No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,

Petitioner,

v.

KRISTIN PERRY, *et al.*,

Respondents.

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

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

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QUESTION PRESENTED

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

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation),[1] is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system.

The Foundation has an interest in this case because it believes the United States Constitution, properly construed, does not guarantee a right to same-sex marriage, and the Framers of the Constitution would be shocked to see their document twisted to protect something they regarded as abhorrent. The Foundation believes marriage is not simply an individual right, but rather it is a divinely-established institution that is as old as if not older than civil government. It was established for and exists for the purpose of organizing society and for bringing forth and raising children. The institution of marriage has been understood throughout Ameri-

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

can history and in Anglo-American common law as a union of a man and a woman. Nothing in the United States Constitution prohibits the State of California from employing that time-honored definition of marriage.

SUMMARY OF ARGUMENT

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

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

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

history until very recently, that has defined marriage as a union of two persons of the same sex.

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

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

ARGUMENT

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

> If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

> The precedent must always greatly overbalance in permanent evil any partial or transient benefit, which the use can at any time yield.

George Washington, *Farewell Address,* 1796.

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

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

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

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

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

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

Id. at 578. (Emphasis supplied.)

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

Modern jurists have become so accustomed to thinking of the marital relationship in terms of individual rights, that they all too often fail to realize that, first and foremost, marriage and the family[2] are a divinely ordained institution for human governance and for bringing forth and raising children.

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

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

governing himself: "These precepts will serve for the government of our conduct."

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

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

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

> [21] And the Lord God caused a deep sleep to fall upon Adam, and he slept: and he took one of his ribs, and closed up the flesh instead thereof;

> [22] And the rib, which the Lord God had taken from man, made he a woman, and brought her unto the man.
>
> [23] And Adam said, This is now bone of my bones, and flesh of my flesh: she shall be called Woman, because she was taken out of Man.
>
> [24] Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.

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

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

In *Sturges* the Court noted that the state can impair the obligation of marriage by granting divorce. *Id*. The family and the state are separate institutions, but they do interact with one another. But although these institutions interact with one another, none of them has authority to re-define the other. That is especially true of the state, which was instituted after the family. And as we see from the Genesis passage quoted above, the traditional definition of marriage has been a union of a man and a woman. Jesus reiterated this definition of marriage when he

quoted the Genesis 2 passage in Matthew 19:4-6. Nearly every society throughout the world and throughout history has defined marriage as a male/female union; although a few societies have, at least for short intervals in their history, countenanced homosexual activity, *Amicus* can find no instance of a society that recognized same-sex marriage.[3]

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

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[3] It is true that some societies have approved or at least tolerated polygamous or polyandrous marriages. But even in these societies, marriages are between male(s) and female(s). In polygamous marriages the man is considered to be married to each of his wives; the wives are not married to each other. In polyandrous marriages the wife is considered to be married to each of her husbands; the husbands are not married to each other. In a polygamous marriage a man commonly married each of his wives individually and divorced each of them individually; likewise a wife in a polyandrous marriage. And in no society of which *Amicus* is aware does marriage ever consist of a group of men without a woman or a group of women without a man. Even the existence of polygamy and polyandry militates against the legitimacy of same-sex marriage.

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

And by striking down Proposition 8, the Ninth Circuit has done much more than tell the people of California that they must recognize the right of same-sex couples to marry. The Ninth Circuit has forced the people of California to put their official stamp of approval upon a union that is contrary to the traditional definition of marriage and that the people of California have clearly, specifically, and decisively stated that they do not want to recognize as a marriage.

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

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

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

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

Perry v. Brown, 671 F.3d 1052, 1063 (2012). But this is misleading. As the Ninth Circuit recognized, the 1849 Constitution of the State of California, Art. XI, §§ 12 and 14 recognized marriage, but "Marriage in California was understood, at the time and well into the twentieth century, to be limited to relationships between a man and a woman." *Id*. at 1065. In 1977 California enacted Ca. Stat. 1977, ch. 339, § 1, which states, "Marriage is a personal relation arising out of a civil contract between a man and a woman. . . ," to ensure that that definition of marriage would be followed. In 2000, to be sure California courts would not recognize same-sex marriages performed out of state, California adopted Proposition 22, which enacted a statute providing that "Only marriage between a man and a woman is valid or recognized in California." Cal. Fam. Code Sec. 308.5.

