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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 Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

BRIEF OF THE LIGHTED CANDLE SOCIETY AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE[1]

The Lighted Candle Society is a not-for-profit corporation based in Washington, D.C. and qualified as tax-exempt under the Internal Revenue Code, 26 U.S.C. § 501(c)(3).

The Lighted Candle Society was founded in 1998 by the Honorable John L. Harmer, former Lieutenant Governor and State Senator of California, and the Honorable Edwin Meese III, former Attorney General of the United States. Mr. Harmer is chairman of the organization and Messrs. Harmer and Meese serve as trustees of the organization.

The purposes of the Lighted Candle Society are to encourage the enforcement of obscenity laws and to support traditional values, including marriage and family. The Lighted Candle Society regards these values as foundational to the survival of American society.

The Lighted Candle Society files this brief because this case presents the question of whether marriage will continue to be defined as a male-female relationship or instead be judicially redefined at a constitutional level in a genderless manner to include

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for a party authored the brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus and its members made such a monetary contribution.

relationships between or among persons of the same sex.

The Lighted Candle Society considers the male-female nature of marriage to be critical to the health and survival of American marriages and families. The Society believes it and other persons and organizations that support traditional marriage have the right and duty to provide input into the important public policy debate over the meaning and future of marriage and family.

SUMMARY OF ARGUMENT

Opposite-sex marriage is an essential foundation of our civilization. The recent movement to redefine marriage to eliminate its opposite-sex nature threatens this foundation.

In this case, a divided panel of the Ninth Circuit held that Proposition 8, which preserves opposite-sex marriage, violates the Equal Protection Clause of the Fourteenth Amendment because it lacks a rational basis. The panel's decision is reported at 671 F.3d 1052. The panel purported to apply *Romer v. Evans*, 517 U.S. 620, 623, 631 (1996).

The two-judge Ninth Circuit decision should be reversed because Proposition 8 is supported by numerous rational bases. The Lighted Candle Society presents two of those here.

First, all laws, especially those seen as carrying a moral imperative, have an educational effect – teaching all citizens, including children, what conduct is proper. The citizens of California may rationally choose not to convey the message, through legally redefining marriage, that same-sex marriage is a "good thing" and equivalent to opposite-sex marriage. And the state may reasonably decide to maintain the educational effect of defining marriage as opposite-sex in nature.

Second, California could reasonably choose to preserve the opposite-sex nature of marriage because redefinition would inevitably create strong pressure to redefine marriage further to include polygamy and polyamory (with the permutations of opposite-sex, same-sex, and bisexual group marriage), and incestuous marriage.

Judicially redefining marriage at the national level would also have a destabilizing effect on the law. It may create a backlash in the same manner as has the Court's abortion decision, *Roe v. Wade*, 410 U.S. 113 (1973), which swept aside all state laws restricting abortion.

The Ninth Circuit panel also erroneously concluded, under *Romer*, that Proposition 8 is invalid because it is based on "animus." But the simple restatement of the traditional opposite-sex nature of marriage can hardly, after six thousand years of recorded history, be found unconstitutional merely by reciting this pejorative label. Having created a

domestic partnership framework for same-sex relationships, California can hardly be found guilty of "animus" toward persons in those relationships. Cal. Fam. Code § 297(a).

Moreover, unlike the divided Ninth Circuit panel's conclusion, *Romer* does not mandate striking Proposition 8 as a denial of equal protection. The Colorado constitutional amendment at issue in *Romer* was "unprecedented," and "[s]weeping" in its forward-operating effect of requiring gays, lesbians, and others to resort to super-majoritarian state constitutional amendments in order to seek legal benefits. 517 U.S. at 627, 629-630, 632-633. This bears no resemblance to the modest language of California Proposition 8, which merely preserves the traditional understanding of marriage as opposite-sex in nature.

ARGUMENT

I. INTRODUCTION

This Court has in many previous cases recognized the paramount importance of male-female or opposite-sex marriage to the survival of our society. At the time of these cases, same-sex marriage had not even been seriously proposed. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court said: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id*. at 486. And in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court recognized:

"Marriage and procreation are fundamental to the very existence and survival of the [human] race." *Id.* at 541. See also *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (marriage is the "relationship that is the foundation of the family in our society" and the "decision to marry and raise the child in a traditional family setting" is entitled to constitutional protection); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (marriage "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"); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) ("no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman . . . the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement"); *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

In recent years, the nature of marriage has become a matter of intense public debate in American society. The primary factor in this process has been a number of strategic lawsuits and lower court judges friendly to the redefinition of marriage. Only since 2009 has any state legislature or popular referendum

supported the redefinition of marriage to eliminate its opposite-sex nature.[2]

The first modern court decision supporting the redefinition of marriage was *Baehr v. Levin*, 852 P.2d 44 (Haw. 1993), which was filed in 1991. There the Hawaii Supreme Court ruled that, in order to limit marriage to opposite-sex couples, the state was required to show "compelling state interests" and that "the statute is narrowly drawn." *Id*. at 67. Since then a number of courts, including the divided Ninth Circuit panel in this case, have ruled that, as a constitutional matter (either state or federal, depending on the case), states must license same-sex marriages. See, e.g., *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

In *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972), the Supreme Court summarily dismissed an appeal from a Minnesota Supreme Court decision rejecting an

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[2] Public opinion has apparently grown more accepting of same-sex marriage, as evidenced by the results of popular votes on November 6, 2012 in Maryland, Maine, Minnesota, and Washington. In more than 30 states, including North Carolina in May 2012, previous ballot measures had preserved the traditional opposite-sex nature of marriage. Geoffrey A. Fowler, *Gay Marriage Gets First Ballot Wins*, The Wall Street Journal (Nov. 7, 2012), p. A17 (available at: http://online.wsj.com/article/SB10001424052970204755404578102953841743658.html) (visited January 16, 2013). It is impossible to know where public opinion would be today if courts had not in a number of cases, in the view of the Lighted Candle Society, exceeded their authority.

equal protection challenge to a Minnesota statute prohibiting same-sex marriages. This dismissal was a decision on the merits. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court overturned criminal statutes forbidding homosexual sodomy. But the Court deliberately avoided addressing "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id*. at 578; see also *id.* at 567.

