No. 12-144

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., PETITIONERS,

v.

KRISTIN M. PERRY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS BRIEF OF THE STATE OF MICHIGAN IN SUPPORT OF PETITIONERS

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Aaron D. Lindstrom
Assistant Solicitor General

Joseph E. Potchen
Tonya C. Jeter
Assistant Attorneys General

Attorney for *Amicus Curiae*
State of Michigan

QUESTION PRESENTED

Whether it is rational for a state to choose to define marriage as the legal union of one man and one woman.

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INTEREST OF *AMICUS CURIAE*

Like the majority of states, Michigan defines marriage as the union between one man and one woman. Michigan's statutory marriage law dates back to 1846, and its citizens recently affirmed its traditional definition by amending the state constitution in 2004. See, RS 1846, Ch. 83, § 1, as added by Pub Acts 1996, No. 324, imd eff June 26, 1996; MICH. COMP. LAWS § 551.1; MICH. CONST. art. I, § 25.

Michigan's definition of marriage is predicated on the conviction that the ideal setting in which to raise children is with their biological mother and father in a stable relationship. And by making that conviction a legal definition, the State provides an affirmative statement about the unique features of the relationship.

The Ninth Circuit's conclusion—that it violates the Equal Protection Clause for a state to establish this standard about the ideal setting in which to raise children—would apply to all states, rendering Michigan's legal scheme unconstitutional. The State of Michigan agrees with the *amicus* brief prepared by the States of Indiana and Virginia but files its own *amicus* brief to underscore the primary justification of Michigan law: Michigan's view that marriage between one man and one woman is the ideal setting for the procreation and rearing of children. In doing so, the State of Michigan does not denigrate other relationships but rather communicates its conviction about child rearing.

INTRODUCTION AND SUMMARY OF ARGUMENT

No other relationship is like that of the marriage of one man and one woman. Its distinct attributes make it uniquely ordered to the procreation and education of children. Only in traditional marriage does the marriage contract reflect the complementarity of the sexes with the natural capacity to bear children, to provide a role model of the identity of manhood and womanhood to the children, and to enable any children born of the marriage to have a biological relationship to each parent.

Michigan's assessment is that this setting is the ideal one in which to raise children. Accordingly, Michigan has an interest in promoting this institution for the welfare of children by conferring on marriage between one man and one woman exclusive rights and obligations. This conclusion is true even for those states, such as California, that reserve to traditional marriage nothing more than the special title of "marriage." And it is reasonable for Michigan and California to make this policy decision.

This brief will not reiterate the many excellent arguments raised in the *amicus* brief filed by the States of Indiana and Virginia. They rightly contend that traditionally the law of marriage has been the preserve of state law, and Michigan concurs that the institution of marriage precedes the state's existence. Moreover, the State of Michigan agrees that there should be no heightened scrutiny for state laws that reserve the definition of marriage to one man and one woman. Finally, Michigan believes that the responsible procreative theory supports traditional marriage based

on the fact that the relationship between a man and a woman is the only one with the natural capacity to create children.

Nevertheless, Michigan's primary justification for legally recognizing marriage between one man and one woman is that it extols virtues that are in the best interest of children. This definition has existed from time immemorial and is not rooted in animus toward same-sex couples or even an unwarranted stereotype that same-sex couples cannot provide a loving setting for children. They clearly can. Michigan's definition simply acknowledges the reality that same-sex relationships are different in that they lack the natural capacity to bear children and the ability to provide a biologically-connected role model of both womanhood and manhood.

In the current debate on marriage, it is evident that the definition of marriage can be understood in many different ways. These are issues on which people of good will may reasonably disagree. This debate should continue; this Court should not overturn the popular will on marriage and impose its own vision, ossifying the debate and leaving those who hold the traditional views effectively silenced. The views of the people of Michigan—some of their most deeply held and revered—are reasoned ones, and are not bigotry.

