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No. 12-144

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,

***Petitioners*,**

v.

KRISTIN M. PERRY, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* PATRICK HENRY COLLEGE IN SUPPORT OF PETITIONERS

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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

Patrick Henry College[1] is a Christian liberal arts college located in Purcellville, Virginia. Its educational program employs a rigorous classical core curriculum. All majors at the college use a blend of traditional classroom instruction supplemented by internships or other "real life" research projects in the field of study.

The College operates the Center for the Original Intent of the Constitution as an academic and advocacy program. Its primary activity is the preparation and filing of *amicus* briefs in appellate litigation. Several students majoring in government participated in research that was used in the preparation of this brief.

Patrick Henry College (PHC) has two interests in this litigation. First, based on its moral convictions arising from its traditional Christian faith, the College views the practice of homosexuality as moral error and would refuse any recognition of same-sex marriage for any of its internal purposes. The outcome of this litigation could operate effectively to change the law of Virginia to require legal recognition of same-sex marriage within the Commonwealth. This could impact the College's ability to deny such recognition for its internal purposes.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party has authored this brief, nor has any counsel, party, or third person made a monetary contribution intended to fund the preparation or submission of the brief. *Amicus* has obtained consent from all parties to file this brief.

The second interest of Patrick Henry College relates to a particular issue that is the focus of this *amicus* brief. Patrick Henry College's motto identifies its mission as educating leaders "for Christ and for Liberty." More than half of Patrick Henry students are government majors. PHC places significant emphasis on preparing students for careers in law and government. PHC has won the last five national championships in the American Collegiate Moot Court Association.

This brief addresses the claim that laws enacted as the result of moral and religious advocacy do not serve a legitimate government interest. PHC seeks to educate students to advance the cause of human liberty using the guiding star of moral and religious conviction. Should this Court, in contradiction to its precedent, fully affirm the holding of the Ninth Circuit, it will have effectively dissolved all meaningful connection between morality and law so that only pragmatic interests can justify any law. Opportunities for moral considerations in politics and law will be severely limited. If moral and religious voices are excluded from legitimate public discourse and the political process, Patrick Henry College students (and millions of people who share their values) will effectively be disenfranchised because they will be forced to discover justifications for their policies which would suffice even in the absence of their moral view. Like all Americans, PHC students want to be able to "vote their values." This brief is submitted with the hope that religious and moral voters will not be subjected to discriminatory rules

that will uniquely burden their participatory rights in American political life.

SUMMARY OF ARGUMENT

Respondents contended, and the Ninth Circuit agreed, that Proposition 8 was unconstitutional because this measure represented the moral disapproval of same-sex marriage by the majority of California voters. Legislation which advances no interest other than the preservation of morality cannot survive even minimal scrutiny under either Equal Protection or Due Process analysis, or so Respondents contend.[2]

Your *amicus* argues that the only relevant limit on religious or moral legislation is found in the Establishment Clause of the First Amendment. All laws represent moral choices of one form or another. A law is not unconstitutional for the sole reason that it parallels the view of religious teaching. *Harris v. McRae*, 448 U.S. 297, 319 (1980).

From the founding of the Republic to modern times, this country has enacted countless laws which have been the result, at least in material part, of the support of those who have advanced religious and moral arguments justifying the law. Such

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[2] Your *amicus* does not intend to imply that there are no justifications for Proposition 8 other than the advancement of morality. Counsel for the Petitioners and other *amici* will address those issues. Rather, it is our contention that even if morality is the sole justification for Proposition 8, it is nonetheless constitutional.

enactments include the Declaration of Independence, the Constitution, the Fourteenth Amendment, the Civil Rights Acts of the 1960s, and many other important provisions.

It is especially incongruous for the Respondents to assault the legitimacy of morally based legislation in this particular context. California's civil union laws had already given same-sex couples 100% of the legal rights of married spouses. Only the public sanction that accompanies the term "marriage" was withheld. The Respondents want the moral approval of society. The voters of California declined to give it. If moral legislation is impermissible, then the Respondents have no available remedy either in litigation or in political activity. If it is unconstitutional for the public to withhold moral approval through Proposition 8, it is equally unconstitutional for the Respondents to seek such approval through other laws.

