No. 12-144

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET. AL.,
Petitioners,
V.
KRISTIN PERRY, ET. AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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August 31, 2012

QUESTION PRESENTED FOR REVIEW

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation),[1] is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of crosses and of the Ten Commandments, legislative prayer, and other public acknowledgments of God.

The Foundation has an interest in this case because it believes the United States Constitution, properly construed, does not guarantee a right to same-sex marriage, and the Framers of the Constitution would be shocked to see their document twisted to protect something they regarded as abhorrent. The Foundation believes marriage is not simply an individual right, but rather it is a divinely-established institution that is as old as if not older

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[1] *Amicus curiae* Foundation for Moral Law files this brief with blanket consent from all parties, copies of which are on file in the Clerk's Office. The parties' counsel of record received timely notice of the Foundation's intention to file this brief no fewer than 10 days before the due date for this brief. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

than civil government. It was established for and exists for the purpose of organizing society and for bringing forth and raising children. The institution of marriage has been understood throughout American history and in Anglo-American common law as a union of a man and a woman. Nothing in the United States Constitution prohibits the State of California from employing that time-honored definition of marriage.

SUMMARY OF ARGUMENT

This Court should exercise judicial authority under the United States Constitution based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon court-created formulas rather than the Constitution's text. The result of these judicial formulas is a modern Right to Privacy jurisprudence that is created out of thin-air emanations and penumbras and bears no relationship to any specific text of the Constitution or to the intents and values of those who drafted and adopted it. *Amicus* urges this Court to return to first principles by embracing the plain and original text of the Constitution, the supreme law of the land.

The Constitution does not guarantee a right to same-sex marriage, either explicitly in its language or implicitly in its tone. The Framers would never have drafted a Constitution with that intent in mind, and if they had, the document would have been soundly rejected in all thirteen states.

The Ninth Circuit erred in viewing same-sex

marriage as a matter of individual rights. Marriage is an institution, at least as old as civil government if not older, established for the ordering of society and for the bearing and raising of children. Throughout all of American history, marriage has been defined as a union of one man and one woman. *Amicus* knows of no society, anywhere in the world or at any time in history, that has defined marriage as a union of two persons of the same sex.

The Ninth Circuit also erred in holding that, because the State of California recognized same-sex marriage for about 140 days, the State cannot now withdraw that recognition, regardless of whether that recognition was enjoyed for a week, or a year, or any length of time. According to the Declaration of Independence, rights are conferred by God, not by courts or legislatures. *Amicus* believes there is a major difference between time-honored rights, and alleged rights that are conferred by a state court decision that is effectively reversed by the people of California through their approval of a state constitutional amendment at the first opportunity.

The Ninth Circuit also erred in holding that there is no rational basis for Proposition 8, and Judge Smith correctly observed in his concurring and dissenting opinion that he is not persuaded that Proposition 8 lacks a rational basis.

ARGUMENT

I. THE CONSTITUTIONALITY OF CALIFORNIA PROPOSITION 8 SHOULD BE DETERMINED BY THE TEXT OF THE CONSTITUTION, NOT JUDICIALLY-FABRICATED FORMULATIONS.

> If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit, which the use can at any time yield.

George Washington, *Farewell Address,* 1796.

The Constitution is utterly silent about same-sex marriage. To read into the Constitution a protection of same-sex marriage and a prohibition against state restrictions on same-sex marriage, is to commit the very folly that President Washington warned against: changing the Constitution by usurpation.

The United States Constitution is the "supreme Law of the Land." U.S. Const. Art. VI. All judges take their oath of office to support the Constitution itself—

not a person, office, government body, or judicial opinion. *Id.* One can change the Constitution by usurpation by giving the words of the Constitution a different meaning from that intended by the Framers. Or, one can change it by usurpation by reading into the Constitution words, rights, and concepts that simply are not there. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *D.C. v. Heller,* 128 S. Ct. 2783, 2821 (2008). As this Court so succinctly but eloquently stated in 1905, "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States,* 199 U.S. 437, 444 (1905).

Griswold v. Connecticut, 31 U.S. 479 (1965), unleashed a Pandora's Box of new and previously unheralded rights under the umbrella of privacy. One is tempted to forget that the term "privacy" itself is found nowhere in the Constitution. As Justices Black and Stewart stated in dissent,

> …I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law

unconstitutional.

