Nos. 12-144, 12-307

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners*,
v.
KRISTIN M. PERRY, ET AL., *Respondents.*

UNITED STATES, *Petitioner*,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
and
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *Respondents*.

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

BRIEF OF *AMICUS CURIAE* HELEN M. ALVARÉ IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is a law professor who has written extensively about family law in the United States, with a special focus on issues involving legislative and judicial treatment of marriage and parenting. She is committed to the public interest and in particular to the marriage and parenting circumstances of the least privileged Americans. Based upon her research into the history of constitutional marriage law and the evolving meaning of "marriage" among less-privileged Americans, she believes that states have a substantial interest in supporting and encouraging marriage among opposite-sex couples in order to highlight the procreative aspects of marriage, and in declining to extend similar recognition to same-sex couples.

SUMMARY OF THE ARGUMENT

I. The state has a substantial interest in *recognizing* and *encouraging* marriage between opposite-sex pairs of adults who consent to commit to one another for exclusive, long-run, sexually intimate relationships, on the explicit grounds of these pairs' intrinsically procreative capacity, and their suitednesss for caring for children. At the very same time, the state has a substantial state interest in disclaiming a *similar* interest in same-sex pairs of

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[1] No counsel for a party authored this brief in whole or in part. Printing costs for the brief were provided by the Witherspoon Institute. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

adults who wish to commit to exclusive, long-run, sexually intimate relationships, but who explicitly deny the link between marriage and children, and who seek to portray marriage as merely a "capstone" or prize for adults' emotional connection or as a reparation for past societal disapproval. To hold otherwise would not only undercut the state's most important interests in marriage, but would perpetuate a "retreat from marriage" that is already apparent among the most vulnerable Americans.

II. This Court has repeatedly described states' interests in marriage as the interweaving of three benefits to society: (1) stable commitment between intimate, opposite-sex pairs of adults, (2) the procreation and the rearing of children, and thereby, (3) the formation of a decentralized, democratic society. These holdings derive from universally shared intuitions about the marital family and historical observations about the shape and functions of the marital family over millennia. In the words of a leading expert on the history of marriage in Western law:

> For nearly two thousand years, the Western legal tradition reserved the legal category of marriage to monogamous, heterosexual couples who had reached the age of consent, who had the physical capacity to join together in one flesh, and whose joining served the goods and goals of procreation, companionship and stability at once.[2]

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[2] John Witte, Jr., *Response to Mark Strasser, in Marriage and Same-Sex Unions* 43, 45 (Lynn Wardle et. al. eds., 2003).

This "core understanding of the form and function of sex and marriage" appeared not only in various religious doctrines, but also in the works of the Greek Platonists and Aristotelians, Roman jurists, and Enlightenment philosophers.[3]

III. The wisdom of the Court's precedents recognizing the states' interests in childbirth, childrearing, and societal stability is today more apparent than ever. New empirical studies reveal the consequences of diminishing the procreative aspects of marriage in favor of adults' interests.

In the United States, especially over the last 50 years, the links between sex, marriage, and procreation have weakened considerably in both law and culture, with repercussions for adults, children, and society as a whole. Marriage is understood less as the gateway to adult responsibilities, centered most often upon the needs of children, and more as the "capstone" or reward for establishing a "soulmate" relationship with another adult.

The harmful consequences of this diminished and adult-centered understanding of marriage have not been equally distributed across society. Rather, the most vulnerable Americans—those without a college education, the poor, and minority groups—have suffered more: they marry less, divorce more, experience lower marital quality, and have far more nonmarital births. Both adults and children suffer, as does the social fabric generally, with the "marriage gap" acting as a major engine of social inequality, which persists intergenerationally. There is also

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[3] *Id*. at 45–46.

troubling evidence that an adult-centered view of marriage is taking hold of the upcoming generation of adults often called "Millennials."

The Plaintiffs in these cases, like other proponents of same-sex marriage, ask this Court to declare that states have no interest in the procreative aspects of marriage generally: bearing and rearing biologically related children. They ask the Court (and states) to re-frame marriage simply as the government's and society's stamp of approval for two persons' mutual emotional and romantic attachments. They view marriage as a kind of accolade to couples declaring their intentions to remain together as romantic partners, and wishing to use marriage as a means to the end of overcoming past stigma visited upon gays and lesbians.

Certainly, gays and lesbians have suffered stigma and discrimination. Yet the new, diminished understanding of marriage advocated by same-sex marriage proponents is dangerous, particularly for under-privileged Americans, because it is closely associated in a substantial body of literature with the retreat from marriage among the poor, the less-educated, and minority groups. States have a strong interest in affirming opposite-sex marriage, without any animus toward gays and lesbians, in order to preserve the vital link between sex, marriage, and children, and to avoid further rupture of the social fabric between the privileged and less-privileged.

ARGUMENT

I. THE STATE HAS AT LEAST A LEGITIMATE, BUT MORE LIKELY A COMPELLING, INTEREST IN SINGLING OUT OPPOSITE-SEX MARRIAGE FOR PROTECTION, SUFFICIENT TO SATISFY THE EQUAL PROTECTION CLAUSE.

Plaintiffs[4] in these cases claim that the Equal Protection Clause of the Fourteenth Amendment prohibits states from defining marriage as the union of a man and a woman. In addition to the many contrary arguments asserted by the *Hollingsworth* Petitioners, this *amicus* adds that this Court should recognize that states have governmental interests sufficient to justify their recognizing opposite-sex but not same-sex partnerships as "marriages."

