

No. 10-CV-20

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IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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HARRY R. JACKSON, JR., *ET AL.*, APPELLANTS,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, APPELLEE

AND

DISTRICT OF COLUMBIA, INTERVENOR-APPELLEE.

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Appeal from the Superior Court of the District of Columbia  
(2009 CAB 8613)

(Hon. Judith N. Macaluso, Trial Judge)

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***AMICUS CURIAE* BRIEF OF THE AMERICAN PSYCHOANALYTIC ASSOCIATION,  
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL  
ASSOCIATION OF SOCIAL WORKERS, VIRGINIA CHAPTER, THE NATIONAL  
ASSOCIATION OF SOCIAL WORKERS, DISTRICT OF COLUMBIA CHAPTER, AND  
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, MARYLAND CHAPTER  
SUPPORTING AFFIRMANCE OF THE JUDGMENT IN FAVOR OF THE APPELLEES**

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### **IDENTITY AND INTEREST OF *AMICI CURIAE***

This brief is submitted by organizations dedicated to the advancement of the social sciences and the promotion of mental health. They submit this brief to present to the Court the perspective of these sciences on certain issues raised in this case. *Amici* file this brief with the consent of all parties to this action.

Established in 1955, the National Association of Social Workers (NASW) is the largest association of professional social workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. The NASW, DC Metro Chapter has 1,646 members and the NASW, Maryland and NASW, Virginia Chapters have 3,908 and 3,186 members respectively. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional standards and criteria, and develops policy statements on issues of importance to the social work profession.

NASW adopted a policy statement on gay issues in 1977, which was subsequently revised and expanded; that policy and the *NASW Code of Ethics* prohibits social workers from discriminating on the basis of sexual orientation. In 2004, NASW reaffirmed its policy supporting same-sex marriage. NASW's family policy recognizes that gay and lesbian people are a part of existing families and provide important caregiving to children, as well as other family members. The policy further identifies discrimination against lesbian and gay parents as undermining the survival of their families. NASW and the NASW, DC Metro, Maryland and Virginia Chapters affirm their commitment to work toward full social and legal acceptance and



recognition of lesbian, gay, and bisexual people as stated in NASW's policy statement, *Lesbian, Gay, and Bisexual Issues*:

It is the position of the NASW that same-gender sexual orientation should be afforded the same respect and rights as other-gender orientation. Discrimination and prejudice directed against any group is damaging to the social, emotional, and economic well-being of the affected group and of society as a whole. NASW is committed to advancing policies and practices that will improve the status and well-being of all lesbian, gay, and bisexual people. . . . NASW supports the adoption of local, state, federal, and international policies/legislation that ban all forms of discrimination based on sexual orientation. LGB people must be granted all rights, privileges, and responsibilities that are granted to heterosexual people, including but not limited to inheritance rights, insurance, marriage, child custody, employment, credit, and immigration.<sup>1</sup>

The American Psychoanalytic Association is a national membership organization that has been the leading organization of psychoanalysts for the past 90 years. The membership of the association includes the leading American psychoanalysts, many of whom are also leaders in their fields of psychiatry, psychology, and social work. There is a large volume of psychoanalytic literature concerning the psychological dimensions of same-sex sexual orientation and the challenges faced by gay and lesbian individuals in our society. In 1997, the American Psychoanalytic Association's Board of Directors—after careful study that addressed not only the well-being of members of gay and lesbian couples but also the well-being of their children, families, and the larger society—adopted a resolution stating that “[b]ecause marriage is a basic human right and an individual personal choice, . . . the [government] should not interfere with same-gender couples who choose to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage.” This statement was backed by extensive systematic research and clinical information that demonstrated the salutary effects for gay men and women, their children, and the community of the availability of marriage to same-

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<sup>1</sup> *Social Work Speaks* 218, 220 (8th ed. 2009).

sex couples.<sup>2</sup>

## **INTRODUCTION**

This case is an appeal from a final order and judgment of the District of Columbia Superior Court affirming the decision of the District of Columbia Board of Elections and Ethics (the “Board”) to reject the Marriage Initiative of 2009 (the “Initiative”). If approved by the voters, the Initiative would add to the District of Columbia’s marriage code, Title 46, Subtitle I, Chapter 4 of the District of Columbia Official Code, D.C. Code § 46-401 *et seq.*, a provision stating that “[o]nly marriage between a man and a woman is valid or recognized in the District of Columbia.” The Board rejected the Initiative based on its conclusion that it would “authorize[, or . . . have the effect of authorizing, discrimination prohibited under” the Human Rights Act (the “HRA”). D.C. Code § 1-1001.16(b)(1)(C).

An increasing number of states and countries—including Connecticut, Iowa, Massachusetts, Vermont, New Hampshire, Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden—now celebrate both opposite-sex and same-sex marriages. Persons married in those jurisdictions—regardless of sexual orientation—are entitled to have their marriages recognized while in the District of Columbia. If approved, however, the Initiative would deny to marriages between same-sex couples the full faith and credit that the District of Columbia now extends to all marriages lawfully entered in other jurisdictions. The Initiative also would block the D.C. Council’s recent extension of the right to marry to people regardless of their sexual orientation.