Your *amicus* also urges this Court not to disenfranchise voters who are motivated to cast their ballots for religious or moral reasons. So long as the Establishment Clause is not violated, every voter should be able to vote for the position of his or her choice for the reason of his or her choice. The efforts of Respondents to use the power of this Court to silence those who disagree with them over political and moral questions should not be countenanced.

ARGUMENT

I. The People of California Should Not Be Coerced to Give Moral Sanction to Same-Sex Marriage

In several cases dealing with homosexuality, parties, *amici*, and this Court have expressed different theories concerning the ability of a state to claim that the enforcement of moral principles may serve as a legitimate government interest to justify legislation when challenged under Equal Protection or Due Process standards. Respondents contend that moral conviction alone may never constitute a rational basis for legislation. Because this argument has been raised consistently, it is necessary to understand it fully in order to provide an appropriate response.

Respondents in *Romer v. Evans* did not suggest that moral conviction could never supply a legitimate state interest. Rather, they contended "that antipathy, by itself, is not a legitimate purpose even for non-racial discrimination." *Romer v. Evans*, 517 U.S. 620 (1996), Brief for Respondents, 36. Respondents noted correctly that "[i]f bare antipathy toward a group could justify discrimination against that group, then the requirements of the Equal Protection Clause would be meaningless." *Id.* at 37. Finding that Amendment 2 was not rationally related to any of the several interests proffered by the State, this Court agreed, holding that the law's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it

lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632.

In *Lawrence v. Texas*, petitioners and *amici* began taking the position that "bare antipathy toward a group" exists *whenever* moral conviction is submitted as the lone justification for law. "All Texas offers to justify its profound intrusion into the private sexual lives of Texans is the state's own, 'because-we-say-it's-wrong' view of morality." *Lawrence v. Texas*, 539 U.S. 558 (2003), Brief for American Civil Liberties Union et al. as *Amici Curiae* 16. "As explained above, this selective prohibition *under the guise of morality* serves no purpose other than the preservation of traditional gender roles, which this Court has made clear is not a defensible governmental purpose." *Id.*, Brief for NOW Legal Defense and Education Fund as *Amicus Curiae* 24 (emphasis added).

> "Texas may not impose its particular view through the intrusive force of a criminal law regulating the very forms of physical intimacy that consenting adults may choose in the privacy of their own homes. By claiming the power to impose its own moral code where constitutional guarantees of personal liberty are at stake, Texas is reversing the proper relationship between the government and a free people." *Id.*, Brief of Petitioners, 29 (internal citations omitted).

While Respondents in *Perry* have focused considerable attention on the motives of those who organized the campaign for Proposition 8, they make it plain that the legislative goal of the voters themselves is sufficient to invalidate the measure on constitutional grounds.

> Proposition 8 is antithetical to the "principles of equality" on which this "Nation . . . prides itself." *Plyler*, 457 U.S. at 219. It creates a permanent "underclass" of hundreds of thousands of gay and lesbian Californians (*id.*)—who are denied the fundamental right to marry available to all other Californians simply because a majority of voters deems gay and lesbian relationships inferior, morally reprehensible, or religiously unacceptable. *Perry v. Brown*, 671 F.3d 1052 (2012), Brief for Appellees, 56.
>
> [T]he district court was right to conclude that the only available inference is that Proposition 8's principal purpose was to advance the majority's moral disapproval of gay relationships. Just as moral disapproval could not justify Amendment 2 in *Romer*, it cannot justify Proposition 8. *Id.*, at 76.
>
> Of course, this does not mean that the voters who supported Proposition 8 were motivated by malice or hostility

> toward gay men and lesbians—although, to be sure, some of the campaign messages reflected these feelings. *Id.*, at 104.

Thus, Respondents make no claim that those with the actual power to make law—the voters of California—acted with animus. Thus, this case does not present the kind of situation identified in *Romer* or *Lawrence* where legislation was attacked as motivated by animus "in the guise of morality." Here the claim is that, even absent a showing of malice by the actual lawmakers, legislation which seeks to enact a moral principle cannot be said to furnish a legitimate state interest sufficient to satisfy basic Equal Protection analysis. Claims of animus remain, but this accusation is made only against the political organizers of Proposition 8.

