

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

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DENNIS HOLLINGSWORTH, *et al.*,  
*Petitioners*,  
v.  
KRISTIN M. PERRY, *et al.*,  
*Respondents*.

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**On Writ of Certiorari to the  
United States Courts of Appeals  
For the Ninth Circuit**

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**BRIEF OF AMERICAN FEDERATION OF  
LABOR AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS AND CHANGE TO WIN AS  
*AMICI CURIAE* SUPPORTING RESPONDENTS  
AND SUGGESTING AFFIRMANCE**

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Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, <i>Income, Poverty, and Health Insurance Coverage in the United States: 2011</i> , U.S. Census Bureau (Sept. 2012), available at <a href="http://www.census.gov/prod/2012pubs/p60-243.pdf">http://www.census.gov/prod/2012pubs/p60-243.pdf</a> .....	6
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Albert Feuer, <i>Who Is Entitled To Survivor Benefits From ERISA Plans?</i> , 40 J. Marshall L. Rev. 919 (2007) .....	25

## TABLE OF AUTHORITIES—Continued

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Naomi G. Goldberg, Christopher Ramos & M.V. Lee Badgett, <i>The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners</i> , Williams Institute (Sept. 2008), available at <a href="http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Goldberg-Ramos-S2521FiscalAnalysis-Sept-2008.pdf">http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Goldberg-Ramos-S2521FiscalAnalysis-Sept-2008.pdf</a> .....	14
Immigration Policy Center, <i>The Migrant Integration Policy Index</i> (2011), available at <a href="http://www.immigrationpolicy.org/just-facts/migrant-integration-policy-index-mipex-iii">http://www.immigrationpolicy.org/just-facts/migrant-integration-policy-index-mipex-iii</a> .....	33
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TABLE OF AUTHORITIES—Continued

	Page
Craig J. Konnoth & Gary J. Gates, <i>Same-Sex Couples and Immigration in the United States</i> , Williams Institute (Nov. 2011), available at <a href="http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf">http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf</a> ...	29
National Center for Lesbian Rights & Equality California, <i>The California Domestic Partnership Law: What It Means for You and Your Family</i> (2009), available at <a href="http://www.nclrights.org/site/DocServer/AB205.04.2007.pdf?docID=1264">http://www.nclrights.org/site/DocServer/AB205.04.2007.pdf?docID=1264</a> .....	5
New Jersey Civil Union Review Commission, <i>The Legal, Medical, Economic &amp; Social Consequences of New Jersey’s Civil Union Law</i> (Dec. 10, 2008), available at <a href="http://www.nj.gov/oag/dcr/downloads/CURC-Final-Report-.pdf">http://www.nj.gov/oag/dcr/downloads/CURC-Final-Report-.pdf</a> .....	35, 36
Office of Justice Programs, <i>Public Safety Officers’ Benefits Programs</i> (2013), available at <a href="https://www.psob.gov/index.html">https://www.psob.gov/index.html</a> .....	19

## TABLE OF AUTHORITIES—Continued

	Page
Ninez A. Ponce, <i>et al.</i> , <i>The Effects of Unequal Access to Health Insurance for Same-Sex Couples in California</i> , Health Affairs (Aug. 2010), available at <a href="http://www.britecenter.org/wp-content/uploads/2013/02/The-effects-of-unequal-access-to-health-insurance-for-same-sex-couples-in-California.pdf">http://www.britecenter.org/wp-content/uploads/2013/02/The-effects-of-unequal-access-to-health-insurance-for-same-sex-couples-in-California.pdf</a> .....	6, 7
Adam P. Romero, <i>et al.</i> , <i>Census Snapshot: United States</i> , Williams Institute (2007), available at <a href="http://escholarship.org/uc/item/6nx232r4">http://escholarship.org/uc/item/6nx232r4</a> .....	17
Services & Advocacy for Gay, Lesbian, Bisexual and Transgender Elders & Movement Advancement Project, <i>Improving the Lives of LGBT Older Adults</i> (2010), available at <a href="http://www.lgbtagingcenter.org/resources/pdfs/ImprovingtheLivesofLGBTOlderAdultsFull.pdf">http://www.lgbtagingcenter.org/resources/pdfs/ImprovingtheLivesofLGBTOlderAdultsFull.pdf</a> .....	23
Social Security Administration, <i>Social Security Retirement Benefits</i> (July 2012), available at <a href="http://www.ssa.gov/pubs/10035.pdf">http://www.ssa.gov/pubs/10035.pdf</a> .....	22
U.S. Citizenship and Naturalization Services, <i>Citizenship through Naturalization</i> (2011), available at <a href="http://www.uscis.gov/portal/site/uscis">http://www.uscis.gov/portal/site/uscis</a> (follow “Citizenship through Naturalization” hyperlink) .....	30

## TABLE OF AUTHORITIES—Continued

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U.S. Citizenship and Naturalization Services, <i>How Do I Help My Relative Become a U.S. Permanent Resident</i> , M-561 (2008), available at <a href="http://www.uscis.gov/USCIS/Resources/B1en.pdf">http://www.uscis.gov/USCIS/Resources/B1en.pdf</a> .....	30
U.S. Department of Labor, <i>An Employee's Guide to Health Benefits under COBRA</i> (Nov. 2012), available at <a href="http://www.dol.gov/ebsa/publications/cobraemployee.html">http://www.dol.gov/ebsa/publications/cobraemployee.html</a> ..	13
U.S. Department of Labor, <i>Frequently Asked Questions for Participants and Beneficiaries</i> , available at <a href="http://www.dol.gov/ebsa/faqs/faq_911_1.html">http://www.dol.gov/ebsa/faqs/faq_911_1.html</a> .....	13
U.S. Department of State, <i>Visa Bulletin: Immigrant Numbers for September 2012</i> , No. 48, No. IX (Aug. 9, 2012), available at <a href="http://www.travel.state.gov/pdf/visa_bulletin/visabulletin_september2012.pdf">http://www.travel.state.gov/pdf/visa_bulletin/visabulletin_september2012.pdf</a> ...	30
U.S. Department of State, <i>Visa Types for Immigrants</i> , available at <a href="http://travel.state.gov/visa/immigrants/types/types_1326.html">http://travel.state.gov/visa/immigrants/types/types_1326.html</a> .....	28
U.S. Office of Personnel Management, <i>2013 Guide to Federal Employees Dental and Vision Insurance Program</i> (Nov. 2012), available at <a href="http://www.opm.gov/healthcare-insurance/healthcare-plan-information/guide/2013-guides/70-BK1.pdf">http://www.opm.gov/healthcare-insurance/healthcare-plan-information/guide/2013-guides/70-BK1.pdf</a>	16

U.S. Office of Personnel Management, <i>FERS Information Survivors</i> (2011), available at <a href="http://www.opm.gov/retire/pre/death/index.asp#FERS">http://www.opm.gov/retire/pre/death/index.asp#FERS</a> .....	20, 27
U.S. Office of Personnel Management, <i>Family Members in Federal Employees Health Benefits Program Handbook</i> , available at <a href="http://www.opm.gov/health-care-insurance/healthcare/reference-materials/reference/family-members/">http://www.opm.gov/health-care-insurance/healthcare/reference-materials/reference/family-members/</a> .....	15
Rebecca Walters, <i>The Uniting American Families Act: A Critical Analysis of Legislation Affecting Bi-National Same-Sex Couples</i> , 17 Am. U. J. Gender Soc. Pol'y & L. 521 (2009).....	31





## INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is submitted, with the consent of the parties,<sup>1</sup> on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and Change to Win (CTW). The AFL-CIO is a federation of 56 labor unions representing more than 12 million working men and women in the public and private sectors in every industry and level of government in the United States. Through the California Labor Federation, AFL-CIO, the AFL-CIO represents approximately 2.1 million working men and women in the State of California. CTW is a federation of four labor unions representing 5.5 million working men and women, including farm workers, food service workers, janitors, security guards, healthcare workers, truck drivers, and others employed in both the public and private sectors. Almost 1.1 million CTW members live and work in the State of California.

