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* EDWARD D. STEIN, JOANNA L. GROSSMAN, KERRY ABRAMS, HOLNING LAU, KATHARINE B. SILBAUGH AND 32 OTHER PROFESSORS OF FAMILY LAW AND CONSTITUTIONAL LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[*]

Amici curiae, 37 professors of family law and constitutional law, submit this brief to address and bring before the Court the relevant precedents concerning the right to marry as a component of the liberty protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Amici* share a common professional interest in this issue. Their academic scholarship in family law and constitutional law enables them to explicate this point.

Amici support Respondents' position that the judgment of the Ninth Circuit should be affirmed, but urge that the Court consider the Due Process Clause as an additional ground for affirming the result below. *Amici* will show that marriage is a fundamental right protected by the Due Process Clause, and that citizens cannot be deprived of the right to marry without a compelling State interest.

The *amici* who have joined in this brief are: [**]

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[*] 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 *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel for *amici* authored this brief on a *pro bono* basis. The parties have consented to the filing of this brief. *See* Docket Entries for December 12, 2012.

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SUMMARY OF ARGUMENT

1. As this Court has held in a long line of decisions, the right to marry falls within the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

2. The right to marry applies regardless of whether a person is heterosexual, gay or lesbian.

3. Because it is protected under the Due Process Clause, the right to marry cannot be denied to gay men or lesbians absent a compelling State interest to support the denial. No such interest was shown at trial.

INTRODUCTION

The Ninth Circuit struck down California's Proposition 8, which amended the State constitution to eliminate the right of same-sex couples to marry, on "the narrowest ground" available: because Proposition 8 "single[d] out" such persons for unequal treatment "by *taking away* from them alone

the right to marry," it violated the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment. Pet.App. 46a-47a (emphasis in original).[1]

While *amici* support affirmance of the Ninth Circuit's decision, *amici* advocate affirming on an additional ground. *Amici* believe the right to marry is fundamental and protected by the Fourteenth Amendment's Due Process Clause. The right to marry therefore cannot be abridged for any group unless the restriction is narrowly tailored to support a compelling State interest.

In this case, the District Court undertook such a due process analysis and concluded that (i) the right to marry is fundamental and protected under the Due Process Clause (Pet.App. 287a-291a); and (ii) Proposition 8 unconstitutionally denies Respondents that right without a legitimate reason, let alone a "compelling" one (*id.* 294a-295a, 301a-316a). *Amici* agree with both of the District Court's conclusions. However, because Respondents and other *amici* will address the lack of a compelling State interest in detail, this brief focuses on the first, basic underpinning of the substantive due process analysis.

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[1] The Appendix to the Petition for a Writ of Certiorari in No. 12-144 is cited herein as "Pet.App." The Joint Appendix in No. 12-144 is cited as "J.A." The Brief of Petitioners is cited as "Pet.Br."

ARGUMENT

PROPOSITION 8 VIOLATES THE DUE PROCESS CLAUSE BY DEPRIVING RESPONDENTS OF THE RIGHT TO MARRY

A. The Right to Marry is a Fundamental Liberty Interest Protected by the Due Process Clause

The Due Process Clause of the Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, §1. The "liberty" guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint, but also the right of the individual … to marry, establish a home and bring up children … and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citations omitted). When due process rights are concerned, "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence v. Texas,* 539 U.S. 558, 572 (2003). With respect to the due process rights of gay men and lesbians, "our laws and traditions in the past half century are of most relevance." *Id.* at 571-72.

