No. 12-144

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,
Petitioners,

v.

KRISTIN M. PERRY, *et al.*,
Respondents.

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

BRIEF *AMICUS CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF PETITIONERS AND SUPPORTING REVERSAL

ANTHONY R. PICARELLO, JR.*
General Counsel
JEFFREY HUNTER MOON
Solicitor
MICHAEL F. MOSES
Associate General Counsel
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300
apicarello@usccb.org
Counsel for *Amicus Curiae*

*Counsel of Record

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INTEREST OF *AMICUS*

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the Catholic Bishops in the United States.[1] The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. Values of particular importance to the Conference include the promotion and defense of marriage, the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of the nation's jurisprudence on these issues.

We submit this brief in support of Petitioners, and urge this Court to uphold Proposition 8.

SUMMARY OF ARGUMENT

California's Proposition 8 encourages and supports the union of one man and one woman, as distinct from other interpersonal relationships, by giving it alone the name "marriage." This is rationally related to legitimate state interests for several reasons.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* state that they authored this brief, in whole, and that no person or entity other than *amicus* made a monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court.

First, as a matter of simple biology, the union of one man and one woman is the only union capable of creating new life. Second, the People of California could reasonably conclude that a home with a mother and a father is the optimal environment for raising children, an ideal that Proposition 8 encourages and promotes. Given both the unique capacity for reproduction and unique value of homes with a mother and father, it is reasonable for a State to treat the union of one man and one woman as having a public value that is absent from other intimate interpersonal relationships.

While this Court has held that laws *forbidding* private, consensual, homosexual conduct between adults lack a rational basis, it does not follow that the government has a constitutional duty to *encourage* or *endorse* such conduct. Thus, governments may legitimately decide to further the interests of opposite-sex unions only. Similarly, minimum standards of rationality under the Constitution do not require adopting the lower court's incoherent definition of "marriage" as merely a "committed lifelong relationship," which is wildly over-inclusive, empties the term of its meaning, and leads to absurd results.

The lower court's definition of "marriage" also fails to reflect the deference to legislative decision-making that characterizes rational basis analysis generally. This is particularly egregious in a context where deference to States is especially warranted, both because marriage is a traditional concern of the States, and because ongoing controversies about marriage are currently working their way through

reasonable democratic processes, yielding a range of results.

The combined force of these objectives argues for upholding Proposition 8, even if this Court were to apply a higher level of scrutiny. Marriage, understood as the union of one man and one woman, is not an historical relic, but a vital and foundational institution of civil society today. The government interests in continuing to encourage and support it are not merely legitimate, but compelling. No other institution joins together persons with the natural ability to have children, to assure that those children are properly cared for. No other institution ensures that children will at least have the opportunity of being raised by their mother and father together. Societal ills that flow from the dissolution of marriage and family would not be addressed—indeed, they would only be aggravated—were the government to fail to reinforce the union of one man and one woman with the unique encouragement and support it deserves.

Proposition 8 is not rendered invalid because some of its supporters were informed by religious or moral considerations. Many, if not most, of the significant social and political movements in our Nation's history were based on precisely such considerations. Moreover, the argument to *redefine* marriage to include the union of persons of the same sex is similarly based on a combination of religious and moral considerations (albeit ones that are, in our view, flawed). As is well established in this Court's precedent, the coincidence of law and morality, or law and religious teaching, does not detract from the rationality of a law.

Finally, redefining marriage—particularly as a matter of constitutional law, rather than legislative process—not only threatens principles of federalism and separation of powers, but would have a widespread adverse impact on other constitutional rights, such as the freedoms of religion, conscience, speech, and association. Affirmance of the judgment below would create an engine of conflict in this area, embroiling this Court and lower courts in a series of otherwise avoidable disputes—pitting constitutional right squarely against constitutional right—for years to come.

