No. 12-144

In The
Supreme Court of the United States

Dennis Hollingsworth, et al., *Petitioners*,

v.

Kristin M. Perry, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the High Impact Leadership Coalition as *Amicus Curiae* in Support of Petitioners

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Table of Contents

Table of Authorities

Cases

Statutes and Constitutional Provisions

Other Authorities

Interests of Amicus Curiae[1]

The High Impact Leadership Coalition is an association of African-American and white evangelical leaders organized in 2005 by Bishop Harry R. Jackson, Jr. The Coalition exists to protect the moral compass of America and be an agent of healing to our nation through education and empowerment. The Coalition hosts I.M.P.A.C.T. Rallies in major cities throughout the nation with the goal of providing practical strategies for every person to effect change in his or her family, community, state, and ultimately across America. The Coalition's core values focus on families, wealth creation, education, and healthcare. Coalition Chairman and Founder Bishop Jackson is a leading national African-American Christian preacher and Pentecostal bishop who serves as the senior pastor at Hope Christian Church in Beltsville, Maryland, and Presiding Bishop of the International Communion of Evangelical Churches.

Members of the Coalition believe and advocate that God has a unique design for the family as the focal point of society. They believe that the foundation of that design is marriage between one man and one woman and that parenting, education, and other issues essential to creating a solid

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[1] The High Impact Leadership Coalition has received the consent of all parties to file this brief with the Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

foundation for the next generation are interrelated with the fundamental concept of marriage. The Coalition believes that the breakdown of the family does not just affect minorities and working poor but all Americans. The Coalition seeks to empower religious and community leaders to impact their world and their communities and protect all American families, black or white.

Bishop Jackson has authored several books on such issues as cultivating racial harmony and diversity, defending marriage and family, preserving and protecting life, protecting religious freedom, alleviating domestic poverty, and ensuring justice. Bishop Jackson and the Coalition work tirelessly within minority and white communities to emphasize the importance of Biblical marriage and family to all Americans, of every race and socioeconomic class.

The Coalition submits this brief because it is deeply concerned by Respondents' attempts to analogize California's domestic partnership law with centuries of legalized racial oppression at the hands of the government.

Summary of the Argument

The City of San Francisco ("San Francisco") asserted below that in allowing same-sex couples to enter domestic partnerships but not marriage, the State of California violated the Fourteenth Amendment. Plaintiff-Intervenor-Appellee City and County of San Francisco Corrected Response to Petition for Rehearing En Banc at 9-11, *Perry*, *et al. v. Hollingsworth*, *et al.*, 681 F.3d 1065 (9th Cir. 2012) (Nos. 10-16696 & 11-16577) (hereinafter, "San

Francisco En Banc Response"). The institution of domestic partnerships, they claim, is akin to a "separate but equal" segregated school for racial minorities and cannot withstand constitutional muster under this Court's equal protection jurisprudence. *Id.* at 9-10 (referencing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

Similarly, Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo ("Plaintiffs") frame the citizen-initiated and majority-passed Proposition 8 as unconstitutionally "singl[ing] out unmarried gay and lesbian individuals" for exclusion from marriage while "affording unmarried gay and lesbian individuals the right to enter into domestic partnerships that carry virtually all the same rights and obligations—but not the highly venerated label—associated with opposite-sex marriages." Respondents' Brief in Opposition to Petition for Writ of Certiorari at 24, *Hollingsworth, et al. v. Perry, et al.*, No. 12-144 (Aug. 24, 2012).

At the heart of these arguments is the assertion that California's expansive domestic partnership law, providing vast rights for same-sex couples, is a modern day Jim Crow law. But comparing California's choice of family institutions to the dehumanizing Jim Crow era is a logical fallacy. Such an assertion not only misunderstands the history and effect of the Jim Crow era but also disrespects those African-Americans that lived through the era and those still struggling with its scars today. Quite simply, there is no comparison.

Both the impetus for and the effect of the Jim Crow laws differed dramatically from those of

California's domestic partnership law. The Jim Crow laws were designed to maintain white supremacy by limiting minority access to the ballot box and government, preventing effective democratic change. By contrast, California's sweeping domestic partnership law, drafted and championed by Lesbian, Gay, Bisexual and Transgender (LGBT) advocacy organizations, was intended to expand the rights of LGBT persons, not limit access to the democratic process.

