No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,
Petitioners,

v.

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

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

BRIEF OF AMICI CURIAE KENNETH B. MEHLMAN ET AL. SUPPORTING RESPONDENTS

MARK C. FLEMING
FELICIA H. ELLSWORTH
ELISABETH M. OPPENHEIMER
REBECCA A. BACT
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

REGINALD J. BROWN
SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL AGUILAR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

NO. 12-144

DENNIS HOLLINGSWORTH, *et al.*,
Petitioners,

v.

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

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

BRIEF OF AMICI CURIAE KENNETH B. MEHLMAN ET AL. SUPPORTING RESPONDENTS

INTEREST OF AMICI CURIAE[1]

Amici are social and political conservatives, moderates, and libertarians from diverse backgrounds. Many have served as elected or appointed officeholders in various Presidential administrations, as governors, mayors, and other officeholders in States and cities across the Nation, as members of Congress, as ambas-

[1] Pursuant to Rule 37.3(a), written consents from the parties to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made any monetary contribution to the preparation or submission of this brief.

sadors, as officials in political campaigns and political parties, and as advocates and activists for various political and social causes. Amici support traditional conservative values, including the commitment to limited government, the protection of individual freedom, and the belief in the importance of stable families. Because amici believe that these values are consistent with—indeed, are advanced by—providing civil marriage rights to same-sex couples, amici submit that, for the reasons set forth in this brief, the decision below should be affirmed.

A full list of amici is provided as an Appendix to this brief.

SUMMARY OF ARGUMENT

Amici hold a broad spectrum of socially and politically conservative, moderate, and libertarian views. While amici differ on many political and social issues, they generally share a commitment to limited government and individual freedom. Amici also believe that when the government does act in ways that affect individual freedom in matters of family and child-rearing, it should promote family-supportive values like responsibility, fidelity, commitment, and stability.

Many of the signatories to this brief previously did not support civil marriage for same-sex couples; others did not hold a considered position on the issue. However, in the years since Massachusetts and other States have made civil marriage a reality for same-sex couples, amici, like many Americans, have reexamined the evidence and their own positions and have concluded that there is no legitimate, fact-based reason for denying same-sex couples the same recognition in law that is available to opposite-sex couples. Rather, amici have

concluded that marriage is strengthened, not undermined, and its benefits and importance to society as well as the support and stability it gives to children and families promoted, not undercut, by providing access to civil marriage for same-sex couples. In view of these conclusions, amici believe that the Constitution prohibits denying same-sex couples access to the legal rights and responsibilities that flow from the institution of civil marriage.

Amici do not denigrate the deeply held social, cultural, and religious tenets that lead sincere people to take the opposite view (and, indeed, some amici themselves once held the opposite view). Whether same-sex couples should have access to civil marriage divides thoughtful, concerned citizens. But this Court has long recognized that a belief, no matter how strongly or sincerely held, cannot justify a legal distinction that is unsupported by a factual basis, especially where something as important as the right to civil marriage is concerned. Amici take this position with the understanding that providing access to *civil* marriage for same-sex couples—which is the only issue raised in this case—poses no credible threat to religious freedom or to the institution of religious marriage. Amici believe firmly that religious individuals and organizations should, and will, make their own decisions about whether and how to participate in marriages between people of the same sex, and that the government must not intervene in those decisions.[2]

---

[2] Given the robust constitutional protections for the free exercise of religion, amici do not believe that religious institutions should or will be compelled to participate in a marriage between people of the same sex. A number of petitioners' amici express concern that their religious liberties will be infringed by state recognition of civil marriage for same-sex couples. *See, e.g.*, Catho-

Amici believe strongly in the principle of judicial restraint and that courts generally ought to defer to legislatures and the electorate on matters of social policy. Amici also believe that courts should be particularly wary of invoking the Constitution to remove issues from the normal democratic process. But amici equally believe that actions by legislatures and popular majorities can on occasion pose significant threats to individual freedom, and that, when they do, courts should intervene. Our constitutional tradition requires the judiciary to protect our most cherished liberties against overreaching by the legislature or the electorate, and that principle, no less than our commitment to democratic self-government, is necessary to individual freedom and limited government. It is precisely at moments like this—when discriminatory laws appear to reflect unexamined, unfounded, or unwarranted assumptions rather than facts and evidence, and the rights of one group of citizens hang in the balance—that this Court's intervention is most needed. Amici accordingly urge this Court to affirm the judgment below.

ARGUMENT

I. THERE IS NO LEGITIMATE, FACT-BASED JUSTIFICATION FOR DIFFERENT LEGAL TREATMENT OF COMMITTED RELATIONSHIPS BETWEEN SAME-SEX COUPLES

Laws that make distinctions between classes of people must have "reasonable support in fact,"

---

lic Answers Br. 16-18; U.S. Conf. of Catholic Bishops Br. 21-22 & nn.18-21. The signatories to this brief share these parties' commitment to and support for the free exercise of religion, and have the deepest respect for those who defend it, including petitioners' amici. Amici are convinced, however, that a decision in this case invalidating Proposition 8—limited as it is to civil marriage—will pose no threat to religious liberty.

