

No. 12-144

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

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DENNIS HOLLINGSWORTH, ET AL.,  
*Petitioners,*

v.

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

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF OF AMERICAN COMPANIES AS *AMICI*  
*CURIAE* IN SUPPORT OF RESPONDENTS**

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**QUESTION PRESENTED**

Does the United States Constitution prohibit a state from defining marriage as a union of a man and a woman?

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## INTEREST OF AMICI<sup>1</sup>

Amici are \_\_\_\_ companies, including many of this country's leading companies, who conduct business throughout the United States and world, including in California. The full list of amici is above, but, just to name a few, the amici include: Apple, Nike, Facebook, Morgan Stanley, Intel, Xerox, AIG, Cisco Systems, Mesirow Financial, Oracle, Panasonic, Barnes & Noble, Office Depot, and Alaska Airlines. As both this list and the full list inside the cover of the brief demonstrate: Some of the biggest and most profitable companies in the world have joined this brief because Proposition 8 and similar laws that prohibit marriage by two people of the same sex discriminate against amici's millions of employees, as well as their customers, clients, and vendors.

Amici are not limited solely to large companies, but include many smaller companies. All told, amici cut across virtually every sector of the United States and world economy, including computers and electronics, financial services, entertainment, social and business networking, retail sales, banking, health care and pharmaceuticals, consulting, insurance, fashion, jewelry, air travel, marketing, and food and beverage. Each of the amici is firmly

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<sup>1</sup> The parties have lodged blanket letters of consent to the filing of amicus briefs with the Clerk of the Court. No counsel for a party authored the brief in whole or in part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than the amicus curiae or its members, made a monetary contribution to this brief.

committed to the fair and equal treatment of all its employees, without regard to sexual orientation. Amici embrace diversity both as an end unto itself and as a business imperative that permits us to attract and retain the most talented and productive workforce in order to compete effectively on a domestic and global level. We are each committed to nondiscrimination in the workplace and in business dealings. Laws like Proposition 8 are not only an affront to those values, but also an impediment to our competitive success.

Proposition 8 and similar laws inflict real and wholly unnecessary injury on business. By marginalizing same-sex couples and foreclosing gay men and lesbians from forming “married” families, these bans on equal access to marriage stigmatize gay men and lesbians and deprive them of the benefits intrinsic to marriage, including happiness and security. No matter how welcoming the corporate culture, it cannot overcome the societal stigma institutionalized by Proposition 8 and similar laws. That stigma dehumanizes; it deprives gay men and lesbians of the solidity of married family life that heterosexuals take for granted and makes it more difficult for gay men and lesbians to perform at the highest level in the workplace. Such laws also make it difficult to recruit, hire, and retain some of the top employees who choose not to live in states where they are relegated to second-class-citizen status and prefer instead other states (or countries)—where amici may not have offices or open positions—where their fundamental right to marry is recognized.

## SUMMARY OF ARGUMENT

Amici, over \_\_\_\_\_ companies in the United States, including many of this nation's leading companies, are irrevocably committed to the proposition that all people, regardless of sexual orientation, are entitled to fair and equal treatment under the law. We file this brief in support of Respondents, because amici honor and respect the personal dignity, value, and importance of all of our customers, clients, vendors, employees, and business associates.

Amici agree with the arguments in Respondents' merits briefs. We file this brief to add more voices to the growing chorus that Proposition 8—and similar laws barring equal access to marriage for same-sex couples—are unconstitutional and should be invalidated. Though this brief focuses primarily on Proposition 8 (because that is the law before this Court), the reasons that Proposition 8 is unconstitutional (as identified below and in Respondents' brief) apply across the nation to similar laws that discriminate against many of the amici's customers, clients, vendors, and employees. Accordingly, amici believe that all laws in all states barring couples of the same sex from marrying are equally unconstitutional.

Laws like Proposition 8 needlessly draw a line between opposite-sex families and same-sex families. In barring marriage for loving and committed same-sex couples, Proposition 8 deprives those couples of fundamental rights to due process and equal protection. There can be no doubt, and indeed there



is no dispute, that the alternative to marriage provided by California and other states in the form of “domestic partnership” and “civil union” are inadequate because society does not accord them a status as significant or important as “marriage.” The very existence of this debate—in which some seek to limit the status of marriage to some, but not all, and others aspire to the societal acceptance that marriage brings and domestic partnership does not—conclusively demonstrates the differences between these two forms of “couplehood.” This separation intolerably relegates same-sex couples to second-class status and sends the signal that gay men and lesbians are unable to form long-term, committed, familial relations.

