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 OF AMICI CURIAE CHRIS KLUWE AND BRENDON AYANBADEJO IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

Chris Kluwe is the punter for the Minnesota Vikings of the National Football League. He majored in political science and history at UCLA. Chris currently contributes to a number of popular publications, and is best known outside of football for his advocacy on behalf of same-sex marriage. He drew broad attention for his recent open letter on the sports website Deadspin regarding a Maryland state delegate's effort to silence such advocacy in violation of the First Amendment (http://deadsp.in/NZo1id), and he has discussed his views on equality on *The Colbert Report*, *The Ellen DeGeneres Show*, *The Nerdist* podcast, and in the documentary "The Last Barrier."

Brendon Ayanbadejo is a linebacker and three-time Pro Bowler for the Super Bowl Champion Baltimore Ravens. The child of a Nigerian father and Irish-American mother, he was taunted over his parents' right to be married when growing up in the Lathrop Holmes housing project on the West side of Chicago, and sees today's fight to legalize same-sex marriage as the 21st century version of the fight for racial equality. Brendon majored in history at UCLA, wrote for the Santa Cruz Sentinel early in his NFL career, is the union representative for the Ravens, and expects to obtain an MBA this Spring

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. *Amici* understand that Petitioners and Respondents have both consented to the filing of amicus briefs in this appeal.

from George Washington University. He advocated for the passage of the FIT Kids Act, and more recently for same-sex marriage, dating back to a posting he wrote that was published by the Huffington Post. His advocacy gained attention when the Maryland delegate mentioned above, writing on state letterhead, urged the Ravens to "take the necessary action . . . to inhibit such expressions from your employees" (http://yhoo.it/SqSVYp). Upon noting that his parents' marriage would have been illegal in 16 states before *Loving v. Virginia* was decided, Brendon stated that he would not be silent on this issue of equality, conscience, and public importance.

Chris and Brendon believe and advocate that, just as athletes should be judged, not by their sexual orientation, but by their performance and the way they treat their teammates, so too should people be judged as citizens by how they act and treat others, and not what they inherently are.

INTRODUCTION

Sports figures receive a celebrity status that influences a large majority of the American population. For far too long, professional sports have been a bastion of bigotry, intolerance, and small-minded prejudice toward sexual orientation, just as they had been to racial differences decades earlier. That is finally changing, and changing drastically. The NFL, NHL, MLB, and NBA, at the league level, team level, and individual level, are finally speaking out against homophobia and intolerance of LBGTQ individuals. More and more of us realize that using demeaning slur words like "faggot," "queer," and "gay" can have serious, negative consequences.

Not necessarily consequences for us. Instead, consequences for the children and adults who look up to us as role models and leaders. Consequences for children and adults who mimic our behavior when they interact with others. And consequences that can be severe, long-lasting, and not infrequently lead to suicide and other serious harm.

America has an ideal—exhibited imperfectly in the original Constitution and more perfectly in the Fourteenth Amendment—that all should be treated equally for what they are. When our government discriminates properly, it does so, not based on what we inherently are, but instead to regulate our negative actions against each other. Courts exist—because of men who long ago placed individual freedom as an ultimate principle for their country—to correct government action that takes away freedoms when that action is motivated by fear and prejudice rather than by evidence and logic. This Court should correct Proposition 8's action to remove marriage rights from same-sex couples because, as the district court and the Ninth Circuit majority so carefully explained, the advocates of Proposition 8 provided no evidence-based rationale—as opposed to one based on fear and prejudice—for treating LBGTQ citizens differently with respect to marriage.

ARGUMENT

I. PROFESSIONAL SPORTS PLAY A MAJOR ROLE SHAPING PUBLIC OPINION AND URGING SOCIETAL PROGRESS, LIKE IT OR NOT

Sports receive great attention, the merits of which can certainly be debated, that influences a

large majority of the American population. With full respect, we submit that few would blink an eye if someone could name all eleven starting offensive or defensive players on their favorite NFL team, but not name half the members of this Court.

That public focus can be positive and it can be negative. On the positive side, Dallas Mavericks owner Mark Cuban recently wrote about how his NBA franchise is different than all his other businesses, and he excerpted communications from fans whose lives had been positively affected:

> [U]nlike every other business, making the most money possible is not a driving motivation. I try to recognize that Mav's fans aren't only about wins and losses. . . . In fact, while they want the Mavs to win, they are Mavs fans, win or lose. . . . There are fans who love the Mavs because it makes their lives better. [¶] There are not many businesses that can begin to have that kind of impact on their customers/fans.

