 desirable status of “domestic partnership,” is rationally related to a legitimate state purpose.⁴
2 *See, Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The “rational basis” test is
3 applied more exactly when liberty interests are at stake. *See, e.g., Eisenstadt v. Baird*, 405
4 U.S. 438, 446-455 (1972). It also is applied more carefully when the negative consequences of
5 the state line-drawing affect only a minority category of persons that has traditionally suffered
6 discrimination from the majority. *See, e.g., Romer v. Evans*, 517 U.S. 620, 633 (1996). Both of
7 these reasons for careful examination are present in the current case, because Proposition 8
8 denies a fundamental right of liberty to a category of persons that has suffered from historical
9 discrimination.
10

11 The Defendant-Intervenor’s argument based on Proposition 8’s purportedly “promoting
12 the welfare of children”—that preventing same-sex couples from marrying actually *encourages*
13 heterosexual marriages that result in a child being raised by both a father and mother—cannot
14 be supported logically or factually, for three different reasons.
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26 ⁴ *Amici* agree with the Plaintiffs that Proposition 8 is subject to the strictest form of
27 constitutional review, because it removes a fundamental right based on sexual orientation and
28 gender. *See, P.O.P.S. v. Gardner*, 998 F.2d 764, 767-68 (9th Cir. 1993); *Carey v. Population
Srvs. Int’l, Inc.*, 431 U.S. 678, 686 (1977). But *amici* argue here that Proposition 8 fails even
the lower “rational basis” test, as applied in this factual context.

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2 **B. There Is No Evidence Or Logic That Supports A Conclusion That Denying Marriage**
3 **To Same-Sex Couples Would Encourage Heterosexual Couples To Marry And**
4 **Procreate**

5 The first logical and factual failure of this supposed rationale for Proposition 8 is that
6 there is no empirical scientific or research evidence that denying marriage to same-sex couples
7 somehow encourages greater rates of marriage among heterosexual couples—much less that it
8 promotes their greater rate of marriage and greater rate of procreation, and therefore leads to a
9 higher percentage of children being raised by one mother and one father. In fact the supposed
10 mechanism by which the state’s denying same-sex couples the right to marry could possibly
11 encourage heterosexual couples to marry and procreate is hard to imagine, since heterosexuals
12 would remain equally free to marry before and after the same right is extended to same-sex
13 couples. The only *conceivable* mechanism by which Proposition 8 could achieve this supposed
14 encouragement of heterosexual marriage would be based on the assumption that there is an
15 attitude among a significant percentage of single heterosexuals that their personal goals of
16 marriage and having children would become less desirable (to the point of personally
17 abandoning them) if the institution of marriage were somehow “devalued” by being made
18 available to a less worthy or respectable group of human beings than they are. That attitude
19 itself would be invidious discrimination, since it necessarily depends upon the view that gays
20 and lesbians are inherently less worthy human beings than heterosexuals.
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23 *Amici* know of no empirical evidence in the relevant scientific literature, nor within their
24 collective clinical experience, of such an extreme and illogical attitude in any significant part of
25 the heterosexual population. Although a majority of the heterosexual population in California
26 may be opposed to legalizing same-sex marriage as a matter of social policy, that is very
27 different from concluding that a significant number of heterosexuals who are otherwise ready to
28

1 marry and start a family might decide *not* to marry and have children, merely because the
2 institution of marriage had somehow been lessened in value by allowing same-sex couples to
3 marry.⁵ And even if there were evidence of such an extreme attitude, it is well established that
4 invidious discrimination by one segment of society against another segment cannot justify the
5 government’s support of further discrimination against that minority. *See, e.g., Palmore v.*
6 *Sidotti*, 466 U.S. 429, 433 (1984).

8 If there is no evidence of any mechanism by which denying the right to marry to same-
9 sex couples could possibly *encourage* heterosexual couples to marry and procreate, then perhaps
10 the primary purpose of Proposition 8 is revealed: to discourage same-sex couples from forming
11 lasting relationships and procreating, in order to protect the privilege, benefits, and status of
12 marriage reserved for the heterosexual majority. This kind of naked discrimination through the
13 political power and will of the majority is, of course, exactly what the Due Process and Equal
14 Protection Clauses of the Fourteenth Amendment prohibit. *See, e.g., Romer, supra*, 517 U.S. at
15 635, *Cleburne v. Cleburne Living Center, supra*, 473 U.S. 432 at 446-447.