In the current legal climate, the typical lawsuit against opposite-sex marriage laws raises equal protection challenges. The Ninth Circuit's decision striking Proposition 8 in this case is an example. That court's decision is based only on equal protection analysis.

At one time challenges to the opposite-sex nature of marriage were primarily based on the non-textual right of privacy that is regarded as implied by the due process clauses of the Constitution. See, e.g., Jennifer L. Heeb, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 Seton Hall L. Rev. 347, 380 (1993) ("[T]he due process right to privacy is a much better weapon than the Equal Protection Clause for recognizing a marriage between same-sex couples . . . .").

In the present case, two judges of the Ninth Circuit struck down Proposition 8, which preserves the opposite-sex nature of marriage, as unconstitutional on equal protection grounds. Proposition 8

states simply: "Only marriage between a man and a woman is valid or recognized in California." 671 F.3d at 1065. According to the Ninth Circuit panel, Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment, as applied in *Romer v. Evans*, 517 U.S. 620 (1996), because it lacks a rational basis.

In this brief, the Lighted Candle Society will therefore confine its analysis to the equal protection challenge. The Lighted Candle Society maintains, however, that its arguments also support Proposition 8 against any due process or privacy challenge.

The proposed use of constitutional law to redefine marriage to eliminate its opposite-sex nature raises a host of concerns that are deeply troubling to the supporters of the Lighted Candle Society. The supporters of the Lighted Candle Society contend that the Ninth Circuit's two-judge decision striking Proposition 8 is profoundly erroneous and a threat to the very survival of our society.

The Ninth Circuit panel majority characterizes its decision in this case as "narrow." 671 F.3d at 1064, 1076. This is false. If the Ninth Circuit's holding that there is no rational basis to preserve the opposite-sex nature of marriage prevails, all laws preserving marriage will be invalidated and we will have 50-state same-sex marriage, with polygamy and

polyamory (including opposite-sex, same-sex, and bisexual group varieties) close behind.[3]

The Ninth Circuit panel also understates the effect of its decision by repeatedly stating that it holds only that same-sex "couples," i.e., "two men or two women," must be allowed to marry. 671 F.3d at 1063-1069, 1076-1079, 1081-1096. But there can be no rational, enduring distinction between redefining marriage to eliminate its traditional opposite-sex nature and redefining it to eliminate its traditional numerical limitation.

The Ninth Circuit panel decision erroneously concludes that no rational basis supports Proposition 8 or the continued definition of marriage as opposite-sex in nature. In fact, numerous rational bases support the historical definition of marriage.

Within the limits of this amicus brief, the Lighted Candle Society emphasizes two rational bases supporting the historical definition of marriage as opposite-sex in nature. Additional rational bases are presented by Petitioners and other amici curiae.

The educational effect of marriage laws furnishes a strong rational basis for respecting and counting as

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[3] Thirty states preserve the traditional opposite-sex nature of marriage in their constitutions, and the United States and nine additional states preserve it through statute. See National Conference of State Legislatures, Defining Marriage, available at http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (visited January 12, 2013).

constitutional laws such as Proposition 8 that maintain the opposite-sex nature of marriage. As discussed below, law has an inevitable educational effect and changing the law to erase the opposite-sex nature of marriage will necessarily require that even small children be taught that same-sex marriage is a good thing.

Of course, society may some day decide to embrace this message. But it is shocking that a court would, without a clear constitutional command, impose this change and thereby mandate this educational message – disregarding history, biology, and democracy.

Another rational basis for maintaining the opposite-sex nature of marriage is that imposing same-sex or genderless marriage at the constitutional level will unavoidably create strong pressure to redefine marriage further. This will include removal of the traditional understanding of marriage as involving two persons (historically one man and one woman). Of course, if same-sex or genderless marriage is imposed, the effort to remove the number component of marriage will necessarily include all permutations of group marriage – opposite-sex, same-sex, and bisexual varieties of polygamy, i.e., polyamory.

Redefinition will also bring challenges against laws forbidding incestuous marriage. If the gender and number limits of marriage are removed by judicial interpretation of the Constitution, it will be impossible logically to reject arguments for extending

constitutional protection to consenting adult relatives who also seek to marry. And, of course, if same-sex marriage is mandated, the law will have to allow relatives of the same gender to marry, e.g., a mother and daughter, father and son, two or more brothers, two or more sisters, etc.

II. THE EDUCATIONAL EFFECT OF MARRIAGE LAWS FURNISHES A STRONG RATIONAL BASIS FOR LAWS MAINTAINING THE OPPOSITE-SEX NATURE OF MARRIAGE.

