

Nos. 12-144, 12-307

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners,*

v.

KRISTIN 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*

**AMICI CURIAE BRIEF OF ROBERT P.
GEORGE, SHERIF GIRGIS, AND RYAN T.
ANDERSON IN SUPPORT OF
HOLLINGSWORTH AND BIPARTISAN LEGAL
ADVISORY GROUP ADDRESSING THE
MERITS AND SUPPORTING REVERSAL**

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QUESTIONS PRESENTED

Hollingsworth, et al. v. Perry, et al.

1. 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.

United States v. Windsor, et al.

1. Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

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INTEREST OF AMICI¹

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¹ The parties have issued letters consenting to the filing of this brief, which are being contemporaneously filed with the Clerk of the Court. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no counsel for a party or party made any monetary contribution intended to fund the preparation or submission of this brief. Printing costs for the brief were paid for by The Witherspoon Institute.

philosophic defense of marriage as a conjugal union. This brief is being filed with the parties' consent.

SUMMARY OF ARGUMENT

At stake in these cases is not who is and is not eligible to marry but what marriage is. Today's debates offer rival answers to that question, two substantive marriage definitions. This Court's task is not to judge the desirability of the Defense of Marriage Act ("DOMA") and California Proposition 8's definition, but only to decide whether citizens and legislators may embody in law the belief in marriage as a conjugal union, as they have historically done.

There are excellent reasons from philosophy and social science to think that marriage is a conjugal relationship—the type of union that only a man and woman can form—rather than just the sort of emotional union that any two (or more) adults can form. And recognizing marriage as such serves important public interests.

Indeed, the most important free community, on which all others depend, is the marriage-based family. But to thrive, it requires a supporting framework of understandings and expectations. A main purpose of marriage law in any society is to promote such a culture. Sound marriage policy therefore serves the common good (especially the institutions of civil society) and helps keep government limited.

Redefining civil marriage can cause corresponding social harms. It weakens the rational foundation (and hence social practice) of the

stabilizing marital norms on which social order depends: norms such as permanence, exclusivity, monogamy. Conferring benefits on same-sex relationships itself does not do this, but *redefining marriage in the public mind* does. And undermining the norms of marriage will in turn damage the many cultural and political goods that draw the law into the marriage business. We list them in summary form here.

Real marital fulfillment. To form a true marriage, one must freely choose it, which requires at least a rough idea of what it actually is. Redefining marriage will harm people (especially future generations) by distorting their idea of what marriage is. It will teach that marriage is essentially about emotional fulfillment, without any inherent connections to bodily union or procreation and family life. As people internalize this view, their ability to realize genuine marital union will diminish.

Child and spousal well-being. Marriage tends to make spouses healthier, happier and wealthier. And it is marriage itself—conjugal marriage—that does this, especially through its distinctive norms of permanence, exclusivity and orientation to family life. As the state's redefinition of marriage makes these norms harder to understand, cherish, justify and live by, spouses will benefit less from the advantages of stability.

Moreover, if marriage is redefined, no civil institution will reinforce the notion that men and women tend to bring different gifts to child-rearing. In all these ways, redefinition will lower the

pressures and incentives for men and women to stay with their spouses and children, or for couples to marry before conceiving. This would harm children's development as children do best when raised by their married biological mother and father. The welfare and correctional state will have to expand to fill the developmental vacuum.

Leading LGBT scholars and activists increasingly agree that redefining marriage would undermine its norms.

Religious liberty. If marriage understood as the union of man and woman comes to be seen as irrational ("bigotry"), freedom to express and live by this idea will be eroded. Individuals and institutions who espouse the conjugal view have been denied government licenses, or educational and professional opportunities, for living by (or even publicizing) their views. The consequences for observant Christians, Jews, Muslims and others are clear.

Moreover, none of these harms is caused by recognizing infertile (opposite-sex) marriages, which cohere with the conjugal view. And finally, enshrining this view of marriage in law is fully consistent with this Court's ruling in *Lawrence v. Texas*.

Because there are good reasons for citizens and lawmakers to conclude that marriage is a union of man and woman—even before considering the harms that redefinition might bring—this Court should uphold DOMA and Proposition 8 as constitutional

exercises of policy-making power by Congress and the citizens of California, respectively.

ARGUMENT

I. At stake in DOMA and Proposition 8 is the definition of marriage.

What we have come to call the gay marriage debate is not a debate about homosexuality, but about marriage. It is not about whom to treat as eligible to marry, but about what marriage is. It marks a pivotal stage in a decades-long struggle between two views of the meaning of marriage.

The *conjugal* view of marriage has long informed the law—along with the literature, art, philosophy, religion, and social practice—of our civilization. Marriage so understood is a *comprehensive* union: Joining spouses in body as well as in mind, it is begun by commitment and sealed by sexual intercourse. So completed in the acts by which new life is made, it is especially apt for and deepened by procreation, and calls for that broad sharing uniquely fit for family life. Uniting spouses in these all-encompassing ways, it calls for all-encompassing commitment: permanent and exclusive. Comprehensive union is valuable in itself, but its link to children's welfare makes marriage a public good that the state should recognize and support.

A *revisionist* view has informed certain marriage policy changes of the last several decades. On the revisionist understanding, marriage is

essentially an emotional union, accompanied by any consensual sexual activity. Such romantic unions are seen as valuable while the emotion lasts.

The revisionist view informs some male-female bonds, not just same-sex ones. But it brooks no real difference between the two: both involve intense emotional bonding, so both can (on this view) make a marriage. But comprehensive union is something only a man and woman can form.

