No. 12-144

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,

Petitioners,

v.

KRISTIN M. PERRY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE REV. RICK YRAMATEGUI, REV. HERB SCHMIDT, AND REV. DARRELL W. YEANEY IN SUPPORT OF RESPONDENTS' POSITION ON THE MERITS

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INTEREST OF AMICI CURIAE[1]

Amici curiae Rev. Rick Yramategui ("Ear-uh-MAH-teh-gee"), Rev. Herb Schmidt, and Rev. Darrell W. Yeaney ("YAY-nee") are members of the clergy. They were educated for the clergy in religious denominations (United Church of Christ, Lutheran, Presbyterian) that initially accepted marriage only for opposite-sex couples. However, their higher religious values led them to recognize and have compassion for the real needs of real people, even when they departed from traditional norms, and to find ways to honor those needs in ways that integrated them into the larger community. They find that these higher values are expressed in other religions and as humane values in the secular world as well. They have listened to and counseled same-sex couples. All three have performed commitment ceremonies and two have performed marriages for same-sex couples. Some of these couples now have children. In their work, Rev. Yramategui, Rev. Schmidt, and Rev. Yeaney have experienced the importance that same-sex couples place on forming families and their profound desire to marry. They support the recognition of same-sex marriage because it will build and

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[1] Pursuant to Supreme Court Rule 37.6, no party or counsel for a party authored this brief in whole or in part and no party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief.

The parties have filed letters giving their consent to the filing of briefs by amici curiae.

strengthen families and will, by bringing same-sex couples and their families into the mainstream, build and strengthen all of our communities.

SUMMARY OF ARGUMENT

This brief supports the results in the courts below but approaches the issues differently from those opinions and Respondents' arguments.

This brief focuses on the fundamental right to form families because it is more fundamental than the right to marry. Independently of what government does, people have a right to and do form families and decide for themselves who will be in their families. In California there is now a diversity of families, some headed by opposite-sex couples, some by same-sex couples, some by single parents, some with their own biological children or adopted children or foster children, and some with no children at all.

Respondents herein have exercised their right to form families, so this case is not about any deprivation of that right. Rather, this case is about California's disparate treatment of two groups of people with respect to their right to form families.

This case is also not about how the institution of marriage must be structured for everyone in the United States or everyone in California.

Marriage is a multi-faceted institution. In its broadest meaning, marriage is a religious and cultural

institution that supports the joining of committed couples to form families. The institution includes the secular laws that affect marriage, but those laws play only a small though important part. What matters more to the broader institution is how married people live their lives and how their relevant community treats them around their marriage.

Marriage is a voluntary institution. Couples can marry only if both parties consent. They have children only if they so decide. Religious and other private organizations maintain their own diverse marriage requirements, ceremonies and support systems in the ways that they value.

In today's environment, where relationships often tend to fall apart, the essential functions of California's marriage laws are to provide a legal structure within which couples can form families, to support the on-going life of couple-led families, and to provide rational procedures for ending marriages. Religious and other organizations often want all marriage laws to fulfill their own purposes, ideas and values relating to marriage. Often, those concerns go beyond the governmental function of the marriage laws into the realm of the religious and cultural institution of marriage. Nevertheless, the only issue in this case is much narrower: whether one of California's secular marriage laws, specifically, Proposition 8, by limiting marriage to opposite-sex couples, violates the Equal Protection Clause.

Same-sex and opposite-sex couples, as human beings, are similarly situated with respect to their fundamental right to form families and their interest in having the support of the marriage laws for their families. This conclusion is supported by a detailed analysis that breaks the similarity issue into its logical components. As a matter of simple logic, since the government action is in the present, the similarities between the groups affected by that action, as well as the justification for any disparate treatment, must be evaluated in light of present-day realities.

Proposition 8 treats same-sex and opposite-sex couples differently with respect to the fundamental right to form families by giving the benefits of marriage to the families of opposite-sex couples while withholding those benefits from the families of same-sex couples.

This brief analyzes two of the various possible justifications for this disparate treatment – opposition to homosexual behavior, and the desire for gender-based uniformity in the institution of marriage – and explains why those justifications fail to provide a compelling state interest.

ARGUMENT

I. INTRODUCTION.

In the present case, the question is whether the Equal Protection Clause requires that California law

give same-sex couples the same access to the legally established structure and benefits of marriage as it gives opposite-sex couples.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that the state treat people equally when they are similarly situated, unless unequal treatment is justified. The constitutional equal protection analysis proceeds through several steps: (1) Are the people similarly situated with respect to the state action? (2) Are they treated unequally? (3) If they are treated unequally, what is the nature of the unequal treatment and the right or interest that is affected by the unequal treatment? (4) Depending on the nature of the right or interest that is affected and on the nature of the unequal treatment, is the unequal treatment justified by a sufficient state interest?

The Equal Protection Clause is stated in abstract terms. "Equal protection" is an abstract statement about the value of things or events – "abstract" because there are any number of concrete circumstances where equality can be found to exist. In mathematics, two quantities or expressions that are not identical – like "2 + 2" and "4" – are equal when they have the same mathematical value. In law, the equal protection analysis begins with a determination that the two groups involved in the case are similarly situated. As with equality in mathematics, the situations subjected to this similarity determination need not be identical. They need only be similar in their nature and value.

