No. 12-144

IN THE SUPREME COURT OF THE UNITED STATES

Dennis Hollingsworth, et al.,
***Petitioners*,**

v.

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

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

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Brief of Amici Liberty Counsel, Inc. and Campaign for Children and Families In Support of Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions and Statutes

Other Authorities

Interest of Amicus Curiae

The Amici[1] are non-profit organizations dedicated to preserving marriage as the union of one man and one woman, the reality that children need a mother and father, and the fact that sexual orientation is not immutable – people can, and have, overcome their same-sex attractions.

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to traditional family values, including marriage, across the United States. Liberty Counsel has successfully defended the federal Defense of Marriage Act ("DOMA"), has defended various state DOMAs, and is presently involved in defending the definition of marriage against constitutional challenges in several jurisdictions. Liberty Counsel has provided amicus curiae briefs in *Conaway*

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[1] All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than the amici, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

v. Deane, 932 A.3d 571 (Md. 2007), *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) and been involved in approximately fifty DOMA cases. Liberty Counsel represented Campaign for California Families in *Smelt v. City of Orang*e, 447 F.3d 673 (9th Cir. 2006) and in its defense of California's law defining marriage as the union of one man and one woman. *In re Marriage Cases*, 143 Cal. App. 4th 873 (2006). Additionally, Liberty Counsel represented plaintiffs in several cases challenging recognition of same-sex marriages in New York, including *New Yorkers for Constitutional Freedoms v. N.Y. State Senate*, 98 A.D.3d 288 (N.Y. App. Div. 2012) and *Hebel v. West*, 25 A.D.3d 172 (N.Y. App. Div. 2005).

Liberty Counsel is committed to upholding the institution of marriage as defined for millennia – the union of one man and one woman – and to ensuring that the institution is not undermined. Liberty Counsel has developed a substantial body of information related to the importance of marriage as the fundamental social institution. Liberty Counsel respectfully submits this

information to assist this Court in evaluating Respondent's claims.

Amicus Campaign for Children and Families represents, fathers, mothers, grandparents and concerned individuals who believe the sacred institutions of life, marriage, and family deserve utmost protection and respect by government and society.

Summary of Argument

The Ninth Circuit's decision rests on the erroneous conclusion that California's Proposition 8 is "remarkably similar" to Colorado's Amendment 2, which was struck down in *Romer v. Evans*, 517 U.S. 620 (1996), and therefore should lead to the same result in this case. *Perry v. Brown*, 671 F.3d 1052, 1080-81 (9th Cir. 2012). The decision in *Romer* rested on five factors, all of which are factually and legally distinguishable from this case.

Significantly, as the *Romer* Court explained, Amendment 2 "impose[d] a broad and undifferentiated disability on a single named group" with respect to "transactions and relations in both the private and governmental spheres." *Romer*, 517 U.S. at 627, 632. Proposition 8, on the other hand, does *not* target a

solitary group of individuals and categorically deny them protection under the law. Rather, Proposition 8 defines marriage as the union of one man and one woman, which is consistent with the definition California has held since its founding in 1849, except for a "143-day hiatus" between the effective date of the California Supreme Court's decision in the *Marriage Cases*, 183 P.3d 384, 417-18 (Cal. 2008) and passage of Proposition 8. *Perry*, 671 F. 3d at 1079. California's Proposition 8 is also focused in its scope, leaving untouched the broad category of protections and benefits afforded to same-sex couples under California's 2008 Domestic Partner Act. *Id.* at 1065.

The Ninth Circuit also erred in its failure to properly consider that Proposition 8 represented a legislative effort (through the people's retained power to enact amendments) to *restore* the longstanding definition of marriage that recently had been redefined by the California judiciary, whereas Amendment 2 represented a legislative effort (through the initiative power) to *repeal* protections afforded through local legislative efforts. Given that significant policy changes are within the province of the legislative, not judicial, branch, it is legally significant that Proposition 8

represents a legislative response (through the people's initiative power) to restore a definition of marriage that had been briefly altered by the judicial branch, which definition is consistent with this Court's precedent defining marriage as the union of one man and one woman. Thus, contrary to the Ninth Circuit's conclusion, Proposition 8 did not strip same-sex couples of any right to same-sex marriage.

The Ninth Circuit also erred when it flatly rejected the proffered justifications for California's decision to define marriage consistent with the longstanding definition in California and this Nation. The court did not even consider whether the stated purposes were legitimate, instead concluding that it was "impossible to credit them." *Perry*, 671 F.3d at 1092. Many courts, however, including this Court, have consistently affirmed society's interest in defining marriage as the union of one man and one woman.

Argument

I. *Romer* Does Not Dictate the Outcome in This Case as Colorado's Amendment 2 and California's Proposition 8 Are Legally and Factually Distinguishable.

In 1992, Colorado voters adopted a statewide referendum, known as Amendment 2, that repealed nondiscrimination protections based on sexual orientation that certain cities had adopted. Amendment 2 provided that

> Neither the State of Colorado . . . nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences,

> protected status or claim of discrimination.

