

No. 12-144

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IN THE  
*Supreme Court of the United States*

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DENNIS HOLLINGSWORTH, et al.,

*Petitioners,*

v.

KRISTIN M. PERRY, et al.,

*Respondents.*

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On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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**BRIEF OF INTERNATIONAL HUMAN RIGHTS  
ADVOCATES AS AMICI CURIAE IN SUPPORT  
OF RESPONDENTS**

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## STATEMENT OF INTEREST<sup>1</sup>

The undersigned human rights advocacy organizations respectfully submit this brief to highlight the international trend toward equal marriage rights for same-sex couples. *Amici* are the International Center for Advocates Against Discrimination (“ICAAD”) in the United States, the National Council for Civil Liberties (“Liberty”) in the United Kingdom, the Canadian Civil Liberties Association (“CCLA”), the Legal Resources Center (“LRC”) in South Africa, and the Center for Legal and Social Studies (“CELS”) in Argentina.

ICAAD was founded for the purpose of combating structural discrimination globally and promoting human rights norms consistent with public international law. ICAAD works to strengthen legal systems by bridging gaps in the implementation of laws and policies. ICAAD has argued that minority communities, including the LGBT community, are adversely impacted by the systemic flaws in documenting hate crimes in the United States, and furthermore that discrimination against the LGBT community has contributed to high rates of bias-motivated violence and murder. ICAAD attorneys have also filed *amicus* briefs in state and federal courts in defense of religious freedom and minority

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<sup>1</sup> Pursuant to Rule 37.6, *amici* certify that no party’s counsel authored this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. All parties have filed blanket consents, which cover this brief.

rights, and have represented parties in similar cases before U.S. appellate courts.

Liberty is one of the United Kingdom's leading civil liberties and human rights organizations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning, and research. The organization has a long-standing interest in discrimination and equality and has been involved in many leading discrimination cases in the United Kingdom. Liberty is providing expert briefing in support of the Marriage (Same Sex Couples) Bill, currently being considered by the U.K. Parliament, which would lift the ban on same-sex marriage in England and Wales. Liberty believes that in a democratic, tolerant, and free society the love and commitment shared by gay and straight couples must be given equal respect and status under the law.

The Canadian Civil Liberties Association was constituted in 1964 to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties in Canada. In its advocacy, the CCLA has supported the right to same-sex marriage as essential to ensuring equality in Canadian society. Because of its geographical closeness to the United States, and the high level of travel and exchanges that characterize the relationship between Canada and the United States, the same-sex marriage issue in the United States has profound repercussions in Canada, including the trans-border validity of same-sex marriages contracted

in Canada. More importantly, the persistence of discriminatory practices in a neighboring country undermines efforts in Canada to end homophobic practices and hate crimes against the LGBT community. American discrimination against gays in the context of marriage is used to justify pernicious discriminatory practices and contributes to the continued and insidious discrimination against the LGBT community in Canada.

The Legal Resources Center is a human rights NGO in South Africa. LRC seeks to use the law as an instrument of justice for the vulnerable and marginalized, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability, or by reason of social, economic, and historical circumstances. Inspired by South Africa's history, its constitution, and international human rights standards, LRC is committed to a fully democratic society based on the principle of substantive equality and to ensure that the principles, rights, and responsibilities enshrined in South Africa's constitution are respected, promoted, protected, and fulfilled.

The Center for Legal and Social Studies is a non-governmental organization that works to promote and protect human rights and to strengthen the democratic system in Argentina. CELS was created in 1979 in the midst of Argentina's military dictatorship. Since that time, it has worked to eliminate the nation's systemic human rights violations by investigating, documenting, and denouncing abuses, as well as litigating in favor of fundamental rights. When

Argentina returned to democracy in 1983, CELS began working to strengthen the state's capacity to protect human rights. CELS's current areas of focus include: citizen security and institutional violence; prison conditions and the use of torture; the strengthening of judicial institutions and expansion of access to justice; economic, social and cultural rights; and the democratization of the armed forces.

### **SUMMARY OF ARGUMENT**

This Court has an opportunity to either solidify or reverse an established and accelerating international trend toward equal marriage rights for same-sex couples. Same-sex marriage ceremonies are legally performed in fourteen countries—including this one—and are recognized in several others. Bills embracing marriage equality are pending and likely to pass in the United Kingdom, France, New Zealand, Colombia, and Uruguay, among others. And international legal authorities are enhancing protections against discrimination on the basis of sexual orientation, including for same-sex couples' rights to found families. This emerging recognition for same-sex marriages is no fad, but is the inevitable consequence of the spread of a universalist vision of human rights. The weight of global opinion holds that it is only a matter of time before marriage equality is regarded as a universal human right, on par with other antidiscrimination norms.

This international trend supports respondents. This Court has long considered international precedent—and especially recent international precedent from Western democracies—when

considering questions that implicate global values such as morality and fairness. It should do so here. While some nations have reached marriage equality by the courts and others have done so legislatively, the unifying feature of all of these decisions is a reliance on principles that are either synonymous with or analogous to U.S. due process and equal protection norms. With increasing frequency, the leaders and people of advanced nations the world over are recognizing that the denial of equal marriage constitutes the denial of a fundamental right. More broadly, the established consensus in the international community is that discrimination on the basis of sexual orientation rests on par with discrimination on the basis of other immutable characteristics, like race. This consensus weighs in favor of heightened scrutiny and a decision recognizing the constitutional dimension of marriage equality.

Moreover, while many cultural and legal institutions are distinctly American, love, marriage, and families are not. Indeed, it is difficult to imagine concepts that have a wider global constituency. The right to marry is universally recognized as fundamental. And in this great nation, as in many others, the concepts of marriage and the family are evolving away from a narrow focus on procreation and toward an emphasis on love, commitment, and support. Interracial relationships, shifting gender roles, adoptions, single parent households, couples who forgo children, blended families, and same-sex couples are but a few of the ways in which the nuclear family has been supplemented. Many countries that have recognized marriage equality have witnessed these



same tectonic shifts and have reasoned—as did the court below—that a restrictive approach to marriage finds no footing on this landscape. These views and experiences are persuasive in evaluating the meaning of marriage here.

