NO. 12-144

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS HOLLINGSWORTH, et al.,
Petitioners,

v.

KRISTIN M. PERRY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF JUDGE GEORG RESS AND THE MARRIAGE LAW FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici Judge Georg Ress and the Marriage Law Foundation believe a comparative family law perspective can illuminate the issues this Court must consider in determining whether to grant certiorari in this case. They believe the information in this brief regarding the treatment of marriage and same-sex unions in Europe and other jurisdictions can provide this Court important perspective on the place of the California amendment, impugned as unconstitutional by the court below, on the spectrum of world opinion.

Amicus Curiae Marriage Law Foundation is a non-profit organization which supports efforts to reaffirm the legal recognition of marriage as the union of a husband and wife. Foundation attorneys have published in the area of comparative law including a recent article for the International Journal of the Jurisprudence of the Family and a monthly digest of U.S. and international cases related to marriage.

Amicus Curiae Judge Georg Ress served as the German judge on the European Court of Human

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[1] As required by Rule 37 of the Rules of this Court, *amici curiae* notified counsel of record for all parties of its intention to file this brief at least 10 days before the due date. In response, the parties all have consented to the filing of this brief. *Amici curiae* also represents that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Rights from 1998 to 2004. Prior to that appointment, he was director of the Europa-Institut of Saarland University from 1979 to 1998 and was the German representative to the European Human Rights Commission in Strasbourg from 1994 to 1999. He is currently Professor of International Law and Jacobs University in Bremen. Professor Ress is an acknowledged expert on human rights law in Europe both as an academic and jurist and can provide important insights on this subject to this Court.

SUMMARY OF THE ARGUMENT

The overwhelming international consensus—including among liberal western democracies with established traditions of concern for the rights of gays and lesbians—is that reserving the formal institution of "marriage" to opposite-sex couples while supporting same-sex couples through other rights and legal mechanisms is sound public policy. That consensus is based not on irrationality, ignorance, or animus toward gays and lesbians but on considered judgments about the unique nature and needs of same-sex couples and children. Of course, international legal consensus and practice cannot and should not determine the meaning of U.S. Constitutional guarantees. But that consensus is nevertheless instructive when considering whether—as the Ninth Circuit has held—California's decision to reserve marriage to opposite-sex couples while at the same time extending the rights of marriage to same-sex couples could only have arisen from irrationality, ignorance, or rank

prejudice. The international consensus contradicts the Ninth Circuit's conclusion.

The international consensus also holds that decisions on the culturally sensitive issues of marriage and marriage-like rights for same-sex couples should be reached through ordinary democratic processes based on careful policy making and compromise rather than through judicial mandates based on broad guarantees in national or international human rights instruments. National and international courts have typically refused to trump the democratic process in the name of gay and lesbian rights when adjudicating claims analogous to those at issue here.

In short, international authorities confirm that there are rational, non-invidious reasons based in secular public policy considerations for the choice the people of California made when enacting Proposition 8. The Ninth Circuit's holding that the people of California have acted irrationally conflicts with that substantive consensus. It also conflicts with the international consensus that such issues should be decided through normal democratic means rather than by the extraordinary and often divisive means of judicial intervention.

ARGUMENT

I. California's approach to the legal recognition of same-sex unions is well within the mainstream of other nations' treatment of these unions.

The majority on the panel below decided that the decision of the people of California to retain in their Constitution the definition of marriage as the union of a husband and wife was singular. The court of appeals found it a violation of the Equal Protection Clause that "Proposition 8 left the incidents [of marriage] but took away [its] status and the dignity" by "tak[ing] away from same-sex couples the right to have their lifelong relationships dignified by the official status of 'marriage'. . . ." App. 54a.

This conclusion conflicts not only with the laws of the vast majority of U.S. jurisdictions but with international legal consensus. To be sure, we are not suggesting that international legal opinion is in any way determinative on the question presented. But this Court has, in another context, "acknowledge[d] the overwhelming weight of international opinion" not to determine the meaning of the U.S. Constitution's guarantees but to "provide respected and significant confirmation" of the Court's conclusions about those guarantees. *Roper v. Simmons*, 543 U.S. 551, 578 (2005). Here, the Ninth Circuit's condemnation of Proposition 8 as irrational and born of prejudice is belied by an international consensus—one supported by most western liberal democracies—to provide same-sex couples with some or all of the rights of marriage while reserving the name "marriage" for opposite-sex couples. The

rationality of Proposition 8 and the approach California has taken in granting extensive rights to same-sex couples is amply confirmed by the "overwhelming weight of international opinion."