Romer, 517 U.S. at 624.

The *Romer* Court considered five factors in reaching its conclusion that Amendment 2 violated the Equal Protection Clause of the United States Constitution. Those factors were (1) whether the amendment targeted a solitary class of people, 517 U.S. at 627, (2) how far-reaching a change in the law was made by the amendment, *id.* at 627, (3) whether the amendment was consistent with emerging traditions in the state, *id.* at 628, (4) whether the amendment made it more difficult for a solitary class of people to petition their government for assistance, *id.* at 628-29, and (5) whether there were legitimate justifications for the amendment other than a bare desire to harm a specific group of people. *Id.* at 630. Each of these factors leads to a different conclusion in this case.

A. Proposition 8 does not target a solitary class of people for discrimination.

The *Romer* Court emphasized that Amendment 2 imposed a special disability upon a solitary class of people

that stripped them of protections most people take for granted. 517 U.S. at 627 ("put in a solitary class"); *id.* at 631 ("imposes a special disability upon those persons alone" and there is "nothing special in the protections Amendment 2 withholds"). This Court further explained that Amendment 2 withdrew from "homosexuals, but no others, specific legal protections from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id.* at 627. Proposition 8, on the other hand, neither targets for a special disability those involved in same-sex relationships nor forbids passage of laws that would redefine marriage as the union of one man and one woman.

First, Proposition 8 does not impose a special disability upon a solitary class of people. Rather, the marriage laws in California, as in the overwhelming majority of other states, place broad restrictions on many people. For example, the marriage laws prohibit people from marrying if they are below a certain age, are too closely related, desire to marry more than one person at the same time, or are both the same sex. These types of classifications are not out of the ordinary insofar as most, if not all, legislation "classifies for one purpose or another,

with resulting disadvantage to various groups or persons." *Id.* at 631. Thus, the fact that Proposition 8 classifies people for purposes of marriage eligibility does not in itself render Proposition 8 unconstitutional.

To suggest otherwise would bring into question the validity of all marriage restrictions and, in fact, the validity of almost all laws. Additionally, characterizing Proposition 8 as imposing an impermissible special disability on a solitary class runs directly contrary to this Court's longstanding affirmation that marriage is limited to the union of one man and one woman. *See Murphy v.* Ramsey, 114 U.S. 15, 45 (1885) (marriage is the "union for life of one man and one woman"). Unlike Amendment 2, therefore, Proposition 8 does not target a solitary group of people for special disability.

Second, Proposition 8 does not forbid reinstatement of laws protecting same-sex couples. By majority vote on a ballot initiative, the California electorate could decide to repeal Proposition 8 or amend the California Constitution to expressly define marriage as something other than the union of a man and a woman. In the meantime, as discussed below, Proposition 8 leaves intact all

other protections afforded same-sex couples.

B. Proposition 8 does not impose far-reaching changes in the law that impact broad protections in the private and public sphere.

The *Romer* Court rejected the government interests offered because the "sheer breadth" of Amendment 2 imposed a "far reaching" and sweeping change in the private and public spheres. *Id.* at 627, 632. Amendment 2 "identifie[d] persons by a single trait and then denie[d] them protection across the board." *Id.* at 633. The Amendment repealed and prohibited "all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government." *Id.* at 629. Proposition 8, unlike Amendment 2, leaves untouched all previously existing protections for same-sex couples.

Not only did Amendment 2 impact a broad range of protections, but the *Romer* Court explained that it found "nothing special" in the protections Amendment 2 withheld. Rather, the Amendment repealed protections "taken

for granted by most people either because they already have them or do not need them . . . ." *Id.* at 631. Proposition 8, on the other hand, is narrowly focused in its effect – affording to same-sex couples all benefits and protections afforded to married couples, except reserving marriage to its longstanding definition.

Although Proposition 8 continues California's long history of defining marriage as the union of one man and one woman, it leaves untouched all of the legal protections and benefits afforded to same-sex couples under California's Domestic Partnership Law. Thus, "[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." Cal. Fam. Code § 297.5 (a). Proposition 8 cannot be described, as Amendment 2 was in *Romer*, as "at once too narrow and too broad." 517 U.S. at 633.

As the dissent below pointed out in *Perry*, "Proposition 8 must reasonably be interpreted in a limited fashion as

eliminating only the right of same-sex couples to equal access to the designation of marriage, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family relationship." *Perry*, 671 F.3d at 1104 (Smith, J., concurring in part and dissenting in part). Proposition 8 "does not burden gays and lesbians to the same extent Amendment 2 burdened gays and lesbians in Colorado." *Id.* at 1105.

C. Proposition 8 is consistent with the longstanding definition of marriage in California and, therefore, is not inconsistent with any emerging trend in California to redefine marriage.