Finally, trends in international law support respondents. The interpretation of international treaties and instruments is moving rapidly toward recognition for marriage equality. Specifically, international law already regards any discrimination on the basis of sexual orientation as anathema to human rights, and thus supports heightened scrutiny in this case. It is only a matter of time before the application of that principle results in global marriage equality. To be sure, international law does not yet *require* recognition of same-sex marriages, and many nations do not yet recognize such marriages. The issue before the Court is therefore not compliance with international obligations, but leadership in the development of international norms. After the decision in this case, the international community will either say that the Court has added its powerful voice to the chorus for equality, or that it has failed to do so in reliance on an outmoded and unduly restrictive interpretation of the right to marry.

For the reasons stated in respondents' briefs, as well as below, the judgment of the court of appeals should be affirmed.

**ARGUMENT****I. This Court Should Sustain The International Trend Toward Marriage Equality By Holding That Denying Same-Sex Couples The Right To Marry Constitutes A Deprivation Of Due Process And A Violation Of Equal Protection.**

This Court should sustain the international trend toward marriage equality. In *Lawrence v. Texas*, 539 U.S. 558, 572 (2003), this Court noted an “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” In holding that sodomy laws violate the Due Process Clause, the Court cited not only domestic sources, but foreign and international law, explaining that the right to engage in consensual sexual relationships “has been accepted as an integral part of human freedom in many other countries.” *Id.* at 572-73, 576-77. The Court acknowledged a long and sad history of discrimination against homosexuals, but took guidance from recent events, concluding that “our laws and traditions in the past half century are of most relevance here.” *Id.* at 571-72. Those traditions reflected a shift against sodomy laws, which the Court struck down as an affront to the basic liberties to which all persons are entitled.

In other cases, this Court has looked to trends in state and foreign behavior for guidance, and has acknowledged that when global opinion shifts, the United States should not remain a recalcitrant outlier.

*See, e.g., Roper v. Simmons*, 543 U.S. 551, 576-77 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). Those decisions reflect a much longer tradition establishing that foreign and international law may shed substantial light on questions of U.S. law. *See, e.g.,* Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 Cal. L. Rev. 1335, 1336 (2007) (explaining that “Chief Justice Marshall would have regarded this practice [of referring to foreign law] as uncontroversial. So would have the Framers of the Constitution and of the Fourteenth Amendment”).

Today, an emerging global norm condemns discrimination on the basis of sexual orientation and supports marriage equality. Clear trends in foreign and international law support heightened scrutiny for policies that discriminate on the basis of sexual orientation, as well as respondents’ claim for equal marriage.

**A. Trends In Foreign Law Support Both Heightened Scrutiny For Sexual Orientation Discrimination And The Recognition Of Marriage Equality.**

There is an emerging awareness—especially in North American and European democracies—that all consenting adult couples have an equal right to access the institution of marriage.<sup>2</sup> The first country to

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<sup>2</sup> This brief includes citations to foreign-language sources. The authors have translated these statements to the best of their

embrace full marriage equality was the Netherlands in 2000. In the ensuing twelve years, Belgium (2003), Spain (2005), Canada (2005), South Africa (2005), Norway (2009), Sweden (2009), Iceland (2010), Portugal (2010), Argentina (2010), and Denmark (2012), have all legalized same-sex marriage as a matter of national policy.<sup>3</sup> Same-sex marriages are also performed in parts of Brazil (including Sao Paulo),<sup>4</sup> Mexico (including Mexico City),<sup>5</sup> and the

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ability. Translated passages shall always appear as paraphrasing, not quotations.

<sup>3</sup> The relevant statutes, in chronological order, are: Act on the Opening Up of Marriage 2001, Stb. 2001, nr. 9 (The Netherlands); Project de Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil [Bill opening marriage to persons of the same sex and modifying certain provisions of the civil Code] (Belgium); Ley 13/2005, 157 B.O.E. 23632 (July 5, 2005) (Spain) ; Canada Civil Marriage Act, S.C. 2005, c. 33; Civil Union Act 17 of 2006 (South Africa); Besler. O. nr. 91 (2007-2008), Lov om endringer i ekteskapsloven, ... mv. (felles ekteskapslov for heterofile og homofile par) [Law amending the Marriage Act, ... etc. (Common marriage for heterosexual and homosexual couples)] (Norway); Svensk författningssamling 2011:891 [Swedish Code of Statutes] (Sweden); Lög Nr. 65/2010, 836 - 485th issue, 28 March 2010 (Iceland); Lei No. 9/2010 de 31 de maio 2010 (Portugal); Ley No. 26618 de 22 de julio 2010 (CXVIII) B.O. 31.949 (Argentina); Lov nr. 532 af 12 June 2012 Gældende (Denmark).

<sup>4</sup> Brazil's highest court has held that same-sex couples may enter unions that can be converted into marriages, and a court in Sao Paulo has held that couples need not go through the intermediate step of a civil union. See Michael K. Lavers, *Brazil's Most Populous State to Allow Same-Sex Marriage*, Wash. Blade,

United States (including nine states and the District of Columbia).<sup>6</sup> And the list is growing. Marriage equality bills are likely to pass this year in Colombia,<sup>7</sup>

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(Dec. 21, 2012), <http://www.washingtonblade.com/2012/12/21/brazils-most-populous-state-to-allow-same-sex-marriage/>.

<sup>5</sup> Mexico City has permitted gay marriage since 2010. On December 5, 2012, the Mexican Supreme Court held unconstitutional a law in the state of Oaxaca banning same-sex marriages, holding that it violates the principle of equality. The various states of Mexico are thus implementing legislation to recognize marriage equality. See J. Lester Feder, *Mexican Supreme Court Rules for Marriage Equality*, Salon.com, (Dec. 5, 2012), [http://www.salon.com/2012/12/06/mexican\\_supreme\\_court\\_rules\\_for\\_marriage\\_equality/](http://www.salon.com/2012/12/06/mexican_supreme_court_rules_for_marriage_equality/).