*Amici* and our affiliated labor unions, which together represent the majority of the American labor movement, are dedicated to the equal and fair treatment of all workers. Protecting the rights of working men and women, including gay and lesbian Americans, is an important part of our collective mission. Accordingly, we bargain and advocate for domestic partner benefits in union contracts, for prohibitions forbidding employers from firing gay and lesbian workers because of sexual orientation, and

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<sup>1</sup> Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

for programs to help end discrimination in the workplace.

Our interest in the invalidation of Proposition 8 is two-fold. First, Proposition 8 inflicts economic harm on workers with same-sex partners by causing them to earn less money, pay higher taxes on their wages and benefits, and receive fewer valuable benefits and protections than their counterparts with different-sex partners. Second, Proposition 8 functions as a state-sanctioned endorsement of discrimination which, in turn, legitimizes the marginalization of gay men and lesbians in the workplace. *Amici*, therefore, stand united in our belief that Proposition 8 perpetuates a two-tiered workforce in which gay and lesbian workers are frequently deprived not only of crucial employment benefits and protections, but inevitably of the basic respect and dignity enjoyed by their colleagues who are permitted to marry under state law. Consequently, Proposition 8 severely impedes our ability to represent union members and to advocate and seek justice for all workers.

### SUMMARY OF ARGUMENT

Several of the *amicus* briefs filed in support of the Respondents vividly illustrate the psychological, familial, and social harms caused by Proposition 8. In addition to those more intangible—but significant—harms, Proposition 8 inflicts concrete economic injuries on gay and lesbian workers, their partners, and their families. These economic injuries are readily quantifiable in terms of the dollars gay and lesbian workers are forced to spend on higher costs and taxes, in the denials of access to publicly and privately provided benefits, and in the refusals of entry

into and in the deportations out of the U.S. These harms further extend into the physical workplace, where gay and lesbian workers often confront and navigate biases about their sexual orientation and the comparative worth of their personal relationships.

Because marital status plays a key role in determining eligibility for a myriad of workplace benefits, rights, and privileges, as well as the level of taxation of many benefits, Proposition 8, in combination with the effects of the Defense of Marriage Act (DOMA), deprives gay and lesbian couples and their families of significant economic protections associated with employment. Proposition 8's effects on working families, particularly in combination with the effects of DOMA, cannot be overstated. Employee benefits, together with state and federal programs for working people and their family members, form the safety net upon which most Americans rely for retirement and financial assistance in the event of illness, injury, disability or death. These rights and protections are particularly crucial for families in which only one adult works outside of the home or is eligible for employer-provided benefits.

Gay and lesbian workers in long-term committed relationships must also contend with the daily battles resulting from the State of California's refusal to recognize the significance of their familial bonds. Even for gay and lesbian couples who have registered as domestic partners, the denial of the right to marry under California law signals that it is permissible for employers to treat gay and lesbian long-term committed relationships as inferior to the marriages of their

heterosexual colleagues. Because of Proposition 8, gay and lesbian workers face daily reminders of their second-class status.

The enforcement of DOMA may mean that the economic burdens described herein would be imposed even if California had not stripped gay and lesbian couples of their right to marry. However, Proposition 8 denies same-sex couples access to the threshold requirement of state-recognized married status and, therefore, the ability to apply for a myriad of federal rights and benefits that are contingent upon marriage. Moreover, by codifying discrimination between same-sex and different-sex committed couples, Proposition 8 demeans gay and lesbian people and their personal relationships.

## **ARGUMENT**

Proposition 8 deprives workers with same-sex partners and their children of significant benefits associated with work, including, among others: (I) equal access to spousal healthcare benefits; (II) Social Security, workers' compensation and other benefits provided to workers in the unfortunate event of workplace injury or death, or long-term disability; and (III) retirement benefits and various tax provisions intended to reward savings in private retirement accounts. The combination of Proposition 8 and DOMA also destabilize dual nationality and immigrant families by foreclosing immigration opportunities for gay and lesbian couples. Finally, Proposition 8 acts as a state-sponsored endorsement of discrimination, thereby legitimizing workplace discrimination against gay men and lesbians and per-

petuating a two-tiered workforce based on sexual orientation.

Some workplace benefits are uniquely associated with marriage. Others are not available to many same-sex couples who—because of a number of considerations—prefer not to register as domestic partners.<sup>2</sup> Even those same-sex couples who do register as domestic partners incur significant transaction costs and other burdens not imposed on married employees in accessing workplace benefits.<sup>3</sup>

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<sup>2</sup> California's domestic partnership status provides only an incomplete and imperfect set of economic benefits compared to marriage. See, e.g., M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits*, Williams Institute, 1 (Dec. 2007), available at [http://www.americanprogress.org/wp-content/uploads/issues/2007/12/pdf/domestic\\_partners.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2007/12/pdf/domestic_partners.pdf). Although same-sex couples in California currently have the ability to register as domestic partners, many gay and lesbian couples who would likely marry choose not to register as domestic partners because of the stigma and lesser status associated with domestic partnership. See Zarillo Test. 82, Jan. 11, 2010 [J.A. vol. 1, 336] (“Domestic partnership would relegate me to a level of second class citizenship, maybe even third class citizenship, currently, the way things are in California today.”); see also Badgett Test. 1337, Jan. 19, 2010 (explaining that domestic partners do not get “the same kind of statement of commitment and social validation that would give rise to . . . the full effect of the other possible benefits, . . . that they would experience if they were allowed to marry.”).

<sup>3</sup> Badgett, *supra* note 2, at 7-8; National Center for Lesbian Rights & Equality California, *The California Domestic Partnership Law: What It Means for You and Your Family*, 17 (2009), available at <http://www.nclrights.org/site/DocServer/AB205.04.2007.pdf?docID=1264>.

## **I. Denial of the Right to Marry Significantly Impairs Gay and Lesbian Couples' Access to Employer-Provided Spousal Healthcare Benefits**

Employer-provided healthcare benefits provide the most common source of medical insurance for working Americans and their families.<sup>4</sup> But for families headed by gay and lesbian couples, the combination of Proposition 8 and DOMA create a litany of impediments that complicate, penalize, or flatly prohibit full-family healthcare coverage.

### **A. Proposition 8 Sanctions the Denial of Spousal Healthcare Coverage to Gay and Lesbian Couples in Long-Term Committed Relationships**

Due in part to their inability to marry, same-sex couples are more than twice as likely to be uninsured than married different-sex couples.<sup>5</sup> Many gay and lesbian couples are forced to rely on coverage avail-

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<sup>4</sup> Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2011*, U.S. Census Bureau, 2 (Sept. 2012), available at <http://www.census.gov/prod/2012pubs/p60-243.pdf> (55.1% of Americans, or 170.1 million people, were covered by employer-based health insurance in 2011).

