Nos. 12-144 & 12-307

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,
Petitioners,
v.
KRISTEN M. PERRY, *et al.*,
Respondents.

UNITED STATES,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS THE 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 Courts of Appeals to the Ninth and Second Circuits

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to protect the constitutional rights of all Americans, regardless of political correctness, including those who believe in and choose to act on traditional family values.

STATEMENT OF THE CASE

Hollingsworth v. Perry

In 2000, the people of California passed Proposition 22, enacting by public Initiative a statute defining marriage as a relationship between a man and a woman. CAL. FAM. CODE §308.5. In 2008, the California Supreme Court held that Proposition 22 as passed by vote of the People was unconstitutional under the California Constitution, even though the Proposition merely reaffirmed the definition of marriage that had prevailed in the state since California first became a state in 1848. The Court interpreted the state Constitution to require that same age old definition of marriage that had prevailed for millennia throughout the world to be redefined to include same sex couples.

Less than 6 months later, the people of California passed Proposition 8, which amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."

Plaintiff respondents sued public officials responsible for enforcing California's marriage laws, arguing that Prop 8 violates the 14th Amendment of the U.S. Constitution. The public official defendants informed the Court they would not defend Prop 8. The proponents of Prop 8 and their ballot measure committee intervened.

After trial, the district court ruled that Prop 8 does violate the Equal Protection Clause of the 14th Amendment because the definition of marriage it adopts does not include same sex couples. Pet. App. 137a. The Ninth Circuit stayed the ruling pending appeal by the Defendant Petitioners.

A divided panel of the Ninth Circuit affirmed the district court, "on the narrow grounds" that the effect of Proposition 8 would be to "take away" from same sex couples "the official designation of 'marriage,'" while "leaving in place all of its incidents," which are available to same sex couples under California's domestic partnership laws. Pet.App.17a-18a. The majority ruled that under this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), this combined "unique and strictly limited effect of Proposition 8" left its traditional definition of marriage followed in throughout the history of mankind unsupportable by any conceivable legitimate rational basis. Judge Smith dissented.

The Ninth Circuit denied Petitioner's petition for rehearing en banc, Pet.App.444a, Judges O'Scannlain, Bybee, and Bea dissenting on the grounds that the panel majority had declared unconstitutional the "definition of marriage that has existed for millennia"

based on a "gross misapplication of *Romer v. Evans*." Pet.App.445a. Judge Smith also dissented from the denial. Pet.App.443a.

United States of America v. Edith Schlain Windsor

Congress passed the Defense of Marriage Act (DOMA) in 1996, signed into law by President Bill Clinton. Pub. L. No. 104-199, 110 Stat. 2419. Section 2 of that Act provides that no State is required to give effect to any public act, record, or judicial proceeding of another state that authorizes same sex marriage under it's state laws. DOMA Section 2, 110 Stat. 2419 (28 U.S.C. 1738C).

Section 3 defines "marriage" and "spouse" under federal law to exclude same sex marriages, regardless of whether they are recognized under any state law. The Section states that for any federal law, ruling, regulation, or administrative decision, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. DOMA Section 3, 110 Stat. 2419 (1 U.S.C. 7).

DOMA consequently does not invalidate same sex marriages in any state that authorizes them. But it defines marriage as a union between one man and one woman for the more than 1,000 federal laws and programs for which qualification turns in part on marital status, as was originally intended when those laws and programs were enacted. See U.S. Gen. Accounting Office, *Defense of Marriage Act: Update to*

Prior Report 1 (2004), http://www.gao.gov/assets/100/92441.pdf.

The Plaintiff in this case, Edith Schlain Wilson, married her same sex partner Thea Spyer, in Canada in 2007. The couple resided in New York when Spyer died in 2009, leaving her estate to Plaintiff. App., *infra,* 3a; Am. Compl. paras 10, 11. As executor of Spyer's estate, Plaintiff paid $363,000 in federal estate taxes, and then filed a refund claim under 26 U.S.C. 2056(a), which provides for property passing from a decedent to a surviving spouse to pass free of federal estate taxes. But the Internal Revenue Service denied the refund claim, holding that Plaintiff was not a spouse of the decedent under DOMA Section 3, and therefore could not be a surviving spouse under Section 2056(a). App., *infra*, 3a-4a; Am. Compl. paras 72-78.

