No. 10−16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

Appeal from the United States District Court
for the Northern District of California
Civil Case No. 09−CV−2292 VRW
(Honorable Vaughn R. Walker)

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF DEFENDANT-INTERVENORS-APPELLANTS AND REVERSAL

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FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure, *Amicus Curiae* American Civil Rights Union declares the following:

The American Civil Rights Union has not issued stock to the public, has no parent company, and no subsidiary. No publicly-held company owns 10% or more of its stock.

Dated September 24, 2010

Respectfully submitted,

/s/ Kenneth A. Klukowski

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Counsel for *Amicus Curiae* American Civil Rights Union

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INTEREST OF *AMICI CURIAE*

The American Civil Rights Union ("ACRU") is a 501(c)(3) nonprofit legal policy organization dedicated to defending all constitutional rights, not just those conforming to a particular ideology. Led by its chairman Susan Carleson and founded in 1998 by President Ronald Reagan's longtime policy advisor Robert B. Carlson, the ACRU files *amicus* briefs in constitutional cases across America.

The individuals on the ACRU's policy board include former U.S. Attorney General Edwin Meese III, former Assistant Attorney General William Bradford Reynolds, John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams, former Harvard University Professor James Q. Wilson, Ambassador Curtin Windsor, Jr., and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce. The ACRU's interest in this case is the proper application of Fourteenth Amendment jurisprudence regarding the right to marry, as it carries implications for the entire jurisprudence governing civil rights.

All parties have consented to the filing of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

The Supreme Court has held that there are certain unenumerated rights in the Fourteenth Amendment Due Process Clause. Only a narrow range of liberty interests enjoy this status. These are fundamental rights, which are inalienable rights that governments exist to secure.

Fundamental rights are those that by their very nature are implicit in the concept of due process. Rather than chosen according to the predilections of judges, these rights are objectively grounded in historical criteria. The Supreme Court rejects any process whereby judges would be unrestrained to declaring and enforcing fundamental rights, and has found a historical inquiry the most useful method for properly finding and defining these rights.

Fundamental rights jurisprudence spans both enumerated rights and unenumerated rights. Since the Court holds provisions of the Bill of Rights entailing fundamental rights to be applicable to the states through the Fourteenth Amendment, case law incorporating the Bill of Rights to the states is as applicable as those precedents declaring implied rights. Both examine whether the asserted right is fundamental.

The relevant line of cases has developed since 1897. In the course of determining whether the rights were universal principles of justice or essential to a free state, the Court continually cited American history and to America's English heritage. This culminated in the 1937 test from *Palko v. Connecticut*, 302 U.S. 319 (1937), of whether the right was "implicit in the concept of ordered liberty."

By 1968, the Supreme Court adopted a new test of whether the right was "necessary to an Anglo-American regime of ordered liberty" in *Duncan v. Louisiana*, 391 U.S. 145 (1968). Although subsequent cases led to temporary confusion regarding the proper test, this Court held that the *Duncan* test was intended to make the inquiry more grounded in historical fact as opposed to philosophical musings, and the Supreme Court confirmed this Court's analysis in *McDonald v. Chicago*, 130 S. Ct. 3020 (2010). Throughout the development of substantive-due-process doctrine, the Supreme Court has increasingly relied upon American history and tradition to cabin judicial finds of novel rights.

Same-sex marriage is not a fundamental right protected by the Fourteenth Amendment Due Process Clause. That conclusion is the inescapable result of the elements this Court and the Supreme Court have established for finding unenumerated rights.

First, any asserted liberty interest that purports to be a fundamental right must be narrowly and carefully defined. This reluctance to expansively find rights arises in part from the recognition that finding any liberty interest to be a fundamental right largely removes it from the democratic process. Narrowly construing unenumerated rights is thus consistent with the properly limited role of unelected judges in our democratic republic, both in the separation of powers at the federal level and also respecting state autonomy in our federal system. Such restraint is necessary to protect the judiciary's legitimacy with the people.

