No. 12-144

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS HOLLINGSWORTH, et al., *Petitioners,*
v.
KRISTIN M. PERRY, et al., *Respondents.*

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

Amicus Curiae Brief for Catholics for the Common Good and The Marriage Law Project in Support of Petitioners

Robert A. Destro
Counsel for *Amici Curiae*

Marriage Law Project
Columbus School of Law
The Catholic University of America
3600 John McCormack Road, N.E.
Washington, D.C. 20064
202-319-5140
robertdestro@hotmail.com

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INTEREST OF AMICI CURIAE[1]

Catholics for the Common Good (CCG) is a non-profit organization incorporated in California. CCG is a lay-led organization, independent from the Catholic Church. It works to promote a more just society, guided by principles of Catholic social teaching. CCG was active in the effort to pass and defend Proposition 8. Its current primary focus is to promote a more just society by working to reverse the breakdown of marriage, which is a recognized cause of poverty and other social problems.

CCG is deeply concerned that if this Court redefines marriage as simply a "committed relationship" between two adults, it will effectively eliminate the only cultural institution recognized by law that presupposes a family unit comprised of mothers, fathers, *and* children. It also has a well-founded fear that its advocacy of policies designed to promote marriage between a man and a woman will result in legal sanctions imposed under existing and future laws that view such policies as discrimination on the basis of gender. Though marriage between a man and a woman before they have children is recommended by sociologists

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[1] Consent of the parties to the filing of this *amicus curiae* brief has been obtained and filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, no person other than Counsel identified on the cover, and the staff of Catholics for the Common Good and the Marriage Law Project participated in authoring this brief. No entity other than Marriage Law Project and its counsel provided financial support for this brief.

across the political spectrum as one solution to the root causes of poverty and the social consequences of fatherlessness, the findings in the courts below demonstrate that expressing such views in public can have significant, adverse, legal consequences.

The Marriage Law Project (MLP) has been actively involved in the effort to defend man-woman conjugal marriage since 1996. Its primary goal is to ensure that religious organizations involved in political disputes over marriage have adequate legal representation and expert advice. Working closely with the United States Conference of Catholic Bishops, other religious organizations, churches, and religious freedom advocates, MLP has worked on the marriage issue in the United States, Canada, Europe, South America, and Africa. Founded by the late David Orgon Coolidge, MLP has advised organizations, filed briefs, or presented legislative testimony before a subcommittee of the Judiciary Committee of the U.S. House of Representatives, and nearly every state in which the marriage issue has arisen. Since 1996, it has been a service of the Interdisciplinary Program in Law & Religion at The Catholic University of America's Columbus School of Law. MLP is also the publisher of one of the most cited books on the research into same-sex unions, Robert Lerner, Ph.D., and Althea K. Nagai, Ph.D., NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING (2001).

Amici present themselves in this case to defend marriage, in in the same spirit in which lay Catholics rose to defend marriage in *Perez v. Sharp* (1948), and in *Loving v. Virginia* (1967),

where Bishops from Maryland, West Virginia, Oklahoma, and eight Southern States attacked anti-miscegenation laws as both immoral and contrary to the letter and spirit of the Civil War Amendments. *See* Brief *Amicus Curiae* of John J. Russell, Bishop of Richmond, *et al.*, 1967 WL 113926.

SUMMARY OF ARGUMENT

When the courts below held the People of California violated the Constitution when they voted to reaffirm the unique biological and cultural status of the only civil institution that unites male-female couples with each other and any children that might be born from their union, they rejected the central premise of this Court's jurisprudence of the Equal Protection Clause. Unlike the "socially-constructed" classifications that the Court now rightly views with suspicion, such as race, illegitimacy and alienage, "physical differences between men and women . . . are enduring" and a "cause for celebration".

Not in the Ninth Circuit.

A majority of that court has held that the views of voters who relied on this view of human sexuality are "so far removed" from reality that the court found "it impossible to credit them."

The trial featured a sustained attack on "religion [as] the chief obstacle for gay and lesbian political progress" that also raises a profound First Amendment question: Does the Equal Protection Clause authorize federal courts to order *the People themselves* – and, by implication, individuals and associations – to provide homosexual persons with

precisely the same "official *recognition* and societal *approval* of their committed relationships that the State makes available to opposite-sex couples"? *Perry v. Brown*, 671 F.3d 1052, 1093 (9th Cir. 2012) (emphasis added). If it does, *political* equality; that is, the right to have, express, and vote in a manner consistent with one's views on the wisdom of public policy touching on human sexuality has become a victim of the Ninth Circuit's apparent view that no rational *voter* could actually believe that marriage has anything to do with "responsible procreation and childbearing." Id., 671 F.3d at 1086-1087.

Unless the members of this Court are prepared to reject the twin propositions that "physical differences between men and women . . . are enduring" and a "cause for celebration", it must restore the power of the People of California to affirm the unique status and importance of the *only* human relationship (even in a test-tube) on which the entire natural, legal, and social order depends.