By enshrining in the law that gay men and lesbians are less worthy than heterosexual individuals—and that same-sex couples are inferior to opposite-sex couples—Proposition 8 announces that the law will tolerate discrimination against homosexual individuals. This message is absolutely contrary to amici’s belief in respect for, and fair treatment of, all people.

In addition to the compelling constitutional case, there is a very strong business case for recognizing the rights of same-sex couples to marry. By singling out same-sex couples for unequal treatment, laws like Proposition 8 can impede business efforts to recruit, hire, and retain the best workers in an environment that enables them to perform at their best. Under Proposition 8, individuals in same-sex couples are denied the happiness and security that comes from marrying one’s loved one. This deprives

those individuals from enjoying the many emotional, psychological, physical, and economic advantages that come from marriage—which may make content and satisfied individuals into happy and productive employees. Proposition 8 also interposes an obstacle to recruiting and retaining the best and the brightest when those potential recruits or employees are members of a same-sex couple. Such individuals may forgo the opportunity to work in California, and prefer other states (like Iowa, New York and Massachusetts) or other nations (like Spain, Sweden, Denmark, the Netherlands, Portugal, or Belgium) where they can be married and obtain equal treatment and respect under the law.

\* \* \*

The time has come to recognize the equal rights of gay men and lesbians and of same-sex couples. Amici stand in firm support of their customers, clients, vendors, employees and all others discriminated against and marginalized by laws such as Proposition 8. Amici urge this Court to affirm the decision of the court of appeals.

## **ARGUMENT**

### **I. PROPOSITION 8 AND SIMILAR LAWS ARE AN AFFRONT TO AMICI'S COMMITMENT TO FAIR AND EQUAL TREATMENT.**

All people, without regard to their sexual orientation, are entitled to fair and equal treatment. Amici express this view in our commitment to diversity in the workplace and in our dealings with

employees, business associates, clients, and customers. See, e.g., Jobs at Apple, <http://www.apple.com/jobs/us>; Google Jobs, <http://www.google.com/about/jobs/>; Careers at Facebook, <https://www.facebook.com/careers>; Nike: Diversity & Inclusion, <http://nikeinc.com/pages/diversity-inclusion>.

This view is deeply engrained in American society and is enshrined in the Constitution. All people “are entitled to respect for their private lives. The state cannot demean their existence or control their destiny.” *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Indeed, “[r]espect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare.” *Romer v. Evans*, 517 U.S. 633 (1996).

In few areas is this more important than in the context of “[t]he freedom to marry,” which “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people].” *Loving v. Virginia*, 388 U.S. 1, 12 (1967). “Marriage is one of the ‘basic civil rights of man.’” *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); see also *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

In light of the importance of marriage as a fundamental right, this Court concluded in *Loving v. Virginia* that antimiscegenation laws “surely ... deprive *all* the [States’] citizens of liberty without due process of law” regardless of whether they planned to enter an interracial marriage prohibited by Virginia’s statute. 388 U.S. at 12 (emphasis added). The same is true here: Regardless of

whether a person plans to enter into a marriage with a person of the same sex, his or her individual autonomy is circumscribed by the State. As this Court reaffirmed in *Lawrence*, “the Constitution demands ... the autonomy of” a person making such private choices:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they informed under compulsion of the State.

539 U.S. at 574 (citation omitted). Of course, this is as true for “[p]ersons in a homosexual relationship ... as heterosexual persons” in heterosexual relationships. *Id.* Accordingly, this Court has “counsel[ed] against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.” *Id.* at 567.

Proposition 8 runs afoul of the Constitution's clear mandate for equal protection and due process and of amici's firm commitment to diversity.<sup>2</sup>

### **A. Proposition 8 And Similar Laws Stigmatize Same-Sex Couples.**

Proposition 8 allows opposite-sex couples in committed, loving relationships to marry while prohibiting the same right to same-sex couples in equally committed, equally loving relationships. Instead, same-sex couples are relegated to domestic partnerships. Pet. App. 25-27a;<sup>3</sup> *accord* Cal. Fam. Code §§ 297-299.6 (establishing domestic partnership as separate from marriage). Domestic partnerships, at least in California, provide many of the legal benefits afforded married couples. Pet. App. 47-50a.