ARGUMENT

I. Proposition 8 Is Rationally Related to Legitimate State Interests.

All three Ninth Circuit judges on the panel below correctly concluded that rational basis review applies to Proposition 8. *Perry* v. *Brown*, 671 F.3d 1052, 1082, 1086-90 (9th Cir. 2012); *id.* at 1100-01 (Smith, J., concurring in part and dissenting in part). Application of rational basis review to legislation that classifies on the basis of sexual orientation is consistent with this Court's precedent and the overwhelming weight of authority.[2] A majority of the panel seriously erred, however, in concluding that Proposition 8 had no rational basis.

[2] We address at length why rational basis review is appropriate for such classifications in our *amicus* brief (pp. 4-18) in *United States* v. *Windsor*, No. 12-307.

A. Two Unique Features of Opposite-Sex Unions Supply Two of Many Rational Bases for Distinguishing Those Unions from Other Relationships.

While California has given persons in same-sex relationships other rights and benefits associated with marriage, it continues to encourage and support the union of one man and one woman, as distinct from other interpersonal relationships, by giving it alone the name "marriage."[3] Government support

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[3] The Ninth Circuit repeatedly described Proposition 8 in terms of State approval and endorsement of the union of one man and one woman, in contradistinction to same-sex relationships. *See*, *e.g.*, *Perry* v. *Brown*, 671 F.3d at 1063 (stating that "the designation of 'marriage,'" if extended to persons in same-sex relationships, would "symbolize[] state legitimization and societal recognition of … [such] relationships"); *id.* at 1065 (stating that Proposition 8 withholds "the official designation of marriage [to persons in same-sex relationships] and thus the officially conferred and societally recognized status that accompanies that designation"); *id.* at 1076 (stating that Proposition 8 denies persons in same-sex relationships "the right to have their committed relationships recognized by the State with the designation of 'marriage'"); *id.* at 1077-78 (stating that Proposition 8 denies same-sex partners the "official status and the societal approval that comes with it"); *id.* at 1078 (stating that "the designation 'marriage' … expresses validation, by the state and the community," and manifests the "recognition that the State affords to those who are in stable and committed lifelong relationships"); *id.* at 1081 (stating that Proposition 8 denies to the "committed lifelong relationships" of persons of the same sex "the societal status conveyed by the designation of 'marriage'"); *id.* at 1083 (stating that Proposition 8 deprives persons in same-sex relationships "the official designation and status of 'marriage'"). Of course, nothing in Proposition 8 prevents *private parties* in a same-sex relationship from calling their relationship a marriage (even if, in our view or California's, it is not a marriage). Rather, the Respondents seek the *State's* endorsement of such relationships by forcing the

and encouragement for such unions have cross-cultural roots as old as recorded history. As the antiquity and near-universality of such marriage laws suggest, there are numerous rational bases for government to uniquely affirm man-woman unions as "marriage," and the Petitioners and supporting *amici* will likely present many. We highlight two.

1. *Recognizing the Unique Capacity of Opposite-Sex Couples to Procreate.* As a matter of simple biology, only sexual relationships between men and women can lead to the birth of children by natural means. As these relationships alone may generate new life, the state has an interest in channeling the sexual and reproductive faculties of men and women into the kind of sexual union where responsible childbearing will take place and children's interests will be protected. *See*, *e.g.*, *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental to the very existence and survival of the race."); *see also* William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 166 (Spring 2004) ("The state has an interest in all opposite-sex couples because all are theoretically capable of procreation.").[4] That childbearing

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State to call those relationships "marriage."

[4] *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (citing "responsible procreation," or the interest in "encourag[ing] heterosexual couples to bear and raise children in committed marriage relationships," as one of two rational bases for upholding Nebraska marriage amendment against a federal equal protection challenge); *Adams* v. *Howerton*, 486 F. Supp. 1119, 1124 (C.D Cal. 1980) (upholding Colorado marriage statute against federal due process and equal protection challenges on the ground that "the state has a compelling interest in encouraging and fostering procreation of the race and

opportunities inherent in the marital union are occasionally unrealized does nothing to undermine the rationality of a law recognizing the unique status of such unions.[5]

2. *Recognizing the Unique Value to Children of Being Raised by Their Mother and Father Together.* It is reasonable to conclude that the optimal

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providing status and stability to the environment in which children are raised"), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *Standhardt* v. *Superior Court of Arizona*, 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003) ("[T]he State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship," and defining marriage as the union of one man and one woman "is rationally related to that interest").