Assuming as true that Amendment 2 reversed an emerging tradition and pattern in Colorado of offering additional protections against discrimination, Proposition 8 did not break with any such emerging tradition. Proposition 8 defined marriage consistent with California's 159 year old definition of marriage as the union of one man and one woman. *Perry*, 671 F.3d at 1064-65. In *Romer*, this Court explained that the emerging tradition in

Colorado was to expand the categories protected against nondiscrimination. 517 U.S. at 628. At common law, owners of public accommodations were prohibited from refusing, without good cause, to serve a customer. When that general rule proved insufficient, states, including Colorado, began to enact "detailed statutory schemes." *Id.* at 627-28.

In Colorado, the laws expanded, as compared to the common law, the list of entities that were prohibited from discrimination and also identified specific groups or persons protected by the nondiscrimination laws. *Id.* at 628-29. The list of protected categories extended well beyond the small number of categories afforded heightened scrutiny under the equal protection clause. *Id.* at 629. In expanding those protected categories, some municipalities in Colorado had included sexual orientation. Amendment 2 repealed those protections: it "nullifie[d] specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment." *Id.* As a result, this Court concluded that Amendment 2 reversed an emerging trend in Colorado to expand the categories of people entitled to protection

and, more specifically, it reversed the trend of protecting against any alleged discrimination based on sexual orientation.

Proposition 8, on the other hand, is consistent with the longstanding definition of marriage and does not reverse any emerging trend by the California electorate to define marriage as anything other than the union of one man and one woman. To the contrary, the People of California and the overwhelming majority of states have consistently defined marriage as the union of one man and one woman: it was the judiciary in this case that broke with tradition and engaged in the policy-making decision to redefine marriage.

D. Proposition 8 does not single out a solitary class of people and make it more difficult for them to petition their government for assistance.

In Colorado, Amendment 2 not only repealed all existing protections based on sexual orientation, but it prohibited people from petitioning government for such protections absent a constitutional amendment to reverse Amendment 2. As a result, the *Romer* Court found that

Amendment 2 was inconsistent with the constitutional guarantee that "government and each of its parts remain open on impartial terms to all who seek its assistance." *Id.* at 633. A law declaring that "in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws . . . ." *Id.*

Proposition 8 is readily distinguishable from Amendment 2 in its effect. First, as discussed above, Proposition 8 does *not* target a solitary class of people. It places on the same footing various groups who are impacted by the longstanding definition of marriage as the union of one man and one woman. Second, and more importantly, Proposition 8 does not make it any more difficult for same-sex couples to petition government to change the definition of marriage than it was prior to amendment – except for the "143-day hiatus" between the time when the California Supreme Court's definition of marriage took effect and November 4, 2008, when the California voters returned the definition of marriage to its longstanding meaning.

Prior to the California Supreme Court's decision in 2008, California voters

could change the definition of marriage from one man and one woman only by passing a ballot initiative, which required a majority vote for it to become law. Proposition 8 did not change that majority vote requirement.

In 2000, the people of California had reserved the definition of marriage to themselves when they passed a statute by ballot initiative that stated only a marriage between a man and a woman shall be valid or recognized in California. Cal. Fam. Code § 308.5. Pursuant to California law, only a subsequent ballot initiative (as compared to a statute passed by the legislature) could amend that definition. Cal. Const. art. 2, § 10(c). Thus, prior to Proposition 8, the electorate could redefine marriage only by a majority vote of the people. Proposition 8 adopted as a Constitutional amendment language identical to the 2000 statute and could also be reversed by a majority vote of the California electorate.

Thus, Proposition 8 did not make it more difficult to petition government to change the definition of marriage than it was prior to Proposition 8.[2] The ballot

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[2] One difference between a ballot initiative to enact a statute and one to enact an

initiative is used frequently in California and that avenue remains open to those who seek to change the definition of marriage to something other than between one man and one woman.

The court below, however, focused on whether Proposition 8 made it more difficult for same-sex couples to marry after passage of the amendment than it was for them to marry after the California Supreme Court declared a right to same-sex marriage in its May 2008 decision. The Ninth Circuit repeatedly stated that Proposition 8 "withdrew," "took away," "eliminated," or "stripped" the right to same-sex marriage. *See Perry*, 671 F.3d at 1063 ("stripped" & "taking away"), 1076 ("stripped"), 1079 ("eliminate"), 1081 ("stripped"), 1082 ("withdrawing"), 1083 ("withdrawing"), 1087-88 ("withdrawing" & "taking something away"), 1092 ("stripped away"), 1096 ("withdraw" & "strip").

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amendment is that a statute requires signatures from 5% of registered voters to be placed on the ballot while an amendment requires 8%. Cal. Elections Code § 9035. But of course, this difference applies equally to all proposed amendments, regardless of the subject matter.

The Ninth Circuit's analysis is flawed both because it ignores the factual circumstances surrounding passage of Proposition 8 and because it rests on the assumption that the judiciary had the authority to make the important public policy decision to change the definition of marriage. Assuming that the judiciary had the authority to engage in a legislative, public-policy making decision – which it did not have – then obviously, an amendment that restores the definition of marriage to the union of one man and one woman makes it more difficult for same-sex couples to marry than it was for them after the California Supreme Court declared a right to same-sex marriage.

