No. 10-16696

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,
***Plaintiffs-Appellees*,**
v.
ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, et al.,
***Defendants*,**
and
DENNIS HOLLINGSWORTH, et al.,
***Defendants-Intervenors-Appellants*.**

Appeal from United States District Court
for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

BRIEF OF STATES OF INDIANA, VIRGINIA, LOUISIANA, MICHIGAN, ALABAMA, ALASKA, FLORIDA, IDAHO, NEBRASKA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, and WYOMING AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-INTERVENORS-APPELLANTS DENNIS HOLLINGSWORTH, et al. AND IN SUPPORT OF REVERSAL

GREGORY F. ZOELLER, ATTORNEY GENERAL
Thomas M. Fisher, Solicitor General
Ellen H. Meilaender, Deputy A.G.
Office of Attorney General
302 W. Washington Street, 5th Floor
Indianapolis, Indiana 46204
(317) 232-6255; (317) 232-7979 (fax)

KENNETH T. CUCCINELLI, II, ATTORNEY GENERAL
E. Duncan Getchell, Solicitor General
Stephen McCullough, Deputy S.G.
Office of the Attorney General
900 E Main Street
Richmond, Virginia 23219
(804) 786-2436; (804) 786-1991 (fax)

MICHAEL A. COX, ATTORNEY GENERAL
Eric Restuccia, Solicitor General
Office of the Attorney General
525 W. Ottawa, Fourth Floor
Lansing, Michigan 48913
(517) 373-1124; (517) 373-4916 (fax)

JAMES D. CALDWELL, ATTORNEY GENERAL
Kyle Duncan, Appellate Chief
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804-9005
(225) 326-6716; (225) 326-6096 (fax)

Counsel for Amici States
Additional counsel listed inside cover

ADDITIONAL COUNSEL

TROY KING
ATTORNEY GENERAL
STATE OF ALABAMA

DANIEL S. SULLIVAN
ATTORNEY GENERAL
STATE OF ALASKA

BILL MCCOLLUM
ATTORNEY GENERAL
STATE OF FLORIDA

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

JON BRUNING
ATTORNEY GENERAL
STATE OF NEBRASKA

THOMAS W. CORBETT, JR.
ATTORNEY GENERAL
COMMONWEALTH OF
PENNSYLVANIA

HENRY MCMASTER
ATTORNEY GENERAL
STATE OF SOUTH CAROLINA

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH

BRUCE A. SALZBURG
ATTORNEY GENERAL
STATE OF WYOMING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF THE *AMICI* STATES

The amici States file this amicus brief in support of intervenors-appellants Dennis Hollingsworth et al. as a matter of right pursuant to Fed. R. App. P. 29(a).

The overwhelming majority of States – forty-five in all – either by constitutional amendment or by statute, limit marriage to the union of one man and one woman, consistent with the historical definition of marriage.[1] The *amici* states have an interest in protecting the ability of

---

[1] Twenty nine States have done so by constitutional amendment: Alabama (Ala. Const. art. I, § 36.03); Alaska (Alaska Const. art. 1, § 25); Arizona (Ariz. Const. art. 30, § 1); Arkansas (Ark. Const. amend. 83, § 1); California (Calif. Const. art. 1, § 7.5); Colorado (Colo. Const. art. 2, § 31); Florida (Fla. Const. art. 1, § 27); Georgia (Ga. Const. art. 1, § 4, ¶ I); Idaho (Idaho Const. art. III, § 28); Kansas (Kan. Const. art. 15, § 16); Kentucky (Ky. Const. § 233A); Louisiana (La. Const. art. XII, § 15); Michigan (Mich. Const. art. I, § 25); Mississippi (Miss. Const. art. 14, § 263A); Missouri (Mo. Const. art. I, § 33); Montana (Mont. Const. art. XIII, § 7); Nebraska (Neb. Const. art. I, § 29); Nevada (Nev. Const. art. I, § 21); North Dakota (N.D. Const. art. XI, § 28); Ohio (Ohio Const. art. XV, § 11); Oklahoma (Okla. Const. art. 2, § 35); Oregon (Or. Const. art. XV, § 5a); South Carolina (S.C. Const. art. XVII, § 15); South Dakota (S.D. Const. art. XXI, § 9); Tennessee (Tenn. Const. art. XI, § 18); Texas (Tex. Const. art. 1, § 32); Utah (Utah Const. art. 1, § 29); Virginia (Va. Const. art. I, § 15-A); Wisconsin (Wisc. Const. art. XIII, § 13). Another twelve States restrict marriage to the union of a man and a woman by statute: Delaware (Del. Code Ann. tit. 13, § 101(a) & (d)); Hawai'i (Haw. Rev. Stat. § 572-1); Illinois (750 Ill. Comp. Stat. 5/201, 212, 213.1); Indiana (Ind. Code § 31-11-1-1); Maine (Me. Rev. Stat. Ann. tit. 19, §§ 650, 701); Maryland (Md. Code Ann. Fam. Law § 2-201); Minnesota

all states to define marriage pursuant to political debate and action through the democratic process – whether by legislative enactment or by citizen referendum.

