No. 12-144

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
PETITIONERS,
v.

KRISTIN M. PERRY, ET AL., RESPONDENTS

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

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF PETITIONERS, ON THE NON-JURISDICTIONAL ISSUES

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Petitioners, Dennis Hollingsworth et al., in Case 12-144 ("*Hollingsworth v. Perry*"). Petitioners oppose overturning California's Proposition 8 (2008), and thus oppose the Court's forcing California to offer marriage for same-sex partners, due to a supposed violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution. This brief will cover the substantive aspects of the case, not the jurisdictional aspects such as standing.

Since both this case and the *United States v. Windsor* ("*Windsor*") case[2] are about same-sex marriage ("gay marriage", or "*per se* sterile marriage" ("PSSM")), are being heard in tandem, and there is a heavy overlap of issues, this brief will discuss both cases.

Amicus has multiple interests in this case, and also in *Windsor*. For example, he, over the years, has promoted gay rights by, e.g., contacting the Ugandan government on various occasions to express distaste with their proposals to jail gays, or even enact a death penalty for homosexual behavior. However, as

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, see S. Ct. R. 37. Blanket permission is on record with the Court for *amicae/i* to write briefs.

[2] 699 F.3d 169 (2d Cir. 2012) (*cert. granted*, 81 U.S.L.W. 3324) (U.S. Dec. 7, 2012) (No. 12-307).

will be explained, gay marriage may be more of a government-granted privilege than a fundamental right like life or liberty.

Also, he is a California resident, and a *Hollingsworth* decision would impact California's Proposition 8, which put a ban on gay marriage into the State's Constitution. In 2008, Amicus voted "no" on Proposition 8, not to morally endorse gay marriage—he has never morally endorsed it—, but out of consideration, e.g., even those not supporting gay marriage may wonder if a full constitutional ban on gay marriage may go too far and seem a little heavy-handed. *See, e.g.*, CNN, *McCain: Same-sex marriage ban is un-Republican*[3] (Senator John McCain asserts that the Defense of Marriage Act ("DOMA")[4] is less intrusive than a needless federal constitutional ban on gay marriage).

However, after Proposition 8 passed, Amicus did not think, "Well, that's illegal and violates the Constitution"; Amicus simply noted that the law had changed, that fair play was had in the democratic election, and the People decided not to support gay marriage. If someone voted "no" on "Prop. 8", it is difficult to call him a "homophobe" or a rabid, unthinking opponent of legalized gay marriage; and he can offer a perspective here that may be more moderate and reasonable-seeming than, say, the perspectives of those who oppose not only gay marriage but also gay rights in general, e.g., the

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[3] July 14, 2004, 4:29 p.m., http://www.cnn.com/2004/ALLPOLITICS/07/14/mccain.marriage/.

[4] Pub. L. 104–199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

right not to be arrested for sodomy which is enshrined in *Lawrence v. Texas* ("*Lawrence*"), 539 U.S. 558 (2003). One can support *Lawrence* wholeheartedly without supporting gay marriage.

Amicus has also submitted briefs to this Court concerning constitutional matters, e.g., his *Schuette v. Coalition to Defend Affirmative Action, et al.*[5] amicus brief recommending summary reversal, *see id.*, in that case because the idea that the Equal Protection Clause mandates legalized affirmative action in a State is absurd.

Similarly, in the instant case, the idea that the Equal Protection Clause mandates legalized gay marriage in a State (or under federal law) is unsupportable. Amicus means to explore equal-protection issues, and many other issues, so that the Court may make the optimal decision in these controversial cases, *Hollingsworth* and *Windsor*.

SUMMARY OF ARGUMENT

Marriage is often a difficult thing, not always "gay": involving pregnancy, children, and possible illness or death, so that some may not support the naming of a gay relationship as "marriage". A gay marriage may even threaten standard marriage, either through a perceived lowering of standard marriage's value, or fiscally.

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[5] Nos. 08-1387, 08-1534, 08-1389, 09-1111, 2012 U.S. App. LEXIS 23443 (6th Cir. Nov. 15, 2012) (en banc), pet. for cert. pending (U.S. Dec. 4, 2012) (12-682).

Also, parents may wonder if a gay lifestyle may be best for their child, in terms of fertility, disease, or other factors. Thus, they may not support State measures which seem to lionize sodomy-based relationships as socially honored. After all, sodomy is a choice, which can be avoided, even permanently.

Ronald Reagan had a balanced and courageous approach to these issues: opposing California's "Briggs Initiative" (Proposition 6, 1978) that banned public-school gay teachers, at the same time he opposed teaching a gay lifestyle. His attitude is a positive role model.

It is wise to, like Reagan, avoid animus to gays, although opposition to gay marriage shows no such animus. Additionally, gays have shown animus, or even wielded threats, to racial minorities, or to opponents of gay marriage, and that animus or harassment too is reprehensible.

The comparison between racial minorities and gays is fruitful, since it reminds us of; the limited fisc available to serve them (and others); the fertility of interracial (but not same-sex) relationships; and the strong possibility that having diverse, opposite-sex parents is at least as important as diversity at college.

Lawrence, laudably, protects gays against animus, but by its own terms does not command nationwide gay marriage. Another legal issue not supporting gay marriage is the lack, in context, of real sex discrimination against gays from gay-marriage bans. ("Gay marriage" may resemble a

houseboat, which despite its name may not be able to perform all of a boat's functions.)

