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In The Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners,*

v.

KRISTEN M. PERRY, ET AL., *Respondents.*

UNITED STATES, *Petitioner,*

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, AND BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

BRIEF OF AMICUS CURIAE MATTHEW B. O'BRIEN IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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INTEREST OF AMICUS[1]

Dr. Matthew B. O'Brien authored the scholarly article, "Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family," *The British Journal of American Legal Studies,* Vol. 1, Issue 2 (Summer/Fall 2012): 411-466. He has served most recently as Veritas Post-Doctoral Research Fellow at the Matthew J. Ryan Center in the Department of Political Science at Villanova University, and previously as Lecturer in the Department of Philosophy at Rutgers University. He received his Ph.D. and M.A. in philosophy from The University of Texas at Austin, and A.B. in philosophy from Princeton University. He has authored scholarly essays and reviews on subjects in moral and political philosophy and jurisprudence.

SUMMARY OF ARGUMENT

Within the broad tradition of "liberal" political thought and constitutional scholarship, there is agreement that moral disapproval *as such* is an illegitimate ground for limiting liberty. When the law implicates questions about momentous issues in human life—marriage, sexuality, conscience, religion, death, and so on—these scholars argue that the law must prescind from imposing any given

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[1] The parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

controversial moral judgment upon a citizenry marked by ethical pluralism.

In other words, they argue that the law ought not to criminalize conduct based solely on judgments about what makes for or detracts from a valuable and morally worthy way of life. Rather, the law should aspire to neutrality between competing visions of how best to live. The ideal of moral neutrality does not purport to expunge the law of its moral content, for this ideal is itself a moral injunction: it is fairness—a moral concept—that requires no one, particular moral vision be privileged by the state. Laws that merely aim to promote controversial judgments about morality, especially when they limit freedom, fail to manifest a legitimate state interest. Some courts have held that the law ought to pass a moral neutrality test based on *Lawrence v. Texas,* 539 U.S. 558 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."). The lower courts here applied this test as an implicit part of their rational basis standard of constitutional review.

Contrary to the decisions of the lower courts, however, the definition of marriage in California's Proposition 8 *does* pass the moral neutrality test just described. This conjugal definition of marriage as between one man and one woman passes the neutrality test, and satisfies the emerging constitutional standard of rational basis review.

Conjugal marriage uniquely contributes to the state's legitimate interest in ensuring the orderly reproduction of society over time.

Conjugal marriage is a unique form of human association because it is intrinsically generative, which makes it distinctively suited to serving the necessary task of orderly social reproduction. A union of two (or more) individuals of the same sex—whether the union consists of gay people who are in a romantic relationship, or siblings united by kinship, or friends animated by platonic admiration, etc.—cannot constitute an intrinsically generative union. Whether a female partner involved in such a union bears a child, or whether such a union happens to become a locus of child rearing, for example, are both incidental matters.

Marriage as a *conjugal* union, by contrast, is intrinsically generative, given its nature as a social-cum-biological identity. To put the point summarily: sex between men and women tends to make babies, and babies need moms and dads. Therefore, in seeking to promote orderly reproduction, the state may reasonably decide to single out and promote the distinctively conjugal partnership that has historically borne the label "marriage." This decision need not stem from any moral judgments about the superiority or inferiority of any one of these various forms of association in relation to the others. Nor does it require the criminalization of non-conjugal sexual relationships, whether same-sex, multi-partner, or anything else.

Previous discussions of conjugal marriage have typically failed to specify properly the legitimate state interest in ensuring orderly reproduction. This failure has inhibited both sides of the marriage debate from appreciating that laws such as Proposition 8 have a constitutional justification entirely independent from the fact that conjugal marriage happens to be the traditional definition of marriage.

In order to specify the state interest in orderly reproduction properly, one must consider the ideal of moral neutrality more thoroughly. The late Harvard philosopher John Rawls is universally regarded as the most important and influential proponent of moral neutrality—or to use his terms, the ideal of "public reason." Rawls's work is in large part responsible for the widespread recognition of moral neutrality as a constitutional principle. Courts in the United States and abroad have cited his work; his influence is palpable in *Lawrence* and in the decisions of the District and Circuit Courts here.