A. The Law Has an Inevitable Educational Effect.

When laws are enacted and promulgated that say "x is permitted" and "y is not permitted," the citizens of the society where the law is in effect are thus instructed or taught that x is proper conduct and y is not. In other words, the law teaches that there is no reason to avoid x, but y should be avoided.

The educational effect addressed here is the educational impact that a law (particularly a new one) has as a result of its very enactment. In other words, it is not that a new law will be used as an occasion by teachers and other authority figures to teach persons to act in accordance with the new law. Rather, the effect in question is that the law itself, apart from any instruction based on the law, will have an educational effect.

Because almost every law is an example of the educational effect of law, countless instances exist. To take only one, the Sarbanes-Oxley Act was enacted by Congress in 2002. Among other things, the law made it illegal for an employer or supervisor to retaliate against an employee for providing information or assisting in an investigation regarding alleged securities fraud. 18 U.S.C. § 1514A. It is obvious that one effect of the enactment and promulgation of this law has been to instruct employers and supervisors not to engage in retaliation.

The educational effect is especially strong where the law is seen as carrying a moral imperative. Laws of this type have traditionally been described as regulating "mala in se," whereas other laws have been described as regulating "mala prohibita."[4]

Legal theorists have long recognized that law has an educational effect and even encouraged lawmakers to use this effect to teach proper conduct to their citizens. In the Nichomachean Ethics, Aristotle urged that "the legislator makes the citizens good by habituating them. . . . [H]abituation is what makes the difference between a good political system and a bad one."[5] In the same work, he added that "legislators should urge people towards virtue and exhort them to

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4 See Joycelyn M. Pollock, *Criminal Law* § 1.8 (Anderson Publishing, 2013).

5 Aristotle, *Nicomachean Ethics*, bk. ii, ch. 2, ¶ 2.1 (T. Irwin trans 1985).

aim at what is fine . . . , but should impose corrective treatments and penalties on anyone who disobeys or lacks the right nature."[6]

One could argue that the educational effect of law is implicit in promulgation, which is a necessary element of law. In order for a command to be considered law, it must be promulgated or disseminated to those who are governed by it. Promulgation gives citizens the opportunity to learn what the law provides and to conform to it. Therefore, practices such as the Roman emperor Caligula's posting of his severe tax statutes in minute letters in high places "so that [they] should be read by as few as possible"[7] have been condemned.

St. Thomas Aquinas, who believed that promulgation was essential to law, wrote:

> [L]aw is laid on subjects to serve as a rule and measure. This means that it has to be brought to bear on them. Hence to have binding force, which is an essential property of a law, it has to be applied to the people it is meant to direct. This application comes about when their attention is drawn to it by the fact of promulgation. Hence this is

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[6] *Id*. at bk. x, ch. 9, ¶ 14.22.

[7] *Dio's Roman History* 357 (59.28.11) (E. Cary trans. 1924).

> required in order for a measure to possess the force of law.[8]

Hammurabi, the ancient lawgiver, says in his famous Code: "[L]et the oppressed, who have a lawsuit, come before my image as king of righteousness. Let him read the inscription on my monument, and understand my precious words." Hammurabi then adds that, when the oppressed is informed of the law he will "discover his rights, and . . . his heart be made glad."[9]

More recent thinkers have argued similarly. Hegel insisted in his Philosophy of Right that law must be made universally known: "If laws are to be binding force, it follows that, in view of the right of self-consciousness . . . they must be made universally known."[10] According to Thomas Hobbes, a law must "declar[e] publicly and plainly."[11] Hobbes also said that statute books should be circulated as widely as the Bible so that all who could read could have a copy.[12] And, according to Jeremy Bentham, persons

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[8] T. Aquinas, 28 *Summa Theologiae* 15-16 (Q 90, Art. 4) (Blackfriars ed. 1966).

[9] William Walter Davies, ed., *The Codes of Hammurabi and Moses* 108 (Jennings and Graham: 1905).

[10] G. Hegel, *Philosophy of Right* 138, ¶ 215 (T. Know trans. 1942 & photo reprint 1949). See also *id*. at 134-136, ¶ 211.

[11] 6 *The English Works of Thomas Hobbes* 26-28 (W. Molesworth ed. 1966).

[12] *Id*.

should not be punished for the violation of a law "not sufficiently promulgated."[13]

The educational effect of the law is also implicit in the doctrine of stare decisis. Under this doctrine, courts follow precedent in order that people may order their affairs based on what they understand the law to be. Obviously, stare decisis assumes that citizens will endeavor to obey or follow the law as it is delivered from authoritative sources. In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), the Court stated the rationale for stare decisis: "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Id*. at 403.

In other contexts, the Court has also recognized the educational influence of the law. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court refused to read into the Constitution a "right to die." The Court held: "If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs." *Id*. at 732. In other words, the Court acknowledged that creating a right to physician-assisted

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[13] J. Bentham, *An Introduction to the Principles of Morals and Legislation* 173 (C.XIII § 3, VIII.2) (1948). See also L. Fuller, *The Morality of Law* 19-51 (1964) (discussing *inter alia* reasons for promulgation); L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 712 Harv. L. Rev. 630, 651-652 (1958).

suicide might cause an increase in such suicides, i.e., behavior would be influenced by the change in law.

In *Ginsberg v. State of New York*, 390 U.S. 629 (1968), the Court upheld laws against the distribution to minors of materials obscene for them. In its decision, the Court quoted with approval from an article by Dr. William Gaylin of the Columbia University Psychoanalytic Clinic: "'To openly permit [pornography] implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval – another potent influence on the developing ego.'" *Id.* at 642-643 n.10 (quoting William M. Gaylin, *The Prickly Problems of Pornography*, Book Review, 77 Yale L.J. 579, 592-593 (1968)).