Even California's former Attorney General, current Governor Jerry Brown, who agrees with Respondents' claim that Proposition 8 is unconstitutional, affirmatively disavowed as "hyperbole" the assertion that California's domestic partnership law is akin a Jim Crow law: "Such hyperbole ignores inconvenient historical facts. Domestic partnerships and civil unions, unlike Jim Crow laws, were not conceived by a majority group for the purpose of oppressing a minority group. Rather, they were sponsored by gay and lesbian rights groups." Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits at 46, *In re: Marriage Cases,* 183 P.3d 384 (Cal. 2008).

The Coalition urges this Court to recognize the important distinctions between the right-restricting and undemocratic Jim Crow laws and California's right-conferring and constitutionally permissible domestic partnership law.

Argument

A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law.

— Martin Luther King, Jr.[2]

I. California's Domestic Partnership Law Confers Rights and Benefits.

In California, a domestic partnership is comprised of "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." CAL. FAM. CODE § 297(a). An eligible couple forms a domestic partnership by filing a "Declaration of Domestic Partnership with the Secretary of State." *Id.* § 297(b). A couple is eligible so long as:

> (1) Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity.
>
> (2) The two persons are not related by blood in a way that would prevent them

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[2] Open letter from Martin Luther King, Jr., from a Birmingham Jail (Apr. 16, 1963), *available at* http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

from being married to each other in this state.

(3) Both persons are at least 18 years of age, except as provided in Section 297.1.

(4) Either of the following:

(A) Both persons are members of the same sex.

(B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in Section 402(a) of Title 42 of the United States Code for old-age insurance benefits or Title XVI of the Social Security Act as defined in Section 1381 of Title 42 of the United States Code for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over 62 years of age.

(5) Both persons are capable of consenting to the domestic partnership.

Id.

Respondent San Francisco claims that the domestic partnership law, which confers expansive rights and benefits, "serves to mark lesbian and gay Californians as second class in the same way that segregated schools did in *Brown* and *Sweatt* [*v.*

Painter, 339 U.S. 629 (1950)] . . . . [The law] cannot stand, even under rational basis review." San Francisco En Banc Response at 11. In so arguing, San Francisco asserts that laws restricting marriage to heterosexual couples will harm or stigmatize same-sex couples in the same way that the "separate but equal" laws of the Jim Crow era did racial minorities.

The comparison is inapposite. California's domestic partnership law is distinguishable from the Jim Crow laws in at least two significant ways.

First, the domestic partnership law does not have the purpose of degrading or oppressing a minority group; by contrast, that was the central purpose of the Jim Crow era. In fact, California's domestic partnership law was crafted by and celebrated by LGBT advocates. Second, California's domestic partnership law is distinguishable from the Jim Crow laws in that it does not have the effect of stigmatizing gay and lesbian couples.

A. California's Domestic Partnership Law Was Orchestrated by Proponents of LGBT Equality.

Unlike the Jim Crow laws, which unabashedly sought to demean and oppress black individuals, the genesis of California's domestic partnership law was a desire to promote LGBT rights.

In fact, California's first domestic partnership bill was sponsored by an organization then-called California Alliance for Pride and Equality ("CAPE").[3] Equality California, AB 205 Fact Sheet at 3 (2003),

[3] CAPE is now called "Equality California."

http://www.eqca.org/atf/cf/%7B687DF34F-6480-4BCD-9C2B-1F33FD8E1294%7D/factsheet_ab205.pdf. CAPE stated that the bill "is a very significant piece of legislation because it would reinforce the importance of partnership as a tool to further mutual protection." Letter from Eric Astacaan, Legislative Advocate for CAPE, to the Honorable Martin Gallegos, Chair, California Assembly Health Committee (April 6, 1999). The bill was also supported by the American Civil Liberties Union (ACLU) and the National Center for Lesbian Rights, among others. California Senate Rules Committee, Third Reading Bill No. AB 26 at 10-11 (Sept. 7, 1999). The legislation was enacted in 1999. *See In re Marriage Cases*, 183 P.3d 384, 413 (Cal. 2008).

