No. 12-144

In the
SUPREME COURT OF THE UNITED STATES

DENNIS HOLLINGSWORTH, et al.
Petitioners

v.

KRISTIN M. PERRY, et al.
Respondents

On Writ of Certiorari To
The United States Court of Appeals For the Ninth Circuit

AMICUS CURIAE BRIEF OF THE WOMEN'S EQUAL RIGHTS LEGAL DEFENSE AND EDUCATION FUND ON THE ISSUE OF THE SPECIAL INTEREST OF WOMEN, AS A GENDER IN AFFIRMING THE DECISION OF THE NINTH CIRCUIT IN THIS MATTER (IN SUPPORT OF RESPONDENTS) FILED PURSUANT TO BLANKET CONSENT ON FILE WITH THE COURT

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I. BRIEF OF *AMICUS CURIAE* WOMEN'S EQUAL RIGHTS LEGAL DEFENSE AND EDUCATION FUND ("WERLDEF") FILED PURSUANT TO BLANKET CONSENT ON FILE WITH THE COURT

A. The interest of WERLDEF in supporting the Respondents, and in affirmation of the decision of the Ninth Circuit.

The Women's Equal Rights Legal Defense and Education Fund ("WERLDEF") is a California non-profit incorporated in 1978 and dedicated to educating women about their legal rights and assisting them in vindicating their rights by providing access to the courts by filing amicus curiae briefs on issues that have an impact on equal rights for women.

The intent is to help bring women into equal partnership with men in each and every aspect of life and to improve the condition and status of women. Our goal is equal rights for women under the law.[1]

Through this *amicus curiae* brief, WERLDEF seeks to bring to the attention of the Court the special interest of women as a gender in affirmation of the

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[1] Counsel for WERLDEF authored this brief in whole. Neither counsel for WERLDEF nor any party made any monetary contribution intended to fund the preparation or submission of the brief. Counsel for WERLDEF was admitted to practice before the United States Supreme Court on February 21, 1979.

decision of the Ninth Circuit, 671 F.3d 1052. That particular interest is not before the Court through the briefs of the parties, and may be of considerable help to the Court in resolving the issues before it.

The parties to this matter have filed with the Supreme Court a blanket consent to the filing of briefs as *amicus curiae*. This brief is therefore properly filed pursuant to Rule 37.2(a) of the Supreme Court.

B. Summary of argument.

Women have had to overcome historical disadvantages in the eyes of the law, and must look to the Courts to protect the rights they have won over time. Any time a popular vote is allowed to restrict civil rights (here a vote on barring certain individuals from marriage), or restrictions on civil rights are grounded in historical precedent, women are particularly vulnerable to loss of such rights. Women must look to the courts as guardians of the civil rights they won. For that reason, women must view any popular initiative which restricts judicially declared civil rights as a dangerous undermining of the doctrine of separation of powers.

Women are also particularly interested in this case because the petitioner's views on the purported purpose of marriage as either (1) having a biological foundation (Petition at 32-33), or (2) inextricably linked to society's interest in responsible procreation (Petition at 35), are restatements of outmoded notions of

women as child bearers who are dependent upon males for support. In fact, marriage, and society's full legal recognition of a relationship, is (and should be) available to those who have no interest in procreation or child rearing. The law already recognizes that same sex couples, and unmarried individuals, are legally entitled to raise children and can do so responsibly.

To justify denying the right to marry someone of the same sex, the Petitioners rely upon the circular argument that since there has never been a right to marry someone of the same sex, there is no such right now.

It is certainly true that marriage has been viewed by many as existing only for opposite sex couples, and that statutes in California have defined marriage in those terms, for too long. It is equally true, however, that the Constitution of the United States evolves over time to eradicate inequality and guarantee equal protection under the law. At various times, racial segregation, miscegenation, and discrimination against homosexuals (i.e., "sodomy" laws), among other things, were viewed as constitutionally permissible and were supported by enabling legislation in our culture. The fact that society has acted badly in the past is no cure for a constitutionally defective law in the present.

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C. Argument.

In their Brief before the Supreme Court, the Petitioners argue that a popular vote on civil rights may serve as a device for "restoring the traditional definition of marriage" (Petition at 25), that marriage between members of the opposite sex "has always been supported by countless people . . . " (Petition at 27), and that the public should be able to "restore democratic authority over" an issue of constitutional dimensions. (Petition at 55) According to the Petitioners, the public should have the final say in who is permitted to marry because, they argue, marriage has a biological foundation (Petition at 32-33), and is inextricably linked to society's interest in responsible procreation (Petition at 35).