Modern legal scholars have also discussed the educational effect of the law. John W. Ragsdale, Jr. recognizes that: "Novel or innovative law, in place long enough without displacement or wholesale evasion, may have an educational effect and inculcate new values or interpretations."[14] Another commentator recognizes that tort law educates as to proper conduct: "Tort law, for example, establishes the appropriate standard for behaviour, serves as a reason

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[14] John W. Ragsdale, Jr., *Possession: An Essay on Values Necessary for the Preservation of Wild Lands and Traditional Tribal Cultures*, 40 Urban Lawyer 903, 908 (2008).

for action for the subjects of a legal norm, and has symbolic and educational effects. . . ."[15]

In another article, two scholars discuss the "educational effect" of the law, using examples of smoking bans, helmet laws, and regulations against fireworks. They recognize that this educational effect can lead "individuals to change their own primary behavior."[16]

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[15] Tsachi Keren-Paz, *Private Law Redistribution, Predictability, and Liberty*, 50 McGill L.J. 327, 348 (2005).

[16] Dhammika Dharmapala and Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 Am. L. & Econ. Rev. 1, 5-6 (2003). See also Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage As A Social Institution: A Reply to Andrew Koppelman*, 2 U. St. Thomas L.J. 33, 51 (2004) ("Laws do more than incentivize or punish . . . . They educate directly and indirectly."); Amir N. Licht, *Social Norms and the Law: Why People Obey the Law*, 4 Review of Law and Economics 716, 725, 740 (2008) ("a law-abiding society may indeed need the law to support a social norm through its expressive function"); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 397-398 (1997); John A. Bozza, *Judges, Crime Reduction, and the Role of Sentencing*, 45 No. 1 Judges' J. 22, 28 (2006); Robert Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 Or. L. Rev. 1, 4, 11 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2024-2025 (1996); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4 (1996); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. Rev. 961, 962 (1992).

B. Laws Changing the Definition of Marriage Educate all Citizens, Including Young Children, that the Traditional Understanding of Marriage as Opposite-Sex and Monogamous in Nature is no Longer Valid.

What will kindergarteners be taught? This may be the most important issue in the same-sex marriage debate. But it is seldom mentioned.

In kindergarten, five-year-old children discuss what marriage is and what a family is. The teacher guides their discussion and helps them understand these concepts.

Through the educational effect of their decisions, courts play a substantial role in writing the school curriculum. This educational impact is especially strong when the law is suddenly changed to protect behavior that was previously forbidden, as has occurred in some jurisdictions with same-sex marriage.

If, as some want, marriage is legally redefined to eliminate the opposite-sex element and perhaps eventually to mean any relationship among consenting adults regardless of gender or number, i.e., polygamy and polyamory, the content of these kindergarten discussions will necessarily change. The children will be taught that marriage and family can be whatever one desires at the moment.

Professor Lynn D. Wardle makes the point. He argues: “As a matter of elementary legal analysis, if

the meaning of marriage changes, education laws and policies that require or allow teaching about marriage, family life, and marital sexuality compel that the curriculum change also."[17]

In American states and countries where same-sex marriage or its equivalent is legal (or supported by education policy makers), this very message is in fact now being delivered to our five-year-olds. Johnny is being taught that before he marries a girl, he may want to consider marrying another boy. Susie is being taught that before she marries a boy, she may want to marry another girl. The lesson includes the message that marrying someone of the same gender is a "good thing." In states where same-sex marriage has been legalized, schools now teach children this lesson in elementary grades using books like "King and King," in which a boy marries another boy, and "Heather has Two Mommies," in which a girl has lesbian parents. Because the redefinition process does not logically stop at same-sex marriage between two persons, the message will naturally evolve into questions about polygamy and polyamory.

In jurisdictions where the law has changed, usually instigated by judicial action, courts have ruled that parents cannot opt their children out of these "same-sex marriage is a good thing" lessons.

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[17] Lynn D. Wardle, *The Impacts on Education of Legalizing Same-Sex Marriage and Lessons from Abortion Jurisprudence*, 2 BYU Educ. & L.J. 593, 595 (2011).

These decisions against opting out are unsurprising. After all, the law is the law.

In *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), the First Circuit overruled parental objections to the use, without prior notice to parents, of "King and King" in public elementary schools in Massachusetts. Reflecting the inevitable educational effect from laws redefining marriage, the court ruled: "Given that Massachusetts has recognized gay marriage under its state constitution, it is entirely rational for its schools to educate their students regarding that recognition." *Id*. at 95. In 2003, the Supreme Judicial Court of Massachusetts made that state the first in the nation to redefine marriage to eliminate its opposite-sex nature. *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

But the American people have the right to decide not to deliver to kindergarteners this message redefining marriage. It is astounding that the lower courts in this case and some others, along with Respondents, ask this Court to rule that the citizens of the United States must deliver to their kindergarteners the message that same-sex marriage is a "good thing" and equally desirable with opposite-sex marriage. But that is precisely what a change in the law will mandate.

The Voter Information Guide used by Petitioners in the campaign for enactment of Proposition 8 specifically articulated its educational effect as a basis for the law. The Guide argued that it would "protect[ ]

our children from being taught in public schools that 'same-sex marriage' is the same as traditional marriage." 671 F.3d at 1091 (quoting Voter Information Guide at 56).

