NOS. 12-144, 12-307

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al., *Petitioners*,

v.

KRISTIN M. PERRY, et al., *Respondents*.

UNITED STATES, *Petitioner*,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

AMICUS CURIAE BRIEF OF INTERNATIONAL JURISTS AND ACADEMICS IN SUPPORT OF PETITIONER HOLLINGSWORTH AND RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

The following individuals—distinguished jurists and academic experts in international and comparative law—have joined as *amici curiae* to share their broad experience concerning the importance of global legal patterns that continue to protect the institution of heterosexual marriage and related values of family, procreation, and the best interests of children around the world. Institutional affiliation is listed for purposes of identification only; all *amici* are acting in their individual capacities.

- Antonio Baldassarre, former Judge and Emeritus President of the Italian Constitutional Court.
- Giuseppe Mifsud Bonnici, former Judge, European Court of Human Rights, 1992–1998; Visiting Professor, University of Malta.
- Alexey Ivanov, Judge, Sofia Appellate Court, Bulgaria.
- Milan Karabin, former President of the Slovak Supreme Court.
- Ján Klučka, Slovak Republic, Judge of the European Court of Justice of the European

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[1] As required by Rule 37 of the Rules of this Court, all parties have consented to the filing of this brief. *Amici curiae* also represent 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. The Marriage Law Foundation, an independent organization not connected with any of the parties, paid for the cost of printing this brief. Otherwise, no person other than *amici curiae,* its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Union (2004-2009); former Justice of the Slovak Constitutional Court; Professor of International Law at Safarik University Law School in Kosice, Slovakia.

- Paolo Maddalena, Emeritus Vice President of the Italian Constitutional Court.
- Lord Mackay of Clashfern, KT PC QCs, former Lord Chancellor; active member, House of Lords, former Dean of the Faculty of Advocates (leader of the Scots bar).
- Georg Ress, former Judge, European Court of Human Rights (1998 – 2004); Emeritus Professor of Law, Universität des Saarlandes, Germany.
- Ombretta Fumagalli Carulli, Director, Department of Law, Università Cattolica del Sacro Cuore; Member, Pontifical Academy of Social Sciences; former State Secretary to the Prime Minister and Vice Minister; former member of the Italian Parliament and Supreme Council of Magistrates.
- Frans A.M. Alting von Geusau, Professor Emeritus of International Law, Tilburg University and Leiden University; former Director of the John F. Kennedy Institute, Center for International Studies, Tilburg University, Netherlands.
- W. Cole Durham, Jr., Susa Young Gates University Professor of Law and Director, International Center for Law and Religion Studies, J. Reuben Clark Law School, Brigham Young University.
- David F. Forte, Professor of Law, Cleveland-Marshall College of Law; Former Consultor Pontifical Council for the Family, Vatican.

- Donald P. Kommers, Professor Emeritus of Political Science and Concurrent Professor of Law, University of Notre Dame.
- Radoslav Prochazka, Member of Parliament and former Chair of the Judiciary Committee of the Slovak Parliament (National Council); Slovakia's Agent to the Court of Justice of the European Union; Professor of Jurisprudence at Trnava University Law School.
- Jeremy A. Rabkin, Professor, George Mason University School of Law; Board of Directors of the United States Institute of Peace.
- Balazs Schanda, Dean, Faculty of Law, Pázmány Péter Catholic University, Budapest.
- Roger Trigg, Emeritus Professor of Philosophy, University of Warwick, and Senior Research Fellow, Ian Ramsey Centre, University of Oxford.

SUMMARY OF THE ARGUMENT

The overwhelming weight of international authority—including a majority of 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. This authority confirms that differences among various national, state and federal jurisdictions on the subject are fully compatible with international norms. The accumulated wisdom reflected in the countless legislative, judicial and

administrative judgments 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, foreign law and practice cannot and should not determine the meaning of U.S. Constitutional guarantees. But the vast experience in other countries 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. International experience contradicts the Ninth Circuit's conclusion. International practice confirms the wisdom of allowing legislative flexibility in the pace and structure of legal change.

Accordingly, most foreign jurisdictions have concluded that decisions on the culturally sensitive issues of marriage and marriage-like rights for same-sex couples should be reached through democratic processes based on careful policy making and compromise rather than through judicial mandates. National and international courts have overwhelmingly 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 that the people of California made when enacting Proposition 8 and that Congress made when

enacting the Defense of Marriage Act (DOMA). The Ninth Circuit's holding that the people of California had no rational basis for adopting Proposition 8 is at odds with the substantive consensus that is evident in a majority of other jurisdictions. That decision demeans the political processes that reached these outcomes. The lesson for both *Hollingsworth* and *Windsor* is that particularly where, as here, profoundly divisive issues are at stake, the dominant international pattern of resolving such issues through normal democratic processes rather than through extraordinary judicial intervention is much the wiser course.