The proposed Initiative thus would relegate gay men and women to an inferior legal

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<sup>2</sup> An expanded version of the research upon which this resolution was based was published by B.J. Cohler and R.M. Galatzer-Levy in *The Course of Gay and Lesbian Lives: Social and Psychoanalytic Perspectives* (2000).

status. Such institutionalized discrimination would stigmatize these individuals and their relationships as inherently inferior. It is precisely to avoid perpetuating such discrimination that the D.C. Council insisted that “no initiated measure . . . establish an affirmative policy in favor of discrimination in this community.” Council of the Dist. of Columbia, Comm. on Gov’t Operations, Rep. No. 1 on Bill 2-317, Initiative, Referendum, and Recall Procedures Act of 1978, at 10 (May 3, 1978). As it explained, “the initiative process may not be used to place the Government in the posture of affirmatively condoning discrimination.” *Id.*

A wide array of social science research and analysis demonstrates both the stigmatizing effects of institutionalized discrimination on the basis of sexual orientation and the harmful impacts of that stigma on the mental health and social standing of gay men and women and their families. *Amici* file this brief to assist the Court in placing the Board’s concerns about discrimination in the appropriate scientific context.

### **ARGUMENT**

In *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), the Supreme Court found that separating individuals from others solely because of their minority status “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” On the basis of this finding, the Court held that “[s]eparate educational facilities” for racial minorities “are inherently unequal.” *Id.* at 495.

Through the proposed Initiative, the District of Columbia would single out gay men and women and prevent them alone from participating in the institution of marriage. By separating this group, solely on the basis of their minority status, the District would do precisely what the Supreme Court condemned in *Brown*. The resulting stigmatizing impact on gay men and women would be profound because it would have “the sanction of law” and would be “interpreted as



denoting the inferiority” of members of the gay community. *Id.* at 494; *see also Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (stigmatization “can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group” because it denotes them as “innately inferior” and as “less worthy participants in the political community”); *Lawrence v. Texas*, 539 U.S. 558, 584 (2003) (O’Connor, J., concurring) (noting that Texas’ sodomy law results in discrimination against homosexuals as a class in an array of areas outside the criminal law and that it subjects homosexuals to a “lifelong penalty and stigma”); *Romer v. Evans*, 517 U.S. 620, 627 (1996) (condemning the change in legal status accomplished when “[h]omosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres.”). Indeed, throughout history, state interference with the ability to marry has been a means of oppression and stigmatization of disfavored groups, serving to degrade whole classes of people by depriving them of the full ability to exercise their fundamental right to marry. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967).

Research demonstrates that the degraded status to which the law relegates the relationships of same-sex couples has adverse stigmatizing effects. Moreover, the substantial social and psychological effects of this stigmatization are borne not only by same-sex couples and individuals but by their children as well.

## **I. STIGMA HAS SEVERE PSYCHOLOGICAL AND SOCIAL EFFECTS.**

“Stigma” refers to an enduring condition, status, or attribute that is negatively valued by society, that fundamentally defines a person’s social identity, and that consequently disadvantages and disempowers those who have it.<sup>3</sup> The concept of “stigma” refers to the

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<sup>3</sup> *See* E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963); B.G. Link & J.C. Phelan, *Conceptualizing Stigma*, 27 *Ann. Rev. Soc.* 363 (2001); J. Crocker et al., *Social*

phenomenon through which an individual with an attribute that is discredited by his or her society is devalued in society as a result of that attribute.<sup>4</sup> The concept has been the subject of numerous empirical studies and has achieved nearly universal acceptance by social scientists.<sup>5</sup> In modern usage, “stigmatization” refers to an invisible sign of disapproval that permits “insiders” to draw lines around “outsiders.” This demarcation permits “insiders” to know who is “in” and who is “out” and allows the group to maintain its solidarity by punishing those who deviate from accepted norms of conduct.<sup>6</sup> Stigma is not inherent in any particular attribute but is the product of a collective social decision directed at individuals possessing an attribute; it has therefore been characterized as an “undesired differentness.”<sup>7</sup> Because stigma is a social construct, attributes subject to stigmatization change over time and evolve along with social norms and mores.

An extensive amount of psychiatric, psychological, psychoanalytic, and sociological research literature has demonstrated the severe adverse psychological and social effects of stigma.<sup>8</sup> Stigma can significantly lower the self-esteem of stigmatized individuals, leading to

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*Stigma*, 2 *The Handbook of Social Psychology* 504 (4th ed. 1998).

<sup>4</sup> See Goffman, *supra* note 3, at 2-3.

<sup>5</sup> See, e.g., J. F. Dovidio et al., *Stigma: Introduction and Overview* in *The Social Psychology of Stigma* 1-28 (Heatherton et al. eds., 2000); B. Major & L.T. O'Brien, *The Social Psychology of Stigma*, 56 *Ann. Rev. Psychol.* 393, 394-412 (2005).

<sup>6</sup> G. Falk, *Stigma: How We Treat Outsiders* 17-33, 339-40 (2001); see also J.A. Funderburk et al., *Does Attitude Toward Epilepsy Mediate the Relationship Between Perceived Stigma and Mental Health Outcomes in Children with Epilepsy?*, 11 *Epilepsy & Behav.* 71, 71-72 (2007) (“stigma exists when elements of labeling, stereotyping, separation, status loss, and discrimination occur together in a power situation that allows them to unfold”).

<sup>7</sup> Goffman, *supra* note 3, at 5.