It is impossible to know the precise effects of teaching every 5-year-old child in public schools in America that same-sex marriage is a good thing and they should aspire to it. But society is warranted in being concerned about the effects on our crumbling society when Johnny has six fathers and no mother at all – after surrogate motherhood and two divorces of his gay parents. As one scholar has said, the redefinition of marriage "will radically transform . . . the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative."[18] The political branches may well decide to take that chance, but the decision to do so should not be made by judges.

The Ninth Circuit panel majority erroneously held that Proposition 8 has no effect on "parents' rights to control their children's education" and "could not have been enacted to safeguard th[is] libert[y]." 671 F.3d at 1063 (slip op. at 1588). The panel dismissed concern over the educational effect of legalizing same-sex marriage: "Both before and after Proposition 8, schools have not been required to teach anything about same-sex marriage." 671 F.3d at 1091.

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[18] Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 84 (2004).

But the panel contradicted itself by also stating that California law requires that students "not be taught the superiority or inferiority of either same- or opposite-sex marriage or other 'committed relationships.'" *Id*. (*citing* Cal. Educ. Code §§ 51500, 51933(b)(4)). In fact, assuming Proposition 8 is upheld, California law will *not* require that school children be taught that same-sex marriage is equally desirable to opposite-sex marriage – because same-sex marriage will not be recognized in that state. In other words, the universe of marriage will not include same-sex marriage.

Even the divided Ninth Circuit panel gave a nod to the educational effect of legally redefining marriage. It recognized: "There is a limited sense in which the extension of the designation 'marriage' to same-sex partnerships might alter the content of the lessons that schools choose to teach." 671 F.3d at 1091. The panel majority said that this is merely the trivial point that a change in the world necessarily means that students will be taught about the change inasmuch as reality has been altered. *Id*. at 1091-1092. The court says that this effect "does not provide an *independent* reason for stripping members of a disfavored group of those rights they presently enjoy." *Id*. at 1092 (emphasis in original).

The request to redefine marriage may be the most audacious request ever made to any court in human history. This Court is asked to rule that a basic social institution and the language accompanying it must, under the U.S. Constitution, be redefined so as to completely change its nature. It is almost as

if the Court were asked to rule that the word "dog" must now be redefined to include cats because some people feel that cats are treated less favorably.

If the people of this country want to recognize same-sex marriage (and even plural marriage), they certainly may do so. But this change should come through the political branches, operating under democratic principles, and not be mandated by a court under the pretense of constitutional construction.

Our society has the right to be alarmed. When this message of the deconstruction of marriage and family penetrates the minds of our kindergarteners, it will inevitably hinder society and the parents of children from transmitting their values to our children. It will unquestionably affect the future behavior of our children and may lead to the destruction of the shared values upon which American society is built.

Those who are opposed to laws maintaining the opposite-sex nature of marriage assume that the meaning of marriage can simply be shifted or expanded to include same-sex relationships. But there is no evidence that this can be done without destroying the institution.

Many lower courts and commentators have asked how imposing same-sex marriage will harm opposite-sex marriage. This is a fair question. It seems unlikely that many adults presently in opposite-sex marriages will suddenly abandon those marriages, in favor of same-sex marriage.

The harm that the Lighted Candle Society is primarily concerned about is not to individual, presently-constituted opposite-sex marriages but rather to the *institution* of marriage and its future. This is where the educational effect of the law comes into play.

If children are taught starting in kindergarten that marriage is not opposite-sex in nature and that same-sex relationships (and perhaps eventually polygamous/polyamorous ones) are fully equivalent and desirable to opposite-sex marriage, states and Congress may reasonably be concerned that the *institution* of marriage will be irreparably damaged and perhaps destroyed.

An essential premise of the Ninth Circuit panel decision in this case is the conclusion that Proposition 8 does not take away the rights of same-sex partners to "enter into an official, state-recognized relationship that affords them 'the same rights, protections, and benefits' as an opposite-sex union and subjects them 'to the same responsibilities, obligations, and duties under law.'" 671 F.3d at 1077, 1086 (quoting Cal. Fam. Code 297.5(a)). The panel majority summarized that Proposition 8 "simply took the designation of 'marriage' away from lifelong same-sex partnerships, and with it the State's authorization of that official

status and the societal approval that comes with it." *Id*. at 1077-1078.[19]

The Ninth Circuit panel majority correctly described the term "marriage" as expressing a certain level of "societal approval." The panel said that the term carries "extraordinary significance" and "expresses validation, by the state and the community . . . that serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important." The panel added, "It is the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it." *Id*. at 1077-1079.

The panel majority framed the question in this case as whether "the People of California have legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples the right to have their lifelong relationships dignified by the official status of 'marriage.'" *Id*. at 1079.

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[19] California could conclude that same-sex relationships are, unlike opposite-sex marriage, seldom "lifelong" in nature, despite the two-judge Ninth Circuit panel's assurances. Extreme promiscuity is a well-known feature of the homosexual subculture. See Maria Xiridou, et al., *The Contributions of Steady and Casual Partnerships to the Incident of HIV Infection Among Homosexual Men in Amsterdam*, 17 AIDS 1029-1038 (2003); M. Hunt, *Gay: What You Should Know About Homosexuality* 157 (Pocket Books, 1977). This is another reason why states may hesitate to accord the designation of marriage to same-sex relationships.

