
In The
Supreme Court of the United States

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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**

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**AMICI CURIAE BRIEF OF DAVID BENKOF,
ROBERT OSCAR LOPEZ, AND
DOUG MAINWARING IN SUPPORT OF
PETITIONERS AND SUPPORTING REVERSAL**

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INTEREST OF *AMICI CURIAE*¹

Amicus David Benkof is the author of “Gay Essentials: Facts for your Queer Brain” (Alyson, 1999). He is the founder and ex-owner of Q Syndicate, the largest provider of content to the LGB press. In 2008 and 2009, he blogged at GaysDefendMarriage.com. He is a former resident of California, having lived there from 1989 to 2001. He moved to Jerusalem in 2010, where he now lives. He is a dual citizen of the United States and Israel.

Amicus Robert Oscar Lopez was born in 1971, between two important events: the Stonewall Rebellion of 1969 and the decision by American psychiatrists and psychologists, a few years later, to de-pathologize homosexuality. As early as 1973, his biological mother and her female partner had shifted their platonic friendship into a full-fledged romantic partnership that would span two decades. Since his father had quit the home since before he could remember, Lopez was accustomed since infancy to having two female caretakers, approximating the condition known today as gay parenting. He grew up, one could say, as the gay community grew up, an

¹ Letters consenting to the filing of all *amici curiae* briefs have been submitted by the parties. *Amici curiae* also represents that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

assertion underscored by the fact that Lopez came out as bisexual in 1989 and has maintained close ties to the LGB community. His forty years of close involvement in the LGB community have influenced his work as a scholar and writer: His screenplay about a Cuban American man raised by two gay men won first place for comedy in the Latino Screenplay Competition of 2008, he published *The Colorful Conservative: American Conversations with the Ancients from Wheatley to Whitman* in 2011 (including queer readings of Thoreau and Whitman), and he has written three epic novels with gay themes forthcoming in 2013. He has been married to a woman since 2001 and has one daughter.

Amicus Doug Mainwaring is a former real estate agent now working as a freelance writer. He came out as gay after his separation in 1998. While a devoted father raising two sons who are now teenagers, Doug realized that even if there were two of him raising his children, a gaping hole would remain in his son's lives. Albeit an unintentional consequence, he realized his lifestyle choice was inflicting deprivation upon his children. He has moved from supporting gay marriage legislation to opposing it, in part as his awareness of his own children's need for their mother's presence has made him rethink the idea that same-sex unions can fulfill the purposes of marriage.



SUMMARY OF THE ARGUMENT

This Court should uphold the right of California voters to retain the traditional understanding of marriage.

Amici come from a variety of families of origin, we have different religious beliefs and we differ among ourselves about whether legislatures should redefine marriage to include same-sex couples. We all believe, however, that Americans ought not be labeled hateful bigots for opposing redefinition.

Our position is based on a shared commitment that marriage is society's institutional expression of a child's right to a mother and father. We are not alone. The ongoing debate over marriage in France has prominently featured gay people who support keeping the understanding of marriage as the union of a husband and wife.

We, and they, believe gay people should be free to love and live as they choose but we also recognize that society has a right to express a rational preference for the kind of unions necessary to the survival of the whole society, and to the well-being of children. Some gay, lesbian and bisexual people will benefit from this preference as they may marry a person of the opposite-sex.

Even some LGB people who support gay marriage recognize that court-ordered gay marriage would be bad for gay people. The question of the future of marriage should be left to the democratic

process, where voices like ours can be heard, and competing interests (such as religious liberty concerns) can be balanced.



ARGUMENT

We are gay and bisexual individuals asking this Court to uphold the right of California voters to keep the traditional understanding of marriage.

Some of us were raised by lesbian parents, some of us come from more traditional homes. Some of us support gay marriage – democratically enacted by the states, and most of us do not.

