No. 12-307

In the Supreme Court of the United States

UNITED STATES, PETITIONER
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL., RESPONDENTS

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

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ON THE NON-JURISDICTIONAL ISSUES

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondent, The Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives in Case 12-307 ("*United States v. Windsor*"). BLAG opposes overturning Section 3 of the Defense of Marriage Act ("DOMA"),[2] and thus opposes the Court's forcing Congress sometimes to offer benefits for same-sex partners, due to a supposed violation of the Equal Protection Clause of the Fifth Amendment of the Constitution. This brief will cover the substantive aspects of the case, not the jurisdictional aspects such as standing.

Since both this case and the *Hollingsworth v. Perry* ("*Hollingsworth*") case[3] about California's Proposition 8 (2008) are about same-sex marriage ("gay marriage", or "*per se* sterile marriage" ("PSSM")), are being heard in tandem, and there is a heavy overlap of issues, this brief will discuss both cases.

Amicus has multiple interests in this case, and also in *Hollingsworth*. For example, he has a general

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, see S. Ct. R. 37. Blanket permission is on record with the Court for *amicae/i* to write briefs, except in the case of Edith Windsor's counsel, who sent Amicus e-mailed permission.

[2] Pub. L. 104–199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7.

[3] 671 F.3d 1052 (9th Cir. 2012) (*cert. granted*, 81 U.S.L.W. 3324) (U.S. Dec. 7, 2012) (No. 12-144).

interest as a lawyer who cares deeply about our Constitution, and who has submitted briefs to this Court concerning constitutional matters, e.g., his *Schuette v. Coalition to Defend Affirmative Action, et al.* (a.k.a. "*BAMN*")[4] amicus brief recommending summary reversal, *see id.*, in that case because the idea that the Equal Protection Clause mandates legalized affirmative action in a State is absurd.

Similarly, in the instant case, the idea that the Equal Protection Clause mandates legalized gay marriage, or similar status, under federal law (or in a State) is unsupportable. Amicus means to explore that parallel, and many other issues, including contextual, moral, and medical ones, so that the Court may make the optimal decision in these controversial cases, *Windsor* and *Hollingsworth*.

Speaking of "controversy", this brief is going to be fairly explicit about various relevant bodily and sexual issues re gay marriage. This is not to cause scandal, but because it would be underinclusive, or even intellectually dishonest, not so to do. Amicus thanks readers for having an open mind.

SUMMARY OF ARGUMENT

Gay marriage has no support in our traditions, and this may be especially worrisome seeing the recent moral decay of America by traditional standards. Thus, the States and Congress are free to decline support and subsidy for gay marriage,

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[4] Nos. 08-1387, 08-1534, 08-1389, 09-1111, 2012 U.S. App. LEXIS 23443 (6th Cir. Nov. 15, 2012) (en banc), *pet. for cert. pending* (U.S. Dec. 4, 2012) (12-682).

despite the false claims of many law professors that governmental bodies are constitutionally shackled from doing so. If some say gay marriage is not a moral issue, there are still many other rational bases to decline governmental support for gay marriage.

For example, the public fisc may be affected by gay marriage. Also, sodomy is a vector of injury and disease. Moreover, a claim that "equal protection" demands court-ordered legalization of gay marriage, is an attack not only on common sense but also on separation of powers, and on the sensible idea that rights are different from privileges, so that not everyone can always get what they want all the time, e.g., polygamists claiming they have a "right" to polygamy. And, the compelling interest of diversity is served by traditional marriage, since a man-woman couple is diverse as no same-sex couple can be.

And speaking of diversity: other groups who may have been oppressed more than gays may not be receiving their due from society themselves, so the "priority" of gay marriage over those other, older grievances is questionable.

Thus, equal protection, considering our laws, history, and culture, does not encompass gay marriage, which neither Martin Luther King nor his wife saw as necessary. Even an "unpopular" cause like reparations for slavery may have a better equal-protection claim than gay marriage, and gay marriage would be no "*Brown v. Board of Education*" (347 U.S. 483 (1954)) for gays. Marriage can justifiably have fertility as a basis, to a limited extent and without policing. And to take away the

People's right to vote no on gay marriage, may be an equal-protection violation of sorts re the value of their votes.

Especially considering all these reasons, DOMA (or Proposition 8) not only passes the proper standard of review, i.e., rational basis sans animus, but also passes heightened scrutiny, either intermediate or even strict scrutiny.

Lawrence v. Texas (539 U.S. 558 (2003)), a charter of freedom, offers American gays the "negative liberty" of not being arrested; but this does not imply the "positive liberty" of receiving the State's approbation and financial aid for a marriage based on sodomy. *Lawrence* does in fact allow gay marriage, i.e., gays can marry in a church, although without being officially married in the eyes of the State. If the Court somehow concludes it is inhumane for measures like hospital visitation for gay partners not to be mandatory nationwide, the Court can mandate such measures without mandating gay marriage.

America's democratic conversation about gay marriage is working, e.g., several States have recently approved gay marriage; and the votes of people in all the States deserve equal protection more than gay marriage does. For the Court to interrupt this successful national conversation would be damaging, even to the cause of gay marriage itself, which even some homosexuals oppose, and which might find more long-term public support if the Court did not force it on the Nation.

ARGUMENT

I. THE TOTAL LACK OF TRADITIONAL UNDERPINNING FOR GAY MARRIAGE

"It is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a husband." One reason Jane Austen did not write that line to begin *Pride and Prejudice* (1813)[5] is that it has been "universally acknowledged" in Anglo-American tradition, until recently, that marriage is between men and women, one of each. If Austen's heroine Elizabeth Bennet had married a "Marcy" instead of Mr. Darcy, this would have seemed a little strange. The Nation's founders seem to have had a similar understanding: if James Madison had married Donny instead of Dolley, this would have caused much consternation.

Historically, the first same-sex relations may have been at Sodom and Gomorrah, *see Genesis* 18-19 (Deity destroys Mideastern cities due to behavior of inhabitants). What back history gay marriage *per se* has, is not entirely salutary. *See, e.g.*, Wikipedia, *Same-sex marriage*,[6] noting, *see id.*, that the first gay marriage in the West was that of the crazed Roman emperor Nero to another man. Wikipedia, *Pythagoras (freedman)*,[7] gives more detail of the tender scene, complete with "blushing bride": in 64 A.D., during the riotousness of Saturnalia, Nero

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[5] She used "wife" instead of "husband", of course, *see id.*

[6] http://en.wikipedia.org/wiki/Same-sex_marriage (as of Jan. 16, 2013, at 22:53 GMT).