What the Ninth Circuit panel overlooked in its analysis is that California apparently wishes to avoid redefinition of "marriage" and withhold that designation from same-sex relationships because it wishes to maintain the identity of the institution as opposite-sex in nature.

The State of California could rationally decide to allow domestic partners to form equivalent families, but withhold the term "marriage" because it wishes to convey the message to its citizens, particularly children, that opposite-sex marriage remains the preferred context for family formation.

In other words, the State of California and other states may conclude, and properly so, that the law should continue to preserve the institution of marriage and its opposite-sex nature as traditionally understood. Legal scholars have recognized that the law may properly be used to protect institutions considered critical to the survival of society.

In the words of Basil Mitchell, "The function of the law is not only to protect individuals from harm, but to protect the essential institutions of society. These functions overlap, since the sorts of harm an individual may suffer are to some extent determined by the institutions he lives under."[20]

[20] Basil Mitchell, Law, Morality and Religion 134 (Oxford, 1967). See also Patrick Devlin, The Enforcement of Morals, 22 (Oxford, 1965) ("But the true principle is that the law exists for the protection of society. It does not discharge its function by

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It has been persuasively argued that redefining the institution of marriage to eliminate its opposite-sex nature and make it genderless would fundamentally alter and perhaps destroy it. It could become like Confederate money, a passé institution with no current value.

As Monte Neil Stewart shows, courts have largely refused to address the social institutional issue.[21] The Ninth Circuit also ignored it in the present case. Stewart demonstrates that a social institution comprises a complex network of "shared meanings."[22] To transform marriage into a genderless creature would effectively deinstitutionalize it. As Stewart says, "A social institution defined at its core as the union of any two persons is unmistakably different from the historic marriage institution between a man and a woman."[23] Indeed, persons of the same gender, due to their lack of biological complimentarity, cannot form a

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protecting the individual from injury, annoyance, corruption, and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together."); Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition, 556 (Harvard, 1983) ("Law is also an expression of moral standards as understood by human reason.").

[21] Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke J. of Const. L & Public Policy 1 (2006).

[22] *Id*. at 8.

[23] *Id*. at 20.

union akin to that of a man and woman (which union may of course result in a child).

Deinstitutionalization is precisely what many proponents of same-sex marriage want. They oppose traditional marriage and view same-sex marriage as a useful Trojan Horse or poison pill – not to make homosexual relationships more stable and enduring – but rather to deinstitutionalize traditional marriage. As Professor Ellen Willis says,

> Marriage . . . should not have legal status . . . . Feminism and gay liberation have already seriously weakened marriage as a transmission belt of patriarchal, religious values; conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart, further promoting the democratization and secularization of personal and sexual life . . . . Legalizing same-sex marriage would be an improvement over the status quo. But let's see it for what it is – a step toward the more radical solution of civil unions, not vice versa.[24]

The goal appears to be to fashion a substitute along the lines of polyamory. In other words, marriage

[24] Ellen Willis, contribution to *Can Marriage be Saved? A forum*, Nation 16-17 (July 5, 2004).

would become like a cafeteria – the participants mix and match, "buying" only what they want.[25]

This Court should not sacrifice its credibility in order to serve the agenda of those who seek to deinstitutionalize marriage. If deinstitutionalization of marriage is what society wants, it can and should accomplish it through the political branches. This result should not be imposed by judicial fiat.

III. IMPOSING SAME-SEX MARRIAGE AT THE CONSTITUTIONAL LEVEL WILL UNAVOIDABLY CREATE STRONG PRESSURE TO REDEFINE MARRIAGE FURTHER TO INCLUDE POLYGAMY AND INCESTUOUS MARRIAGE.

The corollaries of redefining marriage to eliminate its opposite-sex nature will certainly include polygamy or polyamory and incestuous marriage. There will also be pressure constitutionally to protect other previously-forbidden sexual and other "private" practices.

Challenges are already being presented by those who wish also to redefine the number component of

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[25] See Martha L. Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. Colo. L. Rev. 269, 278 (1991) ("I favor functional definitions of families that expand beyond reference to biological or formal marriage or adoptive relationships because the people involved have chosen family-like roles.").

marriage so as to allow plural marriage, i.e., polygamy and polyamory.[26] If same-sex or genderless marriage is imposed, the drive for group marriages will necessarily include opposite-sex, same-sex, and bisexual varieties. In other words, polygamy will morph into polyamory, which is the concept that any group of consenting persons (presumably adults) may form the equivalent of an opposite-sex marriage under current law.

Challenges against laws forbidding incestuous marriage have also been stated.[27] If the gender and

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[26] Drucilla Cornell, *Fatherhood and Its Discontents: Men, Patriarchy, and Freedom, Lost Fathers: The Politics of Fatherlessness in America*, ed. Cynthia Daniels 199 (St. Martin's Press, 1998) ("In a politically liberal society, the state's legitimate interests in family regulation must be consistent with the recognition of both men and women as free and equal persons. The state should have no right to privilege or impose one form of family structure or sexuality over another. This would mean that some adults could choose consensual polygamy. Mormon men could have more than one wife. Four women who worship the mother goddess also could recognize and form a unity and call their relationship a marriage. There would be no state-enforced single relationship – not monogamy, heterosexuality, polygamy, or polyandry.").

[27] Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 Kan. J.L. & Pub. Pol'y 262, 271 (2000) ("Individuals denied marriage under the incest statutes may therefore find themselves disenfranchised in the same manner as homosexual partners who are denied the right to marry and cohabitants who choose not to marry. Both categories of partners are 'increasingly appearing before the courts, seeking the rights traditionally

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number limits of marriage are eliminated, logic will dictate the extension of constitutional protection to consenting adult relatives who also seek to marry.