Whether there is a technical legal equivalence between “marriage” and “domestic partnership,” however, is not the point. Even Petitioners agree that there is a substantial and meaningful symbolic difference between domestic partnership and marriage. Pet. App. 45a (affirming district court's

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<sup>2</sup> Like the Court of Appeals, the amici “do not mean to suggest that Proposition 8 [or similar laws in other states are] the result of ill will on the part of the voters of California” or the legislators or voters of any other state. Pet. App. 87a. We do believe, however, that these laws, regardless of their intentions, violate the rights of gay men and lesbians.

<sup>3</sup> Unless otherwise indicated, all factual statements contained in the summary of argument and argument sections of this brief are taken from the district court's and court of appeals' findings of fact.

finding of fact). Petitioners “conceded ... during discovery” that “domestic partnerships lack the social meaning associated with marriage” and “the difference between the designation of ‘marriage’ and the designation of ‘domestic partnership’ is meaningful.” *Id.* (quotation marks, brackets omitted). By distinguishing between committed and loving same-sex and opposite-sex partnerships, Proposition 8 thus relegates same-sex couples to the inferior category. This is so because barring same-sex couples from marrying “perpetuat[es the] more general premise—now emphatically rejected by [the California Supreme Court]—that gay individuals and same-sex couples are in some respects ‘second-class citizens.’” *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008); *accord id.* at 452 (due to “the historic disparagement of gay persons, the retention of a distinction ... by which the term ‘marriage’ is withheld only from the family relationship of same-sex couples is all the more likely to cause the new parallel institution ... to be considered a mark of second-class citizenship”).

Labeling same-sex couples as “second class” is intolerable. By failing to recognize loving, committed same-sex relationships as “marriages,” same-sex couples are deprived of the relationship that (as the courts below found) is “widely regarded as the definitive expression of love and commitment in the United States.” Pet. App. 240-41a (citing Proponents’ admissions “that there is a significant symbolic disparity between domestic partnership and marriage” and “that the word ‘marriage’ has a unique meaning”), *aff’d*, Pet. App. 45a (affirming this factual finding). In effect, then, Proposition 8 “places

the force of law behind stigmas against gays and lesbians,” such as “gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society.” Pet. App. 248a (Finding of Fact #58). “[E]ven when the state affords substantive legal rights and benefits to a couple’s family relationship that are comparable to the rights and benefits afforded to [opposite-sex] couples,” as is the case in California under Proposition 8, “the state’s assignment of a different name to the [same-sex] couple’s relationship poses a risk that the different name itself will have the effect of denying such couple’s relationship ... equal respect and dignity.” *Marriage Cases*, 183 P.3d at 444; *accord id.* at 446 (“conclud[ing] that the distinction drawn ... between ... opposite-sex couples and ... same-sex couples impinges upon the fundamental interest of same-sex couples in having their official family relationship accorded dignity and respect equal to that conferred upon ... opposite-sex couples.”).

The notion that same-sex couples are inferior or undeserving of equal treatment is premised on the notion that “the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples.” *Marriage Cases*, 183 P.3d at 452. The district court found as a matter of fact, however, based on Petitioners’ admissions below, that “[s]ame-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions” and to form “happy,

satisfying relationships, ... [with] deep emotional bonds and strong commitments to their partners.” Pet. App. 235a (citing, *inter alia*, Petitioners’ admissions). Assignment of same-sex relationships to second-class status is particularly inappropriate since the California Supreme Court “recognizes that an individual’s capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual’s sexual orientation.” *Marriage Cases*, 183 P.3d at 400.

### **B. Proposition 8 And Similar Laws Enshrine Discrimination In The Law.**

By distinguishing between opposite-sex couples (“marriage”) and same-sex couples (“domestic partnership”), California law under Proposition 8 (and similar laws in other states) codifies “differential treatment” based on sexual orientation. *See Marriage Cases*, 183 P.3d at 452. As the district court was obligated to conclude based on the record before it: “Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.” Pet. App. 316a. Indeed, as the court of appeals explained: The sole effect of Proposition 8 is to “take away from same-sex couples the right to be granted marriage licenses and ... use the designation of ‘marriage[.]’” therefore, Proposition 8 “serves no purpose ... other than to lessen the status and human dignity of gays and lesbians in California and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.” Pet. App. 16-17a. This sends an unmistakable signal



that same-sex couples are in some way inferior to opposite-sex couples, a proposition that is anathema to amici's commitment to equality and fair treatment to all.

