No. 10-16696

IN THE

# United States Court of Appeals for the Ninth Circuit

KRISTEN M. PERRY, ET AL.,

*Plaintiffs-Appellees*,

v.

ARNOLD SCHWARZENEGGER, ET AL.,

*Defendants,*

and

PROPOSITION 8 OFFICIAL PROPONENTS
DENNIS HOLLINGSWORTH, ET AL.,

*Defendants-Intervenors-Appellants.*

Appeal from the United States District Court for the Northern District of California
Hon. Vaughn R. Walker, District Judge, Case No. 09-CV-2292 VRW

## BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES

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## STATEMENT REGARDING CONSENT TO FILE

The parties have filed with the Court blanket letters of consent to the filing of *amicus curiae* briefs. Accordingly, Constitutional Accountability Center has consent to file this brief.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus* states that it is not a publicly-held corporation, does not issue stock and does not have a parent corporation. *Amicus* Constitutional Accountability Center is a non-profit 501(c)(3) organization.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

Cases

## TABLE OF AUTHORITIES (continued)

**Page**

## TABLE OF AUTHORITIES (continued)

**Page**



Constitutional Provisions, Statutes, and Legislative Materials

## TABLE OF AUTHORITIES (continued)

**Page**



Books, Articles, and Other Materials

## TABLE OF AUTHORITIES (continued)

**Page**

## INTEREST OF THE AMICUS CURIAE

The Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections for liberty and equality. CAC has filed *amicus* briefs in the U.S. Supreme Court in cases raising significant issues regarding the text and history of the Fourteenth Amendment, including *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and *Northwest Austin Municipal Util. Dist. v. Holder*, 129 S. Ct. 2504 (2009).

## SUMMARY OF ARGUMENT

The text of the Fourteenth Amendment's guarantee of the "equal protection of the laws" is sweeping and universal. It protects all persons, whether African American or white, man or woman, gay, lesbian or heterosexual, young or old, native-born or immigrant. It secures the

same rights and same protection under the law for all. History shows that the original meaning of the Equal Protection Clause—explained by the framers during debates over the Fourteenth Amendment, detailed in contemporaneous press coverage of those debates and the ratification of the Amendment, and confirmed in the earliest Supreme Court cases interpreting the Equal Protection Clause—guaranteed equality under the law and equality of rights for all persons without exception, thus forbidding arbitrary and invidious discrimination.

History also shows that one of the basic civil rights the Fourteenth Amendment was written and ratified to secure was the right to marry. The framers recognized the right to marry the person of one's choosing as a protected civil right inherent in liberty and freedom, and the equality of rights secured by the Fourteenth Amendment's Equal Protection Clause included the equal right to marry the person of one's choice. By denying same-sex couples the right to marry, Proposition 8 contravenes this original meaning.

These fundamental constitutional principles, anchored in the text and history of the Fourteenth Amendment, must control the outcome of this appeal, notwithstanding any alleged "tradition" of discrimination

against marriage between two people of the same sex. The Fourteenth Amendment was designed to destroy discriminatory traditions that deny persons equal rights under law, not perpetuate them in the name of the Constitution.

If the Court finds that the Appellants have standing to appeal the district court's ruling and proceeds to the merits, the ruling below should be affirmed.

## ARGUMENT

### PROPOSITION 8 VIOLATES THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Drafted in 1866 and ratified in 1868, these words establish a broad guarantee of equality for all persons, demanding "the extension of constitutional rights and protections to people once ignored and excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). History shows that the original meaning of the Equal Protection Clause secures to all persons "'the protection of equal laws,'" *Romer v. Evans*, 517 U.S. 620, 634

(1996) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)), prohibiting arbitrary and invidious discrimination and securing equal rights for all classes and groups of persons.

To be sure, the Constitution also protects fundamental rights under the substantive liberty provisions of the Fourteenth Amendment. The Supreme Court's cases protecting the equal right to marry have been rooted in both the Equal Protection Clause's guarantee of equality under the law and equality of rights and the Fourteenth Amendment's protection for substantive liberty. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating ban on marriages between interracial couples under both the Equal Protection and Due Process Clauses); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (applying the Equal Protection Clause to strike down a state law that discriminatorily denied the right to marry); *Turner v. Safley*, 482 U.S. 78 (1987) (applying *Zablocki* and finding, even under a rational basis standard, that prisoners' right to marry was infringed by prison regulations). *Cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996) ("Choices about marriage . . . are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usur-

pation, disregard, or disrespect.") (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)). The Fourteenth Amendment's protection of equality and substantive liberty converge in securing to all persons an equal right to marry.

