No. 12-144

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, PETITIONERS

v.

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, JEFFREY J. ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO

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

BRIEF FOR FOREIGN AND COMPARATIVE LAW EXPERTS HAROLD HONGJU KOH, SARAH H. CLEVELAND, LAURENCE R. HELFER, AND RYAN GOODMAN AS AMICI CURIAE SUPPORTING RESPONDENTS

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BRIEF FOR FOREIGN AND COMPARATIVE LAW EXPERTS HAROLD HONGJU KOH, SARAH H. CLEVELAND, LAURENCE R. HELFER, AND RYAN GOODMAN AS AMICI CURIAE SUPPORTING RESPONDENTS

Harold Hongju Koh, Sarah H. Cleveland, Laurence R. Helfer, and Ryan Goodman respectfully submit this brief as amici curiae in support of respondents.[1]

INTEREST OF AMICI CURIAE

Amici curiae are among the country's leading experts in international and comparative constitutional law and human rights. Each has published and lectured widely in the field. Each has extensive knowledge of global judicial and legislative developments regarding the rights of gay men and lesbians, including the significant and ongoing steps toward recognizing same-sex equality in marriage.[2]

Harold Hongju Koh is Sterling Professor of International Law at Yale Law School, where he served as Dean from 2004 to 2009. He served as Assistant Secretary for Democracy, Human Rights and Labor at

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[1] Letters providing blanket consent to the filing of amicus briefs have been filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

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the U.S. State Department from 1998 to 2001 and as Legal Adviser from 2009 to 2013. He was Counsel of Record for the Brief Amici Curiae of Mary Robinson, et al. in *Lawrence v. Texas*, *available at* http://www.law.yale.edu/documents/pdf/News_&_Events/11lawrence_v._texas_-_amici_br21.pdf.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether a State may single out and penalize one class of families—same-sex couples—by excluding them from the essential institution of marriage after previously including them within it, thereby returning them to a separate and unequal status. To answer that question affirmatively would diminish U.S. leadership in the field of personal freedom and human rights, at the exact moment when other liberal democracies are debating how and when to recognize equal rights for same-sex couples.

This Court is not the first to consider this question. Just as courts of other countries have concluded that excluding same-sex couples from full marriage violates fundamental principles of liberty, dignity, and equality, this Court should conclude that stripping same-sex couples of marriage rights—as Proposition 8 does—violates the due process and equal protection guarantees embedded in the Fourteenth Amendment.

The global progression toward marriage equality began in the 1980s and 1990s, when a number of European countries created registered partnerships giving same-sex couples some of the same rights afforded to married, opposite-sex couples. Since 2001, the legislatures of the Netherlands, Belgium, Spain, Norway, Sweden, Portugal, Iceland, Argentina, and Denmark have recognized that purportedly separate-but-equal institutions offer insufficient substitutes

for full marriage rights. Accordingly, these states—a group of countries that will soon be joined by England and France—have granted same-sex couples the right to marry, and, in many instances, have repealed their registered partnership laws along the way. Change is accelerating rapidly, and there is a realistic prospect of many more countries embracing equal marriage in the next decade.

Based on principles common to the rights protected under the Fourteenth Amendment—including individual liberty and dignity and equality—courts throughout Canada, as well as the highest court in South Africa, have held that the exclusion of marriage rights for same-sex couples violates each state's respective Constitution. Tellingly, not one country that previously extended marriage to same-sex couples has rescinded that promise of equality, as Proposition 8 does. To the contrary, countries that permit marriage for same-sex couples have successfully balanced the rights of religious institutions with the rights of couples to take part in civil marriage. Whatever countervailing "compelling governmental interest" or parade of horribles opponents of equal marriage may have imagined has not materialized.

This Court should consider the reasoning of foreign authorities for three reasons. First, as this Court recognized in *Lawrence,* fundamental principles such as "liberty," "dignity," and "equality" are not solely American concepts, but rather, universal concepts whose interpretation by other leading constitutional courts can usefully inform this Court's

understanding of the issue before it. *See Lawrence v. Texas*, 539 U.S. 558, 572-573, 576-577 (2003).

Second, as Justice Breyer has noted, "the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances," *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting), may "cast an empirical light on the consequences of different solutions to a common legal problem," *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

Third, the United States of America has long cherished a deep and abiding reputation as "the world's foremost protector of liberties." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285 (1990) (Brennan, J., dissenting). Accordingly, courts in other countries have invoked this Court's reasoning in *Lawrence,* for example, to strike down laws that impinge upon the intimate relations between gay and lesbian couples. The Court's ruling in this case is likely to have similar influence.

ARGUMENT

LEGAL DEVELOPMENTS IN OTHER NATIONS CONFIRM THAT DUE PROCESS AND EQUAL PROTECTION PRINCIPLES FAVOR FULL MARRIAGE EQUALITY OVER A "SEPARATE-BUT-EQUAL" INSTITUTION

In evaluating Proposition 8, this Court should consider the reasoning of authorities in other countries that have determined that it violates the fundamental

rights of same-sex couples to exclude them from the institution of marriage. Those decisions rest upon principles common to our own understanding of the rights protected under the Fourteenth Amendment, including the liberty to make fundamental choices for one's own life free from government intervention, the dignity and worth of all persons, and equality under the law. Because Proposition 8 offends those fundamental principles, it violates our Constitution.

A. Just As Other Nations Have Benefitted From This Court's Jurisprudence, Decisions From Other Nations With A Common Legal Heritage Provide This Court With A Useful Comparative Perspective

Since the founding of our Nation, this Court has benefitted from considering international and comparative foreign law in interpreting the U.S. Constitution.[3] In particular, this Court has repeatedly considered foreign and international law to illuminate the rights guaranteed by "due process of law" and "equal protection of the laws." U.S. CONST. amend. XIV, § 1. Constitutional terms like "liberty" and "equality" are universal. The interpretation of these terms by foreign and international courts provides useful guidance that this Court can and should consider.

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[3] *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

To inform the scope of the Fourteenth Amendment, this Court has traditionally looked to decisions of other democracies with which we share legal traditions. As Justice Frankfurter explained in considering whether a forced confession was constitutional in *Malinski v. New York*, "[t]he safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples." 324 U.S. 401, 413-414 (1945) (Frankfurter, J., concurring); *see also Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 366 (1916) (Constitution embodies "relatively fundamental rules of right, as generally understood by all English-speaking communities"). Thus, *Ingraham v. Wright* examined the scope of due process prior to the imposition of corporal punishment, observing that such principles are "implicit in 'the concept of ordered liberty.'" 430 U.S. 651, 673 n.42 (1977) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949)); *see also Palko v. Connecticut*, 302 U.S. 319, 325, 327-328 (1937) (in construing the Due Process Clause, equating the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" with principles so fundamental "that a fair and enlightened system of justice would be impossible without them").

In *Lawrence v. Texas*, this Court consulted comparative and international precedents to assist its conclusion that *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding criminalization of consensual intimacy between persons of the same sex), had been wrongly decided and that "[t]o the extent *Bowers*

relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere." 539 U.S. at 576. The Court observed that the "European Court of Human Rights has followed not *Bowers* but its own decision" and that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct." *Id.* at 576. As the Court noted, that right "has been accepted as an integral part of human freedom in many other countries." *Id.* at 577. Indeed, the Court in *Lawrence* criticized Chief Justice Burger's concurring opinion in *Bowers* for making "sweeping references * * * to the history of Western civilization" but "not tak[ing] account of other authorities pointing in an opposite direction." *Id.* at 572-573. The Court observed that a decision of the European Court of Human Rights was "at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization." *Id.* at 573.