<sup>8</sup> See, e.g., *Stigma and Group Inequality: Social Psychological Perspectives* (S. Levin & C. van Laar eds., 2006) (exploring many different effects of stigma); J. Dollard, *Caste and Class in a Southern Town* 61-96 & generally (3d ed. 1957) (African Americans); B.J. Limandri, *Disclosure of Stigmatizing Conditions: The Discloser's Perspective*, 3 *Archives of Psychiatric Nursing* 69,



social withdrawal, decreased expectation for oneself, avoidance of attempts at high achievement, and angry resentment.<sup>9</sup> Stigmatized individuals suffer from expectations of rejection and discrimination, and therefore harbor a stressful sense of anticipation that their disapproved of attribute will trigger an adverse reaction in others.

In the context of same-gender sexual orientation, the deep and pervasive impacts of stigma are well documented.<sup>10</sup> Research indicates that experiencing stigma and discrimination is associated with heightened psychological distress among gay men and women.<sup>11</sup> Such heightened levels of psychological distress are especially evident during adolescence. This results from the pain of being stigmatized and, ironically, the self-hatred associated with internalization of the social values that led to their stigmatization in the first place.<sup>12</sup>

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69-74 (1989) (survivors of domestic violence and individuals with HIV or AIDS).

<sup>9</sup> See A. Scheyett, *The Mark of Madness: Stigma, Serious Mental Illnesses, and Social Work*, 3 Soc. Work in Mental Health 79, 80, 84, 88 (2005) (society's "negative valuation" of the stigmatized individual "is integrated into the individual's sense of self-worth and identity, and result[s] in an inability to exert power or believe in one's ability to participate in society"); Limandri, *supra* note 8, at 69-74 (stigmatized individuals experience shame). The negative impacts of stigma are extended, not just to the individuals who have the stigmatized characteristic, but also to those who are associated with them. C.K. Sigelman et al., *Courtesy Stigma: The Social Implications of Associating with a Gay Person*, 131 J. Soc. Psychol. 45, 45-55 (1991); R.M. Puhl & J.D. Latner, *Stigma, Obesity, and the Health of the Nation's Children*, 133 Psychol. Bull. 557, 567 (2007) (citing study).

<sup>10</sup> See, e.g., I.H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychol. Bull. 674, 674-85 (2003); L.D. Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. Interpersonal Violence 366, 369-70 (1990).

<sup>11</sup> Meyer, *Prejudice*, *supra* note 10, at 683-85; see also I.H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Soc. Behav. 38 (1995); V.M. Mays & S.D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 Am. J. Pub. Health 1869 (2001) (finding disparities in psychological symptomatology between heterosexuals and gay/bisexual people but also finding that disparities were explained to significant degree by respondents' experiences with discrimination and prejudice).

<sup>12</sup> R.A. Isay, *On the Analytic Therapy of Homosexual Men*, 40 Psychoanalytic Study of the Child 235, 250-52 (1985); R.A. Isay, *The Development of Sexual Identity in Homosexual Men*, 41



Fear of being a target for stigma, moreover, makes some gay and lesbian persons feel compelled to conceal or lie about their sexual orientation. Experiencing barriers to integrating one's sexual orientation into one's life (*e.g.*, by being able to disclose it to others) is often associated with heightened psychological distress<sup>13</sup> and has negative implications for physical health.<sup>14</sup> In addition, to the extent that the threat of being stigmatized motivates some lesbians and gay men to remain in the closet, it further reinforces anti-gay prejudices among heterosexuals.

Just as sexual orientation is inherently about relationships, so is the stigma associated with homosexuality. Although sexual stigma is often directed against individuals (*e.g.*, through ostracism, discrimination, or violence), it is based on those individuals' relationships (actual, imagined, or desired) with others of their same sex. Indeed, a person's homosexuality or bisexuality often becomes known to others only when she or he enters into a same-sex relationship, whether that relationship involves a single sexual act or a lifelong commitment to another person. Psychological research has shown that heterosexuals' reactions to same-sex couples are typically more negative than their reactions to heterosexual couples, and that this

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Psychoanalytic Study of the Child 467, 474, 487 (1986); J. Drescher, *Psychoanalytic Therapy & the Gay Man* 257-91 (1998); Garnets et al., *supra* note 10, at 369-70.

<sup>13</sup> See Meyer, *Prejudice*, *supra* note 10; G.M. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Inter-group Contact, and Heterosexuals' Attitudes Toward Lesbians and Gay Men*, in *Out in Force: Sexual Orientation and the Military* 197, 211-12 (G.M. Herek et al. eds., 1996).

<sup>14</sup> S.W. Cole, *Social Threat, Personal Identity, and Physical Health in Closeted Gay Men*, in *Sexual Orientation and Mental Health: Examining Identity and Development in Lesbian, Gay, and Bisexual People*, 245-67 (A.M. Omoto & H.S. Kurtzman eds., 2006); E.D. Strachan et al., *Disclosure of HIV Status and Sexual Orientation Independently Predicts Increased Absolute CD4 Cell Counts over Time for Psychiatric Patients*, *Psychosomatic Med.*, 69, 74-80 (2007); P.M. Ullrich et al., *Concealment of Homosexual Identity, Social Support and CD4 Cell Count Among HIV-Seropositive Gay Men*, 54 *J. of Psychosomatic Res.* 205-12 (2003).