Marriage, if it is to have any meaning, has to have a definition. Every relationship between individuals does not constitute a marriage. But courts should leave the contentious social issue of "marriage" to the democratic process rather than cutting short the people's deliberations. It is through such vigorous discussions that ideals can be properly established.

ARGUMENT

I. Michigan's view is that the traditional family is the ideal setting in which to raise children.

The State of Michigan's interest in marriage is based on providing the best setting for children. The Michigan Constitution defines marriage "as the union of one man and one woman" and does so "to secure and preserve the benefits of marriage for our society and for future generations of children." MICH. CONST. art. I, § 25. The same is true for Michigan's statutory law, which provides that "this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children." MICH. COMP. LAWS § 551.1.

Although this constitutional and statutory language is relatively new—adopted in the last 20 years—the primary justification for marriage has historically been for the procreation and education of children. See *Sissung* v. *Sissung*, 31 N.W. 770, 772 (Mich. 1887) ("the first purpose of matrimony, by the laws of nature and society, is procreation.") Consequently, the understanding of marriage has always been between one man and one woman, appearing throughout the states from the beginning because it was the understanding of marriage at common law. See, e.g., *State* v. *Fry*, 4 Mo. 120, 1835 WL 2108, *5 (Mo. 1835), quoting Sir Francis Bacon, 6 Bacon Abr. 523, 530 ("marriage is a compact between a man and a woman for the procreation and education of children"). Likewise, Michigan's definition was historically predicated on the understanding that

marriage was between one man and one woman, as reflected in Michigan statutory law. See, e.g., MICH. COMP. LAWS 1915, §§ 11364, 11365 (identifying all of the persons that a man or a woman could not marry based on their blood relationship, all of the opposite sex).

Underlying this definition of marriage as between two persons of the opposite sex is the justification that only traditional marriage has certain characteristics that make it ideal for the raising of children.

A. The marriage of one man and one woman is rooted in the complementarity of the sexes and the unique capacity of that relationship to bear children.

There are two sexes, each necessary for the procreation of children. A man and a woman generally have the inherent ability together to beget a child biologically connected to both parents. The unique capacity of a man and a woman to conceive a child is based on their natural complementarity in a conjugal union. In Michigan, as in other states, there is no obligation to have children in marriage. Yet, there is no dispute that it is through the sexual union of a man and a woman that the vast majority of children are created.

It is through the relationship between man and woman that children have been created from the beginning of time. Thus, the State's decision to solemnize this reality by recognizing the unique capacity of a man and woman to beget a child is a reasonable one. By defining marriage as between one man and one woman, the State elevates this

relationship, identifying it as the ideal standard for the human family.

The case law has generally identified this dynamic as one reflecting the "binary" nature of the human condition in its generative capacity. See *Andersen* v. *King County*, 138 P.3d 963, 991 (Wash. 2006) (Johnson, J., concurring) ("The unique and binary biological nature of marriage and its exclusive link with procreation and responsible child rearing has defined the institution at common law and in statutory codes and express constitutional provisions of many states."). See also *Hernandez* v. *Robles*, 855 N.E.2d 1, 15 (2006) (Graffeo, J., concurring) ("The binary nature of marriage—its inclusion of one woman and one man—reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female.") In other words, sexual complementary is an irreducible difference; no other arrangement has the capacity to create a new life, no matter how committed or loving the relationship.

The traditional definition of marriage thereby corresponds to the ordinary way in which children are conceived—in a relationship between a man and a woman. *Id*. In this way, the traditional definition of marriage follows the reality of how children are created.

B. The traditional definition of marriage enables the parents to serve as role models of each of the sexes for their children.

The traditional definition of marriage also has the ability to provide a male and female role model for any children born of the marriage. This fact again is rooted in the reality of family life.

As one of their key family roles, parents educate their children and provide them with tools that assist them in reaching adulthood. Specifically, parents teach their boys in their transition to manhood and their girls in reaching womanhood. The concept underlying this point is that a child would benefit from an adult of each sex by the "living" example provided by the parents. See *Hernandez*, 855 N.E.2d at 7 (plurality opinion) ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.") Accord *Jackson* v. *Abercrombie*, ___ F. Supp. 2d ___, 2012 WL 3255201, *43 (D. Hawaii 2012). In the absence of both a man and a woman, the child is missing a role model:

> The state also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship.

