

No. 10-16696
Argued December 6, 2010
(Reinhardt, Hawkins, N. Smith)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,
v.
ARNOLD SCHWARZENEGGER, et al.,
Defendants,
and
DENNIS HOLLINGSWORTH, et al.,
Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 VRW (Honorable Vaughn R. Walker)

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* EQUALITY
CALIFORNIA, NATIONAL CENTER FOR LESBIAN RIGHTS, LAMBDA
LEGAL DEFENSE AND EDUCATION FUND, INC., AND ACLU
FOUNDATION OF NORTHERN CALIFORNIA IN SUPPORT OF
PLAINTIFFS-APPELLEES' MOTION TO VACATE STAY PENDING
APPEAL**

SHANNON P. MINTER (SBN 168907)
CHRISTOPHER F. STOLL (SBN 179046)
AMY E. WHELAN (SBN 215675)
MELANIE S. ROWEN (SBN 233041)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 MARKET STREET, SUITE 370
SAN FRANCISCO, CA 94102
TELEPHONE: (415) 392-6257
FACSIMILE: (415) 392-8442
*Counsel for Amici Curiae National
Center for Lesbian Rights, et al.*

DAVID C. CODELL, *OF COUNSEL*
(SBN 200965)
LINDA M. BURROW (SBN 194668)
ALBERT GIANG (SBN 224332)
BENJAMIN A. AU (SBN 237854)
CALDWELL LESLIE & PROCTOR, PC
1000 WILSHIRE BLVD., STE 600
LOS ANGELES, CA 90017
TELEPHONE: (213) 629-9040
FACSIMILE: (213) 629-9022
*Counsel for Amicus Curiae
Equality California*

[Additional Counsel Listed on Next Page]

JON W. DAVIDSON (SBN 89301)
JENNIFER C. PIZER (SBN 152327)
TARA L. BORELLI (SBN 216961)
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
3325 WILSHIRE BLVD, #1300
LOS ANGELES, CA 90010
TELEPHONE: (213) 382-7600
FACSIMILE: (213) 351-6050
*Counsel for Amici Curiae National
Center for Lesbian Rights, et al.*

ALAN L. SCHLOSSER (SBN 49957)
ELIZABETH O. GILL (SBN 218311)
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
39 DRUMM ST
SAN FRANCISCO, CA 94111
TELEPHONE: (415) 621-2493
FACSIMILE: (415) 255-1478
*Counsel for Amici Curiae National
Center for Lesbian Rights, et al.*

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29, *amici curiae* move for leave to file the concurrently submitted *amicus* brief in support of Plaintiffs-Appellees' Motion to Vacate Stay Pending Appeal.

Amici curiae are non-profit organizations advocating for the interests of lesbian, gay, bisexual and transgender Californians and their families. *Amicus* Equality California is California's largest lesbian, gay, bisexual, and transgender civil rights organization, with members in every county in the State of California. *Amici* the National Center for Lesbian Rights (NCLR), the ACLU Foundation of Northern California (ACLU-NC), and Lambda Legal Defense and Education Fund, Inc. are the nation's leading nonprofit legal organizations (and the affiliate of one) working to protect and advance the civil rights of lesbian, gay, bisexual and transgender (LGBT) people. A description of each is included in the accompanying brief under the heading "Interests of *Amici Curiae*."

Amici are familiar with the issues presented in this case. They are able to inform the Court in areas that may not otherwise be addressed adequately in the briefing, specifically regarding the serious, irreparable harm Proposition 8 inflicts on lesbian, gay and bisexual Californians and their families.

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Because of their unique perspective and their abiding interest in the issues now before the Court, *amici* respectfully seek permission from the Court to file the brief that accompanies this motion.