Our Nation's laws and traditions, as expounded by this Court, establish that the freedom to marry the person of one's choice is a fundamental right. Over time, the Court has established that this

fundamental right falls within the liberty protected by the Due Process Clause of the Fourteenth Amendment. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Lawrence*, 539 U.S. at 565, 573-74 (right to privacy in "the marriage relation and the protected space of the marital bedroom" is protected by Due Process Clause); *M.L.B. v. S.L.J.*, 519 U.S. 102, 128-29 (1996) (Kennedy, J., concurring) (describing certain decisions related to "rights and privileges inherent in family and personal relations" as resting on the Due Process Clause); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847-49, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage…. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) ("the decision to marry is a fundamental right"); *Zablocki v. Redhail,* 434 U.S. 374, 384 (1978) ("the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause"); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("personal decisions 'relating to marriage'" are among decisions protected by Constitutional right of privacy, which "an individual may make without unjustified government interference"); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality) (freedom of personal choice in matters of marriage and family life is protected by Due Process Clause);

Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (right of privacy extends to "activities relating to marriage"); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) ("given the basic position of the marriage relationship in this society's hierarchy of values," due process prohibited State from denying access to divorce solely because of inability to pay court fees); *Griswold v. Connecticut*, 381 U.S. 479, 482-83, 486 (1965) (marriage falls within associational rights protected by Due Process Clause); *Meyer,* 262 U.S. at 399 ("the right of the individual … to marry" has been "long recognized at common law as essential to the orderly pursuit of happiness by free men").

Protection of the right to marry is thus firmly embedded in this Court's Due Process Clause jurisprudence. Petitioners' *amici* agree on this point. *See* Brief *Amicus Curiae* of the Family Research Council Addressing the Merits and Supporting Reversal ("Family Research Council Br.") at 9 ("The Court has recognized a substantive due process right to marry.").

The understanding of who may be married has evolved over time. *See* Pet.App. 212a-220a (findings of fact describing changes to race and gender restrictions on marriage); J.A. 414-22, 424-26 (testimony of Professor Nancy Cott, Jonathan Trumbull Professor of American History at Harvard, that marriage laws formerly prohibited interracial

marriage). Despite this evolution, the institution of marriage has remained stable over time. *See, e.g.*, Pet.App. 219a ("[e]liminating gender and race restrictions in marriage has not deprived the institution of marriage of its vitality").

The common theme underlying this Court's marriage jurisprudence is the recognition that adult human beings have a liberty interest in voluntarily forming mutual, enduring intimate relationships and in having those relationships recognized and respected by the State. This Court has affirmed that the freedom to marry the person of one's choice is so fundamental that it may be enjoyed even by prisoners who have had their other liberties substantially curtailed. *See Turner*, 482 U.S. at 95-96. Affording same-sex couples the right to marry demonstrates "the respect the Constitution demands for the autonomy of the person in making these choices." *Lawrence*, 539 U.S. at 574.

B. The District Court Correctly Focused on the Right to Marry, Rather than a Right to Marry Someone of the Same Sex

After a 12-day trial in which it heard testimony from 19 witnesses (including nine experts) and received more than 100 exhibits in evidence, the District Court found that marriage is understood to be "the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents." Pet.App. 220a-221a (citing

Cott testimony). That understanding exists generally and is not limited to the boundaries of California. *See* J.A. 408-09, 427-28 (Professor Cott testifying on "the institution of marriage in the United States").

The District Court's definition is consistent with *amici*'s understanding of marriage based on their scholarship in the fields of family law and U.S. constitutional law. The District Court's definition of marriage is also readily sustainable under the "clearly erroneous" standard applicable to a trial court's findings of fact, *see* Fed.R.Civ. P. 52(a)(6).[2]

The above definition of marriage applies to all people in committed relationships, including same-sex couples. The conclusion that gay and lesbian people have a right to marry their partners is compelled by two of the decisions cited above: *Loving v. Virginia,* 388 U.S. 1 (1967) and *Lawrence v. Texas*, 539 U.S. 558 (2003).

In *Loving*, the plaintiffs challenged Virginia's miscegenation statute. Even though interracial marriage had been prohibited by statute in Virginia and other States for many years, the Court did not define the liberty at issue as a "right to interracial marriage." Instead, the *Loving* Court correctly focused on "[t]he freedom to marry" *in general* as "one of the vital personal rights essential to the

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[2] That these were proper subjects for factfinding is explained in the *Amicus Curiae* Brief of Constitutional Law and Civil Procedure Professors Erwin Chemerinsky and Arthur Miller in Support of Plaintiffs-Respondents Urging Affirmance at Point II.

orderly pursuit of happiness by free men." *Loving,* 388 U.S. at 12.