Id. at 509-10. Even if one does not agree with Justices Black and Stewart in their conclusion that there is no right of privacy in the Constitution, one may still recognize that the so-called right is not as all-encompassing as the Ninth Circuit envisions in this case. Even in *Lawrence v. Texas,* 539 U.S. 558 (2003), Justice Kennedy in the majority opinion emphasized the limited nature of the ruling:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Id. at 578. (Emphasis supplied.)

But step by step, the courts have expanded this ephemeral privacy right to include contraception for single persons, abortion, homosexual activity, and now, if the Ninth Circuit ruling is allowed to stand, same-sex marriage.

II. THE FAMILY IS A DIVINELY ESTABLISHED INSTITUTION FOR HUMAN GOVERNMENT, NOT SIMPLY AN INDIVIDUAL RIGHT.

Modern jurists have become so accustomed to thinking of the marital relationship in terms of

individual rights, that they all too often fail to realize that, first and foremost, marriage and the family[2] are a divinely ordained institution for human governance and for bringing forth and raising children.

That concept sounds strange to some, because today we commonly equate government with the state. However, the Framers understood that the state is but one of several spheres of government, each with its distinct jurisdiction and limited authority granted by God. Noah Webster's definition of "government" is instructive because he knew many of the Framers and frequently interacted with them. Webster's third definition, "[t]he exercise of authority; direction and restraint exercised over the actions of men in communities, societies, or states," is the broadest definition of government and applies to every sphere. Webster also illustrates his second definition, "[c]ontrol; restraint," in terms of individual government: "Men are apt to neglect the government of their temper and passions." Webster's first definition of "government" is "[d]irection; regulation," which he illustrates in terms of the individual person governing himself: "These precepts will serve for the government of our conduct." Noah Webster, *An American Dictionary of the English Language* (Foundation for American Christian Education 1995) (1828).

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[2] The family is a divinely-established institution. Marriage is the means by which that institution is created.

The second government sphere, Webster said, is the family (or the household). We see this in his fourth definition of government, "[t]he exercise of authority by a parent or householder," which he illustrates with the following quote from Shepard Kollock: "Let family government be like that of our heavenly Father, mild, gentle, and affectionate." Lastly, Webster also recognizes the governing sphere of the church, which he defines in one entry as those "united under one form of ecclesiastical government." *Id.*

Each of these spheres of government—individual, family, state, and church—has its own jurisdiction, but they complement and support one another. The church teaches individuals to practice self-restraint and self-discipline. Children who have learned to restrain and discipline themselves are more likely to respect and obey their parents. Children who have been taught to respect and obey their parents are more likely to respect and obey civil authority. And by keeping the peace, the civil authority enables the church and the family to carry out their respective functions.

The institution of the family predates that of the state, and the Judeo-Christian tradition supports this view. The Bible is the authoritative source for Jews, Christians, Muslims, and those of many other religions. *Genesis* 2:21-24 states:

> [21] And the Lord God caused a deep sleep to fall upon Adam, and he slept: and he took one of his ribs, and closed up the flesh instead thereof;
>
> [22] And the rib, which the Lord God had taken from man, made he a woman, and brought her unto the man.
>
> [23] And Adam said, This is now bone of my bones, and flesh of my flesh: she shall be called Woman, because she was taken out of Man.
>
> [24] Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.

According to the Biblical tradition, civil government did not begin until Cain built a city (*Genesis* 4:17) or possibly until after the Flood (*Genesis* 9).

These spheres of government interact with each other. The institution of the family is composed of individuals, and it interacts with the state and the church. Marriages are performed by state officials and by church officials. Most churches recognize marriage performed by state officials, and at least in the United States all institutions of civil government recognize marriages performed by church officials. In *Sturges v. Crowninshield,* 17 U.S. 122, 163 (1819), this Court described marriage as "a contract, the most solemn and sacred of all."

In *Sturges* the Court noted that the state can impair the obligation of marriage by granting divorce.

Id. The family and the state are separate institutions, but they do interact with one another. But although these institutions interact with one another, none of them has authority to re-define the other. That is especially true of the state, which was instituted after the family. And as we see from the Genesis passage quoted above, the traditional definition of marriage has been a union of a man and a woman. Jesus reiterated this definition of marriage when he quoted the *Genesis* 2 passage in *Matthew* 19:4-6. Nearly every society throughout the world and throughout history has defined marriage as a male/female union; although a few societies have, at least for short intervals in their history, countenanced homosexual activity, *Amicus* can find no instance of a society that recognized same-sex marriage.[3]

At least twenty-nine states have provisions in their state constitutions defining marriage as a union of one man and one woman, and at least nine states have