Rawls's account of "public reason" and his defense of the legitimate state interest in orderly reproduction, when rightly understood, provide a powerful justification for supporting the definition of marriage as a conjugal union. While the lower courts embraced a moral neutrality test akin to Rawls's idea of "public reason," they misapplied it. Rawls's doctrine accepts the notion that laws have an inherently moral component, but it requires that such laws find support among public values and standards that all citizens could reasonably accept. As explained in this brief and others filed in support

of Petitioners, the state has a legitimate interest in orderly reproduction and that interest requires the state to ensure a sustainable birth rate and the effective rearing of children into responsible citizens. These interests find general acceptance as public values. They also form the basis for the state's definition of marriage as a conjugal union between a man and woman. Thus, these interests withstand constitutional scrutiny under the rational basis standard and this Court should reverse the lower court decisions.

ARGUMENT

I. Applying *Lawrence v. Texas,* some courts have held that controversial moral judgments are illegitimate grounds for public policies that limit individual liberties, and thus the law must pass a moral neutrality test.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 850 (1992), this Court explained: "Our obligation is to define the liberty of all, not to mandate our own moral code." The Court further elaborated on this obligation in *Lawrence v. Texas*, 539 U.S. at 559, when it explained: "…the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[2]

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[2] *Id.* (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

Even if *Lawrence* in fact adopted a moral neutrality test in order to protect individual liberty, the Court carefully limited that interest primarily to *conduct*. In overturning the Texas anti-sodomy statute, the Court stated that it is "[w]hen sexuality finds overt expression in intimate *conduct* with another person, the *conduct* can be but one element in a personal bond that is more enduring." *Lawrence*, 539 U.S. at 567 (emphasis added). *Lawrence* focused on the liberty of "…adult persons in deciding how to conduct their *private* lives in matters pertaining to sex." *Id.* at 572 (emphasis added). Where the law seeks to promote legitimate public goals and preserve vital social institutions, individual claims to liberty may not be decisive. Thus it is in regard "to *personal* decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" that *Lawrence* noted "the respect the Constitution demands for the autonomy of the person in making these choices…." *Id.* at 574 (emphasis added).

Furthermore, the Court clarified that the liberty interest it referenced in *Lawrence* may protect private homosexual conduct, but it "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578. This clarification is appropriate because marriage as a social institution, as opposed to the private sexual activity of adults, implicates legitimate state interests.

When the citizens of California voted decisively in favor of Proposition 8, they sought to define a

social institution, and did nothing to regulate private conduct.

II. The most influential and persuasive account of moral neutrality stems from the work of the philosopher John Rawls.

State governments have always exercised the traditional "police powers" over public health, safety, and morals, however broadly or narrowly the courts have construed them. The ideal of neutrality is itself a moral ideal, because it is a requirement of fairness, which is a moral notion. Therefore, in limiting government action by a moral neutrality test, the Court has not abandoned the law's moral task. Rather, it has re-interpreted the scope of that task for a pluralistic democracy.

The late Harvard philosopher John Rawls's theory of "public reason" remains the most important account of moral neutrality; Rawls's work has been tremendously influential in constitutional and political theory.[3] Many, perhaps even most, liberal political and constitutional theorists are Rawlsians of one stripe or another. The idea of public reason provides a principled way to transcend the socially divisive, zero-sum terms of the current marriage debate. Public reason proposes an alternative deliberative framework for resolving such clashes between deeply held, but incompatible beliefs. This framework treats the opposing parties equally, because the framework's justification is

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[3] For an account of Rawls's importance, *see* e.g., *The Cambridge Companion to Rawls* 1-61 (Samuel Freeman, ed. 2002).

neutral relative to divergent beliefs about how to live one's life. The "public reason" framework requires that arguments over the legal definition of marriage, like other arguments over matters of basic justice, find common ground among the different viewpoints that form the public political culture of liberal democracies.

It is unreasonable for people who serve in positions of power to attempt to impose what they see as the whole truth on their fellow citizens—political power must be used in ways that all citizens may reasonably be expected to endorse. Reciprocity is therefore a key aspect of public reason. Citizens and the lawmakers who represent them must be able to justify their policy decisions using publicly available values and standards.