The experience of *Roe v. Wade* (410 U.S. 113 (1973)) shows that letting democratic processes solve difficult issues can be valuable; and, in tandem with the Hyde Amendment,[6] shows that a liberty to act, does not imply necessity for state subsidy or approval. To believe otherwise, could lead down a slope to polygamy, or even worse.

Given all this, it is wise for the Court not to "split the difference", e.g., grant a victory in either *Hollingsworth* or *Windsor* just to placate some people, or to grant any rights short of gay marriage, unless absolutely necessary. For any on the Court to be moved by political considerations, or the temptation of "glory" from a "blockbuster decision", would not be up to the best traditions of the Court.

And considering the favorable position gays have in America, especially compared to in many other countries, they have many other ways to achieve gay marriage besides a Court order which would disrespect democracy, separation of powers, and justice itself. As well, there are other useful ways to help gays, here or around the world. And any efforts at gay marriage should avoid false accusations of animus, which in themselves may show animus.

ARGUMENT

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[6] Pub. L. 94-439, tit. II, § 209, 90 Stat. 1434 (1976; amended 2009).

I. WHY MARRIAGE IS NOT ALWAYS GAY; AND, GAY MARRIAGE'S PERCEIVED INSULT OR THREAT TO NON-GAY MARRIAGES

"*Il y a de bons mariages, mais il n'y en a point de délicieux*." ("There are good marriages, but there are no delicious ones.") While this is not strictly true (some members of the Court may have "delicious" marriages themselves, say), La Rochefoucauld still has a point, *see id.*, in that marriage is not always gay in the old sense of "gay", not always a barrel of fun.

This is one reason, moral and Biblical reasons aside, why many Americans may be queasy about taking a gay couple's relationship and calling it "marriage". The very word "gay", which may have been adopted by homosexuals (along with "cheery" symbolology such as rainbow flags), denotes a state of permanent happiness which may sometimes have little basis in reality. And what basis there is, may come partially from the status of being able to have endless sexual relations without ever risking pregnancy.

Of course, gay sex is not all there is to gay marriage. There may be felt love, etc. But it is certainly one primary linchpin of gay marriage, being the physical base of such marriage. By contrast, in a different-sex marriage, the physical base is heterosexual sex, plus, usually, pregnancy and birth: a much broader base indeed than for gay marriage.

See, e.g., *Ballard v. United States*, 329 U.S. 187, 193 (1946): "The truth is that the two sexes are not

fungible; a community made up exclusively of one is different from a community composed of both[.]" *Id.* (Douglas, J.)

Thus, a "gay marriage" may have a lack of Wagnerian weightiness to it, as it were: no chance of children from the biological operations of the marriage, no nine months of labor (and no repetition of those nine months, as happens with women who have multiple children), etc.

Endless women have risked death with their pregnancies, or even died in childbirth. Endless parents have died saving the children of their body from drowning in a pond or various other disasters. To paraphrase the Gettysburg Address:[7] the struggles of men and women married together to have and raise families and provide for them, hallows their marriages beyond anything we can say about it.

So, those who have not made the same struggles, or from birth never had the possibility of making them, may be seen as insulting those who have fought on that battleground. *Cf. United States v. Alvarez*, 567 U.S. ___ (2012) (overturning Stolen Valor Act prohibiting lying about military medals, but upholding the ideal of well-won medals for honor).

Traditional marriage has even been seen as having divine sanction, to the point that the Almighty himself is sometimes compared to a bridegroom in an opposite-sex marriage, *see Isaiah* 62:4-5, saying of Jerusalem, "Thou shalt no more be

[7] President Abraham Lincoln (Nov. 19, 1863).

termed Forsaken . . . . for the Lord delighteth in thee, and thy land shall be married. . . . and as the bridegroom rejoiceth over the bride, so shall thy God rejoice over thee." *Id.* (KJV)

And: "Reader, I married him." That is another noted sentence from literature, by Charlotte Brontë, who, famously, did not write *James Eyre*, but *Jane Eyre* (1847) with the sentence above, spoken by the eponymous protagonist, beginning the ultimate chapter. (Ch. 38) If it had been "James" instead of "Jane", uproar would have ensued; thus we see how traditional traditional marriage really is.

So, gay marriage may be felt as a slap in the face to some people who have actually "walked the walk" and entered into a marriage that can risk pregnancy, that features the obligation of parents to take care of even difficult or ungrateful children of their loins for 18 years.....so that the status of gay marriage may seem to be an unmerited reward, and felt to dishonor those in a standard, non-gay marriage.

As Edith Windsor noted of her case, "It's a culmination of an engagement that happened between us in 1967 when we didn't dream that we'd be able to marry."[8] Otherwise put, she knew what she was doing, that it was not allowed at the time; and at this time, she would like a tax break of over $363,000 for that, *see Windsor*, *passim*. Everyone might like a tax break, but to receive it for behavior

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[8] Adam Gabbatt, *US supreme court takes up gay marriage cases – as it happened*, The Guardian (London), Dec. 7, 2012, updated 4:55 p.m., http://www.guardian.co.uk/world/us-news-blog/2012/dec/07/supreme-court-doma-prop-8-live.

you have known, for decades, was not State-endorsed, is another thing.

As well, the name "marriage" itself is important. Some of those who already have a domestic partnership or such, many legal benefits and protections already, just not named "marriage", may be grateful for what they do have, instead of craving the name "marriage" as well for what traditionally has not been considered a marriage—in fact, for behavior that was often considered a dishonor and a crime worthy of death.