The result of the law's formal statement that loving, committed same-sex couples are inferior "threatens the creation of an underclass" of families with same-sex spouses and parents that simply "cannot be reconciled with 'the Equal Protection Clause.'" *Lawrence*, 539 U.S. 584 (O'Connor, J., concurring in judgment) (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982)). But, as this Court reaffirmed in *Romer* (another case involving discrimination against gay men and lesbians): The Equal Protection Clause "neither knows nor tolerates classes among citizens." 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). This creation of an inferior class of couples—known as "domestic partnerships"—contravenes amici's unwavering commitment to equity and fairness.

**C. Proposition 8 And Similar Laws  
Encourage Additional Discrimination  
Against Gay Men, Lesbians, And Same-  
Sex Couples.**

By enshrining in law the "differential treatment" of people and couples based on sexual orientation, Proposition 8 risks "*validating* a more general proposition that [California law] by now has repudiated: that it is permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than,

heterosexual individuals and opposite-sex couples.” *Marriage Cases*, 183 P.3d at 452. In *Lawrence*, this Court recognized the “important” “link[]” between “[e]quality of treatment and ... due process.” Respect for substantive liberty “advances both interests” because any failure to ensure the equal treatment and liberty of same-sex couples “is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” See 539 U.S. at 575 (discussing the “demean[ing]” effect of criminalizing same-sex sexual activity). Such dangers are not merely theoretical. Gay men and lesbians “have been victims of a long and shameful history of discrimination,” Pet. App. 264a (quoting Petitioners’ counsel’s concession), and such discrimination persists today, Pet. App. 266a (citing Petitioner’s admission “that gays and lesbians continue to experience instances of discrimination”). Accord Pet. App. 264-79a (Proposed Findings of Facts 74-78 and supporting evidence).

It is no justification to point to custom, history, or moral disapproval of same-sex couples. Prior to *Loving*, 16 states “prohibited and punish[ed] marriages on the basis of racial classifications.” 388 U.S. at 6; see *id.* at 6 n.5. At the time of this Court’s decision, the law in *Loving* had been on the books at least since the Racial Integrity Act of 1924. *Id.* at 6. Antisodomy laws, like the one struck down in *Lawrence*, had existed in some form or another since “colonial times” when “passed ... by the Reformation

Parliament of 1533.” 539 U.S. at 568.<sup>4</sup> Despite a lengthy historical record in both *Loving* and *Lawrence* supporting the statutes at issue, in both cases this Court struck down the law. This Court did so because “[h]istory and tradition” are not the only guides “of the substantive due process inquiry.” *Lawrence*, 539 U.S. at 572 (internal quotation marks omitted); *accord id.* at 578 (“[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.”). There are situations where “times can blind us to certain truths” and it is necessary for “later generations” to identify the “laws once thought necessary and proper in fact serve only to oppress.” *Id.* at 579. This is one of those situations in which history and tradition should not prevent invocation of the Constitution and “its principles in ... search for greater freedom.”

It is also no justification to say that laws like Proposition 8 simply codify the majority view of California’s voters that the conduct of gay men and lesbians is “immoral.” *See Lawrence*, 539 U.S. at 577. “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” *Id.* We question whether there is a basis for laws that express “moral disapproval” of two people entering into a loving and

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<sup>4</sup> Though “[i]t was not until the 1970s that any State singled out same-sex relations for criminal prosecution,” *id.* at 570, that history of a more recent vintage was of no moment to the *Lawrence* majority, which held that antisodomy statutes aimed at consenting adults violate the Due Process clause of the Fifth and Fourteenth Amendments, *id.* at 562, 564, 578-79.

committed relationship, starting a family, raising children, and supporting one another. These are central components to marriage. California already encourages these commitments through the “domestic partnership” denomination. Thus it can only be moral disapproval of “the most private human conduct[:] sexual behavior,” *id.* at 567, that accounts for the decision to deprive same-sex couples the right to characterize their relationships as “marriage.” But, as this Court has said, it “demean[s] a married couple” to suggest that “marriage is simply about the right to have sexual intercourse.” *Id.* at 567.