The Plaintiffs-Appellees make a compelling argument for affirmance based on the Supreme Court's rulings under both the Equal Protection Clause and the Due Process Clause. Brief of Appellees at 39-55 (due process argument); 55-104 (equal protection argument). In this brief, *amicus* Constitutional Accountability Center will specifically focus on supporting Appellees' argument for marriage equality under the Equal Protection Clause of the Fourteenth Amendment. This brief will demonstrate that the text of the Equal Protection Clause was intended to be universal in its protection of "any person" within the jurisdiction of the United States; that this broad and sweeping guarantee of equality of rights was understood at the time of the Fourteenth Amendment's ratification to protect any person, of any group or class; and that, in looking to what rights were understood to be protected equally, the framers of the Fourteenth Amendment understood marriage as a fundamental right protected by the Amendment. This text and history

make clear that Proposition 8 unconstitutionally denies the equal protection of the laws regarding marriage, a fundamental right, to same-sex couples, who are unquestionably included within the Equal Protection Clause.

### A. The Text Of The Equal Protection Clause Unambiguously Protects All Persons From Arbitrary And Invidious Discrimination.

The plain text of the Fourteenth Amendment's guarantee of the "equal protection of the laws" is sweeping and universal. While the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects *all* persons. It secures the same rights and same protection under the law for all men and women, of any race, whether young or old, citizen or alien, gay, lesbian, or heterosexual. *See Yick Wo. v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality . . . ."); *Civil Rights Cases*, 109 U.S. 3, 31 (1883) ("The fourteenth amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."). No

person, under the Fourteenth Amendment's text, may be consigned to the status of a pariah, "a stranger to [the State's] laws." *Romer*, 517 U.S. at 635.

The framers crafted this broad guarantee to bring the Constitution back into line with fundamental principles of American equality as set forth in the Declaration of Independence, which had been betrayed and stunted by the institution of slavery. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."). After nearly a century in which the Constitution sanctioned racial slavery and the Supreme Court found that African Americans, as an entire class of people, "had no rights which the white man was bound to respect," *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), the Fourteenth Amendment's framers wrote our Founding promise of equality explicitly into the text of the Equal Protection Clause. As the Amendment's framers explained time and again, the guarantee of the equal protection of the laws was "essentially declared in the Declaration

of Independence," Cong. Globe, 39th Cong., 1st Sess. 2961 (1866) (Sen. Poland), and was necessary to secure the promise of liberty for all persons. "How can he have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' This is so self-evident and just that no man . . . can fail to see and appreciate it." *Id.* at 2539 (Rep. Farnsworth).

The Fourteenth Amendment, of course, was intended not only to restore the guarantee of equality to its rightful constitutional place and redeem the Constitution from the sin of slavery, but also to secure a broad, universal guarantee of equal rights that would protect *all* persons. Focused on ensuring equality under the law not only for newly freed slaves but for all persons in America, the Equal Protection Clause sought to eliminate a whole host of discriminatory state practices, both in the South and throughout the nation.

For example, the Fourteenth Amendment's framers wanted to guarantee equal protection of the laws to non-citizens, who faced pervasive discrimination and prejudice in the western United States. John Bingham, one of the framers responsible for drafting the Fourteenth Amendment, demanded that "all persons, whether citizens or strangers,

within this land, . . . have equal protection in every State in this Union in the rights of life and liberty and property." Cong. Globe, 39th Cong., 1st Sess. 1090 (1866). Indeed, in 1870, two years after the ratification of the Fourteenth Amendment, Congress used its express constitutional power to enforce the Amendment's guarantee of equality under the law to all persons by passing the Enforcement Act of 1870. This Act secured for "all persons within the jurisdiction of the United States . . . the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens," and protected against the "deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien . . . ." 16 Stat. 140, 144; Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870) (Sen. Stewart) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . .; let them be protected by all the laws and the same laws that other men are."); *id.* at 3871 (Rep. Bingham) (observing that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws").