So, when the lower-court opinion proclaims that taking away the name "marriage" from gays after a mere 5 months of availability is some form of animus meant to "lessen the status and human dignity of gays and lesbians", *see* 671 F.3d 1063 (Reinhardt, J.), that is baseless—and especially risks offensiveness given that California has been a Golden State for gays and lesbians in many ways, such as domestic partnerships,[9] hosting the gay meccas of San Francisco and West Hollywood, and defeating the Briggs Initiative (*see infra* at 14).

Of course, feelings may not be enough alone to keep gay marriage illegal. Still, commentary on gay marriage should frankly address the unease that many traditional, heterosexual couples and their supporters feel about creating a new kind of marriage which is deeply alien, in its characteristics, to traditional marriage.

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[9] *See* Cal. Stats. 1999, ch. 588, § 2 (codified at Cal. Fam. Code § 297(a)).

And there may not just be "feelings": there may be actual "trademark dilution" or "expressive harm" of a sort, whereby calling a *per se* sterile marriage, a gay marriage, a "marriage" may lower the perceived value of marriage in general so that marriage is valued less, and fewer heterosexuals bother to marry (and provide a stable home for their children) if marriage is seen as less of a badge of honor than formerly. This could be called a "tragedy of the sexual commons" or "marriage commons".

A law professor has attacked this "trademark dilution" idea, *see* Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. Davis L. Rev. 385 (2009), "Precisely because the word 'marriage' cannot be trademarked, same-sex couples can — and do — refer to themselves as married regardless of whether states give them access to the legal status." *Id.* at 407. However, such couples, if living where gay marriage is disallowed, are not telling the truth, and this dishonesty should give pause.

Karlan also says,

> [O]ne [should] view [a] tarnishment-of-marriage argument skeptically. The argument depends on treating marriage as essentially . . . an exclusionary institution — a claim deeply at odds with the Supreme Court's treatment of marriage under the Due Process and Equal Protection Clauses of the Fourteenth Amendment as a freedom that "has long been recognized as one of the vital personal rights essential to the

> orderly pursuit of happiness by free men."

Id. at 408 (footnotes and citation omitted). However, America has not "long . . . recognized", *id.*, same-sex marriage as legitimate; it is very new and hardly part of "traditional ordered liberty".

Nor does Karlan mention the Supreme Court's "treatment of marriage" under *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing appeal of two Minnesota gay men seeking marriage license, "for want of a substantial federal question"), which is not very favorable.

Even if there is no direct threat to standard marriage from gay marriage, there is the indirect threat of fiscal drainage: since the fisc is limited, money that goes to benefits for gay marriages is not available for non-gay marriages which make children. Especially in difficult economic times, this is important to remember.

Additionally, there is a "free rider problem" of sorts when gay couples get the "brand" and tax benefits of marriage, without actually risking producing children as marriage has traditionally done. Thousands of years of standard marriage have made marriage an honorable status: so, should the Court order that gays receive this status too? Or should each State, and the national Congress, decide?

II. ARE PARENTS OBLIGED TO BE HAPPY IF THEIR CHILDREN CHOOSE A GAY

LIFESTYLE WITH SOME TACIT STATE ENCOURAGEMENT?

Parents may also feel their children are threatened if gay marriage is seen to be so holy that the Courts declares every State and the Congress must endorse it—or even if States or Congress endorse it on their own. Should the government be in the business of sodomy-norming, that is, saying, either *per se* or *de facto*, that sodomy is not just to be tolerated in a free society, but to be honored by the State financially and ceremonially?

A parent may get along with friends, bosses, or co-workers who happen to be gay, but may not be extremely enthused if her or his child expresses interest in living as a gay person. This does not make the parent a "bigot", any false propaganda to the contrary.

And children are being pressured into sodomy these days more than before, *see, e.g.*, Dr. Ruth Westheimer, *New Teen Pressures On Sex*, Forbes[10] (mentioning increased pressure in recent years on teens to have sex, especially oral sex, which can even transmit HIV). The popular culture does not help: even a hit song from several decades ago, *Mickey*[11] by Toni Basil, features a gyrating songstress squalling to the eponymous "Mickey", "Any way you want to do it/I'll take it like a man", *id.*, in a way many believe was an offer to be sodomized. It's not easy to be a parent these days, with peer and media

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[10] Jan. 23, 2008, 6:00 p.m., http://www.forbes.com/2008/01/22/solutions-education-dr-ruth-oped-cx_drw_0123drruth.html.

[11] *On* the album *Word of Mouth* (Chrysalis Records 1982).

pressure; and sodomy-norming by the State may not help.

In fact, the State may try to *obstruct* people's efforts to choose a non-gay lifestyle: *see, e.g.*, Robyn Hagan Cain, *Ninth Circuit Enjoins Gay Conversion Therapy Ban*, FindLaw[12] (appeals court issues injunction against California law preventing sexual-orientation-change therapy for minors).

See also Rob Williams, *Parkinson's sufferer wins six figure payout from GlaxoSmithKline over drug that turned him into a 'gay sex and gambling addict'*, The Independent (London)[13] (man recovers damages in French court for drug making him desire gay sex).

A well-known pro-same-sex-relations rap song, by Macklemore and Ryan Lewis, featuring Mary Lambert, *Same Love*,[14] says, "And I can't change/Even if I tried/Even if I wanted to", *id.* But this may not be correct, *see* the therapy discussed *supra*. Also, someone gay as a youth may grow up and marry someone of the opposite sex, since passions change sometimes.