In turn, foreign judiciaries have increasingly relied on *Lawrence* as illustrating fundamental standards of human decency. In *Naz Foundation v. Government of NCT of Delhi*, the High Court of Delhi, India invoked the holding and reasoning of *Lawrence* at length in striking down a national anti-sodomy law. A.I.R. 2009 (Del.) 96 paras. 57, 58, 68, 75, 76, 95, 115. Courts in Hong Kong and Fiji applied identical reasoning to reach the same result. *Leung TC William Roy v. Secretary for Justice*, [2005] 3 H.K.L.R.D.

657 para. 140 (C.F.I.) (H.K.); *McCoskar v. State* [2005] FJHC 500 (Fiji).

Acknowledging that consenting same-sex intimacy was illegal in some U.S. States before *Lawrence*, in December 2011, then-Secretary of State Hillary Rodham Clinton urged a global audience to learn from America's experience and land on the right side of history:

> [I]n the past 60 years, we have come to recognize that members of [lesbian, gay, bisexual and transgender ("LGBT")] groups are entitled to the full measure of dignity and rights, because, like all people, they share a common humanity.
>
> This recognition did not occur all at once. It evolved over time. And as it did, we understood that we were honoring rights that people always had, rather than creating new or special rights for them. Like being a woman, like being a racial, religious, tribal, or ethnic minority, being LGBT does not make you less human. And that is why gay rights are human rights, and human rights are gay rights.
>
> * * * [I]t is a violation of human rights when life-saving care is withheld from people because they are gay, or equal access to justice is denied to people because they are gay, or public spaces are out of bounds to people because they are gay. No matter what we look like, where we come from, or who we

> are, we are all equally entitled to our human rights and dignity.

Hillary Rodham Clinton, Secretary of State, Remarks in Recognition of International Human Rights Day (Dec. 6, 2011) (transcript available at http://www.scribd.com/fullscreen/74942691).

Secretary Clinton's speech reflects a vibrant conversation across jurisdictions regarding the rights of same-sex couples, not just to live free of discrimination but to attain the equal status of marriage. Thus, in *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts cited and relied on the decision of the Court of Appeal for Ontario in concluding that the common-law meaning of marriage must be refined to include same-sex couples. 798 N.E.2d 941, 969 (Mass. 2003). The Supreme Court of Appeal of South Africa in turn cited *Goodridge* when holding South Africa's marriage exclusion laws unconstitutional, as did Brazil's Superior Tribunal de Justiça. *Fourie v. Minister of Home Affairs* ("*Fourie I*") 2005 (3) BCLR 241 (S. Ct. App.) at para. 18 (S. Afr.); S.T.J., Rec. Esp. No. 1.183.378-RS (2010/0036663-8), Relator: Luis Felipe Salomão 25.10.2011, S.T.J.J. (Braz.).[4]

Amici submit that the experience of equal marriage in other liberal democratic countries provides

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[4] *Available at* https://ww2.stj.jus.br/processo/jsp/revista/abreDocumento.jsp?componente=ITA&sequencial=1099021&num_registro=201000366638&data=20120201&formato=PDF.

particularly useful guidance in this case.[5] As demonstrated below, nations with comparable constitutional provisions that protect essential principles of liberty, dignity, and equality have already addressed questions almost identical to the issue before this Court. The experiences of these other countries—and their conclusions that excluding same-sex couples from the fundamental institution of marriage violates the core values of freedom, dignity, and equality—provide important authority supporting the same conclusion here.

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[5] Justices have also considered strictly international law to assist in the interpretation of the Equal Protection Clause. In *Oyama v. California*, opinions representing four concurring justices cited to the United States' role under a United Nations Charter as support for the Court's decision that a California land law violated the Equal Protection Clause. 332 U.S. 633, 649-650 & n.4 (1948) (Black, J., concurring) ("we have recently pledged ourselves to cooperate with the United Nations to 'promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all' " (omission in original; citation omitted)); *id.* at 673 (Murphy, J., concurring) ("[i]ts inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned"); *see also Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsberg, J., concurring) (relying on two prominent international human-rights treaties as evidence of "the international understanding of the office of affirmative action" in construing the Equal Protection Clause).

Even if international human-rights law does not at present require states to recognize same-sex marriage, nothing in that body of law prevents states from following the trend in foreign jurisdictions with which the United States shares the core human-rights values of liberty, dignity, and equality, and granting such recognition now.

B. Foreign Jurisdictions That Have Recognized Equal Marriage Rights Confirm That Discrimination Against Same-Sex Couples In Marriage Impermissibly Affronts Fundamental Notions Of Liberty, Dignity, And Equality

In both courts and legislatures, other legal systems have recognized equal rights, including marriage, for gay and lesbian people, invoking principles common to our understanding of rights under the Fourteenth Amendment: among them, the individual liberty to marry the person of one's choice, equality under the law, and the unacceptability of institutions that purport to be separate but equal. These rulings offer strong support for this Court to hold that Proposition 8 violates due process and equal protection.

1. The unmistakable global trend is toward recognizing marriage equality

a. Around the world, numerous jurisdictions have taken significant and ongoing steps toward recognizing same-sex equality in marriage. In the past month, the move toward marriage equality has progressed rapidly in England and France. On January 24, 2013, Conservative British cabinet member Maria Miller introduced a same-sex marriage bill for England and Wales in the House of Commons. Marriage (Same Sex Couples) Bill, 2012-13, H.C. Bill [126] (Eng.). "In each century," Minister Miller declared, "parliament has acted—sometimes radically—to ensure that marriage reflects our society to keep it relevant and meaningful. Marriage is not static; it

has evolved and parliament has chosen to act over the centuries to make it *fairer* and more equal. We now face another such moment—another such chance in this new century."[6] On February 5, the House of Commons debated the bill and voted in favor by a 400-175 vote. It is expected to become law by this summer.[7] One week later, the National Assembly of France approved an equal-marriage bill, which is expected to be passed in the Senate later this year.[8]

b. These recent advancements to secure full marriage equality build upon decisions to expand recognition of rights for gays and lesbians by courts and legislatures over several decades, as chronicled in the appendix to this brief. During the 1980s, a number of European democracies began offering limited legal rights for same-sex couples. App., *infra*, 1a. Then in the 1990s, many of these countries began formally recognizing same-sex couples through registered domestic partnerships or civil unions. *Id.* at 1a-2a. In 2001, the Netherlands became the first country to recognize full marriage equality. *Id.* at 2a.

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[6] Patrick Wintour, *Gay Marriage Plan Offers 'Quadruple Lock' for Opposed Religious Groups*, GUARDIAN (Dec. 11, 2012), http://www.guardian.co.uk/society/2012/dec/11/gay-marriage-quadruple-lock-religious-groups (emphasis added).

[7] John F. Burns and Alan Cowell, *British Lawmakers Vote for Gay Marriage Despite Conservative Split*, N.Y. TIMES, Feb. 6, 2013, at A4.

[8] Steven Erlanger, *France: Assembly Passes Gay Marriage Bill*, N.Y. TIMES, Feb. 12, 2013, at A12.