ARGUMENT

I. The approaches of California and the United States Congress to the legal recognition of same-sex unions are well within the mainstream of other nations' treatment of these unions.

The majority opinion below asserted that the decision of the people of California to retain the definition of marriage as the union of a husband and wife in their constitution was singular. The Ninth Circuit held that California's definition of marriage violated the Equal Protection Clause in that the "unique and strictly limited effect" of California's marriage amendment was to "take away" from same-sex couples "the official designation of 'marriage'" while "leaving in place all of its incidents." *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012). Likewise, the Second Circuit found it a violation of the Equal

Protection Clause to have a uniform Federal definition of marriage because, among other reasons, "DOMA's sweep arguably creates more discord and anomaly than uniformity." *Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012).

These conclusions conflict not only with the laws of the vast majority of U.S. jurisdictions but with the weight of international legal authority. 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 extensive international authority, including that of most western liberal democracies. The rationality of California's approach is confirmed by the fact that the majority of countries that recognize some form of same-sex union have, like California**,** reserved the designation of marriage solely for opposite-sex couples.[2] Further, the Second Circuit's conclusion

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[2] Fifteen states recognize same-sex unions without the designation of marriage. Andorra (Qualificada de les unions estables de parella [Termed Stable Marriage Unions] 17 BOPA No. 25 (Law 4/2005)), Australia (Family Law Act 1975 sec. 60EA), Austria (Eingetragene Partnerschaft-Gesetz (EPG) Act of 30 December 2009), Ecuador (Constitución de 2008 art. 68), Finland (Lag 950 of 28 September 2001 Amended by Lag 59 of 4 February 2005), France (Loi relative au pacte civil de

that DOMA creates "discord" and "anomaly" is

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solidarité [Law on the Civil Solidarity Act] No. 99-944 (1999)); Germany (Gesetz zur Beendigung der Diskriminierung Gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften [Act to End Discrimination Against Same-Sex Unions: Civil Partnerships], 2001 BGBl. No. 9 S. 266 (2001), as amended by Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts [Law on the Revision of Civil Partnership Law], 2004 BGBl. No. 29 S. 3996 (2004)), Ireland (Civil Partnership and Certain Rights and Obligations of Cohabitants Act no. 24/2010), Liechtenstein (Lebenspartnerschaftsgesetz (2011)), Luxembourg (Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats), New Zealand (Civil Union Act 2004, 2004 S.N.Z. No. 102), Slovenia (Zakon o registraciji istospolne partnerske skupnosti [Act on Registered Partnerships] (2009)), Switzerland (Loi fédérale sur le partenariat enregistré entre personnes du même sexe du 18 juin 2004 [LSP] [Federal Law on registered partnerships between persons of the same sex] no. 210, art. 95), Uruguay (Ley Nº 18.246 Unión Concubinaria) United Kingdom (Civil Partnership Act 2004, c. 33).

Same-sex unions are permitted to have the designation of marriage in twelve states: Argentina (Ley No. 26.618 de 22 de julio 2010 (CXVIII) B.O. 31.949); Belgium (Civil Code Article 143); Canada Civil Marriage Act, S.C. 2005, c. 33; Denmark (Lov nr. 532 af 12 June 2012 Gældende); Iceland (Lög Nr. 65/2010, 836 - 485th issue, 28 March 2010); The Netherlands (Act on the Opening Up of Marriage 2001); Norway (Besler. O. nr. 91 (2007-2008)), Portugal (Lei No. 9/2010), South Africa (Civil Union Act 17 of 2006), Spain (Ley 13/2005 el día 1 de julio de 2005); and Sweden (Svensk författningssamling 2011:891). Canada and South Africa have both enacted laws giving marriage status to same-sex couples following court order. *See Halpern v. Canada* (Att'y Gen.), [2003] 65 O.R. 3d 161 (Can. Ont. C.A.); *Hendricks v. Quebec*, [2002] R.J.Q. 2506 (Can. Que.); *Barbeau v. British Columbia* (Att'y Gen.), [2003] 12. B.C.L.R. 4th 1 (Can. B.C.); *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC). Of the 12, Brazil is the only country to have instituted same-sex marriage simply by judicial decision. Superior Tribunal of Justice – R.E. 1.183.378 - RS (2010/0036663-8) (1 February 2012).

inconsistent with precedent from countries and multi-country jurisdictions, such as the European Court of Human Rights, which have recognized the reasonableness and legitimacy of legal approaches that seek *both* to define marriage as a heterosexual union *and* at the same time to protect the rights of gay and lesbian couples.[3]