For this reason, enacting same-sex marriage would not expand the institution of marriage, but redefine it. Finishing what policies like “no-fault” divorce began, and thus entrenching them, it would finally replace the conjugal view with the revisionist. This would multiply the marriage revolution’s moral and cultural spoils, and make them harder than ever to recover.

There is therefore no direct line from the principle of equality, to redefining marriage to exclude the norm of sexual complementarity. Equality requires treating like cases alike. To know what counts as “alike,” we have to know what marriage is and how recognizing it helps society.

And because any marriage policy enshrines *some* view of what marriage is—the conjugal, revisionist, or another—no marriage policy is neutral. Each relies on controversial judgments.

Yet in the cases at hand, the Court is charged with judging not the *soundness* of either view, but only whether the conjugal view has a rational basis.

What we show is that citizens have excellent reasons to affirm that view, and that redefining civil marriage to exclude the norm of sexual complementarity can be expected to cause social harm. The first point alone is sufficient to show a rational basis for DOMA and Proposition 8; the second only reinforces this.

II. It is reasonable to affirm that marriage is a union of man and woman.

Any community is created by common action—by certain activities, defined by common goods, in the context of commitment. The activities and goods build up the bond, and determine the commitment it requires.

For example, a scholarly community exists whenever people commit to cooperate in activities ordered toward gaining knowledge. These activities and the truths they uncover build up their bond, and determine the sort of commitment (to academic integrity) that they owe each other.

The kind of union created by *marriage* is uniquely *comprehensive* in just these ways: in (a) how it unites persons, (b) what it unites them with respect to, and (c) how extensive a commitment it demands.

It unites two people (a) in their most basic dimensions, in mind *and* body; (b) with respect to

procreation, family life, and its broad domestic sharing; and (c) permanently and exclusively.²

First, marriage unites persons in their *bodies* as well as their minds. The bodily union of two people is much like the bodily union of organs in an individual. Just as one's organs form a unity by coordinating for the biological good of the whole (one's survival), so the bodies of a man and woman form a unity by coordination (coitus) for a biological good (reproduction) of their union as a whole. In choosing such biological coordination, spouses unite bodily, and do not merely touch or interlock, in a way that has generative significance. This generative kind of act physically embodies their specific, marital commitment. Non-marital bonds are, by contrast, unions of heart and minds, but not bodies.

Second, marriage is oriented to procreation, family life, and thus a comprehensive range of goods. Why? The kind of act that makes marital love is also the one that makes new life: new participants in *every* type of good. Having committed to sharing in the generative acts that unite them organically (as "one flesh"), spouses cooperate in other areas of life (intellectual, recreational, etc.) in the broad sharing uniquely apt for fostering children's all-around development. Ordinary friendships—the unions of hearts and minds embodied in conversations and various joint pursuits—can have more limited and variable scope.

² We expand on this argument about marriage in our book, chapter 2 "Comprehensive Union."

Third, in view of its comprehensiveness in these other senses, marriage inherently calls for comprehensive commitment: permanence and exclusivity. Like the union of organs into one healthy whole organism, marriage is properly total and lasting for the life of the parts. (Indeed, comprehensive union can be achieved *only* by two people, because no act can organically unite three or more people bodily.)

Again, marriage is uniquely apt for having and rearing children, an inherently open-ended task calling for unconditional commitment. So its norms fittingly create the stability and harmony suitable for rearing children. Sociology and common sense agree that such stability is undermined by divorce, which deprives children of an intact biological family, and by infidelity—which betrays and divides one’s attention to spouse and children, often with children from other couplings.

Indeed, only the conjugal view explains why spouses should pledge *sexual* exclusivity at all. If instead marriage is essentially an emotional union, this is hard to explain. After all, sex is just one of many pleasing activities that foster tenderness, and for some partners, sexual “openness” is regarded as fostering deeper and longer-lasting emotional union. But the conjugal view is not arbitrary in picking out sexual activity as central to exclusivity, since it distinguishes marriage by the type of cooperation, defined by the common ends, that it involves: bodily union and its natural fulfillment in children and family life.

While people in other bonds may wish for, promise, and live out permanent sexual exclusivity, only marriage, understood as a conjugal union, objectively requires such a commitment if it is to be realized fully. Only in conjugal marriage is there a principled basis for these norms apart from what spouses happen to prefer. As we show below (Part IV) this is borne out by reasoned reflection, revisionists' own arguments, the progress of recent policy proposals, and preliminary social science.

Because the conjugal view best explains the other norms of marriage, citizens and lawmakers have excellent reasons to affirm it.

III. The conjugal view explains and serves the state's interest in marriage.

Why does the state recognize marriage but not other close bonds? It has an interest in supporting the stabilizing norms of marriage because marriage is uniquely apt for family life. Only male-female sexual relationships produce new human beings—highly dependent people who have the best chance of reaching maturity and contributing socially when reared by their own committed mother and father. But family stability does not happen by chance. It requires a strong marriage *culture*: norms meant to guide people's choices toward their (and others') long-term interests.

As the eminent social scientist James Q. Wilson wrote, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children,

and the sex that makes children possible, does not solve.”³ The law addresses this problem by shaping what people think marriage is—and thus how they act *toward and within* marriage. In so doing, it vindicates a *right*—children’s right to know their own mother and father’s committed love. It also limits the impact of negative externalities on innocent parties, for a culture shaped by large numbers of failed marriages and out-of-wedlock births burdens all with a train of social pathologies, and increase demand for policing and state-provided social services.

Studies that control for other factors, including poverty, show that children reared in intact homes do best on the following indices:⁴

- *Educational achievement*: literacy and graduation rates
- *Emotional health*: rates of anxiety, depression, substance abuse, and suicide
- *Familial and sexual development*: strong sense of identity, timing of onset of puberty, rates of teen and out-of-wedlock pregnancy, and rates of sexual abuse
- *Child and adult behavior*: rates of aggression, attention deficit disorder, delinquency, and incarceration

³ James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* 41 (New York: HarperCollins 2002).