While the issues before the Supreme Court are not uniquely issues of women's rights,[2] those issues are of particular concern to women because (1) women have had to fight to overcome historical disadvantages in the eyes of the law, (2) women must look to the Courts to protect the rights they have won over time, and (3) any time a popular vote is allowed to restrict civil rights (here a vote on barring certain individuals from marriage), the role of the courts as guardians of civil rights, and the doctrine of separation of powers, is undermined.

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[2] Individuals of both genders have an interest in marriage to the person of their choice.

Thus, women are, as a group, particularly threatened any time a party argues, as the Petitioners have argued here, that limits on civil rights by popular vote may serve as a device for "restoring the traditional definition of marriage" (Petition at 25), that some perception of access to civil rights "has always been supported by countless people . . . " (Petition at 27), or that the public should be able to "restore democratic authority over" an issue of constitutional dimensions (Petition at 55).

1. Women have faced a history of discrimination and are therefore particularly concerned with any popular method of restricting civil rights in contravention of the Courts.

It is beyond reasonable dispute that women, as a gender, have been placed at a historical disadvantage in the eyes of the law. "Certain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens." *AT & T Corp. v. Hulteen* (2009) 556 U.S. 701, 724 [129 S.Ct. 1962, 1978, 173 L.Ed.2d 898]. As the United States Supreme Court stated in *Frontiero v. Richardson* (1973) 411 U.S. 677, 684-86 [93 S.Ct. 1764, 1769-70, 36 L.Ed.2d 583]:

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> "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children."

Fortunately, there has been progress over time in declaring the rights of women in society. Given the historical battle for women's rights, women must be concerned whenever they hear that a party seeks to restrict civil rights (e.g., the

right to marry) based upon historical practices. Fortunately, the law recognizes that "history cannot legitimate" unconstitutional conduct. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter* (1989) 492 U.S. 573, 603 [109 S.Ct. 3086, 3106, 106 L.Ed.2d 472]

It is true that marriage has historically been viewed by many as available only to individuals of the opposite sex, and that statutes have defined marriage in those terms. For long periods of our history, racial exclusions, denial of a woman's right to vote, and discrimination against homosexuals (i.e., "sodomy" laws) were all viewed as appropriate, and were supported by legislation. The fact that we have acted abominably (or merely badly) in the past is no cure for a constitutionally defective law in the present.

2. The Petitioner's view of the initiative process is erroneous and seriously undermines the doctrine of separation of powers. When separation of powers is undermined, the role of the courts as the bulwark of civil rights is also undermined.

Women and others who have had to fight for civil rights must look to the courts for protection against actual or threatened encroachments upon those rights. For that reason, the Petitioner's arguments about the claimed role of the electorate

in determining civil rights is extremely troubling. In our society, a constitutional scheme of checks and balances enables the Courts to check excesses by the electorate which violate individual constitutional rights. "The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure." *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.* (1982) 458 U.S. 50, 58 [102 S.Ct. 2858, 2864, 73 L.Ed.2d 598].

> "Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. (Citations omitted). As we stated in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Morrison v. Olson* (1988) 487 U.S. 654, 693 [108 S.Ct. 2597, 2620, 101 L.Ed.2d 569]

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The Petitioners' arguments about the electorate's interests (Petition at 55-61) are premised on the mistaken notion that the electorate has an unassailable right to determine fundamental civil rights in California and, by extension, elsewhere. While WERLDEF does not dispute the use of the initiative process to overturn particular rulings of a court, there is an outside limit to that process. The constitutionally based separation of powers doctrine defines that limit.

Proposition 8 was no mere enactment governing procedures and evidentiary rules. Putting aside its inherent revision of the California Constitution, Proposition 8 would, if left standing, improperly abrogate the function of the judiciary as the arbiter of constitutionality. In *Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 211, 115 S.Ct. 1447, 1449, the Court held:

> "Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular cases and controversies. (Citation omitted) The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article

III hierarchy . . . "

Under those principles, "an attempt to alter legislatively a legal judgment violates the separation-of-powers doctrine." *Plyler v. Moore* (4th Cir. 1996) 100 F.3d 365, 371.