[5] *Adams*, 486 F. Supp. at 1124-25 ("The alternative [to allowing legal marriage as between all couples of the opposite sex, even if infertile or not planning to have children] would be to inquire of each couple, before issuing a marriage license, as to their plans for children and to give sterility tests to all applicants, refusing licenses to those found sterile or unwilling to raise a family. Such tests and inquiries would themselves raise serious constitutional questions."), citing *Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965); *Standhardt*, 77 P.3d at 462 ("[I]f the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns."). Of course, under rational basis review, it is of no moment if the marriage law includes husband-wife unions that cannot or do not produce children. *Citizens for Equal Prot.*, 455 F.3d at 868, citing *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979) (legislation survives rational basis review even if it is underinclusive or overinclusive or both). Even under more exacting scrutiny, the interest in not making the sort of intrusive and unconstitutional inquiries that would be necessary to exclude infertile husband-wife unions fully justifies a definition of marriage that includes such unions.

environment for the raising of children is a family structure in which both a mother and a father are present and bonded together. Only marriage, understood as the union of one man and one woman, assures that children will have the opportunity to be raised by both a mother and a father.[6] A mother and father each bring something unique and irreplaceable to child-rearing that the other cannot.[7] It is precisely

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[6] *Citizens for Equal Prot.*, 455 F.3d at 867-68 (citing the notion that a husband and wife are "the optimal partnership for raising children" as one of two rational bases for rejecting equal protection challenge to Nebraska marriage amendment); *In the Matter of Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677 (Tex. App. 2010) (listing cases that have rejected equal protection challenges to marriage as the union of one man and one woman, and noting that "[i]t is reasonable for the state to conclude that the optimal familial setting for the raising of children is the household headed by an opposite-sex couple"); *id.* at 678 ("The state also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship."); *Hernandez* v. *Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.").

[7] *See*, *e.g.*, Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752 (2012) (finding that children raised by married biological parents fared better in a range of significant outcomes than children raised in same-sex households); David Popenoe, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY, 146 (1996) ("The burden of social science evidence supports the idea that gender differentiated parenting is important for human development and that the contribution of fathers to

such unions, which house the unique and irreplaceable gifts of mother and father, to which the people of California have exclusively conferred the name "marriage."

In short, marriage

> "reinforces the idea that the union of husband and wife is (as a rule and ideal) the most appropriate environment for the bearing and rearing of children.... If same-sex partnerships were recognized as marriages, however, that ideal would be abolished from our law: no civil institution would any longer reinforce the notion that children need both a mother and father; that men and women on average bring different gifts to the parenting enterprise; and that boys and girls need and tend to benefit from fathers and mothers in different ways."

Sherif Girgis, Robert P. George, & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 262-63 (Winter 2011).

Even if California allows the adoption of children by same-sex couples, or provides other rights or benefits to such couples, that does not negate the State's judgment that married couples (husbands and

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childrearing is unique and irreplaceable."); Loren D. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 SOC. SCI. RES. 735, 748 (2012) (explaining flaws in 59 studies conducted on same-sex parenting, including the involvement of small, non-random, convenience samples, and concluding that the generalized claim of "no difference" was "not empirically warranted").

wives) represent the ideal environment for raising children, and therefore continue to warrant the distinctive and preferential name of "marriage."[8] The moral and social good of children who are born of such unions is advanced when government supports, encourages, and prefers their placement within a family structure headed by one man and one woman. Giving the name "marriage" to the union of one man and one woman, and not to other interpersonal relationships, is a legitimate means of encouraging, promoting, and supporting the former as the ideal environment for children.[9]

Put another way, it is reasonable for the government to view the union of one man and one woman united in marriage as the *preferred* environment for the bearing and upbringing of children, even if, as it happens, some children are born and raised in non-marital contexts as well (*e.g.*,

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[8] "That the State does not preclude different types of families from raising children does not mean that it must view them all as equally optimal and equally deserving of State endorsement and support.... Thus, the Legislature may rationally permit adoption by same-sex couples yet harbor reservations as to whether parenthood by same-sex couples should be affirmatively encouraged to the same extent as parenthood by the heterosexual couple whose union produced the child." *Jackson* v. *Abercrombie*, No. 11-00734 ACK-KSC, slip op. at 110, 2012 WL 3255201, at *43 (D. Haw. Aug. 8, 2012), quoting *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 1000-01 (Mass. 2003) (Cordy, J., dissenting) (internal quotation marks and brackets omitted).