Since then, ten other nations—Belgium, Canada, South Africa, Spain, Norway, Sweden, Portugal, Iceland, Argentina, and Denmark—have adopted full marriage equality. *Id.* at 2a-9a. Same-sex marriage is also permitted in various parts of Mexico and Brazil. *Id*. at 9a-11a. Together with England/Wales and France, this brings to 15 the number of countries that currently or soon will provide full marriage equality in all or part of their jurisdictions.

Significantly, not one of the countries that has extended full marriage to same-sex couples has penalized them by subsequently stripping those individuals of that right, as California's unprecedented ballot initiative has done. California's Proposition 8 thus stands alone in nullifying one class's previously granted marriage rights, penalizing only that class by denying it the recognition of basic liberty, dignity, and equality that similarly situated individuals are accorded in many other countries throughout the world.

c. In some of the countries now embracing same-sex marriage, courts held that the lack of full marriage privileges for same-sex couples violated fundamental constitutional rights. While the legislatures in these countries implemented those high-court decisions, the legislation that emerged was enacted as a direct result of judicial recognition that those countries' constitutions mandated that same-sex couples be allowed to marry.

For example, between 2002 and 2004, courts in nine of Canada's provinces and territories, including Ontario, British Columbia, and Québec, uniformly held that the exclusion of same-sex couples from the institution of civil marriage violated the Canadian Charter of Rights and Freedoms. *See Halpern v. Canada* (2003), 65 O.R. 3d 161 (Can. Ont. C.A.); *EGALE Canada, Inc. v. Canada* (2003), 225 D.L.R. 4th 472 (Can. B.C. C.A.); *Hendricks v. Québec*, [2002] R.J.Q. 2506 (Can. Que. C.S.), appeal dismissed, *Hendricks v. Canada* (2004), 238 D.L.R. 4th 577 (Can. Que. C.A.); app., *infra*, 3a-4a. Following that guidance, the Canadian Parliament proposed a bill in which marriage was defined as the lawful union of two people, and referred the proposed bill to the Supreme Court of Canada for evaluation of the bill's constitutionality. In 2004, the Supreme Court of Canada ruled that the bill was constitutional, holding that "[t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another." *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para. 46 (Can.). Canada's Civil Marriage Act then became law in July 2005. Civil Marriage Act, S.C. 2005, c. 33 (Can.).

In December 2005, the Constitutional Court of South Africa joined Canada in holding unconstitutional the exclusion of same-sex couples from the institution of civil marriage. *Minister of Home Affairs v. Fourie* ("*Fourie II*") 2006 (3) BCLR 355 (CC) (S. Afr.), affirming *Fourie I*. In both *Fourie* decisions, the courts held that a definition of marriage that

excludes same-sex couples violates the constitutional rights to equality and human dignity, which require access to the institution of marriage for all couples, regardless of sexual orientation. The South African Parliament implemented the Constitutional Court's ruling by voting to legalize marriage for same-sex couples, thereby codifying the removal of legal barriers to gay and lesbian marriages. Civil Union Act 17 of 2006 ss. 1, 11 (S. Afr.).

d. Recent court decisions are also paving the way for marriage equality in Colombia and Mexico. In Colombia, the Constitutional Court held in 2011 that the constitution precludes the legislature from formally recognizing only opposite-sex couples. It gave the government an opportunity to implement a legislative solution and ordered that if the government failed to act within two years, same-sex couples would be able to formalize and solemnize their unions before a court or notary. *See* Colombia Constitutional Court, Statement No. 30, July 26, 2011.[9] In 2010, Mexico's Supreme Court of Justice ruled that same-sex marriages performed in Mexico City must be recognized throughout Mexico. App., *infra*, 8a. In December 2012, the same court ruled unanimously that Oaxaca's ban on same-sex marriage is unconstitutional. Amparo en Revisión 581/2012, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], Dec. 5, 2012 (Mex.). Significantly, that

[9] *Available at* http://www.corteconstitucional.gov.co/comunicados/No.%2030%20comunicado%2026%20de%20julio%20de%202011.php.

ruling is based on a February 2012 decision of the Inter-American Court of Human Rights, which held that signatories to the Inter-American Accord on Human Rights could not discriminate on the basis of sexual orientation. *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012). The Inter-American Court ruling will likely influence legal developments not just in Mexico, but throughout Latin America.

2. Foreign jurisdictions have grounded same-sex marriage rights in part on basic principles of liberty, a fundamental right protected by due process

a. This Court has long recognized that state laws violate due process if they unduly restrict rights that are "implicit in the concept of ordered liberty." *Palko*, 302 U.S. at 324-325. This Court has treated "ordered liberty" not as a solely American concept, but rather, one "enshrined" in the legal history of other legal systems. *See, e.g.*, *Ingraham*, 430 U.S. at 673 n.42; *Miranda v. Arizona*, 384 U.S. 436, 488 n.59 (1966); *id.* at 521-522 (Harlan, J., dissenting); *Quinn v. United States*, 349 U.S. 155, 167 (1955); *Rochin v. California*, 342 U.S. 165, 169 (1952). "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence*, 539 U.S. at 562. Liberty also necessarily includes the freedom to marry the person of one's choosing. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967).

b. Foreign courts have invoked the liberty interests of individuals to uphold equal marriage rights. For example, the Court of Appeal for Ontario explained that the right of a couple to choose to marry is fundamental to democratic notions of liberty. The "common law requirement that persons who marry be of the opposite sex" violates core principles of liberty because it "denies persons in same-sex relationships a fundamental choice—whether or not to marry their partner." *Halpern*, 65 O.R. at 185 para. 87. The court held that one of the "essential values" in the Canadian Charter of Rights and Freedoms "is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life." *Ibid*. (citation omitted). Thus, "[l]imitations * * * that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty." *Ibid.* (citation omitted).

Similarly, the Constitutional Court of South Africa reasoned that the freedom to marry is an essential component of the liberty rights of gays and lesbians:

> The capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations. It offers a

> social and legal shrine for love and for commitment and for a future shared with another human being to the exclusion of all others.
>
> The current common-law definition of marriage deprives committed same-sex couples of this choice. In this our common law denies gays and lesbians who wish to solemnise their union a host of benefits, protections and duties. * * *
>
> The vivid message of the decisions of the last ten years is that this exclusion cannot accord with the meaning of the Constitution, and that it undermines the values which underlie an open and democratic society based on freedom and equality.

Fourie II, 2006 (3) BCLR 355, at paras. 14-16 (internal quotation marks and footnotes omitted).

Likewise, the Superior Tribunal de Justiça of Brazil ruled that a same-sex couple could convert their civil union into marriage based, in part, on the freedom to define one's family differently. The court reasoned that "as soon as there is a decision by two people to unite, with a view to constituting a family, * * * the Constitution guarantees to them full liberty of choice about the way in which this union will take place." S.T.J., Rec. Esp. No. 1.183.378-RS (2010/0036663-8).

c. The reasoning of these decisions accords with this Court's longstanding recognition that "[t]he

freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Ibid.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

As this Court reaffirmed in *Lawrence*, "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 539 U.S. at 573-574. Deciding whom to marry is one of "the most intimate and personal choices a person may make in a lifetime" and is "central to the liberty protected by the Fourteenth Amendment." *Ibid.* (quoting *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)). Our Constitution "demands" respect "for the autonomy of the person in making these choices." *Ibid.*

For a State to deny marriage is to deny liberty. The heart of liberty, *Casey* instructed, "is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. at 851. In striking down laws banning interracial marriages, this Court recognized that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Loving*, 388 U.S. at 12. "Beliefs about these matters" are so important to who an individual is that they "could not define the attributes of personhood were they formed

under compulsion of the State." *Casey*, 505 U.S. at 851.