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[3] It is true that some societies have approved or at least tolerated polygamous or polyandrous marriages. But even in these societies, marriages are between male(s) and female(s). In polygamous marriages the man is considered to be married to each of his wives; the wives are not married to each other. In polyandrous marriages the wife is considered to be married to each of her husbands; the husbands are not married to each other. In a polygamous marriage a man commonly married each of his wives individually and divorced each of them individually; likewise a wife in a polyandrous marriage. Even the existence of polygamy and polyandry militates against the legitimacy of same-sex marriage.

statutory provisions to the same effect. The states that recently enacted such provisions did so, not to re-define marriage, but to preserve or reinstate the definition of marriage that they had always thought was implicit in the very term marriage. States that had previously not adopted a specific definition of marriage as between a man and a woman had also never defined marriage as a union of two human beings, rather than between a human and a horse or a cat or a vegetable. They never dreamed that such a definition was necessary.

The traditional definition of marriage is a union of one man and one woman. In *Reynolds v. U.S.,* 98 U.S. 145, 165 (1878), this Court called marriage "from its nature a sacred obligation" and called polygamy "an offense against society."[4] Nothing in the U.S. Constitution prohibits the State of California from amending its constitution to reinstate that traditional definition.

And by striking down Proposition 8, the Ninth Circuit has done much more than tell the people of California that they must recognize the right of same-sex couples to marriage. The Ninth Circuit has forced

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[4] Although proponents of same-sex marriage have tried to distance themselves from polygamy, the distance is not easy to maintain. If two men can be joined together in marriage, why not three, or four, or twenty? And can the State bar any one of these men from joining in that marital union just because he is already married to a woman? The recognition of same-sex marriage starts us on a "slippery slope" with dangerous consequences.

the people of California to put their official stamp of approval upon a union that is contrary to the traditional definition of marriage and that the people of California have clearly, specifically, and decisively stated that they do not want to recognize as a marriage.

III. THE PEOPLE OF CALIFORNIA ARE NOT BARRED FROM PROHIBITING SAME-SEX MARRIAGE MERELY BECAUSE A COURT RECOGNIZED SAME-SEX MARRIAGE FOR 143 DAYS; SUCH RECOGNITION IS NOT THE SAME AS A TIME-HONORED, GOD-GIVEN RIGHT.

Judge Reinhardt begins the Ninth Circuit's opinion by stating,

> Prior to November 4, 2008, the California Constitution guaranteed the right to marry to opposite-sex couples and same-sex couples alike. On that day, the People of California adopted Proposition 8, which amended the state constitution to eliminate the right of same-sex couples to marry.

Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir.2012). But this is misleading. As the Ninth Circuit recognized, the 1849 Constitution of the State of California, Art. XI, §§ 12 and 14 recognized marriage, but "Marriage in California was understood, at the time and well into the twentieth century, to be limited to relationships between a man and a woman." Id. at

1065. In 1977 California enacted Ca. Stat. 1977, ch. 339, § 1, which states, "Marriage is a personal relation arising out of a civil contract between a man and a woman...," to ensure that that definition of marriage would be followed. In 2000, to be sure California courts would not recognize same-sex marriages performed out of state, California adopted Proposition 22, which enacted a statute providing that "Only marriage between a man and a woman is valid or recognized in California." Cal. Fam. Code Sec. 308.5.

The California Supreme Court struck down these statutes in *In re Marriage Cases,* 183 P.3d 384 (2008), holding that these statutes violated Article I, § 7 of the California Constitution. That same year, California voters approved Proposition 8, which amended the California Constitution to prohibit same-sex marriage.

Central to the Ninth Circuit's holding is that, rather than refusing to grant a new "right," Proposition 8 allegedly took away the so-called right of same-sex couples to marry, a right that same-sex couples had previously possessed. "Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade." *Id.* at 1079-80.

Amicus respectfully disagrees. Proposition 8 did not remove from same-sex couples a time-honored, God-given right specifically protected in the federal or

state constitution. Rather, same-sex marriage is an alleged "right" which the people of California never contemplated in their original 1849 constitution. Late in the twentieth century, when same-sex marriage became an issue in California, the people of California specifically prohibited same-sex marriage by statute twice in 1977 and 2000. Same-sex marriage became an alleged right only when an unelected California Supreme Court invalidated those statutes in 2008, which decision the people of California effectively repudiated and nullified at their first opportunity about 140 days later when they enacted Proposition 8 on November 4, 2008. Even if we accept that the California Supreme Court is the final interpreter of its state constitution, this hardly seems to be on a par with time-honored God-given rights such as those set forth in the Declaration of Independence, the Bill of Rights, or the express language of the California Constitution.[5]

On its face, this is a narrow decision that applies only in cases in which the state has recognized same-sex marriage and then has withdrawn that recognition. But we need to see the decision for what it really is—a "foot in the door," and a first step toward full recognition of same-sex marriage.