But regardless of orientation, gay *actions* are a choice, which many fight courageously not to choose. *See, e.g.*, in respect to one religion, the blog Gay, Catholic, and Chaste, http://gaycatholicchaste.

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[12] Dec. 28, 2012, 12:01 p.m., http://blogs.findlaw.com/ninth_circuit/2012/12/ninth-circuit-enjoins-gay-conversion-therapy-ban.html.

[13] Nov. 29, 2012, http://www.independent.co.uk/news/world/europe/parkinsons-sufferer-wins-six-figure-payout-from-glaxosmithkline-over-drug-that-turned-him-into-a-gay-sex-and-gambling-addict-8368600.html.

[14] *On* the Macklemore and Ryan Lewis album *The Heist* (Macklemore LLC 2012).

wordpress.com/ (describing efforts of Thaddeus, a gay Catholic, to remain chaste in accordance with Church doctrine); Rod Dreher, *One Crazy — Or Very Brave — Gay Catholic*, The American Conservative,[15] where theology doctoral student Joshua Gonnerman says, "As a Christian who is committed to chastity and who is also gay, I acknowledge and I accept the high claims that ethic makes on my life." *Id.* (citation omitted); David Morrison, *Out of the Closet and into Chastity*, Cath. Educ. Resource Ctr.:[16] "My pilgrimage from being a homosexual-rights activist to living life as a chaste Catholic began in earnest when I read . . . Protestant martyr, Dietrich Bonhoeffer. . . . After all, if a heterosexual man or woman can live chastely, why is a chaste life impossible for a homosexual[?]" *Id.*

Parents may wonder, if a child enters a homosexual lifestyle, whether there will be any grandchildren; whether the child will have a vastly increased risk of AIDS or other problems (e.g., incontinence caused by anal trauma); about social ostracism for the child, especially if he does contract AIDS or other diseases; and about the fate of the child's soul in the afterlife, according to traditional standards of sin in Abrahamic religions. Do these fears make the parents a bunch of backward, prejudiced monsters—or do they make the parents into good parents? Readers may judge.

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[15] May 17, 2012, 3:25 p.m., http://www.theamericanconservative.com/dreher/one-crazy-or-very-brave-gay-catholic/.

[16] 1994, http://www.catholiceducation.org/articles/homosexuality/ho0001.html.

III. THE COURAGE OF RONALD REAGAN IN OPPOSING THE BRIGGS INITIATIVE; AND HIS SAGACITY IN RECOGNIZING THE STATE NEED NOT LAUD GAY LIFE CHOICES

Without endorsing everything former President Ronald Reagan did or thought, Amicus still salutes him for his courage and decency in opposing the Briggs Initiative, a 1978 California ballot initiative that would have banned gay teachers, or even those mentioning homosexuality in a non-negative manner, from teaching at public schools, *see id.* This noisome measure was defeated, partly because of Reagan's intervention against it. *See, e.g.*, Dan Chmielewski, *Ronald Reagan on Gay Rights*, Liberal OC,[17]

> Reagan met with initiative opponents, studied their material and, ultimately, at the risk of offending his anti-gay supporters in the coming presidential election, wrote in his newspaper column: "I don't approve of teaching a so-called gay life style in our schools, but there is already adequate legal machinery to deal with such problems if and when they arise."

Id.

However, Reagan was not thereby endorsing homosexuality in any way or form. In fact, he said explicitly, "I don't approve of teaching a so-called gay

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[17] June 9, 2008, http://www.theliberaloc.com/2008/06/09/ronald-reagan-on-gay-rights/.

life style in our schools[.]" *Id.* This shows that he *was* concerned about measures that would teach or approve homosexuality.

And when a State (or Congress) declares that a union of gay couples deserves the honor of marriage, that teaches that a gay marriage is just as good as a traditional, child-producing one, and presumably that the gay sexual lifestyle which is the physical base of a gay marriage is just as good as a heterosexual lifestyle. *See Olmstead v. United States*, 277 U.S. 438, 485 (1928): "Our government is the potent, the omnipresent teacher." (Brandeis, J., dissenting from the judgment)

So Reagan, a governor of the Golden State, found a golden mean which should guide the Court still today. To protect gays from discrimination in areas where they are possibly as talented as anyone else (e.g., teaching) makes sense; but in area where their actions produce different results (e.g., two men cannot get pregnant together as a male-female couple can), there is room for the State not to extend approval or teach that something is a laudable lifestyle. Tolerance is one thing, endorsement another.

Indeed, gays have contributed many positive things to American life: e.g., from Reagan's own profession, two famous gay actors are Rock Hudson (a friend of Reagan) and (recently self-"outed") Jodie Foster. But so have polygamists like Brigham Young, who has a university named after him despite his multiple wives. Just because gays are a valuable part of the Nation, that does not *ipso facto*

mean the Court should order every State and the Congress to offer gay marriage or benefits to gay couples. (Or to polygamous units, for that matter.)

While Reagan may have been slow to address the AIDS crisis (perhaps due to his advancing age or other factors), he did at least show courage in protecting gays from needless discrimination, even though it could have cost him politically. That, and his justly noting that gay lifestyles don't need a State blessing, should be long remembered.