The arguments used to justify legislation must not depend essentially upon controversial facets of any particular worldview. Rawls urges, "in a constitutional regime with judicial review, public reason is the reason of its supreme court," and "the supreme court is the branch of government that serves as the exemplar of public reason."[4]

A. Rawls demonstrates that the state has a legitimate interest in setting marriage policy to ensure the orderly reproduction of society.

Although Rawls died before the issue of same-sex marriage came to a head in *Goodridge v. Department*

[4] John Rawls, *Political Liberalism* 231 (1995).

of Public Health, 798 N.E.2d 941 (Mass. 2003), his work provides compelling grounds for justifying the conjugal definition of marriage as a union of husband and wife.[5] Any definition of marriage based upon moral approbation or disapprobation of types of sexual acts or classes of persons violates Rawls's notion of public reason. The conjugal definition of marriage need not rely on such judgments.

Rawls shows that the state interest in the family is purely functional, even if families in their own self-image are not.

> The *primary function of the family* for Rawls—what makes it a basic social institution—has nothing to do with romantic love or even marriage between the natural or adoptive parents or caretakers of children. The family is rather regarded as a basic social institution since any society has to have some social structure for nurturing and raising its children. Without some kind of family formation, a society cannot *reproduce itself over time*.[6]

Appeals to the moral value of heterosexual sex as such or appeals to the moral value of same-sex unions as such, equally depend upon contestable judgments about morality. For the state to define

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[5] *See* Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Br. J. Am. Leg. Studies 411 (2012).

[6] Samuel Freeman, *Rawls* 237 (2007).

marriage by either of these appeals would be to specify the state's interest in marriage improperly.

Otherwise liberal advocates of redefining marriage often fail to appreciate that the state's interest in marriage does not include a mandate to impose their own moral vision through changing the law. For example, one prominent advocate of same-sex marriage, Professor Carlos A. Ball of Rutgers University School of Law, argues, "[i]f our society is going to recognize same-sex marriage, the supporters of such marriages must incorporate perfectionist ideals into their arguments." Accordingly, "[t]he struggle for societal acceptance of same-sex relationships entails a frontal attack on the deeply held views of many Americans…."[7] Professor Ball's moral perfectionism and his endorsement of a "frontal attack" on the worldviews of his fellow citizens is troubling.

Such common calls to enlist marriage law in the service of prosecuting a "culture war" violate the idea of public reason.[8] As Rawls emphasizes:

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[7] Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 Geo. L.J. 1871, 1881, 1927 (1997).

[8] *Cf.* Ellen Willis, *Can Marriage Be Saved? A Forum,* The Nation 16 (July 5, 2004) ("conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart"). Gay activist Michelangelo Signorile, for example, is even more explicit: he argues that gay couples "demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution." Michelangelo Signorile, *Bridal Wave,* Out 68, 161 (Dec.-Jan. 1994). The strategy is for gay couples "to fight for same-sex marriage and

> Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine [i.e., worldview], religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity.
>
> [In a pluralistic democracy] no one is expected to put his or her religious or nonreligious doctrine in danger, but we must each give up forever the hope of changing the constitution so as to establish our religion's hegemony, or of qualifying our obligations so as to ensure its influence and success. To retain such hopes and aims would be inconsistent with the idea of equal basic liberties for all free and equal citizens.[9]

Rawls grounds a properly specified marriage policy in the publicly reasonable state interest ensuring the orderly reproduction of society over time. Political responsibility for ensuring the orderly reproduction of society is not optional. Unlike many liberal theorists, Rawls attends to the social imperative of providing for society's future generations:

> [A] political society is always regarded as a scheme of cooperation over time indefinitely;

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its benefits and then, once granted, redefine the institution of marriage completely [, because the] … most subversive action lesbians and gay men can undertake … is to transform the notion of 'family' entirely." *Id.*

[9] John Rawls, *The Idea of Public Reason Revisited,* 64 Chicago L. Rev. 765, 776 (1997).

> the idea of a future time when its affairs are to be wound up and society disbanded is foreign to our conception of society. Reproductive labor is socially necessary labor. Accepting this, essential to the role of the family is the arrangement in a reasonable and effective way of the raising and caring for children, ensuring their moral development and education into the wider culture.[10]

The state interest in orderly reproduction entails two public responsibilities: first, ensuring a sufficient and sustainable birth rate, and second, ensuring the just and effective rearing of children into capable citizens. The second responsibility requires that citizens develop basic psychological maturity, which Rawls argues includes two key abilities or what he calls moral powers: the ability to exercise a sense of justice and the ability to form one's own reasonable worldview about how to live one's life.