Your *amicus* has two responses to this line of reasoning. First, discerning the motives of the organizers of the ballot measure is not relevant for the purposes of determining its constitutionality. "As we have said before, however, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000) (plurality) citing the majority decision of *United States v. O'Brien*, 391 U.S. 367, 382-383 (1968). See also, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it"); *Ex Parte McCardle*, 74 U.S. 506, 514 (1868) ("We are not at liberty to inquire into the motives of the

legislature. We can only examine into its power under the Constitution").

Second, since Proposition 8 is a direct act of the People themselves, their ability to exercise their ultimate sovereign power cannot be defeated by the alleged motives that the Respondents wish to attribute to the campaign organizers. After all, the purpose of this lawsuit is to determine the constitutionality of the law itself, not the legitimacy of the underlying political campaign. Thus, the only relevant assertion is Respondents' claim that Proposition 8 is unconstitutional because the people of California may not employ their own moral convictions to deny same-sex couples the special imprimatur of state approval traditionally reserved for marriage between one man and one woman.

Ironically, Respondents' legal theory is inconsistent with the very purpose of their lawsuit. California's law on domestic partnerships gives 100% of the substantive rights of marriage to same-sex couples. The only thing withheld by Proposition 8 is the imprimatur associated with "marriage." The Ninth Circuit failed to identify a single *state-supplied* good which hinges on the designation "marriage." Every benefit which the Ninth Circuit attributed to the designation is entirely dependent

upon *social* esteem.[3] The Fourteenth Amendment, however, guarantees equal protection of the laws, not equal esteem in the eyes of the people.

We do not suggest that this imprimatur is a trivial matter—on the contrary, it is of great significance not only to those who wish to use the federal courts to coerce such approval in the name of the People of California; it is also significant to the People of California themselves, who voted according to their own values and convictions.

In its landmark same-sex marriage decision, *Goodridge v. Department of Public Health*, 440 Mass. 309, 321, 798 N.E.2d 941 (2003), the Supreme Judicial Court of Massachusetts correctly identified a state's role in the recognition of marriages:

> We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. . . . No religious ceremony has ever been required to validate a Massachusetts

[3] See *Perry*, 671 F.3d at 1078. These benefits include the dichotomy between being "single" or "married" (as opposed to being "domestically partnered"); announcements in newspapers about births, deaths, and marriages; public proposals in restaurants or sporting events (with the phrase, "will you marry me" opposed to "will you enter into a registered domestic partnership with me"); and several other common phrases or literary allusions that indicate the general esteem which society confers by saying "marriage."

> marriage. In a real sense, there are three partners to every civil marriage: *two willing spouses and an approving State*. (Emphasis added; internal citations omitted.)

This is exactly what the Respondents seek—the right to be in a relationship that receives the approval of the People of California. It cannot be emphasized too strongly in this case that the State of California is not a mere geographical entity: it is a body of people. The Respondents are quite willing to concede the power of the People to legislate for moral purposes if the law would *grant* moral approval to their relationships. But Respondents contend that it is unconstitutional for the People to employ their moral judgment to *deny* moral sanction to same-sex marriage. There is no rule of law or logic which can justify the position that moral legislation is constitutionally appropriate only when it yields the answer sought by one party to a dispute.

Respondents may well assert in response that they seek only the same level of moral approval as given to traditional marriages. If moral approval is offered, they contend that it must be available to all on equal terms.

This case, however, is not about access to marriage. In *Loving v. Virginia*, 388 U.S. 1 (1967), the definition of marriage was uncontested. Simply put, Virginia had unconstitutionally chosen to determine *who* could marry on racial grounds, while never doubting that a "marriage" of a man and a woman of two different races could exist. In order to

claim a right to the designation, "marriage," Respondents must argue, not about *who* may marry, but about *what* marriage is. The definition of marriage, however, is a quintessentially moral determination, for it encompasses the question of what marriage *ought* to be. Since this case (like any case dealing with polygamy or incest) is about the *meaning* of marriage, rather than access to it on equal terms, each side is asking the state for *moral* sanction through the designation, "marriage."