IV. ANIMUS AGAINST GAYS, ANIMUS BY GAYS

Reagan may have opposed keeping perfectly qualified teachers out of schools just because of their sexual orientation, since that prohibition may stink of animus. Amicus certainly disagrees with mindless animus against gays. In fact, he might be willing to support thoughtful legislation illegalizing abortion of a fetus for "being gay", i.e., just because genetic markers show the fetus might likely become a gay person. (And the same for gender-selective and race-selective abortion, which seem laden with animus.)

One of the good things about *Lawrence* is that it overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), a case that is looked on with embarrassment today. Under *Bowers*, the State itself could be a vehicle of animus or disparate treatment against gays, in the form of criminal punishment, without rhyme or reason.

(And sending jail to someone for sodomy may be ridiculous. In the close quarters of prison, he might likely sodomize someone else, or be sodomized.

Imprisoning someone for sodomy is like throwing gasoline on a fire.)

But even civil or informal "punishment" or abuse, as opposed to criminal, is questionable. Let us say immigrant Saddam, who works as a burger-flipper at MacWendie's, is fired because his boss finds he is gay. But is that a rational basis is that for firing him? Is Saddam's burger-flipping going to make the burgers into "Gay Burgers" so that anyone eating them turns gay? Absurd. (In this case, firing for *appearance* of being gay may also be relevant: e.g., if Saddam is not in fact gay, but because his name sounds somewhat like "Sodom", and a dimwitted boss thinks this shows him to be gay.)

There have even been deadly hate crimes against gays, such as Matthew Shepard. This is shameful, and we should all be on the watch against further such violence.

As for the law: it has been bruited that some legislators who voted for DOMA or other legislation restricting gay marriage may have had animus for gays. That does not *ipso facto* mean that the legislation is tainted, though. *See Washington v. Davis*, 426 U.S. 229, 253 (1976), "It is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it." (Stevens, J., concurring).

However, sometimes gays or their ostensible supporters have animus against others. Amicus has

witnessed it. (He has no videotape proof, but all the following things happened to the best of his recollection.)

For example, a gay professor of Amicus, when Amicus was mentioning the idea of reparations to African Americans for slavery, and the idea that land could be part of that, replied, "Maybe in Nebraska", in a manner and tone that was not very kindly, and implied that maybe blacks could be put in some isolated cornfield or something. The professor was a member of a minority (gay) himself, yet could not show respect for the suffering of another minority. This is sad.

(Another gay professor Amicus knew was quite liberal towards polygamists, though.)

And in Ann Arbor, Michigan, roughly around 2006-7, Amicus remembers an African-American man, a wandering preacher, preaching against homosexual activity, on the "Diag", a large public square at the University of Michigan. A dark-haired Caucasian man stubbed out a cigarette on the preacher's face. It is hard for Amicus to forget this.

See also, e.g., David Gibson, *Activists mobilize around White House's Catholic 'hate group' petition*, Christian Century[18] (activists petition White House to call Catholic Church hate group because of church's stance on homosexuality); Michelangelo Signorile, *The Time I Called Pope Benedict 'the Devil'*

[18] Jan. 07, 2013, http://www.christiancentury.org/article/2013-01/activists-mobilize-around-white-houses-catholic-hate-group-petition.

to His Face, Huffington Post[19] (editor on blog's "Gay Voices" section celebrates memory of calling Cardinal Joseph Ratzinger "the Devil" in person); and Wikipedia, *Grindr*,[20] on the eponymous mobile gay dating website's problems with users posting racist messages like "No Blacks", *see id.*

See as well, Associated Press, *Boston Mayor Thomas Menino clarifies position on Chick-fil-A*, masslive.com[21] (politician has to retreat from threats to fast-food chicken chain because they don't support gay marriage, and admits he cannot ban them from city); Charles Colson, Robert George, Timothy George, *Manhattan Declaration: A Call of Christian Conscience*[22] (manifesto with hundreds of thousands of signatures, asserting rights including right to freely discuss, and not to bless, same-sex unions, even if persecution of signers is threatened); and John Riley, *McCaskill reinstated as Gallaudet's chief diversity officer*[23] (school officer temporarily suspended from job after signing petition advocating a 2012 ballot referendum on a previously-enacted Maryland gay-marriage act).

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[19] Jan. 25, 2013, 9:43 a.m., http://www.huffingtonpost.com/michelangelo-signorile/the-time-i-called-pope-be_b_2550172.html?utm_hp_ref=gay-voices.

[20] http://en.wikipedia.org/wiki/Grindr (as of Jan. 7, 2013 at 21:46 GMT).

[21] July 27, 2012, 8:10 a.m., http://www.masslive.com/news/index.ssf/2012/07/boston_mayor_thomas_menino_cla.html.

[22] Nov. 20, 2009, http://www.manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf.

[23] Jan. 14, 2013, 4:08 p.m., http://www.metroweekly.com/poliglot/2013/01/mccaskill-reinstated-as-gallaudets-chief-diversity.html.

Thus, active threats and harassment of those who have opinions not favorable to homosexual conduct, abound, and this is worth remembering.