ARGUMENT

The decision below expressly holds that *animus* is the only conceivable reason the People of California to distinguish between the "committed", sexual relationship of a man and a woman (*i.e.* to describe it as a "marriage") and the "committed", sexual relationships of other persons. *Perry v. Brown*, 671 F.3d 1052, 1093 (9th Cir. 2012), *cert. granted* 2012 WL 3134429.

That position finds no support in the Constitution. To the contrary, the Ninth Circuit's

holding that federal or state courts may order a State (or any other person or organization) to provide "official recognition and societal approval" of *anyone's* sexual relationships is unconstitutional on its face.

I. THE STATES MAY RECOGNIZE, AND ARGUABLY MUST ACCOMMODATE, BIOLOGICAL DIFFERENCES BETWEEN MEN AND WOMEN

The premise of Respondents' case is that it is invidiously discriminatory for any government (or, by implication, any association or person) to affirm, by word or deed, that "marriage", procreation, and child-rearing have a *constitutionally relevant* relationship to the specific "physical differences between men and women" that are "enduring" and a "cause for celebration." *United States v. Virginia*, 518 U.S. 515, 533 (1996). In the circumstances of the case at bar, where the voter is the actual policy-maker, the argument is that *every citizen* is obliged to accept, and to value "on its own terms", the distinct life experiences of same-sex and opposite-sex couples.

The argument that there is a constitutionally relevant difference between these experiences is, in this view, a "transparent[] and almost brazen" attempt use rational argument as a proxy for a direct statement that same-sex, sexual relationships "are base, and … degraded, and we are morally evil, and we are unfit for human beings in the ways in which we conduct our relationships." Tobias Barrington Wolff, "Collegiality and Individual Dignity", in Symposium: *Defense of Marriage Act: Law, Policy,*

and the Future of Marriage, 81 Fordham L. Rev. 829, 835 & nn. 11-12 (2012)

Whatever the merits of that claim, this Court cannot resolve it. On the record in this case, the Ninth Circuit has held that it is *impermissible* to construct public policies that assume that there is a real difference between men and women; between mothers and fathers; between boys and girls; and between male-female sexual relationships, and those of same-sex couples. Even without recourse to the burgeoning fields of genetics and neuroscience, common sense and the collective wisdom of eons of human history tell us that human beings who carry the XY-pair of chromosomes are different in important ways from those whose bodies, minds, and perspectives are shaped by the XX-pair. *See, e.g.,* Carol Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 6 (1982) ("It all goes back to Adam and Eve, a story which shows, among other things, if you make a woman out of a man, you are bound to get into trouble."). The biological "complementarity" of men and women is the reason why "a community made up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia,* 518 U.S. at 533. It is also why Congress adopted Title IX in 1972. 20 U.S.C. § 1681(a). *See generally*, *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009).

A. The People of California Had a Rational Basis on which to Resolve the Political Controversy Over the Definition of "Marriage."

There is a reason, beyond common-sense observation, that "a community made up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia,* 518 U.S. at 533. The emerging neuroscientific research on the human brain confirms that male and female brains are different in significant ways. *See, e.g.,* Louanne Brizendine, THE FEMALE BRAIN (Broadway, 2006) at 1 ("Out of the thirty thousand genes in the human genome, the less than one percent variation … influences every single cell in our bodies – from the nerves that register pleasure and pain to the neurons that transmit perception, thoughts, feelings, and emotions."); Steven Pinker, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE (Penguin, 2002) at 340 ("… [U]nlike other human divisions such as race and ethnicity, where any biological differences are minor at most and scientifically uninteresting, … [t]he sexes are as old as complex life and are a fundamental topic in evolutionary biology, genetics, and behavioral ecology.")

There is, of course, considerable disagreement on the extent of sex-linked differences and their meaning (if any). *See, e.g.,* Susan Lipsitz Bem, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY (Yale U. Press, 1994). Psychologist Cordelia Fine, for example, asks pointedly whether, in the future, "we'll ask

whether modern neuroscientific explanations of gender inequality are doomed to join the same scrap heap as measures of skull volume, brain weight, and neuron delicacy." DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE xxvii-viii (W. W. Norton & Co., 2010).

At present, nobody knows where this research will take us, but there is a vast body of credible, scientific evidence that supports the California voters' choice to differentiate the nomenclature to be assigned to male-female pairs (marriage) and single-sex pairs (domestic partnership).

Just as in other fields of scientific endeavor, neuroscience will both deepen our understanding, and spark intense debates. Our enriched understanding of the men and women who, together, *are* the human race will have a profound impact on the ways in which we organize our lives, educate our children, and confront both adversity and opportunity. *See, e.g.,* Susan Pinker, THE SEXUAL PARADOX: MEN, WOMEN AND THE REAL GENDER GAP 254 (Scribner, 2008) (noting that "[t]he science of sex differences is clearly a grab bag of surprises", and that "[g]iven the[] real-life observations [about sex-linked differences in behavior], the puzzle is why the idea of sex differences continues to be so controversial.")