The Ninth Circuit ignored the fact that the People of California began the process to pass Proposition 8 long before the California Supreme Court redefined marriage. Thus, Proposition 8 did not strip same-sex couples of any longstanding, fundamental right to marry. Prior to the California Supreme Court's May 15, 2008 decision that marriage as the union of one man and one woman was unconstitutional, the voters already had gathered 1.1 million signatures to qualify Proposition 8 for the ballot. The signatures were gathered

between November 2007, after the Attorney General issued the initiative title and summary, and April 2008, when the signatures were submitted to qualify for the ballot. Thirty-one days after the signatures were submitted for qualification, on May 15, 2008, the California Supreme Court declared unconstitutional California's definition of marriage as the union of one man and one woman.

On June 2, 2008, Proposition 8 was officially qualified for the November 2008 statewide ballot. Fourteen days later, on June 16, 2008, California began issuing marriage licenses to same-sex couples because the California Supreme Court refused to issue a stay pending the November 2008 vote on Proposition 8. On November 4, 2008, California voters approved Proposition 8 by a margin of 52% to 48% (7.0 million to 6.4 million votes), which amendment took effect on November 5, 2008.

These facts demonstrate that Proposition 8 did *not* strip a longstanding right to same-sex marriage, but rather, it amended the Constitution to reflect the longstanding definition of marriage in California and the Nation. It was the judiciary that improperly stripped the People of their right to determine

whether to make an important public policy shift in defining marriage.

Even assuming, as the Ninth Circuit concluded, that the applicable equal protection analysis changes when a right is conferred and subsequently stripped away, that different equal protection analysis is inapplicable where the *judiciary* (rather than the legislature) conferred the right by usurping the legislative prerogative to make fundamental policy shifts. Under our system of government, powers are divided among three branches, with the legislative branch delegated the authority to make public policy decisions. Courts, on the other hand, "do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *U.S. v. Rutherford*, 442 U.S. 544, 555 (1979). The People of California, therefore, course-corrected the misstep taken by the judiciary when it rewrote California's marriage laws consistent with its own conception of how marriage should be defined.

As the Utah Supreme Court stated when it refused to redefine parentage to include two mothers,

> As a general rule, making social policy is a job for the

> Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another. The responsibility for drawing lines in a society as complex as ours – of identifying priorities, weighing the relevant considerations and choosing between competing alternatives – is the Legislature's, not the judiciary.

Jones v. Barlow, 2007 UT 20, ¶ 34, 154 P.3d 808, 817 (2007). The rationale for leaving the decision to the legislature reflects the unique role played by that governmental branch.

> Courts are unable to fully investigate the ramifications of social policies and cannot gauge or build the public consensus necessary to effectively implement them. Unlike the legislature, which may craft a comprehensive scheme for resolving future cases and then may repeal or amend it at any time should

> it prove unworkable, courts are not agile in developing social policy. If we miscalculate in legislating social policy, the harm may not be corrected until an appropriate case wends its way through the system and arrives before us once again.

2007 UT 20, ¶¶ 35-36, 154 P.3d at 817.

In 2008, the California Supreme Court fundamentally redefined marriage, which definition the people restored through Proposition 8. The courts below overstepped their authority and substituted their judgment for that of California's electorate when the courts concluded that it was unconstitutional for the California electorate to undo the far-reaching public policy shift made by the California Supreme Court.

E. Proposition 8 was not passed based on a bare desire to harm a specific group of people.

Faced with a record replete with facts that Proposition 8 was not passed because of animus, the Ninth Circuit remarkably concluded that Proposition 8 lacked a legitimate purpose and was

based on mere disapproval of same-sex marriage. 671 F.3d at 1093. The Court ignored the fact that many people, including prominent supporters of gay and lesbian rights, and even many gay and lesbian individuals, oppose recognizing same-sex relationships as marriages for legitimate reasons that have nothing to do with animus against gays and lesbians.

For example, some prominent homosexual rights advocates oppose same-sex marriage because the long-term monogamous relationship model is antithetical to their cause. DIX1032 at 118-124, Paula Ettelbrick, former director of Lambda Legal, *Since When Is Marriage a Path to Liberation?*, Out/Look, Fall 1989 reprinted in SAME SEX MARRIAGE: PRO AND CON, A READER (Andrew Sullivan, ed., 1997) ("marriage will not liberate us as lesbians and gay men. In fact, it will *constrain us*, make us more invisible, *force our assimilation* into the mainstream, and undermine the goals of gay liberation. . . . *Marriage runs contrary to two of the primary goals of the lesbian and gay movement*: the affirmation of gay identity and culture and the validation of many forms of relationships. . . . The moment we argue, as some among us insist on

doing, that we should be treated as equals because we are really just like married couples and hold the same values to be true, *we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices*" (emphasis added)); DIX1032 at 141, Evan Wolfson, *Crossing the Threshold*, 3 Rev. L. & Social Change (1994-1995) reprinted in SAME SEX MARRIAGE: PRO AND CON, A READER (Andrew Sullivan, ed., 1997) (Nancy Polikoff contends: "[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that *betrays the promise of both lesbian and gay liberation and radical feminism*" (emphasis added)).

