Case No. 14-50196

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLEOPATRA DE LEON; NICOLE DIMETMAN; VICTOR HOLMES; MARK PHARISS,

Plaintiffs-Appellees,

v.

RICK PERRY, in his official capacity as Governor of the State of Texas; GREG ABBOTT, in his official capacity as Texas Attorney General; DAVID LAKEY, in his official capacity as Commissioner of the Texas Department of State Health Services,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

BRIEF OF *AMICI CURIAE* INDIANA, ALASKA, ARIZONA, COLORADO, IDAHO, MONTANA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA AND UTAH IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Amicus Curiae the State of Indiana, *et al*. has no parent corporation or any publicly held corporation that owns 10% or more of its stock.

s/Thomas M. Fisher
Thomas M. Fisher
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INTEREST OF THE *AMICI* STATES

The *amici* States file this brief in support of Defendants-Appellants, as a matter of right pursuant to Federal Rule of Appellate Procedure 29(a).

The majority of States—thirty-one in all—limit marriage to the union of one man and one woman, consistent with the historical definition of marriage.[1] As the Supreme Court recently affirmed, "[b]y history and tradition the definition and regulation of marriage [is] within the authority and realm of the separate States." *United States v. Windsor*, 133 S. Ct. 2675, 2689-90 (2013). Indeed, the Court has long recognized that authority over the institution of marriage lies with the States. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created . . . .") (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877)). Primary state authority over family law is confirmed by definite limitations on federal power, as even the broadest conception of the commerce

[1] Twenty-eight States have done so by constitutional amendment: Alabama (Ala. Const. art. I, § 36.03), Alaska (Alaska Const. art. 1, § 25); Arizona (Ariz. Const. art. 30, § 1); Arkansas (Ark. Const. amend. 83, § 1); Colorado (Colo. Const. art. 2, § 31); Florida (Fla. Const. art. 1, § 27); Georgia (Ga. Const. art. 1, § 4 ¶ I); Idaho (Idaho Const. art. III, § 28); Kansas (Kan. Const. art. 15, § 16); Kentucky (Ky. Const. § 233A); Louisiana (La. Const. art. XII, § 15); Michigan (Mich. Const. art. I, § 25); Mississippi (Miss. Const. art. 14, § 263A); Missouri (Mo. Const. art. I, § 33); Montana (Mont. Const. art. XIII, § 7); Nebraska (Neb. Const. art. I, § 29); Nevada (Nev. Const. art. I, § 21); North Carolina (N.C. Const. art. XIV, § 6); North Dakota (N.D. Const. art. XI, § 28); Ohio (Ohio Const. art. XV, § 11); Oklahoma (Okla. Const. art. 2, § 35); South Carolina (S.C. Const. art. XVII, § 15); South Dakota (S.D. Const. art. XXI, § 9); Tennessee (Tenn. Const. art. XI, § 18); Texas (Tex. Const. art. 1, § 32); Utah (Utah Const. art. 1, § 29); Virginia (Va. Const. art. I, § 15-A); and Wisconsin (Wis. Const. art. XIII, § 13). Another three States restrict marriage to the union of a man and a woman by statute: Indiana (Ind. Code § 31-11-1-1); West Virginia (W. Va. Code § 48-2-603); and Wyoming (Wyo. Stat. Ann. § 20-1-101).

power forbids any possibility that Congress could regulate marriage. *See United States v. Lopez*, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting) (agreeing with majority that commerce power cannot extend to "regulate marriage, divorce, and child custody") (quotations omitted).

Nor can federal judicial power do what Congress cannot. In finding a lack of federal habeas jurisdiction to resolve a custody dispute, the Supreme Court long ago identified the axiom of state sovereignty that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). The Court has recognized that "the domestic relations exception . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

Particularly in view of traditional, exclusive state prerogatives over marriage, the *amici* States have an interest in protecting state power to adhere to the traditional definition of marriage.

SUMMARY OF THE ARGUMENT

Even aside from *Baker v. Nelson*, 409 U.S. 810 (1972), which the district court erroneously failed to respect as controlling authority, traditional marriage definitions implicate no fundamental rights or suspect classes, and are therefore subject only to rational-basis scrutiny. Traditional marriage is too deeply

imbedded in our laws, history, and traditions for a court to hold that a more recent state constitutional enactment of that definition is illegitimate or irrational.