In light of the district court’s factual finding that domestic partnership is sociologically inferior to marriage (as affirmed by the court of appeals, Pet. App. 45a), Proposition 8 has but one effect: to sanctify as a matter of California constitutional law the conclusion that same-sex couples are both different from and less worthy than opposite-sex couples. The relegation of gay men and lesbian women to second-class citizenship as to “one of the vital personal rights essential to the orderly pursuit of happiness by free [persons],” *Loving*, 388 U.S. at 12, fundamentally offends amici’s commitment to diversity, equality, and fair treatment of all people. Proposition 8 is no more than permission to discriminate against gay men and lesbians—permission the U.S. Constitution affords to no one.

**D. Proposition 8 And Similar Laws Compel Companies To Send Mixed Signals About The Treatment And Respect of Lesbian Women, Gay Men, And Same-Sex Couples.**

Finally, Proposition 8 leaves companies in the untenable position of being compelled implicitly to endorse the second-class status to which their gay and lesbian employees, clients, customers, and business associates are relegated. Indeed, while we can treat members of same-sex and opposite-sex couples exactly the same, so long as same-sex couples are not “married” and cannot be recognized as “spouses,” Proposition 8 compels us to use (or, at least, accept under the law) the labels “marriage” and its lesser cousin, “domestic partnership.” Until the law no longer relegates same-sex couples to second-class status as inferior “domestic partnerships,” our adherence to the law compels us to abide by a distinction that stigmatizes and dehumanizes gay men and lesbians. *Supra* at \_\_\_\_.

**II. PROPOSITION 8 AND SIMILAR LAWS IMPEDE EFFICIENT AND PRODUCTIVE BUSINESS ACTIVITY.**

Recognizing the rights of same-sex couples to marry is more than just a constitutional issue. It is a business imperative. By singling out a group for less favorable treatment, Proposition 8 impedes businesses from achieving the market’s ideal of efficient operations—particularly in recruiting, hiring, and retaining talented people who are in the best position to operate at their highest capacity.

Amici are competing domestically and internationally with companies inside and outside the United States in places where all couples, regardless of whether they are of the same sex, are afforded equal access to marriage. Those of us operating in states like California face a competitive disadvantage, as explained below.

***Benefits of Marriage.*** Marriage makes many people happier and more secure. This Court has long recognized “[t]he freedom to marry ... as one of the vital personal rights essential to the orderly pursuit of happiness by free [persons].” *Loving*, 388 U.S. at 12. That statement is as unassailable today as it was in 1967 when this Court invalidated bans on racially mixed marriages.

The district court found as a matter of fact that “[m]arriage creates economic support obligations between consenting adults and for their dependents,” “promot[es] physical and psychological health,” decreases “behaviors detrimental to health,” provides “[m]aterial benefits, legal protection and social support ... [that] can increase wealth and improve psychological well-being,” and (due to “[t]he long-term nature of marriage”) “allows spouses to specialize their labor ... to increase household efficiency by dividing labor to increase productivity,” Pet. App. 223-25a, thereby “decreas[ing instances of] absenteeism at work,” Pet. App. 257a. According to the record below, “[m]arried individuals [even] live longer on average than unmarried individuals.” Pet. App. 223a.

None of these factual findings regarding the benefits of marriage are particularly controversial. In fact, Petitioners agree with them (albeit only with regard to the benefits of marriage for opposite-sex couples). But Petitioners have identified no reason—and we can think of none—as to why these facts about the benefits of marriage depend on the gender difference of the spouses. Indeed, the district court and the California Supreme Court both concluded that these benefits inhere in same-sex as well as opposite-sex marriages. *Marriage Cases*, 183 P.3d at 400; Pet. App. 235a, 248a. Petitioners admit that people who are “married experience, on average, less anxiety and depression and greater happiness and satisfaction with life than do non-married opposite-sex couples,” and that “marriage between a man and a woman can be a source of relationship stability and commitment, including by creating barriers and constraints on dissolving the relationship,” and that marriage can “encourage[] spouses to increase household efficiency, including by dividing their labor in ways that increase the family’s productivity in producing goods and services for family members.” Pet. App. 223-26a. Petitioners’ concessions and the district court’s findings are in accord with the California Supreme Court’s recognition that “the right to marry” is of central importance to an individual’s opportunity to live a happy, meaningful and satisfying life as a full member of society. *Marriage Cases*, 183 P.3d at 427. “The ability of an individual to join in a committed, long-term, officially recognized family relationship with the person of his or her choice is often of crucial

significance to the individual's happiness and well-being." *Id.* at 424.