New York State Club Ass'n v. *City of N.Y.*, 487 U.S. 1, 17 (1988), and must "operate so as rationally to further" a legitimate government goal, *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 537 (1973). To survive scrutiny under the Equal Protection Clause, a law must at the very least be founded in the "realities" of the subject covered by that law. *Heller* v. *Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation."); *see also Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001) (attitudes unsubstantiated by relevant facts are not sufficient to indicate the furtherance of a legitimate government purpose); *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (a law does not survive review under the Equal Protection Clause it if is "without support in reason").

Amici do not believe that measures like Proposition 8 rest on a legitimate, fact-based justification for excluding same-sex couples from civil marriage. Over the past two decades, amici have seen each argument against same-sex marriage discredited by social science, rejected by courts, and undermined by their own experiences with committed same-sex couples, including those whose civil marriages have been given legal recognition in various States. Amici thus do not believe that any "reasonable support in fact" exists for arguments that allowing same-sex couples to join in civil marriage will damage the institution, jeopardize children, or cause any other social ills. Instead, the facts and evidence show that permitting civil marriage for same-sex couples will enhance the institution, protect children, and benefit society generally.

A. Marriage Promotes The Conservative Values Of Stability, Mutual Support, And Mutual Obligation

Amici start from the premise—recognized by this Court on numerous occasions—that marriage is both a fundamental right protected by our Constitution[3] and a venerable institution that confers countless benefits, both to those who marry and to society at large. *See, e.g.*, *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." (internal quotation marks omitted)).

Our national commitment to civil marriage stems from a common understanding that those who choose to marry benefit tremendously from the stability and mutual support and obligation that the legal relationship confers. Some of these benefits are concrete. *See, e.g.*, Tr. 578, No. 09-cv-2292, *Perry* v. *Schwarzenegger* (N.D. Cal. Jan. 13, 2010) (married couples "fare better. They are physically healthier. They tend to live longer. They engage in fewer risky behaviors. They look better on measures of psychological well-being."). But many of the advantages of marriage are yet more profound, as the legal relationship of marriage distinctly confers on couples numerous autonomy- and security-enhancing benefits.[4]

---

[3] *See infra* pp. 19-20.

[4] That California offers same-sex couples the right to enter into domestic partnerships does not change amici's view. It is

In particular, marriage makes it immeasurably easier for family members to make plans with and decisions for each other, without relying on outside assistance from lawyers. Married individuals can make medical decisions together (or for each other if one spouse is not able to make a decision) and can make joint decisions for the upbringing of children; they can plan jointly for their financial future and their retirement; they can hold property together; they can share a spouse's medical insurance policy and have the health coverage continue for a period after a spouse's death; and they have increased protections against creditors upon the death of a spouse. Some—not all—of these rights and responsibilities can be approximated outside marriage with expensive legal assistance, but only marriage provides family members with the security that these benefits will be *automatically* available when they are most needed.

Marriage also benefits children. "We know, for instance, that children who grow up in intact, married families are significantly more likely to graduate from high school, finish college, become gainfully employed, and enjoy a stable family life themselves[.]" Institute for American Values, *When Marriage Disappears: The New Middle America* 52 (2010); *see also id.* at 95

---

common ground between petitioners and respondents in this case that there is a "'a significant symbolic disparity between domestic partnership and marriage.'" Pet. App. 162a. Amici concur. As the testimony at trial in this case showed, domestic partnerships are viewed by gays and lesbians and heterosexuals alike as an inferior and stigmatizing substitute for marriage. *See* Pet App. 161a-162a (explaining that "gays and lesbians are less likely to enter domestic partnerships than to marry," that domestic partnerships "actually stigmatize gays and lesbians," and that "little of the cultural esteem surrounding marriage adheres to domestic partnerships").

("Children who grow up with cohabiting couples tend to have more negative life outcomes compared to those growing up with married couples. Prominent reasons are that cohabiting couples have a much higher breakup rate than do married couples, a lower level of household income, and a higher level of child abuse and domestic violence." (footnote omitted)). These benefits have become even more critical in recent decades, as marital rates have declined and child-rearing has become increasingly untethered to marriage. *See, e.g.*, Cherlin, *American Marriage in the Early Twenty-First Century*, 15 The Future of Children 33, 35-36 (2005).

These findings do not depend on the gender of the individuals forming the married couple. Same-sex couples, just like couples composed of a man and a woman, benefit from the security and bilateral loyalty conferred by civil marriage. There is no reason to believe that the salutary effects of civil marriage arise to any lesser degree when two women or two men lawfully marry each other than when a man and a woman marry. As Professors Jesse Choper and John Yoo—who support civil marriage for same-sex couples as a policy choice—have explained:

> With regard to gay marriage, the cost of a prohibition is the restriction of the liberty of two individuals of the same sex who seek the same legal status for an intimate relationship that is available to individuals of different sexes. This harm may not be restricted just to the individuals involved but may also involve broader social costs. If the government believes that marriage has positive benefits for society, some or all of those benefits may attach to same-sex marriages as well. Stable relationships may produce more personal income and less de-

> mands on welfare and unemployment programs; it may create the best conditions for the rearing of children; and it may encourage individuals to invest and save for the future.

Choper & Yoo, *Can the Government Prohibit Gay Marriage?*, 50 S. Tex. L. Rev. 15, 33-34 (2008).