Dated: March 1, 2011

Respectfully submitted,

s/ Shannon P. Minter
SHANNON P. MINTER

CALDWELL LESLIE & PROCTOR, PC
David C. Codell, *Of Counsel*
Linda M. Burrow
Albert Giang
Benjamin A. Au
Counsel for Amicus Curiae
Equality California

NATIONAL CENTER FOR LESBIAN
RIGHTS
Shannon P. Minter
Christopher F. Stoll
Amy E. Whelan
Melanie S. Rowen

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
Jon W. Davidson
Jennifer C. Pizer
Tara L. Borelli

ACLU FOUNDATION OF
NORTHERN CALIFORNIA
Alan L. Schlosser
Elizabeth O. Gill
Counsel for Amici Curiae National
Center for Lesbian Rights, et al.

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870 MARKET STREET, SUITE 370
SAN FRANCISCO, CA 94102
TELEPHONE: (415) 392-6257
FACSIMILE: (415) 392-8442
*Counsel for Amici Curiae National
Center for Lesbian Rights, et al.*

DAVID C. CODELL, *OF COUNSEL*
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BENJAMIN A. AU (SBN 237854)
CALDWELL LESLIE & PROCTOR, PC
1000 WILSHIRE BLVD., STE 600
LOS ANGELES, CA 90017
TELEPHONE: (213) 629-9040
FACSIMILE: (213) 629-9022
*Counsel for Amicus Curiae
Equality California*

[Additional Counsel Listed on Next Page]

JON W. DAVIDSON (SBN 89301)
JENNIFER C. PIZER (SBN 152327)
TARA L. BORELLI (SBN 216961)
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
3325 WILSHIRE BLVD, #1300
LOS ANGELES, CA 90010
TELEPHONE: (213) 382-7600
FACSIMILE: (213) 351-6050
*Counsel for Amici Curiae National
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ACLU FOUNDATION OF
NORTHERN CALIFORNIA
39 DRUMM ST
SAN FRANCISCO, CA 94111
TELEPHONE: (415) 621-2493
FACSIMILE: (415) 255-1478
*Counsel for Amici Curiae National
Center for Lesbian Rights, et al.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *amici curiae* Equality California, the National Center for Lesbian Rights, Lambda Legal and the American Civil Liberties Foundation of Northern California state that they are all non-profit corporations; that none of *amici curiae* has any parent corporations; and that no publicly held company owns any stock in either of *amici curiae*.

Dated: March 1, 2011

Respectfully submitted,

CALDWELL LESLIE & PROCTOR, PC
David C. Codell, *Of Counsel*
Linda M. Burrow
Albert Giang
Benjamin A. Au
*Counsel for Amicus Curiae
Equality California*

s/ Shannon P. Minter
SHANNON P. MINTER

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ACLU FOUNDATION OF
NORTHERN CALIFORNIA
Alan L. Schlosser
Elizabeth O. Gill
*Counsel for Amici Curiae National
Center for Lesbian Rights, et al.*

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INTERESTS OF AMICI CURIAE

This brief of Amici Curiae Equality California, National Center for Lesbian Rights, Lambda Legal Defense and Education Fund, Inc., and ACLU Foundation of Northern California is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with a motion seeking leave to file the brief.¹

Amici curiae Equality California, the National Center for Lesbian Rights, the American Civil Liberties Union Foundation of Northern California, and Lambda Legal are non-profit organizations advocating for the interests of lesbian, gay, bisexual and transgender Californians and their families.

Equality California is a state-wide advocacy group protecting the needs and interests of lesbian, gay, bisexual, and transgender Californians and their families, including members of same-sex couples and their children. It is also California's largest lesbian, gay, bisexual, and transgender civil rights organization, with members in every county in the State of California. Equality California's members include same-sex couples who wish to marry in the state of California but cannot do so while Proposition 8 is being enforced; same-sex couples who married in

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici curiae* state (a) that no party's counsel authored the brief in whole or in part; (b) that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (c) that no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

California before Proposition 8's enactment; same-sex couples who are married under the laws of other jurisdictions; and same-sex couples who have registered with the State of California as domestic partners. The issues raised in this appeal will directly affect Equality California's members and supporters. This Court previously granted Equality California leave to file a brief of *amicus curiae* concerning the merits and standing issues in this appeal.