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

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

Amicus respectfully disagrees. Proposition 8 did not remove from same-sex couples a time-honored, God-given right specifically protected in the federal or state constitution. Rather, same-sex marriage is an alleged "right" which the people of California never contemplated in their original 1849 constitution. Late in the twentieth century, when same-sex marriage became an issue in California, the people of California specifically prohibited same-sex marriage by statute twice in 1977 and 2000. Same-sex marriage became an alleged right only when an unelected California Supreme Court invalidated those statutes in 2008, which decision the people of California effectively repudiated and nullified at their first opportunity about 140 days later when they enacted Proposition 8 on November 4, 2008. Even if we accept that the California Supreme Court is the final interpreter of its state constitution, this

hardly seems to be on a par with time-honored God-given rights such as those set forth in the Declaration of Independence, the Bill of Rights, or the express language of the California Constitution.[5]

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

Judge Reinhardt's argument is that the State of California through its judicial system has granted same-sex couples the right to marry, and that right therefore constitutes an unalienable right that the people of California may not take away. This argument misconstrues the nature of rights as they are conceived in American jurisprudence. If we were to apply Judge Reinhardt's reasoning to the current debate over gun control, we would be forced to conclude that because this Court has recently recognized that the Second Amendment protects an individual right to keep and bear arms,[6] the people of the United States are forever estopped from restricting that right by legislation or even by amending the United States Constitution.

Rights are not "granted" by government, especially not through unelected courts. Rather, rights are an

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

[6] *District of Columbia v. Heller,* 554 U.S. 570 (2008); *McDonald v. Chicago,* 561 U.S. 3025 (2010).

endowment of the Creator. Government only secures these rights; government cannot grant them. The Declaration of Independence makes this unmistakably clear:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

When Thomas Jefferson drafted these words, he spoke not only for himself and for the committee that assisted him (John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston), but also for the entire Continental Congress that approved and signed the Declaration, and for the new nation as a whole.[7]

Alexander Hamilton, whose view of government different from those of Jefferson in many ways, held the same view of human rights:

> The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as wit a sunbeam, in the whole volume of human nature, by the hand of the Divinity itself, and can never be erased or obscured by mortal power.[8]

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[7] United States Declaration of Independence, July 4, 1776.

[8] Alexander Hamilton, "The Farmer Refuted," 1775; quoted by Nathan Schachner, *Alexander Hamilton* (New York: Barnes & Co., 1946, 1961) p. 38.

Sir William Blackstone, whose *Commentaries* were read and respected by Jefferson, Hamilton, and the Framers as a whole, declared that "the first and primary end of human laws, is to maintain and regulate these absolute rights of individuals."[9]

Samuel Adams, often called the Father of the American Revolution, wrote of man's "natural right to worship God according to the dictates of his own conscience," and concluded that "Magna Charta itself is in substance but a constrained Declaration, or proclamation, and promulgation in the name of King, Lord, and Commons of the sense the latter had of their original inherent, indefeazible natural rights, and also those of free Citizens equally perdurable with the other."[10]

John Dickinson, a leading Delaware delegate to the Constitutional Convention, likewise recognized God as the source of human rights:

> Kings or parliaments could not give the rights essential to happiness, as you confess those invaded by the Stamp Act to be. We claim them from a higher source—from the King of Kings and Lord of all the earth. They are not annexed to us by parchments and seals. They are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; and cannot be taken from us by any human power, without taking our lives. In short, they

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[9] William Blackstone, *Commentaries on the Laws of England* I:119-23, 157, 237-38, 243-44.

[10] Samuel Adams, *The Writings of Samuel Adams,* ed. Harry Alonzo Cushing (New York: Octagon Books, Inc. 1968) II:355-56.

> are founded on the immutable maxims of reason and justice. [11]

George Washington, who chaired the Constitutional Convention and served as President while the Bill of Rights was being drafted, approved, and ratified, declared that "The smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right, which Heaven itself has ordained."[12] He also recognized the religious liberty of the Jews of Rhode Island as among their "inherent natural rights."[13]

James Madison, who is sometimes called the Father of the Constitution, spoke of religious freedom in his Memorial and Remonstrance and said "This right is in its nature an unalienable right."[14]

The Preamble to the United States Constitution recognizes that one of the preeminent reasons for ordaining and establishing the Constitution was "to secure the Blessings of Liberty to ourselves and our Posterity." The very term "Blessing" implies something bestowed by a superior to a subordinate. In *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 475 (1793), Chief Justice Jay said of the six objects set forth in

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[11] John Dickinson, Address to the Committee of Correspondence in Barbados, 1776; quoted in Benjamin Fletcher Wright, *American Interpretations of Natural Law* (Cambridge, MA: Harvard University Press, 1931) p. 77.

[12] George Washington, Inaugural Address, 1789, National Archives and Records Administration.

[13] George Washington, Letter to Hebrew Congregation, Newport, Rhode Island, 18 August 1790.