[7] http://en.wikipedia.org/wiki/ Pythagoras_(freedman) (as of Dec. 13, 2012, at 23:58 GMT).

> stooped to marry himself to one of that filthy herd, by name Pythagoras, with all the forms of regular wedlock. The bridal veil was put over the emperor; people saw . . . . the couch and the nuptial torches; everything in a word was plainly visible, which, even when a woman weds darkness hides.

Id. (citation omitted) *Res ipsa loquitur*.

Speaking of Rome, Nero's fiddling around with poor Pythagoras, *supra*, brings to mind *Romans* 1:27, where St. Paul says, "the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet." *Id.* (KJV) "For good or ill", such a view of gay marriage has been more typical of our tradition than Nero's lifestyle is.

A later observation, also from Rome, encapsulating the post-Nero Euro-American marriage tradition, is in Pope Paul VI's 1968 encyclical *Humane Vitae*: "[Marital] love is fecund. It is not confined wholly to the loving interchange of husband and wife . . . . Marriage and conjugal love are by their nature ordained toward the procreation and education of children."[8] *Id.* Husband, wife, and fertility, *see id.*, are deemed marks of real marriage.

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[8] Eng. trans. at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

Given the condemnations *supra* of gay marriage or gay sex, it is interesting to note[9] that British Satanist/occultist Aleister Crowley taught anal intercourse techniques as part of the 11th degree of his black-magic system, several degrees above the heterosexual techniques at the mere 9th degree.

See also, e.g., *Leviticus* 18:22: "Thou shalt not lie with mankind, as with womankind: it is abomination." *Id.* (KJV)

This section of the brief is meant to help establish that the question of whether prohibitions of gay marriage (or marital-type benefits) violate the Fifth, or Fourteenth, Amendment, need not even be asked, because the tradition of marriage was clearly never meant to be extended beyond heterosexual couples in the first place.

Seeing the traditions mentioned *supra*: claiming that the illegality of gay marriage discriminates against gays, is like claiming that because a fish can't ride a bicycle, that bicycles discriminate against fish. Bicycles were not meant for fish in the first place. (*See, e.g.*, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U. S. 141, 147 (1940) (Frankfurter, J.))

If a State or Congress wants to go beyond traditional definitions of marriage and newly create gay marriage, or acquiesce to another sovereign's support of gay marriage, that should be up to them, not the courts.

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[9] *See* Wikipedia, *Sex magic*, http://en.wikipedia.org/wiki/Sex_magic (as of Nov. 18, 2012, at 00:58 GMT).

On that note, we now explore the broader issue of our country's morals in general, and who should decide about them and their public endorsement or condemnation.

II. "MORAL DECAY IN MODERN AMERICA"

To many Americans, the country's morals are going into the "toilet" fast these days, due to people's atrocious behavior. *See, e.g.*, Liz Raftery, *Anna Kendrick Tweets Racy Message About Ryan Gosling*, TV Guide,[10]

> The *Twilight* star [Anna Kendrick] made an . . . admission about the actor via Twitter Monday.
>
> "Ugh - NEVER going to a Ryan Gosling movie in a theater again," she wrote. "Apparently m[ ]sturbating in the back row is still considered 'inappropriate.'"

Id. (brackets not in original) Kendrick's "humor", *see id.*, accessible to impressionable young children on the Internet, is not a hopeful sign about where America is going.

Even among our pundit class's writings, decay rages, at least by traditional standards. *See, e.g.*, an article[11] by writer Amanda Marcotte:[12] "Clearly,

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[10] Yahoo! TV, Jan. 16, 2013, 6:33 a.m., http://tv.yahoo.com/news/anna-kendrick-tweets-racy-message-ryan-gosling-143300434.html.

[11] *Copay-Free Birth Control and Other Women's Health Care Starting Today*, Pandagon, Raw Story blog, Aug. 1, 2012, 10:19

what we as a nation need is more f[ ]cking, less praying. A good 30% of our bullsh[ ]t would go away pretty quickly if we just shifted our priorities in the right direction." *Id.* (brackets not in original). There is a sense of "sexual entitlement" abroad in this land, which may be one of this Nation's biggest problems at present.

Young actors or writers aside, elders are not behaving well either, e.g., David Petraeus' sordid affair with his biographer Paula Broadwell, which did not bode well for his career. And all this against a backdrop of other threats to children, as with the horrific slaughter at Sandy Hook School in Newtown, Connecticut. Parents wonder, "How can we protect our families, morally and otherwise?"

Families, family values, and growing up innocent, are, indeed, increasingly endangered. *See, e.g.*, HuffPost Live, *Naomi Wolf, Feminist Author: Internet Porn Causing Risky Sex At Colleges (VIDEO)* ("Wolf Article"),[13]

> Regarding the sexual activities of current college-age men and women that grew up on Internet porn, Wolf relayed some particularly horrifying stories.

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a.m., http://www.rawstory.com/rs/2012/08/01/copay-free-birth-control-and-other-womens-health-care-starting-today/.

[12] Of the *American Prospect* and other publications.

[13] Huffington Post, updated Jan. 16, 2013, 9:33 p.m., http://www.huffingtonpost.com/2013/01/16/naomi-wolf-author-porn-anal-sex_n_2489472.html.

> "I visited a conservative college campus and a liberal one and anal fissures were the number one health problem women were having because everyone was doing anal when they were drunk and had just met, which is not the best way to do anal," Wolf told HuffPost Live. "It's a very delicate thing. So, the scripts are being set by porn."

Id. Amicus has always personally felt that no woman (or man) should have to be sodomized, which, with its injury potential, may border on a constitutional violation. *Cf., e.g.*, *Prude v. Clarke*, 675 F.3d 732 (2012), *available at* http://www.abajournal.com/files/Nutriloaf.pdf: "Deliberate withholding of nutritious food . . . . with the effect of causing . . . . maybe an anal fissure (which is no fun at all[]) . . . . would violate the Eighth Amendment." *Id.* at 5 (Posner, J.).

Sodomy used to be a source of shame, even unmentionable ("the unnamable vice"); but with President William "Bill" Clinton sodomizing his intern Monica Lewinsky on public property (the White House) in the 1990's, it seems the floodgates opened and sodomy became more common. Clinton turned out to be a "role model" of an unexpected kind. Ironically, Clinton signed DOMA. Are Americans obliged to follow up Clinton's *unofficial* endorsement of sodomy (by his actions) by *officially* endorsing a relationship based on sodomy, regardless of what their State or Congress voted for? Some would have the Court make this dictate. The Court should not.