In re Marriage of J.B. and H.B., 326 S.W.3d 654, 678 (Tx. Ct. App. 2010).

Women and men bring undeniably unique gifts to parenting, gifts that are different and complementary. As Justice Ginsburg explained in a different context, arguing in *Duren* v. *Missouri*, 439 U.S. 357 (1979): "Yes, men and women are persons of equal dignity and they should count equally before the law but they are not the same. There are differences between them that most of us value highly. . . . I think that we–perhaps all understand it when we see it and we feel it but it is not that easy to describe, yes, there is a difference." (11/1/78 Tr.)

Moreover, for the transition from adolescence, the ability to have a father who serves as a male role model for a young boy in becoming a man is particularly important as is for a mother to serve as a female role model for a young girl. This concept appears in cases involving divorce, termination of parental rights, or even in evaluating mitigating factors in the sentencing phase of a criminal case. See, e.g., *Dixon* v. *Houk*, 627 F.3d 553, 568 (6th Cir. 2010) (approvingly identifying "lack of father figure" as a mitigating factor for punishment from previous case), reversed on other grounds, *Bobby* v. *Dixon*, 132 S. Ct. 26 (2011). The conclusion that this is a salutary influence for a child to have a male and female role model in the child's transition to adulthood is a reasonable one. See *Lofton* v. *Secretary of Department of Children & Family Services*, 358 F.3d 804, 819–822 (11th Cir. 2004) ("It is chiefly from parental figures that children learn about the world and their place in it, and the formative influence of parents extends well beyond the years spent under their roof, shaping their children's psychology, character, and personality for years to come.").

To be sure, single mothers, single fathers, and same-sex couples can be wonderful parents, while opposite-sex couples can be inadequate parents. But there is nothing unconstitutional about a state choosing to honor the mother-father-child relationship as an ideal familial structure.

C. The traditional definition of marriage enables the parents to have a biological relationship with their children.

In traditional marriage, for any child born from the marital relationship between a man and a woman, the child is then the offspring of each parent. This fact creates a bond between a child and the child's parents. See *Andersen*, 138 P.3d at 982–83 ("Heterosexual couples are the only couples who can produce biological offspring of the couple"). The parents and the children are bound in blood, sharing not only a legal identity as a family but also a physical affinity. In this way, the biological parents of a child are also the legal parents.

In contrast, for same-sex couples, their conjugal union will never yield a child. For any children in their marriage, there will always be at least one biological parent who is outside of the marital union, and there always will be at least one legal parent who is not a biological one. See *id.*

Defining marriage to include a relationship that is not naturally capable of producing children strictly separates the marital sexual union from the procreation of children. For same-sex couples, there will generally be some artificial intervention for the conception of any child, necessarily separating the child from one or both biological parents. *Id.* at 983

("single-sex couples raise children and have children with third party assistance or through adoption"). In traditional marriage in contrast, a child may be the fruit of the conjugal relationship between husband and wife, a fact that can never be true for same-sex couples. They are differently situated.

Again, this conclusion does not disparage the ability of same-sex couples or others to provide loving homes or to establish a stable, nurturing setting for children. The point is that the State may elect to provide legal support for the ideal setting, upholding it as the archetype for all families, and fostering it as the optimal arrangement. The State may reasonably conclude that "it is better, other things being equal, for children to grow up with both a mother and a father." *Hernandez*, 855 N.E.2d at 7 (plurality opinion). This point is even more strongly true where the parents are that child's biological mother and father.

Of course, there are opposite-sex couples who are unable to have children of their own and who adopt children. Under Michigan law, married couples and single persons may adopt, but unmarried couples—including same-sex couples—may not adopt. MICH. COMP. LAWS § 710.24. But there is a fundamental difference between a same-sex couple and a married man and woman seeking to adopt. As explained above, the male and female married couples reflect the complementarity of the sexes and may offer the necessary role modeling helpful to the optimal raising of children. And the relationship of man and woman reinforces the ideal by establishing an example for other couples of the opposite sex.