⁴ For the relevant studies, see *Marriage and the Public Good: Ten Principles* 9–19 (Princeton, N.J.: The Witherspoon Institute 2008), http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf.

Consider the conclusions of the left-leaning research institution Child Trends:

[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 stepfamilies or cohabiting 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.⁵

Several other literature reviews corroborate the importance of intact households for children.⁶

⁵ Kristin Anderson Moore, Susan M. Jekielek, & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It?*, Child Trends Research Brief 1–2 (June 2002), <http://www.childtrends.org/files/MarriageRB602.pdf>.

⁶ See Sara McLanahan, Elisabeth Donahue, & Ron Haskins, *Introducing the Issue*, *Future Children*, Fall 2005, at 3-12, available at http://futureofchildren.org/futureofchildren/publications/docs/15_02_01.pdf; Mary Parke, *Are Married Parents Really Better for Children?: What Research Says about the Effects of Family Structure on Child Well-Being*, CLASP Policy Brief no. 3 (May 2003), available at http://www.clasp.org/publications/Marriage_Brief3.pdf; W. Bradford Wilcox, William J. Doherty, Helen Fisher, et al., *Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences* (New York:

A second public benefit of marriage is its tendency to help spouses financially, emotionally, physically, and socially. After marrying, for example, men tend to spend more time at work, less time at bars, more time at religious gatherings, less time in jail, and more time with family.⁷ Yet as we show below (Part V), it is the conjugal understanding of marriage that makes sense of these stabilizing norms and supports them in practice; attempting to spread them by replacing that understanding of marriage with a competing vision is likely to have just the opposite effect.

Third, given the economic benefits of marriage, marriage decline most hurts the least well-off—especially lower-income communities, as Kay Hymowitz argues in *Marriage and Caste in America*.⁸ In fact, a leading indicator of whether someone will know poverty or prosperity is whether she knew growing up the love and security of her married mother and father.

Finally, since a strong marriage culture is good for children, spouses, indeed our whole economy, and

Institute for American Values, 2nd ed. 2005), *available at* http://americanvalues.org/pdfs/why_marriage_matters2.pdf.

⁷ Steven Nock, *Marriage in Men's Lives* (New York: Oxford University Press 1998). Nock is discussing marriages in the traditional sense: the union of husband and wife.

⁸ Kay S. Hymowitz, *Marriage and Caste in America: Separate and Unequal Families in a Post-Marital Age* (Chicago: Ivan R. Dee 2006). See also W. Bradford Wilcox, *The Evolution of Divorce, National Affairs*, Fall 2009, at 81, 88–93, *available at* http://www.nationalaffairs.com/doclib/20091229_Wilcox_Fall09.pdf.

especially the poor, it also serves the cause of limited government. Where marriages never form or easily break down, the state expands to fill the domestic vacuum by lawsuits to determine paternity, visitation rights, child support, and alimony; and by increased policing and social services. Sociologists David Popenoe and Alan Wolfe's research on Scandinavian countries shows that as marriage culture declines, the size and scope of state power and spending tend to grow.⁹

In fact, a study by the Left-leaning Brookings Institution finds that \$229 billion in welfare expenditures between 1970 and 1996 can be attributed to the breakdown of the marriage culture and the resulting exacerbation of social ills: teen pregnancy, poverty, crime, drug abuse, and health problems.¹⁰ A 2008 study found that divorce and unwed childbearing cost taxpayers "at least \$112 billion" each year.¹¹ And Auburn University scholar David Schramm has estimated that divorce alone

⁹ David Popenoe, *Disturbing the Nest: Family Change and Decline in Modern Societies* xiv–xv (New York: A. de Gruyter 1988); Alan Wolfe, *Whose Keeper? Social Science and Moral Obligation* 132–42 (Berkeley: University of California Press 1989).

¹⁰ Isabel V. Sawhill, *Families at Risk, in Setting National Priorities: The 2000 Election and Beyond* 97, 108 (Henry J. Aaron & Robert D. Reischauer eds., Washington, D.C.: Brookings Institution Press 1999); see also *Marriage and the Public Good*, *supra* note 4, at 15.

¹¹ Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and for All Fifty States* 5 (New York: Institute for American Values 2008), <http://www.americanvalues.org/pdfs/COFF.pdf> (emphasis in original).

costs local, state, and federal government \$33 billion each year.¹²

In short, several aspects of the common good depend on a strong marriage culture.

IV. Redefining marriage would not extend its stabilizing norms, but undermine them across society.

Redefining civil marriage will obscure the true nature of marriage as a conjugal union and undermine the rational basis of marital norms, and hence eventually adherence to them. This in turn will harm spouses, children, and others. Our arguments in this Part depend on three simple ideas:

1. Law tends to shape beliefs.
2. Beliefs shape behavior.
3. Beliefs and behavior affect human interests and human well-being.

In discussing harms, we do not propose changing the controlling constitutional standard, under which Proposition 8 and DOMA are valid if they rationally advance legitimate ends. For that standard, harms (whether to those affected by the legal distinction or by its removal) are strictly beside the point. We discuss them here because they *reinforce* the sufficient reasons already discussed in

¹² David G. Schramm, *Individual and Social Costs of Divorce in Utah*, 27 J. Fam. & Econ. Issues 133, 146 (2006).

previous Parts for holding, and legally enshrining, the conjugal view.

A. If sexual complementarity is merely incidental to marriage, then so are other marital norms, including permanence, monogamy, exclusivity, and even sexual union.