In addition, white Unionists needed the equal protection of the laws to ensure that Southern state governments respected their fundamental rights. *McDonald*, 130 S. Ct. at 3043 (discussing the "plight of whites in the South who opposed the Black Codes"); Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (Rep. Bingham) ("The adoption of this amendment is essential to the protection of the Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been in arms against them."); *id.* at 1263 (Rep. Broomall) ("[W]hite men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country . . . .").

To secure equality not only for the newly freed slaves but for all persons within the United States, the Fourteenth Amendment's framers chose broad universal language specifically intended to prohibit arbitrary and invidious discrimination and secure equal rights for all persons.[1] Indeed, the Joint Committee that drafted the Fourteenth

[1] The Fourteenth Amendment's framers settled on the wording of the Equal Protection Clause after an exhaustive investigation by the Joint Committee on Reconstruction, which took the lead in drafting the Amendment in Congress. The Joint Committee's June 1866 report, "widely reprinted in the press and distributed by Members of the 39th

Amendment rejected numerous proposals that would have limited the Fourteenth Amendment's equality guarantee to a prohibition on laws that discriminated on account of race, preferring the universal guarantee of equal protection, which secured equal rights to all persons, to a race-specific guarantee of equality that proscribed racial discrimination and nothing else. *See* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46, 50, 83 (1914). Whether the proposals were broad in scope or were narrowly drafted to prohibit racial discrimination in civil rights, the framers consistently rejected limiting the Fourteenth Amendment's equality guarantee to racial discrimination. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 260-261 n.* (1998) ("[S]ection 1 pointedly spoke not of race but of more general liberty and equality.").

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Congress to their constituents," *McDonald*, 130 S. Ct. at 3039, found that the Southern states "refused to place the colored race . . . upon terms even of civil equality," or "tolerat[e] . . . any class of people friendly to the Union, be they white or black . . . ." *See* REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xvii (1866). As the extensive testimony taken by the Joint Committee showed, the newly freed slaves and their Unionist allies in the South had as much chance of having their equal rights respected as "a rabbit would in a den of lions." *Id.*, pt II, 17. Accordingly, the committee charged with drafting the Fourteenth Amendment wrote the Equal Protection Clause to eliminate state laws and practices that violated the fundamental rights of particular classes of people, based on more than just race.

The Fourteenth Amendment's sweeping guarantee of equal legal protection meant, first and foremost, equality under the law and equality of rights for all persons. Under the plain text, this sweeping guarantee unambiguously applies to the plaintiffs in this case and to all gay men and lesbians who seek to marry the person of their choice.

### B. The Original Meaning Of The Equal Protection Clause Confirms That Its Guarantee Of Equality Under The Law And Equality Of Rights Applies Broadly To All Persons.

The original meaning of the Equal Protection Clause confirms what the text makes clear: that equality of rights and equality under the law apply broadly to any and all persons within the United States. The Fourteenth Amendment's framers' own explanations of the Equal Protection Clause during the debates on the Fourteenth Amendment, press coverage of the Amendment, and the Supreme Court's earliest decisions interpreting the Clause all affirm this basic understanding.

Introducing the Amendment in the Senate, Jacob Howard explained that the Equal Protection Clause "establishes equality before the law, and . . . gives to the humblest, the poorest, and most despised . . . the same rights and the same protection before the law as it gives to

the most powerful, the most wealthy, or the most haughty." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). The guarantee of equal protection, he went on, "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." *Id.* *See also id.* at 2961 (Sen. Poland) (noting that the Equal Protection Clause aimed to "uproot and destroy . . . partial State legislation"); *id.* at app. 219 (Sen. Howe) (explaining that the Clause was necessary because Southern states had "an appetite so diseased as seeks . . . to deny to all classes of its citizens the protection of equal laws").

Senator Howard's reading of the Fourteenth Amendment—never once controverted during the debates and widely reported "in major newspapers across the country," *McDonald*, 130 S. Ct. at 3074 (Thomas, J., concurring)—demonstrated that "[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation," *Plyler v. Doe*, 457 U.S. 202, 213 (1982), ensuring "the law's neutrality where the rights of persons are at stake." *Romer*, 517 U.S. at 623.