Plaintiff consequently filed this suit seeking declaratory and injunctive relief that DOMA Section 3 is unconstitutional in violation of the Equal Protection Clause, since it treats married same sex couples in New York differently from married opposite sex couples. The complaint also sought return of the federal estate taxes paid by paid by Spyer's estate. App., *infra,* 4a; Am. Compl. paras 82-85.

The United States District Court for the Southern District of New York granted summary judgment to the Plaintiff, holding that Section 3 of DOMA does violate the Equal Protection Clause, as the court concluded it could find no legislative purpose of

Section 3 that bears a rational relationship to a legitimate government interest. App., *infra*, 15a-22a.

The defendants filed timely notices of appeal to the United States Court of Appeals for the Second Circuit. App., *infra*, 25a-29a. Under 28 U.S.C. 1254, the Plaintiff filed a petition for a writ of certiorari directly to this Court on July 16, 2012. The Court granted certiorari on

SUMMARY OF ARGUMENT

Lawrence v. Texas, 539 U.S. 558 (2003), does not apply to this case for at least three independent reasons.

First, *Lawrence* was a privacy and liberty case, which is why *Lawrence* itself said that its holding and reasoning did not involve the issue whether government must redefine marriage to include same-sex relationships. The redefinition of marriage involves *public* recognition of a relationship—not privacy or liberty. This case involves no governmental infringement on plaintiffs' constitutional privacy or liberty rights. The traditional definition of marriage does not limit personal autonomy, and it does not prevent citizens from defining or living according to their own individual concepts of existence.

Second, even when the Constitution prevents governments from prohibiting certain conduct, it does not require them to promote or facilitate it. For example, States cannot ban all abortions, but they can refuse to fund abortion and even actively promote childbirth. Analogously, while the state certainly

cannot ban same-sex relationships under *Lawrence*, the government is under no obligation to recognize or facilitate them to the same degree as traditional marriages. The European Court of Human Rights drew this precise distinction in holding that member states could adhere to traditional marriage even though they cannot ban same-sex relationships. Furthermore, the same privacy concerns that animated *Lawrence* preclude the argument (often advanced by same-sex marriage advocates) that traditional marriage cannot serve the interest of responsible procreation unless government limits marriage to fertile couples. Such a bizarre and invasive rule would stand *Lawrence*, and this Court's privacy jurisprudence, on its head.

Third, the traditional definition of marriage has existed throughout the world for centuries and has been reaffirmed by a substantial majority of States and the Federal Government. *Washington v. Glucksberg*, 521 U.S. 702 (1997), is therefore a better analog to this case than *Lawrence*. As in *Glucksberg*, this Court should allow the States and Congress to continue the ongoing democratic debate over the wisdom of extending marriage to same-sex relationships, instead of interpreting the Constitution to mandate a definition of marriage that lacks any support in our nation's history, traditions, or practices and that tens of millions of Americans fundamentally oppose.

ARGUMENT

I. *LAWRENCE* ADDRESSED CRIMINALIZATION OF PRIVATE CONDUCT, WHEREAS AFFIRMING THE TRADITIONAL DEFINITION OF MARRIAGE CONCERNS PUBLIC GOVERNMENTAL RECOGNITION OF A RELATIONSHIP.

A. *Lawrence* Protected Privacy and Liberty.

Lawrence held that criminalization of private, consensual sex—whether by heterosexuals or homosexuals—violates the Due Process Clause of the Fourteenth Amendment. Specifically, the Court struck down laws that criminalize "the most private human conduct, sexual behavior, and in the most private of places, the home." 539 U.S. at 567.

The Court stressed, multiple times, that its holding was based on the severe deprivation of personal privacy and liberty that such laws impose:

- "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendental dimensions." *Id.* at 562.
- "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Id.* at 567.
- "[L]iberty gives substantial protection to adult persons in deciding how to conduct their

private lives in matters pertaining to sex." *Id.* at 572.

- "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.* at 578.