States are constitutionally permitted in legislation to classify people into groups that "possess[] distinguishing characteristics relevant to interests the State has the authority to implement."[5] Even more relevant to the question of same-sex marriage, this Court has affirmed the constitutionality of state classifications where recognizing or benefitting one group "promotes a legitimate governmental purpose, and the addition of other groups would not."[6]

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[4] For simplicity, *amicus* refers to all proponents of same-sex marriage in *Perry, Hollingsworth*, and *Windsor* as "Plaintiffs."

[5] *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (quotation marks omitted).

[6] *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

As described in Section III below, recognizing same-sex marriage as the institution defined by Plaintiffs—as an adult-centered, emotion-based accomplishment—would not only fail to promote the government's substantial interest in opposite-sex marriages, but contradict that interest in ways likely to harm the segment of society already suffering the most from a retreat from marriage.

In *Perry*, the Ninth Circuit held that California's Proposition 8 "operates with no apparent purpose but to impose on gays and lesbians . . . a majority's private disapproval of them and their relationships."[7] The district court concluded similarly, partially relying on the fact that "California, like every other state, has never required that individuals entering a marriage be willing or able to procreate."[8] Yet the lack of a pre-marital "procreation test" does not undermine the legitimacy of the state's classifying couples as same-sex or opposite-sex, and offering marriage only to the latter.

This Court has repeatedly stated that "[t]he rationality commanded by the Equal Protection Clause does not require States to match . . . distinctions and the legitimate interests they serve with razorlike precision"[9] or "mathematical nicety."[10]

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[7] *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012).

[8] *Perry v. Schwarzenegger*, No. 3:09-2292-VRW (N.D. Cal.), Findings of Fact and Conclusions of Law 60, ECF No. 708 [hereinafter Findings of Fact; docket entries for court documents electronically filed under No. 3:09-2292-VRW shall be referred to only by their names and ECF numbers].

[9] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 63–64 (2000) (age discrimination action brought by university employees).

Rather, classifications that neither involve fundamental rights nor suspect classifications are "accorded a strong presumption of validity."[11] For such classifications, the government is not required to "actually articulate at any time the purpose or rationale supporting its classification,"[12] and a court should uphold it against an Equal Protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[13]

Moreover, even if intermediate scrutiny applies (as for gender-based classifications) an exact fit is not required. Intermediate scrutiny mandates only a "substantial relation" between the classification and the underlying objective, not a perfect fit.[14] "None of our gender-based classification equal protection cases have required that the statute . . . be capable of achieving its ultimate objective in every instance."[15]

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[10] *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).
[11] *Heller v. Doe*, 509 U.S. 312, 319 (1993).
[12] *Id*. at 320 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992)).
[13] *Id*. (quoting *Federal Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).
[14] *See Califano v. Webster,* 430 U.S. 313, 318 (1977) (per curiam) (upholding statute providing higher Social Security benefits for women than men because "women *on the average* received lower retirement benefits than men;" *id.* n.5 (emphasis added)).
[15] *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 US. 53, 70 (2001); *see Metro Broad., Inc. v. Federal Commc'ns Comm'n,* 497 U.S. 547, 579, 582–83 (1990), overruled on other grounds, *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227 (1995) (holding that classification need not be accurate "in every case" if, "in the aggregate," it advances the objective).

In *Perry*, the voters of the State of California drew a distinction between same-sex and opposite-sex couples that is rationally and substantially related to California's interests in preserving the link between sex, marriage, and procreation. In *Windsor*, Congress made the same calculation in enacting the Defense of Marriage Act. No same-sex couples can procreate; the vast majority of opposite-sex couples can and do. According to the Census Bureau, by the age of 44, over 80% of married couples have children in the household. This figure does not even include couples whose children are older or have moved away from home.[16]

Given the invasions of privacy that would certainly be involved in ascertaining couples' procreative willingness and capacities prior to marriage, the possibility of unintended pregnancies, and couples' changing intentions, it would be impossible for states, effectively, to determine the procreative potential of any particular opposite-sex couple. Drawing a line between same-sex and opposite-sex couples is rationally related to the state's interests in maintaining in the public mind the links between sex, marriage, and children.

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[16] U.S. Census Bureau, *Family Households With Own Children Under Age 18 by Type of Family, 2000 and 2010, and by Age of Householder, 2010*, The 2012 Statistical Abstract: The National Data Book, Table 65, http://www.census.gov/compendia/statab/2012/tables/12s0065.pdf (last visited Jan. 24, 2013).

II. THIS COURT HAS REGULARLY AND FREQUENTLY RECOGNIZED WITH APPROVAL THE IMPORTANCE OF STATES' INTERESTS IN THE PROCREATIVE ASPECTS OF OPPOSITE-SEX MARRIAGE. WHILE IT HAS ALSO RECOGNIZED THAT MARRIAGE SERVES ADULTS' INTERESTS IN HAPPINESS AND STABILITY, THE COURT HAS NOT ISOLATED THESE FROM THE PROCREATIVE ASPECTS OF MARRIAGE.

Supreme Court decisions from the early nineteenth to the late twentieth century have repeatedly recognized, with approval, states' interests in the procreative features of marriage: childbirth and childrearing by the adults who conceived them, and the contribution of that childrearing to a stable democratic society.