<sup>6</sup> See Kirk Johnson, *Gay Couples Face a Mixed Geography of Marriage*, N.Y. Times, Feb. 27, 2013, at A13. Marriage equality bills are also moving through legislatures in Illinois and Rhode Island, and may come up for a vote in Minnesota, Delaware, Hawaii, and New Jersey. See Patrick Condon, *Gay Marriage Support Has Risks for GOP Lawmakers*, Associated Press, Feb. 15, 2013, available at <http://news.yahoo.com/gay-marriage-support-risks-gop-lawmakers-080303323.html>.

<sup>7</sup> In 2011, Colombia's Constitutional Court held that if the legislature did not recognize marriage equality by June 20, 2013, same-sex couples could have their marriages recognized before any official on the same terms as heterosexual couples. The Colombian legislature is presently debating a bill giving full marriage rights to same-sex couples, which passed its first Senate committee hearing by a vote of 10-5 on December 4, 2012. See Rachel Glickhouse, *Steps Toward Same-Sex Marriage in Brazil, Colombia, Mexico, the U.S., and Uruguay*, Americas Society / Council of the Americas, (Dec. 20, 2012), <http://www.as-coa.org/articles/steps-toward-same-sex-marriage-brazil-colombia-mexico-us-and-uruguay>.

Finland,<sup>8</sup> France,<sup>9</sup> Luxembourg,<sup>10</sup> Nepal,<sup>11</sup> New Zealand,<sup>12</sup> the United Kingdom,<sup>13</sup> and Uruguay,<sup>14</sup>

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<sup>8</sup> The bill is Lakialoite 2/2012 vp, and its text is available from the Finnish Parliament at [http://www.eduskunta.fi/faktatmp/utatmp/akxtmp/la\\_2\\_2012\\_p.shtml](http://www.eduskunta.fi/faktatmp/utatmp/akxtmp/la_2_2012_p.shtml). The bill legalizes same-sex marriages and abolishes domestic partnerships to provide the same rights to homosexual and heterosexual couples.

<sup>9</sup> The bill is *Projet de loi ouvrant le mariage aux couples de personnes de même sexe* [Bill opening marriage to same-sex couples], No. 344, also known as the “Marriage for All” bill, introduced on November 17, 2012 with the support of President François Hollande. The National Assembly of France—the larger house of Parliament—approved the bill on February 12 in a 329-259 vote, and it is presently before the Senate. See Steven Erlanger, *France: Assembly Passes Gay Marriage Bill*, N.Y. Times, Feb. 13, 2013, at A12. Details on the status of the bill are available from the French Parliament at [http://www.assemblee-nationale.fr/14/dossiers/mariage\\_personnes\\_meme\\_sexe.asp](http://www.assemblee-nationale.fr/14/dossiers/mariage_personnes_meme_sexe.asp).

<sup>10</sup> The bill would permit same-sex couples to get married. It has cleared committees and is expected to have a general vote, where it is expected to pass, before summer. See *Luxembourg MPs to Vote on Gay Marriage Before Summer*, Wort.lu (Feb. 8, 2013), <http://www.wort.lu/en/view/luxembourg-mps-to-vote-on-gay-marriage-before-summer-511379afe4b07d8f8fd39654>.

<sup>11</sup> Nepal’s highest court held in 2008 that marriage equality is legally required. Since that time, the country has been redrafting its constitution, the new version of which will include marriage equality. See *Nepal SC Approves Same-Sex Marriage*, Hindustan Times, Nov. 19, 2008, available at <http://www.hindustantimes.com/world-news/Nepal/Nepal-SC-approves-same-sex-marriage/Article1-352722.aspx>.

<sup>12</sup> The bill is the Marriage (Definition of Marriage) Amendment Bill, or, which “seeks to amend the Marriage Act 1955 to ensure that its provisions are not applied in a discriminatory manner. The bill aims to ensure that all people,

where they have been proposed by liberal and conservative governments alike.<sup>15</sup>

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regardless of sex, sexual orientation, or gender identity will have the opportunity to marry if they so choose.” New Zealand Parliament, Bill Status – Marriage (Definition of Marriage) Amendment Bill, [http://www.parliament.nz/en-NZ/PB/Legislation/Bills/2/c/4/00DBHOH\\_BILL11528\\_1-Marriage-Definition-of-Marriage-Amendment-Bill.htm](http://www.parliament.nz/en-NZ/PB/Legislation/Bills/2/c/4/00DBHOH_BILL11528_1-Marriage-Definition-of-Marriage-Amendment-Bill.htm). The bill passed its first reading in Parliament on August 29, 2012 by a vote of 80-40 with one abstention. On February 27, 2013, a parliamentary select committee recommended that the bill be enacted into law, and it is scheduled for a second reading on March 13. See Isaac Davison, *Committee Approval for Gay Marriage Bill*, New Zealand Herald, Feb. 27, 2013, available at [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10868100](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10868100).

<sup>13</sup> The bill is the Marriage (Same Sex Couples) Bill, which passed its second reading in the House of Commons on February 5, 2013 and is presently in committee. See U.K. Parliament, Bill Status – Marriage (Same Sex Couples) Bill 2012-13, <http://services.parliament.uk/bills/2012-13/marriagesamesexcouplebill.html>. The bill enacts protections for same-sex marriages in England and Wales. Scotland is proposing its own marriage equality bill, also expected to pass. See *Gay Marriage: Draft Bill Launched in Scotland*, BBC News (Dec. 12, 2012), <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-20680326>.

<sup>14</sup> Uruguay’s marriage equality bill passed the lower house and has broad support in the Senate, which is scheduled to vote on the bill in April. It provides equal marriage rights to same-sex couples. See *Uruguay Gay Marriage Vote Postponed Until April*, BBC News (Dec. 27, 2012), <http://www.bbc.co.uk/news/world-latin-america-20849647>.

<sup>15</sup> Steps toward marriage equality are also being taken in other jurisdictions, including Ireland, Taiwan, Turkey, and

These developments, which have taken hold over a period of only twelve years, constitute a clear and accelerating trend toward marriage equality. Crucially, these foreign decisions reflect ideals that are synonymous with American notions of due process and equal protection, holding that sexual orientation discrimination abridges fundamental rights and constitutes invidious discrimination on par with discrimination on the basis of race and other immutable criteria.