In 1997, the Court cited as one reason not to recognize a constitutional right to physician-assisted suicide "avoiding a possible slide towards euthanasia." The Court labeled this as one of several "valid and important public interests [that] easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end." *Vacco v. Quill*, 521 U.S. 793, 808-809 (1997). In other words, inevitable pressure to expand a right is one good reason not to recognize the right. Amicus submits that this is particularly important where the right has little connection to the text of the Constitution. Such rights have no ascertainable boundaries.

As noted above, a necessary premise of the Ninth Circuit's decision in this case is the conclusion that Proposition 8 does not take away the rights of same-sex partners to "enter into an official, state-recognized relationship that affords them 'the same rights, protections, and benefits' as an opposite-sex union and subjects them 'to the same responsibilities, obligations, and duties under law.'" 671 F.3d at 1077 (quoting Cal. Fam. Code § 297.5(a)). Rather,

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reserved for married persons,' attesting to the direct impact benefits reserved for married couples have on nonmarried partners.").

Proposition 8 reserves the term "marriage" for its traditional reference of opposite-sex relationships and withholds "the State's authorization of that official status and the societal approval that comes with it." *Id*. at 1077-1078.

What the Ninth Circuit disregarded is that, as shown by the adoption of Proposition 8, California wishes to avoid redefinition of "marriage" and withhold that designation from same-sex relationships. As mentioned above, the state apparently seeks to encourage opposite-sex marriage as the foundation for families and to discourage inevitable further redefinition of the institution.

IV. JUDICIAL REDEFINITION OF MARRIAGE TO ELIMINATE ITS OPPOSITE-SEX NATURE HAS A DESTABILIZING EFFECT ON THE LAW.

The decisions of some courts to redefine marriage to eliminate its opposite-sex nature has had a destabilizing effect on the law. And the request for this Court to nationalize this redefinition would cause further destabilizaton if it were followed.

When public policy is made by the political branches, it takes into account all views and produces a compromised result that reflects all input. Moreover, unlike judge-made policy, politically-made policy creates no doctrinal imperative for the creation of new or expanded rights.

Inappropriate judicial activism undermines our democratic processes in several ways. It reduces respect for the law. It has wisely been said that "the voice of the judiciary on constitutional questions must ultimately draw its authority from the public's acceptance of its institutional role."[28] If this is so, decisions like *Roe v. Wade*, 410 U.S. 113 (1973) threaten the authority of the courts.

Since *Roe* was handed down in 1973, there has been a growing backlash against it. There are annual massive protests in multiple cities and there have been repeated efforts to overturn *Roe*. Tragically, abortion clinics and providers have even been the targets of violence.

When *Roe* was decided, the political branches were in the process of modifying abortion laws. As Justice Ginsberg has said, "The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[29]

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[28] Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder, *Keeping Faith with the Constitution* 24 (Oxford, 2010).

[29] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 385-386 (1985).

Creating a constitutional right to same-sex marriage would again subvert the process of democratic change and could create another backlash. Impatience with the slow pace of legislative change does not warrant the creation of a new previously-unknown constitutional right and the bulldozing of one of the bedrock institutions of our society and the moral standards supporting it.

V. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT PROPOSITION 8 IS BASED ON "ANIMUS."

Laws that express and preserve the values and standards of society cannot be dismissed simply by reciting the pejorative term "animus" or "animosity." One can always label others' standards as expressing animus. Laws against prostitution, the sale of heroin, or discharge of pollution cannot be found unconstitutional as based on "animus" towards those activities and those who perform them simply because one has a libertarian view and does not regard such laws as legitimate.

The Ninth Circuit repeatedly denigrates Proposition 8 (and by implication other laws preserving the opposite-sex nature of marriage) as merely based on animus. 671 F.3d at 1082, 1085. The majority borrows the term from *Romer v. Evans*, 517 U.S. 620 (1996), in which the Supreme Court struck Colorado Amendment 2 because of both its breadth, as

discussed earlier, and its expression of animus. 671 F.3d at 1080, 1082, 1085.

The Ninth Circuit's "animus" label is at odds with its statement that the nature of marriage is "a matter of great debate in our nation, and an issue over which people of good will may disagree, sometimes strongly." 671 F.3d at 1064.

The Ninth Circuit erroneously dismisses Proposition 8 as motivated by denigration of "the worth and dignity of gays and lesbians as a class" or "disapproval of a class of people." *Id*. at 1094. This mischaracterizes Proposition 8. It does not express disapproval of homosexuals as persons but plainly expresses disapproval only of considering their relationships to be marriage. The First Circuit has recognized that "preserv[ing] the heritage of marriage as traditionally defined over centuries of Western civilization . . . is not the same as 'mere moral disapproval of an excluded group.'" *Massachusetts v. United States Dep't of HHS*, 682 F.3d 1, 16 (1st Cir. 2012) (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in judgment)).

Moreover, as the dissent by Judge Smith in this case recognized, even if some persons involved in the adoption of a law are motivated by "animus," which again may be only a pejorative way of describing standards with which one disagrees, the law may still be valid if it also is supported by a rational basis. The dissent cited *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), in which the Supreme Court

said that while "'negative attitudes' and 'fear' often accompany irrational biases, their presence alone does not a constitutional violation make." 671 F.3d at 1104 (quoting *Garrett*, 531 U.S. at 357). This is consistent with this Court's holdings in other cases, such as Fourth Amendment ones, in which the Court has held that the bad or evil motives of a police officer do not create a violation of the Constitution so long as an arrest is supported by probable cause. See *Graham v. Connor*, 490 U.S. 386, 397, 399 (1989) ("[T]he subjective motivations of the individual officers . . . has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment.").