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 twelve non-U.S. jurisdictions recognize same-sex unions as marriages.[4] *All* of the rest retain the understanding of marriage as the union of a man and a woman. That is, taking the number of member states of the United Nations as the reference point, fifteen times more countries disallow same-sex marriage than allow it. Additionally, many nations have adopted constitutional provisions defining marriage, explicitly or implicitly, as the union of a husband and wife—more nations than have recognized any form of same-sex union. A 2010 article lists thirty-five such nations.[5] Since then, Hungary has adopted a constitution that expressly limits marriage to opposite-sex couples.[6] The German Constitutional

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[3] *See, e.g.*, *Schalk and Kopf v. Austria*, App. No. 30141/04 (ECtHR, 24 June 2010) (holding that Austria's refusal to allow judicial recognition of same-sex marriage was within Austria's "margin of appreciation," but noting with approval the passage of civil partnership legislation).

[4] *See supra* note 2.

[5] 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).

[6] "Hungary protects the institution of marriage between man and woman, a matrimonial relationship voluntarily

Court has interpreted its constitution to the same effect.[7] In 2011, a new Civil Code went into effect in Romania including a definition of marriage that provides a statutory interpretation of the relevant constitutional provision: "Marriage is the freely consented to union between a man and a woman, established as provided by law."[8]

A smaller number of jurisdictions have sought to give recognition to same-sex relationships and provide them with legal incidents associated with marriage. In doing so, a few 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. The distinction between state and federal marriage rights allows the people of each state in our diverse nation to follow different paths. A minority of nine U.S. states have

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established, as well as the family as the basis for the survival of the nation." L cikk, A Magyar Köztársaság Alkotmánya (Hungary).

[7] Article 6 of the German Constitution also protects marriage. 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 Court of Germany] 28. Februar 1980, 53, 245. Similarly, the Romanian Constitution contains a general protection of marriage. Constitution of Romania art. 48.

[8] Codul Civil (2009) (Romania) art. 259(a); *see* Daniel Buda, *The Administrative Reform in Romania: The New Civil Code and the Institution of Marriage* 36 TRANSYLVANIAN REV. OF ADMIN. SCIENCES 27, 33 (2012).

(along with twelve foreign nations) permitted same-sex marriage. The majority of states have chosen to enact constitutional amendments, statutes, or cultural norms defining marriage as between one man and one woman, as is the case in the remaining 180 sovereign states recognized by the United Nations.

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 an approach common 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 combination of a law defining marriage as the union of a man and a woman and a legal status extending incidents traditionally associated with marriage to same-sex couples is common.

For example, since 2003, Austria has granted same-sex cohabiting couples the same legal incidents accorded to opposite-sex cohabiting couples.[9] In 2009, the Austrian Parliament approved a bill creating a registered partnership status through which same-sex couples can access many of the incidents of marriage, though others related to

[9] *Karner v. Austria*, App. No. 40016/98 (ECtHR, 24 July 2003).

children such as adoption and access to in vitro fertilization are not available.[10]

The Czech Republic enacted registered partnership legislation for same-sex couples in 2006, providing registered couples with some limited incidents of marriage related chiefly to decision-making on behalf of the other party.[11]

In 2002, Finland created a registered partnership status with significant marriage incidents extended to same-sex couples.[12]

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 incidents of marriage.[13] The available incidents have been increased since the initial enactment of the law to encompass inheritance rights.[14]

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

[11] Act no. 115/2006 Coll. on Registered Partnership (Czech Republic); *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).

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

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

[14] Joëlle Godard, *PACS Seven Years On: Is It Moving Towards Marriage?*, 21 INT'L J.L. & FAMILY 310, 317 (2007). In 2011, the new French government announced support for legislation to redefine marriage but has since stalled enacting such a law because of significant opposition in the nation, including a

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."[15] In 2010, however, the Irish government created a civil partnership status for same-sex couples allowing registrants to access some marriage incidents.[16]

Slovenia enacted a registered partnership law in 2005 to provide gay and lesbian couples incidents of marriage related to property, support obligations and inheritance.[17]

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.[18]

The United Kingdom recognizes marriage as the union of a man and a woman but nevertheless accords all of the benefits of marriage to same-sex couples.[19]

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recent march of 70,000 people in favor of retaining the nation's legal definition of marriage as the union of a husband and wife. *French Protests Against Gay Marriage Bill*, BBC, 17 November 2012, at http://www.bbc.co.uk/news/world-europe-20382699.

[15] Civil Registration Act 2004 (Act No. 3/2004) (Ireland).