Mexico provides a vivid illustration. On February 18, 2013, the Supreme Court of Mexico published its decision holding unconstitutional the state of Oaxaca's ban on same-sex marriage.<sup>16</sup> The court relied heavily on this Court's equal protection precedents. See J. Lester Feder, *Mexican Supreme Court: American Cases Demand Marriage Equality*, BuzzFeed Politics (Feb. 18, 2013), <http://www.buzzfeed.com/lesterfeder/mexican-supreme-court-american-cases->

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Vietnam. In these countries, authorities have initiated consultations relating to either a new statute or a constitutional amendment embracing marriage equality. Developments, while progressing, are less imminent than in the nations discussed in the text of this brief.

<sup>16</sup> The Mexican courts report decisions monthly, and this decision has not yet appeared in a reporter. As of today, the Mexican court's website was not properly displaying the slip opinion. The case number is Amparo en Revisión 581/2012, and a copy of the opinión is *available at* <https://docs.google.com/viewer?url=http%3A%2F%2Fwww2.scjn.gob.mx%2Fjuridica%2Fengroses%2Fcerrados%2FPublico%2F12005810.002-1310.doc>.



demand-marriage-equalit. Citing this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), the court reasoned that in light of the long history of discrimination against both homosexuals and racial minorities, the denial of the right to marry on the basis of the immutable characteristic of sexual orientation was analogous to the denial on the basis of race. In concluding that registered partnerships and civil unions for same-sex couples are inadequate, the court relied on this Court's rejection of "separate but equal" segregation in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

Mexico is not alone in referring to American precedent. Boris Dittrich—an initial sponsor of the Netherlands' marriage equality bill and one of that country's most prolific legislators—explained that he introduced the bill because the "separate but equal" status [of civil unions] at the time reminded me of apartheid in South Africa and Jim Crow in the United States. When two people decide to share their responsibilities and commit themselves to each other by entering civil marriage, their sexual orientation shouldn't matter to the government." Boris O. Dittrich, *Gay Marriage's Diamond Anniversary*, L.A. Times, Apr. 17, 2011, available at <http://articles.latimes.com/2011/apr/17/opinion/la-oe-dittrich-gay-marriage-20110417>.

Canada rested its decision to embrace marriage equality on Section 15(1) of the Canadian Charter of Rights and Freedoms, which provides, similar to the U.S. Equal Protection Clause, that "[e]very individual is equal before and under the law and has the right to

the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 15(1) (U.K.). After multiple provincial courts determined that the Charter required marriage equality, parliament moved to pass a bill. In moving the second reading, MP Serge Joyal stated:

By making civil marriage accessible to persons of the same sex, Bill C-38 recognizes that discrimination based on sexual orientation is a form of social exclusion that is degrading to the persons involved and unacceptable in a free and democratic society, based on the constitutional equality of everyone before the law and with equal access to all its benefits. That recognition, as the Supreme Court noted last December, flows from the Canadian Charter of Rights and Freedoms. Bill C-38 is about restoring full human dignity to a minority that has long been the object of persecution, marginalization and outrage. It is an issue of minority rights.

Hansard, *Debates*, 38th Parliament, 1st Sess., vol. 142, issue 80, July 4, 2005, *available at* [http://www.parl.gc.ca/Content/SEN/Chamber/381/Debates/080db\\_2005-07-04e.htm?Language=E&Parl=38&Ses=1#13](http://www.parl.gc.ca/Content/SEN/Chamber/381/Debates/080db_2005-07-04e.htm?Language=E&Parl=38&Ses=1#13).

The South African Constitutional Court issued a similarly powerful statement regarding equal protection and marriage equality. In *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC), the court held that restricting the definition of marriage to heterosexual couples violated both the general equal protection provision in Section 9(1) of the Constitution of South Africa as well as the prohibition on sexual orientation discrimination in Section 9(3). Justice Albie Sachs, who built his career fighting the injustice of apartheid, wrote for a unanimous court that these guarantees of equal protection:

[C]annot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law. Their love that was once forced to be clandestine, may now dare openly to speak its name. The world in which they live and in which the Constitution functions, has evolved from repudiating expressions of their desire to accepting the reality of their presence, and the integrity, in its own terms, of their intimate life. Accordingly, taking account of the decisions of this Court, and bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can

only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree.

*Fourie*, 2006 (3) BCLR 355, at ¶ 78.

These are not isolated examples. In recognizing marriage equality, authorities in practically every country that has acted stress same-sex couples' right to equal protection. In Spain, the declarations accompanying the marriage equality law highlight same-sex couples' equal rights under the law and constitution. See Ley 13/2005, 157 B.O.E. 23632, 23632 (July 5, 2005). In Argentina, President Cristina Fernandez advanced a bill for the express purpose of protecting minority rights. See Alexei Barrionuevo, *Argentina Senate to Vote on Gay Marriage*, N.Y. Times, July 14, 2010, at A11. In Norway, a Labour Party official described the same-sex marriage law as "of an importance comparable to universal suffrage." *Norway Adopts Gay Marriage Law*, Agence France-Presse, June 11, 2008. The French bill is described as the "Marriage for All" bill, and its supporters have advanced it as part and parcel of that country's commitment to equality. See *France Gay Marriage: National Assembly Backs Law*, BBC News (Feb. 12, 2013), <http://www.bbc.co.uk/news/world-europe-21433198>. And in the United Kingdom, Maria Miller, the Minister for Women and Equalities, moved the second reading of the Marriage (Same Sex Couples) Bill in the House of Commons by stating that "[t]he depth of feeling, love and commitment between same-

sex couples is no different from that depth of feeling between opposite-sex couples. The Bill enables society to recognise that commitment in the same way, too, through marriage. Parliament should value people equally in the law, and enabling same-sex couples to marry removes the current differentiation and distinction.” 5 Feb. 2013, Parl. Deb., H.C. (2013) 125 (U.K.), *available at* [http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130205/debt\\_ext/130205-0001.htm#13020551000002](http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130205/debt_ext/130205-0001.htm#13020551000002).