There is no requirement in Michigan that a married couple seek to have children or even that the couple have a sexual relationship for a couple to enter the married state. The interest of the State arises from the fact that children are ordinarily born from a relationship between a man and a woman, and the State seeks to ensure the ideal raising of these children. MICH. CONST. art. I, § 25; MICH. COMP. LAWS § 551.1.

II. The reaffirmation of the traditional definition of marriage, which excludes other relationships, is reasonable.

Traditional marriage as defined as one man and one woman has its origin in the common law. It is the foundation of society. *Maynard* v. *Hill*, 125 U.S. 190, 211 (1888) ("It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.").

Contrary to the analysis of the Ninth Circuit, the effort to reassert the traditional definition of marriage is not based on animus toward same-sex couples, but rather reflects an affirmative statement about the virtues of traditional marriage. In fact, the definition of marriage as the union of one man and one woman precedes the entire debate on same-sex marriage, which has only arisen in the last 50 years.

A. Other relationships do not share the unique characteristics of traditional marriage.

In contrast to same-sex relationships, the traditional marriage relationship reflects the complementarity of the sexes with the natural capacity to produce children. And in traditional marriage there is both a mother and a father to serve as role models for the children, and the potential for the children to be the offspring of the married couple. For same-sex couples, there is always an issue about parentage. And there is always only one sex represented among the parents. The preference of the citizens of California, Michigan, and other states, to promote the ideal for families by recognizing only the union of one man and one woman in marriage is predicated on the salutary features of this relationship for children.

There are many traditional families that fail to meet this ideal. And there are many same-sex couples that provide a nurturing and loving setting for children. But this does not answer the point. The law serves the goal of establishing ideal standards, exhorting the public to align themselves to these archetypes. And the State may foster the ideal for children.

The question is whether it is reasonable to believe that these attributes of marriage, unique to the marriage of one man and one woman, further the end of providing the ideal setting for the procreation and education of children. From the beginning of recorded history, this relationship has been the hallmark of family life. Until this past century, all children were conceived in the relationship between a man and a

woman, and the law ratified and codified the reality of an institution already in place. The fact that other committed same-sex adults may provide a loving setting for children does not impeach this fact.

B. The upholding of traditional marriage is not a matter of animus.

The Ninth Circuit determined that the withdrawing of the designation of marriage in California for same-sex couples was based in animus. *Perry* v. *Brown*, 671 F.3d 1052, 1093–94 (9th Cir. 2012) ("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."). Not so. The reassertion of the traditional definition was a response to a judicial imposition of a new definition of marriage, specifically, *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008), which held that "to the extent the current California statutory provisions limit marriage to opposite-sex couples, these statutes are unconstitutional." Thus, Proposition 8 restored the basic legal system in place before the California court interposed its decision.

The broader point relevant for Michigan and the states generally is that the effort to reaffirm the traditional definition is not based in animus toward same-sex couples or individuals who experience same-sex attraction. Every human life has inherent dignity and is of immense worth. Michigan, through its laws, encourages all people to treat each other with respect. Rather, Michigan's definition of marriage is a policy decision that expresses the State's view about the ideal

of family life. See *Lawrence* v. *Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) ("Unlike the moral disapproval of same-sex relations . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.") The State of Michigan advances these affirmative reasons here.

Historically, the primary competing understanding of family life has been plural marriage. There are more than 40 countries that currently permit plural marriage. By excluding plural marriage in the defense of traditional marriage, there is no implied animus or bigotry against cultures that tolerate plural marriage, including some Islamic nations. Rather, this reaffirmation of the traditional definition is a celebration of the virtues of the union of one man and one woman in marriage, not an attack on other relationships.