After all, many Americans still regard sodomy with horror. Many people associate it with prison, feces, and AIDS, *cf.* Winston Churchill's famous alleged quip about the British Navy's tradition of "Rum, sodomy, and the lash". While *Lawrence* wisely prevents gays from being arrested—*inter alia*, where would they all be put?—, that is not an endorsement of their lifestyle. Americans, and their elected governments, should be free to decline such endorsement, or subsidy.

While this Court is manifestly not a Board of Moral Review, the States and Congress, by contrast, may have a strong role to play in making legislation with moral aspects: the States with their "police powers", and Congress perhaps even without the States' powers. *See, e.g.*, Alabama's statute, the Anti-Obscenity Enforcement Act of 1998, Ala. Code § 13A-12-200.2 (1975; amended 1998), which bans erotic stimulatory devices (so-called "sex toys"), *see id.*, and has survived court challenges. In fact, this Court refused to hear an appeal of those challenges in 2005, *see* Associated Press, *High court declines to review Alabama's sex-toys ban*, USA Today:[14] two years after *Lawrence*, which latter case, some claim, might allegedly make morality irrelevant.

However, let us assume for a moment that since *Lawrence*, taboo is taboo, so that neither States nor Congress can make even civil legislation about morals any more. Who could be of help in finding

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[14] Updated Feb. 22, 2005, 11:53 a.m., http://usatoday30.usatoday.com/news/washington/2005-02-22-toys_x.htm.

other reasons to allow the banning of gay marriage? The legal academy, say?

III. THE LEGAL ACADEMY AND GAY MARRIAGE

Maybe not much. In fact, the legal academy has a great deal to answer for in its promotion of mandatory gay marriage ("MGM"). Indeed, adding liberal or radical academics to libertarian ones (who are usually "conservative" in economic matters) produces a huge supermajority, one suspects, in favor of MGM. (Amicus shall mention no names here, though there are many.) But academics may be deluding themselves, as has been known to happen.

In fact, much of legal-academic life may resemble sodomy in its infertility: *see, e.g.*, the famous quip, "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something."[15] Thus, it is not surprising that many law professors, isolated from reality, may act as would-be "Raiders of the Equal Protection Clause" and claim that that clause makes promises that it really doesn't, whether re MGM, or MAA ("mandatory affirmative action", in the *BAMN* case, 12-682). But raiders who arrogantly think they are on the side of the angels, may find their "angels" turn out to have an unpleasant face.

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[15] Said by the current Chief Justice, *see, e.g.*, Walter Olson, *Abolish the Law Reviews!* The Atlantic, July 5, 2012, 12:40 p.m., http://www.theatlantic.com/national/archive/2012/07/abolish-the-law-reviews/259389/ (quoting Roberts, C.J.).

Amicus knew the late gay academic John Boswell, who wrote the controversial book *Same-Sex Unions in Pre-Modern Europe* (Villard Books, 1994). Functioning as a Boswell of Boswell, so to speak, Amicus relates here that at a Christmas party in 1987, at a college where he was taking a history course from Boswell, Amicus heard Boswell relate with glee his research into same-sex marriages in medieval times, supposedly blessed by the Church of that era. However, these days, critical opinion is that Boswell may have been wrong: *see, e.g.*, Wikipedia, *Adelphopoiesis*,[16] detailing how Boswell's idea that the medieval-era Church-allowed fraternal ceremony of *adelphopoiesis* ("brother-making", from the Greek) should be interpreted as "same-sex union", had little evidence, his work suffering from not only misinterpreting ideas but maybe even from mistranslating sources, *see id.* So, while wishful thinking is a temptation, even to famous Ivy League academics, it is a temptation one must resist.

All said, while we respect academics, including the estimable Professor Vicki Jackson who is arguing some jurisdictional aspects of this case, it is important not to succumb to some of their more sterile ideas, including those that would mandate approving marriages that are always sterile.

IV. GAY MARRIAGE AND THE PUBLIC FISC

Indeed, there are many reasons, besides "moral" ones, not to endorse mandatory gay marriage. For example, the fisc may be impacted in numerous ways

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[16] http://en.wikipedia.org/wiki/Adelphopoiesis (as of Jan. 5, 2013, at 9:04 GMT).

by gay marriage. If every marriage were a gay marriage, Americans would tend to become extinct, which would hurt the fisc. On a more modest level: if something is honored as a "marriage" but can never produce posterity, that may be spending public goodwill and resources on a non-productive relationship. If the government considers it wasteful, they are not obliged to adopt it.

A more direct impact on the fisc comes from taxation and bankruptcy. If gay couples are allowed to pay less taxes because of gay marriage, that is a very direct hit on the fisc. In fact, Edith "Edie" Windsor, in her eponymous case, is suing precisely because she wants $363,000 of her taxes to be waived, on the argument that her same-sex relationship should be as tax-free as an opposite-sex relationship, *see id. passim*.

Of course, that $363,000 could be used by the government to, e.g., help police examine hundreds of rape kits and put hundreds of rapists behind bars. Or it could be used for AIDS research. If Congress thinks that would be a better use for the $363,000 than giving Windsor a tax break, they can so decide.

There is a curious observation in *Windsor*, when the Second Circuit pronounces, "DOMA impairs . . . federal laws ([e.g.,] bankruptcy . . .) that have nothing to do with the public fisc." 699 F.3d at 187 (Jacobs, J.). But how is bankruptcy irrelevant to the public fisc? If gays are not afforded the special convenience of filing as married people, they may be less prone to file for bankruptcy, and any back taxes that they would have liked to be discharged (waived)

in bankruptcy, will not be waived. Thus, the public fisc will fatten. And some of that extra money can be spent on couples who *can* make babies with each other—and spent on those babies themselves.

More will be said on the fisc later, but for now, this brief notes that fiscal impact provides a rational, or even substantial, basis not to extend marriage to gay couples.

V. SODOMY AS CANCER, AIDS, OTHER-DISEASE, AND INJURY VECTOR

Another, more alarming reason to disallow gay marriage is that to subsidize relations based on sodomy may increase their number, or at least show *de facto* government endorsement of sodomy, at the same time that sodomy is often a risk factor for disease, injury, or death.

See, e.g., Wolf Article, *supra*, re the anal fissures sodomy often causes. In fact,

> [A]nal sex is considered a high-risk sexual practice because of the vulnerability of the anus and rectum. The anal and rectal tissues are delicate and do not provide natural lubrication, so they can easily tear and permit disease transmission . . . , and the risk of transmission of HIV is higher for anal sex than for vaginal sex.[17]

Id. (citations, including internal, omitted)

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[17] Wikipedia, *Anal sex*, http://en.wikipedia.org/wiki/Anal_sex (as of Jan. 21, 2013, at 07:01 GMT).