That many nations have arrived at marriage equality via legislation as opposed to judicial decision does not make their reasoning any less persuasive, nor does it suggest that courts must defer to legislatures on this issue. Legislatures, like courts, strive to uphold fundamental rights, and this Court has frequently considered foreign legislative acts as precedent. *See, e.g., Lawrence*, 539 U.S. at 572-73 (citing the Wolfenden Report, prepared for the British Parliament, and the bill implementing the report).

Moreover, the possibility of legislative action does not justify judicial abdication. *Contra* Br. for Int’l Jurists 29. Respect for democracy has never meant that courts must permit discrimination. Indeed, the legislation in many countries only highlights the importance of judicial action. In Canada, South Africa, Colombia, and Nepal, for example, legislatures only began crafting laws to recognize marriage equality *after* courts determined that such recognition was constitutionally required. The same process is presently underway in Brazil and Mexico.

And the same result will obtain here. If this Court rules in respondents' favor, the sky will not fall on democracy—instead, legislatures across the nation will likely enact statutes formalizing the recognition of same-sex marriages and setting forth terms and procedures for such marriages. Such legislation may include, for example, protections for religious institutions that do not wish to perform same-sex marriages, as well as other measures protecting freedom of expression and belief. That result properly balances the responsibilities of the Court and legislatures; permitting discrimination in the name of democracy does not.

**B. Developments In Societies That Have Recognized Marriage Equality Parallel Developments In The United States.**

Countries that have recognized marriage equality have emphasized not only equal protection, but also significant developments in family life—developments that find ready parallels throughout the United States.

In Belgium, for example, the report accompanying the marriage equality bill catalogued the history of marriage, explaining that the institution was previously understood as a means to facilitate procreation, but that in modern society it serves primarily to affirm and externalize the intimate relationship of two people. *See* Commission de la Justice, *Project de Loi ouvrant le mariage à des personnes de meme sexe et modifiant certaines dispositions du Code civil* [Bill to open marriage to same-sex couples and modify certain provisions of the civil Code], Rapport No. 50-2165/2, at 5 (Jan. 24,

2003), *available at* <http://www.lachambre.be/FLWB/pdf/50/2165/50K2165002.pdf>. Acknowledging the history and authorities defining marriage as between a man and a woman, the legislature nevertheless concluded that in light of the evolution of society and marriage, there is no reason to deny a person the right to marry solely on the basis of sexual orientation. *Id.*

Similarly, in Spain, the statute acknowledges in its preamble that the origins of Spanish civil marriage date to the French civil code of 1804 and the Spanish civil code of 1889, adopted when gay marriage was unheard of. *See* Ley 13/2005, 157 BOE 23632, 23632 (July 5, 2005). The statute notes, however, that society has evolved to recognize different models of cohabitation, and that the legislature is not only empowered, but *obligated*, to act in light of that fact. *Id.* The statute explained that there is no doubt that today's Spanish society is more rich, diverse, and dynamic than the one that enacted the civil code of 1889, and that society's broad acceptance of same-sex couples warrants the conclusion that such couples should be able to marry. *Id.*

The ongoing debates in the United Kingdom and France reflect these same shifts. During the second reading of the Marriage (Same Sex Couples) Bill in the House of Commons, Shadow Minister for Women and Equalities Yvette Cooper explained that:

Marriage has changed many times over the centuries—and thank goodness for that. For hundreds of years, women were treated as property in marriage, handed from their

fathers to their husbands and denied rights of their own . . . .

...

Some people oppose same-sex marriage because they believe that marriage is by definition about the procreation of children. However, that is not true of civil marriage, and that has been the case for over a century. Many marriages are childless, and we do not prevent people who are too old or too sick to have children from getting married. We do not do fertility tests at the altar. Yes, in vast numbers of families, marriage is an important starting point for a loving family bringing up children, but gay couples bring up children too. As people live longer, the family commitments involved in marriage are much wider than bringing up children . . . .

...

The idea that the biology of procreation should deny same-sex couples the respect that comes with marriage is to ignore the full richness—the happiness but also the tragedies—of modern family life. For better, for worse, for richer, for poorer, in sickness and in health: that is marriage.

5 Feb. 2013, Parl. Deb., H.C. (2013) 139-40 (U.K.), *available at* <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130205/debtext/130205-0002.htm>. A report accompanying France's marriage equality bill makes the same point. *See* Marie-



Françoise Clergeau, *ouvrant le mariage aux couples de personnes de même sexe* [opening marriage to couples of people of the same sex], Rapport No. 581 (Jan. 14, 2013), available at [http://www.assemblee-nationale.fr/14/rapports/r0581.asp#P111\\_8994](http://www.assemblee-nationale.fr/14/rapports/r0581.asp#P111_8994). The report notes recent sharp increases of the number of blended families, children raised by homosexual parents, and other alternative family structures, and concludes that a narrow definition of marriage does not correspond with the realities of modern family life. *Id.* § I.

This global evolution of marriages and families is apparent in the United States. A recent survey by Pew Research found that among unmarried people, only 44 percent identify having children as a “very important” reason to marry, compared with companionship (63%), making a lifelong commitment (74%), and love (84%). See D’Vera Cohn, *Love & Marriage*, Pew Research Social & Demographic Trends (Feb. 13, 2013), <http://www.pewsocialtrends.org/2013/02/13/love-and-marriage/>. The same hierarchy exists among married people—93 percent of married people say that love is a very important reason to marry, versus only 59 percent who identify having children. *Id.* These data confirm the testimony of respondents’ expert Nancy Cott that “marriage has not been one thing, that it is a flexible institution.” J.A. 435.<sup>17</sup>

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<sup>17</sup> They also closely parallel findings from a Dutch survey, which showed that while 95.9 percent of respondents thought that “mutual respect and appreciation” was a very important

The data also show that the makeup of American households and families has shifted dramatically. Between the years 2000 and 2010, for example, the number of households comprising same-sex partners rose from over 350,000 to just under 650,000—an increase of over 80 percent. U.S. Census, *Households and Families: 2010*, at 5 (Apr. 2012), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>. The number of unmarried cohabiting opposite-sex partners also rose sharply, from 4.8 million to 6.8 million—an increase of 40 percent. *Id.* The 2010 census also revealed over 11 million single-parent households, 1.4 million more than in 2000. *Id.* And it showed a substantial increase (approximately 3.2 million) in the number of married households without children. *Id.* The only census category that saw a decrease over this ten-year period was married couples with children, *i.e.*, the nuclear family. *Id.*