One observer even predicts that this new information may, someday, force us to acknowledge what many voters already think they know from lived experience: that "the traditional family plays a special, indispensable role in human flourishing and that social policy must be

based on that truth." Charles Murray, COMING APART: THE STATE OF WHITE AMERICA, 1960-2010 p. 300 (Crown Forum, 2012). *See, e.g.,* K. Seidel, G. Poeggel, R. Holetschka, C. Helmeke, K. Braun, *Paternal Deprivation Affects the Development of Corticotrophin-Releasing Factor-Expressing Neurones in Prefrontal Cortex, Amygdala and Hippocampus of the Biparental Octodon degus*, 23 Journal of Neuroendocrinology 1166, 1167 (November 2011) ("Although the critical role of maternal care on the development of brain and behaviour of the offspring has been extensively studied, knowledge about the importance of paternal care is comparatively scarce. In biparental species, paternal care significantly contributes to a stimulating socio-emotional family environment ….") Wladimir Ovtscharoff, Carina Helmeke, Katharina Brown, *Lack of Paternal Care Affects Synaptic Development in the Anterior Cingulate Cortex*, 1116.1 Brain Research 58 (Elsevier, Oct. 20 2006) (analyzing the impact of paternal care on the synaptic development of the anterior cingulate cortex).

B. Policies Recognizing Innate Differences Between Men and Women and Male-Female Couples Serve Compelling Governmental, Social, Family, and Individual Interests.

In *United States v. Virginia*, 518 U.S. 515 (1996), seven members of this Court held that the males-only policy of the Virginia Military Institute could not be squared with the demands of the Equal Protection Clause. Relying on facts that showed that Virginia had not developed an

equally-rigorous "adversative" program that offered women opportunities designed to develop *their* unique capabilities, the Court invalidated VMI's policies. But it refused to assume that every distinction drawn on the basis of sex is impermissible.

> The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications. *See Loving v. Virginia*, 388 U.S. 1 (1967). Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both." *Ballard v. United States*, 329 U.S. 187 (1946).
>
> "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. . .."
>
> 518 U.S. at 533 (emphasis added).

In *Tuan Anh Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53, (2001), this Court applied *United States v. Virginia* to one of the most profound claims that an individual citizen can make under American constitutional law: *i.e.* whether a child fathered by an American, but born out of wedlock to a woman who is a

foreign national, is entitled to claim birthright citizenship if his father failed to comply with 8 U.S.C. §1409(a).

The Court was persuaded that the biological relationship between a child and his mother in the delivery room, and between a child and the father who raised him, was sufficiently different to support Congress' choice to employ a sex-based classification:

> To fail to acknowledge even our most basic biological differences – such as the fact that a mother must be present at birth but the father need not be – risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.
>
> *Id*. at 73.

However one counts the votes, it is clear that *all* members of the Court who considered the issues in *United States v. Virginia*, in *Nguyen*, and *Miller v. Albright*, 523 U.S. 420 (1998), agreed on

two basic propositions. The first is that "physical differences between men and women . . . are enduring" and a "cause for celebration. *See* 523 U.S. 420, 485 (1998) (Breyer, J., dissenting) ("… I believe that biological differences between men and women would justify … imposition [of paternity testing] where paternity is at issue. . . ."). The second is that because "biological differences" are relevant to policy-making, the law can take them into account for a legitimate purpose. *See Baehr v. Lewin*, 74 Haw. 530, 553, 852 P.2d 44, 55-56 (Hawaii 1993) (plurality op.) (recognizing that the link generally drawn "between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing, on the other is the assumption that the one is simply the logical predicate of the others.")

C. California's Marriage Laws Do Not Discriminate on the Basis of Sex

Laws reserving the term "marriage" for opposite sex couples do not discriminate on the basis of sex. *Sevcik v. Sandoval*, – F.Supp.2d –, 2012 WL 5989662 (D. Nev., Nov. 2012); *Jackson v. Abercrombie*, – F.Supp.2d –, 2012 WL 3255201 (D. Hawai'i, Aug. 2012); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1307-08 (M.D. Fla. 2005); Smelt v. County of Orange, 374 F.Supp.2d 861 (C.D. Cal. 2005), *aff'd in part, rev'd in part on other grounds*, 447 F.3d 673 (11th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006); *Conaway v. Deane*, 932 A.2d 571, 585-602 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006); *Andersen v. King County*, 138 P.3d

963, 987-990 (Wash. 2006) (plurality op.); *Singer v. Hara*, 522 P.2d 1187, 1192-95 (Wash. Ct. App. 1974), *review denied*, 84 Wash.2d 1008 (Wash. 1974). See also, *Baker v. State*, 744 A.2d 864, 880 n.13 (Vermont 1999), and *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 507-09 (Conn. 2008) (Borden, J., dissenting).

D. Lower Courts Accept the Principle that Legislation Can Recognize Obvious Physical Differences, and Maintain Important Social Conventions Built Upon Them.