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

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

[18] Loi fédérale sur le partenariat enregistré entre personnes du même sexe du 18 juin 2004 (Switzerland).

[19] Civil Partnership Act 2004, c. 33 (United Kingdom). On 24 January 2013 the UK Culture Secretary ordered publication of the Marriage (Same Sex Couples) Bill 126. The prospect of such

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.[20] Separately, Parliament has amended various laws to ensure same-sex cohabiting couples and opposite-sex cohabiting couples are treated alike.[21]

In New Zealand, the Court of Appeal interpreted its marriage act to refer to male-female unions.[22] Many of the incidents of marriage in New Zealand have been extended to same-sex couples in civil unions, although not the presumption of paternity or ability to jointly adopt children.[23]

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action has met with significant protest, and on 25 January the Bishop of Leicester released a statement noting that the Church of England "continues to hold the view, set out in doctrine and Canon law, that marriage is a union between one man and one woman. It is a social institution that predates both church and state and has been part of the glue that has bound countless successive societies together." Available at http://churchofengland.org/media-centre/news/2013/01/bishop-of-leicester-responds-to-marriage-(same-sex-couples)-bill.aspx.

[20] Marriage Amendment Act 2004 (Cth) §§ 1, 3 (Australia).

[21] Australia Government Attorney-General's Department, *Same Sex Reforms: Overview of the Australian Government's same-sex law reforms*, at http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Samesexreforms.aspx.

[22] *Quilter v. Attorney General* (1998) 1 NZLR 523 (New Zealand Court of Appeal).

[23] Civil Union Act 2004 (New Zealand).

Germany and Hungary grant constitutional protection to marriage as the union of a husband and wife while providing marriage-related benefits to same-sex couples. Germany's Constitution specifies that marriage shall enjoy the special protection of the state.[24] As noted above, the Federal Constitutional Court has interpreted this provision to refer to "the union of a man and a woman."[25] 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).[26] In 2004, parliament amended the law to allow for stepparent-like adoptions of one partner's biological child by the other partner.[27] 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.[28]

To summarize, California family law mirrors the approach of at least ten European nations, Australia,

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[24] Grundgesetz für die Bundesrepublik Deutschland [GG], 23. Mai 1949, Bundesgesetzblatt [BGBl.] VI (Germany).

[25] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 28. Februar 1980, 53, 245 (Germany).

[26] Gesetz über die Eingetragene Lebenspartnerschaft [LpartG] [Life Partnership Act] 16 February 2001, Bundesgesetzblatt [BGBl] I, 266 (Germany).

[27] *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*, 20 December 2004, Bundesgesetzblatt [BGBl] I, 69 (Germany).

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

New Zealand, and others[29] by defining marriage as the union of a husband and wife while extending marriage incidents to same-sex couples. Indeed, the California approach—extending all marriage incidents—is more expansive than that of most European nations. The fact that California has extended substantially broader benefits to same-sex couples than have been granted by many reform initiatives in Europe and the Pacific can scarcely be taken as evidence that its policies are benighted and less than rational. To the contrary, the appropriate interpretation is that the California electorate sought to effectuate a compromise that would respect the rival dignity claims of groups with profoundly different lifestyle commitments. One of the primary values of protecting legislative flexibility is precisely that it opens up possibilities of nuanced compromise.

B. The reasons other nations have adopted approaches similar to those of California and the United States Congress on the question of marriage reflect important state interests and 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, this is an entirely unfounded supposition. Here

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[29] See *supra* note 2.

again, comparative and international law help explain the important state interests reflected in retaining opposite-gender marriage.

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 nations' constitutions, decisions and debates make clear that retaining the understanding of marriage as the union of husband and wife can be motivated and justified by important social considerations unrelated to 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.

In numerous countries—including those whose constitutions implicitly or explicitly define marriage as a relationship between one man and one woman—family, children and parenting are all linked in the constitutional text. Examples include Azerbaijan, Belarus, Bolivia, Hungary, Germany, Latvia, Lithuania, Moldova, Paraguay, Poland, Suriname, Turkmenistan, and Ukraine.[30] For example, the

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[30] Constitution of the Republic of Belarus [Konstituitsiia Respubliki Belarus] art. 32 ("Marriage, the family, motherhood, fatherhood, and childhood shall be under the protection of the State"); Constitution of the Republic of Latvia [Satversme] art. 110 ("The state protects and supports a marriage, the family, the rights of parents and children."); Constitution of the Republic of Lithuania [Lietuvos Respublikos Konstitucija] art. 38 ("The family shall be under the protection and care of the

German constitution states that "[m]arriage and family shall enjoy the special protection of the state," that "the care and upbringing of children is the natural right of parents," and that "[e]very mother shall be entitled to the protection and care of the community."[31]