Under this standard, same-sex marriage is not a fundamental right secured by the Due Process Clause. Although there is an implicit right to marry in the Fourteenth Amendment, that right is appropriately understood as a right to marry one person of the opposite sex who is not a close relative. The Supreme Court recognizes traditional marriage as the foundational unit of American culture. Marrying a person of the same sex is not deeply-rooted in American history or tradition, constituting a novel form of family relationship. As such, Supreme Court case law involving marriage relied upon by Appellees is inapposite. Same-sex marriage is not guaranteed by the Fourteenth Amendment.

ARGUMENT

Amicus Curiae American Civil Rights Union (ACRU) fully supports Defendant-Intervenors-Appellants' argument that the fundamental right to marry does not include same-sex couples. *See* Opening Brief of Dennis Hollingsworth at 47−70. For the reasons set forth in this brief, the ACRU argues that additional authorities and recent decisions of the Supreme Court and a panel of this Court—some of which were not yet decided at the time the instant case was briefed and argued in the district court—further buttress and confirm the conclusion that the fundamental right to marry only extends to a union between one man and one woman.

I. FUNDAMENTAL RIGHTS ARE DEEPLY-ROOTED IN AMERICAN HISTORY AND TRADITION, SHOWING THEM ESSENTIAL TO AN AMERICAN REGIME OF ORDERED LIBERTY.

"The Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to include a substantive component that protects certain individual liberties from state interference . . . ." *Mullins v. Oregon*, 57 F.3d 789, 793 (9th Cir. 1995) (citations omitted). For the reasons explained in this brief, in considering which purported individual rights are protected by the Due Process Clause:

> We begin by noting the narrow range of liberty interests that substantive due process protects. Only those aspects of liberty that we as a society traditionally have protected as fundamental are included within the substantive protection of the Due Process Clause.

Id. (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion)).

Fundamental rights are inalienable rights. These rights were referenced in the Declaration of Independence as nonexclusively including "life, liberty, and the pursuit of happiness." DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776). Because "governments are instituted among men" to "secure these rights," *id.*, the Constitution protects many of these inalienable rights. Specifically, the Fourteenth Amendment Due Process Clause protects such fundamental rights, which antedate the Constitution, *see United States v. Cruikshank*, 92 U.S. 553, 544−45 (1876);

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 76, 83 (1873). It was understood during the time of Reconstruction that governments exist to protect these inalienable rights, *McDonald v. Chicago*, 130 S. Ct. 3020, 3064 (2010) (Thomas, J., concurring in part and concurring in judgment), as also seen in the statements made by members of Congress when proposing the Fourteenth Amendment, *see, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 1967 (1868) (statement of Rep. Stevens) (referencing the "inalienable right of defending liberty," and adding that the Fourteenth Amendment secures this right).

Determining which rights are fundamental requires courts to consult proper sources in order to correctly interpret the Fourteenth Amendment. The judiciary erodes its own institutional legitimacy when it consults sources not sanctioned by the Constitution in defining unenumerated rights. Of these:

> The foremost illegitimate source is the personal predilections of the individual justices. A Supreme Court that has assumed for itself the ultimate power of judicial review exercises that power legitimately only by not violating the great principle of governance given to us by the Enlightenment: the rule of law.

Bruce A. Antkowiak, *The Rights Question*, 58 KAN. L. REV. 615, 619 (2010). If the personal predilections of jurists constitute an illegitimate source, then the courts must look to some other source in defining the contours of the fundamental rights protected by the Due Process Clause.

A. Fundamental rights must be deeply rooted in our history and tradition to be essential to an American regime of liberty.

The Supreme Court has recently reiterated its longstanding holding that "the only rights protected against state infringement by the Due Process Clause [are] those rights 'of such a nature that they are included in the conception of due process of law.'" *McDonald*, 130 S. Ct. at 3031 (quoting *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1, 6 (1964)) (other citations omitted). This is consistent with the Supreme Court's often-cited articulation that fundamental rights applicable to the states through the Fourteenth Amendment Due Process Clause are those that are, objectively, "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720−21 (1997) (internal citations omitted).