The Court has written a great deal on the nature of the states' interests in the context of evaluating state laws affecting entry into or exit from marriage, or concerning parental rights and obligations. Typically, these statements recognize that states are vitally interested in marriage because of the advantages not only to adults but also to children and to the larger society. Children replenish communities, and communities benefit when children are reared by their biological parents because parents best assist children to grow to become well-functioning citizens. The Court does not give special attention to adults' interests nor accord them extra weight. Nor are the interests of some

children vaulted over the interests of all children generally.

The material below considers the various manners in which this Court has, in the past, discoursed approvingly about marriage and parenting as expressing states' interwoven interests in the flourishing of adults, children, and society.

A. States have substantial interest in the birth of children.

While it is difficult to disentangle completely the Court's language recognizing a legitimate state interest in the very birth of children from the state's interest in the healthy *formation* of children within marriage, still it is possible to discern it.

In the case refusing to allow polygamy on the grounds of the Free Exercise Clause, *Reynolds v. United States,* this Court explained states' interests in regulating marriage with the simple declaration: "Upon [marriage] society may be said to be built."[17] Nearly 100 years later in *Loving v. Virginia*, striking down a state's anti-miscegenation law, the Court referred to marriage as "fundamental to our very existence and survival," necessarily endorsing the role of marriage in propagating society through childbearing.[18]

Even in cases where *only* marriage or childbearing was at issue, but not both, the Court has referred to "marriage and childbirth" together in the same phrase, nearly axiomatically. The following cases illustrate:

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[17] 98 U.S. 145, 165 (1879).
[18] 388 U.S. 1, 12 (1967).

- In *Meyer v. Nebraska,* which vindicated parents' constitutional right to have their children instructed in a foreign language, this Court referred not merely to parents' rights to care for children but to citizens' rights "to marry, establish a home and bring up children."[19]
- In *Skinner v. Oklahoma ex rel. Williamson,* concerning a law punishing certain classifications of felons with forced sterilization, the Court opined: "Marriage and procreation are fundamental to the very existence and survival of the race."[20]
- In *Zablocki v. Redhail*, which struck down a Wisconsin law restricting marriage for certain child support debtors, the Court wrote: "[I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[21] As in *Loving*, *Zablocki* reiterated that marriage is "fundamental to our very existence and survival,"[22] and recognized, additionally the right to "deci[de] to marry and raise the child in a traditional family setting."[23]
- The 1977 opinion in *Moore v. City of East Cleveland*, announcing a blood-and-marriage-

[19] 262 U.S. 390, 399 (1923).
[20] 361 U.S. 535, 541 (1942).
[21] 434 U.S. 374, 386 (1978).
[22] *Id.* at 383.
[23] *Id*. at 386.

related family's constitutional right to co-reside, nonetheless referenced the procreative aspect of family life stating: "the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[24]

- Similarly, in *Parham v. J.R.*, a case treating parents' rights to direct their children's health care, the Court stated: "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."[25]

B. States have substantial interest in the way marriage socializes children.

A second prominent theme in this Court's prior cases touching upon marriage is the unique importance of the marital family for forming and educating citizens for the continuation of a free, democratic society.

Preliminarily, in cases in which natural parents' interests in directing children's upbringing have conflicted with the claims of another, this Court has approvingly noted the importance of the bond between parents and their natural children. This is found in its observations that states presume that biological parents' "natural bonds of affection" lead them to make decisions for their children that are in the children's best interests. Statements in this vein have been made in *Parham v. J.R.* ("historically [the

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[24] 431 U.S. 494, 503–04 (1977).
[25] 442 U.S. 584, 602 (1979).

law] has recognized that natural bonds of affection lead parents to act in the best interests of their children"[26]), in *Smith v. Organization of Foster Families for Equality & Reform* (families' "blood relationship" forms part of the "importance of the familial relationship, to the individuals involved and to the society"[27]), and in the "grandparents' rights" case of *Troxel v. Granville* ("there is a presumption that fit parents act in the best interests of their children"[28]).

Moreover, for over 100 years, this Court has reiterated the relationship between marriage and childrearing for the benefit of a functioning democracy. In *Murphy v. Ramsey*, for example, this Court opined:

> For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[29]

The 1888 decision of *Maynard v. Hill* referred to marriage as "having more to do with the morals and

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[26] *Id.* at 602.
[27] 431 U.S. 816, 844 (1977).
[28] 530 U.S. 57, 68 (2000).
[29] 114 U.S. 15, 45 (1885).

civilization of a people than any other institution," and thus marriage is continually "subject to the control of the legislature."[30] And in 1943, in the course of an opinion affirming parents' authority over their children within the limits of child labor laws, this Court explicitly linked good childrearing practices to a healthy society, saying: "A democratic society rests, for its continuance, upon the healthy well-rounded growth of young people into full maturity as citizens, with all that implies."[31]

Reflecting upon states' continual interest in marriage legislation, in a case concerning the affordability of divorce process, Justice Black's dissenting opinion (objecting to the expansion of the contents of the federal Due Process Clause) in *Boddie v. Connecticut*, asserted that: "The States provide for the stability of their social order, for the good morals of all their citizens and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain and dissolve marriages."[32]

In the 1977 case in which this Court refused to extend equal parental rights to foster parents, the court wrote about the relationships between family life and the common good stating: "Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it

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[30] 125 U.S. 190, 205 (1888).
[31] *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944).
[32] 401 U.S. 371, 389 (1971) (Black, J., dissenting).

plays in 'promot[ing] a way of life' through the instruction of children, as well as from the fact of blood relationship."[33]

As recently as 1983, in the single father's rights case, *Lehr v. Robertson*, the Court referenced the social purposes of the family quite explicitly in terms of states' legitimate interest in maintaining the link between marriage and procreation. Refusing to treat an unmarried father identically to a married father with respect to rights concerning the child, the Court wrote: "marriage has played a critical role . . . in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family."[34]

In summary, it is fair to conclude, upon a review of this Court's family law jurisprudence, that states' interests in the procreational aspects of marriage have been both recognized by this Court and affirmed to be not only legitimate, but essential.