The method for analyzing Equal Protection Clause cases is nowhere stated in the Constitution. The court developed its method in part to give reason and logic to a potentially formless adjudication process, and in part to distinguish between (a) cases where the court ought to defer to legislative judgments that inevitably make distinctions between groups that are arguably similar, and (b) cases where judicial intervention should be exercised to prevent unequal treatment. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

The court's equal protection analysis thus requires interpretation – but it is interpretation of the judicially promulgated method more than the words of the Constitution. In applying the court's analysis, it is necessary to use reason and logic when following the steps prescribed by the court.

II. SAME-SEX AND OPPOSITE-SEX COUPLES ARE SIMILARLY SITUATED.

A. How should the court decide whether the two groups are similarly situated?

The first step in the analysis is to determine whether the two groups at issue are similarly situated. See, *e.g.*, *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 343 (1989).

At the outset, there is a problem: courts are not always clear about what is meant by the term, "similarly situated." This lack of clarity raises several questions.

(1) In what respect must groups be similarly situated?

Some courts don't explain how they choose the characteristics on which they base their similarity determination. Rather, they assume or briefly itemize obvious similarities. See, *e.g.*, *Brown v. Board of Education*, 347 U.S. 483, 494 n. 10, 495 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Washington v. Davis*, 426 U.S. 229 (1976); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

Other courts say that two groups are similarly situated only when they are similarly situated with respect to the *purpose* of the law. See, *e.g.*, *In re Marriage Cases*, 43 Cal.4th 757, 873, 881 (2008), Baxter, J., dissenting and Corrigan, J., dissenting; *People v. Brown*, 54 Cal.4th 314, 328 (2012); *Cooley v. Superior Court*, 29 Cal.4th 228, 253 (2002); Joseph Tussman & Jacobus tenBroek, "The Equal Protection of the Laws," 37 Calif.L.Rev. 341, 346 (1949). In such a case, the problem lies in defining the purpose of the law, because often, laws can be characterized as having several purposes. Then the question becomes, which of the purposes will be used in evaluating the similarity?

Alternative formulations can be made, however, to make the similarity analysis meaningful. It may be said that people must be similarly situated with respect to the *effects* that the governmental action would have on them. Alternately, it may be said that

people are similarly situated when their *circumstances* show that the nature and value of their *interests* are similar with respect to the benefits or burdens of a particular governmental action.

The U.S. Supreme Court has not endorsed the approach that measures similarity with respect to the state's *purposes*. Rather, in practice, but without clearly saying so, the court has taken the approach that measures similarity in relation to the plaintiff's *interests*. See, *e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972) ("look . . . to . . . individual interests affected. . . .").

For example, in *Saenz v. Roe*, 526 U.S. 489 (1999), the court applied an interest-based similarity analysis, noting that the plaintiffs who had recently come to California had the same interest as longer-term residents in benefitting from the privileges and immunities of that state, 526 U.S. at 501-03, and had the same need for welfare assistance, 525 U.S. at 505. The statute in question imposed a durational residency requirement for the purpose of saving money for the state by awarding lower welfare benefits to recent arrivals. The court invalidated the residency requirement. It could not have done so had it analyzed similarity based on that purpose of the statute.

Similarly, in *Armour v. City of Indianapolis*, 566 U.S. ___, 182 L.Ed.2d 998, 1002-04 (2012), all of the property owners shared similar interests. They all owned property in the assessment district and had

been assessed at the same time for the same project using the same assessment formula. However, some had elected to pay the full assessment up front in one payment, whereas others had elected to pay the assessment in installments over many years. After only one year the city forgave the balance on all future installment payments but did not refund any of the up-front payments. Under these circumstances, it could be assumed that all of the owners had the same interest in having their assessment reduced proportionately. These similarities along with the disparate treatment gave the plaintiffs an arguable equal protection claim. Nevertheless, the Supreme Court found that the city had an over-riding interest that justified the city's action. 182 L.Ed.2d at 1006-07.

Judging the similarity of the groups based on their *interests* in the governmental action has significant advantages over a *statutory-purpose*-based analysis.

Basing the similarity determination on the *purpose of the statute* may have the effect of merging the last step in the analysis – whether the unequal treatment is adequately justified by a sufficient governmental purpose – with the first step – whether the two groups are similarly situated with respect to the governmental purpose. Considering the governmental purpose at both stages in the analysis may thus lead to confusion and a failure to find the requisite level of justification. *Cf.* Giovanna Shay, "Similarly Situated," 18 Geo.Mason L.Rev. 581, 587-89,

615-16 (2011); see also, *e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981).

In contrast, basing the similarity analysis on the *interests of the two groups with respect to the governmental action* avoids this problem. With this approach, the first step calls for an analysis of the *private interests* that support an equal protection claim, and the last step then asks whether there are *over-riding governmental interests*. If a similarity is found based on an assessment of private interests, there will still be room for a useful evaluation of the remaining steps because the unequal treatment analysis and the justification analysis will not have been foreclosed by the reasoning in the first step.

(2) Will the similarities or differences govern whether to proceed to the next steps in the analysis?

Next, in any case with a plausible equal protection claim, it is always possible to find some ways in which people are similar and other ways in which they are different. This raises the next question: will the decision to proceed with the equal protection analysis be governed by the similarities or the differences?