The German Constitutional Court has held that these provisions "guarantee the essential structure of marriage."[32] Even while upholding the right of the legislature to create same-sex civil partnerships, the

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state. … Marriage shall be concluded upon the free mutual consent of man and woman."; República de Paraguay Constitución Política art. 52 ("The union in marriage by a man and woman is one of the fundamental factors in the formation of a family."); Constitution of the Republic of Poland [Konstytucja Rzeczypospolitej Polskiej] art. 18 ("Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."); Constitution of Suriname [Grondwet van Suriname] art. 35 (enumerating six fundamental rights associated with marriage, three of which relate to the value of procreation and children in marriage: that "[e]very child shall have the right to protection[,]" that "[p]arents shall have the same responsibilities towards legal or natural children[,]" and that "[t]he State recognizes the extraordinary value of motherhood"); Constitution of Ukraine [Konstytutsiia Ukrainy] art. 51 ("Marriage shall be based on free consent between a woman and a man. Each of the spouses shall have equal rights and duties in the marriage and family. ... The family, childhood, motherhood, and fatherhood shall be under the protection of the State."); Hungary, *supra* note 6.

[31] Grundgesetz für die Bundesrepublik Deutschland [GG], 23. Mai 1949, BGBl. VI (Germany).

[32] Civil Partnership Case, 105 BverfGE 313 (2002) [Germany], English translation in Donald P. Kommers and Russell A. Miller, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (3d ed. 2012), 608.

German Constitution Court has ruled that that "part of the content of marriage, as it has stood the test of time ... is that it is the union of one man with one woman to form a permanent partnership ... ."[33] The constitutional protection of marriage means that "marriage alone, like the family, enjoy constitutional protection as an institution. No other way of life … merits this protection. Marriage cannot be abolished nor can its essential structural principles be altered without an amendment to the constitution."[34] The Court emphasized that marriage is not only a "sphere of freedom" but also a "social institution" and that the "structural principles that characterize marriage give it the form and exclusivity in which it enjoys constitutional protection as an institution."[35]

Other countries' parliaments or constitutional courts have specifically identified the realities of procreation and children as important state interests in retaining marriage as a heterosexual union. Examples include the parliaments of UK, Ireland, and Australia and constitutional courts of France, Italy, and Ireland. [36]

The example of France is instructive. In 2011, the Constitutional Council of France 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

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[33] *Id*.
[34] *Id*. at 609.
[35] *Id*. at 609-10.
[36] See *infra* notes 37-54 and accompanying text.

rule of family law."[37] It understood this difference in situation between same-sex and opposite-sex couples as being in "direct relation to the purpose of the [French marriage] law,"[38] permitting the tribunal to reject the equality claims of two women who sought a marriage license.

Earlier, 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.[39] It reasoned that 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."[40] 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

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[37] *Corinne C. et al.*, Decision No. 2010-92 QPC, French Constitutional Council, 28 January 2011, ¶10 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, 223 (2011)

[38] *Id.*

[39] *Arrêt de la cour d'appel de Bordeaux*, 6e ch., 19 April 2005, 04/04683, *appeal dismissed*, Cass. 1e civ., ar. 3, 2007, 05-16.627, Decision No. 511, as quoted in Duncan, 2 INT'L. J. JURISPRUDENCE FAM. at 220.

[40] *Id.*

treatment is different because their situation is not analogous."[41]

In a 2006 report of the Mission of Inquiry on the Family and the Rights of Children, a French parliamentary commission also relied on the significance of procreation to marriage. It rejected the idea of marriage as no 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."[42] The Mission of Inquiry concluded that it "is not possible to consider marriage and filiation separately, since the two entities are closely related, marriage being built around children."[43] The fact that same-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."[44]

Similarly, the Constitutional Court of Italy upheld the constitutionality of that nation's marriage laws in a 2010 decision that also relied on an understanding of the potential procreative nature of marriage.[45] The court noted that Article 29 of the

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[41] *Id*.

[42] Rapport fait au nom de la mission d'information sur la famille et les droits des enfants, No. 2832, l'Assemblée nationale le 25 janvier 2006 (English translation at http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf 65).

[43] *Id*. at 68).

[44] *Id*. at 76).

[45] *Judgment No. 138 of 2010*, Corte costituzionale (Italy).

