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

AMICUS BRIEF OF THE THOMAS MORE LAW CENTER AND CHUCK STOREY, IMPERIAL COUNTY CLERK, IN SUPPORT OF PETITIONERS (ADDRESSING THE MERITS)

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INTEREST OF AMICI[1]

The Thomas More Law Center (TMLC) is a non-profit, national public interest law firm based in Ann Arbor, Michigan that defends and promotes America's Judeo-Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. The TMLC supports traditional marriage between one man and one women and opposes the legalization of same-sex marriages.

Chuck Storey is the county clerk/recorder of Imperial County, California. The County and some of its officials moved to intervene in the district court in this case; that motion was denied, and the Ninth Circuit affirmed the denial of intervention, in part because the then-county clerk was not a proposed intervenor. *Perry v. Schwarzenegger*, 630 F.3d 898, 903 (9th Cir. 2011). Chuck Storey, recently elected and sworn into office as the new county clerk the day before the Ninth Circuit affirmed the denial of standing, promptly moved to intervene on appeal. Motion to Intervene as Defendant-Appellant, Nos. 10-16691 & 11-16577 (9th Cir. Feb. 21, 2012). The Ninth Circuit denied the motion as untimely. *Perry v. Brown*, 671 F.3d 1052, 1069 n.6 (9th Cir. 2012). The ultimate

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[1]The parties in this case have filed blanket letters of consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the TMLC, Advocates for Faith and Freedom, their members, or counsel for amici made a monetary contribution to the preparation or submission of this brief.

ruling in this case will affect the duties of the county clerk with respect to marriage.

SUMMARY OF ARGUMENT

As with the issue of abortion, "[m]en and women *of good conscience* can disagree," *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) (emphasis added), over the wisdom of redefining marriage to embrace same-sex unions. In light of the "common and respectable reasons for opposing" such a redefinition, *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), taking that position cannot be treated, as a matter of law, as reflecting nothing more than irrational animus against some class of people.

Difference does not imply inferiority. Thus, recognizing marriage as a uniquely male-female relationship is not inconsistent with either protection of private sexual relations, *Lawrence v. Texas*, 539 U.S. 558 (2003), or rejection of animus toward members of the LGBT community, *Romer v. Evans,* 517 U.S. 620 (1996). Rather, adherence to the traditional definition of marriage represents the recognition of the basic biological reality that male-female sexual relations, and only male-female sexual relations, can produce a pregnancy and childbirth. Appreciation of this difference is not discrimination, it is acknowledgment of the facts of life.

This Court should decline to impose a federal judicial requirement to allow same sex marriage. Declaring that adherence to the traditional definition of marriage is irrational and illegitimate would profoundly delegitimize those who subscribe to such a position, facilitating the imposition of a species of

ideological totalitarianism upon objectors to a regime of redefined marriage.

ARGUMENT

I. IT IS RATIONAL AND LEGITIMATE FOR A GOVERNMENT TO RECOGNIZE MARRIAGE AS UNIQUELY THE UNION OF ONE MAN AND ONE WOMAN.

The court below, like other lower courts striking down state or federal laws defining marriage as consisting of the union of a man and a woman, ultimately ruled that it is irrational for the government to distinguish between male-female unions and other couplings for purposes of the law of marriage. This ruling is erroneous. It is plainly rational to recognize the inherent, categorical, biological uniqueness of the act of sexual intercourse.

A. The Marital Act Is Unique, and Uniquely Male-Female, in Nature.

A stark biological fact must begin the inquiry: a man and a woman, and only a man and a woman, are capable of engaging in sexual intercourse, i.e., the biological act which is capable of producing children. *Michael M. v. Superior Court*, 450 U.S. 464, 500 (1981) (sexual intercourse that presents possibility of pregnancy "requires the participation of two persons – one male and one female"; this is an "indisputable biological fact") (Stevens, J., dissenting). Recognition of this fact is no more "discriminatory" than recognition of the fact that only men can get prostate cancer, or that only women have wombs, or that "females can

become pregnant as a result of sexual intercourse; males cannot," *id.* at 478 (Stewart, J., concurring).

To be sure, a man and a woman are not necessary elements for other acts involving sexual organs. But one need not catalogue those acts to acknowledge that, unlike sexual intercourse, *none* of these other acts can produce a human child.