The governmental action in question here is the Proposition 8 definition of marriage that gives access to the legal structure and benefits of marriage. In this case, one can find both similarities and differences between same-sex couples and opposite-sex couples in

relation to that definition. These similarities and differences are documented in the trial court's decision and described in other briefs.

However, one area of similarity between these couples needs emphasis here: both opposite-sex couples and same-sex couples want to and do form families. A family begins with the union of two people who are not biologically related to one another but who, out of a deeply felt emotional attachment to one another, choose to live with one another and commit themselves to one another as life partners. From that point forward, the family they have started may remain as a family of two adults or grow to include children and/or the other relatives of each partner. In both opposite-sex and same-sex couples, the members of the couple find stability in choosing one person for a life-long partner and in forming a family with that partner. The commitment they make to one another takes the members of the couple out of the on-going search for and competition for sex partners, enables these couples to go on with the work of their lives beyond competing for a mate, and enables them to find emotional and sexual satisfaction in their on-going relationship with their partner.

The question then is this: Should the application of the Equal Protection Clause be governed by the similarities or the differences between these couples?

One approach to answering this question would be to say that any differences will end the equal protection analysis. However, this approach would

end the equal protection analysis in nearly every case, because in nearly every case there will be differences between the comparison groups.

A second approach would be to say that regardless of the existence of differences, if there are any similarities, then the Equal Protection analysis should proceed to the next step. Because similarities can be found everywhere, this approach would make too many cases subject to the Equal Protection analysis.

A third approach would be to say that the similarities must be significant in relation to the alleged unequal treatment before continuing with the equal protection analysis. This brief takes this third approach, because it clarifies the private interests that are involved and it opens up questions about values that are likely to be lurking beneath the surface of this case. Further, when the focus is on those values, it should lead the court to view the similarities with a firm understanding of their importance. In addition, it may help to distinguish between those cases where courts should defer to the legislative action and those cases where judicial action may be appropriate. Then, too, whether unequal treatment can be justified may have to take into account both the nature and value of the similarities as well as the nature and effect of the unequal treatment in such a way as to reasonably and logically evaluate the justification for the unequal treatment. Finally, in a case where there are differences between the groups, the differential

treatment may still be justified by a sufficient governmental purpose that takes into account the differences. This third approach maximizes the chances that all relevant factors will be considered before the court reaches its final decision.

Whether the similarities are viewed as significant so as to take the equal protection analysis to the next step is a function of several considerations – (1) the value that is attached to the claimed similarities, (2) the identity of the group whose values are considered relevant to the determination of similarity, (3) the genuineness and credibility of that group's claimed interests, and (4) the level of abstraction at which the similarities are analyzed.

B. The Equal Protection Clause requires that similarities be valued based on today's realities.

The value that is attached to claimed similarities depends on the nature of the interests claimed and their importance to the parties claiming them.

Introducing the question of values into the equal protection analysis can feel like slippery ground, because values can be very subjective. Nevertheless, values must be addressed, because equality is about equivalent values, and subjectivity can be overcome. Values are at the heart of the pursuit of happiness, for ultimately, success in the pursuit of happiness depends on living one's life in accordance with one's deeply felt values. *Human behavior in the pursuit of*

happiness gives an objective measure of human values.

From time to time, values change. As a result, people's behavior in pursuit of happiness also changes. Changes in human behavior can affect the law, by showing whether or not the law is effective, continues to be useful, or continues to provide the protection it initially offered. The law must take such changes into account.

The similarities that plaintiffs allege in support of their equal protection claims relate to their interests in forming families and in receiving the legal recognition and support for their families provided by the marriage laws.

In the past, no value would have been assigned to such a claim by the plaintiffs. In much of the 20th century, homosexuality was viewed as a shocking, heinous activity, to be kept in secret and not discussed. Indeed, sodomy, as it was then called, was a criminal offense. In this regard, consider Chief Justice Burger's concurring opinion in *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986), in which the court upheld the imposition of criminal penalties on homosexual conduct, there called sodomy, and in which the Chief Justice quoted Blackstone's characterization of sodomy as "the infamous crime against nature . . . [and] . . . an offense of deeper malignity than rape, a heinous act the very mention of which is a disgrace to human nature, and a crime not fit to be named." In such an environment, the idea that

homosexuals could form families and marry would have been preposterous.

Now in the 2010's, people claim that same-sex couples should be given access to the legal benefits of marriage. Gay people[2] publicly admit their own homosexuality. Straight people discuss the subject of homosexuality as an accepted fact. Laws in many states have been changed to give gays the right to form domestic partnerships. Many gays live in openly gay relationships. Gays have children, either their own biological children or adopted children. Some states allow gays to marry.

How can constitutional jurisprudence get from the 20th century's hostility towards homosexuality to the view now advocated by gay people in the 21st century – that their form of love is so similar to heterosexual love that they should be treated equally? What legal principle enables or requires this to happen?