Subsequently, the domestic partnership law served as a platform to further expand LGBT rights. In 2003, California passed a follow-up law, the Domestic Partners Rights and Responsibilities Act of 2003, to extend to domestic partners essentially all the rights and benefits of marriage. CAL. FAM. CODE § 297.5. Just like the initial legislation, the 2003 bill was sponsored and championed by LGBT rights advocates. For example, bill sponsor Equality California, along with the Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights, and the ACLU, helped draft the law itself. *See* Equality California, AB 205 Fact Sheet, *supra* at 5-6.

Equality California heralded the bill as a "'tremendous civil rights victory for LGBT people.'" Press Release, Equality California, Governor Davis Makes History with Signature On Domestic Partner Rights and Responsibilities Act of 2003 (Sept. 19,

2003), *available at* http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4025653&ct=5197843. According to Geoffrey Kors, Executive Director of Equality California:

> By signing this bill, Governor Gray Davis honored all California families. . . . Governor Davis . . . has worked with our community to transform California from a state with limited protections for LGBT people into the state with the strongest protections for LGBT people and our families in the country . . . And we have made these civil rights gains through the will of the people – the legislative process.

Id. LGBT advocates fought for California's domestic partnership laws because such laws promoted and supported the needs of the LGBT community.

B. California's Domestic Partnership Law Has the Effect of Supporting, Not Stigmatizing, Gay and Lesbian Couples.

California's "separate system of relationship-recognition for same-sex couples" is similar to systems that were or are in place in Connecticut, New Jersey, Nevada, Oregon, and Washington. Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 Brook. L. Rev. 791, 852 (2010) (footnotes omitted). And there are legitimate reasons for such a system. For one, such a system may provide a flexible legal structure responsive to the unique needs of same-sex couples. Many believe that "the dignity of gay and lesbian people could be *enhanced* by a separate system of relationship-recognition and family law for same-sex unions." *Id.*

at 798. Further, altering the definition of marriage to include same-sex couples may prove harmful to such couples because "marriage is an institution uniquely equipped to handle incentive problems between a man and a woman over their full life cycle." Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 Harv. J. L. & Pub. Pol'y 949, 951 (2006). In fact, to some gay and lesbian rights advocates, Proposition 8, restoring pluralism to California's family law,[4] provides "gays and lesbians . . . the opportunity to *author*—or, in other words, to *exercise agency* with respect to—their own 'separate and *better*' alternatives to (heterosexually-authored) 'majoritarian marriage.'" Redding, *supra*, at 795-96 (footnotes omitted).

These advocates note that the "separate but equal" analogies "are not gaining widespread traction" and that, even if they were, "there are real harms to gay and lesbian agency—and, as a result, dignity—that accompany gay and lesbian absorption into majoritarian family law, and these harms should not be overlooked." *Id.* at 796-97 (footnotes omitted). For this reason, many LGBT advocates prefer a pluralistic family law scheme. *See* Allen, *supra*, at 953 ("The economic case against same-sex marriage, based on new institutional ideas, is that it is likely a bad idea for both heterosexual and homosexual couples."); *see also id.* at 979 (noting that the societal and economic impact of same-sex marriage is distinct from the inclusion of interracial

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[4] Pluralism in family law results when there are multiple avenues for the formation of families, in addition to marriage. *See* Redding, *supra*, at 795.

marriages because "interracial marriages are exactly the same as marriages within a race in terms of contracting issues between parents. Thus, there are no costs to allowing interracial marriages into the franchise; there are only private benefits.").

Tellingly, the record in this case demonstrates that many same-sex couples choose a domestic partnership even when marriage is available. *See* Transcript of Hearing at 1300:23-1301:4, *Perry*, *et al. v. Schwarzenegger*, *et al.*, No. 09-2292 (Jan. 19, 2010), *available at* http://oldsite.alliancedefense fund.org/userdocs/PerryTrialTranscript6.pdf (Mayor Sanders testified that many see civil unions as a reasonable alternative to same-sex marriage). *See also*, *id.* at 1380:7-1381:11, 1384:14-20, 1386:24-1387-1, 1388:20-24 (testimony regarding couples in the Netherlands choosing domestic partnerships over marriages even after legalization of same-sex marriage).