V. RACE, ORIENTATION, THE FISC, AND CONSISTENCY ABOUT DIVERSITY

Animus is sometimes related to the fact that there are multifarious groups in society. Not all of them can be given infinite resources. If a poor, minority, heterosexual mother of four decides that giving gay couples, many of whom may be white and wealthy, an additional tax break, is she a bigot if she doesn't think the public fisc should be used that way? *See, e.g.*, Holly, *How dare you mistrust our rich white gay men?* Feministe,[24] "Everyone KNOWS the HRC [Human Rights Campaign] is beholden to affluent, mostly-white gay folks; they provide the money, they influence the agenda." *Id.*

A failure to recognize this, and to claim that gay marriage is identical to the 1960's Civil Rights Movement, may anger people, *see, e.g.*, Travis Loller, *Southern Baptists: Gay rights not civil rights*, Associated Press,[25] "Rev. Dwight McKissic, pastor of Cornerstone Baptist Church in Arlington, Texas, [said,] 'They're equating their sin with my skin[.]'" *Id.* While that put it somewhat roughly, *see id.*, the rhyming phrase could also just evince a "hate the sin, not the sinner" attitude.

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[24] Jan. 4, 2008, http://www.feministe.us/blog/archives/2008/01/04/telling-it-like-it-is/.

[25] CNSNews.com, June 20, 2012, http://cnsnews.com/news/article/southern-baptists-gay-rights-not-civil-rights.

By the way, while interracial marriage was once banned in America, at least interracial liaisons, fertile ones, have an ancient history. For example, Solomon is alleged to have dabbled with Sheba, resulting in Menelik, the king of Ethiopia[26]—sort of the Obama of his day. (If Sheba had been a He-ba, i.e., male, one doubts Solomon would have taken the time for a liaison: and it would have been an infertile one, being a gay one.)

As for diversity in general: in Amicus' amicus brief, *see id.* at 26, in support of respondents in *Fisher v. Univ. of Tex. at Austin*,[27] he notes that States may offer (and by implication, not offer) affirmative action, or gay marriage.

On that note: the following passage, Amicus found on the Internet, and saved but cannot find a link to it any more (and never recorded the address)—was it erased? However, the passage describes his own thoughts fairly well, so:

> It seems a simple logical inconsistency to claim, on the one hand, that a gender-diverse environment in an educational setting is so likely to be beneficial to youth that a state has a compelling or even an important interest in its existence, and then turn around and claim that a gender-diverse

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[26] *See* Wikipedia, *Kebra Negast*, http://en.wikipedia.org/wiki/Kebra_Negast (as of Nov. 26, 2012, at 20:28 GMT) (on a traditional Ethiopian national book).

[27] 631 F.3d 213 (5th Cir. 2011) (*cert. granted*, 80 U.S.L.W. 3475) (U.S. Feb. 21, 2012) (No. 11-345).

> environment in a home setting has so little relevance to youth's well-being that the very idea that it might be beneficial is inherently irrational. One argument or the the [sic] other - the pro-affirmative action and the gay-rights one -- must be wrong.

Id. So government may have at least as great latitude in offering, or denying, gay marriage, as with affirmative action.

VI. *LAWRENCE*, *ROE*, HOUSEBOATS, SEX DISCRIMINATION, POLYGAMY, AND THE DOGS

Justice Antonin Scalia might disagree, seeing his dissent in *Lawrence*, saying that according to the *Lawrence* majority, "[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising the liberty protected by the Constitution[?]" 539 U.S. at 605 (some internal quotations omitted; some brackets not in original). But one respectfully disagrees; as did Justice Anthony Kennedy, saying his opinion "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578.

So, while there is no criminal law against gay marriage in a church; there is also, simply, no obligatory *State-sponsored* gay marriage. The difference between "negative liberty", and "positive liberty" (or, rather, State endorsement and entitlement) is immense.

Re another controversial issue, abortion, innumerable commentators think that *Roe v. Wade* (410 U.S. 113 (1973)) was decided far too early, when discussion was still heated. The Court may consider this in declining to impose nationwide gay marriage. Also, the Hyde Amendment, beginning in 1976, limited public funding of abortion, so that abortion may be a "negative liberty" rather than a State entitlement. Gay marriage may deserve similar treatment.

Gays unable to marry are arguably not being discriminated against on the basis of sex (both gay men and lesbians are equally "disadvantaged", for one thing), or entirely on the basis of sex (gender), but on the *synergy* created by their union, If you put two people of the same sex together, they are infertile with each other; they practically repel fertility, just as two magnetized objects may repel each other if of the same polarity. Any "discrimination" may, then, literally be against their "sex" itself, i.e., their forever-sterile sexual couplings, not against the people themselves, who under *Lawrence* are free to do all kinds of things in private, and who are even in the U.S. Senate now.

(Similarly, e.g., a houseboat may be called a "houseboat" by name, while largely unable to function as a seafaring boat, so that the law may not treat it as a real boat. Our Constitution itself, like a sturdy ship, may sail on most safely if such common-sense realities are paid heed to, and a spade is called a spade.)

There is admittedly a gray area, when discussing gay marriage, about whether any hypothetical

"discrimination" would be "gender discrimination" or not. Maybe, just as in quantum physics, light can be viewed as either a wave or a particle at times, perhaps legal treatment of gays can have different standards depending on what exactly the law is dealing with in a given situation. E.g., heightened scrutiny could apply in some situations, versus the non-heightened ("rational basis") scrutiny appropriate for gay marriage.

After all, a gay marriage can perform some functions of a standard marriage, but many of those functions could be performed by gays just living together ("romantic/sexual/companionate"), or by adopting children ("having a family"). The vital, some would say utterly necessary, functions of being the right gender to make babies together, and to provide a diverse (female/male) set of role models for children for eighteen years until adulthood, simply cannot be performed by same-sex couples, despite their best intentions and any presumed good faith on their part.