In the House, the framers, too, emphasized that equality of rights and equality under the law were the touchstone of the equal protection guarantee. Thaddeus Stevens observed that "[w]hatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all," Cong. Globe, 39th Cong., 1st Sess. 2459 (1866), while future President James Garfield explained that the Clause "h[e]ld over every American citizen, without regard to color, the protecting shield of the law." *Id.* at 2462. The plain meaning of equal protection, framer after framer explained, was that the "law which operates upon one man shall operate *equally* upon all," *id.* at 2459 (Rep. Stevens) (emphasis in original), thereby "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction." *Id.* at 2502 (Rep. Raymond).

Newspaper coverage of the debates over ratification of the Fourteenth Amendment affirms this same basic understanding of the equal protection guarantee. In an article entitled "The Constitutional Amendment," published shortly after Congress sent the Fourteenth Amendment to the states for ratification, the *Cincinnati Commercial* explained that the Fourteenth Amendment wrote into the Constitution

"the great Democratic principle of equality before the law," invalidating all "legislation hostile to any class." *Cincinnati Commercial*, June 21, 1866, at 4. "With this section engrafted upon the Constitution, it will be impossible for any Legislature to enact special codes for one class of its citizens . . . ." *Id.* Press coverage emphasized that the Amendment "put in the fundamental law the declaration that all citizens were entitled to equal rights in this Republic," *Chicago Tribune*, Aug. 2, 1866, p.2, placing all "throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation . . . ." *Cincinnati Commercial*, Aug. 20, 1866, p.2. *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 72-75 (1949) (discussing press coverage). In short, it was commonly understood at the time the Fourteenth Amendment was ratified that the Equal Protection Clause "was intended to promote equality in the States, and to take from the States the power to make class legislation and to create inequality among their people." Cong. Globe, 42nd Cong., 2nd Sess. 847 (1872) (Sen. Morton).

Consistent with this history and the clear and unequivocal constitutional text, the Supreme Court quickly confirmed the broad reach of

the Equal Protection Clause's guarantee of equality under the law and equality of rights. In 1880, in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), the Court explained that "[t]he Fourteenth Amendment makes no attempt to enumerate the rights it [is] designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property." *See also Barbier v. Connolly*, 113 U.S. 27, 31 (1885) ("The fourteenth amendment . . . undoubtedly intended . . . that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness . . . ."); *Civil Rights Cases*, 109 U.S. at 24 ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ."); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (Field, J.) ("[H]ostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form . . . is forbidden by the fourteenth amendment . . . .").[2]

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[2] In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court turned

The Supreme Court's precedents today firmly establish that the Equal Protection Clause requires "neutrality where the rights of persons are at stake," forbidding states from "singling out a certain class of citizens for disfavored legal status or general hardships . . . ." *Romer*, 517 U.S. at 623, 633. As *Romer* teaches, these settled equal protection principles apply with full force to legislation and state constitutional amendments, such as Proposition 8, that discriminate based on sex and sexual orientation. Under the Equal Protection Clause, states may not deny to gay men or lesbians rights basic to "ordinary civic life in a free society," *id.* at 631, "to make them unequal to everyone else." *Id.* at 635.

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its back on these principles, upholding enforced racial segregation on the theory that laws requiring the separation of African Americans and white persons in public places "do not . . . imply the inferiority of either race to the other . . . ." *Id.* at 544. Justice Harlan, alone faithful to the Fourteenth Amendment's text and history, demonstrated that enforced racial segregation violated the Fourteenth Amendment's guarantee of equality under the law and equality of rights: "[I]n the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . ." *Id.* at 559 (Harlan, J., dissenting). Justice Harlan's views, disregarded then, are fortunately now settled law.

### C. The Equal Protection Clause Guarantees To All Persons An Equal Right To Marry The Person Of One's Choice.

The framers of the Fourteenth Amendment recognized the right to marry as a basic civil right of all persons, "one of the vital personal rights essential to the orderly pursuit of happiness . . . ." *Loving*, 388 U.S. at 12 (discussing how the Fourteenth Amendment's Due Process Clause protects substantive, fundamental rights such as marriage). The equality of rights secured by the Fourteenth Amendment's Equal Protection Clause thus unquestionably includes the equal right to marry the person of one's choice.

The Fourteenth Amendment's framers recognized the right to marry the person of one's choosing as a crucial component of freedom and liberty—a right that had long been denied under the institution of slavery. Slaves did not have the right to marry, and slaves in loving relationships outside the protection of the law were time and again separated when one slave was sold to a distant part of the South. *See* HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925, at 318 (1976) ("[O]ne in six (or seven) slave marriages were ended by force or sale"). As Sen. Jacob Howard explained, a slave "had not the

right to become a husband or father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend." Cong. Globe, 39th Cong., 1st Sess. 504 (1866).