<sup>5</sup> Ninez A. Ponce, *et al.*, *The Effects of Unequal Access to Health Insurance for Same-Sex Couples in California*, Health Affairs, 1539-40 (Aug. 2010), available at <http://www.britecenter.org/wp-content/uploads/2013/02/The-effects-of-unequal-access-to-health-insurance-for-same-sex-couples-in-California.pdf>.

able through public assistance or to go without health insurance entirely because some employers do not provide health insurance coverage to domestic partners.<sup>6</sup> Even when employers extend coverage to same-sex domestic partners, because such couples are denied the fundamental right to marry, they are forced to bear additional costs in federal taxes on the benefits.<sup>7</sup>

In particular when coupled with DOMA, the burdens that Proposition 8 imposes on same-sex couples seeking healthcare coverage can have consequences for the well-being of the entire family. The lack of spousal coverage often forces individuals to remain in the workforce when they might otherwise choose to stay home or work part-time in order to care for children or for elderly or infirm family members. Even when the non-covered partner qualifies for coverage through her own employer, families headed by same-sex couples often face higher insurance costs or lower levels of coverage because coverage under a single enrollment for a couple or family is generally less expensive than coverage under two separate individual enrollments.<sup>8</sup> In addition, one partner's

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<sup>6</sup> *Id.* at 1541.

<sup>7</sup> See Kaiser Family Foundation & Health Research & Educational Trust, *Employer Health Benefits 2011 Annual Survey*, 20 (2011), available at <http://ehbs.kff.org/pdf/2011/8225.pdf>.

<sup>8</sup> See, e.g., *Pedersen v. OPM*, 881 F. Supp. 2d 294, 302-05 (D. Conn. 2012) (finding DOMA unconstitutional in denying equal access to employer-provided healthcare coverage), *appeal docketed*, No. 12-3273 (2d Cir. Aug. 21, 2012), *petition for cert. filed*, No. 12-231 (U.S. Aug. 21, 2012).

employer-provided coverage may charge higher premiums or out-of-pocket costs than those charged by the other partner's employer-provided coverage, denying gay and lesbian couples the ability to choose which partner's benefit plan is the most advantageous for their economic and health needs.

One analysis quantified the discriminatory effect the denial of the right to marry has on a hypothetical same-sex couple partnered for 46 years, who were the parents of two children and whose combined annual income was \$140,000.<sup>9</sup> In the worst case scenario, the couple, who lived in New York State, would incur an additional \$211,993 in health insurance costs over the course of their lifetimes.<sup>10</sup> In the best case scenario, healthcare coverage would cost the same-sex couple at least \$28,595 more in insurance premiums over their lifetimes than it would cost a similarly situated different-sex

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<sup>9</sup> Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. Times, A1 (Oct. 3, 2009), available at <http://www.nytimes.com/2009/10/03/your-money/03money.html>.

<sup>10</sup> In the worst case scenario, one partner earned \$110,000 and the other partner earned \$30,000. *Id.* The lower earning partner's employer did not provide healthcare coverage and her partner's employer did not provide domestic partner coverage. *Id.* Consequently, the higher earning partner provided coverage for herself and the couple's two children and the lower earning partner purchased individual healthcare coverage on the private market. *Id.*



couple.<sup>11</sup> Regardless of the circumstances, however, nearly all of the extra costs would be eliminated if the federal government and State of California recognized the marriages of same-sex couples.<sup>12</sup>

**B. The Combination of Proposition 8 and DOMA Result in Unequal Tax Treatment of Healthcare Benefits for Gay and Lesbian Workers in Long-Term Committed Relationships**

As part of their employees' overall compensation packages, many private sector employers in California extend healthcare and other benefits to their employees, their employees' spouses and domestic partners, and their employees' dependent children. While California state and local governments also extend employee benefits to same-sex domestic partners of public employees, Proposition 8, in combination with DOMA, results in disparate payroll and income tax treatment of such benefits for both employers and employees with same-sex partners.

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<sup>11</sup> In the best case scenario, both partners earned identical incomes and were eligible for employer-provided health insurance coverage. *Id.* One partner's employer provided domestic partner healthcare coverage which the couple used for five years while the other partner stayed home to care for their two children. *Id.* After five years, the other partner returned to work and resumed her employer-provided healthcare coverage. *Id.* The extra cost in premiums was cheaper than using domestic partnership coverage throughout the couple's lifetime because of the burdensome tax implications. *Id.*

<sup>12</sup> *Id.*

The Internal Revenue Code allows married employees to exclude from gross income the value of employer-provided healthcare coverage for their family members.<sup>13</sup> This exclusion represents a significant tax advantage because the fair-market value of employer-provided health insurance would otherwise be taxable as income. Same-sex couples are prevented from enjoying this tax benefit because they are denied the right to marry. The combination of Proposition 8 and DOMA forces both employers and employees to treat the fair-market value of healthcare coverage for domestic partners as taxable income.<sup>14</sup> This is true even where an employer provides coverage under a “family plan,” in which the addition of a spousal beneficiary would not add to the premium cost. In that circumstance, an employee who elects such coverage for her same-sex partner or for the children of her same-sex partner is taxed on the imputed fair-market value of that coverage, unless the individuals covered qualify as tax dependents through independent means.<sup>15</sup>

The tax burdens Proposition 8 and DOMA impose on gay and lesbian couples do not end there. Married

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<sup>13</sup> See, e.g., 26 U.S.C. §§ 105, 106(a), 152; Treas. Reg. § 1.106-1 (excluding from gross income “contributions which his employer makes to an accident or health plan for compensation . . . to the employee for personal injuries or sickness incurred by him, [or] his spouse”).

<sup>14</sup> See, e.g., I.R.S. Priv. Ltr. Rul. 200339001 (June 13, 2003); I.R.S. Priv. Ltr. Rul. 9850011 (Sept. 10, 1998); I.R.S. Priv. Ltr. Rul. 9717018 (Jan. 22, 1997).

<sup>15</sup> I.R.S. Priv. Ltr. Rul. 9850011 (Sept. 10, 1998); see also 26 U.S.C. § 152(a) (defining “dependent”).

couples may generally pay for health insurance premiums incurred on behalf of themselves and certain family members with pre-tax dollars, thereby both lowering the actual cost of coverage and reducing their taxable income.<sup>16</sup> Married couples may also make pre-tax contributions to a “cafeteria” plan on behalf of a spouse, or be reimbursed on a pre-tax basis for spousal medical expenses from a health savings account or flexible savings account.<sup>17</sup> But Proposition 8 and DOMA preclude gay and lesbian couples from being able to take advantage of these tax-saving mechanisms for obtaining healthcare. As a result, these laws significantly increase the cost of benefits to gay and lesbian workers and—in some cases—may even force such workers into a higher tax bracket.

Several studies have confirmed and quantified the economic impact of the inability to marry on the families of gay and lesbian couples. One study calculated that the average employee who receives domestic partner benefits pays \$1,069 more in taxes per year than a married employee with the same coverage.<sup>18</sup> In the analysis regarding the hypothetical

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<sup>16</sup> 26 U.S.C. §§ 105(b), 106(a) (limiting pre-tax treatment of medical expenses to employees, [opposite-sex] spouses and certain dependents).

<sup>17</sup> See 26 U.S.C. § 125(f) (limiting “qualified benefits” under a cafeteria plan to benefits that are “not includible in the gross income of the employee”); Treas. Reg. § 1.106-1 (excluding from gross income “contributions which his employer makes to an accident or health plan for compensation ... to the employee for personal injuries or sickness incurred by him, his spouse” or certain dependents).