The Coalition submits that there is no evidence and no reasonable assertion that African Americans benefited from or chose segregation during the Jim Crow era. The Jim Crow laws were designed to demean and disenfranchise African Americans so as to perpetuate white supremacy. This Court's important decision in *Brown v. Board of Education* is distinguishable from the present case. Indeed, it is in no way analogous.

II. Jim Crow's Systemic Devaluation of Individuals Based on Skin Color Is Incomparable to California's Family Law Plurality.

To understand why California's domestic partnership law cannot be compared to laws discriminating against racial minorities, one must remember the evils faced as racist majorities responded to the extension of constitutional rights to African Americans.

As the country was healing from the Civil War, Congress passed several constitutional amendments designed to confer rights of citizenship and basic human dignity on black individuals. Although duly ratified by the states, many states responded to these amendments by enacting Jim Crow laws to, implicitly or explicitly, strip away the rights just granted. The term "Jim Crow laws" refers to the repressive written laws and oppressive unwritten customs that were prevalent in the United States after the Reconstruction Period that followed the Civil War. During the Jim Crow era, states enacted demeaning laws, such as Oklahoma's requirement of separate street cars, *See St. Louis-San Francisco Ry. Co. v. Loftus,* 109 Okla. 141, 144 (Okla. 1925), and failed to enforce other neutral laws, such as police officers in Alabama turning a blind eye when a white man raped a black woman. *See* Earl Conrad, Jim Crow America, 3-17 (1947). And these laws and customs did more than demoralize and oppress racial minorities; they targeted the democratic process in order to paralyze racial minorities from effectuating democratic change.

A. After the Civil War, the Federal Government Expanded the Rights of Black Americans.

After the devastating Civil War, the United States enacted several constitutional amendments to shore up fundamental rights and aid in the healing of the nation. Adopted between 1865 and 1870, these "Reconstruction Amendments" were strong statements regarding the social policy of the nation.

Ratified on December 6, 1865, the Thirteenth Amendment was the culmination of several anti-slavery proposals and provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Unfortunately, ending slavery did not end discriminatory laws and practices based on race.

Specifically, at that time, this Court's precedent held that African Americans were not citizens of the United States and therefore, not entitled to the protections of the Constitution. *Scott v. Sandford*, 60 U.S. 393, 426-427 (1857) ("*Dred Scott*"). On July 9, 1868, the Fourteenth Amendment was ratified, providing, in part, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> . . .
>
> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, §§ 1, 2. This Court found that Section 1 of the Fourteenth Amendment "overturn[ed] the Dred Scott decision by making all persons born within the United States and subject to

its jurisdiction citizens of the United States." *Slaughter-House Cases*, 83 U.S. 36, 73 (1873).

Section 2 has been called a "compromise" on the path towards minority suffrage. Justice Marshall characterized the choice that this section put to the Southern States:

> The Republicans who controlled the 39th Congress were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance. There were two alternatives available -- either to limit southern representation, which was unacceptable on a long-term basis, or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of suffrage to Negroes was thought politically unpalatable at the time. Section 2 of the Fourteenth Amendment was the resultant compromise. It put Southern States to a choice—enfranchise Negro voters or lose congressional representation.

Richardson v. Ramirez, 418 U.S. 24, 73-74 (1974) (Marshall, J., dissenting) (footnotes omitted).

The Fifteenth Amendment, ratified on February 3, 1870, provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Unfortunately, due to the disenfran-

chisement techniques of the Jim Crow era, it would take decades for African Americans in the South to experience the intention of the Fifteenth Amendment. *See* Library of Congress, *15th Amendment to the Constitution*, http://www.loc.gov/rr/program/bib/ourdocs/15thamendment.html.

B. Many States Responded to the Establishment and Protection of the Rights of Black Americans by Passing or Upholding Jim Crow Laws.

Many states responded to the Reconstruction Amendments by passing Jim Crow laws. Unlike California's domestic partnership law, these laws affected access to educational and economic opportunities, as well as enfranchisement itself.

1. Jim Crow Laws Were Orchestrated by Proponents of White Supremacy.

The hallmarks of the Jim Crow era were laws and customs, written by white men, with the explicit or implicit intention of separating and oppressing African Americans. According to one senator from the South: "'If we can't keep learn' from him altogether, we'll make it as bad for him as we can.'" Conrad, *supra*, at 109-10.