Mark Cuban, *The Mavs are a Business Unlike Any Other*, blog maverick (Feb. 12, 2013, 11:54 AM), http://bit.ly/YoseRc.

No one can explain this emotional connection to sports teams, which causes many to act irrationally. Attorneys and executives in Washington, D.C. wear pig snouts and wigs in public and without shame. Young men who are supposed to be love-stricken choose the fundamentally unromantic locale of a ballpark to propose marriage. And neighbors across thin state lines—who share upbringing, basic values, occupations, religion, and even hobbies—form Hatfield-McCoy battle-lines against each other for

decades, based solely on allegiance to professional sports teams. The natural public pull to professional sports cannot be explained, but it plainly exists. Professional sports have real power to motivate, to inspire, and to form public opinion.

Individual players have similar power, particularly over young people. Indeed, who can doubt the effect of players who are so very often referenced, not ironically, as "heroes." Stanley Frank Musial, through a life that included a 72-year marriage and a Presidential Medal of Freedom was, in the words of President Obama, "an icon untarnished, a beloved pillar of the community, a gentleman you'd want your kids to emulate"—most definitely "The Man." *See, e.g.,* Cal Thomas, *The Man,* Townhall.com (Jan. 21, 2013), http://bit.ly/VKdQVw. Another Medal of Freedom Winner, Billy Jean King, was the most admired woman in the world in 1975 in a poll of Seventeen Magazine readers, and was described by her prime rival as "my mentor" and "the wisest human being that I've ever met [who] has given me advice [on] dealing with my parents and even how to raise children." Stan Grossfeld, *No Royalty like King*, Bos. Globe, Dec. 3, 2006, http://bo.st/WbscMk). The list goes on—Roberto Clemente, Jim Abbott, Michael Oher, and Muhammad Ali. All an inspiration to children and adults who have no doubt used their examples of class and dedication to improve their own lives and the way they treat others.

On a much more substantive level, while some people may be able to name the first African-American Congressperson or physician, so many more know about, and will never forget, Jackie Robinson and what he achieved. Professional

baseball was much more than just a game when Jackie Robinson started playing for the Brooklyn Dodgers in 1947—"trigger[ing] a revolution that altered the sociopolitical landscape in America." Justice B. Hill, *One Meeting, Two Men, a Changed World*, mlb.com (Apr. 15, 2008 12:11 PM), http://atmlb.com/UKbl6L. When professional athletes do the right thing, their efforts are magnified, sometimes in truly astounding ways.

Unfortunately, the same hyper-focus on professional sports follows equally for negative influences. As one national survey concluded, "American kids are mirroring the behavior of famous athletes—the good and bad—both on and off the field." Henry J. Kaiser Family Found., *Children Get Mixed Messages from Famous Athletes, Both On and Off the Field*, Oct. 12, 2000, *available at* http://bit.ly/W4V6mz. The most frequently-reported instances of bad athlete behavior include crimes committed, bad sportsmanship, and marital infidelity.

Under all the bad behavior that makes the news, male professional sports for far too long have harbored bigotry, intolerance, and prejudice—with respect to both race and sexual orientation. Much progress has been made on the racial side, and it has made sports that much better. African-American players are, of course, now well-represented in professional sports, and the situation is improving for coaches and management.

We are just beginning to see progress with regard to the issue of sexual orientation. No active athlete in any of the major male sports has come out, as professional athletes themselves feel the impact of homophobia, like soccer pro (footballer) Robbie

Rogers, who only came out recently as he retired from the sport. Mr. Rogers stated:

> "Secrets can cause so much internal damage. People love to preach about honesty, how honesty is so plain and simple. Try explaining to your loved ones after 25 years you are gay. Try convincing yourself that your creator has the most wonderful purpose for you even though you were taught differently."

Ted Berg, *U.S. Soccer Player Rogers Retires, Comes Out in Blog Post,* USA Today, Feb. 15, 2013, http://usat.ly/UnNqK9.

Yet many professional athletes are speaking up—both to clear the way for any teammates who may be gay and closeted, and from an understanding of how even seemingly minor acts by professional athletes can reverberate with the public. Tolerance is becoming the message in locker rooms and from teams that recognize they cannot countenance use of pointless slurs like "faggot," "queer," and "gay." Regardless the intent with which those terms are spoken, they classify a group and particular people as synonymous with the lesser, and professional athletes are beginning to understand that.[2]

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[2] Progress can also be seen in other traditionally hidebound fields, such as rap and R&B music. *See, e.g.,* Ben Haggerty (a/k/a Macklemore), *Same Love*, *on* The Heist (Macklemore LLC 2012), *available at* http://bit.ly/ZjcMbe ("If I was gay, I would think hip-hop hates me / Our [hip-hop] culture founded from oppression, yet we don't have acceptance for 'em / Call each other faggots, behind the keys of a message board / A word rooted in hate, yet our genre still ignores it") (also sampled in this brief); *see also Macklemore's Gay Anthem*, Studio 360 (Nov.