C. The view of marriage advocated by Plaintiffs in *Perry* and *Windsor* ignores children and society.

Undoubtedly the state also values adults' interests in marriage: adult happiness, mutual commitment, increased stability, and social esteem. Yet a view of marriage that focuses solely on these adult-centric interests is incomplete and denies the

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[33] *Org. of Foster Families*, 431 U.S. at 844 (citation omitted).
[34] 463 U.S. 248, 257 (1983).

Court's decisions affirming the states' interests in procreation and healthy childrearing by stably linked, biological parents. It also risks institutionalizing, in law and culture, a notion of marriage that is at the core of an alarming "retreat from marriage" among disadvantaged Americans. (See, *infra*, Section III.)

Same-sex marriage proponents take great pains to excise references to children when quoting this Court's family law opinions. In their Complaint and Trial Memorandum in *Perry*, for example, Plaintiffs reference from *Loving v. Virginia* only the language about marriage as a "basic civil right[]" of adults, or a "vital personal right[] essential to the orderly pursuit of happiness by free men," leaving out *Loving*'s immediately adjoining reference to marriage as the fount of society.[35] Plaintiffs similarly quote *Cleveland Board of Education v. La Fleur*[36] without noting that the freedom at issue there was a married teacher's "deciding to bear a child."[37]

Perhaps the most egregious example of Plaintiffs' selectively quoting from this Court's opinions addressing the meaning of marriage is their misuse of *Turner v. Safley*, the case in which this Court held that certain prisoners were required to have access to

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[35] Compl. for Declaratory, Injunctive, or other Relief 1, E.C.F. No 1 [hereinafter Compl.]; Pls.' & Pl.-Intervenor's Trial Mem. 3, ECF. No. 281 [hereinafter Trial Mem.]. As noted, *Loving* concludes that marriage and family are "fundamental to our very existence and survival." 388 U.S. at 12.

[36] Trial Mem. 3–4, ECF. No. 281 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) ("personal choice in matters of marriage and family life")).

[37] 414 U.S. at 640.

state-recognized marriage.[38] Plaintiffs cite *Turner* for the proposition that civil marriage is an "'expression . . . of emotional support and public commitment,'" and "an exercise in spiritual unity, and a fulfillment of one's self."[39] The district court's Findings of Fact and Conclusions of Law does likewise, selectively quoting only the adult-related aspects of this Court's statements about the meaning of marriage and excising references to procreation.[40]

However, *Turner* explicitly acknowledged, in two ways, both the adults' *and* the procreative interests in marriage. First, *Turner* concluded that adults' interests were only "elements" or "an aspect" of marriage,[41] and that marriage had other "incidents" that prisoners would eventually realize, referring specifically to consummation, *i.e.* heterosexual

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[38] 482 U.S. 78 (1987).

[39] Trial Mem. 6, ECF No. 281 (citing *Turner v. Safley*, 482 U.S. 78, 95–96).

[40] *See* Findings of Fact 110, ECF No. 708. This approach of Plaintiffs and the courts below is not unique. The plaintiffs in the Massachusetts same-sex marriage case similarly affirmed the ability of the law to affect social perceptions, and requested same-sex marriage recognition in order to attain "social recognition and security" for themselves and their daughter. *Goodridge v. Dep't of Pub. Health*, No. 01-1647 (Superior Court, Cnty. of Suffolk, MA (Aug. 2001), Mem. in Supp. of Pls.' Mot. for Summ. J. 1. They stated that marriage recognition would take away a social "badge of inferiority" and instead "instantly" communicate "their relationship . . . to third parties." *Id.* at 19. And the Massachusetts Supreme Court, like Judge Walker and the Ninth Circuit below, excised children from *Zablocki* and *Loving* and *Skinner* and misused *Turner* similarly. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003).

[41] 482 U.S. at 95–96.

intercourse with a spouse.[42] Second, *Turner* distinguished the situation of prisoners who would someday be free, from that of prisoners whom a state *refused* to permit to marry, on the grounds that life imprisonment would foreclose the ability to parent and rear children.[43] *Turner* noted that in *Butler v. Wilson*[44] the Supreme Court had summarily affirmed the case of *Johnson v. Rockefeller*,[45] in which inmates imprisoned for life were denied marriage, in part upon the rationale that they would not have the opportunity to procreate or rear children. Said the *Johnson* court: "In actuality the effect of the statute is to deny to Butler only the right to go through the formal ceremony of marriage. Those aspects of marriage which make it 'one of the basic civil rights of man'—cohabitation, sexual intercourse, and the begetting and raising of children—are unavailable to those in Butler's situation because of the fact of their incarceration."[46]

In reality, proponents of same-sex marriage ask this Court to insist that every state enact and convey a *new* understanding of marriage. This new understanding would signify that what the state values about sexually intimate couples is their emotional happiness and willingness to commit to one another, exclusively, for a long time.[47] In the case

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[42] *See id*. at 96.
[43] *Id.*
[44] 415 U.S. 953 (1974).
[45] 365 F. Supp. 377 (S.D.N.Y. 1973).
[46] *Id*. at 380 (citation omitted).
[47] *See* Compl. 2, 7, ECF No. 1; Findings of Fact 67, ECF No. 708; *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012). The *Goodridge* court and well-known same-sex marriage advocates

of same-sex couples, marriage would additionally connote that the state and society are sorry for past discrimination and stigmatizing of gays and lesbians.[48] However, this understanding completely disregards the procreative aspects of marriage which this Court has recognized as essential. At the same time, it paints a picture of marriage closely associated with a retreat from marriage among the most vulnerable Americans.