At the outset, it is important to recognize that the vast majority of nations define marriage as solely the union of man and woman. Only 11 non-U.S. jurisdictions recognize same-sex unions as marriages,[2] and many nations have adopted constitutional provisions defining marriage, explicitly or implicitly, as the union of a husband and wife. A 2010 article lists thirty-five such nations.[3] Since then, Hungary has adopted a constitution that expressly limits marriage to opposite-sex couples[4] and the German Constitutional Court has interpreted its constitution to the same effect.[5]

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[2] *See* Michael Heath, *Tasmania Plans Gay Marriage Law, Pressuring Australia's Gillard* BUSINESS WEEK, Aug. 5, 2012 at http://www.businessweek.com/news/2012-08-05/tasmania-to-back-gay-marriage-intensifying-pressure-on-gillard (the nations are Argentina, Belgium, Canada, Denmark, Iceland, the Netherlands, Norway, Portugal, Spain, South Africa and Sweden).

[3] Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition* 4 CAL. WEST. INT'L. L. J. 143, 186-187 note 251 (2010).

[4] "Hungary protects the institution of marriage between man and woman, a matrimonial relationship voluntarily established, as well as the family as the basis for the survival of the nation." L cikk, A Magyar Köztársaság Alkotmánya (Hungary).

[5] The German Constitution also protects marriage and the Federal Constitutional Court has interpreted this provision to refer to "the union of a man and a woman." Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional

Despite this overwhelming consensus, many jurisdictions have sought to provide recognition to same-sex relationships and provide them with legal incidents associated with marriage. In doing so, some have redefined marriage to include same-sex couples. But most have instead crafted compromises that stop short of changing the definition of marriage or even providing all marriage incidents to same-sex couples. In this light, California's approach ranks among the most liberal and accommodating in the world.

A. The decision of the people of California to retain the State's longstanding definition of marriage as the union of a husband and wife while extending benefits associated with marriage to same-sex couples is a common approach to family law internationally.

Like California, a number of nations have extended legal recognition to same-sex unions while retaining the virtually universal understanding of marriage as the union of a husband and wife. In Europe, the legal combination of (1) a law defining marriage as the union of a man and a woman and (2) a legal status extending incidents traditionally associated with marriage to same-sex couples is common.

Since 2003, Austria has granted same-sex cohabiting couples the same legal incidents accorded

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Court of Germany] Feb. 28, 1980, 53, 245. Similarly, the Romanian Constitution contains a general protection of marriage.

to opposite-sex cohabiting couples.[6] In 2009, the Austrian Parliament approved a bill creating a registered partnership status through which same-sex couples can access some of the incidents of marriage though others related to children such as adoption and access to in vitro fertilization are not available.[7]

The Czech Republic enacted registered partnership legislation for same-sex couples in 2006 which provides to registered couples some limited incidents of marriage related chiefly to decision-making on behalf of the other party.[8]

In 2002, Finland created a registered partnership status with significant marriage incidents extended to same-sex couples.[9]

In 1999, France enacted a legal status called a *pacte civil de solidarite* (PACs). Parties to the pact, who can be of the same or opposite-sex, register it with a court clerk and can access some of the

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[6] *Karner v. Austria*, application no. 40016/98, European Court of Human Rights (2003).

[7] Eingetragene Partnerschaft-Gesetz [EPG] Bundesgesetzblatt [BGBl] No. 135/2009 (Austria).

[8] Act no. 115/2006 Coll. on Registered Partnership (Czech Rep.); *see* Macarena Saez, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" Is So Different* 19 J. GENDER, SOC. POL'Y. & L. 1, 30 (2011).

[9] Laki rekisteröidystä parisuhteesta 950/2001 of 9 November 2001 (Finland).

incidents of marriage.[10] The available incidents have been increased since the initial enactment of the law to encompass inheritance rights.[11]

Ireland approved a Civil Registration Act in 2004 which specifically provides that "there is an impediment to marriage if . . . both parties are of the same-sex."[12] But in 2010, the Irish government created a civil partnership status for same-sex couples allowing registrants to access some marriage incidents.[13]

Slovenia enacted a registered partnership law in 2005 to provide incidents of marriage related to property, support obligations and inheritance.[14]

In 2005, a popular referendum in Switzerland approved a registered partnership status for same-sex couples, creating property rights, support obligations and inheritance rules for registrants.[15]

The United Kingdom recognizes marriage as the union of a man and a woman but nevertheless

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[10] Loi 99-944 du 15 novembre 1999 relative au pacte civil de solidarité (France), Journal Officiel de la République Française [J.O.], Nov. 16, 1999, p. 16959.