- "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.*

The Court in *Lawrence* reached its holding by relying on five cases that recognize the right to privacy as a matter of substantive due process. The Court analyzed and described these cases as protecting against governmental infringement of liberty, even distinguishing between liberty interests and governmental recognition of a relationship:

- *Griswold v. Connecticut*, 381 U.S. 479 (1965), recognized "a right to privacy," particularly in "the protected space of the marital bedroom." *Lawrence*, 539 U.S. at 564-65.

- *Eisenstadt v. Baird*, 405 U.S. 438 (1972), "established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship," thus distinguishing between liberty interests and governmental recognition of a relationship. *Lawrence*, 539 U.S. at 565.

- *Roe v. Wade*, 410 U.S. 113 (1973), "recognized the right of a woman to make certain

fundamental decisions affecting her destiny" as a matter of the "liberty" protected under the "substantive dimension" of the Due Process Clause. *Lawrence*, 539 U.S. at 565.

- *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), "confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults," again recognizing *Eisenstadt*'s distinction between personal liberty and public governmental recognition of a relationship. *Lawrence*, 539 U.S. at 566.

- *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), reaffirmed constitutional protection for certain "personal decisions" that are "central to personal dignity and autonomy." *Lawrence*, 539 U.S. at 574.

This Court in *Lawrence* took considerable care to explain how these five cases involved severe governmental restrictions on privacy and liberty precisely because *Lawrence*'s holding was predicated on the severe deprivation of privacy and liberty. *Lawrence*, consequently, does not address whether the government must publicly recognize a relationship or promote particular conduct, even if a person has a constitutional privacy and liberty right to engage in that relationship or conduct.

B. The Court in *Lawrence* Said Its Holding and Reasoning Did Not Involve Whether Government Must Provide Any Recognition to Gay Relationships.

Given that *Lawrence*'s holding and reasoning addressed privacy and liberty, it is no surprise that the Court explicitly said that *Lawrence* did not require States to redefine marriage.

Lawrence, like *Eisenstadt* and *Carey*, distinguished "the *liberty* of persons to choose" to engage in a "personal relationship" from "*formal recognition* in the law" of that relationship. *Lawrence*, 539 U.S. at 567 (emphases added). As the Court explained, the Texas law in *Lawrence* unconstitutionally infringed on the liberty to engage in a personal relationship, regardless of "whether or not [that relationship is] entitled to formal recognition in the law." *Id.*

After recognizing that liberty is distinct from the public, governmental recognition of a relationship, the Court stated that *Lawrence* "d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578. Justice O'Connor's concurrence in the judgment echoed this point:

> That this law as applied to private, consensual conduct is unconstitutional . . . does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, *such as . . . preserving the traditional institution of marriage*.

> Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—*other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group*.

Id. at 585 (emphases added).

The holding in *Lawrence,* therefore, has no bearing on whether government must redefine marriage. *Lawrence* was about privacy, personal autonomy, and the right to engage in sexually intimate conduct—not public, governmental recognition or affirmation of a sexual relationship.

C. Statutes Reaffirming Traditional Marriage, Unlike the Statute in *Lawrence*, Do Not Unconstitutionally Infringe on Privacy or Liberty.

The democratic decision to legally reaffirm the traditional definition of marriage has no adverse effect whatsoever on plaintiffs' constitutional privacy or liberty rights. Unlike *Lawrence*, plaintiffs here are not asking to be spared from punishment, invasion of privacy, or even official disapproval. Rather, they seek official recognition and affirmation of their intimate relationships.

Plaintiffs' claims would turn *Lawrence* (and *Casey*) upside down. As *Lawrence* stated:

> "At the heart of liberty is the right to define one's concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). Plaintiffs, however, want to compel others to adopt their concept of marriage and discard the centuries-old traditional definition of marriage. Yet this Court has recognized, "Our obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence*, 539 U.S. at 571 (quoting *Casey*).

Here, plaintiffs do not seek protection of privacy. They seek *public* governmental recognition of same-sex relationships to the same degree as opposite-sex relationships. As the California Court of Appeal aptly explained, "[t]he right to be let alone from government interference is the polar opposite of insistence that the government acknowledge and regulate a particular relationship, and afford it rights and benefits that have historically been reserved for others." *In re Marriage Cases*, 143 Cal. App. 4th 873, 926 (2006), *rev'd*, 183 P.3d 384 (Cal. 2008). Likewise, New York's highest court stated: "Plaintiffs here do not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a state-conferred benefit that the Legislature has rationally limited to opposite-sex couples." *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). These rulings establish the irrefutable and uncontested proposition that plaintiffs cannot possibly rely on privacy rights to challenge Proposition 8.