Or, from another angle: if a theater director putting on *Othello* refuses to cast, or open casting calls to, a two-foot-tall white woman who wants to play the title role of the warrior Moor of Venice, does that make the director a racist, sexist, size-ist bigot? Maybe not.

Similarly, since marriage is a social role, not just a private entertainment between two persons, it is possible that some people, due to how their actions will fit into the role, may not be given the special privilege of playing that role by the society. Indeed,

to make gays the special favorites of the law because gay marriage is in vogue, while a well-behaved group of 3 adult, consenting, fertile, not notably mentally-ill polygamists is denied State-recognized marriage, may be quite questionable.

(Some may say, if polygamists form a "loving family" and seem good to their children, "how could we possibly deny them marriage"? But that is not right.)

And the possibility of a "slippery slope", re polygamy, etc., is horribly real. *See, e.g.*, this item by a legal academic, Eugene Kontorovich, *The Bestiality Brief*, The Volokh Conspiracy,[28]

> One could argue that ick factor aside, bestiality should if anything be *more* protected than the dominant social paradigm of 2-person sex. Once there are two people involved, it is a social issue, not purely "private." Thus such laws can be justified by some purported negative social consequences . . . . By these standards, bestiality (or any other kind of one-person sexual activity) is the most innocuous, as it involves only a person and his property. Spill-over effects on other humans are minimal.

Id. The legal academy may be going to the dogs.

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[28] Dec. 5, 2012, 4:20 p.m., http://www.volokh.com/2012/12/05/zoophilia-sex-toys-and-the-consitutional-protection-of-autonomous-sex/.

(*Cf.* this view of academics' place in the Inferno, by Anne Barbeau Gardiner, *Why Does Dante Consider Sodomy Worse Than Homicide & Suicide?* New Oxford Review (Sept. 2004),[29]

> The sodomites, as represented by Dante's friend Brunetto Latini, chose continuity through fame, not through children. Brunetto points out that the men in his company were all famous scholars and literary celebrities who raised themselves in the eyes of the world by their talents while they dragged one another down into Hell[, and] were violent to family life by their choice of sterility.

Id. —Amicus wishes no scholars in Hell, but doesn't want them to drag us there, either.)

VII. FIFTY-ONE SHADES OF GAY MARRIAGE; OR, THE LOCAL SOVEREIGNTY OF THE PEOPLE——AND THE NATIONAL SOVEREIGNTY OF THE PEOPLE. (PLUS: *PRINTZ* IN REVERSE)

Since Proposition 8 and DOMA easily pass rational-basis or even higher standards of review, gay marriage is up to the legislatures or direct popular vote. This is even more true when one considers our federalism.

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[29] *Available at* http://www.newoxfordreview.org/article.jsp?did=0904-gardiner.

Vis-à-vis Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012): many of those who were willing to recommend an immense expansion of federal power, popularly dubbed "Obamacare" or "Pelosicare", in that case, enough power to force people to buy health insurance against their will (with which Amicus respectfully disagrees) in an unprecedented way, now believe that federal power is so minimal that DOMA must go because the Government has to do what each State tells it to do, essentially, re gay marriage. This sounds self-contradictory. Is federal power gigantic, or tiny?

The sovereigns have a right to differ, even if they all adopt fifty-one different shades of opinion on gay marriage.

Conversely, *NFIB v. Sebelius*, *supra*, still maintained similar latitude for the States as for the federal government, e.g., the State may drop out of a Medicaid expansion, *see* 132 S. Ct. at 2608. So the States still have substantial authority. If States have such authority, and gay-marriage advocates use it as an argument for the federal government following each State's rules on gay marriage (which Section 3 of DOMA prevents): if States have such authority, then why do gay-marriage advocates think those States have no authority to refuse gay marriage themselves? It seems that some gay-marriage advocates may adopt what arguments sound convenient, even if mutually contradictory.

Commanding the Congress to bow to local gay-marriage policies is practically a "reverse *Printz*", whereby the States may commandeer the Congress

into doing what they tell it to, see *Printz v. United States*, 521 U.S. 898 (1996). This is unbalanced.

Saying the Government *must* defer to the States' gay marriage policies is like saying that this Court is always obliged to show deference to the States' supreme courts. This Court *may* graciously show deference; *but see, e.g.*, the Supremacy Clause, U.S. Const. art. VI, cl. 2.

After all, federalism is called "federalism" partially because the *federal* government is so important. We are not the "United" States for nothing. And both State and federal sovereigns deserve their due, including judicial due deference to the legislatures of both in a contentious, momentous issue like gay marriage.

While there is some tradition of federal deference to the States re marriage policies, gay marriage is certainly not the typical marriage of yore, so that in this new situation, traditional deference is unnecessary.

Ironically, the Court is in kind of a marriage itself, with the other two branches of government. If one of the partners goes too far out of line and shows too little respect, it can be hurtful to balance and fairness—just as in the marriage of 50 States, united, it is damaging if any sovereign, state or federal, needlessly demands the surrender of another.

—While these DOMA-related matters could have been mentioned in Amicus' *Windsor* brief, Amicus sees *Windsor* and *Hollingsworth* as essentially the

same case with different sovereigns; and cross-reference is useful in the cases.

VIII. PITFALLS BEFORE THE COURT HERE

The recent amusing news item, Josh Halliday, *Judge Dredd may be gay, writers hint*, The Guardian (London),[30] reveals the tougher-than-nails British comic-book character Judge Dredd (or a similarly-dressed decoy) may actually be gay, *see id.* Of course, a gay judge can hypothetically do as good a job as a not-gay one.