<sup>18</sup> Badgett, *supra* note 2, at 7-8.

New York State same-sex couple, one scenario demonstrated that it was less expensive for the couple to use their separate, employer-provided coverage because domestic partnership coverage increased their financial burden due to the onerous tax implications.<sup>19</sup> In other words, domestic partnership status does not alleviate, and may in fact exacerbate, the economic burdens caused by Proposition 8 and DOMA.

**C. Proposition 8 and DOMA Together Deny Gay and Lesbian Workers in Long-Term Committed Relationships Federal Guarantees of Uninterrupted Healthcare Coverage**

In the past 25 years, Congress enacted two landmark statutes—the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)<sup>20</sup> and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>21</sup>—that were intended to give workers and their families greater healthcare security and continuity. Due to the combined effect of Proposition 8 and DOMA, however, same-sex couples in California are largely excluded from these statutory protections.

COBRA requires public and private employers with twenty or more employees to offer continued healthcare coverage, at group rates, for a defined period of time to employees and their dependents under certain circumstances, such as termination,

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<sup>19</sup> Bernard, *supra* note 9.

<sup>20</sup> Pub. L. No. 99-272, 100 Stat. 82.

<sup>21</sup> Pub. L. No. 104-191, 110 Stat. 1936.

reduction in employment hours or death of the employee.<sup>22</sup> The aim of this requirement is to maintain the portability of healthcare coverage and ensure that employees who change jobs or become unemployed are not subject to a coverage break without an opportunity to maintain coverage.<sup>23</sup> Proposition 8 and DOMA's ban on recognition of marriages between persons of the same sex undermines this goal. COBRA coverage is limited to spouses of covered employees and does not require employers to extend coverage to domestic partners.<sup>24</sup> Although an employer may voluntarily extend continued coverage to same-sex domestic partners, the coverage would not be subject to the protections of COBRA. Therefore, an employer would remain free to terminate coverage at any time, exposing domestic partners to precisely the type of healthcare insecurity COBRA was enacted to prevent.

Likewise, Congress designed HIPAA to promote portability of healthcare coverage and ease transfers of coverage in the event of a change in family circumstances. In particular, HIPAA allows an

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<sup>22</sup> 29 U.S.C. §§ 1161-69.

<sup>23</sup> See U.S. Department of Labor, *An Employee's Guide to Health Benefits under COBRA* (Nov. 2012), available at <http://www.dol.gov/ebsa/publications/cobraemployee.html>.

<sup>24</sup> See U.S. Department of Labor, *Frequently Asked Questions: Participants and Beneficiaries*, available at [http://www.dol.gov/ebsa/faqs/faq\\_911\\_1.html](http://www.dol.gov/ebsa/faqs/faq_911_1.html) (last visited Feb. 22, 2013); see also 29 U.S.C. § 1167(3) ("qualified beneficiary" defined as covered employee's "spouse").

employee to add a spouse to his or her healthcare plan immediately upon marriage or in the event of certain special circumstances, such as a loss of the spouse's existing coverage resulting from termination of employment.<sup>25</sup> But, once again, same-sex partners cannot take full advantage of this program because the law extends only to married couples. Thus, the combination of Proposition 8 and DOMA, therefore, places gay and lesbian couples at an increased risk of loss of continuity in healthcare coverage.

**D. Gay and Lesbian Federal Employees in Long-Term Committed Relationships are Denied Healthcare Coverage for Their Partners and the Dependent Children of Their Partners**

Active and retired government employees receive several valuable healthcare benefits for themselves and their family members. The Federal Employee Health Benefits Act (FEHBA) provides significantly subsidized healthcare coverage to federal employees, retirees, their spouses, and their dependent children.<sup>26</sup> Federal employees who live in California and have

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<sup>25</sup> See 26 U.S.C. § 9801(f); Treas. Reg. § 54.9801-6.

<sup>26</sup> 5 U.S.C. §§ 8901-14. In 2008, the federal government contributed an average of \$8,100 for non-postal employees toward healthcare coverage for employees with families. Naomi G. Goldberg, Christopher Ramos & M.V. Lee Badgett, *The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners*, Williams Institute, 5 (Sept. 2008), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Goldberg-Ramos-S2521FiscalAnalysis-Sept-2008.pdf>.

same-sex partners are denied spousal and dependent care coverage, however, both because of the current application of DOMA and because they have been stripped of the fundamental right to marry by Proposition 8.<sup>27</sup> Instead, because they cannot marry, same-sex partners of federal employees—and sometimes their dependent children as well<sup>28</sup>—are forced to rely on coverage from another employer (if available), to purchase costly or substandard private healthcare insurance, or to go without healthcare insurance altogether.

The combination of Proposition 8 and the current application of DOMA also result in same-sex partners of federal employees and their dependent children being barred from enrolling in the Federal

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<sup>27</sup> See U.S. Office of Personnel Management, *Family Members in Federal Employees Health Benefits Program Handbook*, available at <http://www.opm.gov/healthcare-insurance/healthcare/reference-materials/reference/family-members/> (last visited Feb. 26, 2013). Legally-recognized children of covered workers are covered automatically, 5 U.S.C. § 8901(5), but because of DOMA the children of a worker's same-sex partner are not necessarily covered, whereas the children of a different-sex spouse automatically receive coverage. In July 2012, the U.S. Office of Personnel Management issued a proposed rule that would allow children of a same-sex domestic partner of a FEHBA enrollee to be covered under FEHBA. Federal Employees Health Benefits Program and Federal Employees Dental and Vision Insurance Program: Expanding Coverage of Children Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums, 77 Fed. Reg. 42914 (July 20, 2012) (to be codified at 5 C.F.R. pts. 890, 892, 894). To date, this proposed rule is not final.

<sup>28</sup> *Id.*

Employees Dental and Vision Insurance Program.<sup>29</sup> This program provides a particularly valuable benefit to employees' family members because the benefits and premiums have been negotiated by a large consumer—the federal government—thereby reducing significantly the cost of the insurance to the employees.<sup>30</sup>

## **II. Proposition 8 and DOMA Together Deny Gay and Lesbian Couples in Long-Term Committed Relationships Access to Critical Programs That Protect Married Workers in the Event of Illness, Workplace Injury or Death**

Several federal programs provide monetary and other assistance to workers in the event the worker or her spouse becomes ill, is injured or dies. The best-known of these programs is Social Security, which provides benefits to surviving spouses of workers who paid into the Social Security system. Many workers are guaranteed the right to unpaid leaves of absence to care for a sick spouse. Federal employees also benefit from a number of programs that provide care for a spouse in the event the worker becomes injured or dies on the job. These benefits are generally only provided, however, to spouses of employees, and are not available to unmarried couples or domestic partners.

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<sup>29</sup> 5 U.S.C. §§ 8951-62, 8981-92; *but see supra* note 27 (discussing proposed regulation).

<sup>30</sup> See U.S. Office of Personnel Management, *2013 Guide to Federal Employees Dental and Vision Insurance Program*, 3 (Nov. 2012), available at <http://www.opm.gov/healthcare-insurance/healthcare/plan-information/guide/2013-guides/70-BK1.pdf>.