Indeed, a study by the Hoover Institution has stated that “if one were to define the most original demographic feature in the post-1980 period in the United States, it would be the changes that were occurring in both families and households for all sections of the national population.” Herbert S. Klein, *The Changing American Family*, 2004 Hoover Digest No. 3 (2004), *available at* <http://www.hoover.org/publications/hoover-digest/article/6798>. Families

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factor in a successful marriage, only 44.8 percent thought that “having children” was very important. M.V. Lee Badgett, *When Gay People Get Married*, at Locations 1926-27 (Kindle ed. 2009).

today include people of multiple races, religions, and sexual orientations. Furthermore, more women than ever before are having children outside of marriage, and more married couples are declining to have children altogether. Thus, marriage is “no longer the exclusive arbiter of fertility . . . .” *Id.* In this rapidly shifting landscape, a narrow vision of marriage based on procreation cannot help but be hopelessly outdated.

None of this is to suggest that marriage’s importance is diminished. As respondent Kristin Perry testified, marriage carries a profound social meaning: married people “are honored and respected by your family. Your children know what your relationship is. And when you leave your home and you go to work or you go out in the world, people know what your relationship means. And so then everyone can, in a sense, join in supporting your relationship, which at this point I can only observe it as an outsider.” J.A. 360. And the court below carefully documented “the extraordinary significance of the official designation of ‘marriage.’” Pet. App. 50a-53a.

But while its importance persists, the meaning of marriage has shifted from a narrow focus on procreation toward an inclusive definition that acknowledges all of the ways that couples affirm and support each other. Ms. Cott explained that far from diluting the meaning of marriage, this opening to “emphasiz[e] the liberty aspects, the creation of a zone of intimacy that the partners choose . . . have helped to give [marriage] new reverence in recent years.” J.A. 436-37. These are the same shifts that motivated many foreign nations to recognize that their historic

legal definitions of marriage no longer accurately define the institution, but instead discriminate against the family life of same-sex couples. This Court should do the same.

**C. Foreign Nations' Experience With Marriage Equality Has Been Empirically Successful.**

Foreign nations' experience with marriage equality is also useful from an empirical perspective. Authorities in nations that have enacted marriage equality bills have noted that opposition to same-sex marriage subsequently waned as a greater segment of society observed that marriage equality did not undermine the institution. Studies indicate that the recognition of marriage equality is not associated with any negative consequences, but is correlated with positive mental health outcomes for gay people, straight people, and children.

A report from the French National Assembly establishes that the legalization of same-sex marriage does not undermine marriage and has a positive effect on social attitudes. See M. Erwann Binet, *ouvrant le mariage aux couples de personnes de même sexe* [opening of marriage to couples of the same sex], Rapport No. 628 (Jan. 17, 2013), available at [http://www.assemblee-nationale.fr/14/rapports/r0628-tl.asp#P359\\_89982](http://www.assemblee-nationale.fr/14/rapports/r0628-tl.asp#P359_89982). The rapporteur convened with parliamentarians from Belgium, Spain, and Portugal to assess their experience with enacting laws recognizing marriage equality. *Id.* § II(B)(3)(b). The parliamentarians unanimously reported that even though the marriage equality bills in each state faced virulent opposition—especially in heavily Catholic

Spain and Portugal—prior to passage, there was no longer any significant controversy regarding the legitimacy of same-sex marriages in those nations. *Id.* Indeed, the shift in public opinion after passage had been swift and massive. Moreover, homophobia in general had declined as same-sex relationships had come to be regarded as normal. *Id.*

In a similar vein, Netherlands Senator Hannie van Leeuwen—a leader of the Christian Democrat Party who had lobbied against that country’s marriage equality bill—recanted, stating: “At the time I opposed same-sex marriage, I was led by fear. Having seen so many gay and lesbian couples getting married, I realize I was wrong. I don’t understand anymore what made me treat gays and lesbians differently from other citizens.” Boris O. Dittrich, *Letter to Members of the French Parliament* (Jan. 21, 2013), available at <http://www.hrw.org/news/2013/01/21/letter-members-french-parliament>. That statement, only four years after the Netherlands recognized marriage equality, illustrates the power that an official signal of equality can have on societal perception.

Academic studies of the foreign experience likewise show that marriage equality correlates with beneficial social outcomes for married couples and society as a whole. A Canadian study showed “positive impact across the personal, interpersonal, and political realities of the couples. The fact that participants reported feeling legitimized, understood, supported and protected by both society and their communities suggests a compelling impact that extends beyond the individuals to encompass the larger society.” Heather

MacIntosh, et al., *Same-Sex Marriage in Canada: The Impact of Legal Marriage on the First Cohort of Gay and Lesbian Canadians to Wed*, 19 Can. J. Human Sexuality 79, 88-89 (2010). A similar study in the Netherlands likewise concluded “that exclusion from marriage is harmful and that the right to marry provides wide-ranging benefits in terms of social inclusion.” M.V. Lee Badgett, *Social Inclusion & the Value of Marriage Equality in Massachusetts & the Netherlands*, 67 J. Soc. Issues 316, 321 (2011).

Studies have also established that recognizing marriage equality does not threaten the institution of marriage, nor does it detract from the rights of heterosexual people. See M.V. Lee Badgett, *When Gay People Get Married*, at Locations 1415-1430 (Kindle ed. 2009) (finding on the basis of demographic data that the enactment of partnership or marriage rights for gay people in Scandinavia and the Netherlands had no meaningful effect on heterosexual marriage and divorce rates). Same-sex marriage also has no negative impact on the well-being of children. See *id.* at Locations 1454-1459, 2223-2225 (“A growing body of evidence in the United States and the Netherlands suggests that children raised by lesbian and gay parents are faring well; they suffer no harm compared to children raised by heterosexual parents.”). Indeed, one of the strongest arguments *for* same-sex marriage is that the children of such couples will have a more stable environment than the children of unmarried partners.