If morality may ever serve as a proper justification for legislation, it is in this case. No substantive legal rights are in play. The only relief that Respondents seek is the moral sanction of the People; thus, they cannot claim that it is unconstitutional for the People to legislate on the basis of morality alone. The Respondents follow a different moral code from that of a majority of the People of California. They have asked the federal courts, and now this Court, to override the moral choices of the People and install the moral code preferred by the Respondents. This Court has consistently refused to grant such requests. ("[T]his Court's obligation is to define the liberty of all, not to mandate its own moral code. *Lawrence*, 539 U.S. at 571 quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

II. Legislation Enacted for Moral Purposes is an Enduring American Tradition

Your *amicus* contends that the only constitutional limitation on efforts to "legislate religion and morality" are found in the

Establishment Clause. This Court has long refused to invalidate laws on the ground that "it happens to coincide or harmonize with the tenets of some or all religions." *Harris*, 448 U.S. at 319, quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). Thus, the Hyde Amendment's prohibition on funding for abortion services was upheld despite the claim that it incorporated the Roman Catholic view of abortion into the law of Congress.

The arguments raised by the Respondents are a rough parallel to the arguments of the Plaintiffs in *Harris v. McRae*. Respondents claim that any law based on morality alone cannot constitute a "legitimate state interest" for the purposes of equal protection analysis. Morality, especially morality tainted by religion, is an unconstitutional basis for legislation—or so goes the argument. In this argument, we find echoes of the claim raised in *Harris*, that religious motives for legislation violate the "secular purpose" test within this Court's Establishment Clause jurisprudence. This argument should be rejected here, just as it was in *Harris*. Enactments which reflect religious viewpoints are not automatically unconstitutional.

The power of a legislature to enact laws for the protection of morality has been assumed to have been constitutionally appropriate from the earliest days of the Republic. Indeed, the traditional definition of the "police power" of the states has long included the power to legislate for moral purposes. This Court made this plain in *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1878):

> Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the *public morals*. . ..
>
> Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a measure of *police regulation, looking to the preservation of public morals*, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts. (Emphasis added.)

The contention that moral legislation (especially when "tainted" by religious values) is an illegitimate use of state power would have been astonishing to the leaders and people of this nation until very recently. We undertake a historical review of the role of religion and morality in the advancement of many of this nation's most important legal and political accomplishments.

Our purpose for this review is *not* to establish that America is a Christian or religious nation or that our law *must* reflect a particular religious or moral truth. Rather, we simply seek to demonstrate that a religious and moral motivation does not render legislation *ipso facto* unconstitutional.

Every American is entitled to participate in the political processes of this nation to advance whatever propositions seem good to him or her, and to do so for whatever reason he or she wishes, whether that motivation is philosophical, religious, moral, or pragmatic. Everyone has the right to vote and to seek legislation for any and all reasons. Those with religious or moral motivations should not be treated as second-class citizens.

In *Romer*, 517 U.S. at 621, this Court struck down Amendment 2 because it denied to homosexuals "safeguards that others enjoy or may seek without constraint." In other words, the ability of homosexual individuals to participate in the political process and to claim protection from discrimination required them to leave aside their sexual orientation as a condition to full political participation. A rule that precludes legislation which reflects moral or religious values has a similar disenfranchising impact on those for whom such values form the core of their self-identity. No voter should be required to lay aside the core of his or her self-identity as a condition of participating in politics. Every person should have the right to seek legislation for reasons that matter to them without having to invent other justifications that reflect the values of other worldviews. So long as the

Establishment Clause is not violated, every person should have the right to seek legislation for any reason that seems good to him or her without the prospect of judicial review based on the self-identity or worldview of the voter.

A. Religion and Morality in Early America

James H. Hutson, Chief of the Library of Congress's Manuscript Division, has distilled the relevant history in his highly acclaimed *Religion and the Founding of the American Republic*. A few examples from his work are sufficient for our purposes.

Religious Arguments Supporting American Independence

Hutson points to the legacy of William Penn who is, of course, properly lauded for his tolerant view of religious diversity. For Penn, however, a commitment to religious freedom did not require any divorce between morality and the law.