There are other deadly problems with sodomy besides HIV/AIDS, such as cancer. *See, e.g.*, Matt Sloane, CNN, *Fewer teens having oral sex, CDC says*,[18]

> "It's widely accepted that there is an increased number of head and neck cancers today due to changes in sexual practices in the '60s, '70s and '80s," -- specifically, an increase in oral sex, said Dr. Otis Brawley, the chief medical officer of the American Cancer Society.

Id.

It may be a truism, but sodomy, and gay sex practices in particular, can be very different from conventional or traditional heterosexual sex. Hear the words of one gay voice, Mark S. King, *Probing My Anal Phobia*, Huffington Post,[19] revealing part of gay sexual culture:

> Leave it to gay men to popularize the "shower shot," a long hose that . . . ends in a narrow nozzle, just right for sliding up your bum for a thorough internal rinse. . . . [Y]ou've just inserted into your a[ ] a pressure washer that could peel the paint off a building.

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[18] KSBW.com, updated 8:34 a.m., Aug. 17, 2012, http://www.ksbw.com/news/health/Fewer-teens-having-oral-sex-CDC-says/-/2024/16166548/-/38nxasz/-/index.html.

[19] Jan. 10, 2012, 6:19 p.m., http://www.huffingtonpost.com/mark-s-king/probing-my-anal-phobia_b_2444663.html?utm_hp_ref=gay-voices.

> [M]y first-time date invited me to visit the bathroom to "rinse out" while he relaxed in bed and waited. . . . That poor, unfortunate man. He had really pretty designer sheets . . . .

Id. For reasons of taste, Amicus shall not mention what happened next, though readers can always read the article themselves. (However, Amicus will note that the "pressure washer", *id.*, sounds somewhat like a torture from Abu Ghraib.) Suffice it to say that non-traditional sex relations can cause unpleasant problems. And if the public does not want to laud and subsidize this all as "marriage", it is quite understandable.

Lesbians, having a different build from gay men, may have somewhat different issues; but, once again, sodomy is sodomy in whatever form, and for lesbians, can include practices like "fisting", i.e., insertion of a fist—or two of them—, into the birth canal (or elsewhere), since women lack certain anatomy males have that would substitute for a fist. *See, e.g.*, Nat'l Ctr. for Biotech. Info., U.S. Nat'l Libr. of Med., Nat'l Insts. of Health, *Vaginal "fisting" as a cause of death.*, PubMed.gov (undated),[20] (young woman dies from vaginal fisting) (citation omitted).

See also, e.g., an article[21] describing one rather notorious gay sex practice, "felching",

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[20] http://www.ncbi.nlm.nih.gov/pubmed/2929548.

[21] Wikipedia, *Felching*, http://en.wikipedia.org/wiki/Felching (as of Jan. 14, 2013, at 22:26 GMT).

> According to the 2003 draft entry for "felch" in the *Oxford English Dictionary*, the earliest occurrence of the word in print appears to have been in *The Argot of the Homosexual Subculture* by Ronald A. Farrell in 1972. . . .
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> . . . .
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> . . . . It was also used in 1979 by Larry Kramer in his novel *Faggots*, where he defined it as sucking the ejaculate from the anus after intercourse.

Id. (citations, including internal, omitted) This concept, *see id.*, may disgust readers, but sodomy is sodomy, and noted gay activist Larry Kramer describes part of it, *see id.* When one leaves the narrow path of man-woman genital sex that can make babies, anything can happen.

If anyone rejoins that not all gays felch, this may be true: but the *predicate* of felching, the depositing of male fluid into the back passage (to be felched, or not), is practically the standard definition of sodomy. Or if one notes that a man and woman could also felch, that may be true, but that kind of "side dish" is not the "main course" of genital sex which can create babies between that female and male.

By contrast, with same-sex sex, sodomy is all that's on the table, ever. The "main course" that perpetuates the human species is forever absent.

VI. DIVERSE MARRIAGE: THE GOOD OF HETEROSEXUAL (MAN/WOMAN), DIFFERENT-SEX MARRIAGE PARTNERS

Another rational base, or even a compelling one, for denying State endorsement of same-sex marriage is the importance of diversity. This is true politically in that if every State decides about gay marriage separately, then likely some States will approve it, and others disapprove: a diverse array of decisions. Then gay couples can take their pick and move to a State offering gay marriage, if they wish. *See, e.g.*, the ideas of Charles Tiebout on "voting with your feet".

However, another level of diversity exists re gay marriage. —It is curious, but not surprising, that "liberals" or "Democrats" who constantly extol the value of racial and gender diversity and affirmative action, tend to suddenly forget the value of diversity when it comes to having two parents of *different* sex, instead of both of the *same* sex.

(Amicus has seen the term "gender incest" used of the lack of diversity inherent in same-sex relationships; without endorsing that term, he still recognizes that one can learn a great deal from the other gender, instead of spending one's whole life with a partner of the same gender.)

Without bothering to cite the copious literature showing the benefits of having a mother and father: common sense tells us that more diversity exists when a child can learn from a female parent and a male parent, than with two male or two female parents. With two fathers, how can a child be breast-

fed by a parent? And with two mothers, a child may have no close male role model from whom to learn.

Landmark affirmative-action case *Grutter v. Bollinger*, 539 U.S. 306 (2003), tells us of the compelling state interest of diversity served by affirmative action at universities, *see id.* at, e.g., 325. But that is only maybe for four years, at a college. By contrast, for the *eighteen* years of pre-adult growing up (including the vital first few years of life), for a child to have diverse, different-sex parenting, could be considered a far more compelling interest. Unless one wishes not to be consistent (here, about the value of diversity); and inconsistency tends to cause problems.

Diversity is also a reason that in adoption, heterosexual couples could be given extra points (just as there are "points" for racial or gender diversity in affirmative action) over gay couples in the adoption process. This would still allow gay couples to adopt (which is an alternative to gay marriage, by the way, if gays really want a family), but would also recognize the crucial value of diversity in children's upbringing.

VII. EQUAL PROTECTION IN OUR LAW, HISTORY, AND CULTURE, RE GAY MARRIAGE

A. Why Affirmative Action Is More Defensible than Gay Marriage; and, Would Martin Luther King Have Been Welcome to Speak at the Presidential Inauguration?