As a number of foreign courts have recognized, the right to choose whom to marry must include the right to marry a person of the same sex. Proposition 8 strips same-sex couples of the private right to make the public commitment that marriage entails and to receive the benefits of marriage. California's law destroys the right of couples to define their own relationships by choosing whether and whom to marry. Such intimate choices are central to the liberty and personal autonomy rights that the Fourteenth Amendment protects. Through Proposition 8, California arbitrarily afforded same-sex couples the benefits and burdens of marriage through separate-but-equal status, while discriminatorily withholding only from those couples the solemn dignity of marital recognition.

3. Foreign jurisdictions have grounded their decisions in human dignity, which this Court has held is protected by the Constitution

In *Lawrence*, this Court acknowledged that "the most intimate and personal choices a person may make in a lifetime"—which are "central to personal dignity and autonomy"—must be "protected by the Fourteenth Amendment." 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). For that reason, *Lawrence* struck down the Texas statute banning sexual intimacy between same-sex persons in part because the

"stigma th[e] criminal statute imposes" degrades "the dignity of the persons charged." *Id.* at 575.[10] Like *Lawrence*, much of the foreign jurisprudence on same-sex marriage draws upon judicial understandings of the dignity and worth of individual persons.[11]

In *Halpern*, the Court of Appeal for Ontario concluded that excluding same-sex couples from the "fundamental societal institution [of] marriage" discriminated against gay men and lesbians in a manner that offended human dignity:

> The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than

[10] "[T]he Supreme Court has, since World War II and the Universal Declaration of Human Rights, embedded the term dignity into the U.S. Constitution" as "an example of how U.S. law is influenced by the norms of other nations, by transnational experiences, and by international legal documents." Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1926 (2003).

[11] *See generally* cases cited in Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, ZUR AUTONOMIE DES INDIVIDUUMS 249, 250-251 (Dieter Simon & Manfred Weiss eds., 2000).

> opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships [and is therefore discriminatory].

Halpern, 65 O.R. 3d at 189-190 para. 107.

As *Halpern* found, "this case is ultimately about the recognition and protection of human dignity." *Id.* at 167 para. 2. In so finding, the court applied the Supreme Court of Canada's decision in *Law v. Canada,* which had defined human dignity as meaning "that an individual or group feels self-respect and self-worth," and had held that "[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits." *Id.* at 167 para. 3 (quoting *Law v. Canada*, [1999] 1 S.C.R. 497, 530 para. 53 (Can.)).[12] *Halpern* also relied on the Ontario Human Rights Code, which provides:

> "[I]t is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a

[12] In *Law*, the Supreme Court of Canada explained that the purpose of the equal-protection provision of the Canadian Charter of Rights and Freedoms is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration." 1 S.C.R. at 529 para. 51.

> climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province[.]"

65 O.R. 3d at 167 para. 4 (quoting R.S.O. 1990, ch. H. 19, pmbl. (Can. Ont.)) (alterations in original).

In the same vein, in *EGALE*, the British Columbia Court of Appeal (the highest court in British Columbia) examined the connection between the importance of marriage as an institution and the resulting impact on an individual's dignity, stating that "[t]he evidence supports a conclusion that 'marriage' represents society's highest acceptance of the self-worth and the wholeness of a couple's relationship, and, thus, touches their sense of human dignity at its core." 225 D.L.R. 4th at 501 para. 90. The very act of public, civil marriage affirms the couple's relationship and the life they intend to join together. Denying one group freedom to take that step affronts their dignity and discriminates against them.

The South African marriage cases likewise rest on the fundamental right to human dignity and personal autonomy. In *Fourie II*, the Constitutional Court examined the profound intangible harms to human dignity from being denied both equal access to marriage and the right to choose to marry:

> It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

2006 (3) BCLR 355, at para. 71. Similarly, in *Fourie I*, the Supreme Court of Appeal stated:

> More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all.

2005 (3) BCLR 241, at para. 15.

Like its Canadian counterpart, the South African Constitutional Court relied on a prior opinion concerning the importance of human dignity, *National Coalition for Gay & Lesbian Equality v. Minister of Home Affairs* 2000 (1) BCLR 39 (CC), at para. 42 (S. Afr.). *Fourie II*, 2006 (3) BCLR 355, at para. 50. In *National Coalition*, the Constitutional Court held that the partners of married, different-sex couples cannot be given preferential immigration status over same-sex couples. 2000 (1) BCLR 39, at para. 97.

The reasoning of the Constitutional Court was unequivocal—human dignity, privacy, and equality demand that same-sex couples' relationships be afforded the same legal status as those of opposite-sex couples:

> Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.

Id. at para. 42.

d. As the courts of both Canada and South Africa determined, exclusion from the institution of marriage demeans the dignity of same-sex couples and the self-esteem and autonomy of persons in such relationships. Proposition 8 produces the same deprivation found to offend basic human dignity. Because this Court has similarly construed the Fourteenth Amendment to protect human dignity, the reasoning of the Canadian and South African marriage cases strongly supports nullification of Proposition 8.

4. Foreign jurisdictions have recognized that separate-but-equal treatment of same-sex couples in marriage violates equal protection under the law

In *Romer v. Evans*, this Court struck down a Colorado constitutional amendment forbidding legal protection for gays and lesbians, in part, because the law "impos[ed] a broad and undifferentiated disability on a single named group." 517 U.S. 620, 632 (1996). *Romer* recognized an obvious truth: that unfounded and targeted prejudice against a particular group can never be a legitimate government interest. Yet as numerous foreign decisions recognize, marriage-exclusion laws are motivated by precisely the same illegitimate interest that *Romer* disavowed: "a bare * * * desire to harm a politically unpopular group [which] cannot constitute a *legitimate* governmental interest." 517 U.S. at 634 (citation omitted; omission and emphasis in original).

Foreign jurisdictions that have recognized same-sex marriage rights have concluded that laws excluding same-sex couples from enjoying the full rights and privileges of marriage reflect an unambiguous governmental determination that those relationships are inherently less valuable than opposite-sex unions. But that is not a determination governments are entitled to make. Like the unlawful state law in *Romer*, Proposition 8 creates the same facially disparate, separate-but-equal treatment of lesbians and gay men with no compelling government purpose that has increasingly been treated as suspect

elsewhere in the world. As several foreign authorities have recognized, the exclusionary effect of laws such as Proposition 8 impermissibly discriminates based on sexual orientation, offending core principles of equal treatment and the anti-discrimination reasoning of *Lawrence v. Texas*.

In *Fourie I*, the South African Court of Appeal held that the exclusion of same-sex couples from an institution of such fundamental social significance as marriage "undermines the values which underlie an open and democratic society based on freedom and equality." 2005 (3) BCLR 241, at para. 16 (citation omitted). On appeal, the Constitutional Court concurred, holding that the exclusion of same-sex couples from civil marriage "represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples." 2006 (3) BCLR 355, at para. 71.