bias is often outside their conscious awareness or control.<sup>15</sup>

By perpetuating stigma through its segregation of gay couples into a separate form of legal relationship, the government contributes materially to harmful, and sometimes tragic, outcomes. In addition, the government's refusal to permit gay men and women to marry persons of their choice deprives them of a critical source of affirmation of their lives. Beginning in infancy and continuing throughout one's entire life, the experience of being affirmed by external sources of power and respect promotes psychological well being.<sup>16</sup> The absence of such affirmation is associated with emotional pain and may lead to significant psychological difficulties.<sup>17</sup> The *de facto* consequence of the government's failure to give gay men and women the same positive affirmation it affords to heterosexuals is that such individuals are left with a harmful sense of unworthiness vis-à-vis other members of society. In effect, the withholding of affirmation itself reinforces the overall stigmatization imposed upon and felt by members of the

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<sup>15</sup> N. Dasgupta & L. M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. of Personality & Soc. Psychol. 268-80 (2006); W.A. Jellison et al., *Implicit and Explicit Measures of Sexual Orientation Attitudes: Ingroup Preferences and Related Behaviors and Beliefs Among Gay and Straight Men*, 30 Personality & Soc. Psychol. Bull. 629-42 (2004); J.A. Tsang & W.C. Rowatt, *The Relationship Between Religious Orientation, Right-Wing Authoritarianism, and Implicit Sexual Prejudice*, 17 Int. J. for the Psychol. of Religion 99-120 (2007).

<sup>16</sup> D.N. Stern, *The Interpersonal World of the Infant: A View from Psychoanalysis and Developmental Psychology* 72-76, 101-11, 138-61 (1985); R.M. Galatzer-Levy & B.J. Cohler, *The Essential Other: A Developmental Psychology of the Self* 61-63, 136-37, 189-95 (1993); T.J. Cottle, *A Sense of Self: The Work of Affirmation* 166 & generally (2003); A. Ornstein, *A Developmental Perspective on the Sense of Power, Self-Esteem, and Destructive Aggression*, 25 Ann. Psychoanalysis 145, 150 (1997).

<sup>17</sup> H. Kohut, *Forms and Transformations of Narcissism*, 14 J. Am. Psychoanalytic Assn. 243, 245-48 (1966); H. Kohut, *The Psychoanalytic Treatment of Narcissistic Personality Disorders: Outline of a Systematic Approach*, 23 Psychoanalytic Study of the Child 86, 88-89 (1968); Ornstein, *supra* note 16, at 150. Affirmation has been shown to buffer the effects of negative attitudes toward oneself that may stem from a homosexual orientation. V.F. Bonfitto, *The Formation of Gay and Lesbian Identity and Community in the Connecticut River Valley of Western Massachusetts, 1900-1970*, 33 J. Homosex. 69, 88-93 (1997).



gay population.

The impact of this deprivation is, again, particularly acute for younger people. Like all children, youngsters who have a gay or lesbian predisposition spend considerable time imagining what their lives will be like when they “grow up.” These psychologically important ideas include images of the stable romantic relationships and families they will create as adults. Such ideas are important to the mental health of children because they help establish a positive personal identity and serve to motivate socially adaptive behaviors (such as doing well at school) and to facilitate turning these dreams into realities.<sup>18</sup> These children, like their heterosexually oriented peers, dream of marriage (and are encouraged by society to do so), but under the current legal regime they cannot see concrete models of how this dream can be actualized. The unavailability of marriage consistent with their sexual orientation thus enhances the psychological burden borne by gay youth.

Through the statutory embodiment of discrimination that would be established if the Initiative were passed, the District of Columbia would send a message to members of the gay community that they must continue to wear a government-sponsored badge of dishonor. As a result, members of this population would remain stigmatized and would continue to endure the psychological and social burdens of that stigmatization.

## **II. SINGLING OUT GAY MEN AND WOMEN AS INELIGIBLE FOR THE INSTITUTION OF MARRIAGE PERPETUATES STIGMA AND INVITES THE PUBLIC TO DISCRIMINATE.**

Decades of research have confirmed that stigmatized people are ostracized, devalued,

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<sup>18</sup> J.W. Astington, *Narrative and the Child's Theory of Mind*, in *Narrative Thought and Narrative Language* 151-71 (B. Britton & A. Pellegrini eds., 1990); B. Cohler & M. Freeman, *Psychoanalysis and the Developmental Narrative*, in *The Course of Life* 126-27, 146, 153-56 (G. Pollock & S. Greenspan eds., vol. 5 1993); P.J. Miller et al., *Narrative Practices and the Social Construction of Self in Childhood*, 17 *Am. Ethnologist* 292, 304-06 (1990); P. Ricoeur, *Hermeneutics & the Human Sciences* 274-96 (J. Thompson ed., 2006).



rejected, scorned, and shunned; experiencing discrimination, insults, attacks, and even murder.<sup>19</sup> This is particularly true for gay men and women, a stigmatized group that has suffered a well-documented history of ostracization, discrimination, and violence.<sup>20</sup> By establishing and perpetuating a regime in which separate treatment of same-sex couples is not only condoned, but enshrined as a matter of District of Columbia statutory law, the government would encourage disparate treatment of gay men and women by the broader society and foster a climate in which such treatment thrives.<sup>21</sup>

The reason that government action affects private behavior is clear. “[L]aws send cultural messages; they *give permission*.”<sup>22</sup> To the extent that government policies differentiate majority and minority groups and accord them differing statuses, they highlight the perceived

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<sup>19</sup> See, e.g., Dovidio et al., *supra* note 5, at 1-24; Falk, *supra* note 5, at 17-35; Dollard, *supra* note 8, at 61-96; see also Scheyett, *supra* note 9, at 87 (citing studies demonstrating links between stigma and discrimination in housing, the workplace, and the criminal justice system); M.V.I. Badgett, *Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men* 9 (2001) (describing economic impact of being seen as member of disfavored group); G.M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. Consulting & Clinical Psychol. 945, 945, 947-48 (1999).