In *A Theory of Justice* Rawls states: "However attractive a conception of justice might be on other grounds, it is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it."[11] To generalize Rawls's point in sociological terms, however attractive a conception of justice might be on other grounds, it is seriously defective if a "just" society fails to reproduce itself in an orderly way over time.

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[10] *Id*. at 782.

[11] John Rawls, *A Theory of Justice* 162-63 (2d ed., 1997).

Rawls's argument implies that the state has no legitimate interest in promoting the personal intimate relationships of adults *as such*. Consequently, in a pluralistic democracy regulated by the ideal of public reason, no morally neutral reason supports the recognition and promotion of homosexual relationships as civil marriages. Such recognition and promotion unjustifiably privileges homosexual relationships above other intimate relationships.

B. A conjugal union of husband and wife is uniquely suited to serving the state's interest in orderly reproduction, because it is intrinsically generative and the optimal context for rearing children.

A liberal democratic society needs sufficient children and it needs them to be educated. Therefore, a liberal democratic society needs families headed by two married parents who are the biological mother and father of the children, because such families are (i) intrinsically generative and (ii) optimal for childrearing. In other words, sex between men and women tends to make babies; society needs sufficient babies; babies need moms and dads.[12]

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[12] C*f.* Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-*Lawrence *World*, 23 Quinnipiac L. Rev. 447, 451 (2004) (arguing that heterosexual marriage "is about uniting these three dimensions of human social life: creating the conditions under which sex between men and women can

Certainly, not every family arrangement in which children are raised will or can conform to this pattern, but the state has a legitimate interest in encouraging people to form families that do so. States have reasonably determined that they can accomplish this by enshrining the conjugal conception of marriage in the law. Why are heterosexual unions intrinsically generative and what does this entail? Many viable forms of parenting partnerships are not generative. Consider, for example, an order of nuns who partner together to run an orphanage, or a widower and his brother who raise the children from the widower's marriage. These arrangements may qualify as viable parenting partnerships, but they are not intrinsically generative, so they could not answer society's need for orderly reproduction over time.

Conjugal heterosexual relationships are intrinsically generative, because children characteristically result from sexual intercourse between a man and a woman in a statistically significant sense, and sexual intercourse is of course partly constitutive of marriage as a relation. In making this functional claim about heterosexual sex's generative character, it is not necessary to any controversial metaphysical biology about "natural purposes" in the way that traditional natural law theorists might. Neither must or should every marriage beget children. Rather, the intrinsically

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make babies safely, in which the fundamental interests of children in the care and protection of their own mother and father will be protected, and so that women receive the protections they need to compensate for the high and gendered (*i.e.*, nonreciprocal) costs of childbearing").

generative nature of heterosexual unions rests upon an incontrovertible observation about a social fact, which has implications for the orderly reproduction of a democratic society.

Some might object that the availability of contraception for heterosexuals and biological advances in artificial gamete donation for homosexuals makes procreation a voluntary choice, not a given feature of relationships that happen to have the biological complementarity that makes them naturally reproductive. This inference is mistaken. It remains a social fact that sex—even contraceptive sex—tends to make babies.[13] Irrespective of access to contraceptives, it is a social fact that heterosexual relationships result in children.

It is also important to recognize that the advent of artificial gamete donation does not change the fact that relationships other than heterosexual unions remain non-generative. Neither does gamete donation provide a public reason for the Court to single out just some of the people who could use the procedure and empowering them to enter into civil marriage just because they happen to be involved in a same-sex romantic partnership. For to do so would be to assume that homosexual relationships have some special intrinsic value (and the order of nuns or

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[13] *See e.g.,* J. Abma et al., *Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth,* Nat'l Ctr. For Health Stats. 19, 28 (1997); Stanley K. Henshaw, *Unintended Pregnancies in the United States*, 30 Family Planning Perspectives 28 (1998).

a widower and his brother, for example, do not), and this assumption is an illegitimate grounds for state action, because it violates public reason. There is an analogy between gamete donation and ordinary adoption. Both of these practices remain available to anybody, whether he or she is a partner in a conjugal marriage or a non-traditional relationship. Neither practice, therefore, gives any reason for uniquely picking out homosexual relationships as a class from among non-traditional relationships generally, and privileging just those with eligibility for civil marriage.