In the Fourteenth Amendment, the framers sought to guarantee to the newly freed slaves the right to marry that they had long been denied. "The attributes of a freeman according to the universal understanding of the American people," Sen. Jacob Howard observed, included "the right of having a family, a wife, children, home." *Id.*; *id.* at 42 (Sen. Sherman) (demanding that the freed slaves "be protected in their homes and family"); *id.* at 2779 (Rep. Eliot) ("[N]o act of ours can fitly enforce their freedom that does not contemplate for them the security of home."). The framers insisted that the "poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land." *Id.* at 343 (Sen. Wilson). Indeed, even opponents of the Fourteenth Amendment recognized that "marriage according to one's choice is a civil right." *Id.* at 318 (Sen. Hendricks). *See also* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION &

FAMILY VALUES 39 (1997) ("Speaker after speaker pronounced marriage rights fundamental and resolved that freedom in the United States would entail the right to marry."); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 670 (2009) ("The common law of families and of contracts had long recognized a right of marriage, and it would be astonishing if that right were not also described in 1868 as having been fundamental."); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. REV. 1297, 1338 (1998) (noting framers' judgment that the freedom promised by abolition "was ultimately worthless without the right to marry, to raise a family, and to maintain a home").[3]

Indeed, few rights were more precious to the newly freed slaves than the right to marry. With the abolition of slavery, "ex-slaves themselves pressed for ceremonies and legal registrations that at once celebrated the new security of black family life and brought their most intimate ties into conformity with the standards of freedom." II FREEDOM:

[3] In the debates during the 39th Congress, only one member of the House, Rep. Moulton, denied that the right to marry was a protected right, "[b]ut he knew that he was in the minority. . . . Reconstruction's advocates were intent on creating . . . constitutional protection for familial rights . . . ." Hasday, 45 U.C.L.A. L. REV. at 1350.

A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, at 660 (I. Berlin et al. eds. 1982). "[M]ass wedding ceremonies involving as many as seventy couples at a time became a common sight in the postwar South." LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 240 (1979).

The newly freed slaves rejoiced to finally, at long last, have the right to marry the person of their choice protected and secured by law. As one African American soldier put it, "I praise God for this day! I have long been praying for it. The Marriage Covenant is at the foundation of all our rights. In slavery we could not have legalised marriage: now we have it." II FREEDOM: A DOCUMENTARY HISTORY at 672 (emphasis omitted). On January 1, 1866, African Americans called the first anniversary of the Emancipation Proclamation "a day of gratitude for the freedom of matrimony. Formerly, there was no security for our domestic happiness. . . . But now we can marry and live together till we die . . . ." Hasday, 45 U.C.L.A. L. REV. at 1338 n.146. In short, the right to marry "by the authority and protection of Law," confirmed that the newly freed slaves, finally, were "beginning to be regarded and treated

as human beings." JAMES MCPHERSON, THE NEGROES' CIVIL WAR 604 (1991).

In writing into the Fourteenth Amendment a requirement of equality under the law and equality of basic rights for all persons, which included the right to marry, the framers ensured that discriminatory state laws would not stand in the way of Americans exercising their right to marry the person of their own choosing. Laws that discriminate and deny to members of certain groups the right to marry the person of one's choice thus contravene the original meaning of the Fourteenth Amendment.

The Supreme Court has many times vindicated this principle. In *Loving v. Virginia*, the Supreme Court invalidated the laws of Virginia and fifteen other states that outlawed marriage between people of different races. Observing that marriage is "one of the basic civil rights of man," *Loving*, 388 U.S. at 12 (quoting *Skinner*, 316 U.S. at 541),[4] the

[4] *Loving* rested on two independent grounds: that Virginia's restrictive marriage law violated the Equal Protection Clause by discriminating on the basis of race and also that it violated the fundamental right to marry the person of one's own choosing, a right protected under the substantive aspects of the Due Process Clause. In this brief focusing on the textual and historical bases under the Constitution for invalidating

Court held the denial of the "fundamental freedom" to marry "solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual . . . ." *Id.*