In Colombia, the Constitutional Court held that the Colombian Constitution recognizes and protects the nation's cultural diversity and that therefore an imposition of a single type of family (heterosexual family) would be contrary to the Constitution. *See* Colombia Constitutional Court, Statement No. 30, July 26, 2011 (summarizing the decision as requiring government to permit same-sex couples to formalize and solemnize their relationships if no legislative solution enacted within two years). Brazil's Superior

Tribunal de Justiça declared: "Equality, and equal treatment, presuppose the right to be different, the right to self-affirmation, and to a life-project that is independent of traditions and orthodoxies. In a word: the right to equality is only realized in full if the right to difference is guaranteed." S.T.J., Rec. Esp. No. 1.183.378-RS (2010/0036663-8) (translated) (emphasis omitted).

And Mexico's Supreme Court of Justice recently held that the Oaxacan marriage law's reference to a man and a woman constituted discrimination on the basis of sexual orientation, finding the law to be unconstitutional because it infringes on principles of equality and freedom from discrimination enshrined in the Constitution. Amparo en Revisión 581/2012. The court added that marriage is not static and that the institution must be adapted to changing realities to avoid discrimination. *Ibid.*

Global legislative activity respecting equal marriage has been animated by the same principles. With the passage of equal-marriage legislation in Argentina, Senator Luis Juez announced that allowing same-sex couples to marry was a matter of legal equality, separate from other considerations.[13] Mexico

[13] Soledad Gallego-Díaz, *Argentina, primer país de Latinoamérica en aprobar el matrimonio gay*, EL PAIS (July 15, 2010), http://internacional.elpais.com/internacional/2010/07/15/actualidad/1279144804_850215.html (in Spanish).

City's 2009 legislation was introduced by assemblyman David Razu, who stated: "We only want everyone treated equally under the law, there is no intention to violate anyone's rights, this simply acknowledges the rights of one social sector with no detriment to another."[14] In 2008, Norwegian Finance Minister Kristin Halvorsen announced that the country's new marriage law was passed to promote "equal rights" and was against all forms of discrimination.[15] Family Issues Minister Anniken Huitfeldt added that the act was "an historic step towards equality"[16] and declared that "this new marriage law is a step forward along the lines of voting rights for all and equality laws."[17]

A growing number of foreign jurisdictions have struck down marriage laws that bar gay and lesbian

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[14] *Mexico City Lawmakers to Consider Gay Marriage*, LATIN AMERICAN HERALD TRIBUNE (Nov. 25, 2009), http://www.laht.com/article.asp?ArticleId=348002&CategoryId=14091.

[15] *Roundup: Norwegian Parliament Approves "Historic" Marriage Bill*, DEUTSCHE PRESSE-AGENTUR (June 11, 2008).

[16] Tony Grew, *Norway Legalises Gay Marriage*, PINK NEWS (June 11, 2008), http://www.pinknews.co.uk/2008/06/11/norway-legalises-gay-marriage/.

[17] Christy M. Glass, et al., *Toward a 'European Model' of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?*, 29 BERKELEY J. INT'L L. 132, 160 (2011).

couples from the institution on the basis that continued exclusion reflects impermissible sexual-orientation discrimination.

Prior to passage of Canada's 2005 Civil Marriage Act, multiple Canadian courts ruled against the marriage exclusion that existed there, in reliance on a body of precedent prohibiting certain forms of discrimination based on sexual orientation that are analogous to the Fourteenth Amendment interest in this case. *See Egan v. Canada*, [1995] 2 S.C.R. 513, 528-529 para. 5, 536 para. 22 (Can.) (recognizing that sexual orientation is "analogous to the enumerated grounds" listed in Section 15 of the Canadian Charter, and that it therefore falls under that Section's equal-protection guarantee).

Mexico's Supreme Court of Justice's recent decision echoes the conclusion of the Canadian courts in rejecting marriage exclusion as a thinly veiled form of discrimination on the basis of sexual orientation. Amparo en Revisión 581/2012.[18]

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[18] Even in *Schalk and Kopf v. Austria*, App. No. 30141/04 para. 105 (Eur. Ct. H.R. 2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605, which held that Austria was not compelled to elevate a couple's domestic partnership to the status of marriage where Austrian law had not previously bestowed that status, the European Court of Human Rights expressly disavowed discrimination on the basis of sexual orientation. The court highlighted the "emerging European consensus towards legal recognition of same-sex couples," and made clear that equal marriage was fully consistent with the European Convention for the Protection of

(Continued on following page)

In short, numerous foreign and international authorities have followed *Romer* in finding that discrimination based on sexual orientation has no place in a modern, democratic society. The reasoning of these decisions supports striking down Proposition 8, a law that nakedly stigmatizes and punishes one group by denying them access to marriage based solely on their most intimate personal identities.

5. Many foreign jurisdictions have recognized that separate domestic partnerships are inherently unequal

"Equal protection" in U.S. constitutional law means that claimed "separate but equal" treatment of a particular group is inherently unequal. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954). Foreign authorities likewise have recognized that anything less than full equality diminishes the self-esteem and well-being of persons in same-sex relationships.

This case will help determine whether the United States will continue to be seen as a global leader in the robust defense of equality principles. To do so, the Court need only recognize the international trend among courts and democratic legislatures toward

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Human Rights and Fundamental Freedoms and that same-sex couples constitute *family life* for purposes of the Convention. *See* Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence From LGBT Rights in Europe*, 67 INTERNATIONAL ORGANIZATION (2013) (*Schalk* reinforces the trend in favor of LGBT equality rights in Europe).

recognizing marriage as an equal status available to all. By striking Proposition 8, this Court would reaffirm our Nation's commitment to equal protection of the laws, not resuscitate the infamous separate-but-equal doctrine.

British Columbia's Court of Appeal highlighted the inherent inequality of separate-but-equal regimes in marriage. In *EGALE*, the court found that "[t]he evidence supports a conclusion that 'marriage' represents society's highest acceptance of the self-worth and the wholeness of a couple's relationship, and, thus, touches their sense of human dignity at its core." 225 D.L.R. 4th at 501 para. 90. "Any other form of recognition of same-sex relationships, including the parallel institution of RDP's [registered domestic partnerships]," the Court held, "falls short of true equality." *Id.* at 501 para. 90, 522 para. 156.

Similarly, the South African Constitutional Court agreed that a separate-but-equal institution for same-sex couples did not satisfy South Africa's constitutional guarantees of dignity and personal autonomy. *Fourie II*, 2006 (3) BCLR 355, at para. 72. There, the court cautioned against a remedy that "on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation." *Id*. at para. 150. "[S]eparate but equal" regimes are a "threadbare cloak for covering distaste for * * * the group subjected to segregation," the court warned. *Ibid*. Viewed in light of "real lives as lived by real people today," the court stressed "the

importance of the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected." *Id*. at para. 151.

Although a number of states initially adopted separate civil-union or domestic-partnership regimes for same-sex couples, those states increasingly have acknowledged those regimes as discriminatory and abandoned them in favor of full marriage. Before reforming its marriage code, for example, Sweden granted same-sex couples marriage-like rights under the Registered Partnership Act.[19] Recognizing that separate-but-equal status insufficiently acknowledges the commitments of same-sex couples, Sweden eliminated registered partnerships in favor of a single, gender-neutral marriage law for all couples.[20] Denmark, the first country to grant some legal protections to same-sex couples through its Registered Partnership Act, replaced the registered-partnership regime with full marriage equality.[21] In Iceland, where the legislature unanimously adopted an equal marriage law, and Norway too, changes to the marriage law eliminated systems of registered partnerships for

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[19] Michael Bogdan, *Private International Law Aspects of the Introduction of Same-Sex Marriages in Sweden*, 79 NORDIC J. INT'L L. 253, 253-254 (2009).