These studies are consistent with studies of the American experience with marriage equality, which

hold that there is “no statistically significant adverse effect from allowing gay marriage,” so that “[t]he argument that same-sex marriage poses a negative externality on society cannot be rationally held.” Laura Langbein & Mark A. Yost., Jr., *Same-Sex Marriage & Negative Externalities*, 90 *Soc. Sci. Quarterly* 292, 292 (2009). By contrast, marriage bans have been shown to do both direct and indirect harm to gay, lesbian, and bisexual adults in the United States. Sharon Scales Rostosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, & Bisexual (LGB) Adults*, 56 *J. Counseling Psychology* 56, 56 (2009).

**D. International Law Supports Both Heightened Scrutiny For Sexual Orientation Discrimination And The Recognition Of Marriage Equality.**

The trend toward marriage equality in foreign law finds a ready counterpart in the evolution of international law. International legal authorities have wholeheartedly embraced the conclusion that discrimination on the basis of sexual orientation and discrimination against non-traditional families are prohibited as violations of basic human rights. While these authorities do not yet require marriage equality, they press strongly in favor of applying heightened judicial scrutiny to policies that discriminate on the basis of sexual orientation. Furthermore, these authorities will inevitably compel marriage equality. As more nations come to understand the denial of marriage rights as a form of discrimination, the

application of the existing norm against discrimination will require nothing less.

The United Nations has been vocal in stating that discrimination on the basis of sexual orientation is prohibited. In a recent report, the High Commissioner on Human Rights stated that “international human rights law prohibits discrimination on the basis of sexual orientation and gender identity. Sexual orientation and gender identity—just like race, sex, colour, or religion—are impermissible bases for distinction.” U.N. High Commissioner for Human Rights, *Born Free & Equal: Sexual Orientation & Gender identity in International Human Rights Law* 40, U.N. Doc. HR/PUB/12/06 (Sept. 2012), available at <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>. This echoes a 2008 statement by the U.N. General Assembly that “everyone is entitled to the enjoyment of human rights without distinction of any kind . . . as set out in Article 2 of the Universal Declaration of Human Rights and Article 2 of the International Covenants on Civil and Political, Economic, Social and Cultural Rights, as well as in article 26 of the International Covenant on Civil and Political Rights.” U.N. General Assembly, Statement on Human Rights, Sexual Orientation and Gender Identity, U.N. Doc. A/63/635 (Dec. 18, 2008).

The documents cited in the General Assembly’s statement condemn discrimination on the basis of sexual orientation. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in the wake of World War II, provides first and foremost that “[a]ll human beings



are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Universal Declaration of Human Rights, G.A. Res. 217 (III), art. 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). In that spirit, the Declaration protects privacy in family life, as well as the right to marry and found a family. *See id.* arts. 12, 16. The Declaration further provides that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *Id.* art. 2. As the United Nations Human Rights Council concluded, the phrase “other status,” which “intentionally left the grounds of discrimination open,” encompasses sexual orientation. U.N. High Commissioner for Human Rights, *Discriminatory Laws & Practices & Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/19/41, ¶ 7 (Nov. 17, 2011). Furthermore, while these provisions have historically been interpreted to protect only heterosexual marriage, their meaning is evolving. That is why on Human Rights Day 2011, the Secretary of State delivered a speech explaining that:

[T]he governments that drafted and passed the Universal Declaration of Human Rights were not thinking about how it applied to the LGBT community. They also weren’t thinking about how it applied to indigenous people or children or people with disabilities or other marginalized groups. Yet in the past 60

years, we have come to recognize that members of these groups are entitled to the full measure of dignity and rights, because, like all people, they share a common humanity.

Secretary of State Hillary Clinton, Remarks on Recognition of International Human Rights Day, Dec. 6, 2011, *available at* <http://www.state.gov/secretary/rm/2011/12/178368.htm>.

A foundational treaty, the International Covenant on Civil and Political Rights (ICCPR) has 167 parties. *See* United Nations, Status – ICCPR, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en). The United States ratified the ICCPR with reservations in 1992, and this Court has previously referred to its provisions as persuasive authority. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 663 n.66 (2006); *Roper v. Simmons*, 543 U.S. 551, 576 (2005). Its equal protection provisions have been deemed by the U.N. Human Rights Committee to prohibit discrimination on the basis of sexual orientation. *See Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, at 235, U.N. Doc. A/49/40 (Mar. 31, 1994) (holding, in a case involving sodomy laws, that Article 26 of the ICCPR—which provides that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground”—encompasses sexual orientation).

Authorities in Europe are even more pointed. Article 9 of the Charter of Fundamental Rights for the

European Union, 2010 O.J. (C 83) 393, adopted in December of 2000 and entered into force in 2009, provides that “[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” This provision not only defines the right to marry and found a family as fundamental, but “the absence of any reference to gender makes the guarantee provided by Article 9 sufficiently broad as to extend the right to marry and to found a family to same-sex couples . . . .” William B.T. Mock, *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* 60 (2010). Article 21 of the Charter further provides that “[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited.” 2010 O.J. (C 83) at 396 (emphasis added). The express inclusion of sexual orientation likewise reflects a preexisting recognition that such discrimination is on par with other forms of prohibited discrimination, including race.

The Charter’s provisions echo a 1994 resolution by the European Parliament calling for an end to discrimination against gays and lesbians. The resolution called for member states to end “the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework,” and to “guarantee the full rights and benefits of marriage, allowing the registration of partnerships.” European Parliament Resolution on Equal Rights for

Homosexuals and Lesbians in the EC, 1994 O.J. (C 61) 40. In 2006, the European Parliament issued a resolution on homophobia. Applying the Charter and noting that “discrimination in violation of the principle of equality” and the “unjustified and unreasonable limitations of rights” were “often hidden behind justifications based on public order, religious freedom and the right to conscientious objection,” Parliament resolved to condemn “any discrimination on the basis of sexual orientation,” called on member states to ensure that “same-sex partners enjoy the same respect, dignity and protection as the rest of society.” European Parliament Resolution on Homophobia in Europe, No. P6\_TA(2006)0018 of Jan. 18, 2006, *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0018&language=EN&ring=P6-RC-2006-0025>.