Nor do plaintiffs seek protection of a constitutional liberty interest. The government's decision about the degree to which relationships are recognized, without corresponding limits on privacy or liberty, does not interfere with an *individual*'s concept of existence, meaning, or the mystery of human life. The law at issue here does not prohibit same-sex couples from

engaging in any conduct. No constitutionally cognizable privacy or liberty interests are implicated by a government's decision not to recognize same-sex relationships to the same degree as traditional marriage. *See infra* Part II.

In short, *Lawrence* holds that each individual has a constitutionally-protected privacy and liberty right to define his or her intimate relationships. Absent limits on personal conduct, however, whether government elects to formally recognize or endorse these relationships cannot abridge that right. *Lawrence* does not support plaintiffs' claims for governmental recognition of same-sex marriage.

II. STATES CAN CONSTITUTIONALLY PROMOTE OR FACILITATE ONLY TRADITIONAL MARRIAGE, EVEN THOUGH CITIZENS HAVE A CONSTITUTIONAL RIGHT UNDER *LAWRENCE* TO ENTER SAME-SEX RELATIONSHIPS.

A. Even When the Constitution Protects Certain Conduct, Government Can Promote or Facilitate Different Conduct.

This Court's decisions make clear that there is no necessary correlation between the right to engage in particular conduct and the right to have the government promote or facilitate that conduct. The Constitution allows the government to further legitimate policy goals without having to affirmatively facilitate the entire range of constitutionally-protected conduct. In other words, government need not promote or facilitate what it cannot prohibit. Thus, for example, although the Constitution protects

the right of parents to choose private rather than public schools for their children, *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925), it does not require a State to facilitate that choice by subsidizing private schools, *see Norwood v. Harrison*, 413 U.S. 455, 462 (1973). As the Court explained, "[i]t is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid." *Id*. Justice Scalia's *Lawrence* dissent did not account for this crucial constitutional distinction when it surmised that the Court's opinion in *Lawrence* somehow "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned." 539 U.S. at 604. With respect, that reading of *Lawrence* is incorrect.

Indeed, even when the Constitution prohibits government from banning a certain type of conduct, government not only may refuse to subsidize that conduct but also may affirmatively promote or facilitate different conduct. Hence, the Constitution allows government to recognize traditional opposite-sex relationships to a greater degree than same-sex relationships, even if under *Lawrence* government cannot intrude on the privacy of intimate same-sex relationships. As this Court has taught, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977); *see Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971,

2989 n.17 (2010) (emphasizing "the distinction between state prohibition and state support").

The abortion/childbirth-funding cases are a primary example of how the government may properly decline to promote one category of constitutionally-protected conduct and instead promote an entirely different—even the opposite—category. This Court has held that with few exceptions government cannot prohibit abortions. *See, e.g.*, *Casey*; *Roe v. Wade*. Nevertheless, this Court has also held that government is not required to pay for abortions even when it directly facilitates childbirth. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 201 (1991); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 510 (1989); *Harris v. McRae*, 448 U.S. 297, 315 (1980); *Maher*, 432 U.S. at 474-76. As the Court explained decades ago, "The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and 'implement that judgment by the allocation of public funds' for medical services relating to childbirth but not to those relating to abortion.'" *Rust*, 500 U.S. at 201 (quoting *Webster*, 492 U.S. at 510). This Court has invalidated governmental prohibitions on protected conduct while upholding the government's refusal to formally subsidize or promote that conduct because the former infringes on liberty whereas the latter does not: The government's "decision to fund childbirth but not abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.'" *Id.* (quoting *Harris*, 448 U.S. at

315). *See also Harris*, 448 U.S. at 317-18 ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.").