More seriously: those on the Court may have to be "tough as nails" in resisting various pressures re this case, as noted below.

A. The Danger of "Splitting the Difference"

Some may tempt the Court to at least "split the difference" as some believe happened with *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003), the twin affirmative action cases. In those cases, it was reasonable to overturn affirmative action in one case, the former, where there was a rigid point bonus for being in a minority, *see id.*, thus frustrating holistic, nuanced judgment of the kind championed in *Grutter*, *see id.*

However, with *Hollingsworth* and *Windsor*, things are not the same as in *Gratz* and *Grutter*, *supra*. *Hollingsworth* and *Windsor* are relatively identical, both about gay marriage and the Equal Protection Clause, just with different sovereigns

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[30] Jan. 25, 2013, 7:08 p.m., http://www.guardian.co.uk/books/2013/jan/25/judge-dredd-gay-writers-hint.

(State, or Congress). There is not the possibility of "refinement", as with the University of Michigan Law School affirmative-action plan (*Grutter*) being considered a more refined, acceptable version of the University of Michigan undergraduate affirmative-action plan (*Gratz*). And the federalism issues, advising respect for all sovereigns, were explored in this brief's previous section.

As mentioned in Amicus' *Windsor* brief at 37, the Court can always grant some lesser benefit for gays instead of gay marriage. (Amicus is basically against that, but it would be less disruptive than nationwide mandatory gay marriage.) If the Court does grant such benefit or status, though, it should be done only out of conviction and with solid legal reasoning, not a mere desire to "split the difference" or to accommodate any political faction.

Finally, the democratic tradition of letting each State and the Congress decide—instead of, say, a U.S. constitutional amendment barring all gay marriage—, may actually preserve and protect gay marriage, if a regime comes to power which wants to ban gay marriage everywhere. So those who want to do an "end run" around democracy and have the Court be the final arbiter here, may want to think again.

B. The Danger of Hubris

Hubris, whether against the Court, or by members of the Court itself, is always a danger. —Some commentators believe the Court, in its surprising and untraditional *NFIB v. Sebelius* decision, succumbed to hubristic political pressure

from President Obama and other politicians—too many commentators to cite. If the Court succumbs in this case, and *Windsor*, especially following Obama's recent second-inaugural message where he seemed to strongly "push" gay marriage, this would look like the Court had lost its independence.

But Justices themselves can fall prey to hubris or other vices: Roger Taney, defender of slavery, is one notorious example. In the instant case, Amicus has read numerous articles pressuring the Court, or particular members or a member of it, to "make history" by mandating legal gay marriage, to "be a hero" or "usher in a new era". This wheedling and seduction is out of place.

Amicus does not oppose judicial heroism or virtue or innovation, such as the Court showed in *Brown v. Board of Education* (347 U.S. 483 (1954)). However, in the present case, the situation is far different. Gays have already had perhaps the prime legal victory they will ever have, *Lawrence*, only ten years ago. When the democratic debate about gay marriage is still flourishing, a judicial false "heroism" in ending the debate would be tragic.

(Not to mention that there would be a whiff of elitist, Jacobin, atheistic centralism, if the Court trampled on the traditional and religious feelings that Americans hold in such number, that most States ban gay marriage, and many ban even civil unions.)

Faith to the judicial oath, common sense, and the Constitution, is more heroic than some needless (or destructive) grand gesture. It is better to fade away

heroically, to paraphrase General MacArthur, than to go out with a bang-and-flash in a way that hurts the People and Nation. One can be seduced otherwise, by phantoms; but generations may look back with gratitude, that that will not happen in this case.

IX. THE FUTURE OF GAYS IN AMERICAN DEMOCRACY

Gays have a bright future in America, it seems. Under *Lawrence*, and with the right to freely speak, organize, raise money, run for office, and live in one of the most affluent, advanced nations on earth, the sky's the limit, in many aspects of their lives. They are also free to adopt a different lifestyle, if they choose, and have children with an opposite-sex partner through traditional means.

However, just because America has been a comparative paradise to gays (compare, e.g., Uganda), that does not let gays for gay marriage, or their allies, off the hard work of American democracy. It gets better for them, perhaps, the more that they do that hard work of organizing and electing, convincing their neighbors that it is a good idea to subsidize marriages that can never make a baby, even if that depletes the fisc, lauds sodomy as worthwhile, and changes the traditional idea of marriage: rather than counting on the courts to do that work for them. Some activists have succeeded in this, as shown by the States with gay marriage.

Additionally, one notes there could be higher priorities than gay marriage for gays: e.g., making sure that gays in other countries are not jailed or

killed for being gay. What is more important: gay marriage or gay survival? Comparatively privileged gays and lesbians, those in America, may want to spend more time on those truly in need.

A closing note of caution, despite the optimism just expressed: Ronald Reagan did not put his political career on the line to protect gays from the Briggs Initiative, so that his State and its people could be slandered as "bigots" just because they did not endorse gay marriage and thereby teach children and others that it is laudable and worthy of State benefit and honor. No State or Congress should be so slandered. We are better than that. That is not the American way, for gays or for anyone else.

CONCLUSION

Amicus respectfully asks the Court to reverse the judgment of the court of appeals; and humbly thanks the Court for its time and consideration.

January 29, 2013 Respectfully submitted,

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