[20] *See* Ministry of Justice, Government Offices of Sweden, *Gender-Neutral Marriage and Marriage Ceremonies Fact Sheet* 1 (May 2009), http://www.government.se/content/1/c6/12/55/84/ff702a1a.pdf.

[21] Peter Stanners, *Gay Marriage Legalised*, COPENHAGEN POST (June 7, 2012), http://cphpost.dk/news/national/gay-marriage-legalised.

same-sex couples, recognizing that such a regime is inadequate.[22]

Several foreign authorities considering the legal sufficiency of domestic partnerships or civil unions have turned to this Court's separate-but-equal doctrine for guidance. The Québec Superior Court, for example, observed that "offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal doctrine" and cautioned against reviving "separate but equal" treatment "after its much heralded death in the United States." *Hendricks v. Québec*, [2002] R.J.Q. 2506, at para. 134. Mexico's Supreme Court of Justice likewise pointed to *Brown v. Board of Education* for the proposition that "regardless of whether models for recognizing same-sex couples only differ from marriage in the name given to each type of institution, they are inherently discriminatory because they constitute a 'separate but equal' regime." Amparo en Revisión 581/2012.

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[22] Birna Bjornsdottir & Nicholas Vinocur, *Iceland Passes Gay Marriage Law in Unanimous Vote*, REUTERS (June 11, 2010), http://www.reuters.com/article/2010/06/11/us-iceland-gaymarriage-idUSTRE65A3V020100611; Marriage Act, 4 July 1991 No. 47 § 1 (Nor.), *available at* http://www.regjeringen.no/en/doc/Laws/Acts/the-marriage-act.html?id=448401; Torstein Frantzen, *National Report: Norway*, 19 AM. U.J. GENDER SOC. POL'Y & L. 273, 274 (2011).

In the recent British parliamentary debate, Member of Parliament David Lammy pointed to the American experience as an abject lesson in inequality:

> There are still those who say it is unnecessary. "Why do we need gay marriage", they say, "when we already have civil partnerships?" They are, they claim, "separate but equal." Let me speak frankly: separate but equal is a fraud. It is the language that tried to push Rosa Parks to the back of the bus. It is the motif that determined that black and white people could not possibly drink from the same water fountain, eat at the same table or use the same toilets. They are the words that justified sending black children to different schools from their white peers—schools that would fail them and condemn them to a life of poverty. It is an excerpt from the phrasebook of the segregationists and racists. * * * It is not separate but equal, but separate and discriminated against, separate and oppressed, separate and browbeaten, separate and subjugated. Separate is not equal, so let us be rid of it.

558 PARL. DEB., H.C. (6th ser.) (2013) 192 (U.K.).

Once again, this Court is called upon to decide whether a legally entrenched, separate and unequal status for a single group comports with the Constitutional guarantee of equal protection enshrined in the Fourteenth Amendment. In the past this Court has consistently answered no, treating the discredited doctrine of separate but equal as an unwarranted

departure from the fundamental principle that all Americans, whatever their race, gender, or sexual orientation, stand equal and alike before the law. Famously, in his dissent in *Plessy v. Ferguson*, Justice John Marshall Harlan declared that state-mandated racial segregation "is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution," that "cannot be justified upon any legal grounds." 163 U.S. 537, 562 (1896) (Harlan, J., dissenting). Justice Harlan also noted: "We *boast of the freedom enjoyed by our people above all other peoples*. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law." *Ibid.* (emphasis added); *see also* JACKSON, *supra* note 3, at 105-106.

The concern that America would dilute its commitment to equality by condoning a separate-but-equal doctrine returned to this Court on the question of school desegregation. The words of the U.S. Government's amicus brief in *Brown v. Board of Education* echo here: "The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. * * * *Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice and democracy*. *The sincerity of the United States in this respect will be judged by its deeds as well as by its words*." Brief for United States as Amicus Curiae at 6, 8,

Brown v. Board of Educ., 347 U.S. 483 (1954) (emphasis added).[23]

C. Foreign Jurisdictions Have Successfully Balanced Equal Marriage And Religious Freedom

Finally, foreign solutions to comparable circumstances "cast an empirical light on the consequences of different solutions to a common legal problem." *Printz*, 521 U.S. at 977 (Breyer, J., dissenting). The experience of numerous foreign jurisdictions confirms that protecting the rights of same-sex couples to marry does not denigrate the rights of others. As the court in *Halpern* observed, "[a]llowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples." 65 O.R. 3d at 195 para. 137. Similarly, in a speech to Portugal's parliament urging enactment of that country's equal marriage law, Prime Minister José Sócrates explained: "No one should interpret this law as a victory of some over others. This law represents a victory for

[23] The government's invocation of international law and opinion in *Brown* recalled its amicus brief supporting the annulment of racially restrictive covenants in *Shelley v. Kraemer*, which cited numerous international agreements, duties under the U.N. Charter, resolutions on racial discrimination adopted by the U.N. General Assembly, and equal-protection resolutions by international conferences. *See* Brief for United States as Amicus Curiae at 97-100, *Shelley v. Kraemer*, 334 U.S. 1 (1947); *see also* Brief for Respondent at 62, *Henderson v. United States*, 339 U.S. 816 (1950).

all, this is always true of all laws about liberty and humanity."[24]

Applying first principles of liberty, dignity, and equality to allow same-sex couples to participate in the "official, cherished status of 'marriage'" offers those couples access to "the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it." Pet. App. 52a-53a. Doing so honors the institution of marriage by making its unique status available to all on a non-discriminatory basis.

Significantly, foreign jurisdictions that have authorized same-sex marriages have successfully balanced individual rights with community preferences—not by condoning illegal discrimination, but rather, by permitting religious institutions and clergy to choose whether to solemnize marriages between same-sex couples. Both the Supreme Court of Canada and South Africa's Constitutional Court ensured that religious officials may continue to enjoy the full exercise of their beliefs by permitting clergy to refuse

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[24] Diário da Assembleia da República, 1 Série – No. 20 at 8 (Jan. 9, 2010) (Port.) (José Sócrates) (translated), *available at* http://app.parlamento.pt/darpages/dardoc.aspx?doc=6148523063446f764c324679626d56304c334e706447567a4c31684a544556484c305242556b6b765245465353554679635856706460d38764d634b714a5449775532567a63384f6a627955794d45786c5a326c7a6247463061585a684c3052425569314a4c5441794d4335775a47593d&nome=DAR-I-020.pdf (Portuguese).

to solemnize marriages between people of the same sex. *Reference re Same-Sex Marriage*, 3 S.C.R. at 721-723 paras. 55-60; *Fourie II*, 2006 (3) BCLR 355, at para. 98. Other jurisdictions have followed suit. For example, the bill recently passed by the British House of Commons exempts religious organizations from having to perform same-sex weddings. Marriage (Same Sex Couples) Bill, 2012-13, H.C. Bill [126] cl. 2 (Eng.).