The vast majority of such laws sought to physically separate individuals based on race through the mandatory use of separate facilities. *See generally Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 393 (1978) ("The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms."). For example, (1) Louisiana required separate railroad cars, *see Plessy v. Ferguson*, 163 U.S. 537 (1896)

(upholding 1890 La. Acts No. 111, p. 152, § 1); (2) Mississippi required separate street cars, *see Southern Light & Traction Co. v. Compton*, 86 Miss. 269 (Miss. 1905) (referencing the Act of 1904, Laws p. 140, ch. 99); (3) Florida required separate beaches, *see Meek v. Metropolitan Dade County*, 805 F. Supp. 967, 979 (S.D. Fla. 1992); and (4) Texas required separate libraries, *see League of United Latin American Citizens, Council No. 4836 v. Midland Independent School Dist.*, 648 F. Supp. 596, 616-617 (W.D. Tex. 1986) (referencing Texas Revised Civil Statutes, Article 1688).

This Court's upholding of "separate but equal" accommodations for racial minorities in *Plessy v. Ferguson* legitimized Jim Crow laws already in place and led to additional laws and cultural biases. 163 U.S. at 552.

Black individuals, stripped of their rights and dignity by such laws, dealt with the mainstream legal and cultural evils by creating their own communities and cultures. *See* Charles J. Ogletree, Jr., All Deliberate Speed 100-102 (2004). Such a coping mechanism was referred to as "living behind the veil." Black individuals would "veil" their true emotions from white individuals, so as not to give them any more power than they had already taken. Many did not speak out because of "fear or apathy," no doubt spurred by continuous and intense oppression. Louis R. Harlan, Separate and Unequal 42 (1958). This stands in stark contrast to California's domestic partnership law, which LGBT advocates supported and championed, and which is actually preferred by many same-sex couples.

Before the Ninth Circuit, Respondent San Francisco dismissed the fact that "California's creation of domestic partnerships was intended as a beneficence to same-sex couples and was advocated by gay people and their allies" by asserting that "the same is true of segregated schools for black children in the late nineteenth and early twentieth centuries, which black communities fought for because they were preferable to no schooling at all." San Francisco En Banc Response at 11.

By so stating, San Francisco misunderstands the black community's *response* to Jim Crow laws. The source relied upon by San Francisco does not support its position. It is certainly true that the black community came together in order to combat the effects of Jim Crow laws. *See* Darlene Clark Hine, *Symposium: Promises to Keep?* Brown v. Board *and Equal Educational Opportunity: the* Briggs v. Elliott *Legacy: Black Culture, Consciousness, and Community before* Brown*, 1930-1954*, 2004 U. Ill. L. Rev. 1059, 1061 (2004). But African Americans had no part in creating the laws in the first place, much less advocating for them. Further, the Coalition has not found any evidence that the black community championed segregated institutions, much less championed them to the same extent that the gay and lesbian community advocated for domestic partnerships.

2. The Jim Crow Laws Had a Deleterious Effect on Minority Voting and Access to Government.

"[V]oting was the major impetus for the expansion of civil rights activities during the late

1930s and early 1940s." Hine, *supra*, at 1060 n.3 (*quoting* Patricia Sullivan, Days of Hope: Race and Democracy in the New Deal Era 143 (1996)). According to then-Senator Richard Yates, "The ballot will finish the Negro question . . . . The ballot is the Freedman's Moses." Richard Wormser, The Rise and Fall of Jim Crow 19 (2003). Not only is the right to vote a promise of citizenship, it is the primary vehicle through which to effectuate policy changes. Therefore it should come as no surprise that those seeking white supremacy focused on disenfranchising the black community, and that many members of the black community put themselves in harm's way for the chance to vote.

Unfortunately, such antidemocratic laws and scare tactics were effective. Although "[i]n the first half of the twentieth century African Americans composed forty-three percent of the population of South Carolina," for example, they "struggled to regain political and social citizenship rights." Hine, *supra*, at 1060.

The effects of disenfranchisement were compounded. As fewer and fewer African Americans were able to vote, fewer and fewer candidates representative of the black community were elected. Thus, progress was stymied by the limitations to Black Americans' "rightful democratic authority." Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 Harv. C.R.-C.L. L. Rev. 65, 66 (2008).

a. The Number of Minority Voters Decreased.