People choose to make many different and valid domestic arrangements of mutual dependency and intimacy. The law is justified in singling out conjugal unions from among these arrangements and defining them as eligible for marriage. When courts seek to privilege just those relationships that happen to be characterized by homosexual intimacy, however, they rely upon their own private moral code and fail to abide by public values that all reasonable citizens could share. In this regard, homosexual orientation is on a constitutional par with, say, a traditional order of chivalry or theology of sacramental rites. The Knights of Malta and the Jesuits, for example, may be legally recognized as non-profit charitable associations that contribute to society's common good, but they cannot, for a publicly reasonable state, be recognized *as* a titled nobility or *as* a sacramental priesthood, respectively. In the same way, a legislature may choose to provide domestic partnerships because two adults are domestically dependent, but not because homosexual

intimacy *as such* has a special value. Such matters are not within the purview of the state.

In addition to being intrinsically generative, families headed by a husband and wife who are the biological mother and father of their children also provide the optimal structure for childrearing. According to Child Trends, a liberal think tank:

> [R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in step-families or cohabitating relationships face higher risks of poor outcomes…. There is thus value for children in promoting strong, stable marriages between biological parents…. [I]t is not simply the presence of two parents, … but the presence of two biological parents that seems to support children's development.[14]

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[14] *See* Kristin Andersen Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?,* Child Trends Res. Brief 1-2, 6 (June 2002), *available at* www.childtrends.org/files/marriage rb602.pdf; *see also* Witherspoon Inst., *Marriage and the Public Good: Ten Principles* (2008), *available at* http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf (summarizing research in a statement on marriage signed by various scholars across multiple disciplines).

Sara McLanahan and Gary Sandefur, sociologists from Princeton University and the University of Wisconsin, respectively, argue:

> If we were asked to design a system for making sure that children's basic needs were met, we would probably come up with something quite similar to the two-parent ideal. Such a design, in theory, would not only ensure that children had access to the time and money of two adults, it would also provide a system of checks and balances that promoted equality parenting. The fact that both parents have a *biological* connection to the child would increase the likelihood that parents would identify with the child and be willing to sacrifice for that child, and it would reduce the likelihood that either parent would abuse the child.[15]

The claim that children do best when reared by the married mother and father who bore them, like any empirical claim whatsoever, is of course contestable. When social scientists do contest it, however, they often mischaracterize what alternative sociological data would have to show in order to support specifically homosexual parenting, or polyamorous parenting for that matter.

Only if conclusive social scientific evidence were to show that children do as well or better with two homosexual parents in comparison to two

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[15] Sarah McLanahan & Gary Sandefur, *Growing Up with a Single Parent* 38 (1994).

heterosexual parents, *and in comparison to two parents of the same sex who were not homosexual*, could the data be taken as evidence that grounded a publicly reasonable argument on behalf of homosexual marriage as such.

Otherwise, studies that purported to show the benefits of homosexual parenting would really just show at best the benefits of having two parents of whatever sexual relation, because they would not control for parenting couples such as a widower and his brother, for example, who are neither homosexual nor husband and wife. This mistake along with many others vitiates the force of the American Psychological Association's unjustly influential 2005 brief on lesbian and gay parenting. The brief asserts: "Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents."[16] But this assertion is extremely misleading, because the 59 studies cited in the brief do not really examine the "children of lesbian or gay parents" and furthermore they fail to use a stable and well-defined conception of "heterosexual parents" as a comparison class.[17] The studies overwhelmingly examine small, non-

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[16] C. J. Patterson, *Lesbian and Gay Parents and their Children: Summary of Research Findings,* Lesbian and Gay Parenting: American Psychological Association 5-22 (2005), a*vailable at* http://www.apa.org/pi/lgbt/resources/parenting-full.pdf.