Moreover, hundreds of thousands of children being raised by same-sex couples[5]—some married, some precluded from marrying—would benefit from the security and stability that civil marriage confers. The denial of civil marriage to same-sex couples does not mean that their children will be raised by married opposite-sex couples. Rather, the choice here is between allowing same-sex couples to marry, thereby conferring on their children the benefits of marriage, and depriving those children of married parents altogether. Laws like Proposition 8 "do[] nothing to promote stability in heterosexual parenting [but rather] prevent[] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure." *Gill* v. *OPM*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (internal quotation marks omitted), *aff'd*, 682 F.3d 1 (1st Cir. 2012); *see also* Pet. App. 247a (documenting evidence of benefits to children of same-sex couples who marry). Indeed, it was in part this very concern for the well-being of children raised by same-sex couples that led David Blankenhorn, petitioners'

---

[5] *See* Sears, et al., *Same-Sex Couples and Same-Sex Couples Raising Children in the United States: Data from Census 2000*, at 1 (Sept. 2005) (reporting that same-sex couples are "raising more than 250,000 children under age 18").

expert witness at trial, to disavow his prior opposition to civil marriage for same-sex couples.[6]

It is precisely because marriage is so important in producing and protecting strong and stable family structures that amici do not agree that the government can rationally promote the goal of strengthening families by *denying* civil marriage to same-sex couples. As British Prime Minister and Conservative Party Leader David Cameron explained, "Conservatives believe in the ties that bind us; that society is stronger when we make vows to each other and support each other. So I don't support gay marriage despite being a Conservative. I support gay marriage because I'm a Conservative."[7]

B. Social Science Does Not Support Any Of The Putative Rationales For Proposition 8

Proponents of laws like Proposition 8 have advanced certain social-science arguments that they contend support the exclusion of same-sex couples from civil marriage. The proponents' main arguments are (1) *deinstitutionalization*: that allowing same-sex couples to marry will harm the institution of marriage by severing it from child-rearing; (2) *biology*: that marriage is necessary only for opposite-sex couples because only they can procreate accidentally; and (3) *child welfare*: that children are better off when raised by two parents

---

[6] *See* Oppenheimer, *David Blankenhorn and the Battle Over Same-Sex Marriage* (June 22, 2012), *available at* http://www.yourpublicmedia.org/content/wnpr/david-blankenhorn-and-battle-over-same-sex-marriage.

[7] Cameron, *Address to the Conservative Party Conference* (Oct. 5, 2011), *available at* http://www.bbc.co.uk/news/uk-politics-15189614.

of the opposite sex. Each of these arguments reflects a speculative assumption rather than fact, is unsupported in the trial record in this case, and has in fact been refuted by evidence.

Deinstitutionalization. No credible evidence supports the deinstitutionalization theory on which petitioners heavily rely. Petitioners fail to explain how extending civil marriage to same-sex couples will dilute or undermine the benefits of that institution for opposite-sex couples—who undoubtedly will continue to make up the vast majority of married couples—or for society at large. It will instead do the opposite. Extending civil marriage to same-sex couples is a clear endorsement of the multiple benefits of marriage—including stability, lifetime commitment, and financial support during crisis and old age—and a reaffirmation of the social value of this institution for *all* committed couples and their families. Although marriage has undoubtedly faced serious challenges over the last few decades, as demonstrated by high rates of divorce and greater incidence of child-bearing and child-rearing outside marriage, petitioners point to nothing to suggest that allowing committed same-sex couples to marry has exacerbated or will in any way accelerate those trends, which have their origins in complex social forces. *See* Choper & Yoo, 50 S. Tex. L. Rev. at 34 ("We are not aware of any evidence that the marriage of two individuals of the same sex produces any tangible, direct harm to anyone either in the marriage or outside of it.").

Opposite-sex couples confront many challenges in raising families, and amici strongly believe that society should make marriage a stronger and more valuable institution for those couples and families. But those challenges will remain whether or not same-sex couples can marry. One of the primary proponents of the dein-

stitutionalization theory, who served as petitioners' expert in the trial court, has now conceded the point: "[I]f fighting gay marriage was going to help marriage over all, I think we'd have seen some signs of it by now."[8] Nor have courts been persuaded by evidence supposedly supporting the deinstitutionalization theory. *See* Pet. App. 192a-197a; *Pedersen* v. *OPM*, 881 F. Supp. 2d 294, 335-339 (D. Conn. 2012).

In addition, the evidence (albeit limited) from States that allow civil marriage for same-sex couples undermines the deinstitutionalization hypothesis. Same-sex marriage has had no measurable negative effect on rates of marriage, divorce, or birth in States where it has been recognized. *See* Pet. App. 245a-246a (noting that Massachusetts marriage and divorce rates had remained consistent in the four years before and after the extension of marriage to same-sex couples and concluding that "[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages"); *see also* Massachusetts Br. pt. III.A (extension of marriage to same-sex couples had no negative impact on rates of marriage, divorce, and nonmarital births in jurisdictions that had legalized civil marriage for same-sex couples).