ARGUMENT

I. States Have Sovereign Primacy Over Marriage.

The district court held that the Constitution requires legal marriage to include same-sex couples. The court not only misread the Constitution, *see infra* part IV, it exceeded its judicial authority. A federal court's *fiat* cannot reorder this foundational legal and social institution whose superintendence has, since the beginning of our nation, been entrusted to the people acting through state governments.

The Supreme Court has long recognized that authority over the institution of marriage lies with the states. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("'The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens

---

(Minn. Stat. § 517.03); North Carolina (N.C. Gen. Stat. §§ 51-1, 51-1.2); Pennsylvania (23 Pa. Cons. Stat. Ann. § 1704); Washington (Wash. Rev. Code §§ 26.04.010, 26.04.020); West Virginia (W. Va. Code § 48-2-603); Wyoming (Wyo. Stat. Ann. § 20-1-101). Four more States have enacted marriage statutes that plainly assume the traditional opposite-sex definition of marriage. *See* N.M. Stat. §§ 40-1-1 – 40-1-7; R.I. Gen. Laws §§ 15-1-1 – 15-1-5; *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 5-6 (N.Y. 2006).

shall be created . . . .'") (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877)). This bedrock principle of federalism is no less true today than it was at the founding. As President Barack Obama has said: "I agree with most Americans, with Democrats and Republicans, . . . with over 2,000 religious leaders of all different beliefs, that decisions about marriage, as they always have, should be left to the States."[2]

Primary state authority over family law is confirmed by definite limitations on federal power. For instance, even the broadest conception of the commerce power forbids any possibility that Congress could regulate marriage. *See United States v. Lopez*, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting) (agreeing with majority that commerce power cannot extend to "regulate marriage, divorce, and child custody") (quotations omitted).

Nor can federal judicial power do what Congress cannot. For instance, in finding a lack of federal habeas jurisdiction to resolve a custody dispute, the Court long ago identified the axiom of state sovereignty that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states,

---

[2] *See* Tars Wall, *Commentary: Obama and Bush are not so far apart*, http://edition.cnn.com/ 2008/ POLITICS/10/13/wall.bush-obama/index.html.

and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). Based on the same principle, the Court has recognized that "the domestic relations exception . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). In addition to that jurisdictional exception, federal abstention is required "when a case presents 'difficult questions of state law bearing on policy problems of substantial public import . . . .'" *Id.* at 705-06 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). This is especially the case where federal judicial power threatens to undermine state determinations of marital or parental status, areas at the "core" of state sovereignty. *See id.* at 706; *id.* at 716 (Blackmun, J., concurring).

To be sure, despite their "'virtually exclusive province'" over domestic relations law, *Zablocki v. Redhail*, 434 U.S. 374, 398 (1978) (Powell, J., concurring) (quoting *Sosna*, 419 U.S. at 404), states may not employ the legal parameters of marriage to discriminate against either spouse or to perpetuate the badges of slavery. *See, e.g., Orr v. Orr*, 440 U.S. 268, 278-79 (1979); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975);

Loving v. Virginia, 388 U.S. 1, 7-12 (1967). Federal intervention was justified in cases such as *Loving* to uphold the core guarantees of the Fourteenth Amendment. *See, e.g., Loving*, 388 U.S. at 6, 11 (describing anti-miscegenation laws as "an incident to slavery" and as "measures designed to maintain White Supremacy"); *id.* at 11 (observing that "[o]ver the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality'") (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

But the Supreme Court has never countenanced the use of federal judicial power to recast the basic parameters of marriage. The notion is at war with the federalist structure of our republic. That structure is designed to allow individual states to experiment with novel social or economic arrangements, without the attendant disruption of forcing the entire nation to do so. *See, e.g., New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The people acting through their state and local governments are best situated to weigh the myriad social, cultural, moral, religious, and economic ramifications that may

follow from altering the basic marital relationship. That act of democratic self-determination cannot take place in a federal court without subverting the traditions of our people.

II. *Baker v. Nelson* Compels Reversal.

From a strictly legal perspective, this is an easy case to decide. In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), the Minnesota Supreme Court held that limiting marriage to opposite sex couples violated neither due process nor equal protection. *Id.* at 187. The United States Supreme Court dismissed the appeal for want of a substantial federal question. *Baker v. Nelson*, 409 U.S. 810 (1972). This resolution is dispositive. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Of course, "the precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.'" *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)). The jurisdictional statement in *Baker v. Nelson* was as follows:

> 1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.