The idea of marriage as a monogamous relationship is itself antithetical to the type of relationship sought by some same-sex marriage advocates. DIX1032 at 140, Camille Paglia, *Connubial Personae*, 10 Percent, May-June 1995 reprinted in SAME SEX MARRIAGE: PRO AND CON, A READER (Andrew Sullivan, ed., 1997) ("My experience is that gay men's idea of marriage or any kind of relationship is rather open. . . . Gay men—they're

'together for thirty years': what does that mean? *That means they go out and pick up strangers every two weeks*. That's a very sophisticated view of marriage. Lesbians aren't like that. Lesbians nest in one big cinnamon bun where they fuse and it's all very sweet and nice. I like the idea of marriage, but I'm not sure that gay relationships have been tested over time. If we can't convince each other about it, I don't know how we're going to convince the greater world." (emphasis added)).

The different notions of what marriage is might explain why there is evidence based on a study of same-sex couples in the Netherlands that *same-sex couples do not want to assimilate into the traditional vision of marriage as a long-term monogamous relationship*. Only 8,000 same-sex couples out of an estimated 53,000 couples chose to marry in the Netherlands, with another approximately 10% registered as domestic partners. In total, "only about 25% of same-sex couples are in a legally recognized relationship, as opposed to 80% of Dutch heterosexual couples." Similar numbers exist in other countries where same-sex couples can choose to marry. PX1273 at 16, M.V. LEE BADGETT, WHEN GAY PEOPLE GET

MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE (2009); Jan. 15, 2010 Tr. of Hr'g at 1246:19-24 (Zia) ("To some gay rights activists, fighting for same-sex marriage is too petty [bourgeois], too much about the nuclear family, cocooning, property rights, and all the bad patriarchal things that marriage stands for.").

Advocates for extending marriage to same-sex couples recognize (and many celebrate) that redefining marriage to include same-sex couples would radically alter the institution of marriage. Preventing this radical redefinition, with its necessary societal ramifications, is a reason for supporting Proposition 8 that has nothing to do with animus. *See* DIX1032 at xxvi, Preface, SAME SEX MARRIAGE: PRO AND CON, A READER (Andrew Sullivan, ed., 1997) ("there is the common belief that to grant this right to the homosexual population would be to fatally undermine the meaning of the society to which those citizens belong"); PX2342 at 19, William N. Eskridge & Darren R. Spedale, *Gay Marriage: For Better or For Worse? What We've Learned from the Evidence* (2006) ("marriage may be unattractive and even oppressive as it is currently structured

and practiced, but enlarging the concept to embrace same-sex couples would necessarily transform it into something new.").

Given the far-reaching consequences of redefining marriage, many advocates for extending marriage to same-sex couples recognize the wisdom in taking a cautious approach to making such a significant change to the institution of marriage. *See* DIX1035 at 3, David Masci, *An Argument for Same-Sex Marriage* (2008) ("But to my great gratitude – and I think it's almost inspirational how right the country has gotten this – the public has refused to be rushed. The public has come to understand that we can take our time with this. And the way to do this is let different states do different things. *Let's find out how gay marriage works in a few states. Let's find out how civil unions work. In the meantime, let the other states hold back*." (emphasis added)); Jan. 19, 2010 Tr. of Hr'g at 1456:8-1457:4 (Badgett) (" 'Some in the gay community argue that change is happening too fast to avoid political backlash and that creating alternatives to marriage, both for same-sex couples and for other family [forms], might be a better way to go.' Now, you obviously don't agree with that,

right? A: No, I don't agree with that either. Q: But you believe that that view is a reasonable one to hold? A: It's one that people offer and that we talk about.").

Many gays and lesbians recognize that same-sex relationships and opposite-sex relationships differ in important ways. And thus, it follows that treating different things differently is not a product of animus. *See* DIX1032 at 132-134, Frank Browning, Why Marry?, N.Y. Times, Apr. 17, 1996 reprinted in SAME SEX MARRIAGE: PRO AND CON, A READER (Andrew Sullivan, ed., 1997) ("By rushing to embrace the standard marriage contract, *we could stifle one of the richest and most creative laboratories of family experience*. . . . We may love our mates one at a time, but our 'primary families' are often our ex-lovers and our ex-lovers' ex-lovers. . . . In a gay family, there are often three parents— a lesbian couple, say, and the biological father. . . . a marriage between two might bring second-class status to the rest of the extended family and diminish their parental roles" (emphasis added)); DIX1434 at 1536-37, Nancy D. Polikoff, We Will Get What We Asked For (1993) ("The only argument that has ever tempted me to support efforts to obtain

lesbian and gay marriage is the contention *that marriages between two men or two women would inherently transform the institution of marriage for all people*" (emphasis added)); PX1273 at 95, M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE (2009) ("On one hand, most of the married and unmarried male couples I spoke with were not monogamous, and some distinguished their norms related to monogamy from those attached to traditional marriage."); Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. Times, Jan. 28, 2010, *available at* http://www.nytimes.com/2010/01/29/us/29sfmetro.html?ref=us ("A study to be released next month is offering a rare glimpse inside gay relationships and reveals that monogamy is not a central feature for many. … None of this is news in the gay community." (emphasis added)).