Equality California has developed extensive expertise regarding legal and factual issues raised in this appeal. Over the past decade, Equality California has successfully sponsored more than 70 pieces of civil rights legislation in the California Legislature for the lesbian, gay, bisexual, and transgender community in California, including many of the state's anti-discrimination laws and laws concerning marriage and domestic partnership. Equality California also frequently participates in litigation in support of the rights of lesbian, gay, bisexual, and transgender persons. For example, Equality California was a plaintiff in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), and was a petitioner in *Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009). As a result of its involvement in marriage equality advocacy, Equality California has developed significant expertise in the movement for the rights of lesbian, gay, bisexual, and transgender persons; the marriage equality movement; the legal issues surrounding marriage rights in the

states and at the federal level; and state and federal constitutional issues specific to Proposition 8.

NCLR is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in protecting same-sex couples and their children.

The American Civil Liberties Foundation of Northern California (ACLU-NC) is the largest affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonpartisan organization with more than 550,000 members dedicated to the defense and promotion of the guarantees of individual liberty secured by state and federal Constitutions and civil rights statutes. ACLU-NC works on behalf of lesbians, gay men, bisexuals, and transgender people to win even-handed treatment by government; protection from discrimination in jobs, schools, housing, and public accommodations; and equal rights for same-sex couples and LGBT families.

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is the nation's oldest and largest nonprofit legal advocacy organization dedicated to

achieving full civil rights for lesbian, gay, bisexual and transgender (LGBT) people and those living with HIV through impact litigation, education, and public policy work. With offices in Los Angeles, Atlanta, Chicago, Dallas, and New York, Lambda Legal litigates cases and engages in public advocacy in all areas of sexual orientation and gender identity discrimination law and policy.

The ACLU-NC, Lambda Legal, and NCLR have significant experience and interest in the issues presented in this case. Together, the organizations represented plaintiffs, including *amicus curiae* Equality California, in the litigation that culminated in the California Supreme Court's decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). The organizations also collectively filed the lead challenge to Proposition 8 in the California Supreme Court, which resulted in that Court's decision in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). This Court previously granted the ACLU-NC, Lambda Legal, and NCLR leave to file a brief of *amicus curiae* concerning the merits and standing issues in this appeal. The ACLU-NC, Lambda Legal, and NCLR have also participated as counsel or as *amicus curiae* supporting the plaintiffs in numerous other lawsuits around the country seeking the freedom to marry on behalf of same-sex couples, and thus bring significant experience and expertise to the issues pending before this Court.

SUMMARY OF THE ARGUMENT

For more than two years, Proposition 8 has deprived tens of thousands of same-sex couples in California of equal dignity and respect, has stigmatized those couples (and, indeed, all gay and lesbian persons in California), and has caused other forms of enormous harm to same-sex couples and their families. During that period, the District Court ruled in this case that Proposition 8 violates the rights of gay men and lesbians to equal protection and due process of law under the United States Constitution. Nevertheless, because that ruling has been stayed pending appeal, Proposition 8's harms have continued unabated. Plaintiffs-Appellees have now requested that this Court lift the stay of the District Court's order so that same-sex couples once again may marry in California. In considering whether a stay of the District Court's order is appropriate, this Court must consider, among other factors, whether "the stay will substantially injure the . . . parties interested in the proceeding" and "where the public interest lies." *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009) (citation and internal quotation marks omitted). *Amici curiae* Equality California, National Center for Lesbian Rights, LAMBDA Legal Defense and Education Fund, Inc., and ACLU Foundation of Northern California submit this brief to highlight the severe harms that Proposition 8 inflicts upon same-sex couples such as Plaintiffs-Appellees and their families every day and that

Proposition 8 will continue to inflict on families throughout California if the stay pending appeal is not vacated.