[11] Joëlle Godard, *PACS Seven Years On: Is It Moving Towards Marriage?* 21 INT'L J.L. & FAMILY 310, 317 (2007).

[12] Civil Registration Act 2004 (Act No. 3/2004) (Ir.).

[13] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Act No. 24/2010) (Ir.).

[14] Zakon o registraciji istospolne partnerske skupnosti (Slovenia).

[15] Loi fédérale sur le partenariat enregistré entre personnes du même sexe (Switz.).

accords all of the benefits of marriage to same-sex couples.[16]

Australia and New Zealand also have laws providing some marriage incidents to same-sex couples while retaining the husband-wife definition of marriage. The Parliament of Australia enacted specific legislation in 2004 defining marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" and prohibiting recognition of same-sex marriages contracted in other jurisdictions.[17] Separately, Parliament has amended various laws to ensure same-sex cohabiting couples and opposite-sex cohabiting couples are treated alike.[18]

In New Zealand, the Court of Appeal interpreted its marriage act to refer to male-female unions.[19] Many of the incidents of marriage in New Zealand have been extended to same-sex couples in civil unions though not the presumption of paternity or ability to jointly adopt children.[20]

Germany and Hungary grant constitutional protection to marriage as the union of a husband and wife while providing marriage-related benefits to

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[16] Civil Partnership Act (2004) (U.K.) chapter 33.
[17] Marriage Amendment Act 2004 (Cth) §§1, 3 (Austl.).
[18] *Same Sex Reforms*, Australia Attorney-General's Department, *available at* http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/SameSexReforms.aspx (accessed July 10, 2012).
[19] *Quilter v. Attorney General* (1998) 1 NZLR 523 (N.Z. Court of Appeal).
[20] Civil Union Act 2004 (N.Z.).

same-sex couples. Germany's Constitution specifies that marriage shall enjoy the special protection of the state.[21] As noted above, the Federal Constitutional Court has interpreted this provision to refer to "the union of a man and a woman."[22] In 2001, Germany's legislature created a legal status for "Life Partnerships" that offered many marriage incidents to same-sex couples (though not joint adoption).[23] In 2004, parliament amended the law to allow for stepparent-like adoptions of one partner's biological child by the other partner.[24] Hungary's marriage amendment is more explicit and was adopted since Proposition 8 in California. In a legal status separate from marriage, Hungary provides most marriage incidents to registered partners though not joint adoption or access to artificial insemination.[25]

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[21] Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG], May 23, 1949, BGBl. VI (Ger.).

[22] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] Feb. 28, 1980, 53, 245.

[23] Gesetz über die Eingetragene Lebenspartnerschaft [LpartG] [Life Partnership Act] Feb. 16, 2001, BUNDESGESETZBLATT [BGBL.] at I, 266 (Ger.).

[24] *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*, Dec. 20, 2004, BUNDESGESETZBLATT, Teil I [BGBL. I] at Nr. 69 (Ger.).

[25] Zsolt Körtvélyesi & András L. Pap, *National Report: Hungary* 19 AM. U. J. GENDER SOC. POL'Y & L. 211, 212 (2011).

B. The reasons other nations have adopted a similar approach to California on the question of marriage are entirely unrelated to any invidious purpose.

The panel below found that the purported uniqueness of California's marriage amendment necessitated a finding that it was motivated by animus. *Perry*, 671 F.3d at 1018. As the marriage amendment's official proponents have demonstrated in its petition for *certiorari*, this is an entirely unfounded supposition. Here again, comparative and international law help explain why.

Courts and legislative bodies in a number of nations and supranational entities have, like this Court, had to address claims for same-sex marriage. These decisions and debates make clear that retaining the understanding of marriage as the union of husband and wife is motivated by and justified by important social considerations unrelated to the invidious discrimination against gay men and lesbians.

The most significant and widespread argument for retaining the male-female definition of marriage relates to the importance of maintaining a link between marriage and procreation.