As this Court later explained, its decision in *Loving* "could have rested solely on the ground that the [miscegenation] statutes discriminated on the basis of race in violation of the Equal Protection Clause." *Zablocki,* 434 U.S. at 383. Instead, however, the *Loving* Court "went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry." *Id.* Thus, "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all* individuals." *Zablocki,* 434 U.S. at 384 (emphasis added).[3]

Loving therefore highlights Petitioners' error in trying to describe the issue at hand as whether to "redefine" marriage (*see, e.g.,* Pet.Br. 12-14). Respondents do not seek to "redefine" marriage, but rather wish to be married and participate themselves in that institution as it already exists. Similar to the Lovings, an interracial couple who successfully challenged a State law that prohibited each of them from choosing the other as a spouse

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[3] Petitioners' attempt to distinguish *Loving* as involving only "racial discrimination" (Pet.Br. 6) ignores the fact that the *Loving* opinion had two separate parts, identified as Part I (equal protection, *see* 388 U.S. at 7) and Part II (substantive due process, *see id.* at 12). This Court's understanding of that structure, as evidenced by its discussion in *Zablocki,* 434 U.S. at 383-84, is likewise unaddressed by Petitioners.

because of his/her race, Respondents are gay men and lesbians who wish to exercise the fundamental right to marry the person of their choosing.

Affirming the decision below would not change the institution of marriage for heterosexual married couples, just as *Loving* did not change marriage for same-race couples. *See* Pet.App. 289a ("When the Supreme Court invalidated race restrictions in *Loving*, the definition of the right to marry did not change."), 245a (permitting same-sex couples to marry would not affect prevalence or stability of opposite-sex marriage), 150a-151a (petitioners' admission at trial that they knew of no way in which "permitting same-sex marriage impairs or adversely affects" the State's interest in promoting procreation), 194a (citing study from 2009 concluding that laws permitting same-sex couples to marry "would have no adverse effect" on marriage rates, divorce, percentage of children born out of wedlock, or other indicators).

Indeed, gay men and lesbians may exercise the right to marry in ten jurisdictions within the United States,[4] just as some States licensed interracial

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[4] The jurisdictions are Maryland, MD. CODE ANN., FAM. LAW § 2-201 (2013); Washington, WASH. REV. CODE § 26.04.010 (2012); Maine, ME. REV. STAT. ANN. tit. 19-A, § 650-A (2012); New York, N.Y. DOM. REL. LAW § 10-a (2011); New Hampshire, N.H. REV. STAT. ANN. § 457:1-a (2010); Vermont, VT. STAT. ANN. tit.15, § 8 (2009); Iowa, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); Connecticut, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); Massachusetts, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); and the District of Columbia, D.C. CODE § 46-401 (2010).

marriages at the time Virginia declared the Lovings' marriage void. Moreover, 18,000 gay or lesbian couples were married in California before Proposition 8 took effect, and those couples' marriages remain valid. Pet.App. 78a-79a, 142a, 302a. The existence of valid marriages between gay men or lesbians in some States undermines the idea that allowing those couples to be married would redefine marriage.

In *Lawrence,* this Court conducted a similar analysis in striking down Texas's criminal law against intimate conduct between persons of the same sex. The issue was *not*, the Court explained, whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy." 539 U.S. at 566. Rather, that phrasing of the issue "demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.* at 567. The Due Process Clause instead protects a broader right: the liberty to engage in "a personal relationship" that may be "more enduring." *Id.*

The *Lawrence* Court stated that it was not presented with the question of "whether the government must give formal recognition" to a relationship between two people of the same sex. *Id.* at 578. This Court, however, will have the opportunity to decide whether a State may constitutionally deny the civil status of marriage to individuals based solely on the fact that they are gay or lesbian.