There can be no doubt that Plaintiffs-Appellees, as well as thousands of other same-sex couples, will suffer substantial injury from any further delay in implementation of the District Court's order striking down Proposition 8. The District Court made many findings of fact, based on the extensive testimony and other evidence presented at trial, that denying same-sex couples access to marriage causes concrete and serious harms to lesbian and gay Californians and their families. Plaintiffs-Appellees established, and the District Court found, that the official stigmatization of lesbians and gay men by Proposition 8 breeds discrimination and even violence, undermines the stability of same-sex couples' relationships and families, and compromises couples' and families' health and well-being. These harms cannot be undone, and they continue every day that Proposition 8 is enforced. *Amici* urge this Court to vacate the stay pending appeal in this case in order to avoid the infliction of further grave harm to tens of thousands of Californians.

ARGUMENT

As the District Court ruled, "Proposition 8 singles out gays and lesbians and legitimates their unequal treatment." *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 979 (N.D. Cal. 2010). In doing so, Proposition 8 inflicts severe harm on gay

and lesbian persons and their children throughout the state of California, including Plaintiffs-Appellees. Those harms should inform this Court's consideration of two of the four factors that the Court must consider in deciding whether a stay pending appeal is appropriate: whether "the stay will substantially injure the . . . parties interested in the proceeding" and "where the public interest lies." *Nken*, 129 S. Ct. at 1756 (citation and internal quotation marks omitted).¹

As more fully explained below, Plaintiffs-Appellees have demonstrated that Proposition 8 not only substantially injures them, as well as same-sex couples across the state, but does so in grave and irreparable ways, and the public interest would be served by the lifting of the stay pending appeal.

I. PROPOSITION 8 DEPRIVES GAY AND LESBIAN PEOPLE OF AUTONOMY AND DIGNITY, INVADES THEIR PRIVACY, AND INTERFERES WITH THEIR RELATIONSHIPS AND FAMILIES.

As long as Proposition 8 remains in effect, same-sex couples are prevented by the government from expressing their love and commitment to one another through a social and legal institution that is uniquely protected by law. "[M]arriage is widely regarded as the definitive expression of love and

¹ The other two factors are "whether the stay applicant has made a strong showing that he is likely to succeed on the merits" and "whether the applicant will be irreparably injured absent a stay." *Nken*, 129 S.Ct. at 1756 (citation and internal quotation marks omitted). As Plaintiffs-Appellees have demonstrated in their motion seeking vacatur of the stay pending appeal, Appellants cannot make either of those two showings.

commitment in the United States.” *Perry*, 704 F.Supp.2d at 970. One of the “core elements of th[e] fundamental right [to marry] is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships.” *In re Marriage Cases*, 183 P.3d 384, 434 (Cal. 2008). But “Proposition 8 reserves the most socially valued form of relationship (marriage) for opposite-sex couples.” *Perry*, 704 F.Supp.2d at 974.

Proposition 8 deprives members of same-sex couples of the autonomy to enter into a legally binding commitment to one another that is universally understood and automatically respected in society. For those who choose to marry, the decision to marry is frequently regarded as one of the most momentous and consequential events of a person’s life. The gravity and importance of a married couple’s commitment to one another, along with the deep cultural meaning of marriage in the eyes of a couple’s family, friends and community, have led the Supreme Court to conclude that marriage is a fundamental liberty under our Constitution. *See, e.g., Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (marriages “are expressions of emotional support and public commitment”). Proposition 8 prevents many Californians from undertaking this weighty public commitment to their person of choice, and therefore deprives them each day of fundamental rights

of autonomy and privacy. Proposition 8 thereby deprives them, as well, of the full measure of dignity to which all persons are entitled.

The availability of domestic partnership does not cure these harms. Instead, the existence of a dual system of family law relegates same-sex couples to an inferior social status that reinforces and perpetuates the social message that same-sex couples' relationships are not as valuable or as worthy of respect as the relationships of different-sex married couples. The District Court found that "[t]he availability of domestic partnership does not provide gays and lesbians with a status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships." *Perry*, 704 F.Supp.2d at 971. Many same-sex couples choose not to enter into domestic partnerships because domestic partnership does not carry the cultural weight of marriage and is seen as an inferior status. *Id.* at 970 (citing expert testimony of economist M.V. Lee Badgett). As long as Proposition 8 remains in effect, not only are same-sex couples deprived of the fundamental liberty to enter into marriage, they are also subjected to a regime of government-enforced social inequality.