Before Proposition 8 was passed, the California Supreme Court's opinion in *In re Marriage Cases* (2008) 43 Cal.4th 757, 76 Cal.Rptr.3d 683 decided that definitions of marriage which draw a distinction between opposite-sex couples and same-sex couples to exclude the latter from marriage are unconstitutional. In reaching that decision, the California Supreme Court held that under the Constitution of that State, (1) the right to marry is so integral to an individual's liberty and personal autonomy that it cannot be abrogated by the Legislature or by the electorate through the statutory initiative process, (2) that statutory definitions which restrict marriage to opposite sex couples treat persons differently on the basis of sexual orientation, (3) that sexual orientation is a suspect classification, and (4) that there is no compelling state interest in distinguishing between same-sex couples and opposite-sex couples in terms of eligibility to marry.

The same constitutional principles, albeit under federal law, are now before the Court. WERLDEF is certain that the Respondents and parties allied with the Respondents will argue those points eloquently. For the sake of women in

particular, WERLDEF urges the Court not to engage in any analysis which would abrogate the role of the courts as the final arbiter of the Constitution's core values of privacy, liberty and equal protection.

3. The Petitioners views regarding the purposes of marriage are inconsistent with the modern realities of marriage and procreation.

As noted above, the Petitioners argue that the public should have the final say in who is permitted to marry because (they say) marriage has a biological foundation (Petition at 32-33), and is inextricably linked to society's interest in responsible procreation (Petition at 35). Those arguments are based upon stereotypical notions of women as serving as child bearers who are dependent upon males. Moreover, the Supreme Court has already recognized marriage as something more than a series of laws pertaining to child rearing and division of property. As long ago as 1987, the Supreme Court recognized that the institution of marriage confers a unique status which is beyond the Legislature's province to restrict. In *Turner v. Safley* (1987) 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64, the Court recognized that marriage constitutes far more than a simple statutory definition when it held unconstitutional a restriction on the right of prisoners to marry because, among other things, that restriction deprived prisoners of the

"expressions of emotional support and public commitment" which were "an important and significant aspect of the marital relationship." 482 U.S. at pp. 95-96, 107 S.Ct. 2254.

If a prisoner has the right to marry the person of his or her choice, a woman who seeks to marry another woman (and a male who seeks to marry another male) should have no less a right.

The Petitioners notions about why marriage continues to exist as a legal entity simply have no basis in reality. Procreation by a male "husband" and a female "wife" is plainly no longer an integral part of the marriage compact. The Supreme Court has recognized that married couples may choose not to procreate. *Eisenstadt v. Baird* (1972) 405 U.S. 438, 453 [92 S.Ct. 1029, 1038, 31 L.Ed.2d 349]. Married (or unmarried) persons can bear children with the sperm or eggs of anonymous donors (See, e.g., *Robert B. v. Susan B.* (2003) 109 Cal.App.4th 1109, 135 Cal.Rptr.2d 785, 786), unmarried persons may legally adopt children (See, e.g., *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, 2 Cal.Rptr.3d 699, 711-2), individuals have the right to procreate through gestational surrogacy contracts (See, e.g., *J.R. v. Utah* (D. Utah 2002) 261 F.Supp.2d 1268, 1271), and children can legally be adopted by homosexuals (See, e.g., *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 422, 2 Cal.Rptr.3d 699, 702).

D. Conclusion.

WERLDEF urges the Court to deny the relief sought by the Petitioners. Of equal importance, WERLDEF urges the Court to decide the matter in a way that (1) preserves the role of the Courts as protectors of constitutional rights, (2) recognizes that popular vote should not be permitted to restrict fundamental civil rights, and (3) recognizes that marriage is not merely a device for orderly procreation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS

The undersigned, counsel for Amicus Curiae Women's Equal Rights Legal Defense and Education Fund, hereby certifies that the foregoing Amicus Curiae brief complies with the word limitations set forth in Supreme Court Rule 33 in that according to the word count of the word-processing system used to prepare the document (set to include footnotes in the word count), the number of words in the document is 3534.

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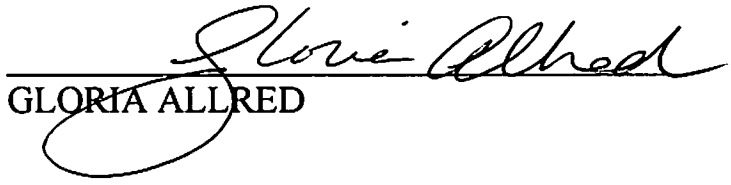

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