There is a general consensus among the lower courts that the rule of *United States v. Virginia* allows State and local governments to regulate when obvious physical differences implicate important social conventions. In *Baehr v. Lewin*, 74 Haw. 530, 553, 852 P.2d 44, 55-56 (Hawaii 1993) (plurality op.), for example, the Hawaii Supreme Court observed that "the right to marry was inextricably linked to the right of procreation." *See also Buzzetti v. City of New York*, 140 F.3d 134, 144 (2d Cir. 1998), *cert. denied*, 525 U.S. 816 (1998) (differential treatment of male and female dancers was justified because "'the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated' in this case", *quoting Rostker* [*v. Goldberg*], 453 U.S. [57] at 79 and *Michael M.* [*v. Superior Court of Sonoma Co*], 450 U.S. [464] at 469 (plurality opinion)); *C.T. v. State*, 939 N.E.2d 626 (Ind. App. 2010), *transfer denied*, 950 N.E.2d 1194 (2011) (public nudity); *In re Estate of Miltenberger*, 737 N.W.2d 513 (Mich.

App. 2007), *appeal granted, then later denied and order vacated*, 753 N.W.2d 219 (Mich. 2008) (opinions written on both sides) (Michigan dower law did not violate equal protection); *In re T.J.S.*, 16 A.3d 386 (N.J. Super. App. Div. 2011), *aff'd by an equally divided court*, 212 N.J. 334, (N.J. 2012) (opinions written on both sides) (differential treatment of men and women with respect to a birth by in vitro fertilization did not deny the equal protection of the laws); *City of Albuquerque v. Sachs*, 92 P.3d 24 (N.M. App. 2004), *cert. denied*, 93 P.3d 1292 (N.M. 2004) (public indecency; no violation of New Mexico ERA, *citing U.S. v. Virginia*); *Frandsen v. County of Brevard*, 800 So.2d 757 (Fla. App. 2001), *review den.*, 828 So.2d 386 (Fla., 2002) (indecent exposure; equal protection guarantees of Florida Constitution; citing *U.S. v. Virginia*).

II. THE PEOPLE OF CALIFORNIA ARE FREE TO REAFFIRM THEIR MORAL, CULTURAL, AND POLITICAL UNDERSTANDING OF THE NATURE OF MARRIAGE

A. The People of California are Entitled to Consider and Reject the Hotly-disputed Proposition that Sex and Gender are "Social Constructs".

In the court below, a majority of the panel held that the rationales that California voters might have relied upon to support their individual votes for a constitutional amendment defining marriage were "so far removed" from reality that the court found "it impossible to credit them." *Perry v. Brown*, 671 F.3d at 1092.

Rather than give California's voters credit for considering the arguments of both sides in this intense political struggle, and then deciding to draw a line based on the unique biological *capacity* of the male-female couple, the courts found that the majority of California's voters were irrational, religiously-motivated, homophobes. *See Perry v. Brown*, 671 F.3d at ("By withdrawing the availability of the recognized designation of 'marriage,' Proposition 8 enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class.")

If the Ninth Circuit is correct that arguments rooted in biological and sociological difference are "so far removed from reality" that it is impossible to credit them," then there is literally nothing left of the holdings in *United States v. Virginia* and *Tuan Anh Nguyen*. Gender and sexuality are, at least in the Ninth Circuit, "social constructs" only. Biology is irrelevant.

The Ninth Circuit's rationale leaves little doubt that that the court has accepted the inherently *political* proposition that

> both sexuality and gender [should be viewed] not as something that people "are," but something that they "do" – that is, that they accomplish in social interaction. Individuals develop identities as sexual beings by (more or less consciously) continuously assessing their desires, adopting (or rejecting) particular attitudes, and engaging in (and revising) various practices.[] Likewise, they become gendered through ongoing experiments with gender

> rules—conforming to some, breaking others—assessing others' reactions, and adapting their gender performances accordingly.
>
> Although analytically distinct, sexuality and gender are intimately interrelated, mutually constructed in distinctive ways in specific social and historical locations.

Laura M. Carpenter, *"Like a Virgin … Again?: Secondary Virginity as an Ongoing, Gendered Social Construction"*, Sexuality & Culture (2011) 15:115–140 (internal references and footnote omitted)

If sexuality and gender are, in fact, "socially constructed", the logic behind the Ninth Circuit's conclusion that a vote for Proposition 8 can be explained *only* by reference to society's largely unconscious and deeply insidious preference for heterosexual relationships is more apparent. So too, unfortunately, does its conclusion that the California's definition of "marriage" must be invalidated so that the state can embark on an effort under the civil rights laws to compel acceptance and affirmation of other "committed relationships" and gender identities. *See, e.g.,* Mathew S. Nosanchuk, *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules Response: No Substitutions Please*, 100 Geo. L.J. 1989, 1996 (2012); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 Va. L. Rev. 1535, 1549 (1993) (discussing the "the potential of

lesbian and gay marriage to transform the gendered nature of marriage for all people.")