Some argue that redefined marriage would only spread stability. But there is nothing magical about the word “marriage” that promotes marital norms, however applied. Rather, the law encourages these norms by promoting an understanding of marriage that justifies them as a coherent whole.

Yet marital norms make no sense as requirements of *principle* and not mere subjective preferences, if marriage is just whatever same- and opposite-sex couples can have in common, namely, intense emotional regard. There is no reason of *principle* why emotional union should be permanent. Or limited to two persons, rather than including larger ensembles. Or sexually exclusive, rather than “open.” Or sexual at all, rather than integrated around other activities (say, where sex is legally impermissible, as between relatives). Or inherently oriented to family life and shaped by its demands. Couples may live out these norms where temperament or taste motivates them, but there is no reason of principle for them to do so, and no basis for using the law to encourage them to do so.

In other words, if sexual complementarity is optional for marriage, present only where preferred,

then so is almost every other norm that sets marriage apart. If conjugal marriage laws unjustly “discriminate” against same-sex relationships because the latter can have loving emotional bonds, then we must be unjust in excluding people in polyamorous (multiple-partner) emotional bonds. As a logical matter, sexual complementarity and other historic norms of marriage rise or fall together.

B. Promoting the revisionist vision of marriage makes conjugal union harder to live out.

No one acts in a void. We all take cues from cultural norms, shaped by the law. For the law affects our ideas of what is reasonable and appropriate. Prominent Oxford philosopher Joseph Raz, who does not share the conjugal view, explains the inevitable and sweeping consequences of changing marriage laws:

[O]ne thing can be said with certainty [about recent changes in marriage law]. They will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear. They will not disappear suddenly. Rather they will be transformed into a somewhat different social form, which responds to the fact that it is one of several forms of bonding, and that bonding itself is much more easily and commonly dissoluble. All

these factors are already working their way into the constitutive conventions which determine what is appropriate and expected within a conventional marriage and transforming its significance.¹³

Redefining civil marriage would change its meaning *for everyone*. Legally recognized opposite-sex unions would increasingly be defined by what they had in common with same-sex relationships.

This change would make marriage itself, the human good, harder to achieve. For one can realize marriage only by choosing it; and one can choose it only if one has at least a rough idea of what it really is. By altering the fundamental understanding of marriage, the revisionist proposal would make people less capable of realizing this basic way of thriving.¹⁴ People forming what the state calls “marriage” would increasingly be forming bonds that merely resembled the real thing in certain ways, as a contractual relationship might resemble a friendship. The revisionist view would distort their priorities, actions, even motivations, in ways detrimental to true marriage.

¹³ Joseph Raz, *Autonomy and Pluralism*, in *The Morality of Freedom* 393 (Oxford: Clarendon Press 1988).

¹⁴ Patrick Lee, Robert P. George, & Gerard V. Bradley, *Marriage and Procreation: Avoiding Bad Arguments*, *Public Discourse*, March 30, 2011, <http://www.thepublicdiscourse.com/2011/03/2637>.

C. By obscuring the rational basis of the stabilizing norms of marriage, redefining marriage would increase marital instability, harming spouses and children.

Permanence and exclusivity—the rational basis, and internal and social motivations to live them out—depend on the conjugal understanding (Part III). By the same token, these norms are undermined by the revisionist view (Part IV.A). Yet law affects behavior. So as more people absorb the new law’s message, we can reasonably expect marriages to take on still more of emotion’s inconstancy.¹⁵

Because there is no *reason* that emotional unions—any more than the emotions that define them, or friendships generally—should be permanent or limited to two, these norms of marriage would make less sense. People would thus feel less bound to live by them whenever they simply preferred to live otherwise. And, being less able to understand the value of marriage itself as a certain sort of union, even apart from its emotional satisfactions, they would miss the reasons they had for marrying or staying with a spouse as feelings waned, or waxed for others.¹⁶

¹⁵ See also Andrew J. Cherlin, *The Marriage-Go-Round: The State of Marriage and Family in America Today* (New York: Knopf 2009), for a discussion of the link between the rise of expressive individualism and the divorce revolution.

¹⁶ See, e.g., W. Bradford Wilcox & Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate versus Institutional Models of Marriage*,

But children and spouses benefit in many concrete material ways from the stability of marriage (Part IV). Thus, the many concrete interests of spouses and children that justify recognizing marriage at all, count against redefining it.

D. Redefining marriage would obscure the distinctive contributions of mothers and fathers and the importance of biological parents generally, to children's detriment.

Conjugal marriage laws reinforce the idea that a conjugal union is, on the whole, the most appropriate environment for rearing children, as the best available social science suggests.

Recognizing same-sex relationships as marriages would legally abolish that ideal. No civil institution would reinforce the notion that men and women typically have different strengths as parents; that boys and girls tend to benefit from fathers and mothers in different ways. Indeed, our law, public schools, and media would teach that mothers and fathers are fully interchangeable, and that only bigots think otherwise (Part VI.C).

And here is the central problem with that: it would diminish the social pressures and incentives for husbands to remain with their wives and

39 Soc. Sci. Res. 687, 687-699 (2010). For research showing that same-sex unions tend more often to eschew sexual exclusivity, see Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. Times, Jan. 28, 2010, available at <http://www.nytimes.com/2010/01/29/us/29sfmetro.html?ref=us>.

biological children, or for men and women having children to marry first. Yet the resulting arrangements—parenting by divorced or single parents, or cohabiting couples; and disruptions of any kind—are demonstrably worse for children. So even if it turned out that studies showed no differences between same- and opposite-sex adoptive parenting, redefining marriage would destabilize marriage in ways that we know hurt children.