<sup>20</sup> See also Meyer, *Prejudice*, *supra* note 10, at 680; G.M. Herek, *Legal Recognition of Same-Sex Relationships in the United States – A Social Science Perspective*, 61 Am. Psychologist 607, 617 (2006); K.T. Berrill & G.M. Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes*, 5 J. Interpersonal Violence 401, 410 (1990); G.M. Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism*, 5 J. Interpersonal Violence 316, 323-26 (1990).

<sup>21</sup> See G.M. Herek, *Hate Crimes Against Lesbians and Gay Men*, 44 Am. Psychologist 948, 949 (1989) (describing antigay hate crimes as a “logical outgrowth” of a climate of government intolerance, which “fosters” violent behavior); Meyer, *Prejudice*, *supra* note 10, at 680 (stating that abuses against gay men and women are “sanctioned by governments and societies through formal mechanisms such as discriminatory laws and informal mechanisms, including prejudice”); G.M. Herek, *The Psychology of Sexual Prejudice*, 9 Current Directions in Psychol. Sci. 19, 21 (Feb. 2000).

<sup>22</sup> N. Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 Ohio St. L.J. 867, 879 (2000); see also Limandri, *supra* note 8, at 70 (“Societal messages that some behaviors or conditions are taboo become[ ] manifested in discrimination”).

“differentness” of the minority and thereby promote stigma. Stigma-derived differentials in status and power are legitimized and perpetuated in the form of *structural stigma*. Structural stigma “represents the policies of private and governmental institutions that restrict the opportunities of stigmatized groups.”<sup>23</sup> By legitimating and reinforcing the “undesired differentness” of sexual minorities and by according them inferior status relative to heterosexuals, structural stigma gives rise to individual acts against them, including ostracism, harassment, discrimination, and violence. Many lesbian, gay, and bisexual people experience such acts of stigma because of their sexual orientation.<sup>24</sup>

Because it seeks to restrict the opportunities of sexual minorities relative to heterosexuals, the proposed Initiative is, by definition, an example of structural stigma. By allowing the Initiative, the government would give same-sex committed relationships a different legal status, segregated from that enjoyed by opposite-sex relationships, and would convey a message that relationships with people of the same sex are different and, implicitly, inferior.<sup>25</sup> The public would listen to this message and understand that, in the eyes of the government, gay men and women are not worthy of equal participation in all of society’s institutions. The

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<sup>23</sup> P.W. Corrigan et al., *Structural Stigma in State Legislation*, 56 *Psychiatric Services* 557-63 (2005). See generally Link & Phelan, *supra* note 3, at 363- 85.

<sup>24</sup> For example, a recent survey of a nationally representative sample of sexual minority adults found that 21% of the respondents reported having been the target of a physical assault or property crime because of their sexual orientation since age 18. Gay men were the most likely to report they had been the targets of such crimes; 38% had been the target of assault or property crime because of their sexual orientation. The same study found that 18% of gay men and 16% of lesbians reported they had experienced discrimination in housing or employment because of their sexual orientation. G.M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates from a National Probability Sample*, J. Interpersonal Violence 24, 54-74 (2007); see also K.T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19 (G.M. Herek & K.T. Berrill eds., 1992); Herek et al., *Psychological Sequelae*, *supra* note 19, at 948; M.V.L. Badgett, *Supra* note 19.

<sup>25</sup> See Herek, *Legal Recognition*, *supra* note 20, at 617.



resulting stigma would attach, not only to same-sex couples who seek to be married, but to all gay men and women, regardless of their relationship status or desire to marry.<sup>26</sup>

The government's distinction between same-sex and different-sex couples is stigmatizing even when same-sex couples are granted some or all of the legal benefits and obligations conferred by marriage. Irrespective of such benefits, the "differentness" of domestic partnerships and civil unions is evident. Significant portions of the U.S. populations do not regard these institutions to be equivalent, as indicated by public opinion polls showing that a substantial proportion of the U.S. population supports civil unions or domestic partnerships but opposes marriage for same-sex couples.<sup>27</sup>

In virtually every context other than the one at issue here, District of Columbia law condemns discrimination against gay men and women. *See, e.g.*, D.C. Code § 2-1402.11 (employment); *id.* § 2-1402.21 (housing and commercial space); *id.* § 2-1402.31 (public accommodations); *id.* § 2-1402.41 (educational institutions). Yet, by treating gay men and women differently in the area of marriage, the District would continue to perpetuate and compound the historical stigma against them, sending the public the message that at least some discrimination is still acceptable. Indeed, the District's continued failure to permit same-sex couples to marry would affirmatively enable private discrimination against same-sex couples. In some instances, the fact that same-sex couples are not married can give "cover" to private parties who discriminate on the basis of sexual orientation. Thus, the Initiative would necessarily

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<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g.*, Pew Research Ctr. for the People & the Press, *Pragmatic Americans Liberal and Conservative on Social Issues* (Aug. 3, 2006), <http://pewforum.org/uploadedfiles/Topics/Issues/Abortion/social-issues-06.pdf> (last accessed Mar. 23, 2010) (finding that, while 35% of respondents to a national survey favored allowing same-sex couples to marry, 54% favored allowing gay and lesbian couples to enter into legal agreements giving them many of the same rights as married couples).



undercut the antidiscrimination policy that the District of Columbia otherwise actively pursues in the Human Rights Act.