A review of the commentary on the marriage debate *within* LGBT community has "long demonstrated [that] an intersecting set of legal and social arguments makes it nearly impossible to characterize the politics of advocating for a more capacious right to marry." Ariela R. Dubler, *Sexing* Skinner*: History and the Politics of the Right to Marry,* 110 Colum. L. Rev. 1348, 1349 (2010) For some, "[a]ccess to marriage is … about equal access to a powerful legal institution that grants both numerous concrete rights, as well as myriad forms of social privilege." *Id.*, 110 Colum. L. Rev. at 1349 & sources cited at n. 2. For others, marriage is "an institution with a venerable pedigree of exclusion and hierarchy" that "stigmatizes those who do not wish to order their intimate lives within marriage's normative structures". *Id.*, 110 Colum. L. Rev. at 1349 & sources cited at n. 3, 1350. *See also* Michael Warner, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 81–82 (Harvard U. Press, 1999)

The common thread in all of these sources is a determination to "combat sexual moralism and to ameliorate the full range of hardships faced by persons associated with marginal gender or sexual identities or practices." Libby Adler, *The Gay Agenda*, 16 Mich. J. Gender & L. 147, 148 (2009); Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 Colum. L. Rev. 1165, 1187 (2006) ("If cases like *McLaughlin* and *Lawrence* are

understood exclusively as points on the long road to marriage, we lose sight of the possibility that, for some people, the right to engage in sex outside of marriage might be as significant as the right to enter into a legal marriage.").

Small wonder that those who voted for Proposition 8 are demonized by the court as irrational bigots, whose only purpose was "to withdraw from gays and lesbians the right to employ the designation of 'marriage' to describe their committed relationships and thus to deprive them of a societal status that affords dignity to those relationships." *Perry*, 671 F.3d at 1093.

But California does *not* deny social status, or oppress those with alternative sexual identities and relationships. To the contrary, its civil rights laws accommodate all of these differences. They prohibit discrimination on the basis of, among other things, sex, gender, gender identity, gender expression, or sexual orientation. West's Ann. Cal. Gov. Code § 12940. *See generally* A. Fausto-Sterling, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 107-114 (Basic Books, 2000) (noting that the number of "genders" is in flux, but may run from just a few to hundreds); Laura K. Langley, *Self-Determination in A Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex. J. C.L. & C.R. 101, 130 (2006) ("Of course it is also possible that if the state halts gender coercion, the number of existent genders will explode beyond the easily-managed two party system of male and female (consider androgynous, gender queer, bi-

gendered and two-spirit genders to name just a few)."); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 Cal. L. Rev. 1, 284 (1995) (noting that "only the Euro-American system deemed it necessary or desirable to adhere gender to sex, which limited the number of cognizable genders to two …")

B. *Perez v. Lippold* Rests on the Same Catholic Theology of Marriage and Sexuality as the Religious Beliefs Condemned by the Witnesses in the District Court.

It is ironic that the LGBT community and other supporters of "marriage equality" have put religious beliefs about sexual ethics and behavior on trial in this case. Catholic teachings about the complementarity of the sexes provide the philosophical foundation on which the California Supreme Court built its decision to invalidate California's anti-miscegenation law. *Perez v. Lippold*, 32 Cal.2d 711, 32 Cal.2d 711, 728, 198 P.2d 17 (1948). Fay Botham, ALMIGHTY GOD CREATED THE RACES: *Christianity, Interracial Marriage, & American Law -- How a Catholic Theology of Marriage Crushed California's Anti-Miscegenation Law* (The University of North Carolina Press: Chapel Hill, 2009). [hereafter "Botham"]

As the Supreme Court of Hawaii recognized in *Baehr v. Lewin,* the "fundamental" nature of the rights recognized in cases like *Perez* and *Loving*

are tied to *procreation*, and the rights and obligations that flow from sexual activity. *Baehr*, *supra*, 74 Haw. at 555, 852 P.2d at 56.

Today, it is fashionable to condemn such beliefs about the nature and purpose of human sexuality as "irrational", "hateful and discriminatory rhetoric". *See* Resolution No. 168-06 (March 21, 2006), *quoted in Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 464 F.Supp.2d 938, 940 (N.D. Cal., 2006), *aff'd* 567 F.3d 595 (9th Cir. 2009), *reh'g in banc ordered*, 586 F.3d 1166 (9th Cir., 2009), *aff'd in banc* 624 F.3d 1043 (9th Cir. 2010), *cert. den.* 131 S.Ct. 2875 (2011). Religious groups have "2,000-year-old teachings on marriage, family, sexuality, morality and other matters related to the truth about human beings" that they are not inclined to change, and that others strongly reject. Cardinal Donald Wuerl, "Acting on Faith", *The Washington Post*, Friday, January 25, 2013 at http://www.washingtonpost.com/opinions/the-catholic-church-a-2000-year-old-mission-of-faith/2013/01/25/4a6c5e6c-64e0-11e2-9e1b-07db1d2ccd5b_story.html (last accessed, January 27, 2013).

Nonetheless, it is undisputed that *Perez v. Lippold* marks the beginning of the end of anti-miscegenation laws across the country. After *Plessy v. Ferguson*¸ 163 U.S. 537, 544-45 (1896) and *Buck v. Bell*, 274 U.S. 200 (1927), it was impossible to mount a federal attack on the eugenic racism embedded in California's anti-miscegenation law. Robert A. Destro, *Introduction, Symposium – Law and the Politics of*

Marriage: *Loving v. Virginia After 30 Years*, 47 Cath. U. L. Rev. 1207 (1998); Emily Field Van Tassel, *"Only the Law Would Rule Between Us": Anti-miscegenation, The Moral Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 Chi.-Kent L. Rev. 873, 916-927 (1995). When *Perez* was decided, "separate, but equal" was the law of the land by the order of this Court.