### **A. Proposition 8 and DOMA Together Deny Social Security Survivor Benefits to Gay and Lesbian Workers in Long-Term Committed Relationships**

The Social Security system provides a variety of disability and survivor benefits to spouses and surviving spouses of covered workers. According to the 2000 Census data, 28% of gay and lesbian couples have at least one partner with a disability, and 7% of same-sex couples have one person who is 65 or older.<sup>31</sup> Social Security provides benefits to some surviving spouses who have not yet retired, whose deceased spouses have paid into the system.<sup>32</sup> This provision is particularly beneficial to a surviving spouse who earned less income than her deceased spouse, because Social Security benefits are computed based on an individual's lifetime earnings.<sup>33</sup> Surviving spouses may also be eligible for a "Lump-Sum Death Benefit"<sup>34</sup> and/or the "Widower's Insurance Benefit," which grants the surviving spouse the insurance benefits of the deceased spouse.<sup>35</sup> Because of Proposition 8 and DOMA, however, surviving same-

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<sup>31</sup> Adam P. Romero, *et al.*, *Census Snapshot: United States*, Williams Institute, 3 (Dec. 2007), *available at* <http://escholarship.org/uc/item/6nx232r4>. The 2000 Census did not distinguish between married and unmarried same-sex couples. Here, "same-sex couple" refers to two people of the same sex who live together and indicated on the Census survey that they are partners.

<sup>32</sup> 42 U.S.C. § 402.

<sup>33</sup> *Id.* § 415.

<sup>34</sup> *Id.* § 402(i).

<sup>35</sup> *Id.* § 402(e), (f).

sex partners in California and other states that prohibit marriage of two people of the same sex are excluded from Social Security death benefits,<sup>36</sup> thereby denying these couples the security and protection otherwise provided married couples in this most vulnerable time.

**B. Proposition 8 and DOMA Together Deny Gay and Lesbian Workers in Long-Term Committed Relationships Access to Family and Medical Leave**

The Family and Medical Leave Act (FMLA) entitles employees of qualified employers up to twelve weeks of unpaid leave to care for a spouse who has a serious health condition.<sup>37</sup> The FMLA is intended “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”<sup>38</sup> Proposition 8 and DOMA undermine the FMLA’s goal of protecting workers from loss of employment when a spouse falls ill because employers are not required to provide FMLA leave to employees who need time off from work to care for a seriously ill unmarried partner.

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<sup>36</sup> For example, one of the plaintiffs in *Pedersen v. Office of Personnel Management* was denied the Social Security Lump Sum Death benefits available to surviving spouses. 881 F. Supp. 2d 294, 302-05, (D. Conn. 2012) (finding DOMA unconstitutional in denying equal access to employer-provided healthcare coverage), *appeal docketed*, No. 12-3273 (2d Cir. Aug. 21, 2012), *petition for cert. filed*, No. 12-231 (U.S. Aug. 21, 2012).

<sup>37</sup> 5 U.S.C. § 6382(a); 29 U.S.C. § 2612(a).

<sup>38</sup> 29 U.S.C. § 2601(b)(1).

### **C. Proposition 8 and DOMA Together Deny Partners of Gay and Lesbian Public Safety Officers and Federal Employees Access to Survivor Benefits**

A number of benefit programs protect families in the event of death or injury of a public safety officer or federal employee. Proposition 8 and DOMA preclude same-sex partners of federal employees who work in particularly dangerous fields from qualifying for specialized workers' compensation benefits provided by the federal Public Safety Officers' Benefits Program. If a married public safety officer dies or becomes permanently disabled as a result of an injury sustained on duty, her spouse is eligible to receive a lump-sum death benefit, and may be eligible for financial assistance for education.<sup>39</sup> Because of Proposition 8 and DOMA, however, a same-sex partner of a public safety officer in California would not be entitled to receive either the lump-sum death benefit or the education benefit in the event such tragedy occurred.<sup>40</sup>

Other programs specifically protect federal employees and their families in the event of death or injury of the federal employee. The Federal Employee Retirement System (FERS), for example, provides death and survivor benefits to the current or former spouse of a federal employee

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<sup>39</sup> 42 U.S.C. §§ 3796(a), 3796d-1; Office of Justice Programs, *Public Safety Officers' Benefits Programs* (2013), available at <https://www.psob.gov/index.html>.

<sup>40</sup> See 42 U.S.C. § 3796d-1.

if the employee dies before retirement and has worked for the federal government for a minimum of eighteen months.<sup>41</sup> Because FERS only extends benefits to married partners of federal employees, however, Proposition 8—in combination with DOMA—bars same-sex partners of deceased federal employees from receiving these benefits.

Another program designed to protect federal employees is the Federal Employees' Compensation Act, which provides workers' compensation benefits to federal employees injured in the performance of duty. If a federal employee dies as a result of such injury, her surviving spouse is entitled to receive up to 75% of the deceased employee's monthly pay.<sup>42</sup> Proposition 8 and DOMA preclude surviving partners of a same-sex couple in California from standing to seek these protections. Federal employees with same-sex partners who desire such protection must purchase life insurance from a private vendor, a burden not shared by similarly situated federal employees who are able to marry under the laws of their state and federal law.

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<sup>41</sup> See U.S. Office of Personnel Management, *FERS Information Survivors*, available at <http://www.opm.gov/retire/pre/death/index.asp#FERS> (last visited Feb. 26, 2013).

<sup>42</sup> 5 U.S.C. § 8133(a); 20 C.F.R. § 10.410.

### **III. The Combination of Proposition 8 and DOMA Creates Significant Burdens for Gay and Lesbian Workers in Long-Term Committed Relationships as They Plan for Retirement**

The combination of Proposition 8 and DOMA encumbers California same-sex couples' ability to plan for retirement by limiting access to pension, Social Security and other benefits intended to provide security in old age.

#### **A. DOMA and Proposition 8 Bar Long-Term Committed Same-Sex Couples Access to Social Security Retirement and Medicare Benefits**

Social Security and Medicare are the foundation of our nation's commitment to ensuring that older workers and their spouses can retire with a modicum of dignity and stability. Yet, Proposition 8 and DOMA prevent same-sex couples from fully sharing in that commitment and thereby place them at greater risk of economic insecurity in retirement.

Upon retirement, a married worker covered by Social Security may opt to receive the larger of either her own retirement benefit or one-half of her covered spouse's benefit.<sup>43</sup> Because of Proposition 8 and DOMA, however, workers with same-sex partners fail to meet a threshold requirement for such benefits: married status. Social Security also permits married persons at full

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<sup>43</sup> 42 U.S.C. § 402.

retirement age to elect to receive the benefits of a spouse or former spouse, while at the same time continuing to accrue delayed retirement credits in their own accounts, a benefit that is not otherwise available to gay men and lesbians in long-term committed relationships.<sup>44</sup>

Similarly, when one spouse receiving Social Security retirement benefits dies, the surviving spouse is entitled to receive the deceased spouse's benefit if it would be greater than that of the surviving spouse.<sup>45</sup> This provision allows a lower-earning spouse to maintain her standard of living in the event the higher-earning spouse predeceases her. Once again, however, Proposition 8 and DOMA combined preclude same-sex surviving partners from taking advantage of these crucial benefits. As a result, when the higher-earning partner in a same-sex relationship dies first, the surviving partner loses the higher-earner's Social Security payment and continues to receive only her own (lower) payment, if she is even eligible to receive any payment.