That said, there is significant evidence that mothers and fathers have different parenting strengths—that their respective absences impede child development in different ways. Girls, for example, are likelier to suffer sexual abuse and to have children as teenagers and out of wedlock if they do not grow up with their father.¹⁷ For their part, boys reared without their father tend to have much higher rates of aggression, delinquency, and incarceration.¹⁸

¹⁷ Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Cambridge, Mass.: Harvard University Press 1994); Bruce J. Ellis, John E. Bates, Kenneth A. Dodge, et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 *Child Dev.* 801, 801-21 (2003); Wilcox, Doherty, Fisher, et al., *Why Marriage Matters*, *supra* note 6, (cited in chap. 3, n. 11); Lorraine Blackman, Obie Clayton, Norval Glenn, et al., *The Consequences of Marriage for African Americans: A Comprehensive Literature Review* (New York: Institute for American Values 2005).

¹⁸ Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, *Future Children*, Fall 2005, at 75, 75–96, available at http://futureofchildren.org/futureofchildren/publications/docs/15_02_05.pdf; Cynthia C. Harper & Sara S. McLanahan,

As Rutgers University sociologist David Popenoe concludes, social science evidence suggests “that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is [...] irreplaceable.”¹⁹ He continues: “The two sexes are different to the core, and each is necessary—culturally and biologically—for the optimal development of a human being.”²⁰

In a summary of the “best psychological, sociological, and biological research to date,” University of Virginia sociologist W. Bradford Wilcox finds that on the whole, “men and women bring different gifts to the parenting enterprise, that children benefit from having parents with distinct parenting styles, and that family breakdown poses a serious threat to children and to the societies in which they live.”²¹

In short: it is at least reasonable to fear that redefining civil marriage would make it more socially acceptable for fathers to leave their families, for unmarried parents to put off firmer public commitment, or for children to be created for a household without a mother or father. But whatever

Father Absence and Youth Incarceration, 14 J. Res. on Adolescence 369–97 (2004).

¹⁹ David Popenoe, *Life without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensable for the Good of Children and Society* 146 (New York: Free Press 1996).

²⁰ *Id.* at 197.

²¹ W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show about the Complementarity of the Sexes and Parenting*, Touchstone, November 2005, at 32, 36.

the cause, there will be a cost to depriving children of the love and knowledge of their married mother and father.²²

E. Many LGBT activists agree—even embrace the result—that eliminating the norm of sexual complementarity will weaken other norms of marriage.

The point that the revisionist view erodes the basis for permanence and exclusivity in *any* relationship is increasingly confirmed by the rhetoric and arguments of revisionists themselves, by the policies that they are increasingly led to embrace, and even by preliminary social science.

University of Calgary philosophy professor Elizabeth Brake, for example, supports “minimal marriage,” in which “individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties, the type

²² Of course, the question of which arrangements our policies should privilege is normative; it cannot be settled by the cause-and-effect descriptions of social science alone. But that point scarcely matters here, because it is impossible to generalize from available studies purporting to find no differences between same-sex and married biological parenting. See also the amicus brief, filed in support of petitioners in *Hollingsworth* and the Bipartisan Legal Advisory Group of the U.S. House of Representatives in *Windsor*, discussing in depth the social science concerning parenting.

of relationship involved, and which rights and responsibilities to exchange with each.”²³

Judith Stacey, a prominent New York University professor, in testifying before Congress against the Defense of Marriage Act, expressed hope that the revisionist view’s triumph would give marriage “varied, creative, and adaptive contours . . . [leading some to] question the dyadic limitations of Western marriage and seek . . . small group marriages.”²⁴ In their statement “Beyond Same-Sex Marriage,” more than three hundred “LGBT and allied” scholars and advocates—including prominent Ivy League professors—call for legally recognizing sexual relationships involving more than two partners.²⁵

Nor are such relationships unheard of: *Newsweek* reports that there are more than five hundred thousand in the United States alone.²⁶ In Brazil, a public notary has recognized a trio as a civil

²³ Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 *Ethics* 302, 303 (2010).

²⁴ See Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 *U. St. Thomas L.J.* 33, 62 (2004).

²⁵ *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, BeyondMarriage.org, July 26, 2006, http://beyondmarriage.org/full_statement.html.

²⁶ Jessica Bennett, *Only You. And You. And You: Polyamory—Relationships with Multiple, Mutually Consenting Partners—Has a Coming-Out Party*, *Newsweek*, July 28, 2009, <http://www.newsweek.com/2009/07/28/only-you-and-you-and-you.html>.

union.²⁷ Mexico City has considered expressly temporary marriage licenses.²⁸ The Toronto District School Board has taken to promoting polyamorous relationships among its students.²⁹

What about the connection to family life? E. J. Graff celebrates the fact that recognizing same-sex unions would change the “institution’s message” so that it would “ever after stand for sexual choice, for cutting the link between sex and diapers.”³⁰ Enacting same-sex marriage “does more than just fit; it announces that marriage has changed shape.”³¹

And exclusivity? Andrew Sullivan, a self-styled proponent of the conservative case for same-sex marriage, has extolled the “spirituality” of “anonymous sex,” and welcomes the fact that the “openness” of same-sex unions might erode sexual exclusivity among opposite-sex marriages.³²

²⁷ *Three-Person Civil Union Sparks Controversy in Brazil*, BBC News, Aug. 28, 2012, <http://www.bbc.co.uk/news/world-latin-america-19402508>.

²⁸ *Mexico City Proposes Temporary Marriage Licenses*, Telegraph, Sept. 30, 2011, <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/mexico/8798982/Mexico-City-proposes-temporary-marriage-licences.html>.

²⁹ *Toronto School District Board Promotes Polygamy, Group Sex to Children*, <http://blazingcatfur.blogspot.com/2012/09/tdsb-promotes-polygamy-group-sex-to.html>.