We believe strongly that opposition to gay marriage need not be rooted in hatred towards gay people, or a desire to do us harm. We respectfully ask that you consider our voices, our stories, and our views before using the extraordinary power of the Court to brand the views of millions of Americans “discriminatory” or rooted in animus, shutting down an ongoing and important moral debate in this country over the nature, meaning and purpose of marriage.

Why would a gay man or woman ask you not to strike down Proposition 8 and brand our marriage tradition discriminatory?

I. Children have a right to a mother and father, and marriage is society's institutional expression of that right.

We believe children have a right to a mother and father; marriage is society's institutional expression of that right. This is not just a theoretical abstraction for us. One of us was raised by two lesbian mothers, and knows first-hand the longing of a child for a father and the hardship a boy faces growing up without a dad.² Another of us has taken his ex-wife back into his home, realizing he can only offer his children half of what they truly need. There is a deep wisdom in our marriage tradition; the bringing together of male and female is a unique and distinct sort of union – one uniquely necessary to children and the whole society. Gay marriage, in particular “marriage equality”, will repudiate the wisdom of this tradition, putting government in the position of stating an untruth: unions of two men or two women are just the same as unions of husband and wife, especially when it comes to children.

We are not alone. A number of gay people in France have posted testimonies on the website Homovox.com (unofficial translations of which have been posted on the website <http://englishmanif.blogspot.com/>). A French gay man who is the mayor of a small town explains:

² Robert Oscar Lopez, *Growing Up With Two Moms: The Untold Children's View* PUBLIC DISCOURSE, August 6, 2012.

As a society we should not be encouraging this. It's not biologically natural. We (gays) do not have the fertility, in the sense of making a baby. We have plenty of other forms of fertility. Artistic, for example, and other forms of fertility. In my case, I feel I've connected with my village, and I've reinvigorated a village that was dying, fading. I know how to create ties within my community. In summary, the law I advise would be whatever's best for the child. One must favor what is best for the child. Nobody can deny, I believe, that it's best for a child to have a mother and a father who love each other as best they can.³

As a French gay man, Xavier Bongibault, opposing gay marriage in his country put it: "Most homosexuals make fun of this proposed law, because they had a mom and dad like everyone else. They want it to be that way for all kids."⁴

II. A preference for opposite-sex unions is rational for government and society.

Many people are capable of either homosexual or heterosexual bonding; keeping marriage as the exclusive union of male and female represents a

³ *Homovox Translations, Parts 1-4* ENGLISH MARRIAGE NEWS ABOUT FRENCH GAY RIGHTS DEBATES (Jan. 9, 2013) at <http://englishmanif.blogspot.com/2013/01/homovox-translations-parts-1-4.html>.

⁴ *Id.*

reasonable preference for the kind of relationship that gives new life to society, where such a relationship is possible. Put another way: in advocating for gay as a permanent orientation, many people are forgetting the “B” of LGB.

We are all too personally aware of the hurtful and hateful restrictions on gay people that American society has today thankfully largely overcome. Gay people should be free to live and love as we choose – and we are now free. But society has a right to express a rational preference for the kind of unions necessary to the survival of the whole society, and to the well-being of children. Such a mild preference may make a real difference in the lives of some LGB people and their children. Fluidity is a well-documented phenomenon in sexual orientation. One of us lived as an openly gay man for close to 15 years before rejecting that as his deepest identity. Another one of us spent nearly 10 years as a gay man before he first became involved with a woman, whom he married. Nor is he alone: New York City’s Public Advocate’s wife was outed in late 2012 by the press as a former lesbian:

De Blasio’s wife, Chirlane McCray, penned a seven-page article for *Essence* magazine in 1979 titled “I Am a Lesbian” that detailed her emotional path to coming out as a gay woman. . . . “In the 1970s, I identified as a lesbian, and wrote about it,” she said. “In 1991, I met the love of my life, married him, and together we’ve raised two amazing kids.