The denial of Social Security benefits to same-sex couples can result in the loss of thousands of dollars of retirement benefits annually. According to a 2009 study, the average difference in annual Social Security income between the partners in a same-sex relationship and different-sex spouses is approxi-

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<sup>44</sup> Social Security Administration, *Social Security Retirement Benefits*, 9-10 (July 2012), available at <http://www.ssa.gov/pubs/10035.pdf>.

<sup>45</sup> See 20 C.F.R. § 404.335.

mately \$5,700.<sup>46</sup> In the worst case, the lower earning surviving same-sex partner could lose up to \$28,152 per year in Social Security payments.<sup>47</sup> This loss of income makes it more likely that a surviving partner of a same-sex relationship will live her elder years in poverty.

Proposition 8 and DOMA together impose comparable restrictions on same-sex partners seeking Medicare coverage. Individuals generally become eligible for Medicare coverage by meeting the same work-history criteria necessary to receive Social Security retirement benefits.<sup>48</sup> The spouses of those individuals are also automatically eligible for Medicare benefits, even if they lack the work history to become eligible in their own right.<sup>49</sup> Because of Proposition 8 and DOMA, however, partners in same-sex couples must qualify for Medicare independently of one another.

Taken together, the combination of Proposition

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<sup>46</sup> Naomi G. Goldberg, *The Impact of Inequality for Same-Sex Partners in Employer-Sponsored Retirement Plans*, Williams Institute, 9 (Oct. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Goldberg-Retirement-Plans-Report-Oct-2009.pdf>.

<sup>47</sup> This assumes that the deceased spouse earned the maximum Social Security payout and the surviving spouse would not qualify for Social Security on her own. Services & Advocacy for Gay, Lesbian, Bisexual & Transgender Elders & Movement Advancement Project, *Improving the Lives of LGBT Older Adults*, 13 (Mar. 2010), available at <http://www.lgbtagingcenter.org/resources/pdfs/ImprovingtheLivesofLGBTOlderAdultsFull.pdf>.

<sup>48</sup> 42 U.S.C. §§ 426(a)-(b), 1395c; 42 C.F.R. § 406.5(a).

<sup>49</sup> 42 U.S.C. § 426(a).

8 and DOMA's restrictions on Social Security and Medicare greatly increase the economic insecurity of same-sex couples in retirement. Moreover, these restrictions have the perverse effects during those couples' working lives of discouraging one spouse from caring for the couples' children on a full-time basis or forgoing employment to care for sick or disabled family members.

**B. Proposition 8 and DOMA Deny Gay and Lesbian Workers in Long-Term Committed Relationships Equal Rights and Benefits under Defined Benefit Pension Plans**

Many private employers provide traditional pension plans—*i.e.*, “defined benefit plans”—to their employees as a benefit of employment. Under these plans, employees, upon retirement, are guaranteed fixed monthly payments for life and often for the life of their spouse. These plans confer several tax deduction and income deferral benefits on both employers and employees, *provided* the plans conform to certain requirements of federal tax law. Included among those prerequisites are numerous nondiscrimination rules, many of which are designed to protect spouses of covered employees. Proposition 8 and DOMA remove those protections for long-term committed same-sex couples by denying them the fundamental right to marry.

The Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code require defined benefit plans and certain other pension plans to provide automatic survivor benefit payments in the form of qualified joint and survivor annuities (QJSA) or qualified pre-retirement survivor annuities



(QPSA) to a surviving spouse of a plan participant who dies prior to retirement, unless the participant elects another payment form and the participant's spouse consents to that election.<sup>50</sup> Although plans may still be able to make survivor annuities available to employees' same-sex partners, Proposition 8 and DOMA preclude gay and lesbian couples from receiving a QJSA or a QPSA.

Additionally, while ERISA provides that benefits provided under a qualified retirement plan may not be assigned or alienated, pension plan amounts may be assigned to alternate payees under qualified domestic relations orders (QDRO), which impose familial support obligations such as alimony and child support in divorce cases.<sup>51</sup> Because Proposition 8 and DOMA prevent recognition of marriage between persons of the same sex for purposes of the QDRO provisions in ERISA, a pension plan may not be required to comply with an order from a state court in which a same-sex domestic partner was named as an alternate payee of a pension benefit.<sup>52</sup>

### **C. Proposition 8 and DOMA Together Prevent Same-Sex Couples in Long-Term Committed Relationships from Contributing to One Another's Retirement Accounts**

Federal law provides certain tax advantages to

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<sup>50</sup> 29 U.S.C. § 1055(a). Analogous provisions may be found in the Internal Revenue Code. *See* 26 U.S.C. § 401(a)(11).

<sup>51</sup> 29 U.S.C. § 1056(d)(3)(B); *see also* 26 U.S.C. § 414(p)(1)(A).

<sup>52</sup> *See* Albert Feuer, *Who Is Entitled To Survivor Benefits From ERISA Plans?*, 40 J. Marshall L. Rev. 919 (2007).

working individuals who make contributions to qualified retirement accounts.<sup>53</sup> For example, working people who file joint tax returns may deduct contributions made to a retirement account on behalf of a spouse who is out of work.<sup>54</sup> These significant tax benefits extend only to married couples, however. By denying same-sex couples the fundamental right to marry, Proposition 8 and DOMA here too combine to preclude long-term committed same-sex couples equal footing in planning for a secure retirement.

The divide furthers when one member of the couple dies. Surviving spouses are permitted to roll over a deceased spouse's IRA or 401(k) plan into their own account and defer withdrawing funds from the account until they reach 70½ years of age.<sup>55</sup> In contrast, a surviving same-sex partner designated as the beneficiary of her partner's retirement account is required to commence withdrawing distributions by the end of the year following the year of death.<sup>56</sup> In addition, an unmarried IRA and 401(k) plan participant who is a member of a domestic partnership is free to change her intended beneficiary, obtain a loan from the retirement account, or change the form of

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<sup>53</sup> 26 U.S.C. § 219.

<sup>54</sup> See *id.* §§ 25B(d)(2)(D), 408, 408A (also generally limiting by half or more the amount an individual in a long-term committed same-sex relationship may contribute to a traditional or Roth IRA when compared to a married individual).

<sup>55</sup> M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 Drake L. Rev. 1081, 1096-97 (2010).

<sup>56</sup> See 26 C.F.R. § 1.401(a)(9)-3, A-3(a).

benefit (*e.g.*, to a lump sum from an annuity) without the written approval or knowledge of her same-sex partner.<sup>57</sup> Indeed, IRA and 401(k) plans are only required to offer the option of joint annuity benefit distribution to married couples. The types of roll-overs available to surviving partners of a same-sex relationship are also limited.<sup>58</sup> Here again, Proposition 8 and DOMA combine to undermine retirement financial security of gay and lesbian couples by precluding access to crucial federal retirement planning tools and benefits.

**D. Proposition 8 and DOMA Deny Gay and Lesbian Federal Employees in Long-Term Committed Relationships the Ability to Participate Equally in Retirement Plans**

Federal employees may opt for a retirement annuity that provides a defined benefit payable to a surviving spouse in the event the federal employee predeceases her spouse.<sup>59</sup> Retired federal employees who choose this option receive a smaller retirement benefit payment while alive to ensure that a surviving spouse will continue to receive benefits in the event the retiree dies first. Because they are denied the right to marry, however, gay and lesbian federal employees in long-term committed

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<sup>57</sup> See 26 U.S.C. § 417(a)(2) (spousal consent required to waive survivor annuity); 26 C.F.R. § 1.401(a)-20, A-24(a).