These athletes understand that, because of their public stature, the consequences flow naturally from their actions even if they cannot see the consequences. Consequences of being a role model and leader. Consequences for young children and adults who mimic our behavior when they interact with other children and adults. Those consequences flow because children and adults want to "Be Like [insert athlete name here]." Athletes are learning that they can no longer say "I am not a role model"—that they are forced to be a role model and privileged to be a role model, and that their words and actions, no matter how innocently intended, are magnified for both good and bad. If a professional basketball or football player says something is "gay," young boys on the playground will copy and magnify the statement. If a hockey player says homosexuals are not welcome in the locker room, a young girl will shun a teammate who she thinks may be gay—where that teammate was until then a bright, happy, smart, and promising kid. After, she will be afraid of being who she is, and will takes steps, even dire steps, to avoid it.

But if a Pro Bowler treats a teammate as being an equal who is worthy of his friendship and respect because that other person is a good friend who places

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30, 2012), http://wny.cc/Uv2bcG (in an interview: "Those [misogyny and homophobia] are the two acceptable means of oppression in hip-hop culture. It's 2012. There needs to be some accountability."); Amy Wallance, "Ocean-ography" (Interview with Frank Ocean), GQ Magazine, Dec. 2012, *available at* http://gqm.ag/WsCKKY (Ocean: "[Y]ou worry about people in the business who you've heard talk that way. Some of my heroes coming up talk recklessly like that. It's tempting to give those views and words—that ignorance—more attention than they deserve.").

the team before himself, then high schoolers in Texas, Georgia, Illinois, Florida, Ohio, Pennsylvania, California, and Minnesota will not—cannot—miss that example. If that Pro Bowler speaks out publicly and kindly, kids will hear it and feel it. Kids who are already dealing with everything youth throws at them will know they can treat others as friends and equals, and those others will know they are equal and that, without question, it is better to be themselves than to be hurt. They will follow the credo, "Live on, and be yourself."

This Court, incredibly enough, has a central role in that process. Your stance, your legal reasoning, will be used by countless people, including athletes, to justify their actions. People are not wholly unplugged. They pay attention to what is going on in the world, what is going on in politics, and what is going on in the law. Professional athletes are citizens of this country just like everyone else, and just like everyone else, the decisions of the Supreme Court are powerful indicators of acceptable behavior.

If the Court reverses the Ninth Circuit, many professional athletes will take their cues from that. And that will cause a ripple effect as even more people follow their role models, their leaders, their heroes.

Those against same-sex marriage? They will use it as yet another tool to support their preconceived idea that gay Americans, who pay their taxes, serve in our military, and by every measure of societal participation are superior neighbors and citizens, are instead second class members of society. That they do not deserve the same rights as everyone else. That separate can be equal.

Those for same-sex marriage? They will see it as proof that justice is not blind in this country, rather, that justice does not exist anymore. History shows that societies suffer when a minority group feels it has no recourse under the legal system, and that it must suffer or try something else.

The amici *hope* that our support for marriage equality here will matter—both with the Court and with people looking for confirmation that it is okay to treat other good people as equals. We *know* for a certainty that this Court's decision truly will matter, and in a tremendous way for many people's lives.

II. THE NINTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH VIEWS OF EQUALITY IN THE CONSTITUTION AND WITH PRECEDENT

Despite legions of attorneys attached at all points to this case, the law regarding the equal protection is pretty simple. In America, if we don't like something but our dislike is based on nothing more than gut feel, misunderstanding, or prejudice, we leave it alone. Live and let live. We want to be free from your interference, so you too should be free from ours.

The Constitution and all that this country is built upon allow governmental discrimination only for legitimate and evidence-based reasons. We discriminate against criminals *because* they are hurting someone and must be treated differently. We discriminate against people who want to drive vehicles by making them pass a test *because* we legitimately want safe roads. And we discriminate against polluters *because* we have a legitimate,

evidence-based interest in clean water and air. We allow such governmental discrimination both because we can readily see a societal basis for it, and because of a lack of any history of pervasive and irrational discrimination against such people and groups.