The previous section offers a lead-in on affirmative action vis-à-vis gay marriage, two very hot-button "equal protection" issues. —Amicus has heard scuttlebutt that the Court is likely to end or gut affirmative action, and endorse gay marriage, this Term, on some supposed "equality" theory that no races or sexual orientations should receive any privileges. But such decisions by the Court would be injurious and not based in reality.

It is not "playing the 'Suffering Olympics' game" to note that blacks may often have had it worse than gays in this country. Were gays as a class enslaved, brought over on ships in chains? *See, e.g.*, the current Quentin Tarantino film *Django Unchained*[22] —including, *see id.*, a character called "Dr. King [Schultz]"—, depicting slaves being sold, branded, pitted against each other in fights to the death, torn apart by dogs, threatened with castration, and similarly abused, *see id.*

So, given different quanta of oppression, how should we treat different groups, or group members?

On those notes: President Obama's second inaugural celebration last week was inspirational, but Martin Luther King, on whose holiday the public inaugural was held, might be considered unfit to give a speech there today. That statement is shocking, but it is true, seeing King's opinions about homosexuality. *See, e.g.*, John Blake, *What did MLK think about gay people?* CNN,[23] relating how King, in

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[22] A Band Apart/The Weinstein Company/Columbia Pictures (2012).

[23] Jan. 16, 2012, http://religion.blogs.cnn.com/2012/01/16/what-did-mlk-think-about-gay-people/.

a 1958 advice column for Ebony magazine, replied to a boy worried about his interest in boys, not girls:

> The type of feeling that you have toward boys is probably not an innate tendency, but something that has been culturally acquired . . . . You are already on the right road toward a solution, since you honestly recognize the problem and have a desire to solve it.

Id.[24] These days, that reply might be enough to get King labeled (falsely) a "vicious homophobic religious fanatic" who sees same-sex attraction as a "problem", *id.*, instead of a blessing.

Reverend Louie Giglio was scheduled to give a benediction at the inauguration, but withdrew after the media found an old 1990's speech in which he, like Reverend Dr. King, questioned the rightness of gay relations, *see, e.g.*, Kae Am, *Crooked Priorities: Louie Giglio, Lady Gaga, and Obama's Inauguration*, Disciple of Thecla blog, Christian Post.[25] An inaugural-committee spokeswoman said, "Pastor Giglio's past comments . . . don't reflect our desire to celebrate the strength and diversity of our country at this Inaugural." *Id.* Does that mean that the millions of Christians, Jews, Muslims, or others

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[24] One wonders what Dr. Martin L. King would think about the openly-discussed lifestyle of Mark S. King, *see Probing My Anal Phobia*, *supra* at 16.

[25] Jan. 21, 2013, 6:17 a.m., http://blogs.christianpost.com/disciple/louie-giglio-lady-gaga-and-obamas-inauguration-14226/.

who question the rectitude of sodomy are not "strong" or "diverse", and have now become non-citizens, or second-class citizens? The implications are chilling. What would our Pilgrim, Puritan forebears think?

What is ironic, horribly so, is that Giglio's projects mirrored King's in another way; Giglio has focused for years on ending human trafficking and sex slavery, *see id.* Giglio wanted people to be "free at last", to quote King. But Giglio was not free to speak at the Inaugural. This embarrasses our Nation.

By the way, King actually had a gay aide, Bayard Rustin, but King never endorsed gay marriage. Thus, King, like Amicus, might be able to live with non-discrimination against gays in employment or other fields, without feeling gay marriage to be a necessary legal option throughout all fifty States.

By contrast, Obama, in his second-inaugural speech,[26] said, "Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law – for if we are truly created equal, then surely the love we commit to one another must be equal as well." *Id.* This sounds lovely, maybe: but what does it mean? Does that mean that the love of polygamous families must be equal, i.e., legalized, as well?

Obama also mentioned, "Seneca Falls, and Selma, and Stonewall", *id.* But it might have surprised Dr. King to hear Stonewall mentioned with Selma (or

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[26] *Available at*, e.g., Rap Genius, *Barack Obama — Second Inaugural Address* (undated), http://rapgenius.com/Barack-obama-second-inaugural-address-lyrics.

even Seneca Falls), *see* his opinions *supra* on homosexuality.

The 1969 battle of gays at the Stonewall bar in New York not to be arrested or harassed for their activities can be sympathized with, even if one does not endorse their lifestyle. But Obama may hit a stone wall if he tries to argue that gay *marriage* is some fundamental right, moral or legal.

Even Dr. King's widow didn't go that far, *see, e.g.*, Andy Towle, *Coretta Scott King Is Dead at 78*, Towleroad.com,[27] featuring Mrs. King's words: "Gay and lesbian people have families, and their families should have legal protection, whether by marriage or civil union." *Id.* While this shows Coretta Scott King supporting gay families, *see id.*, it also shows she was open to *alternatives* to gay marriage, such as civil unions. In fact, California's current offering of a domestic partnership to gays is a "legal protection", *id.*, which might satisfy Mrs. King.

Circling back to affirmative action: this effort at diversity, to be phased out in colleges by c. 2028, has been called vital to national security by Colin Powell and other generals, *see, e.g.*, Br. of Lt. Gen Julius W. Becton, Jr., et al. as *Amici Curiae* in Supp. of Resp'ts in *Fisher v. Univ. of Tex. at Austin*.[28] And it advantages some groups, underrepresented minorities, but in a way that integrates them into institutions where they can perform as well as, or better than, anyone else.

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[27] Jan. 31, 2006, http://www.towleroad.com/2006/01/coretta_scott_k.html.

[28] 631 F.3d 213 (5th Cir. 2011) (*cert. granted*, 80 U.S.L.W. 3475) (U.S. Feb. 21, 2012) (No. 11-345).

By contrast, even the happiest gay marriage can never make a baby, since it can never perform that function. One billion gay couples can make fewer babies than one heterosexual couple (or polygamous unit) can. So, offering "equal protection" to a gay relationship as "marriage" is not necessary under our Constitution, until such time as human biology alters in ways Amicus does not expect.

B. Reparations for Slavery v. Gay Marriage; and, *Brown* v. *Crawford*

Going further: even the somewhat unpopular cause of reparations to African Americans for slavery may have a better equal-protection case than gay marriage does. Amicus has been interested in reparations for some while, *see, e.g.*, his article *Unsavory White Omissions? A Review of Uncivil Wars*, 105 W. Va. L. Rev. 665 (2003) (reviewing David Horowitz book attacking reparations for slavery). Since slavery doubtlessly caused horrific losses, and the U.S. has paid reparations to Japanese Americans (under Ronald Reagan) and Native Americans, but not blacks, one could make a putative equal protection claim, in theory, for such reparations to be paid.