Biology. There is also no biological justification for denying civil marriage to same-sex couples. Allowing same-sex couples to marry in no way undermines the importance of marriage for opposite-sex couples who enter into marriage to provide a stable family structure

---

[8] Blankenhorn, Op-Ed., *How My View on Gay Marriage Changed*, N.Y. Times, June 23, 2012.

for their children. Indeed, there is no evidence that marriage between individuals of the same sex affects opposite-sex couples' decisions about procreation, marriage, divorce, or parenting whatsoever. *Cf. Windsor* v. *United States*, 699 F.3d 169, 188 (2d Cir. 2012) (laws burdening same-sex couples' right to civil marriage "do[] not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation,'" as the "[i]ncentives for opposite-sex couples to marry and procreate (or not) [are] the same after [such laws are] enacted as they were before" (footnote omitted)); *Massachusetts* v. *HHS*, 682 F.3d 1, 14-15 (1st Cir. 2012) (laws burdening same-sex couples' right to civil marriage "do[] not increase benefits to opposite-sex couples ... or explain how denying benefits to same-sex couples will reinforce heterosexual marriage. Certainly, the denial will not affect the gender choices of those seeking marriage").

Moreover, our society has long recognized that civil marriage provides numerous benefits to couples who are unable to, or who choose not to, bear children. Some married couples adopt children and thus benefit from the child-protective institution of marriage; others marry after child-bearing age but still benefit from the web of rights and obligations conferred by marriage. Whatever the merits of petitioners' speculation that marriage was originally fashioned only to channel the procreative impulse, it has been centuries since marriage was so limited (if it ever was). Our Nation's first President and his wife had no children together, but their marriage provided a protective family structure for raising Martha Washington's children by her first marriage as well as her grandchildren. *See* Chernow, *Washington: A Life* 78-83, 421-422 (2010).

Moreover, hundreds of thousands of children are *in fact* being raised in loving families with same-sex parents. The last few decades have demonstrated that many same-sex couples strongly wish to raise children and are doing so; this is a social development that will not be reversed, but will likely only accelerate. Because amici believe that having married parents is optimal for children, amici conclude that granting the rights and responsibilities of civil marriage recognition to same-sex couples will benefit, not harm, these hundreds of thousands of children, as well as the many children who will be raised by same-sex couples in the future.

Child Welfare. If there were persuasive evidence that same-sex marriage was detrimental to children, amici would give that evidence great weight. But there is none. Social scientists have resoundingly rejected the claim that children fare better when raised by opposite-sex parents than they would with same-sex parents. Empirical research "gathered during several decades" showed "no systemic difference" between the child-rearing capabilities of same-sex and heterosexual parents, but rather that the sexual orientation of a child's parent had no measureable effect on the child's well-being. Perrin, et al., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341, 343 (2002) (finding no differences regarding "emotional health, parenting skills, and attitude towards parenting" between same-sex and opposite-sex parents, and finding that "[n]o data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents"); *see also* Farr, et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 Applied Developmental Sci. 164, 175 (2010) (finding

children adopted by same-sex parents to be "as well adjusted as those adopted by heterosexual parents" and that there were "no significant differences" between same-sex and heterosexual parents "in terms of child adjustment, parenting behaviors, or couples' adjustment").[9]

C. Although Measures Like Proposition 8 May Rest On Sincerely Held Beliefs, That Does Not Sustain Their Constitutionality

However firmly and honestly held, the belief that same-sex couples should be treated differently from opposite-sex couples where civil marriage is concerned, by itself, does not provide a permissible justification for a discriminatory law like Proposition 8. The rule that a classification must find support in a legitimate factual justification is central to our constitutional tradition. This Court has long recognized that private beliefs, no

---

[9] Courts that have examined the evidence have unanimously agreed with these studies. *See Gill*, 699 F. Supp. 2d at 388 ("[A] consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents."); Pet. App. 307a ("[T]he evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes."); *Golinski* v. *OPM*, 824 F. Supp. 2d 968, 991-992 (N.D. Cal. 2012) (examining studies on each side and concluding that there is no "genuine issue of disputed fact regarding whether same-sex married couples function as responsible parents").

In addition, no evidence suggests that the sexual orientation of a child's parents makes a child more likely to suffer gender identity disorder or affects a child's sexual orientation. Tr. 1029-1032, *Perry* (N.D. Cal. Jan. 15, 2010) (testimony of Michael Lamb, expert in developmental psychology); *see also* Farr, 14 Applied Developmental Sci. at 175 (finding that children of same-sex parents exhibit "typical gender development").

matter how strongly held, do not, without more, establish a constitutional basis for a law. *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) (private beliefs "may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); *Reitman* v. *Mulkey*, 387 U.S. 369, 374-376 (1967) (striking down constitutional referendum repealing state anti-discrimination laws and holding that that enshrining such "private discriminations" in State law violated the Fourteenth Amendment); *see also City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985). And this Court's gender discrimination cases in particular make clear that formerly widespread traditional views alone cannot justify a discriminatory law, even under the most permissive standard of review. *Stanton* v. *Stanton*, 421 U.S. 7, 14-15 (1975) ("old notions" and "role-typing" did not supply a rational basis for classification); *see also Craig* v. *Boren*, 429 U.S. 190, 198-199 (1976) (rejecting "increasingly outdated misconceptions" as "loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy").