Lawrence directs us to the answer. Writing for the majority, Justice Kennedy explained that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id.* at 574. The Constitution demands respect for a person's autonomy in making such choices. *Ibid.* The Court then concluded: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Ibid.*[5]

Here, what Respondents seek – and what the District Court granted and the Ninth Circuit affirmed – is the removal of unconstitutional barriers that prohibit them from participating in the institution of marriage on the same basis as other Americans. As the District Court put it: "Plaintiffs do not seek recognition of a new right. To characterize plaintiffs' objective as 'the right to same-sex marriage' would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy – namely, marriage. Rather, plaintiffs ask California to recognize their relationships for what they are: marriages." Pet.App. 291a; *but cf.* Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund, Inc. in Support of Petitioners in Support of Reversal ("Eagle Forum Br.") at 9 (asserting that question asked by

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[5] *See also id.* at 601, 604 (Scalia, J., dissenting) (*Lawrence* "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples").

Plaintiffs is "does the federal Constitution provide a right to same-sex marriage").

Tellingly, Petitioners' *amici* agree that, "[f]or purposes of substantive due process analysis, the issue is not *who* may marry, but *what* marriage is." Family Research Council Br. 8 (emphasis in original). But the Family Research Council then characterizes marriage as "the union of a man and a woman," which has everything to do with whom someone is allowed to marry and nothing to do with the essence of the union they seek to create. *Ibid*. The evidence at trial showed that same-sex couples are fully capable of "establish[ing] a home and bring[ing] up children." *Meyer,* 262 U.S. at 399, quoted in Family Research Council Br. at 10; *see* Pet.App. 235a-237a, 263a-264a (finding that children raised by gay or lesbian parents "are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted," and that research supporting this conclusion "is accepted beyond serious debate in the field of developmental psychology").

Petitioners urge, nonetheless, that a "gendered definition of marriage" derives from, and is justified by, the "procreative capacity" of opposite-sex relationships. *See, e.g.,* Pet.Br. 8, 24, 27, 28, 32, 33, 39, 53. *Amici* supporting Petitioners advance similar arguments, claiming that Proposition 8's one-man-one-woman limitation on marriage is justified by the State's interest in "encouraging potentially reproductive relationships between men and women within marriage," and having the resulting children raised by their biological parents. *See Amicus Curiae*

Brief of Scholars of History and Related Disciplines in Support of Petitioners ("Historians' Br.") 4, 13, 20, 21-22, 36; *Amicus Curiae* Brief of American Civil Rights Union in Support of Petitioners 23-24 ("Civil Rights Union Br."); Eagle Forum Br. at 12-13.[6]

Grounding the definition of marriage on biological procreative capacity makes no sense: opposite-sex couples may be past reproductive age, infertile or childless by choice, yet they still have the right to marry. Nor is it supported by this Court's

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[6] Petitioners and certain *amici* supporting Petitioners rely upon the works of Kingsley Davis (1908-1997) for the proposition that marriage is properly defined as, and thereby limited to, a "social system [that] powerfully motivates [heterosexual] individuals to settle into a sexual union and take care of the ensuing offspring." *See, e.g.* Pet. Br. 34-35; Historians' Br. 12; Civil Rights Union's Br. 22-23. Davis's views on marriage and, in particular, his analogies to marriage to support his view that prostitution benefits society, damage his credibility. For example, Davis viewed marriage as an institution "wherein women trade their sexual favors for an economic and social status supplied by men." Kingsley Davis, *The Sociology of Prostitution*, 2 Am. Sociological Rev. 744, 746, 750 (Oct. 1937). In any event, Davis actually thought marriage was "not simply sexual, not simply procreative, not simply economic. It is all three." *Ibid.* at 746-47 n.10. To the extent Davis thought homosexuality contributed to changes in traditional family structures, it was a minor part of a lengthy list of phenomena that Davis credited with causing such changes, including no-fault divorce, abortion, teenage contraceptive services, "the loss of local surveillance," and the employment of women outside the home. Kingsley Davis, *The Meaning & Significance of Marriage in Contemporary Society, in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 9, 10-11 (Kingsley Davis, ed. 1985).

precedents, which recognize that marriage is about much more than procreation:

- In *Griswold v. Connecticut*, this Court held that married couples have a Constitutional right to use contraceptives and thereby *not* to procreate. 381 U.S. 479, 485-86 (1965).