However, Amicus, though he thinks reparations are fair—who likes to be robbed for centuries and not paid back?—, would not dare to claim that the Court is *obliged to order national full reparations* under the Equal Protection Clause. Such things are best dealt with by legislatures. Now if you compare the "injury" to gay couples from not marrying (though they may have civil unions or such), with the real

injury to American blacks and their descendants from several hundred years of uncompensated labor (and monstrous abuse), you may see how weak the "equal protection" claim for gay marriage really is.

Some activists may claim that Court-mandated legal gay marriage will be the *Brown v. Board of Education* (1954) for gays. But to compare the lack of mandatory gay marriage, on one hand, with segregated schools keeping little black children separate from opportunity and equality, on the other, is not a valid comparison. Rather than *Brown v. Board of Education*, another desegregation case, *Crawford v. Board of Education* (of Los Angeles), 458 U.S. 527 (1982), is a better comparison.

In *Crawford*, *supra*, plaintiffs claimed, *see id.*, that a California constitutional amendment taking away protections going beyond those demanded by the Equal Protection Clause of the Fourteenth Amendment, somehow violated that same Clause. They lost, *see Crawford*, 458 U.S. at 545. Similarly, in *Hollingsworth*, plaintiffs (now Respondents Perry et al.) claim that…a California constitutional amendment taking away gay-marriage protections going beyond those traditionally demanded by the Equal Protection Clause of the Fourteenth Amendment, somehow violates that same Clause. One has seen this before, and where it should go, *see Crawford*, *supra*. (*Windsor* has similar problems.)

Had Amicus submitted pre-certiorari briefs in these instant cases, he might have requested summary reversal, as he is doing in *BAMN*, the "mandatory affirmative action" case. The similarity between *BAMN*, *Windsor*, and *Hollingsworth* is

eerie, actually. But the Court is not some Aladdin's lamp to be rubbed, under false claims of "equality", whenever someone feels that he cannot win particular entitlements through democratic means.

C. "*Lawrence* and No Further"; or, Negative Liberty, Positive Liberty, and State-Subsidized Sodomy

Though Court-ordered gay marriage would be no equivalent to *Brown v. Board*, *Lawrence* could be considered an "Emancipation Proclamation" for gays. It was a necessary decision for American freedom, especially seeing that, e.g., the Nazi regime put gays in camps, wearing pink triangles. And today, such problems persist; *see, e.g.*, Associated Press, *Cameroon jails 'gay' man for texting 'I'm in love with you' to male friend*, The Guardian (London),[29]

> In October, two men were convicted of homosexuality because of their "effeminate" appearance and because they were drinking Bailey's Irish Cream, which was viewed as a drink favoured by gay men, according to . . . the U.N. high commissioner for human rights.

Id. The truth-is-stranger-than-fiction air of this absurd, paranoid anti-gay (and anti-Irish?) discrimination, *see id.*, reminds us that *Lawrence* is a good idea, protecting gays from arbitrary abuse

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[29] Dec. 17, 2012, 3:36 p.m., http://www.guardian.co.uk/world/2012/dec/17/cameroon-antigay-legislation-mbede-text.

and letting them participate in democratic discussion about issues like gay marriage.

Not everyone thinks there should be much discussion, though: *see, e.g.*, Manya A. Brachear, *Cardinal George, bishops issue letter opposing gay marriage*, Chicago Tribune:[30] "'Civil laws that establish "same-sex marriage" create a legal fiction,' George and the bishops wrote in a letter sent to priests Tuesday. 'The state has no power to create something that nature itself tells us is impossible.'" *Id.* While George's statement, *see id.*, may have inspirational value to some, it may not be an accurate statement of how American law works.

In fact, our States, and Congress, are clothed with immense power, delegated by the People, so that those governmental bodies can, even if it is unwise, create the right to gay marriage out of nothing. The Constitution allows this. Likewise, it allows those bodies not to create gay marriage, or to repeal it.

So, while *Lawrence* preserves for gays (or other practicers of sodomy) the "negative" liberty, as British philosopher Isaiah Berlin (1909-1997) might put it, of freedom from arrest and harassment, it is up to the People or their representatives to grant, or not, the "positive liberty" of an entitlement or subsidy for gay marriage. And seeing that gay marriage is a sort of state-subsidized sodomy, to be frank, perhaps all the People aren't really up for that at this point. (The laws of dozens of States against gay marriage help confirm this.) Thus, the Court,

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[30] Jan. 2, 2013, http://www.chicagotribune.com/news/local/ct-met-cardinal-george-gay-marriage-0102-20130102,0,1703693.story.

and Nation, are obliged to go no further than *Lawrence* and its protections.

If they did, they might actually infringe on others' rights, even indirectly.

D. The Real Equal Protection Violation in this Case: Voting Rights?

For example, if the right to vote about gay marriage is needlessly removed from voters, that disrespects their right to vote. This disenfranchisement may not be a *per se* equal protection violation, but it may a *de facto* one.

See, e.g., *Bush v. Gore* (531 U.S. 98 (2000))—a well-known case with prominent lawyers like Theodore Olson and David Boies—, on the importance of the vote and equal protection thereof.

There may even be racial issues, *see, e.g.*, Patrick J. Egan & Kenneth Sherrill, *California's Proposition 8: What Happened, and What Does the Future Hold?* Nat'l Gay and Lesbian Task Force,[31] tbl.1, showing, *see id.*, African Americans and Latinos voting yes on Proposition 8 at higher percentages than whites. It is fascinating to see some of the "left-of-center" people who complain about voting-rights violations but remain silent when vast swaths of policy, such as gay marriage, risk being removed from voter control—especially the control of minority voters, *see* Egan and Sherrill, *supra*. This dilution of the vote, and minority vote, should be resisted by the Court.

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[31] Jan. 2009, *available at* http://www.thetaskforce.org/downloads/issues/egan_sherrill_prop8_1_6_09.pdf, at 3 (p. 4 of the PDF).

E. "Occupational Qualification" and Gay Marriage

Finally, one can somewhat compare the function of gender, in marriage, to a bona fide occupational qualification (BFOQ) in employment law. Every gay marriage is a PSSM, forever sterile, so that gay marriages are not "qualified" to produce children or meet the definition of a regular marriage—unless a State or Congress says so. (As for sterile heterosexuals, "policing them" out of marriage might be not just offensive but even impossible: e.g., a couple may think they're sterile, but find, nine months and a pregnancy later, that their doctor was wrong.)