These benefits do not so necessarily accrue in families based on "domestic partnership." Domestic partnership is not an adequate substitute for marriage; for a litany of reasons discussed above, *supra* at \_\_\_, the benefits that inhere in marriage are absent in domestic partnerships. "The legal commitment to the long-term emotional and economic support that is an integral part of an officially recognized marriage" "provides an individual with the ability to invest in and rely upon a loving relationship with another adult ... that may be crucial to the individual's development as a person and achievement of his or her full potential." *Marriage Cases*, 183 P.3d at 816. That legal commitment and its attendant benefits do not so readily apply to domestic partnerships. This is so because "domestic partnerships" do not carry the social meaning associated with marriage. Pet. App. 45a (affirming district court's factual finding). Thus, the perception of long-term relationship stability that affords married spouses the economic security to specialize their labors is absent in domestic partnerships.

Finally, for all the reasons discussed above, couples are much more likely to celebrate a marriage and a wedding as opposed to the commencement of a domestic partnership. Increased wedding celebrations can mean additional revenue for many businesses—such as businesses involved directly in wedding celebrations, businesses that produce goods often given as gifts to newlyweds, and businesses



that benefit from increased tourism from guests who travel to the wedding. *See* Pet. App. 257a; *see also* Angeliki Kastanis, M.V. Lee Badgett, Jody L. Herman, *The Economic Impact of Extending Marriage to Same-Sex Couples in Washington State*, The Williams Institute (Jan. 2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Kastanis-Badgett-Herman-WASalesTaxImpact-Jan-20121.pdf> (finding that total spending on wedding arrangements and tourism in Washington State would increase by approximately \$88 million if same-sex couples were provided equal access to marriage); Cathy Renna, *Extending Marriage Rights to Same-Sex Couples in Iowa Boosted the State and Local Economy by \$12 Million*, The Williams Institute (Dec. 7, 2011), <http://williamsinstitute.law.ucla.edu/press/press-releases/marriage-rights-same-sex-couples-iowa-boosted-economy>.

***Respect and fair treatment.*** Domestic partnership is not an adequate substitute for marriage. Instead, forcing same-sex couples to accept a “domestic partnership” rather than the more socially valued “marriage” leaves them a cruel choice: either accept second-class status (because the law permits them no better), or choose not to legally formalize their relationship at all. Giving up the second-class status of domestic partnership as a matter of principle deprives them of the legal rights afforded domestic partners, including the presumption of parentage, the ability to adopt each other’s children, the right to community property and jointly filed state tax returns, and equal rights to hospital visitation and medical decisions of an

incapacitated partner, to name just a few. *See* Pet. App. 49-50a (listing enumerated rights of domestic partners in California).

But same-sex couples who accept “domestic partnership” in order to secure those legal rights, are nevertheless deprived of the social meaning associated with marriage. Pet. App. 45a (affirming district court’s factual finding). The effect of the alternative and inferior status of “domestic partnership” is to reinforce the “stigma[] against gays and lesbians” that they “do not have intimate relationships similar to heterosexual couples; ... are not as good as heterosexuals; and ... [that their] relationships do not deserve the full recognition of society.” Pet. App. 248a; *accord* Pet. App. 260a (finding as a matter of fact that “Proposition 8 singles out gays and lesbians and legitimates their unequal treatment” by “perpetuat[ing] the stereotype that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents”).

The dehumanizing effect of these stigmas on same-sex couples is reason enough to reject Proposition 8. But there are also practical consequences on businesses to such mistreatment of its employees and business associates. Like anyone else, these stigmas “negatively affect the mental health of gays and lesbians.” Pet. App. 177a. Employees suffering the mental health consequences of discrimination may, as a result, be less productive.

This truism seems especially apt here, where same-sex couples are discriminated against in

perhaps the most personal and private of all decisions (the decision to get married) and the discrimination is enshrined in law, arguably validating other forms of discrimination against those individuals and couples on the basis of their sexual orientation. *Supra* at \_\_\_\_\_. Moreover, the discrimination at issue here is not an isolated incident of discrimination, but rather one that “results in frequent reminders for gays and lesbians in committed long-term relationships.” Pet. App. 261-62a. Reminders are ever-present whenever a same-sex couple must explain that they are not business “partners” for purposes of filling out a loan application or inform a fellow airline passenger that the “partners” would like to sit next to each other or fill out any number of standardized forms that request information about marital status. Pet. App. 261-63a (recounting testimony of such events). These situations are so ubiquitous that same-sex couples are reminded almost daily of their status as “second-class citizens.” *Marriage Cases*, 183 P.3d at 400, 402; *accord* Pet. App. 51-52a. There can be little doubt that an employee who suffers the psychological and emotional strain of such daily reminders of second-class status will not produce his or her best work every day.