This Court has also been attentive to the fact that societal assumptions must yield as new information comes to light. Although amici firmly believe that society should proceed cautiously before adopting significant changes to beneficial institutions and should carefully weigh the costs and benefits of such changes, amici do not believe that society must remain indifferent to facts. *Cf.* 2 Burke, *The Works of the Right Honourable Edmund Burke* 295 (Bell ed. 1886) ("A state without the means of some change is without the means of its conservation."). Our Nation has undergone too many changes for the better already—especially in its repudiation of discrimination against minorities—to allow social policy to be dictated by unexamined assumptions

undermined by evidence. Thus, a basis for a law that might once have been considered adequate cannot be sustained when it no longer reflects the "realities of the subject" that law addresses. *Heller*, 509 U.S. at 321; *see also id.* at 326 ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *Williams* v. *Illinois*, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.").

This Court has not hesitated to reconsider a law's outmoded justifications and, where appropriate, to deem them insufficient to survive an equal protection challenge. *See, e.g.*, *Trammel* v. *United States*, 445 U.S. 40, 52 (1980) (rejecting basis for law discriminating based on sex because its "ancient foundations … have long since disappeared" as "[c]hip by chip, over the years those archaic notions [of women's roles] have been cast aside"); *cf. Taylor* v. *Louisiana*, 419 U.S. 522, 537 (1975) ("If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed."); *Carolene Prods.*, 304 U.S. at 153 ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."). Proposition 8 rests on similar beliefs—sincere and strongly held, but nonetheless refuted by evidence and obsolete—and thus it cannot stand.

II. THIS COURT SHOULD PROTECT THE FUNDAMENTAL RIGHT OF CIVIL MARRIAGE BY ENSURING THAT IT IS AVAILABLE TO SAME-SEX COUPLES

Amici value marriage and families, which play central roles in our society and reinforce essential values such as commitment, faithfulness, responsibility, and sacrifice. Marriage is the foundation of the secure families that form the building blocks of our communities and our Nation. It both provides a protective shelter and reduces the need for reliance on the state. As a perceptive observer of American society wrote almost two centuries ago, "There is certainly no country in the world where the tie of marriage is so much respected as in America …. [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace … [and] he afterwards carries [that image] with him into public affairs." 1 de Tocqueville, *Democracy in America* 332-333 (Reeves trans. 1856).

Choosing to marry is also a paradigmatic exercise of human liberty. Indeed, "[i]t is only those who cannot marry the partner of their choice … who are aware of the extent to which … the ability to marry is an expression of one's freedom." Tr. 206, *Perry* (N.D. Cal. Jan. 11, 2010). As an expert on the history of marriage testified, "When slaves were emancipated, they flocked to get married. And this was not trivial to them, by any means. [One] ex-slave who had also been a Union soldier … declared, 'The marriage covenant is the foundation of all our rights.'" *Id.* at 202-203. Marriage is thus central to the liberty of individuals and a free society. Indeed, the mutual dependence and obligation fostered by marriage affirmatively advance the appropriately narrow and modest role of government. *See* Goldwater, *The Conscience of a Conservative* 14 (1960)

("[F]or the American Conservative, there is no difficulty in identifying the day's overriding political challenge: it is *to preserve and extend freedom.* As he surveys the various attitudes and institutions and laws that currently prevail in America, many questions will occur to him, but the Conservative's first concern will always be: *Are we maximizing freedom?*").

For those who choose to marry, the rights and responsibilities conveyed by civil marriage provide a bulwark against unwarranted government intervention into deeply personal concerns such as medical and child-rearing decisions. *See, e.g.*, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925) (affirming "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer* v. *Nebraska*, 262 U.S. 390, 401 (1923) (recognizing "the power of parents to control the education of their own"). Thus, as noted above, this Court has recognized on numerous occasions that the freedom to marry is one of the fundamental liberties that an ordered society must strive to protect and promote.[10] This Court has

[10] *See, e.g.*, *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." (citation omitted)); *Turner* v. *Safley*, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right" and an "expression[] of emotional support and public commitment."); *Zablocki*, 434 U.S. at 384 ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-640 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving* v. *Virginia*, 388 U.S. 1, 12

reaffirmed that freedom by securing marriage rights for prisoners, *Turner* v. *Safley*, 482 U.S. 78, 95 (1987); striking down laws requiring court permission to marry, *Zablocki*, 434 U.S. at 388; and eliminating racially discriminatory restrictions on the right to marry, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967).

Amici recognize that a signal and admirable characteristic of our judiciary is the exercise of restraint when confronted with a provision duly enacted by the people or their representatives, and it is not the job of this Court "to protect the people from the consequences of their political choices." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012). Nonetheless, this Court's "deference in matters of policy cannot …

(1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Meyer*, 262 U.S. at 399 (the right "to marry, establish a home and bring up children" is a central part of liberty protected by the Due Process Clause); *Maynard* v. *Hill*, 125 U.S. 190, 205, 211 (1888) (marriage is "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress"); *see also, e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 574 (2003) ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. … Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."); *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) ("[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."); *Boddie* v. *Connecticut*, 401 U.S. 371, 376, 383 (1971) ("[M]arriage involves interests of basic importance in our society" and is "a fundamental human relationship."); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (marriage is "one of the basic civil rights of man," "fundamental to the very existence and survival of the race").

become abdication in matters of law." *Id.* It is this Court's duty to set aside laws that overstep the limits imposed by the Constitution—limits that reflect a different kind of restraint that the people wisely imposed on *themselves* to ensure that segments of the population are not deprived of liberties that there is no legitimate basis to deny them. As James Madison put it,

> In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

5 *Writings of James Madison* 272 (Hunt ed. 1904). Likewise, while it is the duty of the political arms of the government "in the first and primary instance" "to preserve and protect the Constitution," the judiciary must not "admit inability to intervene when one or the other level of Government has tipped the scales too far." *United States* v. *Lopez*, 514 U.S. 549, 577-578 (1995) (Kennedy, J., concurring).