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18 **C. The Purported “Legitimate State Interest” Based on the Welfare of Children**
19 **Actually Harms The Welfare Of Children Of Same-Sex Parents**

20 Second, the state’s legitimate interest in the welfare of children (which *amici* of course
21 strongly affirm) is not rationally served by Proposition 8 because it purportedly elevates the
22 welfare of the children of heterosexual couples at the expense of the welfare of the children of
23 same-sex couples—a further discriminatory impact.

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27 ⁵ *Amici* submit that it strains the imagination that any heterosexual couple otherwise committed
28 to marriage and having a family could so easily be discouraged from getting married
themselves, and question whether a significant number of such persons exists.

1 *Amici* submit it is indisputable that the children of same-sex couples, if their parents
2 could marry, would benefit from greater stability, social acceptance, and clarity of legal
3 relationships with both parents, among other things. In fact, Defendant-Intervenor’s expert
4 David Blankenhorn conceded this point in his trial testimony.⁶ Trial Tr. at 2803, 2839.

5
6 Therefore, even if there were evidence that the state’s valid interest in the welfare of
7 children should and must apply equally to the welfare of all children affected by the law or
8 constitutional provision at issue, not just the children of heterosexual couples—or, at the least,
9 the line separating the advantaged children from the disadvantaged children cannot be based on
10 raw discrimination against the parents of the latter, as so plainly appears to be the case here.

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13 **D. No Empirical Scientific Evidence Supports The Conclusion That Heterosexual**
14 **Couples Are Better Parents Than Same-Sex Couples**

15 Finally, and most importantly, the essential premise of this purported legitimate state
16 interest is that heterosexual couples are simply better parents than same-sex couples. The
17 collective clinical experience of *amici* and their membership, however, is that same-sex couples
18 are as effective in parenting as heterosexual couples.

19 That collective experience is confirmed by an examination of the empirical scientific
20 literature by and for mental health professionals. No peer-reviewed research supports a
21 conclusion that same-sex couples are less effective parents than heterosexual couples. *See*
22 summaries of the relevant research in, e.g., T.J. Biblarz & J. Stacey, *How Does the Gender of*
23 *Parents Matter?*, *Journal of Marriage and Family* 72 (February 2010) (“At this point, no
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26 ⁶ At pages 2846-2853 of the Trial Transcript, Mr. Blankenhorn agrees that there are at least 12
27 quite substantial ways that same-sex families and society in general would benefit from
28 California’s allowing same-sex marriage, emphasizing the undisputed burden that Prop 8 places
upon same-sex families, supposedly in return for a benefit to the children of heterosexual
couples. But empirical science actually does not support the existence of that benefit.

1 research supports the widely held conviction that the gender of parents matters for child well-
2 being.”); A. Goldberg, *Lesbian and Gay Parents and Their Children*, pp. 134-141 (2010); D.
3 Linville & M. O’Neil, *Family Therapy with Same-Sex Parents*, *Family Therapy Magazine* 36
4 (2008); C.J. Patterson, *Family Relationships of Lesbian & Gay Men*, 62 *J. Marriage & Fam.*
5 1052 (2000); J. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership*
6 *Laws on the Health and Well-being of Children*, 118 *Pediatrics* 349, 358-60 (2006) (“More than
7 25 years of research have documented that there is no relationship between parents’ sexual
8 orientation and any measure of a child’s emotional, psychosocial, and behavioral adjustment.”);
9 E.C. Perrin & Committee on Psychological Aspects of Child and Family Health, *Technical*
10 *Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341 (2002).
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12 See also, Trial Transcript at 1010-1011, 1014-1015, 1025.

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14 The American Psychological Association has also confirmed that scientific research
15 unanimously supports the conclusion that same-sex parents are as effective as heterosexual
16 parents:

17 [T]here is *no* scientific evidence that parenting effectiveness is related to sexual
18 orientation: Lesbian and gay parents are as likely as heterosexual parents to provide
19 supportive and healthy environments for children. . . . [T]he children of lesbian and gay
20 parents are as likely as those of heterosexual parents to flourish.