<sup>58</sup> See *id.* § 402(c)(11) (limiting non-spousal beneficiaries to direct rollovers).

<sup>59</sup> U.S. Office of Personnel Management, *supra* note 41.

relationships and who live in California are not permitted to designate their partners as survivor beneficiaries under this important retirement program.

#### **IV. Proposition 8 and DOMA Diminish Financial and Familial Stability for Bi-National and Foreign National Gay and Lesbian Couples Seeking to Work in the United States**

Foreign nationals seeking to work and live in the United States do so either through family sponsorship or employment-based preferences.<sup>60</sup> While lawful immigrants are normally permitted to immigrate with a spouse,<sup>61</sup> Proposition 8 in combination with DOMA denies this entitlement to long-term committed same-sex couples living in California.

According to a 2010 study based on Census Bureau data, an estimated 28,574 bi-national couples and approximately 11,422 dual non-citizen couples

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<sup>60</sup> An individual not married to a U.S. citizen may also seek to immigrate to this country through diversity visas and refugee visas, both of which include the right to bring a different-sex, but not a same-sex, spouse. *See* U.S. Department of State, *Visa Types for Immigrants*, available at [http://travel.state.gov/visa/immigrants/types/types\\_1326.html](http://travel.state.gov/visa/immigrants/types/types_1326.html) (last visited Feb. 26, 2013).

<sup>61</sup> 8 U.S.C. § 1153(d) (spouse of lawful immigrant entitled to immediate visa and to the same status as spouse, even if not otherwise qualified to immigrate).

currently reside in the U.S.<sup>62</sup> In California alone, there are over 7,115 same-sex bi-national couples.<sup>63</sup> Although U.S. immigration policy generally places spousal relationships above all others—protecting and even facilitating U.S. citizens’ right to marry non-citizens while providing safeguards to facilitate the bi-national, married couple’s ability to remain in the U.S. to work, seek employment, and pursue higher education—Proposition 8 and DOMA preclude bi-national same-sex couples from access to such rights.

**A. Proposition 8 and DOMA Together Foreclose the Option of Immigration Through Family Sponsorship for Bi-National Gay and Lesbian Couples Living in California**

U.S. immigration policy puts the highest priority on reuniting non-citizen spouses with their spouses who are either U.S. citizens or lawful permanent residents. U.S. citizens who marry non-citizens are generally automatically granted the rights and benefits of “Family Sponsorship,” enabling the U.S. citizen to sponsor her spouse for conditional permanent residence.<sup>64</sup> In order to effect the timely reunification of married couples, non-citizen spouses of U.S. citizens

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<sup>62</sup> Craig J. Konnoth & Gary J. Gates, *Same-Sex Couples and Immigration in the United States*, Williams Institute, 1 (Nov. 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf> (“bi-national” refers to couples where only one member is a U.S. citizen).

<sup>63</sup> *Id.*

<sup>64</sup> 8 U.S.C. §§ 1430, 1151(b), 1154(a)-(b).

are not subject to the numerical limitations on immigration generally applicable to other types of immigrant visa holders. This allows a non-citizen to join her U.S. citizen spouse expeditiously, bypassing the quota system, waiting lists, and priority dates applicable to other types of family-sponsored immigration.<sup>65</sup> If a lawful permanent resident becomes a U.S. citizen while her spouse is waiting for a visa, her spouse immediately receives a visa as well.<sup>66</sup> In addition, a non-citizen spouse of an American citizen becomes eligible for U.S. citizenship after only three years, in contrast to the five-year wait required of other lawful permanent residents.<sup>67</sup>

Federal immigration law does not extend sponsorship rights to unmarried bi-national couples, however. Thus, because they are precluded from marrying

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<sup>65</sup> The quota system can often stall family reunification for years and even decades. For example, the wait time for an F-1 family visa for unmarried sons and daughters of U.S. citizens from Mexico is nearly 20 years. U.S. Department of State, *Visa Bulletin: Immigrant Numbers for September 2012*, No. 48, No. IX, 2 (Aug. 9, 2012), available at [http://www.travel.state.gov/pdf/visabulletin/visabulletin\\_september2012.pdf](http://www.travel.state.gov/pdf/visabulletin/visabulletin_september2012.pdf) (stating priority dates at or before June 8, 1993 for citizens of Mexico and an overall priority date of October 1, 2005 for most other chargeable areas); 8 U.S.C. § 1151(b)(2).

<sup>66</sup> U.S. Citizenship & Naturalization Services, *How Do I Help My Relative Become a U.S. Permanent Resident*, M-561, 2 (Aug. 2008), available at <http://www.uscis.gov/USCIS/Resources/B1en.pdf>.

<sup>67</sup> See U.S. Citizenship & Naturalization Services, *Citizenship through Naturalization* (2011), available at <http://www.uscis.gov/portal/site/uscis> (follow “Citizenship through Naturalization” hyperlink).

by Proposition 8 and because of the effect of DOMA, California resident gay men and lesbians are precluded from sponsoring their partners to immigrate to the United States.<sup>68</sup>

### **B. Proposition 8 and DOMA Together Make It Difficult for Gay and Lesbian Couples to Immigrate to the United States**

Workers may also immigrate to the United States through sponsorship by an employer.<sup>69</sup> Employment-based visas normally provide immigrant workers the right to bring their spouses, who in turn are provided the right to live and work in the United States.<sup>70</sup> Proposition 8, in combination with DOMA, denies gay and lesbian immigrating workers in long-term committed relationships who are living in California the right to benefit from these immigration laws.

The denial of these rights can profoundly affect the ability of gay and lesbian legal immigrants to maintain family relationships and financial stability.

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<sup>68</sup> See Rebecca Walters, *The Uniting American Families Act: A Critical Analysis of Legislation Affecting Bi-National Same-Sex Couples*, 17 Am. U. J. Gender Soc. Pol'y & L. 521, 525 (2009) (Immigration and Nationality Act [INA] does not explicitly exclude bi-national same-sex couples from immigration benefits but is constrained by DOMA's definition of spouse); *but see Matter of Paul Wilson Dorman*, 25 I. & N. Dec. 485, 2011 BIA LEXIS 8 (Op. Att'y Gen. Apr. 26, 2011).

<sup>69</sup> 8 U.S.C. § 1101(a)(15)(H).

<sup>70</sup> *Id.* § 1153(d).

Without lawful permanent resident status, same-sex partners of employment-based visa holders must be able to obtain their own visitor visas or other types of visas to remain with a spouse in the United States. However, many gay and lesbian partners of employment-based visa holders are unable to qualify for a visitor visa or may not be permitted to renew the visitor visa. Under these circumstances, the partner may need to return to her home country for extended periods of time, resulting in costly travel expenses and extended periods of time separated from her partner and children, who are permitted to remain lawfully in the U.S.<sup>71</sup> Such extended visits can hinder the occupational advancement of either or both members of the couple, significantly reducing the family's earnings over the course of a lifetime.<sup>72</sup>

Even when the partner can obtain a visitor visa, such visas generally require the applicant to prove that she does not intend to stay permanently in the United States and that she maintains strong ties to her home country, which can be difficult if not impossible if she is partnered with a United States citizen or a person who has permanent resident status. Not only must gay and lesbian couples deliberate about whether they can tolerate the harsh constraints placed on their immigration prospects when considering U.S. employment opportunities, employers may be reluctant

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<sup>71</sup> Badgett, *supra* note 55, at 1097-98.

