No. 10-16696

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTIN PERRY, ET AL.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervener-Appellee,

v.

ARNOLD SCHWARZENEGGER, ET AL.,

Defendants,

DENNIS HOLLINGSWORTH, ET AL.,

Defendant-Intervenors-Appellants.

On Appeal from the United States District Court for the Northern District of California

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

OTHER AUTHORITIES

INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. The ACLJ believes that marriage inherently consists of the conjugal union of one man and one woman and that attempts to redefine that institution strike at the heart of this fundamental unit of society.

This brief is being filed with the consent of the parties.

ARGUMENT

I. LIMITING MARRIAGE TO THE UNION OF A MAN AND A WOMAN IS RATIONAL.

It is rational for a state to recognize that different things are different. The district court therefore erred when it held that Proposition 8, limiting marriage to the union of a man and a woman, "fails to advance any rational basis," *Perry v. Schwarzenegger*, No. C 09-2292, slip op. at 135 (N.D. Cal. Aug. 4, 2010) (ER 170).

There is a basic difference between a heterosexual marriage and any other kind of sexual union. Only a man and a woman have the inherent, categorical capacity (even if disabled in particular cases) to engage in genital intercourse of the type that can procreate. A union of man and man, or of woman and woman, by contrast, lacking sexual

complementarity, is inherently, categorically incapable of consummating a marriage[1] and generating children.

It is not irrational for a state to notice this categorical difference. Nor is it irrational for a state to act upon it by formally recognizing man-woman unions, but not others, as the kind of union which can constitute a marriage. In constitutional terms, treating dissimilar things differently is not a denial of equal protection. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (internal quotation marks and citations omitted). Likewise, declining to jettison the concept of marriage, in order to assign the label "marriage" to something inherently, categorically different, is not a denial of due process. *See Washington v. Glucksberg*, 521 U.S. 702, 711 (1997) (rejecting due process challenge to ban on assisted suicide where ban reflected "enduring themes of our philosophical, legal, and cultural heritages").

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[1] George & Bradley, *Marriage and the Liberal Imagination*, 84 Geo. L.J. 301, 308 (1995) ("This requirement [consummation] for the validity of a marriage, where in force, has never been treated as satisfied by an act of sodomy, no matter how pleasurable. Nothing less (or more) than an act of genital union consummates a marriage") (footnotes omitted).

The district court sought to downplay the inherent, categorical difference between male-female unions and other unions by stating that only "some" opposite-sex couples "are capable through sexual intercourse of producing . . . offspring," slip op. at 122 (ER 157). This is like saying only "some" people have two arms or only "some" birds can fly. The existence of exceptions does not negate the categorical validity of the rule.

The Constitution does not compel states to legislate for the exceptions to a rule so much as for the rule itself. Otherwise, the age-of-consent laws for marriage in various states would be unconstitutional, as surely there are those under the pertinent ages who possess sufficient maturity, and those over the pertinent ages who lack maturity.

In the case of Proposition 8, the line drawn is far less arbitrary than in the case of an age-of-consent law, as the entire category of same-sex couples is inherently incapable of a bodily sexual union that is procreative.

Thus, the district court's focus, slip op. at 60, 111 (ER 95, 146), upon the failure of states to screen would-be married couples, on a case-by-case basis, for procreative capacity, is irrelevant. Leaving aside the practical impossibility and tyrannically invasive nature of such fertility inquiries

(themselves sufficient reasons for not conducting them), the state is entitled to rely upon the categorical physiological norm, just as it does with age-of-consent laws.

The district court saw no reason "why the government may need to take account of fertility when legislating." Slip op. at 122 (ER 157). This assertion is facially absurd, equivalent to saying that procreation and demographics are of no concern to the state.

Marriage, then, is not "an artifact of a foregone notion that men and women fulfill different roles in civic life," slip op. at 124 (ER 159), but rather a sober reflection of the biological reality that male and female humans, while equal in dignity, are in fact different in physical ways that have procreative significance.[2]

Indeed, what plaintiffs-appellees seek is not so much marriage, as

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[2] The district court's assertion that marriage as an opposite-sex arrangement "arose" out of legally enforced gender roles, slip op. at 124 (ER 159), implies a preexisting world of genderless marriage. The court below identified no evidence of such a world.

the fundamental redefinition of that institution.[3] The district court, for example, redefined marriage as follows:

> Marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents.

Slip op. at 67 (ER 102) (transcript citations omitted). The court's novel and wildly overbroad redefinition would include friends or relatives who choose to live together, are committed to each other, and forms a household based upon mutual affection. But more to the point, this is a redefinition, not a restatement, of marriage. Leaving "[r]elative gender composition aside," slip op. at 113 (ER 148), to equate same-sex and opposite-sex couples, is like leaving origin and authorship aside when comparing genuine money or artwork with counterfeits. The district court simply read out of the equation, as if it were meaningless, precisely the crucial factor of gender complementarity.

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[3] This case is thus entirely unlike *Loving v. Virginia*, 388 U.S. 1 (1967). Ethnic or racial labels do not affect sexual complementary or prevent either consummation of a marriage or procreation. The ban on miscegenation in *Loving* had nothing to do with marriage and everything to do with notions of racial "purity."

The decision below must be reversed.