The hero of *Perez* is Daniel Marshall, the President of the Catholic Interracial Council of Los Angeles, and the attorney who represented Sylvester Davis, an African-American male, and Andrea Perez, a woman of Mexican descent. The couple had been told by their pastor at St. Patrick's Church in Los Angeles that the county would not issue them a marriage because the bride-to-be was a white woman and her fiancé was a black man.

Marshall built his case against the law on *religious liberty*, not racial equality. "There is no rule, regulation, or law of the Roman Catholic Church which forbids a white person and a Negro person from receiving conjointly the sacrament of matrimony and thus to intermarry". Petition for a Writ of Mandamus, Memorandum of Points and Authorities, and Proof of Service, Andrea Perez and Sylvester Davis v. J.F. Moroney, as County Clerk of the County of Los Angeles, State of California, Supreme Court of California, Case # LA 20305, filed August 8, 1947.

The attack on the eugenic racism of *Dred Scott*, *Plessy*, and California's anti-miscegenation statute was based on Pope Pius XI's 1937

encyclical, *Mit Brennender Sorge*, which had expressly (and in German) condemned Third Reich's eugenic theories of racial purity as a "myth of race and blood." "Mit Brennender Sorge" ("With deep anxiety"), Encyclical of Pope Pius XI on the Church and the German Reich to the Venerable Brethren the Archbishops and Bishops of Germany and Other Ordinaries in Peace and Communion with the Apostolic *See* http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge_en.html [hereafter MBS] It pleaded with Germans to remember that the "real common good ultimately takes its measure from man's nature," and argued that any law or policy that ignores human nature will "shake the pillars on which society rests, and … compromise social tranquility, security and existence." MBS ¶30. The 1910 *Catholic Encyclopedia* had made the same point with respect to marriage.

> When men pretend to be the final arbiters of the marriage contract, they base their claim on the assumption that this contract is merely of human institution and is subject to no laws above those of man. But human society, both in its primitive and organized form, originated by marriage, not marriage by human society. …
>
> CATHOLIC ENCYCLOPEDIA (1910): "Moral and Canonical Aspect of Marriage", I: "Marriage Instituted by God", ¶2 at: http://www.catholic.org/encyclopedia/view.php?id=7602 (last accessed, January 27, 2013).

Marshall's argument succeeded. The main opinion, by Justice Traynor, relied on the vagueness and inherent irrationality of the racial categories embedded in the California law. He noted that California statute "impair[ed] the right of individuals to marry on the basis of race alone and … arbitrarily and unreasonably discriminat[ed] against certain racial groups." *Perez v. Lippold*, 32 Cal. 2d 711, 731-732, 198 P.2d 17 (1948).

The concurring opinions of Justices Carter and Edmonds attacked this Court's holdings in *Dred Scott* and *Plessy on explicitly religious grounds*. Relying on the Declaration of Independence, the United Nations Charter, Abraham Lincoln, Cedric Dover, Thomas Jefferson *and the Apostle Paul*, Justice Carter delivered a broadside against this Court's record from *Dred Scott* forward.

> In the years following the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, many courts still did not think that there was real equality among men despite the fact that the language of the amendments is quite clear. Another round of the vicious circle was begun, this time by limiting as far as possible the language of the amendments. Many cases might be cited to support this view, but the hardest blow to liberal minded persons – the biggest step backwards into days of slavery – was the decision in *Plessy v. Ferguson*, 163 U.S. 537.

Perez, 32 Cal. 2d at 736-737

Justice Edmonds, who cast the all-important, fourth (and deciding) vote in *Perez* went even further in his reliance on the religious arguments Daniel Marshall had presented:

> I agree with the conclusion that marriage is "something more than a civil contract subject to regulation by the state; it is a fundamental right of free men." Moreover, it is grounded in the fundamental principles of Christianity. The right to marry, therefore, is protected by the constitutional guarantee of religious freedom, and I place my concurrence in the judgment upon a broader ground than that the challenged statutes are discriminatory and irrational.

Perez, 32 Cal. 2d at 740.

The Catholic beliefs and teachings Respondents have condemned as "irrational" in this case are rooted in *centuries* of reflection on the dignity of the human person and the reality of the human condition.

Catholics have been defending marriage against "socially constructed" racial restrictions at least as far back as the late Middle Ages, and did so notwithstanding the dominant mores of ruling classes hostile to their beliefs. In Maryland, where, in 1681, the punishment for intermarriage with a slave was that the white spouse and any subsequent children would also be slaves, a Catholic priest named Hubbert married an indentured white servant girl, Irish Nell, to a black slave, Negro Charles. Botham, at 62. In

French New Orleans, Spanish Governor Don Antonio de Ulloa was thrown out of office in 1766 because of the suspicion that suspected that he and his chaplain had allowed an interracial marriage to be solemnized in Ulloa's own house. Botham at 63. In 1773, Father Junipero Serra travelled to Mexico and convinced the viceroy to allow marriages between Spanish soldiers and native women. *Id*., at 63-64. In 1852, Archbishop Antonio Maria Claret prevailed upon the Supreme Tribunal of Havana, Cuba to permit certain interracial marriages. *Id*., at 64-65.