> Penn required his magistrates, whom he called in the Puritan fashion "ministers of God," to repress an encyclopedic list of moral offenses. . .. Although Penn recognized that, in attempting to enforce morality, he was dealing with the "effect of evil" and not its cause, he was determined to use his full powers to keep Pennsylvanians a moral people and to prevent the

> extraordinary liberties he had provided from degenerating into licentiousness.[4]

Hutson places considerable emphasis on the role that religious arguments played in the political efforts to justify the American War for Independence.

> The plain fact is that, had American clergymen of all denominations not assured their pious countrymen, from the beginning of the conflict with Britain, that the resistance movement was right in God's sight and had His blessing, it could not have been sustained and independence could not have been achieved.[5]

The Continental Congress, concerned that a "backsliding military" would meet with defeat, required of the Continental Army "strict observation of the articles of war, and particularly, that part of the said articles which forbids profane swearing, and all immorality."[6]

Religious Arguments Supporting Disestablishment

In the early battles for religious liberty in Virginia, religious arguments were commonly

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[4] James H. Hutson, *Religion and the Founding of the American Republic* (Library of Congress 1998), 11.

[5] *Id*. at 40.

[6] *Id*. at 56.

invoked to justify complete religious liberty. A petition from Prince Edward County urged:

> That our Honorable Legislature would blot out every vestige of British Tyranny and Bondage, and define accurately between civil and ecclesiastic Authority; then leave our Lord Jesus Christ the Honour of being the Sole Lawgiver and Governor in his Church.[7]

James Madison's efforts for disestablishment in Virginia were strongly supported by the Baptist pastors, for example, James Leland of Orange County. The Baptists had a history of supporting religious liberty for some two hundred years. Throughout this history, they made religious arguments to advance the political principle of religious freedom.[8] The eminent Harvard historian of the 1930s, W.K. Jordan, summarized the Baptist argument and history:

> The Baptists taught . . . consistently . . . that the true Church was a voluntary congregation of believers, and they were never confused by the . . . teaching, that it was the duty of the prince to encourage the true religion and to

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[7] Petition from Prince Edward County, October 11, 1776, *Early Virginia Religious Petitions*. A collaborative project between the Library of Congress and the Library of Virginia. http://memory.loc.gov/ammem/collections/petitions/ (accessed January 24, 2013).

[8] Michael P. Farris, *From Tyndale to Madison* (B&H Publishing 2007), 292-304.

> repress the false. The Baptists not only regarded the Church as a voluntary organization, but insisted that the regenerated alone could be admitted to it. . ..[9]

Religious Arguments Supporting the Northwest Ordinance

Shortly thereafter, under the Articles of Confederation, Congress adopted the Northwest Ordinance, which embraced the idea that there is a necessary corollary between religion and government: "Religion, Morality and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged."[10]

Washington's Religious Arguments for Principles of Government

George Washington, who famously declared that American institutions give "to bigotry no sanction," nonetheless contended that religion and morality were proper supports of government. His views are fully reflected in his famous Farewell Address:

> Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In

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[9] W.K. Jordan, *Development of Religious Toleration in England*, 4 vols. (Harvard University Press 1932-40), 2:259.

[10] Hutson, 57.

> vain would that man claim the tribute of Patriotism, who should labour to subvert these great props of the duties of Men and citizens. The mere Politician, equally with the pious man ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. . . And let us with caution indulge the supposition, that morality can be maintained without religion. . . 'Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free Government.[11]

Religious Arguments of John Adams for Principles of Government

John Adams defended the necessity of a system of divided power by appealing to the sinful nature of man. While doing a thorough review of the positions of a number of great philosophers, Adams added a religious justification for his view of governmental structure:

> [A]lthough this [the sinfulness of the human heart] seems a harsh supposition, does not every Christian daily justify the truth of it, by confessing it before God and the world? And are we not expressly told the same

[11] Hutson, 80-81.