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 that Article 30 protects the rights of children "born outside marriage." It declared: "The necessary and fair protection guaranteed to biological children does not undermine the constitutional significance attributed to the legitimate family and the (potential) creative purpose of marriage which distinguishes it from homosexual unions."[46] The court explained that 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."[47]

In the United Kingdom, 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

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[46] *Id.* at 26-27.
[47] *Id.* at 27.

foundation for opposite-sex couples raising children."[48]

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 fundamental institution."[49] In the Senate, the major opposition Labor Party announced its support of the measure.[50] A Senate Committee report from 2009 recommending rejection of a bill to create same-sex marriage based its recommendation, in part, on submissions to the Committee that "argued in favour of preserving the narrower and common definition on the basis of 'natural procreation' and on the potential effect of same-sex parenting on children."[51] In 2012, Parliament again considered a proposal to redefine marriage. The key speech in opposition in the Senate argued "marriage is … ultimately about the next generation and its socialisation, with the benefit of having, if at all possible, mother and

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[48] Civil Partnership Bill [H.L.], House of Lords Debate, 22 April 2004, Hansard vol. 660 cc. 388-433, available at http://hansard.millbanksystems.com/lords/2004/apr/22/civil-partnership-bill-hl.

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

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

[51] Australia Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009* (November 2009).

father role models."[52] The proposal was rejected 98-42 in the House of Representatives and 41-26 in the Senate.[53]

In a High Court decision in Ireland involving a challenge to the government's failure to treat same-sex couples as married for tax purposes, the court heard extensive evidence on the potential effects of same-sex marriage for child well-being. In rejecting the claim for recognition of same-sex marriage, the court said: "Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry albeit there is no evidence of any adverse impact on welfare."[54]

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 give legal recognition to same-sex marriage, the Netherlands, still does not apply the presumption of parentage associated with marriage to male same-sex couples.[55] 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.[56] Thus, these nations

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[52] Australia Senate, Marriage Amendment Bill (No. 2) 2012, Speech, 18 September 2012 (Senator Eric Abetz).
[53] Peter Westmore, *Australian People Win on Marriage,* NEWS WEEKLY (13 October 2012).
[54] *Zappone v. Revenue Commissioners*, [2006] IEHC 404 (Ireland High Court 2006), p. 130.
[55] Saez, *supra* note 11 at 4.
[56] *Id*. at 5-6.

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.[57] Legislators need to be left free to take into account the rich and complex ways that the connections of marriage and the best interests of children are woven together in the fabric of society.

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.

As will be discussed in this section, the European Court of Justice, the European Court of Human Rights, the United Nations Human Rights Committee, the French Constitutional Court, the Italian Constitutional Court, the German Federal Constitutional Court, and the New Zealand Court of Appeal have all rejected the notion that same-sex marriage is a constitutional or human right. Particularly instructive is the opinion of the European Court of Human Rights which examines the consensus of member states to determine

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[57] *Cf.* Duncan, 2 INT'L. J. JURISPRUDENCE FAM. 222 (arguing that in framing same-sex marriage as an issue of rights and equality, some U.S. courts have ignored the interests of children recognized by French tribunals).

whether they have established a certain norm in their practice. It is instructive that they have found no such consensus in Europe. In contrast with the decision of the Second Circuit, it is also significant that the European Court of Human Rights has not required uniformity on marriage law among the 47 states it oversees.

The Ninth Circuit's holding that California's retention of the designation "marriage" for heterosexual unions was unique is not only erroneous, but to the contrary, it is the panel's conclusion that the U.S. Constitution mandates a judicial redefinition of marriage that is out of step with international legal patterns.

International tribunals consistently have been unwilling to impose same-sex marriage through judicial interpretation of international human rights norms.

One of the earliest decisions along these lines was handed down in 2003 by the European Court of Justice. It held the Convention on Human Rights "protects only traditional marriage between two persons of opposite biological sex."[58] A subsequent proceeding concurred, citing a European Court of Human Rights decision to the effect that "the barrier to marriage arising from the fact that English law does not allow a transsexual who has undergone gender reassignment to amend his or her birth

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[58] *K.B. v. National Health Service Pensions Agency*, Case No. C-117/01 (2003) ¶55.

certificate does not constitute an infringement of Articles 8, 12 or 14 of" the Convention.[59]

Even the European Court of Human Rights, which has been supportive of sexual orientation claims in a large number of other settings,[60] has declined to recognize a right to same-sex marriage. In *Schalk and Kopf v. Austria*,[61] the Court rejected the claim, similar to that presented here, 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. 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."[62]

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[59] *Id.* at ¶24. .