Notably, proponents of same-sex marriage acknowledge the power of marriage laws to affect citizens' perceptions and behavior. Indeed, a change of perceptions and behaviors is precisely what the Plaintiffs sought in bringing suit,[49] and what the

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urge a similar meaning for marriage. *See Goodridge*, 798 N.E.2d at 948 (Marriage is the "exclusive commitment of two individuals to each other."); *see, e.g.,* Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, New Republic (Aug. 28, 1989, 1:00 AM), http://www.tnr.com/article/79054/here-comes-the-groom# (describing marriage as a "deeper and harder-to-extract-yourself from commitment to another human being"); *Talking about Marriage Equality With Your Friends and Family*, Human Rights Campaign, www.hrc.org/resources/entry /talking-about-marriage-equality-with-your-friends-and-family (last visited Jan. 24, 2013) (describing marriage as "the highest possible commitment that can be made between two adults").

[48] Several times in Plaintiffs' Complaint in *Perry*, they refer to the theme of "gay and lesbian individuals[] . . . long and painful history of societal and government-sponsored discrimination," or to "stigma." Compl. 1, 4, 7–8, ECF No. 1.

[49] *See, e.g.,* Compl. 9–10, ECF No. 1 (asserting that recognition of same-sex marriage would produce the result of "hav[ing] society accord their unions and their families the same respect and dignity of opposite-sex unions and families"); Compl. 8, ECF

courts below attempted to achieve in upholding the Plaintiffs' claims.[50] Plaintiffs specifically urge that marriage *not* be understood to imply procreation.

There is only one group of children who consistently feature in Plaintiffs' and other same-sex marriage advocates' arguments: children currently being reared in same-sex households. Plaintiffs claim that these children will be helped, indirectly, via the social approval that would flow to the same-sex partners in the children's household if their "parents" were married.[51] Even this brief argument mentioning children, however, is flawed.

First, it is not at all clear that granting marriage to same-sex partners equates with bringing marriage into the lives of such children's "parents." Exact figures are unknown, but it appears from at least one nationally representative sample of children who lived in same-sex households before the age of 18, [52] and a recent analysis of the U.S. Census,[53] that the

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No. 1 (ameliorate the "stigmatizing" gays and lesbians experience and affect their "stature" in the community).

[50] *See* Findings of Fact 86–87, ECF No. 708 (marriage recognition would convey that gays and lesbians partake of the "most socially valued form of relationship"); *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012) (suggesting that the state's designation of a relationship as a "marriage," by itself "expresses validation, by the state and the community," and is "a symbol . . . of something profoundly important").

[51] *See* Trial Mem. 7, ECF No. 281.

[52] Mark Regnerus, *How different are the adult children of parents who have same-sex relationships? Findings from the new family structures study*, 41 Soc. Sci. Research 752 (2012).

[53] Garry J. Gates, *Family Focus on…LGBT Families: Family formation and raising children among same-sex couples*, National Council on Family Relations Report, Issue FF51, 2011.

majority of children were conceived in heterosexual relationships and are presently living with one biological parent and that person's same-sex partner. Tremendous uncertainty, therefore, surrounds the questions of whether state recognition of same-sex marriage would bring "married parents" to a large number of children and whether social approbation would follow.

Second, the "jury is still out" on whether parenting in a same-sex household advances the state's critical interest in children's, and therefore society's, formation. Since the district court rendered its decision in *Perry*, a peer-reviewed journal issued the first nationally representative study of children reared in a same-sex household.[54] These children's outcomes across a host of emotional, economic and educational outcomes were diminished as compared with children reared by their opposite-sex parents in a stable marriage. The author of the study acknowledged that the question of causation remains unknown; however, the children's outcomes might indicate problems with same-sex parenting, or even problems with family structure instability, given that most children were conceived in a prior heterosexual relationship by one of the adults later entering a same-sex relationship. The latter possibility raises further questions about the overall stability of same-sex couples and about the role played by bisexuality. This is relevant to child well-being given that a consensus is emerging among social scientists that

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[54] *See* Mark Regnerus, *supra*.

many poor outcomes for children might be explained by instability in their parents' relationships.[55]

Importantly, same-sex marriage proponents' attempt to redefine "marriage" to excise childbearing, and childrearing comes at a time in history when new empirical data shows that childbearing and childrearing in marriage is threatened—a threat disproportionately visited upon the most vulnerable populations. (See Section III.) States have responded to the data. In fact, over the past 20 years, the legislatures in all 50 states have introduced bills to reform their marriage and divorce laws precisely to better account for children's interests in their parents' marriages.[56] The federal government has done the same, particularly via the marriage-promotion sections of the landmark "welfare reform" law passed in 1996 by bipartisan majorities, and signed into law by President Clinton.[57] Furthermore, Presidents Bush and Obama, in particular, have promoted extensive federal efforts on behalf of marriage and fatherhood.[58]

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[55] Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 Law & Policy 87, 94 (2004).