Continued enforcement of Proposition 8 also harms same-sex couples' interests in familial privacy. As noted, marriage is a universally understood and recognized social institution; individuals and couples can explain their marital

status without disclosing any further information about their sexual orientation or family circumstances. By contrast, the very use of the term “domestic partnership” highlights and often forces disclosure of the sexual orientation of those who have entered into domestic partnerships. *Id.* at 974 (citing admission by California Attorney General that “because two types of relationships — one for same-sex couples and one for opposite-sex couples — exist in California, a gay or lesbian individual may be forced to disclose his or her sexual orientation when responding to a question about his or her marital status”). Thus, the dual system of marriage for different-sex couples and domestic partnership for same-sex couples subjects lesbian and gay Californians to a risk that they will be forced to disclose their sexual orientation — potentially exposing them to discrimination and other adverse treatment, as discussed in Section 2 below.

In addition, Proposition 8 makes it more difficult for same-sex couples to protect one another and their children. By depriving same-sex couples of access to the universally recognized and respected status of marriage, Proposition 8 takes away an important means of obtaining acceptance and respect for their relationships and families. The District Court specifically found that “[t]he children of same-sex couples benefit when their parents can marry” and noted expert testimony that “[t]he children of unmarried gay and lesbian parents do not have the same protection that civil marriage affords the children of heterosexual

couples.” *Perry*, 704 F.Supp.2d at 973 (citing July 2005 position statement of the American Psychiatric Association entitled “Support of Legal Recognition of Same-Sex Civil Marriage”). The District Court also noted expert testimony that “[a] survey of same-sex couples who married in Massachusetts shows that 95 percent of same-sex couples raising children reported that their children had benefitted from the fact that their parents were able to marry.” *Id.* (citing testimony of expert psychologist Anne Peplau). Indeed, in ruling that the California Constitution required that California permit same-sex couples to marry, the California Supreme Court concluded that in California, notwithstanding the existence of a comprehensive set of rights for domestic partners, relegating same-sex couples to a separate family law status “pose[s] significant difficulties and complications for same-sex couples, and perhaps most poignantly for their children, that would not be presented if, like opposite-sex couples, same-sex couples were permitted access to the established and well-understood family relationship of marriage.” *In re Marriage Cases*, 183 P.3d 384, 446 (Cal. 2008). The California Supreme Court found that by stigmatizing their family relationships and depriving them of the added security provided by marriage, “the exclusion of same-sex couples from the designation of marriage works a *real and appreciable harm* upon same-sex couples and their children.” *Id.* at 452 (emphasis added).

II. PROPOSITION 8 STIGMATIZES SAME-SEX COUPLES AND THEIR FAMILIES, THEREBY FOSTERING DISCRIMINATION AND VIOLENCE.

Proposition 8 also causes severe and ongoing harm to same-sex couples because, as the District Court recognized, Proposition 8 “places the force of law behind stigmas against gays and lesbians.” *Perry*, 704 F.Supp.2d at 973. Such official stigmatization is harmful not only because of the denigration it communicates directly to gay and lesbian persons, but also because such official stigmatization “identifies which members of society are devalued” and thereby gives private individuals and organizations “a level of permission to denigrate or attack particular groups, or those who are perceived to be members of certain groups in society.” *Id.* at 974 (citing expert testimony of psychologist Gregory Herek). The stigmas that Proposition 8 reinforces include the notions that “gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society.” *Id.* Those stigmas cause numerous harms to lesbian, gay and bisexual Californians, and Proposition 8 will continue to cause such harms as long as it remains the law.