That predominantly Catholic countries such as Spain, Portugal, Mexico, Argentina, and Brazil now allow same-sex marriages (either throughout the country or in some jurisdictions) vividly illustrates that religious freedom and individual rights can readily co-exist with respect to same-sex marriage. Those jurisdictions made deliberate choices—whether through legislation or though their courts—to implement same-sex marriages despite strong opposition from leaders of the Catholic Church.[25] Their choices show an emerging global consensus that governments best ensure the dignity and autonomy of all people not by arbitrarily denying equal access to the legal institution of marriage, but rather, by respecting the religious freedom of some groups to grant solemn religious recognition in accordance with the particular tenets of their faith.

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[25] *See, e.g.*, Uki Goñi, *Defying Church, Argentina Legalizes Gay Marriage*, TIME (July 15, 2010).

CONCLUSION

For the foregoing reasons and those stated in respondents' briefs, California may not penalize same-sex couples by excluding them from the essential institution of marriage after previously including them within it, relegating them to separate and inherently unequal status.

Fifty-nine years ago, this Court rejected the doctrine of separate-but-equal in *Brown v. Board of Education*. Forty-six years ago, this Court overturned state law prohibitions on interracial marriage in *Loving v. Virginia*. In the past twelve years, numerous democratic nations around the world have honored the equal protection legacy of this Court by rejecting separate civil unions and domestic partnership regimes for same-sex couples in favor of marriage equality. To preserve U.S. leadership in the field of personal freedom and human rights, the judgment of the court of appeals should be affirmed.

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APPENDIX

SUMMARY OF KEY HISTORICAL EVENTS RELATED TO SAME-SEX MARRIAGE

The following summary highlights key developments in the global progression toward marriage equality.[1]

A. Introduction Of Domestic Partnerships And Civil Unions

The Netherlands (1979). Adopts unregistered cohabitation scheme, giving limited rights to same-sex couples.

Denmark (1986). Recognizes unregistered same-sex relationships.

Sweden (1988), Norway (1989), Belgium (1998). Extend common-law marriage rights to same-sex couples.

Denmark (1989), Norway (1993), Sweden (1994), Iceland (1996), the Netherlands (1997), Belgium (1999), California (1999), France (1999), Germany (2000), Finland (2001). Formally adopt registered partnerships for same-sex couples, granting some but not all of same rights as marriage.

Vermont (1999-2000). Supreme Court of Vermont rules that excluding same-sex couples from

[1] The events are listed in chronological order within each section.

marriage rights violates Vermont constitution, and orders legislature to establish same-sex marriage or equivalent institution. Vermont legislature enacts civil union law.[2]

B. The First Same-Sex Marriage Laws

The Netherlands (2001). House of Representatives and Senate enact first same-sex marriage bill in 2000. Act on Opening Up of Marriage 2001 [Staatsblad van het Koninkrijk der Nederlanden 2001, nr. 9 (11 January)] (Neth.) (effective April 1, 2001).

Belgium (2003). Parliament of Belgium gives equal recognition to the relationships of same-sex and opposite-sex couples by permitting same-sex couples

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[2] After 2001, numerous other jurisdictions create registered-partnership regimes or civil unions for same-sex couples.

Jurisdictions with registered partnerships include Tasmania, Australia (2003); New Jersey (2004); Maine (2004); Luxembourg (2004); the United Kingdom (2004); Switzerland (2005); Slovenia (2005); Czech Republic (2006); Washington (2007); Oregon (2007); Victoria, Australia (2008); Australian Capital Territory, Australia (2008); Maryland (2008); Hungary (2009); Nevada (2009); Wisconsin (2009); Austria (2009); New South Wales, Australia (2010); Ireland (2010); Isle of Man (2011); Liechtenstein (2011); Jersey (2011); and Queensland, Australia (2011).

Jurisdictions with civil unions include New Zealand (2004); Andorra (2005); Connecticut (2005); Distrito Federal (Mexico City), Mexico (2006); New Jersey (2006); Coahuila, Mexico (2007); New Hampshire (2007); Uruguay (2007); Ecuador (2008); Illinois (2011); Hawai'i (2011); Brazil (2011); Delaware (2011); and Rhode Island (2011).

to marry starting June 1, 2003. Civil Code Article 143 (Law of 30 January 2003) (Belg.).

C. Anti-Sodomy Laws Ruled Unconstitutional in the United States

***Lawrence v. Texas* (2003).** Supreme Court of the United States rules in *Lawrence v. Texas*, 539 U.S. 558 (2003), that laws criminalizing intimate sexual conduct between persons of the same sex violate the Due Process Clause of the Fourteenth Amendment.

D. Canada And South Africa Recognize Marriage Equality Through Court Decisions And Legislation

Ontario (2002). Ontario Superior Court of Justice, Divisional Court, rules that limiting marriage to opposite-sex couples violates the Canadian Charter of Rights and Freedoms. *Halpern v. Canada (Attorney General)*, 95 C.R.R. (2d) 1 (Can. Ont. C.S. 2002). Decision stayed while Canadian government appeals.

Québec (2002). Québec Superior Court rules that same-sex couples must be permitted to marry. *Hendricks v. Québec*, [2002] R.J.Q. 2506 (Can. Que. C.S.). Government appeals.

British Columbia (2003). British Columbia Court of Appeal rules that same-sex couples must be permitted to marry. *EGALE Canada, Inc. v. Canada* (2003), 225 D.L.R. 4th 472 (Can. B.C. C.A.). Remedies

suspended to give government time to revise legislation.

Ontario (2003). Ontario Court of Appeal agrees with trial court that same-sex marriage must be permitted under the Canadian Charter of Rights and Freedoms. *Halpern v. Canada* (2003), 65 O.R. 3d 161 (Can. Ont. C.A.). Marriage immediately becomes available throughout Ontario.

Canada (2003). Prime Minister Jean Chrétien announces the government will not appeal the decisions of the Ontario, Québec, and British Columbia courts and will pursue legislation permitting same-sex marriage throughout Canada.

British Columbia (2003). British Columbia Court of Appeal lifts stay of its decision. Same-sex marriages are permitted immediately.

Québec (2004). After government dismisses appeal of Superior Court's ruling, Québec Court of Appeals rules same-sex marriage must be permitted immediately. *Hendricks v. Canada* (2004), 238 D.L.R. 4th 577 (Can. Que. C.A.).

Yukon Territory, Manitoba, Nova Scotia, Saskatchewan, Newfoundland and Labrador, and New Brunswick (2004-2005). Courts in each of these provinces and territories rule that same-sex marriage must be permitted. Government does not defend these lawsuits and does not appeal.

Canada (2004). Supreme Court of Canada rules that enacting proposed same-sex marriage legislation

throughout Canada is within Parliament's authority. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Can.).

Canada (2005). Parliament of Canada enacts Civil Marriage Act, officially permitting same-sex marriage throughout Canada. Civil Marriage Act, S.C. 2005, c. 33 (Can.).

South Africa (2004). Supreme Court of Appeal of South Africa rules that excluding same-sex couples from civil marriage violates the constitution by denying them liberty and equality. *Fourie v. Minister of Home Affairs* 2005 (3) BCLR 241 (S. Ct. App.) (S. Afr.).

South Africa (2005). Constitutional Court of South Africa, the nation's highest court for constitutional matters, rules that excluding same-sex couples from civil marriage is unconstitutional and that anything less than full marriage equality violates equal protection. *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) (S. Afr.).

South Africa (2006). Parliament of South Africa enacts the Civil Union Act, which authorizes same-sex marriages throughout South Africa beginning on November 30, 2006. Civil Union Act 17 of 2006 ss. 1, 11 (S. Afr.).