It is accordingly not a violation of principles of judicial restraint for this Court to strike down laws that infringe on "fundamental rights necessary to our system of ordered liberty." *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3042 (2010). It is instead a key protection of limited, constitutionally constrained government. *See The Federalist* No. 78 (Hamilton) ("[A] limited Constitution … can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."); *see also* Madison, *Speech in Congress on the Removal Power* (June

8, 1789) ("[I]ndependent tribunals … will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution.").

The right to marry indisputably falls within the narrow band of specially protected liberties that this Court ensures are protected from unwarranted curtailment. This Court's special solicitude for marriage is manifest in its decision in *Loving*, where this Court rejected the arguments that the Fourteenth Amendment did not extend so far as to void the State's antimiscegenation law, that it was inappropriate for this Court to address an issue of exclusively State concern, and that social science evidence demonstrated that interracial marriage harmed children, led to higher divorce rates, and weakened the marital bond. *See* Appellee Br., *Loving* v. *Virginia*, No. 66-395 (U.S. Mar. 20, 1967).[11]

Proposition 8 ran afoul of our constitutional order by submitting to popular referendum a fundamental right that there is no legitimate, fact-based reason to deny to same-sex couples. *Cleburne*, 473 U.S. at 448 ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order [State] action violative of the Equal Protection Clause, and the [State] may not avoid the strictures of the that Clause by deferring to the wishes or objections of some frac-

---

[11] This Court intervened in *Loving* even though States were actively debating whether to repeal or to continue enforcing miscegenation laws. 388 U.S. at 6 & n.5; *see also id.* at 7-8. That intervention did not improperly short-circuit ongoing democratic developments in the States, but rather fulfilled this Court's responsibility to enforce the constitutional guarantee of equal protection.

tion of the body politic." (citation omitted)); *see also West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, … and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."); *Lucas* v. *Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-737 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."). This case accordingly presents one of the rare instances in which judicial intervention is necessary to prevent overreaching by the electorate. When fundamental liberties are at stake, personal "choices and assessments … are not for the Government to make," *Citizens United* v. *FEC*, 130 S. Ct. 876, 917 (2010), and courts must step in to prevent any encroachment upon individual rights.

Our constitutional guarantees of freedom are no less a part of our legal traditions than is the salutary principle of judicial restraint, and this Court does no violence to those traditions—or to conservative principles—when it acts to secure constitutionally protected liberties against overreaching by the government. *Cf.* Goldwater 13-14 ("The Conservative is the first to understand that that practice of freedom requires the establishment of order: it is impossible for one man to be free if another is able to deny him the exercise of his freedom. … He knows that the utmost vigilance and care are required to keep political power within its proper bounds."). Thus, this Court has invalidated laws infringing on the Second Amendment right to self-defense and right to bear arms. *District of Columbia* v. *Heller*, 554 U.S. 570, 635 (2008). It has ensured that States do not infringe on fundamental First Amendment rights in limiting individual campaign contributions. *Randall* v. *Sorrell*, 548 U.S. 230, 236-237 (2006).

Likewise, the Court has voided the application of a State law where it interfered with the fundamental "liberty of parents … to direct the upbringing and education of children." *Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972) (voiding application of law under the First Amendment). And this Court has protected the rights of religious groups to assemble in and use public facilities. *See Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-397 (1993); *Widmar* v. *Vincent*, 454 U.S. 263, 276-277 (1981). Our society is more free because the Court has exercised its duty to enforce the Constitution in that manner. The Court should do likewise in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MARK C. FLEMING
FELICIA H. ELLSWORTH
ELISABETH M. OPPENHEIMER
REBECCA A. BACT
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

REGINALD J. BROWN
SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL AGUILAR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

FEBRUARY 2013

APPENDIX

LIST OF AMICI CURIAE

Kenneth B. Mehlman, Chairman, Republican National Committee, 2005-2007

Tim Adams, Undersecretary of the Treasury for International Affairs, 2005-2007

Cliff S. Asness, Businessman, Philanthropist, and Author

David D. Aufhauser, General Counsel, Department of the Treasury, 2001-2003

Charles Bass, Member of Congress, 1995-2007 and 2011-2013

John B. Bellinger III, Legal Adviser to the Department of State, 2005-2009

Katie Biber, General Counsel, Romney for President, 2007-2008 and 2011-2012

Mary Bono Mack, Member of Congress, 1998-2013

William A. Burck, Deputy Staff Secretary, Special Counsel, and Deputy Counsel to the President, 2005-2009

Alex Castellanos, Republican Media Advisor

Paul Cellucci, Governor of Massachusetts, 1997-2001, and Ambassador to Canada, 2001-2005