[17] *See* Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting,* 41 Social Science Research, Issue 4, July 2012, Pages 735–751, *available at* http://dx.doi.org/10.1016/j.ssresearch.2012.03.006.

representative convenience samples of well-educated, wealthy, white lesbian mothers who live in cities on the East or West coast. The studies fail to investigate how children fare beyond adolescence, which precludes the studies from registering dysfunctions that typically arise in adulthood, and they evaluate children by documenting their *parents'* perceptions about the children's wellbeing, rather than evaluating the children themselves.

In summary, the conjugal definition of marriage serves the state interest in orderly reproduction over time. The intrinsically generative nature of heterosexual unions contributes to society's need for children to come into being, and the optimality of conjugal marriage as a child-rearing institution serves society's need for children to be educated into mature and functioning citizens.

C. In defining marriage as a conjugal union, the state need not assert moral disapproval of any other forms of association or intimate relationships, including same-sex ones, and it need not appeal to any religious or traditionalist premises.

Some of the voters in California who passed Proposition 8 were no doubt motivated to reaffirm the conjugal definition of marriage for various religious and moral reasons. These religious and moral reasons do not undermine the publicly reasonable and neutral justification for conjugal marriage. In order to appreciate this fact, consider

the apt comparison between a publicly reasonable defense of conjugal marriage and of racial equality.

The mid-twentieth century civil rights movement for racial equality in the United States was deeply Christian. Many participants in the movement were not Christians of course, and there were specifically Christian arguments that some segregationists made *against* racial equality. Nevertheless, Rev. Martin Luther King and other key leaders in the movement made Christian arguments in the public square for racial equality in a biblical idiom that echoed the arguments of the anti-slavery movement in the 19th century, which were even more confessionally Christian.[18] These arguments motivated legislative reform. The reliance of Rev. King and others upon the Christian moral tradition did not violate the canons of public reason, however, because the case for racial equality could be re-stated in nonsectarian terms that expressed a generally accessible conception of justice.

The same is true for the traditional marriage movement. Some members of this movement deploy specifically religious arguments in its defense, and appeal to the value of tradition, but these facts are unproblematic, because such religious and tradition-based arguments are additional to the publicly reasonable and neutral case for conjugal marriage,

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[18] On the Christian character of abolitionism, *see* James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 8 (1988); Eric Foner, *Politics and Ideology in the Age of the Civil War* 72 (1980); Aileen S. Kraditor, *Means and Ends in American Abolitionism* (1967). *See also* Michael Sandel, *Liberalism and the Limits of Justice* 213 n.74 (2d ed. 1998).

such as the one sketched here. Indeed, just as Rawls argues that the Rev. Martin Luther King and his fellow civil rights activists could have translated their Christian case for racial equality into public reasons, so could today the religious and traditionalist advocates of conjugal marriage do the same.

This point merits emphasis because liberal proponents of same-sex marriage habitually refer to the religious motivations of some advocates for traditional marriage as if these motivations implied a *reductio ad absurdum* of any political argument in favor of marriage as a conjugal union. (This in part explains why liberal followers of Rawls have often failed to appreciate that his theory of public reason supports conjugal marriage.[19]) But if the Christian inspiration of the anti-slavery and civil rights movements did not render those movements incompatible with political liberalism, then neither should the religious inspiration of members of the traditional marriage movement.

III. The Rawlsian justification of the conjugal definition of marriage finds confirmation in the recent decisions of American courts.

The state's legitimate interest in ensuring orderly social reproduction by defining marriage as a conjugal union constitutes an emerging theme in American jurisprudence. State and federal courts

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[19] *See e.g.*, Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 Fordham L. Rev. 1241, 1244-52 (1998) (arguing that Rawlsian liberalism requires gay marriage).

decisions from 2000 to 2012 that deal with same-sex unions reflect this theme. During this period, eight decisions upheld the conjugal definition of civil marriage.[20] One state court decision mandated "civil unions" that are equivalent in all but name to conjugal marriage.[21] Four decisions redefined the conjugal conception of marriage and mandated same-sex marriage.[22] All eight decisions upholding conjugal marriage accepted the defendants' appeal to the legitimate state interest in procreation and childrearing. Indeed, even in the New Jersey Supreme Court case that ordered civil unions, the majority notes:

> The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children. Other than sustaining the traditional definition of marriage, which is

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[20] *See Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451 (Ariz. Ct. 2003).