[60] See, e.g., *Dudgeon v. the United Kingdom,* App. No. 7525/76 (ECtHR, 22 October 1981) (barring prohibition of homosexual activity by consenting adults); *Lustig-Prean and Beckett v. the United Kingdom,* App. Nos. 31417/96 and 32377/96 (ECtHR, 27 September 1999) (extensive investigation into lives of homosexual military officials violated privacy rights); *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96 (ECtHR, 21 December 1999) (holding that sexual orientation discrimination falls under Article 14's general ban on discrimination); *A.D.T. v. the United Kingdom*, App. No. 35765/97 (ECtHR, 31 July 2000) (states may not ban private taping of homosexual acts); *E.B. v. France*, App. No. 43546/02 (ECtHR, 22 January 2008) (sexual orientation discrimination in application of adoption law violates Article 14's nondiscrimination ban);

[61] App. No. 30141/04 (ECtHR, 24 June 2010).

[62] *Id.* at ¶63.

The *Schalk* decision explicitly rejected a claim analogous to plaintiffs' Equal Protection claim here: that the failure to redefine marriage constituted sexual orientation discrimination. Even holding that "differences based on sexual orientation require particularly serious reasons by way of justification," the Court rejected the claim of discrimination because "a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy."[63] The court also noted that while "there is an emerging European consensus towards legal recognition of same-sex couples … this tendency has developed 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."[64] The court also held that 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.[65]

In 2012, 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

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[63] *Id.* at ¶97.
[64] *Id.* at ¶105.
[65] *Id.* at ¶108.

States the obligation to extend the right of marriage to a same-sex couple."[66]

Later in 2012, the European Court also had occasion to address the question of whether Finnish law could permissibly require that an individual undergoing a gender change transform her marriage into a civil partnership. In that case, the court explained: "While it is true that some Contracting States have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not flow from an interpretation of the fundamental rights as laid down by the Contracting States" in the European Convention.[67]

In 1998, the New Zealand Court of Appeal also rejected a claim for same-sex marriage. The majority held that 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 of the same sex)."[68]

As discussed above, the Italian Constitutional Court, German Federal Constitutional Court and French Constitutional Council also rejected claims

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[66] *Gas and Dubois v. France*, App. No. 25951/07 (ECtHR, 15 March 2012) ¶66.
[67] *H. v. Finland*, App. No. 37359/09 (ECtHR, 13 November 2012) ¶38.
[68] Kenneth McK. Norrie, *National Report: New Zealand*, 19 AM. U. J. GENDER SOC. POL'Y & L. 265, 269 (2011).

that national constitutions mandated recognition of same-sex marriage or similar statuses.[69]

Finally, the United Nations Human Rights Committee, the official treaty body charged with interpreting the International Covenant on Civil and Political Rights, has held that the Covenant 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.[70]

B. Extensive international authority holds that same-sex marriage should be addressed by democratic institutions, not by the courts.

With the exception of Brazil, Canada, and South Africa, international judicial bodies have consistently declined to redefine marriage, considering this an issue to be determined in legislatures.

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

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[69] *Judgment No. 138*, *supra* note 45 at 25; Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 17. Juli 2002, 1 BvF 1/01, ¶111; *Corinne C. et al.*, *supra* note 37.

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

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."[71]

The Italian Constitutional Court 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 cohabiting relationships.[72] In rejecting a challenge to the country's civil partnership law, Germany's Federal Constitutional Court also stated 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."[73]

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.[74]

Of the twelve countries that have redefined marriage to include same-sex couples, nine have done so without the involvement of judicial bodies relying on constitutional or human rights provisions;

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[71] *See Schalk and Kopf, supra* note 3 at ¶62.
[72] *Judgment No. 138, supra* note 45 at 25.
[73] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 17. Juli 2002, 1 BvF 1/01 ¶111.
[74] *Mrs. Corinne C. et al.*, *supra* note 37 at ¶10.

Argentina, Belgium, Denmark, Iceland, the Netherlands, Norway, Portugal, Spain, and Sweden all redefined marriage by legislative action rather than court mandate.[75]

Even in Canada and South Africa, where courts were the initial impetus for the acceptance of same-sex marriage, adoption of same-sex marriage was ultimately referred to the legislative branch or involved significant legislative input. In Canada, where a provincial appellate court had ruled the Charter of Rights and Freedoms necessitated creation of same-sex marriage,[76] the final resolution of the issue was by an act of Parliament.[77]

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,[78] the resolution was in Parliament.[79] In responding to the court's direction, however, Parliament declined to amend the existing marriage act. Instead, it created an additional, alternative status of civil unions which includes both civil partnership and marriage. Thus, opposite-sex couples can marry under the Marriage Act of 1961, under the Civil Union Act of 2006, or they can register a civil partnership under the latter Act

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[75] See *supra* note 2.
[76] *Halpern v. Att'y Gen. of Can.*, 65 OR3d 161, 172 OAC 276, P 71 (2003).
[77] Canada Civil Marriage Act, S.C. 2005, c. 33.
[78] *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) (South Africa).
[79] South Africa Civil Unions Bill, B 26B-2006.

while same-sex couples can marry or register a civil partnership only under the 2006 law.[80]

Brazil stands alone as the only country to have same-sex marriage established solely by courts. [81]

In sum, only three courts in foreign jurisdictions (Brazil, Canada, and South Africa) have held that national or supranational charters require same-sex marriage. By contrast, the United Nations Human Rights Committee, the European Court of Human Rights, the European Court of Justice, the French Constitutional Council, the German Federal Constitutional Court, the Italian Constitutional Court, and the New Zealand Court of Appeal have all rejected such claims.