³⁰ E. J. Graff, *Retying the Knot*, in *Same-Sex Marriage: Pro and Con: A Reader* 134, 136 (Andrew Sullivan ed., New York: Vintage Books 1997).

³¹ *Id.* at 137.

³² Andrew Sullivan, *Virtually Normal: An Argument about Homosexuality* 202-03 (New York: Vintage Books 1996).

Similarly, in a *New York Times Magazine* profile, same-sex marriage activist Dan Savage encourages spouses to adopt “a more flexible attitude” about sex outside their marriage.³³ A piece in *The Advocate*, a gay-interest newsmagazine, supports our point still more candidly:

Anti-equality right-wingers have long insisted that allowing gays to marry will destroy the sanctity of “traditional marriage,” and, of course, the logical, liberal party-line response has long been “No, it won’t.” But what if—for once—the sanctimonious crazies are right? Could the gay male tradition of open relationships actually alter marriage as we know it? And would that be such a bad thing?³⁴

Other revisionists have also embraced the goal of weakening the institution of marriage *in these very terms*. “[Former President George W.] Bush is correct,” says revisionist advocate Victoria Brownworth, “. . . when he states that allowing same-sex couples to marry will weaken the institution of marriage. . . . It most certainly will do so, and that will make marriage a far better concept than it previously has been.”³⁵ Michelangelo

³³ Mark Oppenheimer, *Married, With Infidelities*, N.Y. Times, June 30, 2011, available at <http://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html?pagewanted=all>.

³⁴ Ari Karpel, *Monogamish*, *Advocate*, July 7, 2011, http://www.advocate.com/Print_Issue/Features/Monogamish/.

³⁵ Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?*, in *I Do/I Don't: Queers on*

Signorile, a prominent advocate of redefining marriage, urges people in same-sex relationships to “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.”³⁶ They should “fight for same-sex marriage and 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.”³⁷

These views represent a trend among revisionist advocates, who increasingly agree that redefining marriage would undermine its stabilizing norms.

F. Preliminary social science, too, suggests that opposite-sex and same-sex relationships tend to follow different norms.

Preliminary social science also suggests that opposite-sex and same-sex relationships observe and thrive on different norms. In the 1980s, David McWhirter and Andrew Mattison set out to disprove popular beliefs about same-sex male partners’ lack of adherence to sexual exclusivity. Of those that they surveyed, whose relationships had lasted from one to thirty-seven years, more than 60 percent had begun

Marriage 53, 58–59 (Greg Wharton & Ian Philips eds., San Francisco: Suspect Thoughts Press 2004).

³⁶ Michelangelo Signorile, *Bridal Wave*, Out 42, December–January 1994, at 68, 161.

³⁷ *Id.*

the relationship expecting sexual exclusivity, but not one couple stayed sexually exclusive longer than five years.³⁸

More recently, the *New York Times* reported on a San Francisco State University study: “[G]ay nuptials are portrayed by opponents as an effort to rewrite the traditional rules of matrimony. Quietly, outside of the news media and courtroom spotlight, many gay couples are doing just that.”³⁹

One study even suggests that exclusivity affects men’s satisfaction in opposite-sex relationships more than in same-sex ones.⁴⁰ According to another, sexually open gay relationships last longer.⁴¹ By contrast, 99 percent of opposite-sex spouses demand of each other and anticipate sexual exclusivity,⁴² and violations of it are “the leading cause of divorce across 160 cultures and are one of the most frequent reasons that couples seek marital therapy.”⁴³

³⁸ David P. McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* 252–53 (Englewood Cliffs, N.J.: Prentice-Hall Trade 1984).

³⁹ James, *Many Successful Gay Marriages Share an Open Secret*, *supra* note 16.

⁴⁰ Trevor A. Hart & Danielle R. Schwartz, *Cognitive-Behavioral Erectile Dysfunction Treatment for Gay Men*, 17 *Cognitive & Behav. Prac.* 66, 66-76 (2010).

⁴¹ James, *Many Successful Gay Marriages Share an Open Secret*, *supra* note 16.

⁴² Alfred DeMaris, *Distal and Proximal Influences on the Risk of Extramarital Sex: A Prospective Study of Longer Duration Marriages*, 46 *J. Sex Res.* 597, 597-607 (2009).

⁴³ Julie H. Hall & Frank D. Fincham, *Psychological Distress: Precursor or Consequence of Dating Infidelity*, 35 *Personality & Soc. Psychol. Bull.* 143-59 (2009).

Numbers of partners and relationship longevity also tend to vary. A 1990s U.K. survey of more than five thousand men found that the median numbers of partners over the previous five years for men with exclusively heterosexual inclinations was two, with bisexual inclinations was seven, and with exclusively homosexual inclinations was ten.⁴⁴ A U.S. survey found that the average number of sexual partners since the age of eighteen for men who identified as homosexual or bisexual was over two and a half times as many as the average for heterosexual men.⁴⁵ And a study of same-sex civil marriages in Norway and Sweden found that “divorce risks are higher in same-sex partnerships than opposite-sex marriages and . . . unions of lesbians are considerably less stable, or more dynamic, than unions of gay men.”⁴⁶

Incipient social science thus suggests that same- and opposite-sex bonds tend to live by different norms.

⁴⁴ C. H. Mercer, G. J. Hart, A. M. Johnson, & J. A. Cassell, *Behaviourally Bisexual Men as a Bridge Population for HIV and Sexually Transmitted Infections? Evidence from a National Probability Survey*, 20 *Int'l J. STD & AIDS* 87, 88 (2009).