[9] *Jackson*, *supra*, slip op. at 111, 2012 WL 3255201 at *43 ("[I]t is not irrational for the state to provide support for the parenthood of same-sex couples through the civil unions law, but not to the same extent or in the same manner it encourages parenthood by opposite-sex couples.").

by single persons, or by persons in same-sex relationships). It bears emphasizing that a government preference for husband-wife unions as the optimal environment in which to raise children is a judgment about *marriage* as the only institution that serves to connect children with their father and mother together in a stable home. It is not a judgment about the dignity or worth of any *person*, married or not. *See*, *e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in the judgment) ("[R]easons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").[10] It also is not a judgment about the parental competency of any one person over another.

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[10] Some advocates and even some lower courts (including the lower courts in this case) have caricatured a moral preference for *marital unions* as disapproval of *persons* with same-sex attractions. This is as misleading and inaccurate as saying that the current marriage laws of 50 states disparage or undermine the dignity of single persons, or of persons who practice polygamy, as opposed to simply representing a moral preference for marriage. First, the current debate specifically concerns the meaning of marriage and the proposal to redefine marriage, not the phenomenon of same-sex attraction and the persons who experience such attraction. For this reason, the suggestion that opposition to the redefinition of marriage is equivalent to an animus against people who experience same-sex attraction is particularly offensive and plainly wrong. Second, the Church's pastoral care of persons who are sexually attracted solely or predominantly to persons of the same sex is informed not only by its teaching about the proper use of the sexual faculty, but by its conviction that each and every human person, regardless of sexual inclination, has a dignity and worth that derives from his or her Creator. Thus, the further suggestion that opposition to homosexual *conduct* is simply animus against *persons* who engage in such conduct is also erroneous and offensive.

Given the procreative capacity of different-sex couples, the basic right of a child to be raised by his or her father and mother together, and the interest in encouraging homes with a mother and father, marriage, as the union of one man and one woman, has a societal value that is absent from other interpersonal relationships. In particular, because marriage advances legitimate interests that same-sex relationships do not, the State is not required to treat them as equivalent. *See Johnson* v. *Robison*, 415 U.S. 361, 383 (1974) (a classification subject to rational basis review will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not").

B. The Court Below Erred in Finding the Unique Affirmation of Opposite-Sex Unions Irrational.

1. *Rationality Does Not Require the State to Endorse or Promote Same-Sex Relationships If It Endorses or Promotes Opposite-Sex Unions.* When the citizens of California endorsed, supported, and promoted the union of one man and one woman as uniquely valuable by conferring on that union the name "marriage," they neither incurred an obligation to extend the same endorsement to same-sex relationships, nor implicitly expressed hostility to them.

Indeed, in striking down a ban on homosexual acts, this Court has cautioned expressly that a duty of government non-interference with such acts does *not* mean that the government has a duty, constitutional or otherwise, to support or encourage

same-sex relationships, whether by calling them "marriage" or otherwise. *Lawrence*, 539 U.S. at 578 (noting that case involving a criminal prohibition of homosexual conduct "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").[11]

This is fully consistent with other decisions of this Court, which recognize that the constitutional protection of private conduct from government interference does not imply a constitutional duty to endorse or promote that conduct. For example, this Court has ruled that there are certain types of private conduct that states may not *ban,* such as abortion before viability. *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992). But that has never translated into a constitutional requirement that states *support* or *encourage* abortion. Quite the contrary, states may encourage childbirth, and it is well settled that when they do so they incur no duty to encourage abortion. *Harris* v. *McRae*, 448 U.S. 297 (1980); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Beal* v. *Doe*, 432 U.S. 438 (1977).