Significantly, this Court's rejection of the traditional definition of marriage may require the acceptance of plural marriage. The underlying rationale for the Ninth Circuit's decision is that generally two adult persons who are dedicated to one another and seek to raise a child should be able to marry. Cf. *Perry*, 671 F.3d at 1076 ("[Proposition 8] stripped same-sex couples of the right to have their committed relationships recognized by the State with the designation of 'marriage'"). But any number of adults can be committed to one another and seek to raise children together. Once the courts reject a state's ability to promote the view that the ideal family structure consists of a mother, father, and children, the reasoned ability to limit marriage to two adults is

weakened. *Lewis* v. *Harris*, 875 A.2d 259, 277 (N.J. Sup. Ct. 2005) (Parrillo, J., concurring) ("If, for instance, marriage were only defined with reference to emotional or financial interdependence, couched only in terms of privacy, intimacy, and autonomy, then what non-arbitrary ground is there for denying the benefit to polygamous or endogamous unions whose members claim the arrangement is necessary for their self-fulfillment?")

In sum, a state may reasonably reserve marriage to one man and one woman because of that relationship's unique characteristics. This union alone provides for the complementarity that is naturally capable of producing life while also enabling the married persons—in the ideal—to beget children who have a biological relationship to each parent, who may then serve as role models of both sexes for their children.

C. The debate over the definition of "marriage" is ongoing and should be left to the states.

Since this nation's founding, the institution of marriage and its legal development have been in the constant care of state legislatures and the citizens of the states. Our nation is currently engaging in a robust debate on same-sex marriage. This debate should be allowed to play out in our democratic institutions and should not be short-circuited by the courts. "When this Court assumes for itself the power to declare any law—state or federal—unconstitutional because it offends [a] majority[] [of the court's] own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the 'law of the land'

and instead becomes one governed ultimately by the 'law of the judges.'" *In re Winship*, 397 U.S. 358, 384 (1970). (Black, J., dissenting). Deeply rooted cultural definitions of marriage are best left to the political arena where the full discourse of public debate can occur.

In areas fraught with sensitive social policy, such as the ideal family setting for children, people of good will may genuinely and reasonably disagree without any sort of discriminatory animus. An open democratic process ensures full vetting of matters involving the ideal societal structure. Federal courts should not halt these democratic principles by judicial fiat. And any social policy regarding definitions of marriage should come by way of democratic processes, not judicial activism.

As Justice Black recognized, perhaps the most fundamental individual liberty of citizens is the right of each person to participate in the self-government of their society. *In re Winship*, 397 U.S. at 385 (Black, J., dissenting). "The people . . . may of course be wrong in making . . . determinations [of fairness], but the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights." *Id.*

State laws necessarily promote a vision of what is the "ideal." And different communities will have different visions of what constitutes the "ideal." The view in some communities is that marriage is only about recognizing the emotional fulfillment of adults, separate from encouraging a legal attachment between children and their natural parents. The view in others is that sexual identity is inconsequential in marriage,

rendering mothers and fathers entirely interchangeable. And all Michigan citizens are free to argue about the current understanding of the "ideal" of marriage. There are different reasonable conclusions that citizens may draw on these questions. The democratic processes of this country are ill-served by the judiciary stepping in and relegating one side of the debate to the status of irrational. To arrogate this decision to themselves, the courts will dismiss some of the most ancient and cherished beliefs of half of the country as animus. Democracy should not work that way.

It is well settled that there is a "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher* v. *Roe*, 432 U.S. 464, 475 (1977). By adopting a traditional definition of marriage, Michigan does not interfere with the right of adults to commit each other to an exclusive, loving relationship. But Michigan has established traditional marriage as the ideal setting for the procreation and rearing of children. There is nothing unconstitutional about this conclusion.

CONCLUSION

The State of Michigan as *amicus curiae* would ask this Court to reverse and affirm the constitutionality of California law on marriage.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Aaron D. Lindstrom
Assistant Solicitor General

Joseph E. Potchen
Tonya C. Jeter
Assistant Attorneys General

Attorney for *Amicus Curiae*
State of Michigan

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