The courts below had ample evidence of legitimate reasons for continuing to define marriage as the union of one man and one woman, yet flatly rejected them. At their core, the decisions below reflect a vision for

marriage different than that held by the overwhelming majority of states that have defined marriage as one man and one woman. Although "[m]en and women of good conscience can disagree" and perhaps will always disagree about the profound societal and moral implications of fundamentally redefining the core building block of any society – marriage – the courts below were wrong to declare California's marriage laws unconstitutional because those courts have a different vision of marriage. *Cf. Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992) (explaining that the Court's role is not to make such policy decisions based on its notions of morality).

California's decision to retain the longstanding definition of marriage that transcends state, and even, national boundaries, was not, as the courts below erroneously held, based on animus. Because the Ninth Circuit refused to even credit the justifications offered, it should be reversed.

II. This Court Should Resist Any Effort to Treat Sexual Orientation as a Suspect Classification.

Although the Ninth Circuit did not classify sexual orientation as a suspect classification, the district court did. This Court should refuse to classify sexual orientation as a suspect classification. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010). "[A] classification neither involving a fundamental right nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). This strong presumption reveals that legislative classifications "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate government purpose." *Id.* Regardless of how the courts below believe marriage should be defined, Proposition 8 "must be upheld against an equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification*." *F.C.C. v. Beach Commc'n, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added).

"[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor

proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Rational basis review is also consistent with the level of scrutiny that this Court has applied to legislative classifications on the basis of sexual orientation. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

Proposition 8 does not discriminate against a suspect class. This Court long ago articulated the classic test for determining whether a statute discriminates against a suspect class. It requires a showing that the statute (1) burdens a fundamental right; (2) burdens democratic process; (3) discriminates on the basis of race, religion, or nationality; or if (4) prevailing prejudice against a discrete and insular minority curtails that minority's ability to take advantage of the political system. *United States v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938).

Despite the long history of this test, this Court has only identified three suspect classifications: racial status, national ancestry and ethnic origin, and alienage. *See Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). This Court has never treated sexual orientation as a suspect class, and it

should not do so now. Proposition 8 does not infringe upon any fundamental right, because there is no fundamental right to same-sex marriage. *See Washington v. Glucksberg*, 521 U.S. 702, 720, 721 (1997) (noting that fundamental rights are only those that are deeply rooted in the Nation's history and traditions and that are implicit in the concept of ordered liberty); *Baker v. Nelson,* 409 U.S. 810 (1972) (dismissing for want of a substantial federal question a challenge to the definition of marriage as the union of one man and one woman).

No one can assert that there is a fundamental right to marry a member of the same-sex as it is not deeply rooted in the history of the Nation nor is it implicit in the concept of ordered liberty. "Until a few decades ago, it was an accepted truth for almost everyone that ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

Nor can sexual orientation be classified as a suspect classification under this Court's precedents. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). In *City of Cleburne*, this Court articulated the test for determining

whether a statute discriminates against a quasi-suspect class, which requires that (1) the statute bears no relation to the group's ability to contribute to society; (2) there remains widespread prejudice against the group; (3) the group is presently shut out of the political process; and (4) the statute discriminates on the basis of an immutable characteristic. *Id.* at 440-45.[3] Similar to that of suspect classifications, this Court has only found a quasi-suspect classification in two instances: gender and illegitimacy. *Woodward*, 871 F.2d at 1076. This Court should follow its precedent and resist expanding the list of classifications deemed quasi-suspect to include sexual orientation.

Significantly, sexual orientation, unlike gender or race, is not "an immutable characteristic determined solely by accident at birth." *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1986). "Members of recognized suspect or quasi-suspect classes . . . exhibit immutable

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[3] The *Cleburne* test builds on the fourth category identified in *Carolene Products* – whether there is prevailing prejudice against a discrete and insular minority that curtails the minority's ability to take advantage of the political system.

characteristics, whereas homosexuality is primarily behavioral in nature." *Woodward*, 871 F.2d at 1076 (emphasis added). Although scientists have studied homosexuality for many years, there is still no universally accepted definition of sexual orientation among professionals.

"Same-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and for some, sexual orientation identity (*i.e.*, individual or group membership and affiliation, self-labeling) is fluid or has an indefinite outcome." *See American Psychological Association, Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, vii (2009), *available at* www.apa.org/pi/lgbt/resources/therapeutic-response.pdf. Additionally, "the recent research on sexual orientation identity diversity illustrates that sexual behavior, sexual attraction, and sexual orientation identity are labeled and expressed in many different ways, some of which are fluid." *Id.* at 14. If homosexuality is properly understood as a behavior or lifestyle choice, and is well-recognized as fluid and developing, then certainly it cannot be said to be immutable.