The Court's application of this standard demonstrates the primacy of history and tradition. The *Glucksberg* Court illustrated this test by providing an example from an earlier case that, when considering whether refusing unwanted medical treatment was protected by heightened scrutiny, the Court inquired into whether that right "was so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment." *Id.* at 721 n.17 (referencing *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278−79 (1990)).

Historical inquiry partially constrains the courts from erroneously expanding fundamental-right status to enshrine in the Constitution asserted interests that the American people have never embraced. The *Glucksberg* majority was careful to note that some jurists "would largely abandon this restrained methodology," *Id.* at 721 (noting the opinion of Justice Souter, concurring in judgment), and unequivocally rejected all unrestrained alternatives. *See id.* As discussed further in Part II.A, *infra*, alternative interpretive theories unbounded by the American people's history and tradition would place far too much power in the hands of the judiciary. As the current chief judge of this Court has explained, "[e]xpanding some [rights] to gargantuan proportions . . . is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences." *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., *dissenting from denial of rehearing en banc*).

Thus the judiciary has sought objective and extrinsic bases for finding rights to be fundamental. "In defining the scope of a constitutionally protected 'liberty,' the Supreme Court has engaged in an analysis of whether tradition supports the judicial recognition and enforcement of an unenumerated right." Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48

WM AND MARY L. REV. 923, 937 (2006). Examining Supreme Court precedent reveals that:

> The Justices have consulted the state of the law at the time of the framing to ascertain the level of acceptance that a right had achieved at the time of the Constitution's or amendment's adoption. . . . A second methodology looks at whether the states have voluntarily recognized and protected a particular right over time.

Id. at 938. This objective history-and-tradition criterion has proven invaluable as the Court has explored the Fourteenth Amendment Due Process Clause.

B. In developing substantive due process, the Supreme Court has increasingly focused its inquiries on history and tradition.

The Supreme Court's examination of fundamental rights implicit in the Fourteenth Amendment Due Process Clause reveals an increasing focus on history and tradition as the *sine qua non* of a fundamental right. This case law—spanning more than a century since 1897—shows that only those items which have been widely-recognized throughout American history rise to the level of being included in the concept of due process.

This case law includes the Court's precedents on incorporating provisions of the Bill of Rights into the Fourteenth Amendment Due Process Clause. In 1947 incorporation case law fully became part of substantive due process. Beginning in *Adamson v. California*, the Court rejected Justice Black's "total incorporation" theory, *see* 332 U.S. 46, 68−123 (1947) (Black, J., dissenting), in favor of Justice Frankfurter's "selective incorporation" theory, *see id.* at 59−68 (Frankfurter, J., concurring). Frankfurter's approach was then refined into its modern form by Justice Brennan, wherein fundamentality became the touchstone by which rights are incorporated into the Fourteenth Amendment. *See Cohen v. Hurley*, 366 U.S. 117, 154–60 (1961) (Brennan, J., dissenting). In adopting the refined Frankfurter model, the Court embedded incorporation into substantive due process, by establishing the principle that only fundamental rights from the Bill of Rights are extended to the states through the Fourteenth Amendment Due Process Clause. *See* Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 209–12 (2009). Thus, the test for unenumerated rights became the same test as for incorporating provisions from the Bill of Rights: Fundamentality.

The question in both types of cases is whether the asserted right is a fundamental right. And history-and-tradition was found *ab initio* as an element in this case law as well, as Justice Frankfurter required that rights found in the traditions of "English-speaking people." *Adamson*, 332 U.S. at 67.