[14] James Madison, *Memorial and Remonstrance Against Religious Assessments, in* THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds., 1987).

the Preamble, "they collectively comprise every thing requisite, with the blessing of Divine Providence, to render a people prosperous and happy. . . ." Even the Constitution does not grant rights or blessings; it only "secures" the rights or blessings God has already bestowed.

Justice William O. Douglas recognized this principle in his *McGowan v. Maryland* dissent: "The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect." 366 U.S. 420, 563 (1952).

The California Constitution contains a similar understanding of the nature of human rights. The Preamble declares that "We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution." The California Constitution therefore recognizes God as the source of freedom and declares that the purpose of the California Constitution is to secure and perpetuate the blessings of freedom that God has bestowed. Article I Section 1 recognizes that "All people are by nature free and independent and have inalienable rights." The concept of rights found in the California Constitution is therefore similar to that of the Framers of the Declaration of Independence and the Constitution of the United States, in that rights come from a Higher Source than civil government.

An unalienable or inalienable right, as the Framers conceived it, is rooted in the eternal and unchanging law of God. It is not something that a court, a legislature, an executive, or even a constitution can grant.

Governments only secure, that is, protect and make possible the enjoyment of, the rights that God has already granted.

The Framers would be mystified and shocked by Judge Reinhardt's contention that, because an unelected California Supreme Court in a 4-3 ruling construed the California Constitution as protecting a right to same-sex marriage, that right to same-sex marriage suddenly became a God-given unalienable right on an equal plane with the rights of life, liberty, and pursuit of happiness recognized in the Declaration of Independence and the rights of life, liberty, and property secured by the Fifth and Fourteenth Amendments to the United States Constitution, and the people of California are forever precluded from countermanding that decision by amending their state constitution, which they did decisively at the ballot box at their first possible opportunity a few months later.

And yet, that is exactly what happened. No one suggests that God conferred a right to same-sex marriage. The people of California did not confer this right. Rather, an unelected California court conferred the right by a 4-3 vote in a strained construction of a California constitutional provision, and the people of California repudiated that construction by amending their constitution at the earliest possible opportunity a few months later.

Amicus believes the people of California were entitled to amend their constitution by enacting Proposition 8. Recognizing same-sex marriage involves a major change in one of the most fundamental institutions of society, and in this instance it was done by a subtle reinterpretation of a state constitutional provision. If a change of this magnitude to the very

institution of marriage is to be undertaken, it should be done in clear and unmistakable constitutional language that the people of California understand and approve. Such a change should not be forced upon the people of California by a subtle stroke of Judge Reinhardt's pen. Creating and conferring "rights" that heretofore were non-existent is simply not the role of judges as envisioned by the Framers of our constitutional system of government.

IV. A RATIONAL BASIS FOR PROPOSITION 8 EXISTS.

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

Writing for the majority, Judge Reinhardt listed many benefits that are commonly associated with marriage, such as raising children together, adopting each other's children, becoming foster parents, sharing community property, filing taxes jointly, participating in the partner's group health insurance, enjoying hospital visitation privileges, making medical decision for an incapacitated partner, being given the status of a widow or widower, serving as the conservator of the partner's estate, and suing for the partner's wrongful death. *Id.* at 1077. Under other circumstances one might argue that an unwillingness to grant these benefits to same-sex marriage partners constitutes a rational basis. However, Judge Reinhardt noted that Proposition 8 did not affect these rights or other rights commonly associated with marriage, and therefore the State of California did not have a rational basis for denying same-sex couples the right to marry. *Id.* Ironically, if one follows Judge Reinhardt's logic, the people of California would be better able to show a rational basis for Proposition 8 if they had gone further in Proposition 8 and prohibited not only same-sex marriage but also all of the benefits associated therewith.

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

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

(1973), communities can ban pornographic theaters because "The States have the power to make a morally neutral judgment that public exhibition of obscene material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Chief Justice Warren's words, the States' 'right . . . to maintain a decent society.'"

CONCLUSION

Americans today, in all fifty states and at all levels of government, are engaged in vigorous discussion and debate over the morality and legitimacy of same-sex marriage. A reversal of the Ninth Circuit's decision would allow this discussion and debate to continue.

An affirmance of the Ninth Circuit's decision, even on narrow grounds, would stifle discussion and debate, causing legislators and the general public to conclude that the issue has been settled, not by popular consensus but by judicial decree.

Amicus therefore prays that this Court will reverse the ruling of the Ninth Circuit and uphold the right of the people of California to amend their Constitution by enacting Proposition 8.

Respectfully submitted,

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