In short, *Lawrence* and *Casey* involved a right (albeit not absolute) to keep government's hands *off* of certain personal decisions—in one case, whether to

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[11] *See Jackson*, *supra*, slip op. at 38, 2012 WL 3255201 at *15 ("[T]he court in *Lawrence* implicitly recognized that it is one thing to conclude that criminalizing private, consensual homosexual conduct between adults violates due process; it is entirely another matter to conclude that the constitution requires the redefinition of the institution of marriage to include same sex couples."), quoting *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 513 (Conn. 2008) (Borden, J., dissenting).

have an abortion, in the other, to engage in homosexual relationships. On the other hand, this Court has never intimated that this "right to be let alone"—the right to government non-interference with constitutionally protected private conduct—requires as a matter of basic rationality some right to affirmative government support. The government is not somehow constitutionally required to place its *imprimatur* on those personal decisions with which it may not constitutionally *interfere*.

2. *Rationality Does Not Require Acceptance of the Lower Court's Incoherent Definition of Marriage.* The Ninth Circuit's radical "redefinition" of marriage to mean "committed lifelong relationships," 671 F.3d at 1078, 1081,[12] empties marriage of its meaning and leads to absurd results. Any number of relationships (brother-sister, mother-daughter, father-son, or lifelong friends) may be "committed" and "lifelong" without constituting a marriage. For that matter, three or more persons may have a lifelong, committed relationship, but their relationship is plainly not a marriage. Though no party to this litigation argues that multiple friendships and polygamous relationships constitute marriage, it is not evident why they would not also qualify as "marriages" under the Ninth's Circuit's novel test. Moreover, if the meaning of marriage is so malleable and indeterminate as to embrace all "lifelong and committed" relationships, then marriage simply

[12] *See also id.* at 1078 (stating that marriage is "the name that society gives to the relationship that matters most between two adults," and that the name "marriage" signifies "the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships").

collapses as a coherent legal category. *What is Marriage?*, *supra* at 269-75. Indeed, the ultimate elimination of marriage as a relevant legal category is the announced goal of many who seek social approval of same-sex sexual relationships. *See*, *e.g.*, Julie Shapiro, *Reflections on Complicity*, 8 N.Y. CITY L. REV. 657, 658 & n.6 (Fall 2005).

C. The Court Below Failed to Show California the Judicial Deference Characteristic of the Rational Basis Standard, or Appropriate to State Decisions in Areas of Ongoing Controversy and Traditional Concern.

The Ninth Circuit's redefinition of marriage represents a stark departure from the traditional role of federal courts in applying the rational basis standard, and intrudes into an area of law that falls squarely within the classic regulatory powers of the States.[13] Federal judicial review of state marriage laws has been especially deferential, even beyond the deference typical of the rational basis standard.[14]

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[13] It does not interfere with the traditional primacy of the States in regulating marriage for the federal government to define the legal term "marriage" for purposes of *federal* law, as the federal Defense of Marriage Act does.

[14] *See, e.g., Pennoyer* v. *Neff*, 95 U.S. 714, 734-35 (1878) (a State "has [an] absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved"), quoted in *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975); *see Zablocki* v. *Redhail*, 434 U.S. 374, 392 (1978) (Stewart, J., concurring in the judgment) ("Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry

Accordingly, a judicially-imposed redefinition of marriage would improperly insert federal courts into the middle of a public policy dispute to which the various states have, so far, offered competing answers.