II. MORALITY IS A LEGITIMATE BASIS FOR LEGISLATION.

The Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), did not abolish the legitimacy of morality as a state interest. Indeed, to have done so would have been both revolutionary and destructive, as morality has long been recognized as a basis for law, and countless laws today rest upon morality. The district court therefore erred in dismissing moral considerations out of hand. Slip op. at 8, 132 (ER 43, 167).

The Founders and their contemporaries remarked upon the validity, indeed the essentiality, of morality to the American Experiment:

- "[T]he solid foundation of morals [is] the best security for the duration of free governments." Letter from Charles Carroll to James McHenry of November 4, 1800, *in* Bernard C. Steiner, *The Life and Correspondence of James McHenry* 475 (1907)
- "[I]t is religion and morality alone which can establish the principles upon which freedom can securely stand. The only foundation of a free constitution is pure virtue." Letter from John Adams to Zabdiel

Adams (June 21, 1776), *in* 9 *The Works of John Adams, Second President of the United States: with a Life of the Author, Notes and Illustrations, 1799-1811* 401 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854)

- "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." John Adams, To the Officers of the First Brigade of the Third Division of the Militia of Massachusetts October 11, 1798, *in* 9 *The Works of John Adams, Second President of the United States*, *supra,* at 229
- "It is certainly true that a popular government cannot flourish without virtue in the people." Richard Henry Lee, Letter to Colonel Mortin Pickett on March 5, 1786, *in* 2 *The Letters of Richard Henry Lee* 411 (James Curtis Ballagh, ed., 1914)
- "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labour to

subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connexions with private and public felicity. . . . It is substantially true, that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric?" George Washington, The Farewell Address of George Washington (Sept. 17, 1796), *in Gateway Series of English Texts* 36 (Frank W. Pine ed., 1911).

- "[I]f we and our posterity reject religious instruction and authority, violate the rules of eternal justice, trifle with the injunctions of morality, and recklessly destroy the political constitution which holds us together, no man can tell how sudden a catastrophe may overwhelm us that shall bury all our glory in profound obscurity." Daniel Webster, The Dignity and Importance of History (Feb. 23, 1852), *in* 13 *The Writings and Speeches of Daniel Webster* 492-93

(JW McIntire ed., 1903)

- "[M]orality is the best security of law and the surest pledge of freedom." Alexis de Tocqueville, *Democracy in America* 35 (George Adlard ed., Henry Reeves trans., Scatcherd and Adams, 2d ed. 1838).

The Supreme Court and its members have long recognized as black-letter law the securing of health, safety, and *morals* as the traditional scope of sovereign police powers. "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991) (plurality opinion of Rehnquist, C.J., joined by O'Connor & Kennedy, JJ.). *See also id.* at 575 (Scalia, J., concurring) (providing as examples of morals legislation bans on "sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and [pre-*Lawrence*] sodomy" and noting that "absent specific constitutional protection for the conduct involved, the Constitution does not prohibit [such laws] simply because they regulate 'morality'"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 530 (1981) (Brennan, J., joined by Blackmun, J., concurring in judgment) (noting "more

traditional health, safety, morals, or welfare justification" for laws, as opposed to mere "aesthetics"); *Poe v. Ullman*, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting) ("provision for the health, safety, morals or welfare of its people" is "inherent" power of sovereignty); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) ("social organization . . . requires the protection of law against the evils which menace the health, safety, morals and welfare of the people"); *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919) (per Holmes, J.) (upholding restriction "in the interest of the safety, morality, health and decency of the community") (internal quotation marks and citation omitted); *Holden v. Hardy*, 169 U.S 366, 392 (1898) ("the police power . . . may be lawfully resorted to for the purpose of preserving the public health, safety or morals").

The *Lawrence* Court by no means purported to overrule this longstanding legal axiom. *Lawrence*, of course, expressly distinguished the question currently before this court, saying that the *Lawrence* case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," 539 U.S. at

578. On the question of morality, the *Lawrence* Court held that the traditional moral "condemn[ation of] homosexual conduct" did not justify "enforce[ment of] these views on the whole society through operation of the criminal law." *Id.* at 571. This is a context-specific holding that pursuit of morality does not warrant criminal prohibition of same-sex sodomy. That holding does not translate into a wholesale repudiation of morals as a basis for legal enactments.

Indeed, if morality were no longer a legitimate basis for legislation, a plethora of laws would fall. *See*, *e.g.*, *United States v. Extreme Associates*, 352 F. Supp. 2d 578, 593 (W.D. Pa. 2005) (holding that "[a]fter *Lawrence*, . . . upholding the public sense of morality is not even a legitimate state interest" as to "sexual conduct in private" and invalidating federal obscenity statutes), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006). Minimum wage laws, intellectual property laws, legal and medical ethics codes, anti-discrimination laws, defamation laws, evidentiary privileges, animal cruelty laws -- the list of morals-based enactments goes on and on.

In fact, the Supreme Court has already specifically placed marriage

laws within the ambit of state legislative power by reason of, *inter alia*, the connection between marriage and morality:

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people then any other institution, has always been subject to the control of the legislature.

Maynard v. Hill, 125 U.S. 190, 205 (1888).

To the extent that Proposition 8 is one more example in the very large collection of laws reflecting moral judgments, it is not on that account constitutionally defective.

The decision below must be reversed.

CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully submitted,

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September 24, 2010

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