⁴⁵ Edward O. Laumann, J. H. Gagnon, R. T. Michael, & S. Michaels, *The Social Organization of Sexuality: Sexual Practices in the United States* 314–16 (Chicago: University of Chicago Press 1994).

⁴⁶ Gunnar Andersson, Turid Noack, Ane Seierstad & Harald Weedon-Fekjaer, *The Demographics of Same-Sex Marriages in Norway & Sweden*, 43 *Demography* 79, 95 (2006).

V. Beyond weakening marriage and its stability, enshrining the revisionist view would burden rights of conscience.

Americans are impatient with those we regard as enemies of equality. Often barred from respectable jobs, they enjoy little social tolerance. The First Amendment does not keep us from revoking certain of their civil privileges or variously suing them for living by their views.⁴⁷

Yet the revisionist view depends on the idea that it is irrational to see important differences between same- and opposite-sex relationships. If the state accepted this idea, it would come to see conjugal marriage supporters as champions of invidious discrimination. This would undermine moral and religious freedom, and parents' rights to direct their children's education.

From the wedding on through the honeymoon and into common life, couples transact *as a couple* with countless people. Photographers, caterers, innkeepers, adoption agency officials, parochial school administrators, counselors, foster-care and adoption providers, and others will be forced to

⁴⁷ For example, the Internal Revenue Service revoked the tax-exempt status of Bob Jones University because of its racially discriminatory practices, and the Supreme Court upheld this action as compatible with the university's First Amendment rights. *Bob Jones University v. United States*, 461 U.S. 574 (1983).

comply with the revisionist view or lose their jobs—or licenses and government contracts.⁴⁸

We are not crying wolf, but taking revisionists at their word. If support for conjugal marriage is like racism, we need only ask how society treats racists. We marginalize and stigmatize them. Thus, in Canada, Damian Goddard was fired from his job as a sportscaster for expressing on Twitter support for conjugal marriage.⁴⁹ In Massachusetts, Catholic Charities was forced to give up its adoption services rather than violate its principles by placing children with same-sex cohabitants.⁵⁰ When public schools began teaching students about same-sex marriage, precisely on the ground that it was now the law of the commonwealth, a Court of Appeals ruled that parents had no right to exempt their children.⁵¹ The Becket Fund for Religious Liberty reports that over “350 separate state anti-discrimination provisions

⁴⁸ Marc D. Stern, *Same-Sex Marriage and the Churches*, in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 1–57, 1, 11–14 (Douglas Laycock, Anthony Picarello, & Robin Fretwell Wilson eds., Lanham, Md.: Rowman & Littlefield 2008). This collection of essays includes the views of scholars on both sides of the same-sex marriage question, who conclude that conflicts with religious liberty are inevitable when marriage is extended to same-sex couples.

⁴⁹ *TV Host Fired over Sean Avery Debate*, ESPN.com, May 13, 2011, <http://sports.espn.go.com/new-york/nhl/news/story?id=6532954>.

⁵⁰ Maggie Gallagher, *Banned in Boston: The Coming Conflict between Same-Sex Marriage and Religious Liberty*, Weekly Standard, May 15, 2006, <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>.

⁵¹ See, e.g., *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

would likely be triggered by recognition of same-sex marriage.”⁵²

If the people judge that the conjugal view of marriage is reasonable, they may also reasonably judge that state efforts to suppress it harm the common good, by curbing freedoms of speech, religion, and conscience for nothing more than empty ideological uniformity.

VI. It is rationally consistent for the state to recognize infertile opposite-sex couples but not same-sex couples.

Many of our arguments—about what marriage is, and why it matters socially—depend on a subtle connection between marriage and children. This leads some to argue that the conjugal understanding of marriage leaves a state no principled basis for recognizing infertile couples’ unions but not same-sex couples.

This challenge is easily met. (1) An infertile man and woman can still form together a comprehensive (bodily as well as emotional) union, which differs only in degree, not type, from fertile ones before or after their first birth. So recognizing such unions has (2) none of the costs of recognizing same-sex bonds; (3) most of the benefits of

⁵² Becket Fund for Religious Liberty, *Same-Sex Marriage and State Anti-Discrimination Laws 2* (Washington, D.C.: Becket Fund for Religious Liberty, Jan. 2009), available at <http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendices.pdf>.

recognizing fertile ones; and (4) an *additional* benefit.

1. Infertile conjugal unions are still true marriages

To form a true marriage, a couple needs to establish and live out the (i) comprehensive (i.e., mind-and-body) union that (ii) would be completed by, and be apt for, procreation and domestic life and so (iii) inherently calls for permanent and exclusive commitment.

Every male-female couple capable of consummating their commitment can have all three features. With or without children, on the wedding night or ten years later, these relationships are all comprehensive in the three senses specific to marriage, with its distinctive sort of value. Without exception, same-sex and multiple-partner unions are not.

2. Recognizing infertile conjugal unions has none of the costs of redefining marriage.

Since infertile couples can form a true marriage, recognizing them has none of the *costs* of recognizing same-sex, polyamorous, or other nonmarital unions. It does not make it harder for people to realize the basic good of marriage, for it does not undermine the public's grasp of the nature of true marriage. Nor does it undermine marital *norms*, which are grounded in that nature, or make

fathers or mothers seem superfluous. It prejudices no one's religious or moral freedom.

Besides, failing to recognize infertile couples' unions may really violate the principle of equality to which revisionists appeal, since infertile as well as fertile couples can form unions of the same *kind*: comprehensive unions. Absent strong reasons, such differential treatment would be unfair.

3. Recognizing such unions has many of the benefits of recognizing fertile unions.

Many couples believed to be infertile end up having children, who are served by their parents' marriage; and trying to determine fertility would require unjust invasions of privacy.