Reserving marriage to a man and a woman thus reflects the inherent distinction between those pairs capable of engaging in the act which can produce human offspring, and those pairs which cannot. Tellingly, the act of sexual intercourse is referred to as "the marital act." *E.g.*, *Boyd v. Folsom*, 257 F.2d 778, 782 (3d Cir. 1958) ("Mr. Boyd's death occurred while he was performing the marital act"); *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980) (loss of consortium claim: "it was impossible for us to consummate the marital act"); *Stepanek v. Stepanek*, 193 Cal. App. 2d 760, 763, 14 Cal. Rptr. 793, 795 (1961) (marriage annulment) ("failure or inability to accomplish the marital act"); *State v. Gray*, 187 Neb. 197, 202, 188 N.W.2d 705, 708 (1971) ("'what is commonly known as the marital act of sex'"); *De Baillet-Latour v. De Baillet-Latour*, 301 N.Y. 428, 431, 94 N.E.2d 715, 715 (1950) (annulment) ("fraudulent intent not to perform the marital act"); *Furlow v. Campbell*, 459 S.W.2d 284, 286 (Mo. 1970); *Duncan v. Duncan*, 182 Ga. 602, 603, 192 S.E. 215, 216 (1937).

It is certainly true that nowadays a child can be generated without the marital act. *In vitro* fertilization and artificial insemination, for example, can be used to produce children. *E.g.*, *Astrue v. Capato*, 132 S. Ct. 2021, 2025 (2012). But these technologies are available to all persons, not just same-sex couples, and thus are not tied to any particular union, sexual or otherwise.

These scientific developments do not negate the unique potential of the marital act, as a human sexual act, to procreate children.

Of course not every marital act produces a child. In some cases the couple may be physically incapable of conceiving their own biological offspring. Others may decide, as a matter of personal choice, not to procreate for a time or even permanently. Nevertheless, it remains true that only the marital act has the inherent, categorical potential, unlike all other sexual acts, to generate a human child. And only a man and a woman can engage in the marital act.

Certainly there are same sex couples who are already raising children (including, in some cases, children biologically related to one or even both care givers). But siblings, relatives, and single people can do the same. How the law should deal with child rearing, custody, and child support obligations in situations apart from the raising of a pair's naturally conceived, biological offspring is a matter to be addressed by adoption and custody laws, which do not necessarily overlap coextensively with marriage laws. That an aunt and her sibling uncle can raise or adopt a child does not mean they have to be able to marry.

B. It Is Neither Irrational Nor Illegitimate to Recognize Inherent Differences.

Government recognition of the unique potential of the marital act, for purposes of marriage legislation, is neither irrational nor illegitimate. As Justice O'Connor observed, "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in the judgment).

The *Lawrence* decision "d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578 (majority). Since only a man and a woman can engage in the procreative act, *supra* § I(A), government can properly recognize that there is something importantly different about man-woman unions, as opposed to man-man or woman-woman unions.

1. There is no unfairness.

This distinction is not unfair.

To say that same-sex couple are denied "marriage equality" begs the question. If marriage is an institution inherently tied to the unique one-flesh procreative potential of male-female unions, then same-sex couples are no more denied equality than are two devoted sisters. Unless the institution is *a priori* redefined – say, as a committed romantic union of two consenting adults – there is no denial of access in the first place. While those sexually attracted to members of the same gender understandably may not *want* to enter a marriage with a person of the opposite sex, they are as legally entitled to do so as anyone else. Moreover, their reason not to pursue this state of life with a person of the opposite sex is just one of many reasons why people do not marry.

Same-sex couples may be financially dependent upon each other. But so may a pair of elderly sisters, or lifelong nonsexual friends, or a widowed parent and unmarried child. Imposing an estate tax, for example, upon the surviving sibling of a pair who lived in a shared home is no less burdensome and unfair in this

sense. The siblings cannot legally marry each other either.

Same-sex couples may profess love for each other. Of course, the state does not require love to enter a marriage; nor does the state require a lack thereof to dissolve one. Marriage is not "officially acknowledged romance." In any event, siblings, colleagues, "best friends forever," and even people already in marriages to other persons may love each other. This does not mean governments must proffer them the option to marry.

Same-sex couples may find special meaning in sexual acts they engage in. But as explained above, the unique nature of the marital act makes it stand alone among sexual acts. Different does not necessarily mean better or worse. It just means *different*.