- In *Boddie v. Connecticut,* this Court held that the Due Process interest in marriage required the removal of financial barriers to *divorce* – an outcome that facially did not advance the cause of procreation within marriage. 401 U.S. 371, 374, 380-81 (1971).

- In *Turner v. Safley,* the Court held that prisoners have a fundamental right to marry, even when they are unable to procreate with their spouses. 482 U.S. 78, 94-99 (1987).

In fact, as Professor Cott testified during trial and the District Court found, "California, like every other state, has never required that individuals entering a marriage be willing or able to procreate." Pet.App. 211a-212a; J.A. 411 (Cott testimony; "[P]rocreative ability has never been a qualification for marriage. Nor has … the lack of same … been a ground for divorce.").

Clearly, the Court's marriage jurisprudence is protecting something aside from the regulation of childbearing or traditional gender roles, *see Orr v. Orr*, 440 U.S. 268, 280-81 (1979) ("no longer is the

female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas") (internal citation omitted); *see also Kirchberg v. Feenstra*, 450 U.S. 455, 459-60 (1981) (Louisiana statute granting husband exclusive control over disposition of community property constituted "express gender-based discrimination" and violated Equal Protection Clause); *but cf.* Family Research Council Br. 2 (asserting that one purpose of marriage is to provide "the benefits of dual-gender parenting").

As the Court observed in *Turner*, even taking into account the limitations of prison life, "[m]any important attributes of marriage remain." These include "emotional support and public commitment," "spiritual significance," "religious faith," "personal dedication" and other "incidents of marriage." 482 U.S. at 95-96. Or, in the words of the *Griswold* Court, "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." 381 U.S. at 486.

Same-sex couples may have exactly that sort of relationship. This was proven at trial and found as a fact by the District Court. Pet.App. 235a ("Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners."), 312a. This Court has acknowledged the capacity – or, at least, the right – of gay men and lesbians to enter into the type of committed, long-term relationship that States recognize and respect when they make civil marriage available to couples. *See Lawrence,* 539 U.S. at 567 ("When sexuality finds

overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

Underscoring the point, same-sex couples in California and many other States have the same rights as heterosexual couples to adopt children. *See* Pet.App. 237a, 307a; *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005); CAL. FAM. CODE § 297.5 (2007); Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C.L. Rev. 955, 970 n. 54 (May 2012) (reporting that same-sex couples may adopt children in 18 States). Same-sex couples in California also have the same rights as heterosexual couples to conceive children with medical assistance and to bear children through a surrogate or raise foster children. *See* Pet.App. 237a, 307a; *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005); CAL. FAM. CODE § 297.5.

Crucially, Petitioners' *amici* recognize that "couples who rear children via adoption (or its predecessor statuses such as guardianship or other informal relationships) *are still serving these 'procreative' functions*." Historians' Br. 34-35 (emphasis added). Proposition 8 thus leaves gay men's and lesbians' procreative rights and capabilities unaffected. It has only the perverse effect of depriving their children of the benefit of having parents who are married. *See* Pet.App. 223a-226a, 247a (finding that marriage would benefit the children of gay men and lesbians); *see also* Gary J. Gates, The Williams Institute, "LGBT Parenting in

the United States," Feb. 2013, http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf (estimating that approximately 125,000 same-sex couples are raising nearly 220,000 children in the United States).

To the extent that one role of marriage has been to "advance important child-centered interests," *see, e.g.*, Historians' Br. 10, 15, Proposition 8 therefore undermines that goal. *See* Pet.App. 308a (concluding that Proposition 8 reduces likelihood that sexual activity will occur within stable households, because it requires some sexual activity, child-bearing and child-rearing to occur outside marriage).