> 2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
>
> 3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027). Plainly, at this stage of appellate review, *Baker v. Nelson* is dispositive. Other federal courts have so held,[3] and indeed this Court has noted in dicta *Baker's* controlling effect. *See Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982). Only the United States Supreme Court has the "prerogative . . . to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). As a consequence, "lower courts are bound by summary decisions by th[e

[3] *McConnell v. Nooner*, 547 F.2d 54, 55 (8th Cir. 1976) (*Baker* "dispositive" of claim that same sex couple entitled to increased educational benefits afforded to spouses); *Walker v. Mississippi*, Civil Action No. 3:04-cv-140LS, 2006 U.S. Dist. LEXIS 98320, at *4-6 (S.D. Miss. April 11, 2006), *adopted by* 2006 U.S. Dist. LEXIS 98187, at *4 (S.D. Miss. July 25, 2006), cert. denied, 129 S. Ct. 2437 (2009); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982); *see also Morrison v. Sadler*, 821 N.E.2d 15, 19-20 (Ind. Ct. App. 2005) (lead opinion).

Supreme] Court 'until such time as the Court informs (them) that (they) are not.'" *Hicks*, 422 U.S. at 344-45 (citation omitted).

III. No Fundamental Rights or Suspect Classes are Implicated.

A. Same sex marriage is not a fundamental right that is deeply rooted in this nation's history and tradition.

Fundamental rights are those that are "objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). A "'careful description' of the asserted fundamental liberty interest" is required, and the Supreme Court has noted that "[b]y extending constitutional protection to an asserted right or liberty interest, [courts], to a great extent, place the matter outside the arena of public debate and legislative action. [Courts] must therefore 'exercise the utmost care whenever [they] are asked to break new ground in this field . . . .'" *Id.* at 720, 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993) and *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

Marriage is a foundational and ancient social institution that predates the formation of our Nation. Until very recently, its meaning was universally understood to be limited to the union of a man and a woman. Less than a decade ago, in 2003, Massachusetts became the first State to recognize same sex marriage. It did so through a 4-3 court decision, without a majority opinion and by interpreting its *state* constitution. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). In 2008, a closely divided Supreme Court of Connecticut similarly held that its state constitution established a right of same-sex marriage. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008). A panel of the Iowa Supreme Court did so in 2009, again under the state constitution. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009). Only three state legislatures have authorized same sex marriage, Maine in 2009 and New Hampshire and Vermont in 2010.[4] *See* N.H. Rev. Stat. Ann. § 457:46; 15 V.S.A. § 8. But not all have stuck. In 2009, Maine voters repealed the statute enacted by its legislature. *See* State of Maine, Bureau of Corporations, Elections and

[4] The District of Columbia also enacted a same-sex marriage ordinance in 2009. D.C. Code § 46-401 (2009).

Commissions, "November 3, 2009 General Election Tabulations," http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html.

In any event, voters and legislatures in forty-one states have affirmatively rejected the notion of same-sex marriage, either by constitutional amendment or legislation, and voters or legislatures in four other states have left in place statutes that plainly assume the opposite-sex definition of marriage. *See supra* n.1. Thus, as in *Glucksburg*, "[t]he history of the law's treatment of [same-sex marriage] in this country has been and continues to be one of the rejection of nearly all efforts to permit it." 521 U.S. at 728. "That being the case . . . the asserted 'right' . . . is not a fundamental liberty interest protected by the Due Process Clause." *Id.*

B. Limiting marriage to the union of a man and a woman does not implicate a suspect class.

The United States Supreme Court has never held that homosexuality constitutes a suspect class, and the law in this circuit is that homosexual persons do not constitute a suspect class. *See*, *e.g.*, *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003);

Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *Meinhold v. United States Dep't of Def.*, 34 F.3d 1469, 1478 (9th Cir. 1994); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990). The same holds true in other circuits. *See* Brief of Defendant Intervenors-Appellants at 71 n.5 (collecting authorities so holding from ten other circuits).

Furthermore, neither *Lawrence v. Texas,* 539 U.S. 558 (2003), nor *Romer v. Evans*, 517 U.S. 620 (1996), supports heightened scrutiny for legislation governing marriage. *Romer* expressly applied rational basis scrutiny, 517 U.S. at 631-32, and *Lawrence* implied the same. 539 U.S. at 578. And while this Court has cited *Lawrence* when applying heightened scrutiny to the "don't ask, don't tell" policy applicable to United States Armed Forces, *Witt*, 527 F.3d at 816-17, 819, both *Witt* and *Lawrence* addressed only the legality of private sexual conduct, not lack of public endorsement by the government.