### III. THE INSTITUTION OF MARRIAGE OFFERS SOCIAL, PSYCHOLOGICAL, AND HEALTH BENEFITS.

The Initiative also would harm same-sex couples by denying them the benefits of marriage. Social scientists have long understood that marriage as a social institution has a profound effect on the lives of the individuals who inhabit it. In the nineteenth century, for example, the sociologist Emile Durkheim observed that marriage helps to protect the individual from “anomie,” or social disruption and the breakdowns of norms.<sup>28</sup> Expanding on this notion, twentieth-century sociologists characterized marriage as “a social arrangement that creates for the individual the sort of order in which he can experience his life as making sense”<sup>29</sup> and suggested that “in our society the role that most frequently provides a strong positive sense of identity, self-worth, and mastery is marriage.”<sup>30</sup> Although it is difficult to quantify how the meaning of life changes for individuals once they are married, empirical research demonstrates that marriage has distinct benefits that extend beyond the material necessities of life.<sup>31</sup> Both

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<sup>28</sup> E. Durkheim, *Suicide: A Study in Sociology* 259 (J.A. Spaulding & G. Simpson trans., Glencoe, Ill.: Free Press 1951) (original work published 1897).

<sup>29</sup> P. Berger & H. Kellner, *Marriage and the Construction of Reality: An Exercise In the Microsociology of Knowledge*, 46 *Diogenes* 1 (1964).

<sup>30</sup> W.R. Gove et al., *The Effect of Marriage on the Well-Being of Adults: A Theoretical Analysis*, 11 *J. Fam. Issues* 4, 16 (1990).

<sup>31</sup> See S. Stack & J.R. Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 *J. Marriage & Fam.* 527 (1998) (finding that married individuals manifested significantly more happiness than the unmarried in the United States, Canada, and 14 other nations in which survey data were collected); S.L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 *J. Fam. Issues* 53, 53 (1995) (finding that married couples were happier with their relationship than unmarried cohabiting couples, displayed greater commitment to the relationship, and had better relationships with their parents, indicating greater integration “into the networks of others who are in more traditional relationships”); Gove et al., *The Effect of Marriage*, *supra* note 30, at 5 (reviewing literature and concluding that “virtually all data bearing on the well-being of

tangible and intangible elements of the marital relationship have important implications for the psychological and physical health of married individuals and for the relationship itself.

Because marriage rights have been granted to same-sex couples only recently and in a limited number of jurisdictions, no empirical studies have yet been published that systematically compare married same-sex couples to unmarried same-sex couples. However, a large body of scientific research has compared married and unmarried *heterosexual* couples and individuals. Based on their scientific and clinical expertise, *amici* believe it is appropriate to extrapolate from the empirical research literature for heterosexual couples—with qualifications as necessary—to anticipate the likely effects marriage would have on that segment of the sexual minority population that would choose to marry if allowed to do so.<sup>32</sup> *Amici* believe that the potential benefits of marriage for gay men and lesbians in same-sex couples are similar to those that have been documented for heterosexuals.

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individuals that is representative of the general population indicate that the married have higher levels of well-being than have the unmarried”). One study drew on data from a representative national sample to show that the beneficial effects of marriage on psychological well-being can be attributed, in part, to the fact that married individuals report that their lives have purpose and meaning to a greater extent than their unmarried counterparts. See R.P.D. Burton, *Global Integrative Meaning as a Mediating Factor In the Relationship Between Social Roles and Psychological Distress*, 39 J. Health & Soc. Behav. 201 (1998).

<sup>32</sup> Researchers recognize that comparisons between married and unmarried individuals in heterosexual couples are complicated by the possibility that observed differences might be due to self-selection. People who choose to marry may differ in important ways from those who do not choose to marry (*e.g.*, in terms of mental health or happiness). After extensive study, however, researchers have concluded that the benefits associated with marriage result largely from the institution itself rather than from self-selection. See, *e.g.*, Gove et al., *The Effect of Marriage*, *supra* note 30, at 10; J.E. Murray, *Marital Protection and Marital Selection: Evidence from a Historical-Pro prospective Sample of American Men*, 37 Demography 511 (2000). Similarly, in anticipating that being able to marry will have beneficial effects for same-sex couples, *Amici* recognize that self-selection will play a role in marriage between same-sex partners as it currently does with different-sex partners. Given the opportunity to marry, not all same-sex couples will choose to do so, any more than is now the case for heterosexuals. It is reasonable to expect that same-sex couples who choose to marry, like their heterosexual counterparts, will benefit from the institution of marriage itself.