The answer to this question lies in an important aspect of equal protection: as a matter of simple logic, whether or not state action affords equal protection to two groups can only be judged now, at the time of the litigation, in light of circumstances, values and behavior that exist now, when the alleged discriminatory

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[2] This brief uses the term "gay" to refer to males, females and transgender individuals whose sexual orientation leads them to prefer same-sex intimate relationships over opposite-sex relationships.

treatment is applied to the two groups. How the interests of any of the groups were valued in the past has no bearing on the issue of equal treatment today. If two groups are similarly situated today as to the nature and value of their interests, then they are entitled to equal protection of the law today.

This principle was recognized by the court in *Brown*, *supra*, 347 U.S. at 489-490, 493. There, the court noted that when the Fourteenth Amendment was adopted, public education was not widely practiced, whereas by 1954, when the case was before the court, public education was the standard method for providing education. In 1954, many blacks were relegated to inferior education in segregated schools. The court held that the equal protection issue must be decided based on the realities in 1954, not the realities of 1868.

Many of the marriage laws were enacted long ago. Now, gays claim the right to equal treatment under these laws. Even old laws that were previously unquestioned must be re-evaluated for their current validity. It doesn't happen often that old laws have to be rewritten for the benefit of latecomers to the claim for equality. However, this is exactly the kind of situation that the Fourteenth Amendment was intended to fix.

The Fourteenth Amendment was designed to require equal treatment for all blacks. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Brown*, *supra*, 347 U.S. at 490. Before the Thirteenth Amendment was enacted,

blacks were slaves, not entitled to equality, and laws had been long on the books excluding blacks from the benefits afforded to whites. The idea that blacks were in any way equal to whites was viewed as preposterous. Nevertheless, after the Thirteenth Amendment freed the slaves and the Fourteenth Amendment was passed, blacks became entitled to equal treatment. Under the compulsion of the Fourteenth Amendment, the long-standing laws then in effect that excluded blacks had to be rewritten or reinterpreted to include them.

A similar situation occurred in *U.S. v. Virginia*, 518 U.S. 515 (1996). In that case, women sought entry into the Virginia Military Institute which, since its founding in 1839, had admitted only men. However, as a result of the women's movement, some women came to feel that they, just like men, could benefit from the education offered at VMI. Thus, viewing both men and women as human beings with the same desires, interests, values and capabilities, women came to see themselves as similarly situated with men. On that basis, in the 1980's some women sought admission to VMI. In 1990, the U.S. Attorney General filed a lawsuit on behalf of one woman who had been denied admission. Ultimately, the U.S. Supreme Court held that VMI's 150-year-old practice of male-only education was a denial of equal protection to the women who sought admission. Writing for the court, Justice Ginsberg noted, "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." 518 U.S. at 557.

Once again, ideas of equality that formerly were considered preposterous were finally accepted because values and behavior changed.

Similarly, gay people have long been excluded from the previously written marriage laws. Now, however, they too have been freed – not by a single legal fiat, but by changes in social values and behavior. Now that they are free to form families, now that they hold themselves out in public as forming families, and now that they have been given positive social recognition for their families, it is now possible to see what could not be seen previously – that *the value of their families is the same as the value of families formed by opposite-sex couples*.

C. The similarity analysis should be based on the interests and values asserted by gays who support same-sex marriage.

Today, same-sex couples assert that their interest in social support for their families through the marriage laws is similar both in nature and value to that of opposite-sex couples. At the same time, many others dispute this claim. This, then, raises the next question: Whose claim that the two groups are similarly situated is relevant? Is it the claim of same-sex couples or the claim of those who oppose same-sex marriage, or is the claim to be judged by some independent, objective standard?

In answering this question, first consider the existential nature of the claims that are made here. The claim made by gays, that same-sex marriage is essential to their pursuit of happiness, is an existential claim about what is valuable to them. No one can be a better judge of this than gays themselves. The gays who seek the right to marry are adults. They know better than anyone else what their own feelings, emotions, desires and dreams are and how important they are. They are the kinds of feelings, emotions, desires and dreams that demand expression and drive a person towards self-realization. If they are wrong about what will aid them in their pursuit of happiness, they are the ones who will bear the consequences. In this respect, their situation is the same as that of heterosexuals – many of whom, in the matter of marriage, turn out to be wrong about what will aid them in their pursuit of happiness. But gays are no more likely than heterosexuals to be mistaken about these kinds of existential needs.

Second, consider the children in the families of same-sex couples. These couples seek the support of marriage for their children's benefit, as well as for themselves.

Third, consider the minority status of gays. They are a minority in our culture and will likely remain so. Today, in many parts of the country, a majority of the people oppose same-sex marriage. Implicit in that opposition is a judgment that the existential concerns of gays have a lesser value than the existential concerns of heterosexuals, and a judgment that the

families of gays have a lesser value than the families of heterosexuals.

The Equal Protection Clause is designed in part to protect the rights of minorities. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 472, and fn. 24 (1985). In a democratic society with majority rule, there are few situations in which there is a need for the Equal Protection Clause to protect the majority's right to equal treatment. Majorities are usually protected simply by their majority voting power. In this context, it does not make sense to judge the existential claims made by minorities by relying on the value claims made by the majority. Letting the majority's value judgments rule, simply because they are the value judgments of the majority, would make the Equal Protection Clause meaningless as a protection for minorities.

Therefore, the court should guide its decision-making process by focusing on the interests and values asserted by the minority group that seeks recognition for its equal protection claims.