2. There is no inherent animus.

"Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Bray*, 506 U.S. at 270. Here, however, as in *Bray*, "opposition" to the redefinition of marriage "cannot possibly be considered" – at least, as a matter of binding constitutional law – "such an irrational surrogate for opposition to" those desiring government recognition of their unions as legally "marriages." *Id*. As noted above, treating different things differently does not imply a value judgment. Here, preserving the traditional definition of marriage can simply recognize the unique biological potential of the marital act. That recognition is an acknowledgment of biology, not an

expression of bias. Indeed, one can embrace a right for those with same-sex attractions to set up a household, adopt, receive the protection of anti-discrimination laws, *Romer v. Evans*, and engage in sexual acts, *Lawrence*, without denying the unique procreative potential of the male-female marital act. In fact, one can be a member of the LGBT community without necessarily believing that marriage should be redefined to include same-sex unions. *E.g.*, B.P. Terpstra, "Gays Against Gay Marriage," Taki's Magazine (Mar. 12, 2012); Jonathan Soroff, "Gays Against Adam and Steve," The Good Men Project (June 8, 2011); Ryan Conrad, ed., *Against Equality: Queer Critiques of Gay Marriage* (2010).

Biology is not ideological. Nor does the recognition of biological reality imply any disparagement of individuals. A man need not feel maligned, or consider himself a self-hater, for example, because he realizes that he will never conceive and become pregnant.

II. JUDICIALLY IMPOSED REDEFINITION OF MARRIAGE WOULD DELEGITIMIZE OBJECTORS AND THUS FACILITATE CONSTRICTION OF THEIR LIBERTY.

To enshrine one side of a deeply divisive issue in constitutionally untouchable concrete is to fashion a legal weapon with which to beat down ideological opponents, at the cost of intellectual liberty. For this Court to say that it is irrational or illegitimate for a government to recognize, and act upon, the distinction between the potentially procreative marital act, and every other sexual act, would be for this Court implicitly to declare as irrational, benighted, or

bigoted, all those individuals who adhere to the traditional view of marriage.

Already those who dare to voice objections to any part of the political program of various LGBT advocacy groups risk villification, marginalization, or worse. *See infra*. Liberty suffers when one side of a debate is delegitimized as a matter of constitutional law.

In the similarly controversial context of abortion, this Court has more recently adopted a détente of sorts: states may not *outlaw* the act, but they may *treat it differently* for purposes of funding and regulation. This approach recognizes the unique nature of abortion in biological terms. *Casey*, 505 U.S. at 852 ("Abortion is a unique act"); *Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Abortion is inherently different from other medical procedures"). The union of a man and woman in the marital act is likewise unique, and it is thus legitimate for the government – and individuals – to recognize and act upon this difference.

In *Lawrence*, this Court has held that sexual acts between persons of the same sex may not be prohibited. But to go further and say that no government may treat such acts as *different*, for purposes of government policy or official recognition, from the unique marital acts of a man and a woman, would be enormously to expand the constitutional power this Court already affords sexual choices as such. To take that additional step would be to declare unacceptable and illegitimate the recognition of the uniqueness of the marital act. Those who subscribe to that recognition, in turn, then become pariahs, ignoramuses, or bigots in the eyes of the law.

Opponents of the legal redefinition of marriage already face the prospect of significant retaliation. *E.g.*, *Hollingsworth v. Perry*, 130 S. Ct. 705, 707 (2010)

(per curiam); *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010); *id.* at 2826-27 (Alito, J., concurring). Equating such persons, as a matter of constitutional law, with racist rednecks or backwards fools, serves as a legal license to continue or increase the legal and social marginalization of such persons. The price is the loss of liberty for these individuals who can no longer obtain gainful employment in their fields, *e.g.*, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (counseling student expelled for failure to subscribe to view that homosexual relations are equivalent to heterosexual relations); *Elane Photography v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012) (professional photographer fined for failure to treat lesbian commitment ceremony the same as a wedding), and the loss of intellectual diversity for the larger society, *e.g.*, *Dixon v. University of Toledo*, No. 12-3218 (6th Cir. Dec. 17, 2012) (black administrator fired for writing op-ed piece criticizing analogy of sexual orientation to race). This Court should not foster the imposition of what would be, in effect, an ideological totalitarianism, i.e., a regime in which the unquestioning acceptance of the same-sex marriage movement represents the only permissible point of view.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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