I'm reminded every day how lucky I am to have met my soulmate."⁵

Researchers have noted a large number of women, in particular, who understand their identities as a lesbian to be a choice, not an intrinsic part of their nature. "Contrary to the notion that most sexual minorities undergo a one-time discovery of their true identities, 50% of [a study's] respondents had changed their identity label more than once since first relinquishing their heterosexual identity."⁶ Sexual orientation is more fluid than race because sexual desire is more fickle and fluid than skin color, and sexual identity is a choice made in the face of the uncertainties of future sexual desire.

Moreover, the history of the Fourteenth Amendment is not amenable to treating sexual desire or behavior as equivalent to biological traits such as race, since African Americans have had to fight against a discriminatory logic that assumed their skin color alone betokened inevitable dangerous behaviors such as dishonesty, laziness, and sexual licentiousness. One of us is a person of color and knows how dangerous it is to equate biological traits

⁵ Tina Moore, *Public Advocate Bill de Blasio Married to Woman Who Was Out and Proud in the 1970s* N.Y. DAILY NEWS (Dec. 5, 2012) at <http://www.nydailynews.com/new-york/bill-de-blasio-married-woman-proud-1970s-article-1.1214329>.

⁶ Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. OF SOC. ISSUES 301 (2000).

with behavior, since this equation lies at the core of stereotyping.

Here is what we are asking this Court to endorse in rejecting a bid to require gay marriage: Freedom for all, but a preference through marriage for what is necessary for the social order, for a mother and father as the social ideal. This is a rational and reasonable decision states should be left free to make.⁷

III. Democratic forums, not the courts, are the right place to work out profound moral disagreements, like those embodied by gay marriage.

Even some LGB people who support gay marriage recognize that court-ordered gay marriage would be bad for gay people. Jonathan Rauch is a gay man, who has advocated for gay marriage since 1996.⁸ But he writes in the *New Republic*: “What if a Court decision writing gay marriage into the Constitution were met without a murmur of populist anger? Frankly, it would still be a bad idea, and bad, above all, for gays.” He goes on:

⁷ Commentator Jonathan Rauch has noted: “most [opponents of redefining marriage] are motivated by a sincere desire to do what’s best for their marriages, their children, their society.” JONATHAN RAUCH, GAY MARRIAGE 7 (2004).

⁸ Jonathan Rauch, *For Better or Worse? The Case for Gay (and Straight) Marriage* THE NEW REPUBLIC (May 6, 1996) at http://www.jonathanrauch.com/jrauch_articles/gay_marriage_1_the_case_for_marriage/.

“Gay Americans are in sight of winning marriage not merely as a gift of five referees but in public competition against all the arguments and money our opponents can throw at us. A Supreme Court intervention now would deprive us of that victory. Our right to marry would never enjoy the deep legitimacy that only a popular mandate can bring.”

He concludes, “Strange but true: a favorable Supreme Court intervention next year would make us weaker, not stronger.”⁹

Rauch is right.

The question of the future of marriage should be left to the democratic process, where voices like ours can be heard, and competing interests (such as religious liberty concerns) can be balanced.

Marriage is more than a legal construct, created by governments for instrumental purposes. If gay people who support gay marriage seek the legitimacy that comes with marriage, we must seek that personal affirmation from our fellow citizens. No court action can confer the legitimacy that comes from winning in the democratic process.

Gay people are not powerless children who need to be protected by the courts in an extraordinary way.

⁹ Jonathan Rauch, *How Can the Supreme Court Help Gay Rights? By Keeping Out Entirely* THE NEW REPUBLIC (Dec. 12, 2012) at <http://www.tnr.com/blog/plank/110949/the-only-way-the-supreme-court-can-help-gay-marriage-staying-out-it#>.

Please leave the American people free to work out our disagreements with each other on marriage in the give and take of the democratic process.



CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the decision of the court below.

Respectfully submitted,

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