D. The value claims in support of same-sex marriage are genuine and credible.

Should minority claims be given uncritical acceptance? Certainly not. At very least, they should be examined to see whether they are genuine and credible.

Credibility is something courts are regularly called upon to judge. Here, the trial court accepted the credibility of the plaintiffs with respect to their claimed desire to marry – that it arose from a genuine love for one another and an understandable desire to participate as families in the benefits of legal marriage.

The plaintiffs' claims cannot be rebutted here. The trial court considered extensive evidence (FOF 25-54)[3] and made key findings about the reality of how gay people live today (FOF 54-108). Despite social disapproval, ostracism, loss of jobs, anti-gay violence, and other societal punishments (FOF 96:9-98:17), gays have established and maintained life-long relationships (FOF 77:1-78:12). Gays now assert pride in their sexual orientation. In California, gays are becoming the biological parents of their own biological children, they adopt children, they become foster parents, and they raise these children in their families, along with their gay partners. Gays, having been afforded in some jurisdictions the right to marry, have moved rapidly in large numbers to embrace that opportunity. During the 4-1/2 month window when marriage was available to same-sex couples in California, 18,000 marriage licenses were issued to same-sex couples (FOF 2). Other countries around the

[3] All references to "FOF" are to the decision and order of the district court, entitled, "Pretrial Proceedings and Trial Evidence, Credibility Determinations, Findings of Fact, Conclusions of Law, Order" (District Court Docket # 708).

world have endorsed the right of gays to marry. *The fundamental value that gays place in forming families has been demonstrated and made objectively verifiable by their behavior*. In this case, the trial court considered all the witnesses offered and claims made in support of same-sex marriage and found that in all respects they were genuine and credible (FOF 25-54).

E. Similarity should be judged at a high level of abstraction – at the level of humanity, not gender.

Some words are concrete. These words refer to specific individual things or limited groups of things in the world. Other words are abstract. These words refer to broader groups of individuals or things that are similar or related. At the concrete level, all individuals of any particular species are different from one another. Viewed concretely, the cow on one side of the fence is different from the cow on the other side of the fence. At the same time, at a higher level of abstraction, both of these individual animals are cows, and in that respect they are similar. At an even higher level of abstraction, they are mammals, and in that respect they are similar to humans. At an even higher level of abstraction, they are vertebrates and in that respect they are similar to lizards and even fish.

Now apply the same kind of analysis to the different levels of abstraction here. At a concrete level of description, opposite-sex couples and same-sex

couples are different. One couple has members of opposite genders. The other has members of the same gender. At times, gender is important to us humans. When a child is born, the first question we ask is about its gender – is it a boy or a girl? Gender matters to us often, all the way into adulthood.

At a higher level of abstraction, however, the members of same-sex and opposite-sex couples are all human beings. As humans, they experience love and desire intensely. They want intimacy with another human being, they want life partners, they want children, they want families, they want social support for their families, and when they have these relationships, they take good care of them (FOF 77:1-78:12). Here, gender makes no difference to our understanding of the reality and importance of these common feelings and desires.

The constitutional question, then, is this: What is the appropriate level of abstraction at which similarities and differences will be considered in an equal protection analysis? Will it be at the level of gender, or at the level of humanity?

The terms, "abstract" and "concrete," as applied to words, are not merely academic or semantic classifications. These terms identify ways of thinking that affect how people feel, think again and then act.

Separately from the Constitution, standards of human decency have naturally evolved. One of the driving forces behind this natural evolution of standards of human decency is the human tendency to

view the world in abstract terms, in order to see and emphasize the commonality that binds otherwise diverse peoples in the common endeavor of becoming more humane towards one another.

Tolerance is one of the standards of human decency that has evolved over the millennia of human history. As more and different people crowd together and as greater communication brings us greater knowledge of one another, our need for tolerance grows. The evolution of tolerance begins with this key understanding: all human beings can be described in concrete terms as differing from one another, but when they are described in more abstract terms, they can be seen as sharing the same basic human qualities, the same desires and the same needs for help and freedom and understanding, and these similarities transcend the differences among them.

Compassion is another of the standards of human decency that has evolved over the millennia of human history. When people see that others are like themselves at the level of deeply felt emotions, people find that they have compassion for others by understanding that others – like themselves – feel desire, pain, loss, loneliness, belonging and love.

Once people see the similarities between themselves and other people who at first appear to be different, they disregard the superficial differences and start treating the others with the same humane values that they apply to themselves.

Many areas of the law deal with objective realities, measurable occurrences, and cold, hard facts that fit easily into formulaic solutions. On the other hand, family law – and this is a family law case – deals with how people feel and act in relationships with one another. In these kinds of cases, abstract thinking that leads to tolerance for differences and compassion for the deepest emotions shared by others is an essential element in the adjudicative process.

In deciding on the appropriate level of abstraction at which similarities and differences will be considered, look to the words of the Equal Protection Clause itself. This clause uses highly abstract language – "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." This highly abstract statement permits the interpretation of similarities between groups at a similarly high level of abstraction.