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[5] If the Court is concerned about the rights of those same-sex couples who have gone through a marriage ceremony during the 140-day interval between the *Marriage Cases* decision and the adoption of Proposition 8, the Court could "grandfather" those couples by reading a narrow exception into Proposition 8.

IV. A RATIONAL BASIS FOR PROPOSITION 8 EXISTS.

Even the rational basis test may be inapplicable to this case, because Proposition 8 is not about regulating marriage but about correcting a court's attempt to re-define marriage. Nevertheless, as Ninth Circuit Judge N.R. Smith has demonstrated in his concurring and dissenting opinion, those who challenge Proposition 8 have the burden of negating every conceivable basis which might support the measure. Judge Smith summarizes, better than *Amicus* can in this short brief, that those who are challenging Proposition 8 have failed to meet that burden. There is, he says, at least "rational speculation" that married biological parents can best raise children. *Id.* at 1096-97, 1101-02. There is also the valid concern that the people of California do not want to put their stamp of approval upon same-sex unions that the people of California regard as immoral and unhealthy for children and for society. There is also the valid concern that legalizing same-sex marriage would cause children to conclude that same-sex marriage is normal and moral, a conclusion many if not most California parents do not want their children to draw.

Writing for the majority, Judge Reinhardt listed the many benefits that are commonly associated with marriage, such as raising children together, adopting each other's children, becoming foster parents, sharing community property, filing taxes jointly, participating in the partner's group health insurance, enjoying

hospital visitation privileges, making medical decisions for an incapacitated partner, being given the status of a widow or widower, serving as the conservator of the partner's estate, and suing for the partner's wrongful death. *Id.* at 1077. Under other circumstances one might argue that an unwillingness to grant these benefits to same-sex marriage partners constitutes a rational basis. However, Judge Reinhardt noted that Proposition 8 did not affect these rights or other rights commonly associated with marriage, and therefore the State of California did not have a rational basis for denying same-sex couples the right to marry. *Id.* Ironically, if one follows Judge Reinhardt's logic, the people of California would be better able to show a rational basis for Proposition 8 if they had gone further in Proposition 8 and prohibited not only same-sex marriage but also all of the benefits associated therewith.

As further evidence of a rational basis, *Amicus* invites the Court's attention to the monumental study of J.D. Unwin, *Sex and Culture* (Oxford University Press 1934). After surveying numerous cultures, ancient and modern, Dr. Unwin concluded that the most successful societies were those which confined the sexual urges to monogamous marriage.

Furthermore, the State of California is not required to show precise statistics to prove its rational basis. As Chief Justice Burger observed in *Paris Adult Theatre I v. Slayton,* 413 U.S. 49, 69 (1973), communities can ban pornographic theaters because

"The States have the power to make a morally neutral judgment that public exhibition of obscene material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Chief Justice Warren's words, the States' "right ... to maintain a decent society."

CONCLUSION

If ever there was a case in which a grant of certiorari was appropriate, this is the case. As noted above, at least twenty-nine states have adopted provisions in their state constitutions similar to that enacted by the people of California in Proposition 8, and at least nine states have statutes to a similar effect. Still other states are considering such enactments, including Minnesota in the 2012 election. This case does not affect only California; it affects the entire country.

And lower courts are divided on this issue. In *Citizens for Equal Protection v. Bruning,* 455 F.3d 859 (8th Cir. 2006), the Eighth Circuit reversed a federal district court and held that Nebraska Initiative Measure 416, which amended the Nebraska Constitution to express a prohibition of same-sex marriages, was constitutional. The lower courts, the state legislatures, the citizenry at large, and those who want to enter same-sex unions, are looking to this court to provide definitive guidance on the issue.

Even if this Court were to deny certiorari on the narrow basis that this case does not address whether a

state can prohibit same-sex marriage but rather whether a state can prohibit same-sex marriage after having allowed it, the people and the legislators will interpret a denial of certiorari as striking down all prohibitions on same-sex marriage.

For the reasons stated, this Honorable Court should grant Petitioner's writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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