Americans throughout the Nation have already demonstrated that, notwithstanding their differences, they are capable of reasonably addressing competing claims made about marriage. Most states define marriage as the union of one man and one woman, and many of these do not permit civil unions or other marriage-like institutions among persons of the same sex.[15] Other states define marriage as the union of one man and one woman but confer some of the rights and benefits of marriage upon persons in a civil union or domestic partnership, that is, something short of marriage. California has taken yet a third approach and conferred upon same-sex couples all of the rights and benefits associated with marriage, but promotes and encourages marriage itself, understood as the union of one man and one woman, by giving it the exclusive designation

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who has a living husband or wife."). One notable exception to this norm is *Loving* v. *Virginia*, 388 U.S. 1 (1967), but that case involved *racial* classifications that derived from the notion of "White Supremacy." *Id.* at 7, 11. These classifications triggered the strictest judicial scrutiny, for they squarely violated the "clear and central purpose" (*id*. at 9-10) and "central meaning" (*id*. at 12) of the Equal Protection Clause. It cannot seriously be maintained that a State law defining marriage as the union of one and one woman warrants this exceptional treatment.

[15] *See* our *amicus* brief (pp. 7-8 n.5) in *United States* v. *Windsor*, No. 12-307 (listing state constitutional amendments and statutes that define marriage as the union of one man and one woman).

"marriage," a designation not afforded to persons in same-sex relationships. These and other approaches are still being considered and evaluated by the citizenry. This Court should not short-circuit that process by interposing federal constitutional constraints that would foreclose debate.[16] The states are the proper forum for experimentation and continued debate on the issue of marriage. That debate should be allowed to unfold.[17] *See Windsor* v. *United States*, 699 F.3d 169, 211 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part) ("Courts should not intervene where there is a robust political debate because doing so poisons the well, imposing a destructive anti-majoritarian constitutional ruling on a vigorous debate. Courts should not entertain claims like those advanced here, as we can intervene in this robust debate only to cut it short.").

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[16] It would be odd to hold, as a matter of constitutional rule, that the broad accommodations that California has *granted* to persons in homosexual relationships trigger an entitlement to the name "marriage." Such a rule would create an incentive to *deny* Respondents those very accommodations if a State wished to avoid conferring the name "marriage" upon their relationships. *See Jackson*, *supra*, slip op. at 96, 2012 WL 3255201 at *37 (acceptance of the plaintiffs' argument that a civil unions law triggers a constitutional right to marry a person of the same sex "would provide a perverse incentive for states not to enact … civil union laws").

[17] We do not claim that the compromises described above represent wise public policy. But the fact that we may disagree with what some states have done on the issue of the legal recognition of same-sex relationships is precisely the point: people and institutions do in fact have good faith disagreements about this issue, and the Court should not foreclose varying judgments by the citizenry by forcing the issue into a constitutional Procrustean bed.

Judicial preemption of the political process on an issue like marriage would only be the start, and this Court would be called upon endlessly to define the scope and meaning of any constitutional "right" it declares on this subject, including its impact on other settled constitutional interests. *See* discussion *infra* at 21-24. In the past, this Court has demonstrated prudence and restraint in not allowing itself to be drawn into novel social and political activism. *See*, *e.g.*, *Washington* v. *Glucksberg*, 521 U.S. 702 (1997) (declining to find a substantive due process right to physician-assisted suicide); *Vacco* v. *Quill*, 521 U.S. 793 (1997) (declining to find an equal protection right to physician-assisted suicide). The exercise of restraint in this case as well will redound to this Court's institutional credit. Indeed, a contrary ruling, one upholding the Ninth Circuit's judicial redefinition of marriage, *see* discussion *supra* at 14 & n.12, would violate the principles of judicial restraint that this Court articulated in *Glucksberg*.

D. Although Rational Basis Review Is the Appropriate Standard, Proposition 8 Would Also Survive More Rigorous Scrutiny.

The government interests we have described and that Proposition 8 advances—such as encouraging procreation in stable households headed by a mother and father—are compelling interests, those of the highest order. No institution other than marriage joins a man and a woman together in a permanent and exclusive way and unites them to any children born of their union. No other institution ensures that children will have the opportunity to be raised by both a mother and father. The devaluation and loss

of such families as the primary venue for raising children is one of the chief ills of our Nation. Laws that strongly encourage and promote the union of one man and one woman in marriage are an important part of the remedy for this national problem. It would be a grave disservice to the Nation, and a serious misreading of the Constitution, to strike down such laws.