<sup>72</sup> *Id.*



to hire immigrant workers who may be compelled to return home regularly.<sup>73</sup>

Denial of the fundamental right to marry cruelly forces many bi-national gay and lesbian couples in California into a painful and untenable dilemma. Families are either broken apart or qualified workers with same-sex partners may choose not to immigrate to the United States for employment. Denial of the right to marry leaves many gay and lesbian couples with a choice among three equally poor options: the citizen must leave the United States, the non-citizen must reside in the United States illegally, or the couple must separate.<sup>74</sup> Each of these options directly contravenes long-standing U.S. immigration policy favoring family unification.

## **V. Proposition 8 Stigmatizes Gay and Lesbian Workers and Legitimizes the Devaluation of Their Relationships in the Workplace**

The institution of marriage “symbolizes state legitimization and societal recognition of [] committed relationships.”<sup>75</sup> By divesting same-sex couples of the fundamental right to marry, Proposition 8 “lessen[s] the status and human dignity of gays and lesbians in

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<sup>73</sup> Immigration Policy Center, *The Migrant Integration Policy Index* (2011), available at <http://www.immigrationpolicy.org/just-facts/migrant-integration-policy-index-mipex-iii>.

<sup>74</sup> Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 Nev. L.J. 629, 630 (2011).

<sup>75</sup> *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012) [Pet. App. 16a-17a].

California, and [] officially reclassif[ies] their relationships and families as inferior to those of opposite-sex couples.”<sup>76</sup> The designation of “domestic partnership” is a woefully inadequate proxy for marriage as it is undisputed “that there is a significant symbolic disparity between” marriage and domestic partnership.<sup>77</sup> Marriage is the long-established and deeply-rooted tradition of “state recognition and approval of a couple’s choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents.”<sup>78</sup> Domestic partnership, on the other hand, is a contemporary invention whereby couples attain a bundle of legal rights and responsibilities but not the social acceptance of a committed union.<sup>79</sup> Gay and lesbian couples consequently shoulder not only the economic burdens imposed by Proposition 8, but also the ever-present awareness that their familial relationships are accorded less value than heterosexu-

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<sup>76</sup> *Id.* [Pet. App. 17a].

<sup>77</sup> *Id.* at 1075. [Pet. App. 45a] (quoting Def.-Intervenors’ Resp. to Pls.’ First Set of Reqs. for Admis.).

<sup>78</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010) [Pet. App. 220a-221a].

<sup>79</sup> “The 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.” *Id.* at 971 [Pet. App. 243a]. Indeed, many gay and lesbian couples choose to forego domestic partnerships precisely because it implies an inferior status. *Id.* at 970 [Pet. App. 242a].

al married relationships. For gay and lesbian workers, in particular, this disparity frequently manifests itself in differential treatment in the workplace.<sup>80</sup>

### **A. Proposition 8 Perpetuates a Two-Tiered Workforce Based on Sexual Orientation**

Proposition 8 reinforces the stigma that gay and lesbian individuals, and consequently their relationships, are inferior by giving the state's imprimatur to a two-tiered system based solely on sexual orientation. By its very existence, then, Proposition 8 signals that it is appropriate to treat gay and lesbian workers differently than their heterosexual counterparts.<sup>81</sup>

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<sup>80</sup> See, e.g., Badgett, *supra* note 55, at 1088.

<sup>81</sup> See, e.g., New Jersey Civil Union Review Commission, *The Legal, Medical, Economic & Social Consequences of New Jersey's Civil Union Law*, 8 (Dec. 10, 2008), available at <http://www.nj.gov/oag/dcr/downloads/CURC-Final-Report-.pdf> (testimony explaining that Massachusetts' marriage equality bill prompted many employers to provide benefits to gay and lesbian couples because "employers also understand that without the term 'civil union' or 'domestic partner' to hide behind, if they don't give equal benefits to employees in marriages, these employers would have to come forth with the real excuse for discrimination . . . [T]he word 'marriage' has great persuasive weight in getting companies to offer benefits notwithstanding ERISA."); see also Sanders Test. 1277, Jan. 14, 2010 [J.A. vol. 1, 677] ("And I think that when a city, when leadership talks in disparaging terms about people, or denies the rights that everybody else have, the fundamental rights, then I think some people in the community feel empowered to take action in hate crimes and in other ways.").

Even when employers are permitted to extend benefits and protections to gay and lesbian couples, they may choose not to do so because Proposition 8 functions as a state-sanctioned “invitation to discriminate.”<sup>82</sup> In addition, gay and lesbian workers must continually weigh the risks of revealing their sexual orientation or their relationship status to employers and colleagues due to the possibility that they may face hostile reactions or be treated less favorably. Some employers, for example, are less willing to accommodate an employee’s request for time off or personal leave for familial obligations because the employers regard gay and lesbian relationships as less significant or enduring than different-sex marriages.

Proposition 8’s negative effects persist even when employers have instituted policies mandating fair and equal treatment regardless of sexual orientation. Despite many employers’ laudable efforts in this respect, gay and lesbian workers inevitably feel the sting of discrimination due to the constant devaluation of their relationships. Employees are forced, as a result of Proposition 8, to identify themselves as either “single” or write in “domestic partnership” on employment forms and official documents despite the fact that these employees may feel such an assertion misrepresents the true character of their relationship status.<sup>83</sup>

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<sup>82</sup> See, e.g., New Jersey Civil Union Review Commission, *supra* note 81, at 11.

<sup>83</sup> *Id.* at 9.

## **B. The Cumulative Discriminatory Impact of Proposition 8 Adversely Affects Gay and Lesbian Workers' Productivity**

Navigating the landmine of workplace biases and discrimination, whether benign or not, imposes a tremendous strain on gay and lesbian workers. As Kris Perry testified, “the decision every day to come out or not come out at work . . . is exhausting.”<sup>84</sup> Exhaustion, however, is merely one of the adverse effects caused by differential treatment based on sexual orientation. Research indicates that, due to their disfavored status, gay and lesbian individuals are approximately twice as likely as heterosexuals to experience mood, anxiety, and substance disorders.<sup>85</sup>

When gay and lesbian workers feel they are treated differently than their heterosexual coworkers, research suggests that these feelings, which are harmful in and of themselves, are compounded by adverse effects on work performance.<sup>86</sup> Because they are unable to maximize their full potential, gay and lesbian workers may lose opportunities for future economic gains through promotions and raises.<sup>87</sup> These lost professional opportunities exacerbate the economic harm already caused by Proposition 8 in combination with DOMA, thereby reducing the financial resources available to gay and lesbian families.

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<sup>84</sup> Perry Test. 152, Jan. 11, 2010 [J.A. vol. 1, 369].

<sup>85</sup> Meyer Test. 898-99, Jan. 14, 2010.

<sup>86</sup> Badgett Test. 1336, Jan. 19, 2010.

<sup>87</sup> *Id.*

If gay and lesbian workers regain the fundamental right to marry, the state's imprimatur of equality is likely to result in decreased workplace discrimination and hostility. In addition, it is undisputed that "opposite-sex couples who are married experience, on average, less anxiety and depression and greater happiness and satisfaction with life than do non-married opposite-sex couples or persons not involved in an intimate relationship."<sup>88</sup> Accordingly, the invalidation of Proposition 8 and the ensuing ability of gay and lesbian couples to marry will improve working conditions for gay and lesbian people in California.

## CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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<sup>88</sup> *Perry*, 704 F. Supp. 2d at 962 [Pet. App. 223a].