***Recruiting and Marketing.*** It is undisputed that gay men and lesbians suffer a daily gratuitous insult by their relegation to second-class status—an insult that negatively affects their productivity in the workplace and thus indirectly impairs their employers. Businesses suffer a more direct injury than that, however. Because domestic partnerships are not equivalent to marriages, *supra* at \_\_\_\_\_, it

should come as no surprise that loving, committed same-sex couples may choose to relocate to states where their relationships are afforded the dignity and respect they deserve as marriage. Take, for example, a graduating engineering student near the top of her class at MIT. She is interested in putting her skills to work for one of the major technology companies in Silicon Valley and finds the perfect job that utilizes all of her skills, talents, and education. The problem is that she is also in a long-term committed, same-sex relationship and she expects that she and her significant other will soon marry and start a family. With those goals in mind, however, the couple cannot move to California (or, at least, would have no interest in moving to California) because they will not be able to get married in California or have their marriage from another state recognized in California. So, they choose to stay in Massachusetts, and, since that perfect Silicon Valley job is only available in California, this superstar engineer looks for and accepts a job in Massachusetts or New York, even if that job does not fully utilize her talents. Even worse for American business, she and her significant other could choose to move to Spain, Sweden, Portugal, the Netherlands, Denmark, or Belgium—all countries that recognize marriage of same-sex couples. And the superstars from those countries will be less likely to take jobs here.

The effects of losing existing and prospective highly talented and qualified employees can be devastating in this highly competitive world of international competition. This is because there is no substitute for hiring and retaining the best

workers possible. Nor is there any substitute for diversity of ideas and experience. As one amicus explained its strong support for diversity: “[W]e don’t just accept difference—we celebrate it, we support it, and we thrive on it for the benefit of our employees, our products and our community.” <http://www.google.com/about/jobs/>. Another amicus explains that diversity is essential to the success of innovative companies, like amici:

Most companies embrace diversity. Not Nike. We soak it up. We squeeze it out. We want it to drip over everything Nike does. Because without diversity of opinion, ... of background, ... of perspective, ... the Idea grows fallow. Or worse, it vanishes altogether. The mission is to harness diversity and inclusion to inspire ideas and ignite innovation.

Nike: Diversity & Inclusion, <http://nikeinc.com/pages/diversity-inclusion>; *accord*  
Verizon Diversity and Inclusion, [http://www22.verizon.com/jobs/workinghere\\_diversityinclusion.html](http://www22.verizon.com/jobs/workinghere_diversityinclusion.html) (“At Verizon, we foster an environment that thrives on different perspective.... Join a company with steadfast values that embraces diversity and personal development not only because it’s the right thing to do, but also because it’s smart business.”).

Amici thrive in large part thanks to the hard work and creativity of our employees. If external forces—such as discrimination on the basis of sexual

orientation in the laws of the states where we operate—block us from recruiting, hiring, and retaining the very best employees, we will be unable to achieve the success that each of us is capable of achieving with a workforce of the best and brightest employees.

### **III. MERELY INVALIDATING THE DEFENSE OF MARRIAGE ACT DOES NOT ADDRESS THE HARMS OF PROPOSITION 8.**

Striking down the Defense of Marriage Act (“DOMA”) will not address the harms identified here. While striking down DOMA would address some of the discrimination inherent in federal law, it would not address any of the unacceptable consequences of Proposition 8 and similar state laws. Those laws would continue to discriminate against and stigmatize same-sex couples, *see supra* at \_\_\_\_, with all of the attendant negative consequences to those individuals and to business, *see supra* at \_\_\_\_. Accordingly, we respectfully suggest that no matter what decision this Court hands down in *United States v. Windsor*, Nos. 12-307, 12-63, this Court must still address whether state laws such as Proposition 8 infringe the constitutional rights of same-sex couples.

### **CONCLUSION**

For these reasons and the reasons urged by Respondents, this Court should affirm the judgment of the court of appeals.

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