Abortion may be the primary example of this constitutional doctrine, but it applies to all contexts involving constitutionally protected conduct. As the Court explained in *Harris*, 448 U.S. at 318, the government has no affirmative duty to facilitate contraception or private-school enrollment, even though the Due Process Clause prevents the government from banning contraception, *Griswold*, 381 U.S. 479, or (as noted above) prohibiting parents from sending their children to private schools, *see Pierce*, 268 U.S. 510. Similarly, the government has no duty to promote a whole host of other conduct protected by the Constitution, such as the right to travel or the right to free speech. "To hold otherwise would mark a drastic change in [this Court's] understanding of the Constitution." *Harris*, 448 U.S. at 318.

The basic distinction between governmental prohibition and governmental promotion is deeply rooted in Western law. The European Court of Human Rights, for instance, has held that while the 47 member states of the Council of Europe cannot under human rights norms criminalize same-sex relationships, they are not required to redefine traditional marriage to include same-sex relationships. *Compare Dudgeon v. United Kingdom*, 45 Eur.

Ct. H.R. (ser. A) (1981) (criminalizing homosexual conduct violates the European Convention for the Protection of Human Rights and Fundamental Freedoms), *with Schalk and Kopf v. Austria*, App. No. 30141/04 (Eur. Ct. H.R. June 24, 2010) (Convention does not require members to extend traditional marriage to same-sex relationships).

The Constitution, in brief, does not prohibit government from promoting opposite-sex relationships through traditional marriage, even though under *Lawrence* it may not prohibit same-sex relationships. By way of analogy, *Roe*/*Casey*/*Griswold*/*Pierce* are to *Maher*/*Harris*/*Webster*/*Rust*/*Norwood*, as *Lawrence* is to this case. The former cases (*Roe*, *Casey*, *Griswold*, *Pierce*, and *Lawrence*) prohibit governments from banning certain constitutionally conduct, while the latter (*Maher*, *Harris*, *Webster*, *Rust*, *Norwood*) allow governments to promote or facilitate a different or even opposing category of conduct.

Here, the government chose a "legislative policy" that promotes or privileges traditional marriage. *Maher*, 432 U.S. at 475. Facilitating traditional marriage advances multiple legitimate social goals, such as encouraging responsible procreation and child-rearing. The challenged policy recognizing only heterosexual couples as "marriages" does not punish homosexuals or their relationships, just as it doesn't punish the many other close personal relationships that the law likewise declines to specially recognize or promote. *See, e.g.*, *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment) ("[O]ther reasons exist to promote the institution of marriage

beyond mere moral disapproval of an excluded group."). In fact, the law at issue here leaves intact any material benefits the State legislature has conferred or in the future may choose to confer on same-sex couples. But because the challenged law involves no governmental prohibition of same-sex relationships, government is free not to recognize same-sex relationships to the same degree as opposite-sex relationships, if at all.

B. The Constitution Does Not Require Government to Strictly Tailor Its Definition of Marriage to Cover Only Procreative Couples.

In his *Lawrence* dissent, Justice Scalia also raised the concern that overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), would undermine "encouragement of procreation" as a valid justification for limiting "marriage" to opposite-sex couples, "since the sterile and the elderly are allowed to marry." *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting). That concern was unwarranted. On the contrary, the holding in *Lawrence* actually *shields* the procreation argument from the facile retort that such an interest could be valid only if government limited marriage to fertile couples. While *Lawrence* provides no support for a right to governmental endorsement of one's sexual relationships, its holding and logic assuredly limit the government's power to intrude into the precincts of intimate relationships to ensure that heterosexual couples seeking to marry intend and are able to naturally procreate. The supporting and dissenting opinions in *Lawrence* disagreed on whether tradition and precedent supported a constitutional right to engage in private sexual

conduct that the majority disapproves of. But there can be little disagreement that our Nation's history, traditions, and practices would bar the conditioning of marriage on a couple's passing a governmental interrogation into their procreative intentions and abilities. Such a practice would be utterly alien to our laws and in deepest tension with this Court's procreation jurisprudence. *See, e.g.*, *Griswold*, 381 U.S. at 485 (emphasizing the elevated status of the traditional marriage relation and the protected status of private marital intimacy).