In 1908 the Court described the boundaries of due process as encompassing "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Twining v. New Jersey*, 211 U.S. at 102 (internal quotation marks omitted). The Court applied the test of whether the right is "a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen." *Id.* at 106. The Court added that the right at issue (against self-incrimination) "has no place in the jurisprudence of civilized and free countries outside the domain of the common law." *Id.* at 113. This statement was consistent with the Court's then-recent decision incorporating of the Takings Clause into the Fourteenth Amendment, in which the Court held that the right in question was "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 238 (1897). After articulating this test, the Court specifically examined the history and traditions of the Founding in assessing whether the right against self-incrimination should be deemed fundamental. *See Twining*, 211 U.S. at 102−09. Thus history and tradition were the indicators of whether a right is "a fundamental principle of liberty."

In 1925, when examining the right of free speech, the Court applied the standard of whether the right in question is "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925). This is consistent with the Court's subsequent application of free speech in the context of freedom of the press, when in 1931 the Court asked whether the right was "essential to the nature of a free state." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

During this era the Court continually returned to history and tradition in determining whether the asserted rights were fundamental. Just three years later, the Court described rights implicit in due process as those that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). And again in 1937, the Court referenced historical controversies in previous decades in holding the right of assembly fundamental, as one of "those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of the due process clause." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (citing, *inter alia*, *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

Later that same year, the Court expounded this reasoning and announced the well-known articulation that the Due Process Clause includes those rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled in part by Benton v. Maryland*, 395 U.S. 784 (1969). The Court elaborated that this concept includes rights of such a nature "that a fair and enlightened system of justice would be impossible without them." *Id.*

The *Palko* test became the standard formulation for declaring rights fundamental, and thus implicit in the Due Process Clause. When the Court extended the exclusionary rule to the states, the Court did so by applying the *Palko* test of the right being "implicit in the concept of ordered liberty." *See Mapp v. Ohio*, 367 U.S. 643, 650, 655 (1961). Shortly thereafter in 1963, the Court seemed to apply multiple tests, but these tests always referenced (or outright applied) *Palko*, and coupled *Palko* with an examination of whether the right was seen in American history and tradition. Considering whether the federal right to legal counsel was fundamental, the Court invoked a previous case's exploration of state and colonial constitutional law, and added an examination of statutory provisions from the Framing to the present. *See Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942)). The Court also went on to apply the test of whether the right was among "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *id.* at 341 (quoting *Powell*, 287 U.S. at 67), and "implicit in the concept of ordered liberty," *id.* at 342 (quoting *Palko*, 302 U.S. at 325). Similar language was used in other cases over the following four years. *See, e.g.*, *Washington v. Texas*, 388 U.S. 14, 18 (1967); *Pointer v. Texas*, 380 U.S. 400, 403−04 (1965); *Malloy*, 378 U.S. at 5−6.

This era ended in 1968, when in declaring fundamental the Sixth Amendment right to a jury trial, the Court did so because the right was "fundamental to an American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The Court elaborated this standard in a footnote as meaning that such a right "is necessary to an Anglo-American regime of ordered liberty." *Id.* at 149 n.14. The following year the Court applied this test from *Duncan* when holding that the right in the Double Jeopardy Clause is fundamental. *Benton*, 395 U.S. at 794. After applying *Duncan*, the *Benton* Court added that "[i]nsofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled." *Id.* Although that may seem at first glance conclusive for the proposition that the *Duncan* test of "necessary to an Anglo-American regime of ordered liberty" supplanted the *Palko* test of "implicit in the concept of ordered liberty," such a conclusion sweeps too broadly. *Palko* held that the Fifth Amendment right against double jeopardy was not fundamental, and thus not applicable to the states through the Fourteenth Amendment. 302 U.S. at 322. *Benton* held that this same right was fundamental, and as such does apply against the states. 395 U.S. at 794. While it is clear that *Benton*'s conclusion overruled the conclusion in *Palko*, it is unclear whether the *Duncan* test employed in *Benton* likewise overruled the *Palko* test.