Married men and women generally experience better physical and mental health than their unmarried counterparts.<sup>33</sup> These health benefits do not appear to result simply from being in an intimate relationship because most (although not all) studies have found that married individuals generally manifest greater well-being than comparable individuals in heterosexual unmarried cohabiting couples.<sup>34</sup> The health benefits of marriage may be due partly to married couples enjoying greater economic and financial security than unmarried individuals.<sup>35</sup> Of course, marital status alone does not guarantee greater health or happiness. People who are unhappy with their marriage often manifest lower levels of well-being than their unmarried counterparts, and experiencing marital discord and dissatisfaction is often associated with negative health effects.<sup>36</sup> Nevertheless, married couples who are satisfied with their relationships consistently manifest higher levels of happiness, psychological well-being, and physical health than the unmarried.

Being married also is a source of stability and commitment for the relationship between

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<sup>33</sup> See N.J. Johnson et al., *Marital Status and Mortality: The National Longitudinal Mortality Study*, 10 *Annals Epidemiology* 224 (2000); C.E. Ross et al., *The Impact of the Family on Health: The Decade in Review*, 52 *J. Marriage & Fam.* 1059 (1990); R.W. Simon, *Revisiting the Relationships Among Gender, Marital Status, and Mental Health*, 107 *Am. J. Soc.* 1065 (2002).

<sup>34</sup> See authorities cited *supra* note 31; see also S.L. Brown, *The Effect of Union Type on Psychological Well-Being: Depression Among Cohabitors Versus Marrieds*, 41 *J. Health & Soc. Behav.* 241 (2000). But see, e.g., C.E. Ross, *Reconceptualizing Marital Status as a Continuum of Social Attachment*, 57 *J. Marriage & Fam.* 129 (1995) (failing to detect significant differences in depression between married heterosexuals and comparable unmarried, cohabiting heterosexual couples).

<sup>35</sup> See, e.g., C.E. Ross et al., *supra* note 33; Stack & Eshleman, *supra* note 31; Brown, *supra* note 34; see also L.I. Pearlin et al., *The Stress Process*, 22 *J. Health & Soc. Behav.* 337 (1981) (finding that economic strains increase an individual's experienced stress and thereby place her or him at greater risk for psychological problems).

<sup>36</sup> See W.R. Gove et al., *Does Marriage Have Positive Effects on the Psychological Well-Being of the Individual?*, 24 *J. Health & Soc. Behav.* 122 (1983); K. Williams, *Has the Future of Marriage Arrived? A Contemporary Examination of Gender, Marriage, and Psychological Well-Being*, 44 *J. Health Soc. Behav.* 470 (2003); J.K. Kiecolt-Glaser & T.L. Newton, *Marriage and Health: His and Hers*, 127 *Psychol. Bull.* 472 (2001).



spouses. Social scientists have long recognized that marital commitment is a function not only of attractive forces (*i.e.*, features of the partner or the relationship that are rewarding) but also of external forces that serve as barriers or constraints on dissolving the relationship. Barriers to terminating a marriage include feelings of obligation to one's spouse, children, and other family members; moral and religious values about divorce; legal restrictions; financial concerns; and the expected disapproval of friends and the community.<sup>37</sup> In the absence of adequate rewards, the existence of barriers alone is not sufficient to sustain a marriage in the long term. Not surprisingly, perceiving one's intimate relationship primarily in terms of rewards, rather than barriers to dissolution, is likely to be associated with greater relationship satisfaction.<sup>38</sup> Nonetheless, the presence of barriers may increase partners' motivation to seek solutions for problems when possible, rather than rushing to dissolve a relationship that might have been salvaged. Indeed, the perceived presence of barriers is negatively correlated with divorce, suggesting that barriers contribute to staying together for at least some couples in some circumstances.<sup>39</sup>

Same-sex relationships are held together by many of the same *attracting* forces as heterosexual couples, but marriage also provides heterosexual couples with institutionalized *barriers* to relationship dissolution that same-sex couples do not enjoy.<sup>40</sup> For example, although

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<sup>37</sup> See G. Levinger, *Marital Cohesiveness and Dissolution: An Integrative Review*, 27 J. Marriage & Fam. 19 (1965); J.M. Adams & W.H. Jones, *The Conceptualization of Marital Commitment: An Integrative Analysis*, 72 J. Personality & Soc. Psychol. 1177 (1997).

<sup>38</sup> See, *e.g.*, D. Previti & P.R. Amato, *Why Stay Married? Rewards, Barriers, and Marital Stability*, 65 J. Marriage & Fam. 561 (2003).

<sup>39</sup> See T.B. Heaton & S.L. Albrecht, *Stable Unhappy Marriages*, 53 J. Marriage & Fam. 747 (1991); L.K. White & A. Booth, *Divorce Over the Life Course: The Role of Marital Happiness*, 12 J. Fam. Issues 5 (1991).

<sup>40</sup> One study that directly compared same-sex cohabiting couples with heterosexual married couples on this factor found that gay and lesbian couples experienced significantly fewer

data are lacking in this area, it appears that social norms do not discourage the dissolution of a domestic partnership in the same way that they discourage marital divorce. Lacking access to legal marriage, the primary motivation for same-sex couples to remain together derives mainly from the rewards associated with the relationship rather than from formal barriers to separation. By denying same-sex couples the right to marry, the Initiative denies to same-sex couples an important tool for forging enduring relationships. This discrimination in access to marriage harms same-sex couples as well as their children.