David C. Chavern, Business Association Executive

Mary Cheney, Director of Vice Presidential Operations, Bush-Cheney 2004, 2003-2004

Thomas J. Christensen, Deputy Assistant Secretary of State for East Asian and Pacific Affairs, 2006-2008

Jim Cicconi, Assistant to the President and Deputy to the Chief of Staff, 1989-1990

James B. Comey, U.S. Deputy Attorney General, 2003-2005

Jeff Cook-McCormac, Senior Advisor, American Unity PAC

R. Clarke Cooper, U.S. Alternative Representative, United Nations Security Council, 2007-2009

Julie Cram, Deputy Assistant to the President and Director of the White House Office of Public Liaison, 2007-2009

S.E. Cupp, Author and Political Commentator

Michele Davis, Assistant Secretary for Public Affairs and Director of Policy Planning, Department of the Treasury, 2006-2009

Tyler Deaton, Secretary, New Hampshire Young Republicans, 2011-Present

Alicia Davis Downs, Associate Political Director, White House, 2001-2003

Kenneth M. Duberstein, White House Chief of Staff and Assistant to the President, 1981-1984 and 1987-1989

Janet Duprey, New York State Assemblywoman, 2007-Present

Clint Eastwood, Producer, Director, Actor, and Mayor of Carmel, California, 1986-1988

Christian J. Edwards, Special Assistant to the President and Director of Press Advance, 2005-2007

Lew Eisenberg, Finance Chairman, Republican National Committee, 2002-2004

Mark J. Ellis, State Chairman, Maine Republican Party, 2005-2006 and 2007-2009

Elizabeth Noyer Feld, Public Affairs Specialist, White House Office of Management and Budget, 1984-1987

Charles Freeman, Assistant U.S. Trade Representative for China Affairs, 2002-2005

David Frum, Author and Special Assistant to the President, 2001-2002

Reed Galen, Director of Scheduling and Advance, Bush-Cheney 2004, 2003-2004

Richard Galen, Communications Director, Speaker's Political Office, 1996-1997

Mark Gerson, Chairman, Gerson Lehrman Group and Author of *The Neoconservative Vision: From the Cold War to the Culture Wars* and *In the Classroom: Dispatches from an Inner-City School that Works*

Benjamin Ginsberg, National Counsel, Bush-Cheney 2000 and 2004

Josh Ginsberg, National Field Director, Romney for President, 2007-2008

Juleanna Glover, Press Secretary to the Vice President, 2001-2002

John Goodwin, Chief of Staff to Raul Labrador, Member of Congress, 2011-2013

Adrian Gray, Director of Strategy, Republican National Committee, 2005-2007

Richard Grenell, Spokesman, U.S. Ambassadors to the United Nations, 2001-2008

Mark Grisanti, New York State Senator, 2011-Present

Patrick Guerriero, Mayor of Melrose, Massachusetts, and Member of Massachusetts House of Representatives, 1993-2001

Carlos Gutierrez, Secretary of Commerce, 2005-2009

Stephen Hadley, Assistant to the President and National Security Advisor, 2005-2009

Richard L. Hanna, Member of Congress, 2011-Present

Jill Hazelbaker, Communications Director, John McCain for President, 2007-2008

Israel Hernandez, Assistant Secretary of Commerce for International Trade, 2005-2009

Douglas Holtz-Eakin, Director, Congressional Budget Office, 2003-2005

Margaret Hoover, Advisor to the Deputy Secretary of Homeland Security, 2005-2006

Michael Huffington, Member of Congress, 1993-1995

Jon Huntsman, Governor of Utah, 2005-2009, and Ambassador to China, 2009-2011

David A. Javdan, General Counsel, U.S. Small Business Administration, 2002-2006

Reuben Jeffery, Undersecretary of State for Economic, Energy, and Agricultural Affairs, 2007-2009

Greg Jenkins, Deputy Assistant to the President and Director of Presidential Advance, 2003-2004

Coddy Johnson, National Field Director, Bush-Cheney 2004, 2003-2004

Gary Johnson, Governor of New Mexico, 1995-2003, and Libertarian Party Nominee for President, 2012

Nancy L. Johnson, Member of Congress, 1983-2007

Robert Kabel, Special Assistant to the President for Legislative Affairs, 1982-1985

Neel Kashkari, Assistant Secretary of the Treasury, 2008-2009

Theodore W. Kassinger, Deputy Secretary of Commerce, 2004-2005

Jonathan Kislak, Deputy Undersecretary of Agriculture for Small Community and Rural Development, 1989-1991

David Kochel, Senior Iowa Advisor, Mitt Romney for President, 2007-2008 and 2011-2012

James Kolbe, Member of Congress, 1985-2007

Cyrus Krohn, eCampaign Director, Republican National Committee, 2007-2009

Jeffrey Kupfer, Chief of Staff and Acting Deputy Secretary, Department of Energy, 2006-2009

Ed Kutler, Assistant to the Speaker of the House, 1995-1997

Kathryn Lehman, Chief of Staff, House Republican Conference, 2003-2005

Thomas A. Little, Vermont State Representative, 1992-2002 and Chairman of the Vermont House Judiciary Committee, 1999-2002