This confusion was compounded by a fairly recent case, wherein the Court considered whether an asserted federal right of assisted suicide was applicable to the states as a fundamental right. In *Washington v. Glucksberg*, the Court applied a two-prong test of whether the right was both "deeply rooted in this Nation's history and tradition," 521 U.S. at 721 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)), and also "implicit in the concept of ordered liberty," meaning that "neither liberty nor justice would exist if they were sacrificed," *id.* (quoting *Palko*). Thus, post-*Duncan* and post-*Benton*, the Supreme Court applied an expanded version of the *Palko* test (one that placed greater emphasis on history and tradition), and did so without even considering *Duncan*.

Examining this case law in 2010, the Supreme Court noted that:

> in some cases decided during this era the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection.

McDonald, 130 S. Ct. at 3031 (quoting *Duncan*, 391 U.S. at 149 n.14) (internal quotation marks omitted). Referring to the transition from the *Palko* test to the *Duncan* test, the *McDonald* Court reasoned that the Court's:

> decisions during this time abandoned . . . characteristics of the earlier period. The Court made it clear that the governing standard is not whether *any* "civilized system [can] be imagined that would not accord the particular protection." Instead, the Court inquired into whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice.

Id. at 3034 (internal citations and footnotes omitted). At the same time, the Court also noted that "in recent cases addressing unenumerated rights, we have required that a right also be 'implicit in the concept of ordered liberty.'" *Id.* at 3034 n.11 (citing *Glucksberg*, 521 U.S. at 721) (emphasis added). That need not be understood as indicating that there is a different test for enumerated rights versus unenumerated rights, however, as the question for both remains whether the asserted liberty interest is a fundamental right, and the Court's clear holding in *McDonald* as to what analysis should be applied in determining fundamentality.

History and tradition is an essential element of finding a right to be fundamental. As Justice Scalia explains:

> In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.

Michael H., 491 U.S. at 122 (plurality opinion of Scalia, J.).

C. This Court's *Nordyke* opinion correctly applied the proper test for fundamentality.

This Court recently adopted the position that the *Duncan* test is essential to finding a fundamental right in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), the panel opinion of which was recently vacated by this Court sitting *en banc* and remanded to the panel for reconsideration in light of the Supreme Court's intervening *McDonald* decision. 611 F.3d 1015 (9th Cir. 2010).[1] This Court

[1] As the *Nordyke* panel opinion has been vacated for reconsideration, it is not presented here as controlling authority. It is instead offered as persuasive authority, along with the assertion that nothing in the Supreme Court's *McDonald* decision invalidates the *Nordyke* panel opinion, or would impede the panel from simply reinstating the relevant part of the original opinion cited herein.

applied the *Duncan* test of whether the right is necessary to an Anglo-American regime of ordered liberty in incorporating the Second Amendment. *See* 563 F.3d at 451. This Court held that "only those institutions and rights 'deeply rooted in this Nation's history and tradition' can be fundamental rights protected by substantive due process." *Id.* (quoting *Moore*, 431 U.S. at 503 (plurality opinion)).

This Court rejected the proposition that *Palko* still controlled, finding that *Palko* "invited an exercise in speculative political philosophy, guided by 'a study and appreciate of the meaning, the essential implications, of liberty itself.'" *Id.* at 449 (quoting *Palko*, 302 U.S. at 326). Evidently finding such philosophical speculation impermissibly empowers judges to constitutionalize their personal preferences:

> The Supreme Court ultimately abandoned this abstract enterprise in favor of a more concretely historical one. In *Duncan*, the Court recognized that it had jettisoned the metaphysical musings of *Palko* for an analysis grounded in the "actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country."

Id. (quoting *Duncan*, 391 U.S. at 149).

This Court then went on to hold that *Duncan* would also govern cases such as the instant case. *Nordyke* noted, "[s]ubstantive due process addresses unenumerated rights; selective incorporation, by contrast, addresses enumerated rights." *Id.* This Court then went on to hold that incorporation is one aspect of substantive-due-process doctrine, constituting one form of substantive due process, reasoning that "incorporation is logically a part of substantive due process." *Id.* at

451. Therefore the case law incorporating provisions of the Bill of Rights into the Fourteenth Amendment is subsumed into the framework governing substantive due process.