These are not the actions of irrational bigots. They are the enlightened actions of those who are driven by reason to synthesize ethical rules of behavior from a study of both Scripture and of human nature. They challenged the conventional wisdom because it was the right thing to do.

California's voters did exactly the same thing when they challenged the California Supreme Court's uncritical acceptance of today's conventional wisdom about the nature of marriage and human sexuality. Reasonable minds differ on the wisdom of a policy that views human sexuality and sexual behavior as a "social construct", and posits the need to "deconstruct" marriage

This Court should reject the pernicious argument that those who flatly reject the conventional wisdom of "the thoughtful part of the Nation" in this case are irrational "homophobes". Like Respondents, they are citizens who made a choice at the ballot box among competing theories of human sexuality.

III. EQUAL *PROTECTION* OF THE LAWS REQUIRES RECOGNITION OF THE FUNDAMENTAL BIOLOGICAL DIFFERENCES BETWEEN OPPOSITE-SEX AND SAME-SEX COUPLES

A. The "Moral Views" Rejected by the Courts Below Are a Reasonable and Constitutionally Protected Response to a Debatable Public Policy Position

Catholic teachings concerning the nature and meaning of human sexuality are based on an extended dialogue that synthesizes faith and reason. John Paul II, Fides et Ratio, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_15101998_fides-et-ratio_en.html (last accessed, January 27, 2013). Such a dialogue includes study of the emerging neuroscientific data about sex-based differences the brain and their effects on behavior, as well as study of the science of "sex-assignment", which enables us better to comprehend the processes by which sexual characteristics are expressed. *See, e.g.,* William Byne, M.D., Ph.D, *Developmental Endocrine Influences on Gender Identity: Implications for Management of Disorders of Sex Development,* 73:7 MOUNT SINAI J. MED. 950-959 (Nov. 2006); Olaf Hiort, Ute Thyen, Paul-Martin Holterhus, *The Basis of Gender Assignment in Disorders of Somatosexual Differentiation,* 64 HORMONE RESEARCH 18 (2005 Supplement 2) (abstract)

The teachings of other religious traditions, including Judaism and Islam, have alwso

developed in an ongoing, and centuries-old, dialogue that integrates the teachings of the Scriptures with lived human experience. *See, e.g.,* Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & Religion 65 (1987) ("The fact is that there might be important reasons [in a jurisprudence of *mitzvoth*] which justify distinctions in obligations (e.g., the capacity to bear children) which … do not in any way mitigate against complete equality of participation."); Anver M. Emon, *Negotiating Between Two Convictional Systems*, 66 Fordham L. Rev. 1283, 1293-94 (1998) (footnotes omitted) ("Like law, … the Shari'a is part of the "public reason" of Islam, … the Halakha is part of the "public reason" of the Jewish faith, or the Canons are part of the "public reason" in the Catholic faith."); Havva G. Guney-Ruebenacker, *Islamic Law: An Ever-Evolving Science Under The Light of Divine Revelation and Human Reason*, Averroes Foundation for Faith and Reason in Islam, at http://www.averroes-foundation.org/articles/islamic_law_evolving.html (last accessed January 25, 2013) (""Islamic law is a very sophisticated legal science and it has, like all other legal disciplines, very close ties with all other human sciences such as philosophy, sociology, theology, history and linguistics.").

In the Catholic tradition, the dialogue of faith and reason begins with Genesis 1:27: "God created man in his own image . . . male and female he created them", and reasons from the *fact* of biological difference to the fundamental conclusion that "[i]n creating men 'male and female,' God gives man and woman an equal personal dignity."

Catechism of the Catholic Church ¶2334. [hereafter "Catechism ¶"]

Reasoning from nature in light of Scripture, Catholic teaching is that

> Sexuality affects all aspects of the human person in the unity of his body and soul. It especially concerns affectivity, the capacity to love and to procreate, and in a more general way the aptitude for forming bonds of communion with others. Everyone, man and woman, should acknowledge and accept his sexual identity. Physical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life. the harmony of the couple and of society depends in part on the way in which the complementarity, needs, and mutual support between the sexes are lived out.
>
> Catechism of the Catholic Church ¶¶ 2332-2333

Human dignity is, in the words of the Declaration of Independence, a *natural* "endowment" from the Creator. As the foundation of all human rights, the rights that inhere in human dignity "are prior to society and must be recognized by it[, for t]hey are the basis of the moral legitimacy of every authority…." Catechism ¶1930.

Your *amici* submit that marriage, understood as an exclusive, sexual relationship of one man and one woman is the very foundation of the

common humanity of every man, woman, and child. Everyone, without exception, has a biological mother and father, and has a right "as far as possible, … to know and be cared for by his or her parents." United Nations Convention on the Rights of the Child, art. 7 (1). Children thrive in a stable, low-conflict, committed relationship created and sustained by both. It was therefore eminently rational for the People of California to rely on arguments about the nature of children and families as a grounds for rejecting judicial attempts to redefine the nature and character of marriage.