The most extensive discussion of the legitimate interest the government has in preserving the link between marriage and procreation has occurred in France. In a 2005 case assessing the validity of a marriage license issued to a same-sex couple, the court of appeal in Bordeaux rejected the notion that

failure to issue licenses to same-sex couples is discrimination because the existing marriage law merely recognizes "the fact that nature has made potentially fertile only opposite-sex couples" and the law "take[s] this biological reality into account" in determining the forms of marriage "encompassing the couple and the predictable consequences which are commonly children, in a specific institution called marriage."[26] Thus, for French law marriage is "a social platform for a family" and same-sex couples "that nature did not create potentially fruitful are therefore not implicated in this institution" so "their legal treatment is different because their situation is not analogous."[27]

In a 2006 report of the Mission of Inquiry on the Family and the Rights of Children, a French parliamentary commission said marriage was more than a "contractual recognition of a couple's love. It is a demanding framework with rights and obligations designed to welcome the child and provide for his or her harmonious development."[28]

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[26] Cour d'appel, Bordeaux, 6e ch., Apr. 19, 2005, 04/04683, *appeal dismissed*, Cass. 1e civ., ar. 3, 2007, 05-16.627, Decision No. 511, as quoted in William C. Duncan, *Why French Law Rejects a Right to Gay Marriage: An Analysis of Authorities* 2 INT'L. J. JURISPRUDENCE FAM. 215, 220 (2011).

[27] *Id.*

[28] Assemblee Nationale Mission D'Information Sur la Famille et Les Droits des Enfants, "Rapport" No. 2832 (Jan. 25, 2006) (English translation at http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf). The commission found "it is not possible to consider marriage and filiation separately, since the two entities are closely related, marriage being built around children." *Id.* (English translation at 68). The fact that same-

In 2011, the Constitutional Council of France similarly held "that the difference in situation between couples of the same sex and couples composed of a man and a woman can warrant a difference in treatment in regards to the rule of family law."[29]

The Constitutional Court of Italy reached essentially the same conclusion. In a 2010 decision, the court addressed the constitutionality of that nation's marriage laws. The court noted that article 29 of the Italian Constitution provides recognition to marriage and the family and then article 30 makes provision for the protection of children. The court explained the significance of this fact: "it is not by chance that, after addressing marriage, the Constitution considered it necessary to deal with the protection of children." The court noted article 30 protects the rights of children "born outside marriage" and says: "The necessary and fair protection guaranteed to biological children does not undermine the constitutional significance attributed

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sex couples sometimes raise children was not dispositive for the commission because "since children conceived in that way require a third party donor, if not a surrogate . . . same-sex couples are objectively not in the same situation as heterosexual couples." *Id.* (English translation at 76). So, the commission concluded "marriage is inconceivable absent the idea of filiation and the sex difference is central to filiation. It corresponds to a biological reality—the infertility of same-sex couples—and to the vital need to construct an identity for the child necessarily resulting from the union of a man and a woman." *Id.* (English translation at 77).

[29] *Corinne C. and other*, Decision No. 2010-92 QPC, French Constitutional Council, Jan. 28, 2011, ¶10 as quoted in Duncan, 2 INT'L. J. JURISPRUDENCE FAM. at 223.

to the legitimate family and the (potential) creative purpose of marriage which distinguishes it from homosexual unions."[30] The court then explains the nation's marriage law "is grounded on Article 29 of the Constitution" and "the legislation itself does not result in unreasonable discrimination, since homosexual unions cannot be regarded as homogenous with marriage."[31]

During the debate over Civil Partnerships in the House of Lords in 2004, government minister Baroness Scotland of Asthal explained that the legislation was intended to offer "a secular solution to the disadvantages which same-sex couples face in the way they are treated by our laws" but not to "undermine or weaken the importance of marriage." She said: "it is important for us to be clear that we continue to support marriage and recognise that it is the surest foundation for opposite-sex couples raising children."[32]

When the Australian Parliament debated the 2004 law to enshrine the definition of marriage, the Attorney General introduced the measure noting that marriage "is vital to the stability of our society and provides the best environment for the raising of children." He referred to marriage as "a central and

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[30] *Judgment No. 138 of 2010*, Corte costituzionale (Italy) at 26-27.
[31] *Id.* at 27.
[32] House of Lords Debate, April 22, 2004, Hansard vol. 660 c. 388 at http://hansard.millbanksystems.com/lords/2004/apr/22/civil-partnership-bill-hl.

fundamental institution."[33] In the Senate, the major opposition Labor Party announced its support of the measure.[34]

Notably, even some of the nations that have redefined marriage to include same-sex couples recognize the salience of these procreation concerns. The first nation to create same-sex marriage, the Netherlands, still does not apply the presumption of parentage associated with marriage to male same-sex couples.[35] Belgium which redefined marriage in 2003 and Spain which did so in 2005, do not extend the presumption of parentage to same-sex married couples.[36] Thus, these nations have attempted to recognize biological realities that have long been linked to the legal regulation of marriage even as they have redefined it. This, of course, is only possible when the law is created by political bodies which can make these kinds of distinctions, rather than courts charged with an up-or-down vote on constitutionality.