D. The Supreme Court's recent decision in *McDonald v. Chicago* confirms the *Nordyke* panel opinion as to the correct test for fundamentality.

At the end of its October 2009 Term, in June 2010 the Supreme Court confirmed that this Court's panel opinion in *Nordyke* correctly articulated and applied the governing test for fundamentality. One constitutional scholar, Professor Steven Calabresi, wrote in 2008—before these recent case law developments—that according to the case law as it then stood, "'[i]t is possible but unlikely that fundamental rights or rights implicit in the concept of ordered liberty would not also be deeply rooted in our history and tradition." Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 12 (2008). After *McDonald v. Chicago*, there is no longer any doubt that the proper test for fundamentality consults American history and tradition to determine whether the purported right is essential to an American scheme of ordered liberty.

The Supreme Court in *McDonald* noted that over the decades the Court has "used different formulations in describing the boundaries of due process." 130 S. Ct. at 3032. Although it is clear that only fundamental rights are incorporated against the states through the Fourteenth Amendment Due Process Clause, there was some confusion in the law regarding what the proper test is for finding a right "fundamental." *See* Klukowski, *supra*, at 210−12.

The Supreme Court has thus indicated that a history-focused *Duncan* test this is the proper test by applying it as recently as the Court's last Term. *See McDonald*, 130 S. Ct. at 3034. The Fourteenth Amendment only extends to the states those provisions of the Bill of Rights that entail fundamental rights. In incorporating the Second Amendment into the Fourteenth Amendment, the Court began with a lengthy study of American history and tradition, *see McDonald*, 130 S. Ct. at 3036−42, and then concluded on the basis of the widespread recognition of the asserted right in history and tradition that "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty," *id.* at 3042.

Thus, as with any asserted liberty interest, this Court must determine whether the asserted interest is a fundamental right. The test for fundamentality to be applied in such a case is whether the right is essential to an Anglo-American regime of ordered liberty. A right is not essential to American liberty if it is not deeply-rooted in American history and tradition, especially with regard to the Framing of the Constitution and the Framing of the Fourteenth Amendment.

II. Same-sex marriage does not come within a fundamental right because fundamental rights must be narrowly defined.

Same-sex marriage is not a fundamental right under the U.S. Constitution. The Constitution protects a fundamental right to marry. *Loving v. Virginia,* 388 U.S. 1, 12 (1967).

However, this right does not extend to any union other than that of one man and one woman. A plurality of the Supreme Court has noted:

> [D]efining the scope of the Due Process Clause "has at times been a treacherous field for this Court," giving "reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court."

Michael H., 491 U.S. at 121 (plurality opinion) (quoting *Moore*, 431 U.S. at 502 (plurality opinion)). This concern of expansively defining rights to suit personal preferences was subsequently adopted in a holding of this Court:

> This nation's democratic tradition, moreover, demands our reluctance to expand the substantive protection of the Due Process Clause, lest the only limits upon the judicial veto become the predilections of those who happen to be members of the federal judiciary.

Mullins, 57 F.3d at 793 (citing *Michael H.*, 491 U.S. at 122 (1989) (plurality opinion); *Moore*, 431 U.S. 494 (1977) (plurality opinion); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398−400 (1798) (opinion of Iredell, J.)). Same-sex marriage does not satisfy the scrutiny that attends this reluctance to expand substantive due process.

A. Any asserted fundamental right must be carefully and narrowly defined.

Not all important personal matters are constitutional rights protected by the Fourteenth Amendment. The Supreme Court explains:

> That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . .

Glucksberg, 521 U.S. at 727 (citation omitted). In discussing the few occasions where the Justices have recognized fundamental rights outside the express terms of the Constitution's text, the Court strongly cautions:

> [W]e "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of Members of this Court.