Furthermore, even an obviously infertile couple can for reasons of principle, and not merely subjective preference, live out the features of true marriage, and so contribute to a strong marriage culture. This makes couples who might conceive more likely to form a marriage and abide by its norms. And that, in turn, ensures that more children are reared by their married biological parents.

4. Recognizing such unions has at least one additional benefit.

Finally, recognizing only fertile marriages would suggest that marriage is valuable only as a means to children—and not good in itself, as it is. So recognizing infertile marriages serves at least one

purpose *better* than recognizing fertile unions does: to recall for us the truth, crucial for healthy and stable marriages generally, that marriage, considered precisely as a comprehensive or conjugal union, has value in itself.

Thus, though the conjugal view does not restrict marriage to spouses with children, its success would tend to limit children to families led by committed spouses. The more spouses (including infertile ones) reflect by their lives the truth about what marriage requires, the more saturated we will all be in those truths, so that more families *with* children will stay intact.

VII. Upholding DOMA and Proposition 8 is fully consistent with this Court's ruling in *Lawrence v. Texas*.

Laws defining marriage as a union of man and woman are *not* relevantly similar to the Texas anti-sodomy law; the considerations cited in *Lawrence v. Texas*, 539 U.S. 558 (2003), against that law do *not* apply to marriage; and its majority opinion and concurrence expressly *deny* any analogy between the two.

A. The majority opinion and concurrence in *Lawrence* are consistent with upholding Proposition 8 and DOMA.

Lawrence held that a statute criminalizing homosexual sodomy violated the Due Process Clause. Writing for the majority, Justice Kennedy denied that citizens “may use the power of the State

to enforce [moral disapproval of sodomy] on the whole society through operation of the criminal law.” 539 U.S. at 571. *But DOMA and Proposition 8 leave the criminal law untouched.* They merely define civil marriage as the union of a man and woman. Unlike, say, anti-bigamy laws, they criminalize nothing. Individuals are free to form same-sex relationships, and religious and other institutions remain free to recognize those relationships as marriages.

Does *Lawrence* exclude DOMA and Proposition 8 by *analogy*? Is *criminalizing* the conduct of certain relationships analogous to *not recognizing* them as marriages? No, it is not.

The majority opinion cites the American Law Institute’s 1955 Model Penal Code, which discourages bans on private consensual sexual activity on the grounds that such provisions: undermine respect for the law by outlawing widespread practices, criminalize what is harmless, and are arbitrarily enforced. *Id.* at 572. None of these considerations is relevant to the non-recognition of same-sex partnerships, which shows no signs of undermining adherence to or respect for the law, criminalizes nothing, and is from the moment of passage uniformly enforced.

The majority opinion points to “the stigma this [Texas anti-sodomy] criminal statute imposes . . .” and decries the fact that “[t]he petitioners will bear on their record the history of their criminal convictions.” *Id.* at 575. Such statutes “demean [homosexual persons’] existence or control their destiny *by making their private sexual conduct a*

crime.” *Id.* at 578 (emphasis added). Not being in a union recognized by government as a marriage implies none of these things.

Likewise, DOMA and Proposition 8 do not involve (as *Lawrence* held that anti-sodomy laws do) the slightest “intrusion into the personal and private life” of anyone. *Id.* Thus, *Lawrence*’s identification of a constitutionally protected “realm of *personal* liberty which the government *may not enter*” leaves intact DOMA and Proposition 8—which concern a *public* institution, and *limit* the government’s interference in the personal sphere by constricting the scope of legally regulated relationships. *Id.* at 578 (emphasis added) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992)).

Indeed, the majority opinion explicitly disavows any implications for marriage, saying that the petitioners’ case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,” *id.* at 578, and suggesting that one of the few reasons for which the state *may* “define the meaning of [a] relationship or [...] set its boundaries” is to prevent “abuse of an institution the law protects.” *Id.* at 567. Justice O’Connor’s concurrence goes even farther by expressly affirming that “preserving the traditional institution of marriage” is a “legitimate state interest” and that “other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.” *Id.* at 585.

B. The Lawrence dissent should not be construed to suggest that Lawrence creates a constitutional right to state or federal recognition of same-sex bonds as marriages.

Dissenting in *Lawrence*, Justice Scalia warned that, despite Justice Kennedy's insistence, the logic of *Lawrence* undermines the restriction of civil marriage to unions of sexually complementary spouses. For, Justice Scalia argues, *if* "preserving the traditional institution of marriage" is a legitimate state interest, then so is "preserving the traditional sexual mores of our society." *Id.* at 601 (Scalia, J., dissenting). But *Lawrence* declares unconstitutional only a certain *means* of preserving the traditional sexual mores of our society—i.e., *criminalization*—whereas DOMA and Proposition 8 criminalize *nothing*.

There is no contradiction in holding that while the state may introduce legal structures to encourage adherence to certain norms and ideals (to promote ways of life that in its judgment serve the welfare of children and the more vulnerable parent), it may not use the heavy hand of criminal law—with its deprivations of *liberty* or *property*—in service of the same goals. Indeed, the majority opinion and Justice O'Connor's concurrence in *Lawrence* offer several reasons for maintaining just this distinction.

Finally, traditional marriage law admits many justifications that would not apply to anti-sodomy laws. The state's promotion of marriage as a union of husband and wife itself entails nothing about the

morality of non-marital bonds. It can remain agnostic about these while insisting on the social value of the institution of marriage for establishing as a norm and ideal, and to some extent ensuring, that men and women unite as husbands and wives and thus remain committed fathers and mothers to any children their union may produce.

CONCLUSION

For the foregoing reasons, this Court should uphold DOMA and Proposition 8 as constitutionally valid exercises of policy-making power.

Respectfully submitted,

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