But we default to freedom from governmental discrimination—freedom of individuals to lead peaceful and productive lives. We do that because our Founders rebelled from overbearing government, and because they baked that principle right into our original and amended Constitution, making our government one of limited powers in general, and one that must, absent good reason to the contrary, provide equal protection under the laws to all its citizens. Much as a referee is to call no penalty unless there is a foul—and to let athletes play the game according to their own styles because that maximizes everyone's enjoyment of the game, government should stay to the side until and unless it can identify a real foul that needs correcting.

In making decisions on Constitutionality, this Court sometimes arrives with a *skepticism directed against the regulator*, when the regulation is of a type that has traditionally been enacted with improper motivation (e.g., race-based laws), and a *skepticism directed against the regulated* when the field has traditionally been subject to benign laws (like basic economic regulation). *E.g., Romer v. Evans*, 517 U.S. 620, 634 (1996); *City of Cleburne v. Cleburne Living Cent.,* 473 U.S. 432, 440 (1985). This case is one that merits closer review of the government action, as the district court so carefully identified the historical targeting of gay men and lesbians via ballot initiatives and other

discrimination despite the undoubted positive contributions they make to society. *E.g.*, Pet. App. 228a-234a; 264a-279a; 300a. Indeed, how could a group with such high employment, high educational achievement, low crime, and high positive societal participation be the target of so much negative governmental action, but for improper and irrational motive?[3]

Moreover, marital choice is a central right in history and in the history of this Court's jurisprudence. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). It is "intimate to the degree of being sacred," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), and "essential to the ordinary pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Moreover, the Court has found it to be associated with the fundamental rights of association, privacy, and liberty. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Griswold*, 381 U.S. at 486. Thus, our cultural history and this Court's history both counsel for a close review by the Court of the purported reasons for passing Proposition 8, and taking away a right that same-sex couples previously held.

Our nation's treatment of LGBTQ citizens also has parallels to its treatment of racial minorities—

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[3] *See, e.g.,* Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, Demography 150 (May 2000), *available at* http://bit.ly/12bgNny ("The gays and lesbians in the census sample appear to be highly educated, span the distribution of ages, and are similar in racial make-up to the population as a whole.").

though no situation can ultimately compare to that which made Jackie Robinson's actions so important. For example, advocates of racial separation certainly cited "evidence" for their positions, yet when analyzed, that evidence time and again fell away and revealed underlying fear and prejudice. Advocates of racial separation also used labels—ugly, dirty labels—to mark those they feared and misunderstood, as do many today, still based on race but also on sexual orientation. And such advocates argued that their proposed legislation was good for families, yet their logic was largely circular (e.g., society wants white people with white people; therefore, it is good for society if white people stay with white people) and fell apart on any meaningful inspection, as do the rationales provided by the proponents of Proposition 8. *E.g., Loving*, 388 U.S. at 8. Without lessening the importance of the country's long struggle with race, *amici* submit that the historical reasons for trying to regulate based on sexual orientation are based as much on pretext as those that tried to regulate based on race. And certainly if sexual orientation were something you could not hide, like skin color, our national history in this particular area would be much worse.

Yet the Ninth Circuit's decision can and should stand, based on the record developed below, whether this Court gives a searching or a passing review of the reasons that underlie Proposition 8. The proponents of the law understandably spent little time at trial on their "Responsible Procreation" argument, because heterosexual couples, and particularly heterosexual fathers, are plainly motivated to stay with their children only by factors wholly separate from whether there might be a gay couple (married or not) down the street. The

"Proceeding with Caution" argument falls of its own weight, because it could be applied any time the majority wants to take rights from the minority. And the proponents' underlying argument—that society simply morally disapproves of same-sex marriage—is lacking in any reason for that disapproval, and thus reduces to an animus-based rationale. *See Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Conner, J., concurring).

In short, just as *application* of the labels "gay" and "queer" in derogation indicate that one class of people is inferior, *deprival* of the label and status "married" equally indicates that the class is inferior. Even a fifth grader knows that words have very serious meaning, and even a fifth grader can see that the proponents of Proposition 8 provide no reasoned, evidence-based rationale for taking away that label and that all-important status. In America, there truly is no freedom until we're equal.

When we advance the idea that some people should be treated differently because of who they are, demeaned in public as lesser beings, not worthy of the same rights and benefits as others despite their actions as good citizens and neighbors, then we deny them equal protection under the laws. America has walked this path before, and courageous people and the Court brought us to the right result. We urge the Court to repeat those actions here.

CONCLUSION

The *amici* encourage the Court to affirm the Ninth Circuit's decision overturning Proposition 8.

Respectfully submitted.

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