One topical issue re gays and occupational qualification is the military. Amicus thinks it makes sense to allow openly gay soldiers in the military, as long as good order is kept and they can do their jobs. Amicus sees the issue through a "duty" prism, not always a "rights" one, e.g., gays never should have been able to avoid military service in the first place, and avoid dying for their country, just because they're gay. Even heterosexuals have been able to avoid military service through pretense of homosexuality, *see, e.g.*, BBC News, *Hendrix 'quit army with gay lie'*[32] (guitarist Jimi Hendrix pretended homosexuality to drop out of 101st Airborne); but they apparently don't have that option now.

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[32] Updated July 30, 2005, 12:44 p.m. GMT, http://news.bbc.co.uk/2/hi/entertainment/4730547.stm.

Sentimentalists may say, that if gays are risking their lives for the country in the military, they should be allowed State-recognized marriage. However, one could say the same for a man and two women who served in the military and then desire to enter a polygamous relationship. Their service is appreciated, but it doesn't necessitate throwing out our family laws and traditions, nor does it allow the Equal Protection Clause to be unlawfully drafted into attempts to throw them out.

VIII. GAY MARRIAGE LEADING TO POLYGAMY: NO JOKE, UNFORTUNATELY

Indeed, polygamy is part of the real "slippery slope" created if the Court decides local decisions on gay marriage are an outrageous, illegal oppression. If consenting adults are entitled to any marriage they want, why not *ménage à trois*—or *ménage à quatre*, *cinq*, etc.? And under *Lawrence*, gays, while not entitled to a government-recognized marriage, are free to openly marry at the church, synagogue, or coven of their choice.

See, e.g., Coven Oldenwilde, *Asheville's 18th Annual Free Public Witch Ritual on Samhain (Halloween) Mass Wedding & Handfasting*:[33]

> GET HITCHED BY WITCHES IN DOWNTOWN ASHEVILLE THIS HALLOWEEN!

[33] Undated but re Halloween 2012, http://oldenwilde.org/oldenwilde/samhain/rite2012/upcoming2012.html.

> . . . Following trance dancing to magical music and an opportunity for singles to mingle and meet, Coven Oldenwilde's High Priestess Lady Passion and High Priest *Diuvei will conduct a mass handfasting and broom-jumping for partners of any gender or number who wish to declare or renew their vows to one another. . . .
> . . . "Prejudice is petty. This will be a spirited demonstration for love equality," emphasizes Lady Passion. "We'll use the olde words from the Gardnerian Book of Shadows to sanctify anyone's marital bonds, including polyamorous groups." . . .

Id. Note the connection "Lady Passion" makes between gay marriage and polyamory, *see id.* Once off the rails of traditional marriage, what's to stop a plunge down the cliff?

Some may claim that polygamy is inherently dangerous and unequal in a way that a pair of married gay people is not. However, what if, say, there were an isogamous multipair marriage ("IMM"), "isogamous" roughly from the Greek, "iso" ("equal") plus "gamous" ("marriage"), which had an even number of partners, both in total and in balance of female and male. E.g., two men marrying two women. Or three marrying three. There could be an upper bound set by a State, e.g., ten people (five pairs) would be too many, so an eight-person marriage would be the maximum. But "equality"

would reign, and gender balance. What open-minded gay couple could complain about an "IMM"?

An "IMM" would be horrific, as all polygamy (or polyandry) is; but could one claim it to be so unequal and inherently dangerous, that it *ipso facto* is less legalizable than gay marriage? One wonders. (And as vile as polygamy is, at least it makes children.)

But this all, horrifically enough, is not just conjecture these days. *See, e.g.*, Paul Foy, *Federal court hears 'Sister Wives' lawsuit*, Associated Press, AnnArbor.com,[34]

> A federal judge heard arguments on whether Utah can prohibit plural marriage but issued no immediate ruling in a lawsuit by the stars of the reality show "Sister Wives[", Kody Brown and his four wives.]
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> . . . .
>
> The hearing dealt with the legalities of due process and freedom of association.
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> . . . .
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> [The Browns' lawyer, constitutional law professor Jonathan] Turley said Utah has to prove the harm of polygamy[.] He argued . . . that Utah was trying to enforce morality.
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> "We're asking for what Justice Brandeis called the most important

[34] Jan. 18, 2013, 4:01 a.m., http://hosted2-2.ap.org/MIARB/de28c0fc889d40d9b250be473495121a/Article_2013-01-18-Sister%20Wives/id-c1ed807330de46cd99a808d6c5d20a75.

> constitutional right, the right to be left alone," Turley said[.]

Id. So to speak, the barbarians are at the gate. Does the Court want to throw it open?

IX. RATIONAL BASIS SANS ANIMUS IS THE RIGHT LEVEL OF SCRUTINY, THOUGH DOMA (OR PROPOSITION 8) MAY PASS HIGHER LEVELS AS WELL

Any rational basis should be enough to prevent legalized polygamy, or gay marriage. As in *Romer v. Evans*, 517 U.S. 620 (1996), rational basis "with a bite", *see id. passim*, is the correct level of scrutiny to sift governmental actions re gay marriage. The "bitelessness" refers to the need for the State actions to lack animus towards gays. Since gays are not a "protected group", i.e., a racial or religious group, rational basis sans animus ("RBSA") is appropriate, instead of stricter scrutiny.

This is especially so since gays are less oppressed than they used to be. Since *Romer*, there has been *Lawrence* (2003), most notably. Also, gays are now free to serve openly in the armed forces. There is a publicly lesbian U.S. Senator now, Tammy Baldwin, *see, e.g.*, Emanuella Grinberg, *Wisconsin's Tammy Baldwin is first openly gay person elected to Senate*, CNN,[35] who can hold or block, on her own, legislation she deems injurious to gays. And Baldwin's state *bans gay marriage, see id.*, which helps disprove the idea that a ban on gay marriage

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[35] Updated 3:01 p.m., Nov. 7, 2012, http://www.cnn.com/2012/11/07/politics/wisconsin-tammy-baldwin-senate/index.html.

shows "animus". If Wisconsinites hate gays so much, why did they elect one to the Senate?

So, since gays are actually in better shape than formerly, why should "rational basis" be dropped in favor of heightened scrutiny?

An additional strike against heightened scrutiny is the relative amorphousness of homosexual status. E.g., is homosexuality present from birth, with no element of choice present? One doubts this. —A hypothetical: even if tomorrow science mysteriously discovered a new radioactive element, call it, say, "lesbium", which predisposes people to be gay in proportion to how much of it is in a particular person: this would only show a tendency, not a tyranny. People overcome, or simply ignore, many of their tendencies.