II. Proposition 8 Is Not Rendered Invalid Because It Was Informed by Religious and Moral Viewpoints.

It is hard to recall any significant legal reform movement in American history that has not been informed by religious and moral viewpoints, against which different or opposing religious and moral viewpoints are often arrayed. As this Court has insisted, "[w]e are a religious people." *Lynch* v. *Donnelly*, 465 U.S. 668, 675 (1984), quoting *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). If the religious viewpoints of the people were deemed "out of bounds" in public policy—falling below even a minimum standard of rationality—then the history of our Nation would have been much different (and worse).

The social and political movements that led to the abolition of slavery and the subsequent adoption of civil rights laws, for example, were all informed by religious motivations and moral viewpoints. Indeed, every January the Nation celebrates the birthday of a minister, a leading figure in the civil rights movement, who drew upon decidedly religious and moral notions of human dignity in urging the reform of American law.

Moreover, the arguments made in favor of *redefining* marriage to include same-sex relationships are *themselves* shaped by religious and moral arguments and viewpoints, albeit (in our view) erroneous ones. Thus, if the policy arguments made by those favoring marriage are ruled "out of bounds" simply because they are religiously and morally motivated, then those religious and moral claims favoring the redefinition of marriage are equally impermissible. In short, religious and moral considerations—sometimes explicit, sometimes implicit—are interwoven into the fabric of the current and unfolding debate about marriage, on all sides of the debate.

It is well established that a law is not constitutionally impermissible because it overlaps with a religious teaching. This Court has squarely rejected any claim that "a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris* v. *McRae*, 448 U.S., at 319, quoting *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). The government may enact laws that "reflect[] 'traditionalist' values" toward an issue without being found to have adopted as laws "the views of any particular religion." *Harris*, 448 U.S. at 319.

It is therefore a mistake to characterize laws defining marriage as the union of one man and one woman as somehow embodying a purely religious viewpoint over against a purely secular one. This Court should therefore reject any argument that Proposition 8 is irrational or otherwise

unconstitutional because it corresponds with one or another religious or moral view of marriage.

III. Redefining Marriage Will Generate Wide-Ranging Burdens on Religious Liberty and Other Well-Established Constitutional Rights.

If this Court were to impose constitutional constraints on how states define marriage, it would impede the prospect of compromise and accommodation that the legislative process makes possible. The disputes that have arisen to date are a good predictor of what would come.

Individuals, either directly or as principals of closely-held businesses, are already encountering government obstacles to entering or remaining in their chosen profession[18] or in the marketplace, because of their support for marriage as the union of one man and one woman.[19] Religiously-affiliated

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[18] *See Ward* v. *Wilbanks*, No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010) (upholding dismissal from academic program of counseling trainee based on her religious objection to affirming potential counselee's same-sex relationship), *rev'd*, 667 F.3d 727 (6th Cir. 2012).

[19] Catholic owners of a bed and breakfast in Vermont were charged with violating Vermont's Fair Housing and Public Accommodations Act for allegedly not hosting a "wedding" reception for two persons of the same sex. Ultimately the owners agreed to pay a fine and not to host any wedding receptions. *See* ACLU Press Release (Aug. 23, 2012), *available at* http://www.aclu.org/lgbt-rights/vermont-resort-pay-fine-and-revise-policies-settle-discrimination-lawsuit-lesbian-couple; *see also Elane Photography* v. *Willock*, 284 P.3d 428 (N.M. App. 2012) (holding that wedding photographer's religious objection to photographing same-sex "commitment ceremony" must yield

nonprofit organizations now face the prospect of civil suits—previously unavailable before the redefinition of marriage—where the organization, in keeping with its religious and moral beliefs, declines to extend to an employee's same-sex "spouse" health benefits reserved to married couples.[20] Notaries public, court clerks, and justices of the peace with religious and moral objections to same-sex relationships have been forced to give up their positions.[21] As difficult as

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to New Mexico law forbidding discrimination on the basis of sexual orientation).