At trial, Professor Cott, an expert on the history of marriage, testified about its function in the United States. She explained that marriage is "a couple's choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life." J.A. 399.

The ability to marry, Professor Cott testified, "is a basic civil right. It expresses the right of a person to have the liberty to be able to consent validly." J.A. 399-400. Thus, in pre-Civil War times, slaves were denied the right to marry; when the slaves were emancipated, "they flocked to get married." J.A. 400-403. In modern times, "the realm created by marriage, that private realm has been repeatedly

reiterated as a … realm of liberty for intimacy and free decision making by the parties." J.A. 397.

Striking down Proposition 8 would not redefine marriage. Rather, it would provide gay men and lesbians in committed relationships access to a fundamental right that this Court has recognized as "essential to the orderly pursuit of happiness." *Meyer,* 262 U.S. at 399.

C. A State Cannot Deprive a Class of Citizens of the Right to Marry Unless It Has a Compelling State Interest, and the District Court Correctly Found that None Exists Here

Because marriage is a fundamental right, the District Court correctly held that proponents must meet a "heavy burden" of showing that Proposition 8 is "narrowly tailored to a compelling government interest." Pet.App. 295a. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) ("[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests"); *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("[w]here certain 'fundamental rights' are involved, the Court has held that regulations limiting these rights may be justified only by a compelling state interest and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake") (citations omitted).

As this Court has observed, "'[c]ompelling' is of course the key word" in the inquiry. *Carey v. Population Services, Int'l,* 431 U.S. 678, 686 (1977). Where decisions such as marriage are concerned, "regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Ibid.* Where "marriage and family life" are concerned, "the Due Process Clause of the Fourteenth Amendment requires that [restrictive] rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area" of constitutional liberty. *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 640 (1974); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality) ("[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.").

By prohibiting same-sex couples from marrying, Proposition 8 materially and substantially burdens their fundamental right to marry.

Courts have recognized compelling justifications for limiting the right to marry. *See, e.g., Potter v. Murray City,* 760 F.2d 1065, 1070 (10th Cir. 1985) (State of Utah had compelling State interest in prohibiting polygamy; monogamous marriage "is the bedrock upon which our culture is built"); *Interest of Tiffany Nicole M.,* 214 Wis.2d 302, 318-20, (Wis. Ct. App. 1997) (identifying State interests supporting prohibition on incest); *cf. Moe v. Dinkins,* 669 F.2d

67, 68 (2d Cir. 1982) ("the right of minors to marry has not been viewed as a fundamental right deserving strict scrutiny").

In this case, however, no compelling State interest was proven at trial – and none exists – for denying gay men and lesbians the right to marry the partner of their choosing. Moreover, as the District Court correctly found, Proposition 8 does not even advance the *non*-compelling interests identified by its proponents, and thus cannot survive even a "rational basis" review. Pet.App. 301a-316a.

Indeed, nine States and the District of Columbia have recognized that gay men and lesbians should have access to the right to marry, *see supra* n.4, and California itself has 18,000 gay and lesbian couples who were legally married before Proposition 8 took effect (*see* Pet.App. 142a, 302a). Yet, the record is bereft of any evidence that the harms feared by Proposition 8's proponents have occurred. *See* Pet.App. 150a-151a. The joining of those couples in marriage did not disturb what Petitioners' *amici* describe as "the social norm that male-female sexuality should be expressed within marriage," Historians' Br. 5. Rather, the 18,000 gay and lesbian couples were simply allowed to declare, in the same way as heterosexual couples, that they share "a personal bond that is more enduring," *Lawrence,* 539 U.S. at 567.

We need go no further. The Respondents and other *amici* will examine in detail the absence of any acceptable justification for Proposition 8. While those arguments will be advanced under the Equal Protection Clause, they support equally the Due Process Clause analysis set forth above.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the Court should affirm the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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