Indeed, the Court's opinion in *Lawrence* pointedly noted that the case did not involve "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."

Lawrence, 539 U.S. at 578 (majority opinion); *see also id.* at 585 (O'Connor, J., concurring) (noting that case did not involve the assertion of a legitimate state interest, such as "preserving the traditional definition of marriage"). For its part, *Romer* had nothing to do with marriage, but merely invalidated a Colorado constitutional amendment barring all state and local governments from allowing "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" to form the basis for "minority status, quota preferences, protected status or claim of discrimination." 517 U.S. at 624. Unlike the classification in *Romer*, which effected a "[s]weeping and comprehensive . . . change in [the] legal status" of homosexuals, *id.* at 627, Proposition 8 merely seeks a prospective restoration of the historical definition of marriage.

IV. The Concept of Traditional Marriage Embodied in the Laws of Forty-Five States Satisfies Rational Basis Review.

A. Rational basis standard is highly deferential.

Because Proposition 8 does not involve a fundamental right or a suspect class, it benefits from a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). Proposition 8 must be upheld "'if there is any reasonably conceivable state of facts that could provide a rational

basis for the classification.'" *Id.* at 320 (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

Of particular note, the factual findings of the district court are irrelevant because the inquiry is a legal one. "A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* (citing *Beach Commc'ns*, 508 U.S. at 315). "'[A] legislative choice *is not subject to courtroom factfinding* and may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* (quoting *Beach Commc'ns*, 508 U.S. at 315) (emphasis added).

B. The definition of marriage is too deeply embedded in our laws, history and traditions for a court to hold that the democratic choice to adhere to that definition is irrational.

The people of forty-five states, directly or through their representatives, have defined marriage in the traditional manner. In California, the traditional definition was declared unconstitutional under the state constitution by the State Supreme Court. *In re Marriage Cases*, 183 P.3d 384, 400-02 (Cal. 2008). Employing the popular sovereignty remedy of initiative, the voters of California realigned the state with the majority view.

The imbeddedness of historic marriage in our laws makes it logically impossible to say that the act of the people to commit the decision to their will and not that of the California Supreme Court is irrational. The people themselves cannot be considered irrational in deciding "that the fundamental definition of marriage, as it has universally existed until very recently, should be preserved." *Id.* at 467 (Baxter, J., dissenting in relevant part). In the same vein, the New Jersey Supreme Court observed that "[w]e cannot escape the reality that the shared societal meaning of marriage – passed down through the common law into our statutory law – has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin." *Lewis*, 908 A.2d at 222. It is not irrational for a people to conclude that "[i]f such a profound change in this ancient social institution is to occur, the People and their representatives, who represent the public conscience, should have the right, and the responsibility, to control the pace of that change through the democratic process." *In re Marriage Cases*, 183 P.3d at 467-68 (Baxter, J., dissenting in relevant part).

The people of California have a rational basis to prefer that such fundamental decisions not be made judicially under the state constitution.

C. Protecting the fundamental institution of traditional marriage from the law of unintended consequences is rational.

The traditional institution of marriage is deeply rooted in human history and social experience. That is why it is accorded the protected status of a fundamental right. *See Loving*, 388 U.S. at 12. As an institution it has served so many interlocking and mutually reinforcing public purposes that it always and everywhere in our civilization has enjoyed the protection of the law. Its benefits include optimal child raising, protecting those who undertake the long-term vulnerable roles of husbands and wives, mothers and fathers, and fostering social order.

Although the district court purported to find that same sex marriage would not weaken traditional marriage, it was not entitled to convert legislative facts into adjudicative facts. *Beach Commc'ns*, 508 U.S. at 315. Under rational basis analysis, it was reasonable for the electorate to believe that extending an essential institution by analogy to same-sex unions would further weaken an institution already

thought by many to be in a weakened state. Nor would it be irrational to conclude that such fundamental and largely untested change could produce unintended consequences. *See Goodridge*, 798 N.E.2d at 1003 n.36 (Cordy, J., dissenting) ("Concerns about . . . unintended consequences cannot be dismissed as fanciful or far-fetched. Legislative actions taken in the 1950's and 1960's in areas as widely arrayed as domestic relations law and welfare legislation have had significant unintended adverse consequences in subsequent decades including the dramatic increase in children born out of wedlock, and the destabilization of the institution of marriage.").

D. States recognize marriages between members of the opposite sex in order to encourage responsible procreation, and this rationale does not apply to same-sex couples.

Until recently, "it was an accepted truth for almost everyone who 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) (plurality opinion). Consequently, it is utterly implausible to suggest, as the legal argument for same-sex marriage necessarily implies, that states long-ago invented marriage as a tool of invidious discrimination based on sex or same-sex love interest.