E. Recognition of Marriage Equality Accelerates

Massachusetts (2003). Supreme Judicial Court of Massachusetts rules that same-sex couples have

the right to marry. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003). Marriage licenses issue beginning May 17, 2004.

Spain (2005). Spain's parliament, the Cortes Generales, enacts legislation permitting same-sex couples to marry and granting full adoption and inheritance rights. Ley 13/2005 el día 1 de julio de 2005 (Spain) (effective July 3, 2005).

Israel (2006). Supreme Court of Israel rules that Israeli government must recognize same-sex marriages performed outside Israel. 3045/05 *Ben-Ari v. Dir. of the Population Admin. in the Ministry of the Interior* (2006) (Isr.) (unpublished decision).

New York (2008). New York begins recognizing same-sex marriages performed outside the State.

Norway (2008). Storting, Norway's parliament, amends its marriage law to be gender-neutral and simultaneously repeals its registered-partnership law. Besler. O. nr. 91 (2007-2008) (Nor.) (effective January 1, 2009).

Connecticut (2008). Supreme Court of Connecticut rules that denying same-sex couples the right to marry violates guarantees of equality and liberty under Connecticut Constitution. *Kerrigan & Mock v. Connecticut Dept. of Public Health*, 957 A.2d 407 (Conn. 2008). First marriage licenses issue November 12, 2008.

Sweden (2009). Riksdag, the Swedish parliament, eliminates registered partnerships in favor of

single, gender-neutral marriage law for all couples. Civilutskottets betänkande 2008/09:CU19 (Swed.) (effective May 1, 2009).

Iowa (2009). Iowa Supreme Court rules unanimously that limiting marriage to opposite-sex couples violates equal-protection clause of Iowa Constitution. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). Marriage licenses become available April 27, 2009.

Vermont (2009). Vermont legislature overrides gubernatorial veto to enact same-sex marriage legislation. S. 115, 2009-2010 Sess. (Vt. 2009) (effective September 1, 2009).

New Hampshire (2009). New Hampshire legislature passes same-sex marriage legislation. H.B. 73, 2009 Leg. (NH 2009) (effective January 1, 2010).

District of Columbia (2009). Council of the District of Columbia passes Religious Freedom and Civil Marriage Equality Amendment Act of 2009, granting full marriage equality. Marriage licenses become available March 3, 2010.

Distrito Federal (Mexico City), Mexico (2009). Federal District of Mexico, i.e., Mexico City, amends Article 146 of the Civil Code to permit same-sex marriage.

Portugal (2010). Congress of Portugal amends marriage laws to be gender-neutral and to define marriage as a contract between two people that intend to form a family through a community of life.

Lei No. 9/2010 de 31 de maio 2010 (Port.) (effective June 5, 2010).

Iceland (2010). Parliament of Iceland unanimously passes legislation authorizing same-sex marriage and eliminating registered-partnership regime. Lög Nr. 65/2010, 836 – 485th issue, 28 March 2010, Hjúskaparlög, staðfest samvist o.fl. (Ice.) (effective June 27, 2010).

Argentina (2010). National Congress of Argentina passes same-sex marriage legislation, making Argentina first South American country, and third predominantly Catholic country, to recognize equal marriage rights for same-sex couples. Ley No. 26.618 de 22 de julio 2010 (CXVIII) B.O. 31.949 (Arg.) (effective July 22, 2010).

Mexico (2010). Suprema Corte de Justicia de la Nación, Mexico's highest court, rules that all Mexican states must recognize same-sex marriages performed in Mexico City. Acción de Inconstitucionalidad 2/2010 Promovente: Procurador General de la República, Pleno de la Suprema Corte de Justicia [Supreme Court], Agosto de 2010 (Mex.).

New York (2011). New York legislature enacts same-sex marriage legislation. Marriage Equality Act of 2011, AB A08354, 2011-2012 Leg., (N.Y. 2011). (effective July 24, 2011).

Colombia (2011). Constitutional Court gives Congress two years to enact legislation recognizing same-sex unions. If deadline passes with no legislation,

same-sex couples will be able to formalize and solemnize their unions before a judge or notary. Corte Constitutional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11 (Colom.).

Brazil (2011). Superior Tribunal de Justiça, highest Brazilian appellate court except for federal constitutional questions, rules that same-sex marriage is permitted under Constitution of Brazil and orders civil union of two women to be converted into marriage. S.T.J., Rec. Esp. No. 1.183.378-RS, Relator: Luis Felipe Salomão, 25.10.2011, S.T.J.J. (Braz.). Ruling is not binding on states within Brazil.

Alagoas, Brazil (2012). Following decision of Brazil's Superior Tribunal de Justiça, court in Brazilian state of Alagoas orders marriage licenses to be issued to same-sex couples.

Rhode Island (2012). State begins recognizing same-sex marriages performed outside the State.

Denmark (2012). Folketing, Denmark's national parliament, replaces registered-partnership regime with full marriage equality for same-sex couples. Lov nr. 532 af 12 jun 2012 (Den.) (effective June 15, 2012).

Quintana Roo, Mexico (2012). Secretary of State for Mexican state of Quintana Roo issues decision authorizing same-sex marriage.

Maryland (2012). Maryland voters approve Question 6, a same-sex marriage referendum. Marriage licenses become available January 1, 2013.

Washington (2012). Washington voters approve Referendum 74, a same-sex marriage referendum (effective December 6, 2012).

Maine (2012). Maine voters approve Question 1, An Act to Allow Marriage Licenses for Same-Sex Couples and Protect Religious Freedom (effective December 29, 2012).

Oaxaca, Mexico (2012). Suprema Corte de Justicia de la Nación, Mexico's highest court, rules that state of Oaxaca's prohibition on same-sex marriages is unconstitutional. Decision does not require, but paves the way for same-sex marriages throughout Mexico. Amparo en Revisión 581/2012, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], Dec. 5, 2012 (Mex.). Court relies in part on a 2012 decision from the Inter-American Court of Human Rights holding that sexual orientation is a suspect class and that a child-custody ruling against a lesbian mother based on her sexual orientation violated the equal-protection guarantees under the American Convention on Human Rights. *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

Bahia, Brazil (2012). Court in state of Bahia orders same-sex marriages to be permitted.

Distrito Federal (Federal District), Brazil (2012). Court rules that same-sex marriage licenses must be issued in the Federal District.

Piauí, Brazil (2012). Court orders that same-sex marriage licenses be issued in state of Piauí.

Uruguay (2012). Chamber of Deputies approves same-sex marriage bill. Bill now goes to Senate.

São Paulo, Brazil (2012). Court orders that notaries in state of São Paulo must issue marriage licenses to same-sex couples.

Rhode Island (2013). House of Representatives of Rhode Island approves same-sex marriage bill. Bill now goes to Senate.

England and Wales (2013). House of Commons votes 400-175 in favor of same-sex marriage legislation for England and Wales. Marriage (Same Sex Couples) Bill, 2012-13, H.C. Bill [126] (Eng.). After third reading and final approval in House of Commons, bill will be considered by House of Lords, which has power only to delay, not block, legislation. Prime Minister David Cameron states he expects bill to become law by summer 2013.

France (2013). National Assembly, lower house of Parliament, passes same-sex marriage legislation. Senate is expected to take up consideration of bill in April 2013.

Illinois (2013). Illinois Senate approves same-sex marriage bill. Bill now goes to House of Representatives.