Among Proposition 8’s chief harms is that it facilitates and invites public and private discrimination against lesbian, gay, and bisexual people. As the

District Court found, Proposition 8 enacted into public law a private moral view that lesbian, gay and bisexual people are inferior. *Id.* at 1002. Proposition 8 accordingly “sends a message that would [...] encourage or at least is consistent with holding prejudicial attitudes” and “provides state endorsement of private discrimination.” *Id.* at 979, 935 (quoting expert testimony of social epidemiologist Ilan Meyer). *See also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (noting that state laws that improperly deny gay people equality with respect to a core right of personal relationship privacy and autonomy impose stigma that invites discrimination against them generally “in the public and in the private spheres”). Indeed, trial testimony showed that the Proposition 8 campaign reinforced the widespread, defamatory notion that gay men and lesbians molest and recruit children. *Id.* at 979, 983. The continued enforcement of Proposition 8 – especially in the wake of that campaign – reinforces this prejudice.

Proposition 8 further facilitates and invites discrimination against the children of same-sex couples in a wide variety of settings, from schools to the community at large. Proposition 8 “perpetuates the stereotype that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents.” *Perry*, 704 F.Supp.2d at 979; *see also id.* at 980 (citing American Psychological Association, *Answers to Your Questions: For a Better Understanding of Sexual Orientation and Homosexuality* at 5 (2008))

(concerns raised about children of lesbian and gay parents “are generally grounded in prejudice against and stereotypes about gay people”). “Children of same-sex relationships are the secondary target of the stigma directed at their parents because of their parents’ sexual orientation.” New Jersey Civil Union Review Commission, *The Legal, Medical, Economic, And Social Consequences Of New Jersey’s Civil Unions Law* at 16 (December 10, 2008), <http://www.state.nj.us/lps/dcr/downloads/CURC-Final-Report-.pdf> (hereinafter “New Jersey Commission Report”).

While the stigmas against lesbian, gay and bisexual people are damaging on their own, the secondary effects of physical attacks and violence are devastating. Evidence presented at trial indicated that gay and lesbian persons “are far more likely to experience violence” than their heterosexual counterparts. *Perry*, 704 F.Supp.2d at 979 (quoting expert testimony of political scientist Gary Segura). Particularly disturbing was the evidence at trial that “[o]ver the last five years, there has actually been an increase in violence directed toward gay men and lesbians” and that in 2008, crimes against gay men and lesbians accounted for seventy-one percent of all hate-motivated murders and fifty-five percent of all hate-motivated rapes. *Id.* (quoting expert testimony of Segura). This evidence led an expert to conclude that “[t]here is simply no other person in society who

endures the likelihood of being harmed as a consequence of their identity [more] than a gay man or lesbian.” *Id.*

In addition, the health of lesbians and gay men suffers because of the significant social stress they experience living in a society that devalues and stigmatizes their relationships. *Id.* at 942 (citing expert testimony of Meyer). That harm is more acute where, as here, the government itself perpetuates and sanctions the discrimination. As experts testified at trial, “Proposition 8 increases the likelihood of negative mental and physical health outcomes for gays and lesbians.” *Id.* at 935 (citing testimony of Meyer); *see also id.* at 978 (“[E]xclusion from civil marriage contributes to health care disparities affecting same-sex households” (quoting American Medical Association Policy: Health Care Disparities in Same-Sex Partner Households, Policy D160.979 at 1).) Proposition 8 also denies same-sex couples the documented health benefits of being married. *Id.* at 962.²

² Proposition 8 also “inflict[s] substantial economic harm on same-sex couples and their children” in California. 704 F.Supp.2d at 978 (citing expert testimony of economist M.V. Lee Badgett). “Proposition 8 increases costs and decreases wealth for same-sex couples because of increased tax burdens, decreased availability of health insurance and higher transactions costs to secure rights and obligations typically associated with marriage.” *Id.* In addition, marriage “confers numerous economic benefits” that “are not quantifiable but are nevertheless substantial,” including “greater validation and social acceptance of the relationship and more positive workplace outcomes.” *Id.* (citing expert testimony of economist Badgett).