Civil marriage recognition arises from the need to protect the only procreative relationship that exists, and in particular to make it more likely that unintended children, among the weakest members of society, will be cared for. Rejecting this fundamental rationale for marriage undermines the existence of *any* legitimate state interest in recognizing marriages.

1. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships.

Civil recognition of marriage historically has not been based on state interest in adult relationships in the abstract. Marriage was not born of animus against homosexuals but is predicated instead on the positive, important and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. It is no exaggeration to say that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

In short, traditional marriage protects civil society by encouraging couples to remain together to rear the children they conceive. It creates a norm where sexual activity that *can* beget children should occur in a long-term, cohabitative relationship. *See, e.g., Hernandez*, 855 N.E.2d at 7 ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."); *In re Marriage of J.B. & H.B.*, – S.W.3d –, 2010 WL 3399074, at *18 (Tex. App. Aug. 31, 2010) ("The state has a legitimate interest in promoting the raising of children in the optimal familial setting. It is reasonable for the state to conclude that the optimal familial setting for the raising of children is the household headed by an opposite-sex couple."). "[A] central and probably preeminent purpose of the civil institution of marriage (its deep logic) is to regulate the consequences of man/woman intercourse, that is, to assure to the greatest extent practically possible adequate private welfare at child-birth and thereafter." Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 47 (2004). "[M]arriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences." *Id.*

States have a strong interest in supporting and encouraging this norm. Social science research shows that children raised by both biological parents in low-conflict intact marriages are at significantly less risk for a variety of negative problems and behaviors than children raised in other family settings. "[C]hildren living with single mothers are five times more likely to be poor than children in two-parent households." Barack Obama, The Audacity of Hope: Thoughts on Reclaiming the American Dream 334 (New York: Crown Publishers 2006). Children who grow up outside of intact marriages also have higher rates of juvenile delinquency and crime, child abuse, emotional and psychological problems, suicide, and poor academic performance and behavioral problems at school. *See, e.g.*, Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 782-87 (2002); Lynn D. Wardle, *The Fall of Marital Family Stability & The Rise of Juvenile Delinquency*, 10 J.L. & Fam. Stud. 83, 89-100 (2007).

Traditional marriage is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget, which is optimal for children and society at large.

Marriage links potentially procreative sexual activity with child rearing by biological parents. Through civil recognition of marriage, society channels sexual desires capable of producing children into stable unions that will raise those children in the circumstances that have proven optimal. Gallagher, *supra*, at 781-82. This argument from design by itself suggests the traditional definition of marriage. *See* John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations,* 42 Am. J. Juris. 97, 131 (1997) ("[Marriage] is fundamentally shaped by its dynamism towards, appropriateness for, and fulfillment in, the generation, nurture, and education of children who each can only have two parents and who are fittingly the primary responsibility (and object of devotion) of those two parents.").

A related but analytically distinct point is that marriage provides the opportunity for children born within it to have a biological relationship to those with original legal responsibility for their well-being. By encouraging the biological to join with the legal, traditional marriage "increas[es] the relational commitment, complementarity, and stability needed for the long term responsibilities that result from

procreation." Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interest in Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771, 792 (2001). This ideal does not disparage the suitability of alternative arrangements where non-biological parents have legal responsibility for children. Rather, the point is that the State may rationally conclude that, all things being equal, it is better for the natural parents to also be the legal parents. *See Hernandez*, 855 N.E.2d at 7.

Traditional marriage is rooted in the acquired cultural wisdom of citizens and cannot be impeached by the opinions of a few elite experts. The traditional definition of marriage is a reflection of the community's understanding of the human person and the ideal ordering of human relationships. These are deep questions of identity and meaning that are not easily subject to measurement. Indeed, the conclusion that the ideal ordering of human relationships is one in which a child is the product of the love of father and mother is not one subject to objective verification, nor is it a conclusion based on animus toward same-sex couples.

In brief, the State may rationally reserve marriage to one man and one woman because this relationship alone provides for both intimacy and complementarity, while also enabling the married persons – in the ideal – to beget children who have a natural and legal relationship to each parent, who serve as role models of both sexes for their children.