Id. at 720 (quoting *Collins v. Harker Heights*, 503 U.S. 115 (1992), and *Moore*, 431 U.S. at 502 (plurality opinion), respectively)) (second brackets in the original) (internal citations omitted).

One of the greatest constraints against judges illegitimately enshrining their personal preferences in the Due Process clause is requiring that asserted liberty interests be narrowly and carefully defined. The Supreme Court describes the definitional component delimiting judicial ability to find a fundamental right:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties that are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause.

Glucksberg, 521 at 720–21 (internal citations omitted). The latter part of the Supreme Court's framework arising from this section—careful definition—has subsequently been used to refine the former part in the *McDonald* opinion decided earlier this year—a historical focus on American liberty—discussed in Part I.D, *supra*.

As with other constitutional doctrines defining the role of the judiciary, construing unenumerated rights narrowly is consistent with "the proper—and properly limited—role of the courts in a democratic society." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)) (internal quotation marks omitted). The narrowly-and-carefully-defined requirement must be regarded as among the "several doctrines that reflect this fundamental limitation." *Id.* at 1149. Such limitations helps ensure that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). It "would significantly alter the allocation of power . . . away from a democratic form of government" to allow a federal court to exercise the power of judicial review to override the will of the voters unless the Constitution absolutely commands it. *See Summers*, 129 S. Ct. at 1148 (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)) (internal quotation marks omitted).

Courts have a strictly limited role in a democratic republic, especially when reviewing the actions of the American people at the ballot box. Doctrines delimiting the judicial power are Article III's:

> means of "defining the role assigned to the judiciary in a tripartite allocation of power," and "a part of the basic charter . . . provid[ing] for the interaction between [the federal] government and the governments of the several States."

Spencer v. Kemna, 523 U.S. 1, 11−12 (1998) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474, 476 (1982)) (brackets in the original). The Supreme Court "never [] formulate[s] a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *United States v. Raines*, 362 U.S. 17, 21 (1960) (quoting *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). Thus, when formulating the content of an unenumerated right, courts must not define such content more broadly than what history and tradition indicate are essential for an American regime of ordered liberty.

This restraint is essential for preserving the legitimacy of the courts. Prudence counsels:

> [t]hat the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.

Mullins, 57 F.3d at 793 (quoting *Moore*, 431 U.S. at 544 (White, J., dissenting)) (internal quotation marks omitted).

Each time the Supreme Court considered a case wherein a party asserted to have a right protected by the Due Process Clause, the Court "sought a careful, specific description of the right at issue in order to determine whether that right, thus narrowly defined, was fundamental." *McDonald*, 130 S. Ct. at 3053−54 (Scalia, J., concurring). Consequently when confronted with claims such as the Appellee's claim in the instant case, "[this Court's] first task is to describe carefully the asserted liberty interest." *Mullins*, 57 F.3d at 793.

Unenumerated rights must be narrowly defined because the judiciary treads upon dangerous ground when it proclaims rights where the people have chosen not to do so by codifying those purported rights in the Constitution. As Justice Iredell explained in one of the Court's earliest cases:

> [Where] the Legislature of the Union, or the Legislature of any Member of the Union, shall pass a law, within the general scope of its constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of

> natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Calder, 3 U.S. (3 Dall.) at 399 (opinion of Iredell, J.). Otherwise put, "[l]aws that transgress the terms of the Constitution should be struck down, . . . but otherwise judges should not don the robes of the philosopher king." Antkowiak, *supra,* at 621.

B. Same-sex marriage does not fall within the fundamental right of marriage.

One of the challenges with any asserted right is how broadly or narrowly to define that right, and the same holds true for same-sex marriage. If a marriage is defined as a relationship entered into by two consenting adults with the intent of forming a new household, then such a definition would encompass same-sex couples. Courts lack the power to decree such a novel definition, however.