For example, there is actress Anne Heche, who was in a lesbian relationship with Ellen DeGeneres but has gone on to have two children with two different men, *see, e.g.*, Alex Witchel, *Anne Heche Is Playing It Normal Now*, N.Y. Times.[36] If gayness is immutable, how explain Heche? Those who are "pro-choice" may want to acknowledge that she made choices of lifestyle, and was not just the helpless puppet of congenital Sapphic desires.

But even if heightened scrutiny is somehow necessary, the various rational bases already adduced (plus any mentioned in the meritorious briefs on the sides of BLAG and Hollingsworth), when added together, form at least an important, or

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[36] July 31, 2009, http://www.nytimes.com/2009/08/02/magazine/02heche-t.html?_r=3&pagewanted=all&.

very important, government interest or interests, with the non-endorsement of gay marriage substantially related to those interests. E.g., not giving tax or bankruptcy breaks to gay couples is obviously seriously related to the public fisc.

In fact, even strict scrutiny might be met by the interests adduced. E.g., the interest in gender diversity of parents may be at least compelling as racial or gender diversity at colleges; and this compelling interest is met in practically as narrowly tailored a manner as can be. People are not arrested for not entering opposite-sex marriages, or propagandized or harassed by State billboards or mandatory "get married" classes into entering them; rather, people are just not actively *subsidized and lionized* by government for entering another type of marriage, same-sex marriage.

Similarly, with the disease- and injury-risking practice of sodomy—and reduction of AIDS and cancer seems to be a compelling national interest—, *Lawrence* prohibits punishing sodomy, so how can sodomy be not encouraged? By…being not *encouraged*, which is what the illegality of gay marriage does, since no State "merit badge" or financial benefit, no reward, is given to gay marriage, which is a marriage physically centered on sodomy. (People are legally free to engage in sodomy in private all they want.)

This is arguably even more narrowly tailored than government-funded "safe sex" classes, which may actively mention the danger of practices like anal intercourse. By contrast, the lack of gay marriage doesn't even *mention* anything, or *do*

anything at all; it is just a gap, a lack of State approval and reward.

X. GENEROUS ALTERNATIVES TO COURT-ORDERED LEGAL GAY MARRIAGE

While the Court is not obliged to force States or Congress to grant any benefits to gay couples whatsoever, it may, for all Amicus knows, feel obliged to grant something. Then, here, in ascending order of desirability, is what the Court could order, in lieu of ordering nationwide gay marriage:

1. Mandatory legality of civil unions or similarly-named arrangements, with much or all of the benefits of marriage, but sans the name "marriage".

2. The same as in 1, *supra*, but with "domestic partnerships" in place of "civil unions".

3. Mandatory bundle of rights or entitlements, e.g., hospital visitation, funding, etc., with much or all of the benefits of marriage, but sans the name "marriage", "civil union", or "domestic partnership". I.e., there would be rights or entitlements, but with no official union/partnership recognized by the State. If a name is needed, it could be called a "Co-Resident Long-Term Contract" or such.

4. Mandatory individual and *a la carte* rights or entitlements, e.g., hospital visitation, or any other particular measure or measures, which might be considered so crucial that it would putatively be illegally inhumane for any American governmental unit to deny them.

The least undesirable level would be level 4, *supra*, since it is the least intrusive on the will of the States and Congress. But Amicus is not recommending the Court impose any of the levels above upon America.

XI. HOW COURT-ORDERED GAY MARRIAGE MAY HURT THE CAUSE OF GAY MARRIAGE

Even gay-marriage advocates, ironically, may not want the Court to impose at all on these issues. *See, e.g.*, Jonathan Rauch, *How Can the Supreme Court Help Gay Rights? By Keeping Out Entirely*, The New Republic,[37]

> Until this year, gay-marriage proponents lost in every state referendum where they made their case to the voters. Last month, the tide turned; we won four out of four. . . .
>
> . . . .
>
> Gay Americans are in sight of winning marriage not merely as a gift of five referees but in public competition against the [sic] all the arguments and money our opponents can throw at us. A Supreme Court intervention now would deprive us of that victory.

Id.

This is not even mentioning those gays who *oppose* gay marriage, *see, e.g.*, Gays Against Gay

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[37] Dec. 12, 2012, 12:00 a.m., http://www.tnr.com/blog/plank/110949/the-only-way-the-supreme-court-can-help-gay-marriage-staying-out-it#.

Marriage, *Gay Marriage IS a Threat — To Gay Sexual Freedom*,[38] "Gay activists are rejecting civil unions that are literally identical to state-enforced marriage contracts except in name, on principle. This is because they want to mimic the religious heterosexuals that hate them." *Id.*; Jonathan Soroff, *Gays Against Adam and Steve*, The Good Men Project,[39]

> It's demonstrably not the same thing as a marriage between a man and a woman. It's two guys or two girls, and no matter how much Mendelssohn and matching white outfits you dress it up in, the religious and social significance of a gay wedding ceremony simply isn't the same. We're not going to procreate as a couple (until science catches up), and while the desire to demonstrate commitment might be laudable, the religious traditions that have accommodated same-sex couples have had to do some fairly major contortions to do so . . . . So the promise part is nice. Otherwise, "gay marriage" is beside the point. And for precisely that reason, I find it cringe-worthy to watch gay couples aping the rituals of a heterosexual wedding ceremony.

Id.

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[38] July 5, 2011, http://nogaymarriage.wordpress.com/2011/07/05/gay-marriage-is-a-threat-to-gay-sexual-freedom/.

[39] June 8, 2011, http://goodmenproject.com/featured-content/gays-against-adam-and-steve/.

"Straights" (heterosexuals) may disagree with, and gays may agree with, the two Jonathans, *supra*. Or vice versa. In any case, all these perplexities are for the People and their representatives to hash out. And hash them out civilly, sans animus or rancor, in respectful agreement or disagreement, "with malice toward none, with charity toward all".[40] And these battles may even be recalled 10 or 20 years hence, "*Forsan et haec olim meminisse iuvabit*",[41] over a glass of Bailey's Irish Cream—not that there's anything wrong with that.[42]

CONCLUSION

Amicus respectfully asks the Court to reverse the judgment of the court of appeals; and humbly thanks the Court for its time and consideration.

January 29, 2013 Respectfully submitted,

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[40] President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).
[41] Virgil, the *Aeneid*, bk. I, l. 203, translatable, *see id.*, as "Maybe one day we'll look back on these things and laugh."
[42] *Pace* the Cameroonian opinion, Guardian article, *supra* at 27.