The Inter-American Court of Human Rights has also held—in a custody case involving sexual orientation discrimination—that nondiscrimination “has entered the realm of *jus cogens*,” *i.e.*, that “[t]he juridical framework of national and international public order rests on this principle and permeates the entire legal system.” *Atala Riffo and daughters v. Chile*, I/A Ct. H.R., Series C No. 239 (Feb. 24, 2012), ¶ 79. Citing European and international decisions, the court held that sexual orientation discrimination falls under this norm because sexual orientation is “innate or inherent to the person.” *Id.* ¶¶ 87-91. The court also held that in order for an act to constitute discrimination, “[i]t is sufficient to confirm that . . . the person’s sexual orientation was taken into account,

either explicitly or implicitly, in adopting a specific decision.” *Id.* ¶ 94.

Considering the collective effect of these international instruments, the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (“Yogyakarta Principles”) constitute a restatement of international law, as applied to sexual orientation and gender identity. Although the Principles are not themselves binding, they have been signed by leading human rights authorities and represent an informed, multinational perspective. Principle 2 provides:

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms.

See Yogyakarta Principles, Principle 2 (2007), available at [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf). Principle 24 provides that “[e]veryone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.” Principle 24 therefore requires states to take steps to recognize same-sex marriages or equivalent partnerships.

These instruments demonstrate that the movement toward marriage equality is gathering force in international law. While states are not yet required to recognize same-sex marriages, *see, e.g., Schalk & Kopf v. Austria*, App. No. 30141/04 (ECtHR, 24 June 2010), that result is only a matter of time. International law reflects the consensus of states, and its development therefore lags behind the law in states that take a leadership role. As societal understandings of marriage and families evolve, the discriminatory effects of a heterosexual definition of marriage will only grow starker. Soon, a critical mass of states will determine that marriage equality is a necessary facet of equal protection and international law will embrace that norm. When it does, recalcitrant nations will find themselves on the wrong side of history.

This Court should not allow the United States to become one of those nations. This case provides a vital opportunity to exercise leadership and to demonstrate to the world that the principles of equal protection in our constitution are robust and equal to the task of

protecting today's vulnerable minorities. At a bare minimum, the Court should adopt the established international rule that discrimination on the basis of sexual orientation is on par with discrimination on the basis of race, religion, and national origin, and should apply strict or heightened scrutiny to policies discriminating on that basis.

**E. Contrary Sources Of Foreign And International Law Are Not Persuasive.**

Of course, foreign and international authorities do not line up uniformly in favor of marriage equality. As noted, international law does not yet require that result, and most countries have longstanding definitions of marriage that have not yet changed. However, there are persuasive reasons to privilege the recent trend in favor of marriage equality over the background pattern.

First, foreign law is valuable to the extent that it illuminates the question before the Court, and countries that are similarly situated to the United States shed more light. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 577 (2005) (reasoning that “[t]he United Kingdom’s experience bears particular relevance here” in part because of “the historic ties between our countries”). As explained above, the facts in the United States largely parallel those in countries that have accepted marriage equality as an obligation. The evolution of marriage, the diversification of families, and the presence of robust protections against discrimination all distinguish the nations that have recognized marriage equality from the majority of those that have not. On the subject of rights for same-

sex couples, the United States can learn more from its close cultural neighbors, *e.g.*, Canada, than it can from countries that do not resemble this one, *e.g.*, Hungary.

Second, this Court should privilege recent action over a history of inaction. As this Court reasoned in *Lawrence v. Texas*, 539 U.S. 558, 572 (2003), when determining modern norms and standards, modern laws and traditions are entitled to greater weight than ancient ones. And just as many nations had stale sodomy laws on the books when *Lawrence* was decided, many nations have antiquated definitions of marriage today. But there are many reasons why foreign nations might not modify an existing definition of marriage that have nothing to do with the correctness of the definition. Differences in access to the courts and other mechanisms to effect change, differences in the allocation of political power, and differences in societal priorities can all produce inertia, even as a society's values move toward marriage equality. The more telling indicator is therefore states that have taken action on this issue. As the Court explained in *Atkins v. Virginia*, 536 U.S. 304, 316 (2002), sometimes “[i]t is not so much the number of” jurisdictions that adopt a rule “that is significant, but the consistency of the direction of change.” *See also Roper*, 543 U.S. at 566, 576 (citing a “trend toward abolition of the juvenile death penalty” among the states as a reason to abolish it, and citing international legal instruments including the ICCPR).

Viewed through this lens, the trend toward marriage equality is extremely strong. Among states that resemble the United States and have taken recent



action, none have done what California did here, *i.e.*, revoke an existing right to marriage equality.<sup>18</sup> Every relevant nation is moving toward marriage equality. To be sure, some are moving faster than others. But many of the most prominent holdouts—Australia and Germany, for example—are likely to shift their positions soon. See YouGov, *YouGov/EMEA Survey Results* (Jan. 11, 2013), [http://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/ak4r6iaz4u/YG-Archive-results-December-EuroTrack.pdf](http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/ak4r6iaz4u/YG-Archive-results-December-EuroTrack.pdf) (finding that 66% of German adults believe in marriage equality); Josephine Tovey, *New Poll Backs Same-Sex Marriage*, Sydney Morning Herald (Feb. 13, 2012), <http://www.smh.com.au/national/new-poll-backs-samesex-marriage-20120213-1t1h4.html> (“[A] new poll shows two-thirds of Australians support same-sex marriage.”).

In sum, the trends toward heightened scrutiny for sexual orientation discrimination and in favor of marriage equality are clear and accelerating. This Court should embrace those trends and lend its powerful voice toward the goal of securing equal rights for all people.

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<sup>18</sup> Petitioners’ *amici* argue that California has essentially enacted civil unions, which several other countries have also recently done. See Br. for Int’l Jurists 5-7. Not so. Proposition 8 did not create civil unions—its sole effect was to eliminate a right. This is important because many countries that have enacted civil unions are now considering marriage equality bills. But California is moving in the opposite direction—as is any jurisdiction that restricts marriages.

**CONCLUSION**

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

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