Instead, the foregoing case law requiring a narrowly and carefully described right does not permit same-sex marriage to come within the definition of "marriage" for purposes of being a fundamental right. The Supreme Court describes marriage as "the relationship that is the foundation of family in our society." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). The Supreme Court has held that the "freedom to marry . . . [is] essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. Understood in the full context of the carefully-defined rule, it is that the "freedom to marry one unrelated person of the opposite sex is essential to the orderly pursuit of happiness by free men."

Only the union of one man and one woman has formed the foundation of family in America, as the previously-cited cases demonstrate, and as other *amici* discuss in their briefs. Case law demonstrates that only the marriage of one man with one woman that the Supreme Court has described in a manner as to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder*, 291 U.S. at 105. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Michael H.*, 491 U.S. at 123−24 (plurality opinion). Therefore:

> the legal issue in the present case reduces to whether the relationship between persons in the situation [at issue] has been treated as a protected family unit under the historic practices of our society, or whether, on any other basis, it has been accorded special protection.

Id. at 124.

"While the institution of marriage is deeply rooted in the history and traditions of our country and our State, the right to marry someone of the same sex is not." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 987 (Mass. 2003) (Cordy, J., dissenting). It is thus not surprising that other courts have refused to hold that same-sex marriage inheres in the fundamental right to marry. *See, e.g.*, *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005), *aff'd in part and* *vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005). As a Texas appellate court stated as recently as last month:

> Having concluded that the claimed right in question is properly defined as the right to marry a person of the same sex, we consider whether that right is "deeply rooted in this Nation's history and tradition." Plainly, it is not. Until 2003, no state recognized same-sex marriages. Congress and most states have adopted legislation or constitutional amendments explicitly limiting the institution of marriage to opposite-sex unions.

In re J.B., 2010 Tex. App. LEXIS 7127, at *51 (Tex. Ct. App. Aug. 31, 2010) (quoting *Glucksberg*, 521 U.S. at 721) (other citations omitted).

American history and tradition—as well as case law—answer the question of whether same-sex marriage falls within the contours of the constitutional right to marry in the negative. "What this case is really about is creating a new family unit where none has existed before." *Mullins*, 57 F.3d at 794. In that vein, to the extent that Appellees rely upon *Moore* their argument fails, as this Court rejected a similarly-attempted reliance in *Moore* because a "negative right to be free of government interference does not translate into an affirmative right to create an entirely new family right out of whole cloth." *Id.* (citation omitted). Appellee's argument that misguided laws in various jurisdictions against interracial marriages in antiquity cuts against a history-and-tradition standard in the instance case is incorrect, and their consequent reliance upon *Loving v. Virginia* as supporting their position in this regard is misplaced. Assuming *arguendo* that this argument had merit—which it does not because the marriages banned by antimiscegenation laws were one-man-one-woman marriages—it remains that the Supreme Court based its decision in *Loving* explicitly upon the premise that the Fourteenth Amendment was designed to end racially-discriminatory laws. *See Loving*, 388 U.S. at 12 ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.").

The right to marry protected by the Fourteenth Amendment Due Process Clause is specifically a fundamental right to marry one person of the opposite sex who is not a close blood-relative. Any more-inclusive definition is irreconcilable with Supreme Court precedent that the asserted right be narrowly and carefully defined. As same-sex marriage falls outside the boundaries of the right to marry thus defined, entering into such a union does not carry the status of a fundamental right in the United States Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the District Court for the Northern District of California should be reversed.

Respectfully submitted,

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September 24th, 2010

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

The undersigned counsel of record for *amici curiae* affirms and declares as follows:

This brief complies with the type-volume limitation of Fed. R. App. P. Rule 32(a)(7) for a brief utilizing proportionally-spaced font, because the length of this brief is 6,671 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5)and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font, with footnotes in 11-point font.

Executed this 24th day of September, 2010.

s/ Kenneth A. Klukowski

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 10−16696

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