Proposition 8 also does not discriminate in a manner with no relation to one's ability to contribute to society. By continuing to define marriage as the union of one man and one woman, Californians were attempting to preserve the longstanding understanding that marriage and biological procreation are connected. Certainly, those involved in same-sex sexual conduct "cannot procreate simply by joinder of their different sexual being." *Windsor v. United States*, 699 F.3d 169, 199 (2d Cir. 2012) (Straub, J., dissenting). While the details of marriage in a particular culture varies considerably, it always has something to do with public recognition of the sexual union between a man and a woman for the purpose of ensuring that children have both a mother and a father and that society has the next generation it needs.

Numerous courts also have recognized that the state purpose of furthering procreation where both parents are present to raise the child is at least rational, if not compelling. *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982) ("state has a compelling interest in encouraging and fostering procreation of the race"); *Baker v. Nelson*,

191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed for want of a substantial federal question, 409 U.S. 810 (1972) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis").

Essentially, the law presumes that a marriage will produce children. That childbearing opportunities inherent in the male/female marital union are occasionally unrealized (*i.e.,* exceptions to the general pattern) does nothing to undermine the basis for the rule of recognition of the special status of traditional marriage. By affirming a particular kind of relationship as the social ideal, the state attempts to both discourage unmarried childbearing and to encourage sufficient childbearing within marriage to reproduce the population. Even this Court has recognized that marriage plays an important role in "assuring that a biological parent-child relationship exists." *Nguyen v. I.N.S.*, 533 U.S. 53, 62 (2001). The California voters' attempt to encourage that relationship, even while affording same-sex couples broad protections, does bear on homosexuals' ability to contribute to the traditional

biological parent-child relationship and is not merely intended to discriminate against them without cause.

Not only does Proposition 8 further the state's interest in steering childrearing into the husband-wife marriage model, but it furthers the important interest in providing male and female role models in the family. Male gender identity and female gender identity are each uniquely important to a child's development. As a result, one very significant justification for defining marriage as the union of a man and a woman is because children need a mother and a father. We live in a world demarcated by two genders, male and female. There is no third or intermediate category. Sex is binary. By striking down Proposition 8, this Court will be making a powerful statement: our government no longer believes children deserve mothers and fathers. In effect, it would be saying: "Two fathers or two mothers are not only just as good as a mother and a father, they are just the same."

The government promotion of this idea will likely have some effect even on people who are currently married, who have been raised in a particular culture of marriage. But this new idea of marriage, sanctioned by law and

government, will certainly have a dramatic effect as the next generation's attitudes toward marriage, childbearing, and the importance of mothers and fathers are formed. By destroying the traditional definition of marriage, the family structure will be dramatically transformed. Many boys will grow up without any positive male influence in their lives to show them what it means to be a man, and many girls will grow up without any female influence to show them what it means to be a lady.

The repercussions of this are incalculable and will reshape the culture in which we live. Many children learn appropriate gender roles by having interaction with both their mother and their father and by seeing their mother and father interact together with one another. By redefining marriage to state that this is not a family structure that the state wants to foster and encourage, this Court will be overturning centuries of historical understandings of the family and the home.

"[C]hildren appear most apt to succeed as adults—on multiple counts and across a variety of domains—when they spend their entire childhood with their married mother and father." Mark Regnerus, *How Different are the Adult*

Children of Parents Who Have Same-sex Relationships? Findings from the New Family Structures Study, 41 Social Science Research 752, 766 (2012). Indeed, in this study, participants raised in same-sex households were more likely to fare worse on educational attainment, mental health needs, and economic stability. *Id.* at 763-64. "When compared with children who grew up in biologically intact, mother-father families, the children of women who reported a same-sex relationship look markedly different on numerous outcomes, including many that obviously suboptimal (such as education, depression, employment status, or marijuana use)." *Id.* at 764 (emphasis added).

Regnerus concluded, based on the only large representative sample study to date that controlled for external variables, that the reason for the significant differences between children raised in traditional one man and one woman families as compared to homosexual parent families "is located not simply in parental sexual orientation but in successful cross-sex relationship role modeling, or its absence or scarcity." *Id.* at 763. This study provides additional support for California's legitimate

interest in defining marriage as it did in Proposition 8.

In fact, even many involved in homosexuality recognize the need for and the importance of children having both a mother and a father present in the home. *See* Wendy Wright, *French Homosexuals Join Demonstration Against Gay Marriage*, Catholic Family & Human Rights Institute (Jan. 17, 2013), *available at* www.c-fam.org/fridayfax/volume-15/French-homosexuals-join-demonstration-against-gay-marriage.html. A prominent French politician, who also identifies as a homosexual, protested France's proposed same-sex marriage bill, stating that "[t]he rights *of* children trump the right *to* children." *Id.* (emphasis added). What he meant was that children deserve to be raised in a home with both a mother and a father, and he did not believe that same-sex marriage fostered this important and historical tradition.