The vast majority of countries that now permit same-sex marriage did so not as a matter of court order but through legislative action. Further, most nations that do recognize some form of same-sex union do not give them the designation of marriage.

Protection of marriage as a distinctive form of relationship is a recurring pattern around the world, and this is not seen to be inconsistent with finding nuanced ways of assuring that those in same-sex relations are not prejudiced as a result. The fact that some support for these global legal patterns may have emanated from religious or moral

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[80] *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).

[81] Superior Tribunal of Justice – R.E. 1.183.378 - RS (2010/0036663-8).

considerations does not alter this conclusion. Particularly in democratic nations committed to freedom of expression and freedom of religion,[82] the range of discourse that can and should be brought to bear on sensitive social issues needs to be wide-ranging and robust.[83] Disparaging moral and religious reasons as sub-rational and excluding them from the public square—as occurred in the decisions below—denies them the weight and respect they deserve,[84] and over time risks impoverishing some of

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[82] Jeffrey Stout, *Religious Reasons in Political Argument*, in DEMOCRACY AND TRADITION (Princeton: Princeton University Press, 2004) 63-92 ("The free expression of religious premises is morally underwritten not only by the value we assign to the freedom of religion, but also by the value we assign to free expression, generally.")

[83] *See generally* Richard John Neuhaus, THE NAKED PUBLIC SQUARE (Grand Rapids: William B. Eerdmans Publishing Co., 1984); Douglas G. Smith, *The Illiberalism of Liberalism: Religious Discourse in the Public Square*, 34 SAN DIEGO L. REV. 1571 (1997).

[84] Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475 (1997); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 679, 682 (2001) ("… to construe the nonestablishment norm to forbid legislators to base a political choice on a religiously grounded moral belief unless the belief also has a plausible, independent secular ground would be to unfairly deprivilege religious faith (relative to secular belief) as a ground of moral judgment … . Such deprivileging would discriminate against religious grounds for moral belief, thereby subverting the equal citizenship of religious believers who, unlike citizens who are not religious believers, would be prevented from having their most important moral beliefs transformed into law (absent a plausible, independent secular grounding for those beliefs)."); Steven D. Smith, *Separation and the 'Secular': Reconstructing*

the deepest wellsprings of value in our common social life.[85] *A fortiori* where, as here, a range of secular reasons have also contributed to the shaping of legal responses, courts should defer to normal democratic processes.[86]

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the Disestablishment Decision, 67 TEX. L. REV. 955, 1008-15 (1989).

[85] *See, e.g.*, Jean Elshtain, *The Question Concerning Authority*, in Paul J. Weithman, ed. RELIGION AND CONTEMPORARY LIBERALISM (Notre Dame: University of Notre Dame Press, 1997) 253, 253-54 ("if we operate under an epistemological urgency that dictates translating religious language into one dominant philosophic language … we erode over time the authoritative grounding of the American democracy itself … ."); Paul J. Weithman, *Introduction*, Weithman, *supra*, 26-37 (discussing "civic democracy" theories that underscore the importance of the role that civil society organizations including religion play in cultivating the capacities of citizens needed for healthy democratic societies); John A. Coleman, *Deprivatizing Religion and Revitalizing Citizenship*, in Weithman, *supra*, 264-90 (privatization of religion is linked to decline of interpersonal trust and social capital requisite for effective democracy).

[86] Kent Greenawalt, 2 RELIGION AND THE CONSTITUTION (Princeton and Oxford: Princeton University Press, 2008) 535-537 (because of the typical mixture of religious and nonreligious reasons individuals and legislators may bring to bear in support of public policy decisions, the appropriate grounds for invalidating laws relying on religious premises "are too narrow to have much practical significance"); Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B. C. L. REV. 781, 843-849 (2007) (noting the need for "respect, flexibility, and humility on all sides in the clash between religious groups and advocates for rights for gays, lesbians, and transgendered people" and the value of "giving latitude for those whose views [one] reject[s] in order to advance a larger commitment to freedom and coexistence.")

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the decisions of the courts below.

Respectfully submitted,

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