The Equal Protection Clause was adopted after the Civil War, in part to make sure that freed slaves would not be subjected to discrimination. However, the words of the Equal Protection Clause – unlike the words of the Fifteenth Amendment – are not restricted to discrimination based on "race, color, or previous condition of servitude." The words prohibit the denial of equal protection to all people in all circumstances. The drafters could have chosen more concrete language, but they did not. This must be seen as a conscious choice on their part, reflecting the broader concern for human equality that was expressed by the founders in 1776.

The Equal Protection Clause has never been limited to the protection of black people. As Justice Black noted about the Equal Protection Clause in 1938, in the cases considered by the U.S. Supreme Court in the first 50 years after the adoption of the Equal Protection Clause, "less than one-half of one percent invoked it in protection of the Negro race, and more than 50 percent asked that its benefits be extended to corporations." (*Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Justice Black, dissenting).

Equality is the highly abstract concept in the Equal Protection Clause. Equality is about equivalent values. In the abstract, there are timeless values, yet over time, people find different ways of expressing those values. For example, there is a timeless value in loving one another. But what does that mean in terms of the actual human expression of love? Does one man express his love for another by asking him to marry or by refraining from such a proposal? In an earlier era, the answer would certainly have been to refrain, but in the present era, with some men, the answer is different – a man expresses his love for another man by asking him to marry. Thus, even with respect to enduring values, like love, the concrete expression of those values differs from one time to another and one person to another. Nevertheless, in each of these forms of expression, the presence of the same underlying value is the similarity that matters.

In the last half of the 20th century there have been tendencies that led to the falling apart of families. In such a world, the values that build and support families should be preferred over values that discourage families. In this case, gays assert values which oppose the tendency towards family disintegration and which aim at building and supporting families.

In addition, the values which lead towards greater tolerance and compassion should be preferred over those which separate us. In this case, gays assert values at a higher level of abstraction – at the level of humanity. This makes it possible to see the similarities between gays and heterosexuals, thereby leading towards greater tolerance and compassion.

In light of these considerations, the similarities between same-sex and opposite-sex couples must be judged at the higher level of abstraction – at the level of humanity, not at the level of gender. See *Frontiero v. Richardson*, 411 U.S. 677, 688-91 (1973) (as human beings, without regard to gender, men and women are similarly situated, in that case with similar status in the military and similar interests in receiving military benefits); *Brown*, *supra*, 347 U.S. at 493-95 (as human beings, without regard to race, blacks and whites have the same capacity to benefit from education and the same interest in receiving a quality education).

F. Same-sex couples and opposite-sex couples are similarly situated with respect to their interest in forming a family, and that similarity is sufficient to invoke further equal protection analysis.

In light of the foregoing considerations, the similarities between same-sex couples and opposite-sex couples are sufficient to invoke the further equal protection analysis. Same-sex couples have a genuine and credible interest in forming their own families, whether they remain families of two adults or later expand to include children and other relatives. That interest arises out of the same existential need in gays as it does in heterosexuals. Forming a family is as important to gays as it is to heterosexuals.

Same-sex couples' interest in forming families relates directly to their interest in marriage, because marriage laws have been enacted to provide legal recognition and support for the couples who form families and for the expanded families built by such couples.

The differences in gender combinations between same-sex and opposite-sex couples do not have any bearing on their interest in forming a family or in marriage. A person wants to form a family because he or she is a human being. Both men and women want to build families, gay men and women want this just as much as do heterosexual men and women. Of course, many gay men and women desire to remain single, but so do many heterosexual men and women.

The differences in the gender make-up of same-sex couples and opposite-sex couples therefore do not provide a basis for declining to go forward with the equal protection analysis.

For these reasons, the court must go forward with the equal protection analysis based on this analysis of the similarities between same-sex and opposite-sex couples.

III. THE RIGHT TO FORM A FAMILY IS A FUNDAMENTAL RIGHT.

The similarities between same-sex and opposite-sex couples go to the heart of the human pursuit of happiness, regardless of gender: finding a lifetime partner and forming a family.

In our country, families are formed when two people, on their own, choose one another as partners. We do not live in a country where families are formed when older relatives choose the marital partner for the younger adults and arrange their marriages. Today, even though most people choose to form families that begin with two adults of opposite genders, some people choose to form families that begin with two adults of the same gender. In either case, these choices are fundamental to a person's core identity.

The family is also the basic social unit in human society. It is fundamental to human happiness, whether it be a family of two, or a family with children, or an extended family with brothers, sisters,

parents, uncles, aunts, and any number of other possible relatives. The right to form a family is a fundamental human right – indeed, it is perhaps the most fundamental of all human rights. (FOF 110-114). See, *e.g.*, United Nations, Universal Declaration of Human Rights, Article 16 ("The family is the natural and fundamental group unit of society . . . "); Human Rights Education Association, hrea.org, "The Right to Family."

The right to form a family is a fundamental right protected by the Constitution. The formation of a family is the essential choice that people make in the exercise of their First Amendment freedoms of association and expression. They do this by choosing a lifetime mate and by publicizing to their community that they are a family. They do this by saying in public who it is they love, by following through with that love by behaving in public towards the one they love in conformity with that love, and by making a public, life-time commitment to that person. Families also establish an area of privacy for the family members, and that, too, is protected by the constitution. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-20 (1984); *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 503-05 (1977); *cf. In re Marriage Cases*, 43 Cal.4th at 809-10, 814-19.