> in several passages of the holy scriptures, and in all systems of human philosophy?[12]

Paraphrasing Machiavelli, Adams demonstrated a belief in the necessity of laws for moral ends:

> Men are never good but through necessity; on the contrary, when good and evil are left to their choice, they will not fail to throw everything into disorder and confusion. Hunger and poverty may make men industrious, but laws only can make them good; for, if men were so of themselves, there would be no occasion for laws; but, as the case is far otherwise, they are absolutely necessary.[13]

Whether or not one agrees with Adams' view of the ability of the law to make men good, the central point remains: Adams felt free to make moral and religious arguments to advance his view of the necessity of bicameral legislatures and the importance of checks and balances as instruments of liberty.

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[12] John Adams, *The Works of John Adams*, ed. Charles C. Little and James Brown (Bolles and Houghton 1851), 408

[13] Adams, 410.

Early Congressional Recognition of Police Power for Moral Legislation

In 1804, Congress recognized the legitimacy of legislating for moral purposes when it delegated its police power to the town council of Alexandria (which was then in the District of Columbia), saying:

> [It] shall have power to make all laws which they shall conceive requisite for the preservation of the health of the inhabitants and for the regulation of the morals and police of the said town, and to enforce the observance of their laws by reasonable penalties and forfeitures. . .. *Ex Parte Dean*, 2 Cranch C.C. 125, 7 F. Cas. 306, 307 (C.C.D.C. 1816).

Jefferson's Religious and Moral Arguments for the Declaration of Independence

No review of the history of early America would be sufficient without some consideration of the views of Thomas Jefferson, who gave us what may be the single most important phrase in American history:

> 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. . ..

This phrasing in the Declaration of Independence was not the only time Jefferson expressed such ideas. He emphasized the importance of the public's embrace of this religious concept, saying, "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath?"[14]

Historians have noted the importance of Jefferson's religious arguments. Gaustad writes, "In the Statute [for Religious Liberty], Jefferson wrote of 'Almighty God' who created the mind free and of the 'Holy Author of our Religion, . . . Lord both of body and mind.'"[15] Jefferson also wrote, "The God who gave us life, gave us liberty at the same time. . .."[16] As Sanford says quite pithily, "Jefferson never advocated freedom from religion."[17]

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[14] Thomas Jefferson, *Notes on the State of Virginia* (J.W. Randolph 1853), 174 available from the Harvard University Library http://books.google.com/books?id=DTWttRSMtbYC&printsec=frontcover&dq=thomas+jefferson+notes+on+the+state+of+virginia&hl=en (accessed January 24, 2013).

[15] Edwin S. Gaustad, *Sworn on the Altar of God: A Religious Biography of Thomas Jefferson* (Wiliam B. Eerdmans Publishing 1996), 94.

[16] Charles B. Sanford, *The Religious Life of Thomas Jefferson* (Univ. Press of Virginia 1984), 217.

[17] *Id*. at 176.

Jefferson himself credits his phrasing of the Declaration to values commonly accepted by the people. In his *Letter to Henry Lee, May 8, 1825*, Jefferson wrote, "Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, [the Declaration] was intended to be an expression of the American mind. . .. All it's [sic] authority rests then on the harmonizing sentiments of the day. . .."[18]

Summarizing the religious foundation beneath America's greatest proclamation of equality—Jefferson's eloquent declaration that all men are created equal—Eicholz writes, "The first of these [self-evident truths] is a basic equality in the eyes of God, because it was God who gave to man his essential character as a moral creature."[19]

B. Religion, Morality, Abolition, and the Adoption of the Fourteenth Amendment

The Fourteenth Amendment is central to this litigation. Your *amicus* submits that the adoption of this Amendment was motivated and supported by the very kind of moral arguments that are attacked by the Respondents.

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[18] *A Casebook on the Declaration of Independence: Analysis of the Structure, Meaning, and Literary Worth of the Text* (Robert Ginsberg ed., Thomas Y. Crowell Company 1967), 33.

[19] Hans L. Eicholz, *Harmonizing Sentiments: The Declaration of Independence and the Jeffersonian Idea of Self-Government* (Peter Lang Publishing 2001), 103.

It is beyond legitimate debate that the abolition movement, whose efforts ultimately led to the adoption of this Amendment, was infused with religious and moral arguments from its earliest days.