Another prominent spokesman against the French same-sex marriage bill, who identifies as a homosexual, stated that he was raised by two women and that "he suffered from the lack of a father, a daily presence, a character and a properly masculine example." *Id.* Obviously, when individuals raised in homes lacking the traditional and

necessary components of a mother and a father recognize that it caused them harm, California has a legitimate interest in fostering familial relationships that promote the beneficial role of the traditional family. Indeed, one man stated that permitting same-sex marriage would be "institutionalizing a situation that had scarred him considerably." *Id.* Given these reports, and the countless other examples that Regnerus reported in his study, the California electorate certainly had a legitimate interest in maintaining the traditional definition of marriage as between one man and one woman.

Rational basis review is "a paradigm of judicial restraint." *FCC v. Beach Commc'ns*, 508 U.S. 307, 314 (1993). Significantly, this Court has noted that when "there are *plausible* reasons for Congress' action, our inquiry is at its end." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (emphasis added). Under this extraordinarily deferential standard, Proposition 8 must be upheld unless those opposing the amendment have satisfied their "burden to negative every conceivable basis which might support it." *Beach Commc'ns*, 508 U.S. at 315. That burden has not been met.

Indeed, this Court has long understood the importance of the marriage union as between one man and one woman. *See Murphy v. Ramsey*, 114 U.S. 15 (1885). In affirming Congress' definition of marriage to exclude polygamists and bigamists, this Court explained:

> For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, *as consisting in and springing from the union for life of one man and one woman* in the holy estate of matrimony; *the sure foundation of all that is stable and noble in our civilization*; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are

> practically hostile to its attainment.

Id. at 45 (emphasis added).

Thus, this Court specifically affirmed Congress' authority to disenfranchise polygamists and bigamists because those relationships were inconsistent with the longstanding common law meaning of marriage as the union of one man and one woman. Based on this rationale, California certainly has the authority to define marriage consistent with that same longstanding definition, which, unlike Amendment 2 in *Romer*, does not have the dramatic effect of disenfranchising any voters.

This Court has affirmed the longstanding definition of marriage in other cases as well. For example, in 1888, this Court described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). In *Reynolds v. United States*, 98 U.S. 145, 166 (1878), the Court acknowledged that the legal redefinition of marriage (in the context of polygamy) would significantly impact the social structure of the nation, emphasizing the authority of the legislature to choose one form of marriage over another: "there cannot be a doubt

that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Reynolds*, 98 U.S. at 166.

The cultural significance of redefining marriage is not limited to the context of polygamy. Throughout the history of Western civilization, and certainly since the founding of the United States more than 200 years ago, the marriage-based familial structure has provided the basis of civil society, as parents infuse their own children with the education, values, and training necessary for continued self-government. Marriage is a normative social institution; it is *not* primarily a way of expressing approval for infinite variety of human affectional or sexual ties. Rather, it consists, by definition, of isolating and preferring certain types of unions over others. By socially defining and supporting a particular kind of sexual union, the state defines for its young—as it is constitutionally entitled to do—what the preferred relationship is and what purposes it serves.

Declaring marriage as the union of one man and one woman as being no

different than any other type of sexual coupling will have negative, societal consequences. Marriage is distinguished from other kinds of relationships by law and government as well as society because it is not merely a private, individual good, but a public, common good. Even people who do not marry depend on a healthy marriage culture in order to carry society into the next generation. Many courts continue to articulate this public understanding of marriage. *See, e.g., Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

When the traditional definition of marriage as that between one man and one woman is reversed to include other marriages, the state is left with little, if any, justification for other laws restricting marriage. For example, some might argue that larger family groups (of 3 or more adults) would provide an even stronger private support network than the two-adult model. Or, marriage between certain close relatives would minimize the number of legal heirs, potentially minimizing disputes over property distribution upon death. At a minimum, there is nothing inherent in polygamous or certain incestuous

relationships (*e.g.*, consenting adults who are related, but not by blood) that makes those unions less worthy of state recognition under such criteria.

Ultimately, there is no principled basis for recognizing a legality of same-sex marriage without simultaneously providing a basis for the legality of consensual polygamy or certain adult incestuous relationships. In fact, every argument for same-sex marriage is an argument for them as well.

At its core, the Ninth Circuit erred when it dawned its superlegislature regalia and substituted its judgment for that of the People of California who have the authority to define marriage in a manner consistent with the history and traditions of California and of this Nation. Respondents simply cannot satisfy their burden to defeat every conceivable or plausible justification for continuing to define marriage as the union of one man and one woman.

In sum, the California voters could have rationally concluded that marriage is society's way of recognizing that the sexual union of one man and one woman is unique, and that government needs to regulate and support this union for the benefit of society and its children, or that despite the personal fulfillment of

intimate adult relationships, marriage laws are not primarily about adult needs for approbation and support, but about the well-being of children and society. As a result, Proposition 8 is constitutional.

Conclusion

Amici respectfully request that this Court reverse the decision below and hold that Proposition 8 is constitutional.

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