[21] *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

[22] *Varnum v. Brien,* 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Dep't of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Goodrich v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). In February 2012, the Ninth Circuit decided the fifth case in *Perry v. Brown*, which affirmed the district court's overturning of California's Proposition 8. *Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012).

> not implicated in this discussion, the State has not articulated any legitimate public need [for attaching specific benefits and burdens to married heterosexual couples].[23]

Thus, the Court implies that the State *could* have justifiably argued against homosexual civil unions if it had appealed to encouraging procreation or childrearing. The Connecticut Supreme Court mandated same-sex marriages in *Kerrigan v. Department of Public Health*, but here too, the majority decision emphasizes:

> we note that the defendants expressly have disavowed any … belief that the preservation of marriage as a heterosexual institution is in the best interest of children, or that prohibiting same-sex couples from marrying promotes responsible heterosexual procreation….[24]

Therefore, only three decisions out of thirteen rejected the state defense of defining marriage as a conjugal union when that defense was expressed in terms of promoting procreation and childrearing. Furthermore, the three anomalous cases—*Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), and *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)—were decided explicitly on the basis of contestable moral assertions that violated the ideal

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[23] *Lewis,* 908 A.2d at 217.
[24] *Kerrigan*, 957 A.2d at 478.

of public reason.[25] When the courts have attended to the state interest in orderly reproduction, and respected a standard like public reason as an aspect of rational basis review, they have reaffirmed the definition of marriage as a conjugal union of husband and wife.

Most recently, in *Jackson v. Abercrombie*, the federal district court in Hawaii held that conjugal marriage satisfies both publicly reasonable criteria for the state interest in marriage:

> the legislature could rationally conclude that defining marriage as a union between a man and woman provides an inducement for opposite-sex couples to marry, thereby decreasing the percentage of children accidently conceived outside of a stable, long-term relationship…. It is undisputed opposite-sex couples can naturally procreate and same-sex couples cannot. Thus, allowing opposite-sex couples to marry furthers this interest and allowing same-sex couples to marry would not do so.[26]

It is unsurprising that courts have reaffirmed the conjugal definition of marriage when they have abided by constitutional standards that are publicly available to all reasonable citizens.

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[25] *See* Adam MacLeod, *The Search for Moral Neutrality in Same-Sex Marriage Decisions,* 23 BYU J. Pub. L. 1 (2008). (discussing the "perfectionist ambitions" of *Goodridge* and *In re Marriage Cases*).

[26] *Jackson v. Abercrombie*, No. 11-00734 , 2012 WL 3255201, at *3 (D. Haw. August 8, 2012).

CONCLUSION

Most lawmakers, judges, and citizens do not need the work of John Rawls to teach them that members of a pluralistic society must accept a particular set of basic laws, which they hold in common regard. Without this basic solidarity, the very possibility of political life dissolves. A court deciding on a same-sex marriage law would violate public reason were it to base its opinion on the book of Leviticus in the Bible, for example. Why? Because the values and standards of Leviticus are not public. Not all members of society can reasonably be expected to accept Judeo-Christian scriptures as an authoritative source of political values, even if many people may find in them profound religious truth.

Rawls's work teaches that the constitutional principle of public reason applies universally—to secular values as much as religious ones. Therefore, just as a court could not reasonably expect all citizens to accept a decision based upon Leviticus, neither could it expect everyone to accept a decision based upon theories of "liberated" sexuality or moral philosophies of individual autonomy and egalitarianism. Perhaps Andrew Sullivan, the noted writer and gay activist, has put this point best. Liberalism, he says,

> has most to lose when it abandons the high ground of liberal neutrality. Perhaps especially in areas where passion and emotion are so deep, such as homosexuality, the liberal should be wary of identifying his

> or her tradition with a particular way of life, or a particular cause; for in that process, the whole potential for liberalism's appeal is lost. Liberalism works—and is the most resilient modern politics—precisely because it is the only politics that seeks to avoid these irresolvable and contentious conflicts.[27]

If liberalism retains the high ground by abiding by public reason, then it will reaffirm the conjugal definition of marriage as a union of husband and wife.

Given the foregoing argument, *amicus* respectfully requests that this Court reverse the decisions of the courts below.

Respectfully submitted,

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[27] Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* 162-136 (1996).