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[33] Australia House of Representatives, Marriage Amendment Bill 2004, Second Reading Speech, June 24, 2004 (Philip Rudock, MP).

[34] Australia Senate, Marriage Amendment Bill 2004, Second Reading Speech, August 12, 2004 (Senator Joe Ludwig).

[35] Macarena Saez, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" Is So Different* 19 J. GENDER, SOC. POL'Y. & L. 1, 4 (2011).

[36] *Id.* at 5-6.

II. The overwhelming weight of legal opinion from other nations and from supranational bodies rejects the judicial redefinition of marriage.

A. Same-sex marriage is not required by international human rights norms.

The majority opinion in the court below concluded that California's marriage amendment violated the Fourteenth Amendment, in part because of the purportedly "unique" (*Perry*, 671 F.3d at 1018) circumstance that California extends the incidents of marriage to same-sex couples while retaining, as a constitutional matter, the definition of marriage as the union of a husband and wife. As already noted, as a matter of comparative law, California's approach is hardly unique since (1) most nations have, like California, a legal definition of marriage as the union of a husband and wife and (2) those, like California, that have created a legal status for same-sex unions often choose to extend this recognition through a separate legal status so that the definition of marriage is unaffected.

In fact, when taking into account the international context, it is the panel's conclusion that the U.S. Constitution mandates a judicial redefinition of marriage that is outside the main currents of international legal precedent.

Of the eleven countries that have redefined marriage to include same-sex couples, nine have done so without the involvement of judicial bodies

interpreting human rights provisions. Argentina[37], Belgium[38], Denmark[39], Iceland[40], the Netherlands[41], Norway[42], Portugal[43], Spain[44], and Sweden[45] all redefined marriage by legislative action rather than court mandate. Even Canada, where a provincial appellate court had ruled the Charter of Rights and Freedoms necessitated creation of same-sex marriage[46], the final resolution of the issue was by an act of Parliament.[47] So too, while South Africa's Constitutional Court gave Parliament a year to create same-sex marriage after interpreting that nation's constitution as requiring such a step[48], the resolution was in Parliament. Civil Unions Bill, B 26B-2006. In responding to the court's direction, however, Parliament declined to amend the existing marriage act. Instead, it created an alternative status of Civil Unions which includes both Civil Partnership and marriage. Thus, opposite-sex couples can marry under the Marriage Act of 1961 or under the Civil Union Act of 2006 or they can register a civil partnership under the latter Act

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[37] Boletin Oficial de la Republica Argentina Buenos Aires, jueves 22 de Julio de 2010.
[38] Law of 30 January 2003.
[39] Lov nr. 532 af 12.06.2012.
[40] Hjuskaparlog, staofest samvist o. fl., ein hjuskaparlog.
[41] Act on the Opening Up of Marriage, 2001.
[42] Ot.prp. nr. 33, 2009.
[43] Lei Nº9/2010 de 31 de Maio.
[44] Boletin Oficial del Estado, July 3, 2005.
[45] Civilutskottets betänkande 2008/09:CU19.
[46] *Halpern v. Att'y Gen. of Can.*, 65 OR3d 161, 172 OAC 276, P 71 (2003).
[47] Canada Civil Marriage Act, R.S.C. ch. 33 (2005).
[48] *Fourie v. Minister of Home Affairs*, 2006 (3) BCLR 355 (CC) (S. Afr.).

while same-sex couples can marry or register a civil partnership only under the 2006 law.[49]

International tribunals have been similarly unwilling to impose same-sex marriage through the interpretation of international human rights norms. The European Court of Human Rights rejected the claim that an Austrian law permitting same-sex couples to contract registered partnerships but not marriages violated the European Convention for the Protection of Human Rights and Fundamental Freedoms. That claim was very similar to the claims made in this case. The European Court held the right to marry protected in Article 12 of the Convention "does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage."[50]

The *Schalk* decision also rejected a claim analogous to plaintiffs' Equal Protection claim here: that the failure to redefine marriage constituted sexual orientation discrimination. The court said "differences based on sexual orientation require particularly serious reasons by way of justification" but that "a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy."[51] The court also noted that while "there is an emerging European consensus towards legal recognition of same-sex couples" and "this tendency has developed