B. The Decisions Below Violate the First Amendment in that they Require Individuals and Communities to Affirm Disputed Political and Ideological Positions

In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943), this Court held that:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

The precedents of this Court consistently reaffirm the proposition that government may not compel any individual or group to affirm a

message with which they disagree, or to remain silent when they have something important to say. *See, e.g., Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2010); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 15-16 (1986) (plurality opinion); *Lee v. Weisman*, 505 U.S. 577 (1992); *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976) (per curiam); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974)(striking Florida's right-to-reply statute because "(t)he Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter").

There is no disagreement about the remedy sought in this case. Respondents want an order from this Court forcing the People of California to affirm the equal status and legitimacy of their relationships. *In re Marriage Cases*, 43 Cal. 4th 757, 845, 183 P.3d 384, 445-446 (2008) (emphasis added); *Perry*, 671 F.3d at 1096.

The Equal Protection Clause does not repeal the First Amendment whenever a court or politician concludes that a political or private community can be accused of harboring "hateful", discriminatory, or homophobic tendencies.

The Constitution respects both the political equality of persons *and political communities.* The political equality of the States is embodied in their equal representation in the Senate. U.S. Const.

art. V (1787). The States have an equal right *as communities* to self-rule protected by the Full Faith & Credit Clause. The Establishment and Free Exercise Clauses are also guarantees that religiously motivated individuals and associations are entitled to equal treatment at the hands of the federal government.

In sum, the Constitution is built around a series of *structural* mechanisms that protects the political equality of American citizens, both as individuals and in their respective political communities. They are not to be demonized, as they were in the courts below, because they refuse to affirm – at the ballot box, no less – a series of disputed political and cultural ideas that have enormous cultural and civic consequences for both individuals and associations. But this is precisely what is happening.

The trend is widespread, and the decisions are ominous. In *Dixon v. University of Toledo*, 702 F.3d 269 (6th Cir., 2012), the Sixth Circuit upheld the termination of a university administrator who questioned the "analogy to race" by writing "an op-ed column in the *Toledo Free Press* rebuking comparisons drawn between the civil-rights and gay-rights movements." Though the University was well within its rights as an institution to preserve what it considered to be the integrity of its own message, Judge Moore's explicit assumption is that anyone who questions the "analogy to race" is a bigot:

> … [B]y voicing her belief that members of the LGBT community do not possess an immutable characteristic in the way that

> she as an African–American woman does, the implication is clear: Dixon does not think LGBT students and employees of the University are entitled to civil-rights protections, ….
>
> Id.

The court infers from Ms. Dixon's questioning the received wisdom concerning the immutability of sexual orientation and the analogy to race that *Ms. Dixon* believes that people who identify as LGBT should not have civil rights. The quoted passage tells us far more about the mindset of the Sixth Circuit panel than it does about Ms. Dixon.

California is not far behind. It recently banned any attempt to change a person's sexual orientation. California Business & Professions Code §§ 865-865.2 (2013); *See Pickup v. Brown*, Case 2:12-cv-02497-KJM-EFB, Doc. 80, filed 12/04/12 (E.D. Cal.) (refusing preliminary injunction), http://www.lc.org/media/9980/attachments/pr_ca_change_therapy_order_mueller_uphheld_120412.pdf, *preliminary injunction granted*, No. 12-17681 (9th Cir., filed December 21, 2012), http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000635 (accessed January 27, 2013). *See also Harriet Bernstein, Luisa Paster, & J. Frank Vespa-Papaleo, Dir., New Jersey Div. on Civil Rights*, Petitioners,, OAL DKT. CRT 6145-09, 2012 WL 169302 (N.J. Adm. Jan. 12, 2012) (denial of tax exemption for refusal to rent religiously owned pavilion for a civil union ceremony); *Case of Eweida and Others v. The United Kingdom*, Applications nos. 48420/10,

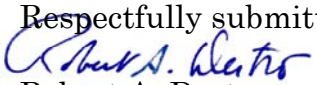
59842/10, 51671/10 and 36516/10, European Court of Human Rights, Judgment of January 13, 2013 (compelling counselors to counsel gay couples on sexual issues notwithstanding their religious objections to doing so); *Smith and Chymyshyn v. Knights of Columbus,* 2005 BCHRT 544 (British Columbia Human Rights Tribunal) (fining Knights of Columbus for refusing to rent church hall for same-sex reception); *Trinity Western University v. College of Teachers (British Columbia)* [2001] 1 SCR 772 (refusal of College of Teachers to certify educational program of religious university because its conduct code would lead to creation of a hostile environment in any public school in which its graduates taught).

CONCLUSION

Your *amici* respectfully submit that there is a profound, good faith disagreement here. The Equal Protection Clause provides no authority for the Supreme Court to resolve it as a matter of constitutional law. The issues are rooted in real and substantial differences over the meaning of human nature and the relevance of a whole host of disputed scientific terms, social phenomena, research efforts, empirical data, and the relevance and utility of hotly-contested social categories like LGBT (and all its variants), "straight", "homosexual", "gender", "gender identity", "sexual preference", and "gender role". And it will not end here:

The decisions below should be reversed.

Respectfully submitted,



Robert A. Destro,
Counsel for *Amici Curiae*

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