In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Supreme Court held that a Wisconsin statute that denied the right to marry to parents who had failed to satisfy pre-existing child support obligations violated the Equal Protection Clause, emphasizing that the "right to marry is of fundamental importance for all individuals." *Id.* at 384. *Zablocki* explained that *Loving*'s holding did not depend on "the context of racial discrimination," but rather that "the laws arbitrarily deprived the couple of a fundamental liberty . . . , the freedom to marry." *Id.* at 383-84. Applying strict scrutiny, the Court invalidated the statute's discriminatory denial of the right to marry to parents who had failed to pay

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Proposition 8 under the Equal Protection Clause, we rely on *Loving* to show that the right to marry the person of one's choosing is a basic civil right, and thus must be provided equally to all persons.

child support, finding it imposed "a serious intrusion into . . . freedom of choice in an area in which we have held such freedom to be fundamental." *Id.* at 387. Because the Equal Protection Clause secured an equal right to marry to all persons, the government could not pursue its legitimate interest in ensuring payment of child support obligations by "unnecessarily imping[ing] on the right to marry." *Id.* at 388. *See also M.L.B.*, 519 U.S. at 117 ("Choices about marriage . . . are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (quoting *Boddie v. Connecticut*, 401 U.S. at 376).

Both the Fourteenth Amendment's text and history and Supreme Court precedent establish that the clear command of the Equal Protection Clause is equality of rights for all persons, including the right to marry. Laws that discriminatorily deny the fundamental right to marry are subject to strict scrutiny and must be narrowly tailored to serve a compelling state interest. *See Zablocki*, 434 U.S. at 388;[5] *see also Skin-*

[5] In *Turner v. Safley*, 482 U.S. 78 (1987), the Court did not apply strict scrutiny, applying instead reasonableness review because the challenge

*ner*, 316 U.S. at 541 (applying strict scrutiny under the Equal Protection Clause to legislation involving "one of the basic civil rights of man . . . lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws"). *See generally* Brief of Appellees at 58-72 (arguing that heightened scrutiny applies in this case).

### D. Proposition 8's Infringement Of The Right To Marry Violates The Guarantee Of The Equal Protection Clause That All Persons Shall Have Equality of Rights and Equality Under the Law.

Proposition 8 violates these basic, well-settled equal protection principles. By forbidding committed same-sex couples from participating in the "the most important relation in life," and the "foundation of the family in our society," *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888), *quoted in Zablocki*, 434 U.S. at 386, Proposition 8 contravenes

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arose in the prison context. Even under this deferential standard of review, however, the Court nonetheless found that the state had no legitimate basis for denying prisoners the right to marry the person of their own choosing. Certainly, if the right to marry is so fundamental that there is no reasonable basis for denying the right to incarcerated prisoners, there is no basis under any standard of scrutiny—but especially under strict scrutiny—for denying that right to committed, loving same-sex couples. *See* Brief of Appellees at 58-104 (demonstrating that Proposition 8 fails under heightened scrutiny as well as rational basis review).

the Equal Protection Clause's central command of equality under the law and equality of rights reflected in both the text of the Fourteenth Amendment and its history.

Denying gay men and lesbians the right to marry the person of their choosing is inconsistent with the text of the Equal Protection Clause, which secures equality of rights to all persons, regardless of sexual orientation, *see Romer*, *supra*, and its history, which demonstrates that the right to marry the person of one's choosing was a basic and fundamental right, guaranteed to all persons under the Fourteenth Amendment. Proposition 8 is prohibited class legislation, a "status-based enactment" that denies gay men and lesbians the right to marry "to make them unequal to everyone else." *Romer*, 517 U.S. at 635. Under Proposition 8, men and women who love and choose to marry a person of the same sex do not stand equal before the law and do not receive its equal protection. As the district court properly recognized, no constitutionally legitimate rationale—let alone any compelling state interest—justifies California's refusal to accord gay men and lesbians the right to marry the person of their choosing.