2. Courts have long recognized the responsible procreation purpose of marriage.

From the very first legal challenges to traditional marriage, courts have refused to equate same-sex relationships with opposite-sex relationships. In *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court observed that limiting marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Id.*

This analysis is dominant in our legal system. *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Lofton v.*

Dep't of Children & Fam. Servs., 358 F.3d 804, 818-19 (11th Cir. 2004); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *rev'd on other grounds*, 447 F.3d 673 (9th Cir. 2006); *Ake*, 354 F. Supp. at 1309; *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *In re Kandu*, 315 B.R. 123, 145-47 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court*, 77 P.3d 451, 461-64 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part); *id.* at 363-64 (Steadman, J., concurring); *Morrison*, 821 N.E.2d at 24-27; *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Baker*, 191 N.W.2d at 186; *Hernandez*, 855 N.E.2d at 7; *In re Marriage of J.B. & H.B.*, 2010 WL 3399074, at *18-19; *Anderson v. King County,* 138 P.3d 963, 982-83 (Wash. 2006).

Accordingly, state and federal courts have also rejected the theory that restricting marriage to opposite-sex couples evinces unconstitutional animus toward homosexuals as a group. *See Kandu,* 315 B.R. at 147-48 (upholding the federal Defense of Marriage Act as explained by legitimate governmental interests and not homosexual animus); *Standhardt*, 77 P.3d at 465 ("Arizona's prohibition of same-sex

marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else."); *In re Marriage of J.B. & H.B.*, 2010 WL 3990074, at *21 (rejecting argument that Texas laws limiting marriage and divorce to opposite-sex couples "are explicable only by class-based animus"). The plurality in *Hernandez* articulated the point most directly, observing that "the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind." 855 N.E.2d at 8. As those judges explained, "[t]he idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Id.*

In contrast to the widespread judicial acceptance of this theory, the only lead appellate opinion to say that refusal to recognize same-sex marriage constitutes *irrational* discrimination came in *Goodridge*, 798 N.E.2d at 961 (opinion of Marshall, C.J., joined by Ireland and Cowin,

JJ.).[5] That opinion rejected the responsible procreation theory as overbroad (for including the childless) and underinclusive (for excluding same-sex parents). *Id.* at 961-62. This, of course, is irrelevant to the rational basis analysis as it is ordinarily applied. And *Goodridge* never identified an alternative plausible, coherent state justification for marriage of any type. It merely declared same-sex couples equal to opposite-sex couples because "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Id.* at 961. Having identified mutual dedication as one of the central *incidents* of marriage, however, the opinion did not explain why the state should care about that commitment in a sexual context any more than it cares about other voluntary relationships. *See Morrison*, 821 N.E.2d at 29.

---

[5] The essential fourth vote to invalidate the Massachusetts law came from Justice Greaney, who wrote a concurring opinion applying strict scrutiny. *Id.* at 970-74. Meanwhile, the Supreme Courts of California, Connecticut, Iowa and Vermont invalidated their states' statutes limiting marriage to the traditional definition, but only after applying strict or heightened scrutiny. *In re Marriage Cases*, 183 P.3d at 432; *Kerrigan,* 957 A.2d at 476; *Varnum*, 763 N.W.2d at 883; *Baker v. State*, 744 A.2d 864, 880 (Vt. 1999). The New Jersey Supreme Court held in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), that same-sex domestic partners were entitled to all the same benefits as married couples, but that court was never asked to consider the validity of the responsible procreation theory as a justification for traditional marriage.

3. "Overbreadth" arguments do not undermine the responsible procreation theory.

The fact that heterosexual couples may marry even if they do not plan to have children or are unable to have children does not undermine this norm or invalidate the states' interest in traditional marriage. *See Singer*, 522 P.2d at 1195 (holding that marriage "exists as a protected legal institution primarily because of societal values associated with the propagation of the human race" and that this is no less true "even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married"). Even heterosexual couples who are infertile or do not have children still reinforce and exist in accord with the traditional marriage norm. "By upholding marriage as a social norm, childless couples encourage others to follow that norm, including couples who might otherwise have illegitimate children." George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581, 602 (1999).

Furthermore, it would obviously be a tremendous intrusion on individual privacy to inquire of every couple wishing to marry whether

they intended to or could procreate. States are not required to go to such extremes simply to prove that the purpose behind civil recognition of marriage is to promote procreation and child rearing in the traditional family context.

4. Parenting by same-sex couples does not implicate the same state interests.

Nor does the availability of adoption and reproductive technology for same-sex partners undermine the responsible procreation theory or enable parallel claims for state recognition of the partners' relationship. *See Standhardt*, 77 P.3d at 462-63. Legislatures may reasonably understand that, while the traditional family context is the best environment for procreating and for raising children, other arrangements exist. "Alternate arrangements, such as adoption, arise not primarily in deference to the emotional needs or sexual choices of adults, but to meet the needs of children whose biological parents fail in their parenting role." Gallagher, *supra*, at 788.