Although African Americans were a minority nationally, that was not the case in the South. "In 1880, for example, African Americans were an absolute majority in Louisiana, Mississippi, and South Carolina; and were over 40% of the population in Alabama, Florida, Georgia, and Virginia, making African Americans the largest single voting bloc in those states." Chin & Wagner, *supra*, at 66. Because of this potential for democratic change, Jim Crow laws and customs focused on preventing access to the ballot box.

Seeking to sidestep the Fifteenth Amendment, states imposed laws requiring poll taxes or literacy requirements for voting. For example, Mississippi embedded into its constitution a poll tax and a literacy test for voter registration. *Williams v. Miss.*, 170 U.S. 213, 220-23 (1898). This Court upheld the constitutional provisions because "[t]hey do not on their face discriminate between the races." *Id.* at 225. Emboldened, other states enacted similar laws that were innocuous on their face but discriminatory and antidemocratic in practice.

States created loopholes to these laws for white individuals. For example, Oklahoma exempted from its literacy test individuals whose grandfathers were eligible to vote before 1866, a time before the Fifteenth Amendment was ratified. *See Guinn v. United States*, 238 U.S. 347, 364-365 (1915) (striking down the law).

After *Guinn*, those seeking white supremacy turned to new avenues of disenfranchisement.

In 1923, Texas passed a law prohibiting black Americans from participating in the Democratic Party's primary election. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). This Court swiftly held the law unconstitutional under the Fourteenth Amendment. *Id.* at 541. The Texas legislature responded by substituting for the offensive law a substantially similar law that granted the political parties the ability to determine who may vote in their primaries. *Nixon v. Condon*, 286 U.S. 73, 81-82 (1932). The law was found to be equally offensive under the Fourteenth Amendment and this Court struck it down. *Id.* at 89. But the Texas Democratic Party's rules on absentee ballots, which were not passed by the legislature, but that prevented African Americans from voting, were found to be outside the protections afforded by the Fourteenth or Fifteenth Amendment by this Court. *Grovey v. Townsend*, 295 U.S. 45, 55 (1935). And so disenfranchisement continued in Texas until 1944, when this Court determined that the Texas Democratic Party was an agent of the state. *Smith v. Allwright*, 321 U.S. 649, 663 (1944).

Even if a black voter was legally permitted to vote on Election Day, he would encounter a new host of problems once he got to the ballot box, ranging from threats to his livelihood to even threats to his family and person. *See* Jerrold M. Packard, American Nightmare: the History of Jim Crow 85 (2002) (recounting "tools of intimidation" faced by African Americans daring to defy the Jim Crow customs, such as loss of employment, burning of homes, and lynching). *See also* Wormser, *supra*, at 30; and Chin & Wagner, *supra*, at 88.

b. The Number of Minority Elected Officials Decreased.

During Reconstruction, seventeen African Americans served in Congress. But as the North withdrew troops from the South and Jim Crow laws increased, the numbers began to recede. "Black Americans were distinct from other groups because they experienced a prolonged period of contraction, decline, and exclusion that resulted from segregation and disfranchisement. After winning the right to participate in the American experiment of self-government, African Americans were systematically and ruthlessly excluded from it." Office of History and Preservation, Office of the Clerk, U.S. House of Representatives, Black Americans in Congress 1870-2007, 2 (2008). Between 1887 and 1901, only five Black Americans served in Congress. *Id*. "From 1901 to 1929, there were no blacks in the federal legislature." *Id*.

Those black men brave enough to run for public office faced an organized opposition during their campaign. For example, "[i]n 1898, the Democratic Party in North Carolina . . . launched an openly racist campaign based on white supremacy. Blacks were shown in vitriolic cartoons as a threat, especially to white women." Wormser, *supra*, at 83.

Fewer black men voting led to fewer black men serving in the Legislature which, in turn, led to fewer and fewer legislative protections for the Black community. It was a vicious cycle.

c. The Residual Effects of Jim Crow Laws Still Elicit Federal Government Intervention.