One of the very earliest calls for abolition came from the same group of Baptists who had been so instrumental in working with James Madison to protect religious liberty. Even as the Bill of Rights was being debated and ratified, the Virginia General Baptist Association held a political meeting in Richmond on May 8, 1790.[20] One of the resolutions emerging from the meeting concerned the issue of slavery. A committee was appointed to consider the matter, but it could not agree on the wording of any resolution. But, as the official minutes record, they "agreed to lay the weight thereof, on the Reverend James Leland who brought forth in a resolution which was agreed to and is as followeth":

> *Resolved*, That slavery, is a violent deprivation of the rights of nature, and inconsistent with a republican government; and therefore recommend it to our Brethren to make use of every legal measure, to extirpate the horrid evil from the land, and pray Almighty God, that our Honourable Legislature may have it in their power, to proclaim

[20] Farris, 389-90.

> the general Jubilee, consistent with the principles of good policy.[21]

The appeal to the "general Jubilee" is a direct reference to an Old Testament teaching where all slaves were to be released and all debts to be forgiven.[22]

Decades later, the call for abolition continued to be buttressed with appeals to religion and morality. The arguments of Lincoln and his contemporaries were often religious, and nearly always based on moral premises:

> Moral opposition to slavery was another powerful influence. Lincoln proclaimed that this moral stance was the primary difference between himself and Douglas. For many Republicans, opposition to slavery was religiously based. Hale and others thought slavery was a sin, forbidden by the Word of God, while Giddings called opponents of the Republicans "infidels." Chase declared that "the cause of human freedom is the cause of God." Others believed that slavery was prohibited by the Bible because God gave Adam dominion over the beasts, but not over his fellow men.

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[21] *Minutes of the Baptist General Committee at their yearly meeting, held in the city of Richmond, May 8th, 1790*, Virginia Baptist General Committee (Richmond: T. Nicolson 1790), 6-7.

[22] Leviticus 25:8-55; Leviticus 27:16-25.

> Many antislavery leaders also based their views on the Declaration of Independence, with its stress on inalienable rights and inherent equality.[23]

John Bingham, who would later play a key role in the drafting of the Fourteenth Amendment, argued for abolition using the moral premises he found in the Declaration and the Constitution.

> [T]he fathers of the Republic never would have made their Constitution; they never would have borne the sacred ark of liberty through a seven years' war, if they had not believed in a higher law—in the eternal verities of truth and justice. That law is of perpetual and of universal obligation. It is obligatory alike upon individual and collective man; upon the citizen and upon the State.[24]

Senator Charles Sumner gave voice to the moral and religious motivations for the adoption of the Fourteenth Amendment. Arguing for equal protection and the enfranchisement of the freedmen, Sumner said:

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[23] Daniel A. Farber and John E. Muench, *Ideological Origins of the Fourteenth Amendment*, 1 Const. Comment. 235 (1994), available at: http://scholarship.law.berkeley.edu/facpubs/394 (last visited Jan. 26, 2013).

[24] CONG. GLOBE, 36th Cong., 2d Sess. App, 83 (1861).

> Our fathers solemnly announced the Equal Rights of all men, and that Government had no just foundation except in the consent of the governed; and to the support of the Declaration, heralding these self-evident truths, they pledged their lives, their fortunes, and their sacred honor. . .. And now the moment has come when these vows must be fulfilled to the letter. In securing the Equal Rights of the freedman, and his participation in the Government, which he is taxed to support, we shall have performed those early promises of the Fathers, and at the same time the supplementary promises only recently made to the freedman as the condition of alliance and aid against the Rebellion. A failure to perform these promises is moral and political bankruptcy. It is a repudiation of moral and political duties. . ..
>
> The moral duty to perform these promises is as plain as the Decalogue. . ..
>
> There is also a Christian Providence which watches this battle for right, caring especially for the poor and downtrodden who have no helper. The freedman still writhing under cruel oppression now lifts his voice to God the

> avenger. It is for us to save ourselves from righteous judgment.[25]

III. Every Law Embodies a Moral Precept

It is impossible to talk or think about the law without reference to the concepts of right or wrong. Every law is a legislative enactment of someone's moral choices. It is wrong to murder. It is wrong to harm another. It is wrong to pollute the air. Defamation is wrong. Nude dancing is wrong. Obscenity is wrong. Prostitution is wrong. Racial discrimination is wrong. Drug use is wrong.