Daniel S. Loeb, Businessman and Philanthropist

Alex Lundry, Director of Data Science, Romney for President, 2012

N. Greg Mankiw, Chairman, Council of Economic Advisers, 2003-2005

Catherine Martin, Deputy Assistant to the President and Deputy Communications Director for Policy and Planning, 2005-2007

Kevin Martin, Chairman, Federal Communications Commission, 2005-2009

David McCormick, Undersecretary of the Treasury for International Affairs, 2007-2009

Mark McKinnon, Republican Media Advisor

Aaron McLear, Press Secretary to Governor Arnold Schwarzenegger, 2007-2011

Bruce P. Mehlman, Assistant Secretary of Commerce, 2001-2003

Susan Molinari, Member of Congress, 1990-1997

Connie Morella, Member of Congress, 1987-2003, and U.S. Ambassador to the Organization for Economic Co-operation and Development, 2003-2007

Michael E. Murphy, Republican Political Consultant

Beth Myers, Romney for President Campaign Manager, 2007-2008 and Senior Advisor, 2011-2012

Michael Napolitano, White House Office of Political Affairs, 2001-2003

Ana Navarro, National Hispanic Co-Chair, John McCain for President, 2008

Susan Neely, Special Assistant to the President, 2001-2002

Noam Neusner, Special Assistant to the President for Economic Speechwriting, 2002-2005

B.J. Nikkel, Colorado State Representative and Majority Whip, 2009-2012, and District Director for Marilyn Musgrave, Member of Congress, 2002-2006

Meghan O'Sullivan, Deputy National Security Advisor for Iraq and Afghanistan, 2005-2007

Richard Painter, Associate Counsel to the President, 2005-2007

Ruth Ann Petroff, Wyoming State Representative, 2011-Present

Nancy Pfotenhauer, Regulatory Advisor, Romney for President, 2008, and Economist, Presidential Transition Team, 1988

Gregg Pitts, Director, White House Travel Office, 2006-2009

J. Stanley Pottinger, Assistant U.S. Attorney General, Civil Rights Division, 1973-1977

Michael Powell, Chairman, Federal Communications Commission, 2001-2005

Larry Pressler, U.S. Senator from South Dakota, 1979-1997, and Member of Congress, 1975-1979

Deborah Pryce, Member of Congress, 1993-2009

John Reagan, New Hampshire State Senator, 2012-Present

Luis Reyes, Special Assistant to the President and Deputy Assistant to the President, 2006-2009

Tom Ridge, Governor of Pennsylvania, 1995-2001, and Secretary of Homeland Security, 2003-2005

Mark A. Robbins, General Counsel, U.S. Office of Personnel Management, 2001-2006

Kelley Robertson, Chief of Staff, Republican National Committee, 2005-2007

Brian Roehrkasse, Director of Public Affairs, Department of Justice, 2007-2009

Ileana Ros-Lehtinen, Member of Congress, 1989-Present

Harvey S. Rosen, Chairman and Member, Council of Economic Advisers, 2003-2005

Lee Rudofsky, Deputy General Counsel, Romney for President, 2012

Patrick Ruffini, eCampaign Director, Republican National Committee, 2005-2007

Corry Schiermeyer, Director for Global Communications, National Security Council, 2005-2007

Steve Schmidt, Deputy Assistant to the President and Counselor to the Vice President, 2004-2006, and Senior Advisor, John McCain for President, 2008

Adam Schroadter, New Hampshire State Representative, 2010-Present

Christopher Shays, Member of Congress, 1987-2009

Faryar Shirzad, Deputy Assistant to the President and Deputy National Security Advisor for International Economic Affairs, 2004-2006

Ken Spain, Communications Director, National Republican Congressional Committee, 2009-2010

Robert Steel, Undersecretary of the Treasury for Domestic Finance, 2006-2008

Nancy Stiles, New Hampshire State Senator, 2010-Present

David Stockman, Director, Office of Management and Budget, 1981-1985

Jane Swift, Governor of Massachusetts, 2001-2003

Richard Tisei, Massachusetts State Senator 1991-2011, and Senate Minority Leader 2007-2011

Michael E. Toner, Chairman and Commissioner, Federal Election Commission, 2002-2007

Frances Fragos Townsend, Homeland Security Advisor to the President, 2004-2008

Michael Turk, eCampaign Director for Bush-Cheney 2004, 2003-2004

John Ullyot, Communications Director, U.S. Senate Armed Services Committee, 2003-2007

Sally A. Vastola, Executive Director, National Republican Congressional Committee, 2003-2006

Jacob P. Wagner, Chairman, New Hampshire Federation of College Republicans, 2012-Present

Mark Wallace, U.S. Ambassador to the United Nations, Representative for UN Management and Reform, 2006-2008

Nicolle Wallace, Assistant to the President and White House Communications Director, 2005-2008

William F. Weld, Governor of Massachusetts, 1991-1997, and Assistant U.S. Attorney General, Criminal Division, 1986-1988

Christine Todd Whitman, Governor of New Jersey, 1994-2001, and Administrator of the EPA, 2001-2003

Meg Whitman, Republican Nominee for Governor of California, 2010

Robert Wickers, Republican Political Consultant

Paul Wolfowitz, Deputy Secretary of Defense, 2001-2005, and President of the World Bank Group, 2005-2007

Dan Zwonitzer, Wyoming State Representative, 2005-present