Much as *Lawrence* does not require government to promote every intimate relationship as a condition to supporting traditional conjugal unions, so too the Constitution does not require government, as the price of maintaining the unique status of traditional marriage, to adopt Orwellian, burdensome, and ineffective definitions of marriage that would eviscerate the privacy rights of couples. Societies have long recognized marriage regardless of fertility, and no American jurisdiction has ever conditioned marriage on that ground. Even Catholic Canon Law, with its social and natural-law understanding of marriage as an inherently procreative union, has permitted infertile couples to marry for centuries. *See* 1983 CODE c.1084, §3 ("Sterility neither prohibits nor nullifies marriage"). Government's important procreative interest in facilitating traditional marriage is not negated by allowing ostensibly "sterile" or "elderly" opposite-sex couples to marry, and any attempt to narrowly tailor marriage to fertile couples would run headlong into privacy protections secured by nearly half a century of this Court's decisions, from *Griswold* to *Lawrence*.

In carrying out its marriage policies, government can rationally enact "an easily administered scheme" to avoid "the subjectivity, intrusiveness, and difficulties of proof" that would inevitably arise from "an inquiry into any particular bond or tie." *Nguyen v. INS*, 533 U.S. 53, 69 (2001). That is precisely what government has done for decades in adhering to the traditional definition of marriage. For example, states have adopted a reasonable, yet imperfect, irrebuttable presumption instead of conducting intrusive individualized testing for fertility, and this Court has held that such presumptions are constitutional. *See, e.g.*, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315-16 (1976).

Moreover, even when heightened intermediate scrutiny applies, this Court has not "required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen v. INS*, 533 U.S. 53, 70 (2001); *see, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (classification did not have to be perfect, under intermediate scrutiny, where "Congress simply did not consider it worth the added burdens"). Thus, government can further its important interest in promoting procreation by adopting a classification that *generally* achieves the intended objective; the classification need not be accurate "in every case." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 582-83 (1990), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Opposite-sex couples "on the average" are able to procreate, and that is sufficient to uphold this classification under intermediate scrutiny. *Califano v. Webster*, 430 U.S. 313, 318 & n.5 (1977) (per curiam). Same-sex couples, in contrast, are cate-

gorically unable to procreate within the confines of their relationship.

There would be myriad other problems with requiring the States to redefine marriage to include only couples capable of procreation. Legally, the unconstitutional conditions doctrine probably precludes the government from conditioning the right to marry on couples' publicly revealing sensitive fertility information. *Cf., e.g.*, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). Again, such a rule would stand *Lawrence* on its head and contravene this Court's privacy jurisprudence. *See, e.g.*, *Standhardt v. Superior Ct.*, 77 P.3d 451, 462 (Ariz. App. 2003); *Adams v. Howerton*, 486 F.Supp. 1119, 1124-25 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982). It would also result, as a practical matter, in an absurd and arbitrary scheme.[2] Allowing "legal marriage as between all couples of opposite sex" is "the least intrusive alternative available to protect the procreative relationship" in a rational way. *Adams v. Howerton*, 486 F.Supp. at 1124-25.

To carry the point even further, bare procreation is not the only policy goal advanced by traditional

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[2] Problems would not be limited to premarital fertility testing. States would presumably have to annul childless marriages after the couple reached a certain age if marriage had to be predicated on fertility. And yet, this intrusive regime to determine fertility would be inherently unreliable. There is the "scientific (i.e., medical) difficulty or impossibility of securing evidence of such [procreative] capacities," not to mention "the costs associated with that endeavor if attempted." Monte Neil Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y 313, 345 (2008).

marriage, so government is not required to tailor its definition of marriage simply to further procreative relationships. Government can conclude that traditional marriage promotes *responsible* procreation—that is, procreation that furthers the government's powerful interest not only in more children but in children that are well raised and cared for. For example, when one spouse is infertile, the other spouse could still potentially engage in sexual activity with a third party. Promotion of traditional marriage decreases the likelihood that such sexual activity will occur outside of stable family units, and it increases the chances that "children receive from birth onward the maximum amount of private welfare" from stable family units. Monte Neil Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y at 344.

In sum, nothing in *Lawrence* undermines procreation arguments for traditional marriage. Rather, as shown, *Lawrence*'s privacy limitations support the traditional definition—including the ancient and ubiquitous practice of allowing infertile and elderly couples to marry.

III. UNLIKE THE STATUTE IN *LAWRENCE*, TRADITIONAL MARRIAGE LAWS HAVE BEEN ENFORCED FOR CENTURIES AND REAFFIRMED BY A SUBSTANTIAL MAJORITY OF STATES AND THE FEDERAL GOVERNMENT.