[20] Sharon Otterman, *Employee Sues for Benefits to Cover Same-Sex Spouse*, N.Y. TIMES (June 19, 2012), *available at* http://www.nytimes.com/2012/06/20/nyregion/st-josephs-medical-center-sued-over-benefits-by-same-sex-couple.html.

[21] With the passage of marriage redefinition in Maine last November, the Maine Secretary of State has informed all notaries public (roughly 25,000), including clergy, that regardless of their religious objections, they must officiate at "weddings" of persons of the same sex or officiate at no weddings at all; otherwise they will be fined. *See* Judy Harrison, *Same-Sex Marriage Law Means Notaries Can't Discriminate in Performing Weddings*, BANGOR DAILY NEWS (Dec. 12, 2012), *available at* http://bangordailynews.com/2012/12/12/news/same-sex-marriage-law-means-notaries-cant-discriminate-in-performing-weddings/. After New York State redefined marriage to include same-sex unions, municipal clerks with religious objections to facilitating such unions were forced to resign their positions. *See NY Town Clerk Quits, Cites Gay Marriage Opposition*, NEWSDAY (July 12, 2011), *available at* http://www.newsday.com/news/region-state/ny-town-clerk-quits-cites-gay-marriage-opposition-1.3020914; Jen Doll, *Ruth Sheldon, Town Clerk, Will Also Resign Instead of Performing Gay Marriages*, THE VILLAGE VOICE (July 18, 2011), *available at* http://blogs.villagevoice.com/runninscared/2011/07/ruth_sheldon_gay_marriage.php. After the Massachusetts Supreme Judicial Court redefined marriage in *Goodridge* v. *Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), twelve justices of the

these cases may be for regulators and legislators to address—for example, by crafting appropriate accommodations—they will become almost impossible to address in a balanced way if this Court determines that the government is constitutionally required to treat same-sex relationships exactly as it does different-sex marriage, in every case.[22]

Finally, if the Constitution were construed to require government affirmation of same-sex relationships as marriage, it would seem a short step to requiring such affirmation as a condition of receiving government contracts, participating in public programs, or being eligible for tax exemption.[23]

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peace resigned rather than agree to solemnize same-sex unions. *See* Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES (May 17, 2004), *available at* http://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html?.

[22] The Becket Fund for Religious Liberty has filed an *amicus* brief in this case and in *United States* v. *Windsor*, No. 12-307, providing further detail about the burdens on religious liberty implicated in both cases. *See also* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds. 2008).

[23] *See, e.g., Bob Jones Univ.* v. *Simon*, 416 U.S. 725 (1974). After Massachusetts redefined marriage, Catholic Charities of Boston was forced to end its adoption work rather than comply with a state law requiring that same-sex couples be allowed to adopt children. *See* Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE (Mar. 11, 2006), at A1. After the District of Columbia redefined marriage, government officials informed Catholic Charities of the Archdiocese of Washington that it no longer would be allowed to continue to provide foster care and publicly-funded adoption programs in the District of Columbia. Memorandum from Archdiocese of Washington (Mar. 1, 2010), *available at* http://site.adw.org/pdfs/10Marr_CathChar%20Impact_0301.pdf.

In short order, those who disagree with the government's moral assessment of such relationships would find themselves increasingly marginalized and denied equal participation in American public life and benefits.

CONCLUSION

For the foregoing reasons, Proposition 8 should be upheld, and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ANTHONY R. PICARELLO, JR.*
General Counsel
JEFFREY HUNTER MOON
Solicitor
MICHAEL F. MOSES
Associate General Counsel
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS
3211 Fourth Street, N.E.
Washington, D.C. 20017
apicarello@usccb.org
(202) 541-3300

January 29, 2013 **Counsel of Record*

Thus, in 2010, Catholic Charities of the Archdiocese of Washington had to close its foster-care and adoption programs. *Same-sex "Marriage" Law Forces D.C. Catholic Charities to Close Adoption Program*, CATHOLIC NEWS AGENCY (Feb. 17, 2010), *available at* http://www.catholicnewsagency.com/news/same-sex_marriage_law_forces_d.c._catholic_charities_to_close_adoption_program/.