Moreover, same-sex parents can never become parents unintentionally through sexual activity. Whether through surrogacy or reproductive technology, same-sex couples can only become biological parents by deliberately choosing to do so, requiring a serious

investment of time, attention, and resources. *Morrison*, 821 N.E.2d at 24. Consequently, same-sex couples do not present the same potential for unintended children and the state does not necessarily have the same need to provide such parents with the incentives of marriage. *Id.* at 25; *see also In re Marriage of J.B. & H.B.*, 2010 WL 3990074, at *19 ("Because only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage.").

Again, states may look to the entire history of civilization to see what problems arise for children when there is no social institution to encourage biological parents to remain together. By comparison, it has had only a relative blink-of-an-eye to evaluate whether society suffers when unmarried same-sex couples become parents. If over time society concludes that the children of same-sex couples would do better if some incentive existed for such couples to remain together, then states can address that need. But the mere existence of children in households headed by same-sex couples does not put such couples on the same footing vis-à-vis the state as opposite-sex couples, whose general ability

to procreate, even unintentionally, legitimately gives rise to state policies encouraging the legal union of such sexual partners.

V. The District Court's New Definition of Marriage Contains No Principle Limiting the Types of Relationships That Can Make Claims on the State.

A. The district court's open-ended re-definition of marriage has no legal basis and no principled limits.

In light of the inability of same-sex couples to procreate, the district court had to find a new rationale for civil marriage recognition in order to justify extending the constitutional definition of marriage to same-sex couples. That rationale predicates civil marriage recognition on nothing more than a couple's choice to live in a committed relationship, and it conclusively eliminates any link between responsible procreation and marriage. Among many other problems, however, this novel rationale for marriage provides no limiting principle that would exclude polyamorous, or indeed any even non-sexual, relationship. Nor does it explain why secular civil society has any interest in recognizing or regulating marriage *at all*.

Based on the testimony of a single historian, the district court "defined" marriage as the state's "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." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 933, 961 (N.D. Cal. 2010). That is a staggeringly broad definition, and the district court provided no explanation as to why it was legally superior to the definition of marriage (as being between one man and one woman) that has prevailed since governments first began recognizing marriage.

The open-ended capaciousness of the district court's definition is not just an abstract distinction with no real-world implications. Nothing in this definition assumes a sexual, much less a procreative, component to the relationship; its terms could encompass a variety of platonic relationships—even those that if sexual in nature states could plainly prohibit, such as incestuous or kinship relationship. A brother and sister, a father and daughter, an aunt and nephew, two business partners, or simply two friends could decide to live with each other and form a household and economic partnership together based on their "feelings" for each other, even if not sexual in nature—indeed *especially* if not sexual in nature. Under the district court's definition, States

would be required as a matter of federal constitutional law to recognize all such relationships as "marriages" if the parties desired that status.

This definition also contains no inherent basis for limiting its purview to *couples*. Groups of three or more adults may desire to live with each other, be committed to one another, and form a household and economic partnership based on their feelings for one another. Having eliminated the "rule of opposites" from the definition of marriage, the district court did not even attempt to provide a principled basis for a "rule of two." Once the link between marriage and responsible procreation is severed and the commonsense idea that children are optimally raised in traditional intact families rejected, there is no reason for government to prefer couples to groups of three or more.

B. The district court confused *benefits* of marriage for *purposes* of marriage, and still provided no principled limit on the institution.

Like its definition of marriage, the district court's "purposes" for marriage contain no inherent limiting principles. The purposes ordained by the district court include: 1) facilitating governance and public order by organizing individuals into cohesive family units; 2)

developing a realm of liberty, intimacy, and free decision-making by spouses; 3) creating stable households; 4) legitimating children; 5) assigning individuals to care for one another; and 6) facilitating property ownership. *Perry*, 704 F. Supp. 2d at 961.

As an initial matter, some of these purposes, such as creating stable households, legitimating children, and assigning individuals to care for one another, appear to be little more than attempts to repackage society's interest in responsible procreation in generalized language that obscures marriage's longstanding, special focus on this interest. And the others are not "purposes" of marriage, so much as beneficial consequences of marriage. At most, the state seeks to provide these benefits as a means to another end—as incentives for potentially procreative couples to stay together for the sake of their children.

On a related note, if seen as "purposes" rather than as incidents of, or benefits geared toward achieving, something more fundamental, these benign circumstances would command ever-expanding state action. If the purpose of marriage is to create stable households and family units in which children can be raised and individuals can be

assigned to care for each other, there is no governmental objective to be vindicated by limiting marriages to couples or unrelated individuals. There is no inherent reason why polyamorous or platonic kinship relationships would be unable to provide the same level of family stability and care for members of the family unit as that provided by same-sex couples.