[56] *See, e.g.*, Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 Fam. L.Q. 783, 790 (1999); Karen Gardiner et al., *State Policies to Promote Marriage: Preliminary Report*, The Lewin Group (Mar. 2002).

[57] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (1996).

[58] *See* Helen M. Alvaré**,** *Curbing Its Enthusiasm: U.S. Federal Policy and the Unitary Family*, 2 Int'l J. Jurisprudence Fam. 107, 121–24 (2011).

In sum, the Court should reaffirm its many prior statements supporting the interests of states in childbearing, childrearing, and social stability that are advanced by opposite-sex marriages. It should resist Plaintiffs' effort to redefine marriage. That states and the federal government may have ignored children's interests too much in the past, is not a reason why states may not choose, and are not choosing today, to legislate to better account for both children's and society's robustly and empirically supported interests in marriage.

III. REDEFINING MARRIAGE IN A WAY THAT DE-LINKS SEX, MARRIAGE AND CHILDREN CAN HARM THE MOST VULNERABLE AMERICANS AND EXACERBATE THE "MARRIAGE GAP," WHICH IS RESPONSIBLE FOR INCREASING LEVELS OF SOCIAL INEQUALITY IN AMERICA.

The disappearing of children's interests in marriage, both at law and in culture, and the vaulting of adults' emotional and status interests, are, today, associated with a great deal of harm, particularly among the most vulnerable Americans. This, in turn, has led to a growing gap between the more and less privileged in the United States, threatening our social fabric. Recognizing same-sex marriage would confirm and exacerbate these trends. Consequently, states legitimately may wish to reconfirm their commitment to opposite-sex marriage on the grounds of its procreative aspects, and refuse to grant marriage recognition to same-sex couples.

Speaking quite generally, law and culture before the 1960s normatively held together sex, marriage, and children. Obviously, this was not true in the life of every citizen or family, but social and legal norms widely reflected it. In the ensuing decades, however, these links deteriorated substantially.

First, the link between sex and children weakened with the introduction of more advanced birth control technology and abortion, both of which came to fore in the 1960s and were announced to be constitutional rights by this Court in the 1960s and 1970s. Then, the link between marriage and children was substantially weakened by the passage of no-fault divorce laws during the 1970s. The transcripts of debates concerning the uniform no-fault divorce law reveal the degree to which children's interests were minimized in favor of adult interests, sometimes with mistaken beliefs about children's resiliency and sometimes on the false assertion that most failing marriages were acrimonious such that divorce would benefit, not harm children.[59]

New reproductive technologies further separated children from marriage and sex from children. Since the creation of the first "test tube baby" in 1978, which spawned a billion dollar industry in the United States, neither the federal government nor any states have passed meaningful restraints on such practices. There are today, still, almost no laws affecting who may access these technologies or obtain "donor"

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[59] *See* Helen M. Alvaré, *The Turn Toward the Self in Marriage: Same-Sex Marriage and its Predecessors in Family Law*, 16 Stan. L. & Pol'y Rev. 101, 137–53 (2005).

sperm, oocytes, or embryos.[60] This persists despite troubling indications that "donor children" experience an enhanced risk of physical or psychological difficulties.[61]

Interwoven with these developments is the declining stigma of nonmarital sex, and even nonmarital pregnancies and births, which further separate sex from marriage, but not always from children.

The effects of these legal and social developments are not evenly distributed across all segments of the population. In fact, a robust and growing literature indicates that more privileged Americans—*i.e.* non-Hispanic Whites, and Americans with a college education—are economically and educationally pulling away from other social classes to an alarming degree.[62]

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[60] *See* The President's Council on Bioethics, *Reproduction and Responsibility: The Regulation of New Biotechnologies* 8–12 (2003).

[61] *See* Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults Conceived through Sperm Donation*, Commission on Parenthood's Future (2010); Jennifer J. Kurinczuk & Carol Bower, *Birth defects in infants conceived by intracytoplasmic sperm injection: an alternative explanation*, 315 Brit. Med. J. 1260 (1997).

[62] *See, e.g.*, *The Decline of Marriage and Rise of New Families*, Pew Research Center (Nov. 18, 2010), http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/; Richard Fry, *No Reversal in Decline of Marriage*, Pew Research Center (Nov. 20, 2012), http://www.pewsocialtrends.org/2012/11/20/no-reversal-in decline-of-marriage/; Pamela J. Smock & Wendy D Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 Law & Pol'y

In the words of prominent sociologists W. Bradford Wilcox and Andrew J. Cherlin:

> In the affluent neighborhoods where many college-educated American live, marriage is alive and well and stable families are the rule . . . . [T]he divorce rate in this group has declined to levels not seen since the early 1970s. In contrast, marriage and family stability have been in decline in the kinds of neighborhoods that we used to call working class . . . . More . . . of them are having children in brittle cohabiting unions. . . . [T]he risk of divorce remains high. . . . The national retreat from marriage, which started in low-income communities in the 1960s and 1970s, has now moved into Middle America.[63]

By the numbers, Americans with no more than a high school degree, African Americans, and some groups of Hispanic Americans, cohabit more, marry less often, divorce more, have lower marital quality, and have more nonmarital births than those possessing a college degree, sometimes by very large margins. The situation for those with less than a high school degree is even more dire. A few comparisons portray the situation.