"The right to form a family" is an abstract expression for a fundamental human right. By their nature, fundamental human rights and fundamental values are expressed as abstract concepts or principles because as time passes and history produces

changes, fundamental rights have a habit of finding different concrete expressions. To hold that a fundamental right can be exercised in only one concrete way is to confuse the fundamental right with the concrete expression endorsed by one person or one period of history, and thereby to lose sight of the fundamental nature of that right. See *In re Marriage Cases*, 43 Cal.4th 757, 811-12 and fn. 33, citing *Lawrence v. Texas*, 539 U.S. 558, 567-77 (2003), and *Turner v. Safley*, 482 U.S. 78, 95-96 (1987): fundamental rights "should be understood in a broader and more neutral fashion so as to focus on the substance of the interests that the constitutional right is intended to protect."

IV. PROPOSITION 8 TREATS SAME-SEX AND OPPOSITE-SEX COUPLES UNEQUALLY WITH RESPECT TO THE FUNDAMENTAL RIGHT TO FORM A FAMILY.

Proposition 8 treats same-sex and opposite-sex couples unequally with respect to their fundamental right to form a family (FOF 85-87, 91-94). Through its limited definition of marriage, Proposition 8 gives the legal recognition and support of marriage to the families of opposite-sex couples and withholds it from the families of same-sex couples. In this regard, the trial court noted specifically that the availability of domestic partnership status for same-sex couples in California was not an adequate solution to the inequality brought about by withholding marriage from those couples (FOF 80-83, 114-116).

V. THERE IS NO SUFFICIENT JUSTIFICATION FOR THE UNEQUAL TREATMENT.

A. The inequalities in this case can be justified only by a compelling state interest.

When similarly situated people have been treated unequally with respect to a fundamental right, the unequal treatment can be justified only when it is *necessary* and *narrowly tailored* so as *actually to serve* a *compelling state interest*. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Cleburne, supra,* 473 U.S. at 440. The proponents of the unequal treatment must produce evidence to support each element in that justification. *Dunn*, *supra*, 405 U.S. at 343-60; *Craig v. Boren*, 429 U.S. 190, 197-204 (1976). The same logic that requires assessment of similarities based on present day realities also requires assessment of any justification based on present day realities.

The trial court analyzed a number of justifications and found that they failed to meet even the rational basis test. This brief will consider two possible justifications in ways that were not considered by the trial court.

B. The objections to homosexuality harbored by a significant section of the population do not justify denying marriage equality.

Even though many people now favor marriage equality for same-sex couples, there is still a sizeable

segment of the population that remains uncomfortable with any homosexual behavior, let alone marriage equality. This discomfort arises from the feeling that is triggered by the thought of homosexual behavior and that finds expression in words such as, "I would never do that" or "that behavior disgusts me."

This kind of discomfort with homosexual behavior often makes people unwilling to understand a gay person's point of view. However, that unwillingness can be overcome so as to alleviate the discomfort. Sometimes, finding that a good friend or a member of one's own family is gay helps to overcome it. Sometimes finding that a successful person in public life is gay helps. Sometimes, the growing weight of public opinion helps. Sometimes, the moral leadership provided by others helps. Sometimes listening to others with the active intent to accept and understand what they say about themselves helps. Sometimes credible evidence that counters the discomfort helps.

This kind of discomfort cannot provide a legitimate reason for denying marriage equality. This discomfort is as annoying as the discomfort many people feel with the way others exercise their free speech rights, free religion rights, gun ownership rights and most other rights, but those rights are protected, nevertheless. The constitution does not and cannot guarantee that everyone will be comfortable with what other people do, but on the contrary, assumes that Americans are a robust people who can tolerate the dissonance that accompanies public

discourse and activities and that frequently prevails in a country which values freedom and equality. *Tinker v. Des Moines School District*, 393 U.S. 503, 508-09 (1969).

Therefore, this discomfort with homosexuality does not provide a compelling state interest for rejecting same-sex marriage.

C. The desire to support uniformity in the institution of marriage does not justify denying marriage equality.

Some people like uniformity in the social institutions that surround them. They want to live among people who act and think the way they do. Other people like diversity. They are happiest when they can associate with people who are different from themselves and who behave differently. Most people have a mix of these tendencies that affect different parts of their lives.

The debate over same-sex marriage is a debate about diversity versus uniformity in the institution of marriage. Supporters of same-sex marriage want diversity in the institution of marriage. Opponents of same-sex marriage want uniformity in the institution of marriage and claim that same-sex marriage harms that institution.

There is no factual or logical basis for the claim that same-sex marriage harms the institution of marriage. The trial court in this case found that the

proponents of Proposition 8 had produced no evidence whatsoever in support of their claim that allowing same-sex marriage would harm opposite-sex marriages (FOF 9-10, 83-84).

What the recognition of same-sex marriage does, however, is to end the previously existing gender-based uniformity in this institution.

The relevant question, then, is whether the State of California has any interest in supporting gender-based uniformity in the institution of marriage.

One can see some value in having uniformity in social institutions. Knowing that a "married couple" will always include one man and one woman provides some people with a sense of familiarity and comfort. It gives predictability to human behavior. It gives a sense of safety and certainty to those who value the approved behavior. It sets simple, easily defined limits for acceptable behavior.