CONCLUSION

For the foregoing reasons, *amici curiae* support the Plaintiff-Appellees' Motion to Vacate Stay Pending Appeal and respectfully request that the Court grant the Motion.

Dated: March 1, 2011

Respectfully submitted,

s/ Shannon P. Minter
SHANNON P. MINTER

CALDWELL LESLIE & PROCTOR, PC
David C. Codell, *Of Counsel*
Linda M. Burrow
Albert Giang
Benjamin A. Au
Counsel for Amicus Curiae
Equality California

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ACLU FOUNDATION OF
NORTHERN CALIFORNIA
Alan L. Schlosser
Elizabeth O. Gill
Counsel for Amici Curiae National
Center for Lesbian Rights, et al.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure (“FRAP”) and Ninth Circuit Rule 32-1, the undersigned certifies that the attached brief of amici curiae is proportionally spaced, has a typeface of 14 points or more, and contains 3496 words, excluding matters that may be omitted under Rule 32(a)(7)(B)(iii) of the FRAP, according to the word count feature of the word processing program used to prepare this brief.

Dated: March 1, 2011

Respectfully submitted,

s/ Shannon P. Minter
SHANNON P. MINTER

CALDWELL LESLIE & PROCTOR, PC
David C. Codell, *Of Counsel*
Linda M. Burrow
Albert Giang
Benjamin A. Au
Counsel for Amicus Curiae
Equality California

NATIONAL CENTER FOR LESBIAN
RIGHTS
Shannon P. Minter
Christopher F. Stoll
Amy E. Whelan
Melanie S. Rowen

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
Jon W. Davidson
Jennifer C. Pizer
Tara L. Borelli

ACLU FOUNDATION OF
NORTHERN CALIFORNIA
Alan L. Schlosser
Elizabeth O. Gill
Counsel for Amici Curiae National
Center for Lesbian Rights, et al.

9th Circuit Case Number(s) 10-16696

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SERVICE LIST

<p>Thomas Brejcha THOMAS MORE SOCIETY 29 S. La Salle Street, Suite 440 Chicago, IL 60603</p>	<p>Stuart J. Roth AMERICAN CENTER FOR LAW AND JUSTICE 201 Maryland Avenue, N.E. Washington, DC 20002</p>
<p>Von G. Keetch KIRTON & McCONKIE, PC Eagle Gate Tower 60 E. South Temple Salt Lake City, UT 84111</p>	<p>Anita L. Staver LIBERTY COUNSEL P.O. Box 540774 Orlando, FL 32854</p>
<p>Jeffrey Mateer LIBERTY INSTITUTE 2001 W Plano Parkway, Suite 1600 Plano, TX 75075</p>	<p>Mathew D. Staver LIBERTY COUNSEL 1055 Maitland Center Commons 2nd Floor Maitland, FL 32751</p>
<p>Jeffrey Hunter Moon Anthony R. Picarello, Jr. Michael F. Moses UNITED STATES CATHOLIC CONFERENCE 3211 Fourth Street, N.E. Washington, DC 20017</p>	<p>James F. Sweeney SWEENEY & GREENE LLP 8001 Folsom Boulevard, Suite 101 Sacramento, CA 95826</p>
<p>Lincoln C. Oliphant COLUMBUS SCHOOL OF LAW The Catholic University of America 3600 John McCormack Road, NE Washington, DC 20064</p>	<p>M. Edward Whelan, III ETHICS AND PUBLIC POLICY CENTER 1730 M Street N.W., Suite 910 Washington, DC 20036</p>
<p>Arthur Bailey, Jr. HAUSFELD LLP 44 Montgomery Street Suite 3400 San Francisco, CA 94104</p>	<p>Suzanne B. Goldberg COLUMBIA UNIVERSITY LAW SCHOOL Sexuality and Gender Law Clinic 435 West 116th Street New York, NY 10027</p>