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22 Am. Psychol. Ass’n, *Resolution on Sexual Orientation, Parents, and Children* (2004) (emphasis
23 added).⁷

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27 ⁷ This document is available on the website of the APA at
28 www.apa.org/about/governance/council/policy/parenting.aspx (last accessed 1/29/10).

1 In its Position Statement supporting the legal recognition of same-sex marriage, the
2 American Psychiatric Association also agreed that scientific research is unanimous on this
3 point:

4 [N]o research has shown that the children raised by lesbians and gay men are less well
5 adjusted than those reared within heterosexual relationships.

6
7 Am. Psychiatric Ass'n, *Position Statement: Support of Legal Recognition of Same-Sex Civil*
8 *Marriage* (2005).⁸

9 Therefore, because the rationale for Proposition 8 purportedly based on “promoting the
10 welfare of children” completely lacks a logical and factual foundation, Proposition 8 cannot be
11 deemed to be “rationally related to a legitimate state interest” based upon this rationale. *See,*
12 *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).
13

14 15 16 II.

17 **AMICI AGREE THAT SAME-SEX COUPLES AND THEIR CHILDREN SUFFER** 18 **STIGMA FROM BEING DEPRIVED OF AN EQUAL RIGHT TO MARRY**

19 The second issue relevant to the clinical experience of *amici* organizations' membership
20 is whether same-sex couples and families suffer stigma from being denied the right to marry.
21 The collective clinical experience of the members of *amici* is that such stigma is pervasive and
22 highly destructive, and this collective experience is confirmed by an examination of the research
23 literature by and for mental health professionals on this subject.
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27 ⁸ This document is available at the website of the American Psychiatric Association:
28 www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200502.aspx (last accessed 1/29/10).

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The brief *amicus curiae* of the American Anthropological Association; the American Psychocoanalytic Association; the National Association of Social Workers; the National Association of Social Workers, California Chapter; and the American Academy of Pediatrics, California, offers an extensive analysis of the scholarly and professional research on this subject. *Amici* agree with this analysis and hereby join in the argument presented in that brief *amicus curiae*.

CONCLUSION

Amici curiae respectfully urge this Court to recognize that Proposition 8 is based on nothing more than an unexamined and erroneous assumption that same-sex couples are not as capable of being effective parents as heterosexual couples. Common sense indicates that Proposition 8 would never have passed by the narrow margin that it did, without veiled appeals by its proponents to this erroneous prejudice.

That erroneous prejudice may be held by a narrow majority of Californians, but the Fourteenth Amendment of the United States Constitution prohibits that narrow majority of

1 voting citizens from imposing their erroneous views by force of law on a minority that has been
2 historically subject to invidious discrimination. The time to end that invidious and
3 unconstitutional discrimination is now. There is no doubt that it will be ended sooner or later—
4 justice is on the side of California offering marriage on an equal basis to *all* its couples who
5 desire to form lasting bonds to support their families. *Amici curiae* respectfully request this
6 Court to act to bring about that inevitable day of justice sooner, for the benefit of untold
7 thousands of California families who long for it.
8

9
10 DATED: February 3, 2010

/S/

By: _____
Kelly Kay
of Counsel
THE LAW OFFICES OF RUEL WALKER

11
12 Attorney for *Amici Curiae*
13 THE AMERICAN ASSOCIATION FOR
14 MARRIAGE & FAMILY THERAPY,
15 CALIFORNIA DIVISION;
16 THE CALIFORNIA ASSOCIATION OF
17 MARRIAGE AND FAMILY THERAPISTS
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22 AMERICAN FAMILY THERAPY
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24 LESBIAN AND GAY PSYCHOTHERAPY
25 ASSOCIATION OF SOUTHERN
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SIGNATURE ATTESTATION

I hereby attest that I have on file all holograph signatures for any signatures indicated by a "conformed" signature (/S/) within this efiled document.

Kelly Kay
of Counsel
THE LAW OFFICES OF RUEL WALKER