It is inescapable that "A legal order is a moral order."[26] While some might say that each of the aforementioned vices may be restricted solely on the basis of the tangible harm which it wreaks upon society, the assertion that harm-based justifications are distinct from moral precepts is chimerical. Ostensibly dissolving the connection between law and morality in favor of laws which merely prevent harm still requires one of two moral affirmations: either one *ought* not harm his neighbor, or one *ought* not restrain his neighbor unless there is a risk of harm. Even a law which simply stated "no morality exists" would stem from a moral perspective and *function* as a moral precept even as it denied the

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[25] CONG. GLOBE, Senate, 39th Cong., 1st Session, 674-686 (Feb. 6, 1866).

[26] Deryck Beyleveld and Roger Brownsword, *Law As Moral Judgment* (Sweet & Maxwell 1986), 164. (See link: http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9337.1994.tb00171.x/abstract)

existence of morality. Since, therefore, law both presupposes and implies a moral position, it cannot be true that the Fourteenth Amendment looks only on "secular" interests of the state as legitimate.

IV. This Court Should Not Disenfranchise Voters for Following Their Religious or Moral Values

"Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). "The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association." *Rhodes*, 393 U.S. at 41 (Harlan, J., concurring).

These ideals led the Colorado Supreme Court to invalidate Amendment 2 in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993). While this Court affirmed on slightly different grounds, *Romer v. Evans*, 517 U.S. at 626, there can be no doubt of the validity of the rule announced in *Williams v. Rhodes*.

Both sides of the debate over Proposition 8 should have the total freedom to vote for or against that measure for reasons of their own choosing. Some think that same-sex marriage is morally right. Some think it is morally wrong. Neither side engages in an unconstitutional action when it votes according to its own convictions and beliefs.

In 2012, the voters of three states—Washington, Maryland, and Maine—legalized same-sex marriage. Should the federal courts now

entertain legal challenges to these laws on the grounds that the proponents of same-sex marriage advanced moral or religious arguments in support of these measures?

> In Maine, where voters rejected gay marriage in 2009 after it passed the statehouse, the spread was the widest; 54 to 46 percent in favor. Religious coalitions in favor of the ballot measure predominated.
>
> "Engaging countless faith leaders and people of all political affiliations who support the freedom to marry is part of this campaign's legacy in this historic election," said Jill Barkley, marriage project coordinator for the American Civil Liberties Union of Maine.[27]

The rule against religious and moral legislation must cut both ways. If California cannot constitutionally adopt Proposition 8 because of the presence of moral and religious motivations, Maine's newly enacted law approving same-sex marriage is also obviously in trouble. No voter in this country should ever be questioned about his or her motivation for casting a vote.

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[27] Lauren Markoe, "Election 2012 Shows A Social Sea Change On Gay Marriage," *Huffington Post*, November 8, 2012, http://www.huffingtonpost.com/2012/11/08/election-2012-gay-marriage-sea-change_n_2090106.html (accessed January 24, 2013).

The preservation of morality has long been understood to be a basic goal of society. While this goal cannot be pursued through measures that violate the Establishment Clause, laws which articulate a moral standard are not unconstitutional for that reason alone. If this is the case, all law is unconstitutional, for all laws articulate a moral standard.

In reality, it is only a certain kind of morality and a certain brand of religion that is deemed suspect in America in 2013. Conservative Christians—both Protestant and Catholic—and others who advocate traditional morality are routinely castigated for "homophobic" positions. Any sports figure, news commentator, or college professor who dares to articulate a conservative position on this issue is in for an outpouring of public opprobrium. That is the rough-and-tumble of political life.

This Court, however, should not take sides in this debate. It should leave all citizens in an equal position to promote their political and moral values. While the issue of marriage itself goes to the bedrock of our society, this case has the potential to harm other fundamental spheres of public life, as well. The rights of freedom of speech and equal participation in political life could suffer greatly if this Court affirms the decision below on the basis asserted by the Ninth Circuit and the Respondents.

It is a grave error to silence the majority of California voters simply because they embrace

religious and moral values that are at odds with those of the Respondents and their allies.

CONCLUSION

For the reasons set forth above, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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