History and tradition may not be the "ending point" for the constitutional analysis "in all cases"; but if ever there were a case where history and tradition controlled, this is it. *Lawrence*, 539 U.S. at 572. The traditional definition of marriage has existed for

centuries, which is precisely why a substantial majority of States and the Federal Government have expressly reaffirmed it during the last 15 years.

In light of the substantial history and tradition supporting traditional marriage, *Washington v. Glucksberg*, 521 U.S. 702 (1997), not *Lawrence*, is the relevant substantive due process case to which this Court should look for guidance. *Glucksberg* upheld a State ban on assisted suicide, noting that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide." *Id.* at 711 The Court also recognized that a substantial majority of States banned assisted suicide. *Id.* at 710 & n.8. And these laws were not, according to *Gluckberg*, "innovations" but were rather "longstanding expressions of the States' commitment to the protection and preservation of all human life." *Id.* at 710.

Similarly, here, the traditional definition of marriage has existed for much more than 700 years, and a substantial majority of States and the Federal Government have recently reaffirmed this definition to support traditional marriage and procreative relationships that are "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Some States may be "currently engaged in serious, thoughtful examinations" about whether the traditional definition of marriage should be extended to same-sex relationships, just as States were contemplating "physician-assisted suicide" in *Glucksberg*. *Glucksberg*, 521 U.S. at 719. And attitudes about same-sex relationships may have changed over the years, just like "[a]ttitudes toward

suicide itself have changed since [the 13th Century]." *Id.* But *Glucksberg* confirms that those are not sufficient reasons for invalidating state laws that reaffirm century-old concepts ingrained in the Anglo-American common-law tradition.

The history and tradition in *Lawrence* was far different from that in *Glucksberg* and this case. *Lawrence* found that "American laws targeting same-sex couples did not develop until the last third of the 20th century." 539 U.S. at 570. In contrast, the traditional definition of marriage has existed throughout the world for centuries, like the assisted-suicide prohibitions in *Glucksberg*.

Moreover, *Lawrence* implicitly recognized that laws establishing the traditional definition of marriage do not target same-sex relationships through discriminatory animus. If the fact that "American laws targeting same-sex couples did not develop until the last third of the 20th century" was evidence that such laws were not deeply rooted in the American legal tradition, then the fact that the traditional definition of marriage predates the United States itself is evidence that such laws were never meant to target same-sex couples. *Id.* at 570. *Lawrence* supports the common sense understanding that traditional marriage laws were not enacted out of animus towards same-sex couples. *Cf. Romer v. Evans*, 517 U.S. 620, 634 (1996) (invalidating law that deprived homosexuals of protection under state antidiscrimination laws, because the law was "born of animosity toward the class of persons affected"). Plus, far from criminalizing same-sex relationships like in *Lawrence*, the challenged measure here leaves undisturbed laws that recognize same-sex

relationships through domestic partnerships. *Cf. Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."). It merely declines to denominate such relationships as "marriages."

Reasonable minds can differ on whether the historically entrenched concept of traditional marriage should be extended to same-sex relationships. Most States have retained traditional marriage laws; a minority have extended marriage to same-sex relationships. "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality" of same-sex relationships. *Glucksberg*, 521 U.S. at 735. This is democracy at work in a pluralistic society, *see id.*, where different jurisdictions acting in their own respective spheres can "serve as a laboratory" and "try novel social and economic experiments," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Whatever the outcome of that debate, this Court's decision in *Lawrence* provides no support for the present effort to redefine marriage. That case involved historically novel and extremely invasive prohibitions on intimate relations between adults in the privacy of the home. By contrast, whether the Constitution requires the redefinition of "marriage" to include same-sex couples involves not a prohibition on private conduct such as occurred in *Lawrence* but rather the right of the people through democratic means to refuse to publicly promote one type of

relationship and instead promote another type—the traditional, conjugal union between husband and wife—that for centuries has been deemed the very bedrock of civilization. Properly viewed, *Lawrence* supports the constitutionality of the traditional definition of marriage.

CONCLUSION

The Court should accept petitioners' arguments and reverse the decision below.

Respectfully submitted,

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