**IV. THE CHILDREN OF SAME-SEX COUPLES WILL BENEFIT IF THEIR PARENTS ARE PERMITTED TO MARRY.**

Allowing same-sex couples to marry legally will not have any detrimental effect on children raised in heterosexual households, but it will benefit children being raised by same-sex couples. Children benefit from having a clearly defined legal relationship with both of their de facto parents. The District recognized this fact when it adopted the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009. *See* D.C. Code § 7-205(e)(2A) (providing that “[i]f the mother was in a domestic partnership at the time of either conception or birth, or between conception and birth, the name of the domestic partner of the mother shall be entered on the certificate as a parent of the child, unless parentage has been determined otherwise by the Court pursuant to D.C. Official Code § 16-909”). Such legal clarity is especially important during times of crisis, ranging from school and medical emergencies involving the child to the incapacity or death of a parent. The death of a parent is a highly stressful occasion for a child and is likely to have important effects on the child’s well-being. In those situations, having a clearly defined legal relationship with the surviving parent can provide the child with as

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institutional barriers to ending their relationship compared to the heterosexual couples. L.A. Kurdek, *Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples*, 60 J. Marriage & Fam. 553 (1998).



much continuity as possible in her or his relationship with that parent and can minimize the likelihood of conflicting or competing claims by non-parents for the child's custody.

Moreover, a recent study funded by the American Academy of Pediatrics concluded that in families headed by same-sex parents, "[c]ivil marriage can help foster financial and legal security, psychosocial stability, and an augmented sense of societal acceptance and support. . . . Children who are raised by civilly married parents benefit from the legal status granted to their parents."<sup>41</sup> Children obviously benefit to the extent that their parents are financially secure, physically and psychologically healthy, and not subjected to high levels of stress. They also benefit to the extent that their parents' relationship is stable and likely to endure.<sup>42</sup>

Furthermore, children of school age and in early to mid-adolescence generally have a strong desire to conform to the norms of their community, to be like other kids, and not to stand out from their peers.<sup>43</sup> Coming from a family that is perceived as ordinary or normal is extremely important to many children. Given the social disapproval of same-sex couples that persists in many communities, the children of such a relationship may suffer some degree of

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<sup>41</sup> J.G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 *Pediatrics* (Official J. of the Am. Acad. of Pediatrics) 349, 361 (2006).

<sup>42</sup> See, e.g., G. Downey & J.C. Coyne, *Children of Depressed Parents: An Integrative Review*, 108 *Psychol. Bull.* 50 (1990); M. Smith, *Parental Mental Health: Disruptions To Parenting and Outcomes for Children*, 9 *Child & Fam. Soc. Work* 3 (2004); M. Rutter & D. Quinton, *Parental Psychiatric Disorder: Effects on Children*, 14 *Psychol. Med.* 853 (1984). Some research suggests that a similar pattern holds when the parents are lesbian or gay. See, e.g., C.J. Patterson, *Families of the Lesbian Baby Boom: Maternal Mental Health and Child Adjustment*, 4 *J. Gay & Lesbian Psychotherapy* 91 (2001) (finding that mentally healthy lesbian mothers also described their children as better adjusted); R.W. Chan et al., *Psychological Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 *Child Dev.* 443 (1998) (reporting that children of both heterosexual and lesbian mothers had fewer behavior problems when parents were experiencing less stress, having fewer interparental conflicts, and feeling greater love for one another).

<sup>43</sup> K.H. Rubin et al., *Peer Interactions, Relationships, and Groups*, in *Handbook of Child Psychology* 641-44, 653-54, 658 (W. Damon ed., vol. 3, 5th ed. 1998).



stigma and distress regardless of the government's official attitude toward their parents' relationship. Such distress is enhanced if the government itself labels their parents' relationship as "different" and implicitly of lesser standing.

Indeed, people who are associated with stigmatized individuals often experience a similar devaluing, a phenomenon referred to as a courtesy stigma,<sup>44</sup> or stigma by association.<sup>45</sup> The children of same-sex domestic partners may experience such stigma by association as a result of the "undesired differentness" created by the existence of separate statuses for married parents and parents who are domestic partners. Contexts in which a child's parents and their marital status are salient (*e.g.*, the school setting) are likely to make the differentness of domestic partners especially evident. This differentness is likely to lead to differential treatment as a result of teachers, administrators, and other children according preferential treatment to their own in-group, *i.e.*, the children of married parents. Consequently, children of unmarried parents may experience teasing at the hands of other children or may find that they are excluded from play groups. Teachers and other adults may exhibit biases that favor the children of married parents over those with unmarried parents. Thus, the threat of stigma represents a burden with which families headed by same-sex couples must cope, and it is reasonable to predict that children will benefit by having even the threat of such stigma removed from their lives.

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<sup>44</sup> Goffman, *supra* note 3.

<sup>45</sup> See, *e.g.*, S.L. Neuberg et al., *When We Observe Stigmatized and "Normal" Individuals Interacting: Stigma by Association*, 20 Personality & Soc. Psychol. Bull. 196-209 (1994) (finding that male research participants were more likely to denigrate another man if they believed he was a heterosexual conversing with a gay male friend, than if they believed the same man was a heterosexual conversing with a heterosexual male friend).

## CONCLUSION

The decision of the Superior Court upholding the Board's decision is correct and prevents the District from engaging in and perpetuating stigma and discrimination. It should be affirmed.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing *Amicus Curiae* Brief was mailed, proper first class postage prepaid, this 26th day of March, 2010, to:

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