VI. *ROMER V. EVANS* DOES NOT SUPPORT THE CONCLUSION THAT LAWS PRESERVING THE OPPOSITE-SEX NATURE OF MARRIAGE LACK A RATIONAL BASIS.

The two-judge majority on the Ninth Circuit panel in this case hinged its decision on *Romer v. Evans*, 517 U.S. 620 (1996). But the lower court misinterpreted and misapplied *Romer*.

Other appellate courts, both federal and state, have expressly rejected *Romer*-based challenges to the traditional definition of marriage. See, e.g., *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 680 (Tex. Ct. App. 2010); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006); *Standhardt v.*

Superior Court of Ariz., 77 P.3d 451, 464-465 (Ariz. Ct. App. 2003).

In *Romer*, the Court held Amendment 2 of the Colorado Constitution unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Court summarized Amendment 2 as not only repealing or rescinding local ordinances banning certain discrimination based on sexual orientation, but also "prohibit[ing] all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexuals or gays and lesbians." *Id*. at 624.

Thus, operating on a forward-looking basis, Amendment 2 inserted into the Colorado Constitution a prohibition on measures that in the future entitled any "'homosexual, lesbian, or bisexual'" to "'any moral status, quota preferences, protected status or claim of discrimination.'" *Id*. at 624. This Court agreed with the Colorado Supreme Court that Amendment 2 "'prohibit[ed] any government entity from adopting . . . protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures.'" *Id*. at 627 (see also *id*. at 630 (Amendment 2 operates against "future reenactment" of local ordinances protecting affected groups)). The Court repeatedly described the Colorado Amendment in apocalyptic terms – characterizing it as "unprecedented," "[s]weeping and comprehensive," "far reaching," "severe," "broad," and characterized by "sheer breadth." *Id*. at 627, 629-630, 632-633. Obviously, the

preservation by Proposition 8 of the traditional opposite-sex nature of marriage bears no resemblance to the uncharted impact of Colorado Amendment 2.

The striking of Colorado Amendment 2 did not have the effect of imposing anti-discrimination laws in favor of gays, lesbians, and bisexuals. Rather, striking the Amendment allowed legislatures and other law-making bodies to consider such anti-discrimination measures in the future on the same basis as they might consider any other measures that might be proposed for enactment.

The equal protection sin of Amendment 2 identified in *Romer* was that it closed off gays, lesbians, and bisexuals from normal access to the law-making apparatus in Colorado – the access that all other citizens enjoyed. In other words, only gays, lesbians, and bisexuals were required to resort to the super-majoritarian mechanism of constitutional amendment to pursue their interests. According to the Court, "The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." *Id.* at 633.

Even the Ninth Circuit divided panel acknowledged in this case that Colorado Amendment 2 was broader than Proposition 8. The panel conceded that Proposition 8 is "less sweeping" than Amendment 2. In fact, the Ninth Circuit described Proposition 8 as operating "with surgical precision" by prescribing only the use of the term "marriage." *Id.* at 1081.

The Ninth Circuit panel fallaciously equated the effect of its striking Proposition 8 as unconstitutional and the Supreme Court's striking of Colorado Amendment 2 in *Romer*. In attempting to distinguish *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982), which "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede," *id*. at 1084-1085, the divided panel noted that, by striking Colorado Amendment 2, *Romer* also reinstated non-required rights. The Ninth Circuit said: "The rights that were repealed by Amendment 2 included protections against discrimination on the basis of sexual orientation in the private sphere" which "were not compelled by the Fourteenth Amendment." 671 F.3d at 1083.

What the panel majority missed is that the decision in *Romer* did not result in the reenactment of ordinances forbidding discrimination based on sexual orientation that could not be later repealed. *Romer* said nothing that would limit the ability of the Colorado municipalities in question later to repeal these same ordinances. On the other hand, the Ninth Circuit's decision in this case has the effect of forever requiring California to recognize same-sex marriages. So, despite the court's blithe assurances, the decision of the Ninth Circuit creates precisely a "'one-way ratchet.'" 671 F.3d at 1082-1083. By this logic, a state could never grant greater rights to prostitution, abortion, divorce, sale and use of controlled substances, or other activities and then recede from the expansion of these rights.

It defines logic to grant that states may reasonably preserve the traditional opposite-sex nature of marriage but the moment a court such as the California Supreme Court (perhaps mistakenly) redefines marriage, a state suddenly may no longer reasonably define marriage as opposite-sex in nature, even if the court decision is reversed (by a higher court, or here by constitutional initiative).

CONCLUSION

The motto of the U.S. Department of Justice, which is spread across its website, is: "The common law is the will of Mankind issuing from the Life of the People." Amici agree and urge the Court to respect Proposition 8 as the "will of [the people of California] issuing from the Life of [its] People." Proposition 8 is rationally related to the state's interests in: encouraging opposite-sex marriage through the educational effect of the law; and preventing the further redefinition of marriage so as also to include polygamy, incestuous marriage, and other decisions and activities that a majority of

citizens constitutionally regard as socially destructive.

Respectfully submitted,

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