However, it is now clear that some people are homosexual. Diversity in the sexual orientations within a population is therefore a reality that is not going to go away. The trial court found that this was so. (FOF 71-72). The trial court further found that individuals do not generally choose their sexual orientation. (FOF 74-76). What matters is that gay people understand that they are gay, that there is nothing wrong with this, that they can function successfully in all aspects of their life and their community. They understand that is who they are. They understand that hiding their gayness would

introduce a level of dysfunction into their lives that could undermine all of their success. The trial court found that sexual orientation is "an enduring pattern of sexual, affectional, or romantic desires," without regard to what might be the cause (FOF 71). The court found that most people are consistent in their sexual orientation throughout their lives (FOF 72).

Diversity in sexual orientation exists, and thus, diversity exists in the preferences people have for lifetime partners. This diversity is the human reality. It is not going away.

Further, here is California's legal reality: by statute and case law, California law has already authorized the formation of diverse families with children (FOF 78:13-79:10). Legal fathers and mothers need not be biologically related to their children. The psychological parent-child relationship matters more than the biological relationship. Families with children may be headed by same-sex couples. See California Family Code §§ 297.5(d), 7611(d), 7612(b), 8600, 9000(b); California Welfare and Institutions Code § 16013; *In re Nicholas H.*, 28 Cal.4th 56 (2002); *In re Jesusa V.*, 32 Cal.4th 588 (2004); *Sharon S. v. Superior Court*, 31 Cal.4th 417 (2003); *Elisa B. v. Superior Court (Emily B.),* 37 Cal.4th 108 (2005). Having authorized such diversity in its families, California has a compelling interest in supporting all of these families and the children in them by encouraging stability and durability in the relationships of the couples who head these families. Legal marriage currently accomplishes this for opposite-sex

couples. California has a compelling interest in doing this for same-sex couples as well.

Further, when it comes to fundamental matters that bear on the pursuit of happiness, the U.S. Constitution values diversity. *Grutter v. Bollinger*, 539 U.S. 306 (2003). The constitutional preference for diversity is expressed most clearly in the First Amendment. *Tinker*, *supra*, 393 U.S. at 511-12.

The First Amendment guarantees freedom of speech. When people speak freely, they speak with diverse voices, they say things that persuade or offend. What any individual may say on any particular occasion may not be predictable, and the Constitution guarantees his or her right to speak unpredictably.

The First Amendment also guarantees freedom of religion. This guarantee was put into the Constitution because in 1789 there were already various religious groups who held tightly to their diverse beliefs. This guarantee protects religious diversity, including both the diversity that existed when the First Amendment was adopted and the diversity of all religions that have come thereafter. In *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), the court stated:

> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed."

Diversity in other ways already exists within the religious institution of marriage. Currently, different religions have differing requirements for marriage, without doing harm to the broader institution of marriage.

The First Amendment also, by implication, guarantees freedom of association – the right of people to form organizations and to associate in large or small groups. This right guarantees that our country will harbor and protect a diversity of associations, without fear that government will disrupt them. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-20 (1984).

Marriage involves all of these freedoms.

The freedom to choose and to associate with a life partner is at the heart of marriage.

Marriage is often thought of as holy matrimony and is blessed by many religions. *Turner v. Safley*, *supra*, 482 U.S. at 96. Nevertheless, the law also recognizes marriages that are entirely secular. People who marry are free to invest their marriages with their own religious beliefs, whatever they may be. Each religious group is free to honor only the kinds of marriages that fit within its own beliefs.

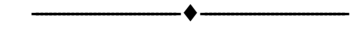
Marriage involves the freedom to speak. A person who marries chooses the right to say to another person in a public or private ceremony, "I love you" and "I do," and to have those statements understood

by all who hear them as carrying binding commitments.

Finally, those who support the current gender-based uniformity in marriage argue that uniformity channels people into the kind of marriage that favors the bearing and rearing of children. However, in the trial of this matter there was no evidence to support this "channeling" claim. The growth of the same-sex marriage movement is itself evidence that gender-based uniformity does not channel gays into such marriages. Rather, sexual orientation propels people into relationships that fit with their sexual orientation. (FOF 79:25-80:14, 83:20-84:13). In addition, the court found, based on evidence at the trial, that there was no significant difference in outcomes for children raised in opposite-sex homes as compared with same-sex homes. (FOF 17:15-18:21, 34:1-8, 37:5-13, 44:24-45:16, 48:10-17, 84:14-25, 94:24-96:8).

Where a rational basis is the justification standard, any conceivable legitimate state purpose suffices. When a stronger justification is required, there must be sufficient evidence to show that the disparate treatment actually serves the claimed purpose. *Dunn*, *supra*, 405 U.S. at 343-60; *Craig v. Boren*, *supra*, 429 U.S. at 197-204. There was no such evidence to support the "channeling" claim here.

For all of the reasons described above, the State of California cannot have a compelling interest in supporting gender-based uniformity in marriage.



CONCLUSION – PROPOSITION 8 VIOLATES THE EQUAL PROTECTION CLAUSE.

Petitioners elevate theory and tradition over the trial court evidence that shows the realities in today's diverse families. For the reasons stated in this brief, as well as for the other reasons advanced by the Respondents in this case, this court should find that Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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