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87 (2004); The National Marriage Project and the Institute for American Values, *When Marriage Disappears: The Retreat from Marriage in Middle America*, State of Our Unions (2010), http://stateofourunions.org/2010/when-marriage-disappears.php (last visited Jan. 24, 2013).

[63] W. Bradford Wilcox & Andrew J. Cherlin, *The Marginalization of Marriage in Middle America*, Brookings, Aug. 10, 2011, at 2.

- Among Americans with a college degree or more, the nonmarital birth rate is a mere 6%. Among those with only a high school degree, the rate is 44%, and among those without a high school degree, the rate is 54%.[64]
- Poor men and women are only half as likely to marry as those with incomes at three or more times the poverty level.[65]
- The children of these less-privileged groups are far less likely to be living with both their mother and their father, more likely to have a nonmarital pregnancy, and less likely to graduate college or to obtain adequate employment as an adult.[66]

Experts attempting to diagnose this retreat from marriage in Middle America certainly identify economic factors, such as the decline in adequately paying work for men, and a belief by both sexes that a man should have a stable job before entering marriage. But economic factors cannot explain the entire retreat. Prior severe economic downturns in the U.S. were not accompanied by the same retreat

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[64] *Id*.

[65] Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage among the Disadvantaged*, The Future of Children, Fall 15(2) 2005, at 117–18.

[66] Wilcox & Cherlin, *supra*, at 6; The National Marriage Project, *supra*, at 10–11, 17 (citing Ron Haskins & Isabel Sawhill, *Creating an Opportunity Society* (2009); Nicholas H. Wolfinger, *Understanding the Divorce Cycle: The Children of Divorce in Their Own Marriages* (2005)).

from marriage or increases in nonmarital childbearing.[67]

Similarly, law professor Amy Wax has concluded: "the limited research available suggests that men who were once regarded as marriageable and were routinely married—including many men with earnings in the lower end of the distributions—are now more likely to remain single than in the past." Furthermore, she points out, rationally speaking, that marriage would bring certain gains to any two persons: two incomes, economies of scale, divisions of labor, and gains from cooperation. But the less advantaged appear unmoved by such advantages, for themselves or for their children.[68]

What best explains these trends among the disadvantaged are changes in norms regarding the relationships between sexual activity, births and marriage. Among these, researchers note legal changes emphasizing parenthood but not marriage (*e.g.* strengthened child support enforcement laws), and emphasizing individual rights as distinguished from marriage. They also point to the declining stigma of nonmarital sex, particularly among the lesser educated, and the availability of the pill for separating sex and children.[69] Professor Cherlin writes that law and culture made other ways of

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[67] *See* Wilcox & Cherlin, *supra*, at 3.

[68] Amy L. Wax, *Diverging family structure and "rational" behavior: the decline in marriage as a disorder of choice*, *in Research Handbook on the Economics of Family Law* 29–30, 31, 33 (Lloyd R. Cohen & Joshua D. Wright, eds., 2011).

[69] Wilcox & Cherlin, *supra*, at 3–4.

living, as distinguished from marriage, not only more acceptable, but also more practically feasible.[70]

Among the lesser privileged, stable employment for the man and a love relationship are the precursors for marriage. The disadvantaged are far less concerned than the more privileged about having children without marriage. To them, marriage is not about children, and children do not necessarily indicate the wisdom of marrying.

And there is further evidence that this trend away from linking children's well-being to a stable home with both a mother and a father is becoming characteristic not only of the disadvantaged, but also of the "millennial generation" as well.[71] Professor Cherlin confirms that among young adults who are not necessarily poor, the idea of "soulmate" marriage is spreading. Never-married Millennials report at a rate of 94% that "when you marry, your [sic] want your spouse to be your soul mate, first and foremost." They hope for a "super relationship," an "intensely private, spiritualized union, combining sexual fidelity, romantic love, emotional intimacy, and togetherness."[72]

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[70] Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, The Future of Children, Fall 15(2) 2005, at 41.

[71] *See* Wendy Wang & Paul Taylor, *For Millennials, Parenthood Trumps Marriage*, Pew Research Center, 2 (Mar. 9, 2011), http://www.pewsocialtrends.org/2011/03/09/for-millennials-parenthood-trumps-marriage/ (on the question of a child's need for two, married parents, 51% of Millennials disagreed in 2008, compared to 39% of Generation Xers in 1997).

[72] Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. of Marriage & Fam. 848, 856 (2004).

There is also emerging evidence, concerning both the young and the less-privileged, that marriage—once the gateway to adulthood and parenting—is viewed by the less privileged as a "luxury good." In the words of sociologists Kathryn Edin and Joanna Reed: "Marriage has become a luxury, rather than a necessity, a status symbol in the true meaning of the phrase." These authors explain that the disadvantaged place very high expectations upon relationship quality within marriage. "If this interpretation is correct, the poor may marry at a lower rate simply because they are not able to meet this higher marital standard." Finally, there is a sense among the disadvantaged that marriage is reserved to those who have "arrived" financially.[73] This appears to be an increasingly widely shared view among experts.[74]

Professor Cherlin points to an emphasis on emotional satisfaction and romantic love and an "ethic of expressive individualism that emerged around the 1960s." There is a focus on bonds of sentiment, and the emotional satisfaction of spouses becomes an important criterion for marital success.[75] Professor Cherlin continues, stating that in the later 20th century, "an even more individualistic

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[73] Edin & Reed, *supra*, at 117, 121–122.