Similarly, purposes such as facilitating governance, public order, and property ownership can be served through social units composed of more than two adults, or of related adults—perhaps even more efficiently than recognition of couples only. Nor is there any limiting principle inherent in the purpose of developing a realm of liberty and intimacy. If that purpose is served by expanding marriage to same-sex couples, it must necessarily be served even more by expanding marriage to any group of individuals seeking to express and realize their personal preferences, sexual or otherwise.

What the district court's "purposes" for marriage suggest is that the argument for same-sex marriage proceeds only from the desire for social recognition and validation of same-sex sexual love and relationships. Plaintiffs argued, and the district court found persuasive,

that marriage has a "special meaning" that no other status can provide. *Perry*, 704 F. Supp. 2d at 932. Marriage provides people with the "language" to describe to others their relationship, love, and level of commitment. *Id.* at 933. It is the "definitive expression of love and commitment." *Id.* at 970. Marriage will make them "feel included 'in the social fabric'" and will diminish their struggle "to validat[e] ourselves to other people." *Id.* at 933, 939. Not allowing them to marry "stigmatizes" them and says that their relationships are not "valuable." *Id.* at 935, 973, 979. If this is the basis upon which civil recognition of marriage is premised, however, the expansion of marriage could not be limited to monogamous same-sex couples. Others not permitted to marry may equally feel they have been denied the definitive expression of their love (even if platonic) as well as excluded from the social fabric. If civil marriage is justified only by reference to adult desires, no relationship can be excluded *a priori* from making claims upon the government for recognition.

C. Regulating marriage in terms of validation of adult relationships is incoherent on its own terms.

For the Founding generation, as well as those who enacted and ratified the Fourteenth Amendment, the institution of marriage was a

given. The institution itself was antecedent to the state. The district court's attempt to redefine marriage as nothing more than societal validation of personal bonds of affection leads not to the courageous elimination of irrational, invidious treatment, but instead to the tragic deconstruction of civil marriage and its subsequent reincarnation as a glorification of the adult self. But this new effort to redefine marriage, devoid of any meaning from history or tradition, fails even on its own terms.

To put it most directly, the mere end of self-validation – divorced from the traditional characteristics of marriage, including the raising of children by those whose relationship naturally creates them – is inherently incoherent because it lacks limits even on its own terms. That is, if public affirmation of anyone and everyone's personal love and commitment is the single purpose of marriage, a limitless number of rights claims could be set up that evacuate the term marriage of any meaning.

The theory of traditional marriage, by contrast, focuses on the unique qualities of the male-female couple, particularly for purposes of procreating and rearing children under optimal circumstances. As

such, it not only reflects and maintains the deep-rooted traditions of our Nation, but also furthers public policy objectives, while containing an inherent limitation on the types of relationships warranting civil recognition. In attempting to deprive defenders of traditional marriage of these long-recognized underpinnings for marriage, however, advocates of same-sex marriage have left themselves without any significant public interest to advance and without any coherent limitation on the nature of the relationships to recognize.

This Court should reject a theory of constitutional law that requires undermining the status quo without providing any coherent alternative. Just as numerous courts before it have done, this Court should hold that both the deeply rooted traditions of our country and the responsible procreation theory of marriage justify limiting civil recognition of marriage to opposite-sex couples.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court based on the decision of the United States Supreme Court in *Baker*. Alternatively, if this Court reaches the merits, it should reverse the district court and hold that Proposition 8 does not violate either the

Due Process or the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

September 24, 2010 /s Thomas M. Fisher

GREGORY F. ZOELLER
ATTORNEY GENERAL
Thomas M. Fisher, Solicitor General
Ellen H. Meilaender, Deputy A.G.
Office of Attorney General
302 W. Washington Street, 5th Floor
Indianapolis, Indiana 46204
(317) 232-6255; (317) 232-7979 (fax)

KENNETH T. CUCCINELLI, II
ATTORNEY GENERAL
E. Duncan Getchell, Solicitor General
Stephen McCullough, Deputy S.G.
Office of the Attorney General
900 E Main Street
Richmond, Virginia 23219
(804) 786-2436; (804) 786-1991 (fax)

MIKE COX
ATTORNEY GENERAL
Eric Restuccia, Solicitor General
Office of the Attorney General
525 W. Ottawa, Fourth Floor
Lansing, Michigan 48913
(517) 373-4875; (517) 373-4916 (fax)

JAMES D. CALDWELL
ATTORNEY GENERAL
Kyle Duncan, Appellate Chief
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804-9005
(225) 326-6716; (225) 326-6096 (fax)

Counsel for Amici States
Additional counsel listed inside front cover

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,890 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 word processing software in 14-point Century Schoolbook font.

/s Thomas M. Fisher
Thomas M. Fisher
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 24, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s Thomas M. Fisher
Thomas M. Fisher
Counsel for *Amici Curiae*