Contrary to the arguments suggested by the Proponents, the text and first principles the framers wrote into the Fourteenth Amendment control this Court's constitutional analysis, not purported "traditional" understandings of marriage. "No tradition can supersede the Constitution." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting). *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) ("'[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; neither history or tradition could save a law prohibiting miscegenation from constitutional attack.'") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *Bd. of County Comm'rs, Waubunsee County, Kan. v. Umbehr*, 518 U.S. 668, 681 (1996) (refusing to carve out a "special exception" to the First Amendment's protection of political speech based on a "long and unbroken tradition" of "allocation of government contracts on the basis of political bias") (citation and quotation marks omitted); *Rutan*, 497 U.S. at 92 (Stevens, J., concurring) ("The tradition that is relevant in these cases is the American commitment to examine and

reexamine past and present practices against the basic principles embodied in the Constitution.").[6]

These principles apply with special force to the Equal Protection Clause, which changed the Constitution from one that sanctioned inequality to one that prohibited it. The very point of the Equal Protection Clause was to stop dead in its tracks the state "tradition" of denying to African Americans, and other disfavored groups, equal rights under the law. As far as the Equal Protection Clause is concerned, discriminatory traditions are no part of our nation's constitutional traditions. *Cf. Umbehr*, 518 U.S. at 681 (explaining that a tradition of political bias in contracting is "not . . . the stuff out of which the Court's principles are to be formed") (citation and quotation marks omitted).

In drafting the Equal Protection Clause in broad, universal terms, the framers of the Fourteenth Amendment struck at the entire range of

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[6] This is true even of traditions existing at the time of the ratification of the Fourteenth Amendment. *See Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (rejecting the idea that "the specific practices of States at the time of the adoption of the Fourteenth Amendment mark[] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects"); *Rutan*, 497 U.S. at 82 n.2 (Stevens, J., concurring) (rejecting the argument that "mere longevity can immunize from constitutional review state practices that would otherwise violate the First Amendment").

unequal laws, including a host of longstanding, discriminatory state practices. At the time of the framing, discrimination against the newly freed slaves, as well as other persons, "had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected." *Strauder*, 100 U.S. at 306. Carving out of the text of the Fourteenth Amendment an exception for traditional forms of discrimination would have strangled the Equal Protection Clause in its crib, subverting its central meaning. *See Illinois State Employees Council 34 v. Lewis*, 473 F.2d 561, 568 n.14 (7th Cir. 1972) (Stevens, J.) ("[I]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would. . . have been doomed to failure."). Thus, "tradition" cannot save a state law or policy that contravenes the Equal Protection Clause's command of equality under the law and equality of rights for all persons.

Indeed, the Supreme Court's cases vindicating the equal right of all persons to marry have long recognized this basic point. For many years in this country, states prohibited marriages between persons of different races, but *Loving* held that such a "traditional" concept of

marriage violated the Fourteenth Amendment because "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Loving*, 388 U.S. at 12. *See also Casey*, 505 U.S. at 980 n.1 (Scalia, J., dissenting) (denying that "adherence to tradition would require us to uphold laws against interracial marriage" because such a "tradition" is "contradicted *by a text*—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value.") (emphasis in original).

It is thus of no constitutional relevance that the marriages plaintiffs wish to solemnize have long been denied legal recognition. As the Supreme Court confirmed in *Loving*, history is a valid source of inquiry for identifying basic and fundamental constitutional rights and protections, but historical "tradition" cannot be used in an Equal Protection Clause analysis to justify a law or practice that denies any group the equal protection of the laws. Denial of the equal right to marry—like other fundamental constitutional protections—"'cannot be justified on the basis of 'history.' . . . Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional.'" *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 478

(Conn. 2008) (quoting *Hernandez v. Robles,* 855 N.E.2d 1, 33 (N.Y. 2006) (Kaye, C.J., dissenting)). *See also Varnum v. Brien*, 763 N.W.2d 862, 898-899 (Iowa 2009) (concluding that "some underlying reason other than the preservation of tradition must be identified" because "[w]hen a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective, which objective is to maintain the classification."); *Goodridge v. Dep't of Public Health,* 789 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring) ("[A]s matter of constitutional law . . . the mantra of tradition . . . can[not] justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families.").

As the text and history of the Fourteenth Amendment show, the Equal Protection Clause guarantees to all persons—regardless of race, sexual orientation, or other group characteristics—equality of rights, including the fundamental right to marry the person of their choosing.

Proposition 8 conflicts with this fundamental constitutional principle, and the district court was correct to have invalidated it.

## CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court affirm the ruling of the district court.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,623 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Century Schoolbook font.

Executed this 25th day of October, 2010.

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## CERTIFICATE OF SERVICE

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

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Executed this 25th day of October, 2010.

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