Jim Crow laws were so prevalent that federal intervention was necessary. Congress passed the sweeping Civil Rights Act in 1964 (Pub. L. 88-352, 78 Stat. 241, enacted July 2, 1964). But an outbreak of violence followed in the South, including one particular "watershed episode in Alabama on March 7, 1965 when state troopers clubbed and tear-gassed peaceful civil rights marchers in Selma" which led to the passage of the Voting Rights Act in 1965. Terry Baynes, "Supreme Court to review law on minority voting rights" (Nov. 9, 2012), *available at* http://www.reuters.com/article/2012/11/09/us-usa-court-voting-lawidUSBRE8A81G920121109. The federal government continues to monitor compliance with the Voting Rights Act to this day.

In summary, the harm of Jim Crow laws was much more than racial discrimination; racial disenfranchisement meant that a large portion of the population was not being represented in government and, in turn, did not exert a proportional influence on social and economic changes. Chin & Wagner, *supra*, at 67. But California's domestic partnership law did not have the intent, and does not have the effect, of disenfranchisement for gay and lesbian individuals.

3. Conversely, California's Domestic Partnership Law Has No Measurable Effect on Access to Democracy.

Unlike the Jim Crow laws, California's domestic partnership law has had no adverse effect on gay and lesbian individuals' access to the ballot box or

representation in the legislative sector. In fact, LGBT participation in elections and democratic representation has only increased since enactment of California's domestic partnership law.

For example, California is home to the California Legislative LGBT Caucus. Formed in 2002, this Caucus is comprised of the openly-LGBT state legislators and seeks to focus on the issues important to the LGBT community. *See* California Legislative LGBT Caucus, http://lgbtcaucus.legislature.ca.gov/.

In 2012, Californians elected "Susan Eggman the first openly-gay Latina in the state Legislature" and "Mark Takano of California will be the first LGBT person of color in the House of Representatives." Press Release, California Legislative LGBT Caucus, Assemblyman Rich Gordon's statement on Tuesday's Historic Election (Nov. 7, 2012), *available at* http://lgbtcaucus.legislature.ca.gov/news/2012-11-07-assemblyman-rich-gordon-s-statement-tuesday-s-historic-election.

Similarly, LGBT participation and representation is on the rise nationally. The Gay and Lesbian Victory Fund, a group backing LGBT candidates, estimates that "in 1991, there were 49 openly LGBT elected or appointed officials. Today, there are more than 500. Roughly 22% of all Americans are represented by an openly LGBT elected official." The same group also touts that 106 out of 165 Victory Fund-endorsed candidates were elected in 2010 (a 65% win rate). Gay and Lesbian Victory Fund, *Run for Office*, http://www.victoryfund.org/get_involved/run_for_office. According to the Human Rights

Campaign, "a record number of openly LGB members and key allies were elected to Congress" in 2012. Human Rights Campaign, "Winning at the Ballot Box," http://www.hrc.org/bestof2012/entry/winning-at-the-ballot-box.

According to post-election polls from the 2012 Presidential election, gay, lesbian, and bisexual individuals comprised "5 percent of the electorate." Human Rights Campaign, *New Poll: LGB and Allied Voters Critical to 2012 Electoral Successes* (Nov. 13, 2012), http://www.hrc.org/blog/entry/new-poll-lgb-and-allied-voters-critical-to-2012 electoral-successes. Such democratic success is staggering, especially since polling suggests that only 3.4-3.8% of Americans identify as LGBT. Gary J. Gates and Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT* (Oct. 18, 2012), *available at* http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx. Indeed, as of January 2012, "48 US states [had] openly lesbian or gay public officials." Paul Canning, 48 States Now Have Openly Gay Politicians (Jan. 3, 2012), *available at* http://www.care2.com/causes/48-states-now-have-openly-gaypoliticians.html.

The LGBT community is well-represented both in California and nationally. Unlike the antidemocratic Jim Crow laws, California's domestic partnership law has not had an effect on access to the ballot box or democratic representation.

Conclusion

This short history of Jim Crow laws and efforts to desegregate the South demonstrates the stark contrast between such laws and California's domestic partnership law drafted, supported, and lobbied for by the gay and lesbian community. To claim that these laws are the equivalent of Jim Crow laws is disingenuous and wrong. The Court should reverse the judgment of the Ninth Circuit below.

Respectfully submitted,

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