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[49] *See* Civil Unions Bill, B 26B-2006 (South Africa); Francois du Toit, *National Report: The Republic of South Africa* 19 J. GENDER, SOC. POL'Y. & L. 277, 280 (2011).
[50] *Schalk v. Austria*, App. No. 30141/04 (2010) ¶63.
[51] *Schalk* at ¶97.

rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes."[52] The court also held Austria could make its own determinations about the precise incidents of marriage extended to same-sex couples even if they did not create precise equality with those accorded married couples.[53]

Schalk accorded with an earlier decision of the European Court of Justice that the Convention "protects only traditional marriage between two persons of opposite biological sex."[54] Earlier this year, in a case involving France's adoption law, the European Court of Human Rights confirmed this holding, noting "Article 12 of the Convention does not impose on the governments of member States the obligation to extend the right of marriage to a same-sex couple."[55]

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[52] *Id.* at ¶105.
[53] *Id.* at ¶108.
[54] *K.B. v. National Health Service Pensions Agency*, Case No. C-117/01 (2003) ¶55.
[55] *Gas v. France*, App. No. 25951/07 (2012) ¶66.

B. The overwhelming international consensus holds that same-sex marriage should be addressed by democratic institutions, not by the courts.

International bodies have decided that retaining the definition of marriage as the union of a husband and wife, promotes an interest in deferring to longstanding custom and practice related to marriage in the absence of consensus or legislative action to redefine marriage.

Thus, the European Court of Human Rights rejected a claim that the Convention for the Protection of Human Rights and Fundamental Freedoms required member nations to create same-sex marriage: "the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of the national authorities, who are best placed to assess and respond to the needs of society."[56] The court noted there was no consensus among the forty-seven state parties to the Convention about same-sex marriage.[57]

The Italian Constitutional Court decision already discussed similarly concluded that "it is for Parliament to determine—exercising its full discretion—the form of guarantee and recognition for the aforementioned unions" referring to same-sex

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[56] *Schalk v. Austria*, App. No. 30141/04 (2010) ¶62.
[57] *Id.* at ¶56.

cohabiting relationships.[58] In rejecting a challenge to the country's partnership law, Germany's Federal Constitutional Court said that for the legislature "it is not forbidden in general to establish new opportunities for couples of opposite sex or for other relationships . . . . But there is no constitutional command to create such opportunities."[59]

The French Constitutional Council has held that it is not the prerogative of the court "to substitute its appreciation to that of the legislator in considering, in this manner, the difference in situation" between same and opposite-sex couples.[60] The Italian Constitutional Court and German Federal Constitutional Court also rejected claims that national constitutions mandated recognition of same-sex marriage or similar statuses.[61]

In 1998, the New Zealand Court of Appeal rejected a claim for same-sex marriage with the majority holding the Bill of Rights Act did not require redefinition because "there was no discrimination since there was no differential treatment (gay and lesbian people can marry just as much as non-gay and non-lesbian people can—neither gay nor straight people can marry partners

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[58] *Judgment No. 138 of 2010*, Corte costituzionale (Italy) at 25.
[59] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] July 17, 2002, 1 BvF 1/01, ¶111.
[60] *Corinne C. and other*, Decision No. 2010-92 QPC, French Constitutional Council, Jan. 28, 2011, ¶10.
[61] *Judgment No. 138 of 2010*, Corte costituzionale (Italy) at 25; Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] July 17, 2002, 1 BvF 1/01, ¶111.

of the same sex)."[62] New Zealand's law was also challenged before the United Nations Human Rights Committee which held the International Covenant on Civil and Political Rights created a treaty obligation "to recognize as marriage only the union between a man and a woman wishing to marry each other" and that a "mere refusal to provide for marriage between homosexual couples" did not breach the Covenant.[63]

To sum up, only two courts in foreign jurisdictions (Canada and South Africa) have held that national or supranational charters require same-sex marriage. By contrast, the U.N. Human Rights Committee, European Court of Human Rights, European Court of Justice, French Constitutional Council, German Federal Constitutional Court, Italian Constitutional Court, and New Zealand Court of Appeal have all rejected such claims. The vast majority of countries that now have same-sex marriage did so not as a matter of court order but through legislative action.

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[62] Kenneth McK. Norrie, *National Report: New Zealand* 19 AM. U. J. GENDER SOC. POL'Y & L. 265, 269 (2011).

[63] *Joslin v. New Zealand*, Comm. No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (U.N. Hum. Rts. Cmte. 2002).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant review in this case.

Respectfully submitted,

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