[74] *See, e.g.*, Pamela J. Smock, *The Wax and Wane of Marriage: Prospects for Marriage in the 21st Century*, 66 J. of Marriage & Fam. 966, 971 (2004) ("success is difficult because marriage means so much"; and the "current thinking [is] . . . that our high expectations for marriage are part of what is behind the retreat from marriage").

[75] Cherlin, *The Deinstitutionalization of American Marriage*, *supra*, at 851.

perspective on the rewards of marriage took root." It was about the "development of their own sense of self and the expression of their feelings, as opposed to the satisfaction they gained through building a family and playing the roles of spouse and parent. The result was a transition from the companionate marriage to what we might call the individualized marriage."[76]

If this is all marriage means, why then do people continue to marry at all? Professor Cherlin opines that they may be seeking what he calls "enforceable trust," a lowering of the risk that one's partner will renege on agreements.[77] Rather than being any longer a foundation on which to build a family life then, marriage becomes the "capstone" of a preexisting, emotionally close relationship, with the wedding as a "symbol" of the couple's financial status and of their level of self development.[78] Yet marriage as merely a symbol of personal achievement is often beyond the experience or reach of the lesser privileged. Increasingly visible expert literature confirms that shifting cultural norms about marriage and procreation, the weakening of institutional structures, and changes in notions of role responsibilities affect the least advantaged to a greater degree.[79] Particularly for the disadvantaged, there is an "underappreciated role for traditional institutions in guiding behavior."[80]

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[76] *Id*. at 852.
[77] *Id*. at 854.
[78] *Id*. at 855, 857.
[79] *See, e.g*., Wax, , *supra*, at 15, 59–60.
[80] *Id*. at 60.

Notwithstanding these troubling trends, Professor Wax concludes that a "strong marriage norm" is an opportunity to "shape[] the habits of mind necessary to live up to its prescriptions, while also reducing the need for individuals to perform the complicated calculations necessary to chart their own course."[81] Of course, individuals' decisions will be influenced by individual characteristics and circumstances, but "nonetheless, by replacing a complex personal calculus with simple prudential imperatives, a strong expectation of marriage will make it easier . . . for individuals to muster the restraint necessary to act on long-term thinking."[82]

A strong prescription in favor of marriage as the gateway to adult responsibilities and to caring for the next generation would therefore again likely influence behavior in favor of bearing and rearing children by stably linked, biological parents, ready and able to prepare children for responsible citizenship. Simple rules and norms "place[] less of a burden on the deliberative capacities and will of ordinary individuals." If, however, individuals are left to guide sexual and reproductive choices in a culture of individualism, "people faced with a menu of options engage in a personal calculus of choice. Many will default to a local [short-term, personal gain] perspective."[83]

The "retreat from marriage" and marital childbearing affects not only individuals and their communities. There is evidence that its problematic

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[81] *Id.*
[82] *Id.*
[83] *Id.* at 61.

effects are being felt even at the national level. Largely as a consequence of changes to family structure, including the intergenerational effects of the absence or breakdown of marriage, there is a growing income and wealth gap in the United States among the least educated, the moderately educated, and the college educated. According to a leading study of this phenomenon, family structure changes accounted for 50% to 100% of the increase in child poverty during the 1980s, and for 41% of the increase in inequality between all Americans between 1976 and 2000.[84] The National Marriage Project even suggests that "it is not too far-fetched to imagine that the United States could be heading toward a 21st century version of a traditional Latin American model of family life, where only a comparatively small oligarchy enjoys a stable married and family life."[85]

In conclusion, marriage historian John Witte Jr. has observed that:

> The new social science data present older prudential insights about marriage with more statistical precision. They present ancient avuncular observations about marital benefits with more inductive generalization. They reduce common Western observations about marital health into more precise and measurable categories. These new social science data thus

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[84] Molly A. Martin, *Family Structure and Income Inequality in Families With Children, 1976-2000*, 43 Demography 421, 423–24, 440 (2006).

[85] The National Marriage Project and the Institute for American Values, *supra,* at 17.

offer something of a neutral apologetic for marriage.[86]

The notion of marriage that same-sex advocates are describing, and demanding from this Court and from every state, closely resembles the adult-centric view of marriage associated with the "retreat from marriage" among disadvantaged Americans. It would intrinsically and overtly separate sex and children from marriage, for every marriage and every couple and every child. It promotes a meaning of marriage that empties it of the procreative interests understood and embraced by this Court (and every prior generation). Rather, as redefined by Plaintiffs, marriage would merely become a reparation, a symbolic capstone, and a personal reward, not a gateway to adult responsibilities, including childbearing, childrearing, and the inculcating of civic virtues in the next generation for the benefit of the larger society.

Of course, it is not solely the fault of same-sex marriage proponents that we have come to a "tipping point" regarding marriage in the United States, where if the procreational aspects of marriage are not explicitly preserved and highlighted, additional harm will come upon vulnerable Americans and our social fabric itself. The historic institution of marriage was already weakened, likely emboldening same-sex marriage advocates to believe that a redefinition of marriage was only a step, not a leap away. But in its essence, and in the arguments used to promote it, same-sex marriage would be the *coup de grâce* to the

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[86] John Witte, Jr., *The Goods and Goals of Marriage*, 76 Notre Dame L. Rev. 1019, 1070 (2001).

procreative meanings and social roles of marriage. It is hoped that the necessary movement for equality and nondiscrimination for gays and lesbians will choose a new path, and leave marriage to serve the crucial purposes it is needed to serve.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgments in both these cases.

Respectfully submitted,

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Amicus Curiae

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