As an institution, marriage always and everywhere in our civilization has enjoyed the protection of the law. For the Founding generation and those who enacted and ratified the Fourteenth Amendment, the institution of traditional marriage was a given—antecedent to the State in fact and theory. Until recently, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). Consequently, it is implausible to suggest, as the legal argument for same-sex marriage necessarily implies, that States long-ago invented marriage as a tool of invidious discrimination against homosexuals. *See, e.g.*, *Andersen v. King County*, 138 P.3d 963, 978 (Wash. 2006); *Hernandez*, 855 N.E.2d at 8; *Conaway v. Deane*, 932 A.2d 571, 627-28 (Md. 2007).

The Supreme Court has observed the longstanding importance of traditional marriage in its substantive due process jurisprudence, recognizing marriage as "the most important relation in life," and as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888). The right "to marry, establish a home and bring up children" is a central component of liberty protected by the Due Process

Clause, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and "fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

All of these pronouncements, recognizing the procreative function of marriage and family, implicitly contemplate the traditional definition of marriage. That definition, in turn, arises not from a fundamental impulse of animus, but from a cultural determination that children are best reared by their biological parents. The theory of traditional civil marriage turns on the unique qualities of the male-female couple for procreating and rearing children under optimal circumstances. It not only reflects and maintains deep-rooted traditions of our Nation, but also furthers the public policy of encouraging biological parents to stay together for the sake of the children produced by their sexual union.

The district court's redefinition of marriage as nothing more than societal validation of personal bonds of affection leads not to the courageous elimination of irrational, invidious treatment, but instead to the tragic deconstruction of civil marriage and its subsequent reconstruction as a glorification of the adult self. And unlike the goal of encouraging responsible procreation that underlies traditional marriage, the mere objective of self-validation that inspires same-sex marriage lacks principled limits. If public affirmation of anyone and everyone's personal

love and commitment is the single purpose of civil marriage, a limitless number of rights claims could be set up that evacuate the term "marriage" of any meaning.

The decision below denies traditional marriage's long-recognized underpinnings, but identifies no alternative public interests or principled limits to define marriage. Once the natural limits that inhere in the relationship between a man and a woman can no longer sustain the definition of marriage, it follows that any grouping of adults would have an equal claim to marriage. This theory of constitutional law risks eliminating marriage as government recognition of a limited set of relationships and should be rejected.

ARGUMENT

I. No Fundamental Rights or Suspect Classes Are Implicated

A. Same-sex marriage has no roots in the Nation's history and traditions

Fundamental rights 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) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). A "'careful description' of the asserted fundamental liberty interest" is required, and courts must "'exercise the utmost care whenever [they] are asked to break new ground in this field . . . .'" *Id.*

(quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993), and *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

"Marriage" is a foundational and ancient social institution that predates the formation of our Nation and has been thought of "as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). Until recently, its meaning was internationally and universally understood as limited to the union of a man and a woman. *See id.* at 2715 (Alito, J., dissenting) (noting that the Netherlands first extended marriage to same-sex couples in 2000). Indeed, the historic definition of civil marriage is a limited, narrow, and very specific fundamental right long defined precisely by reference to opposite-sex couples. *See id.* at 2689. The plaintiffs cannot assert a fundamental right to "marriage" because they, as same-sex couples, plainly fall outside the scope of the right itself.

They also cannot assert a fundamental right to "same-sex marriage," as this concept is not "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty.'" *Glucksberg*, 521 U.S. at 720-21. Barely a decade ago, in 2003, Massachusetts became the first State to extend the definition of marriage to same-sex couples. It did so through a 4-3 court decision, without a majority opinion, by interpreting its state constitution. *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). Other state supreme

courts followed suit, *see Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008), *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009), but so far only twelve States and the District of Columbia have extended marriage to same-sex unions legislatively, the first not occurring until 2009.[2]

Yet the district court inferred from *Loving v. Virginia*, 388 U.S. 1 (1967), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), that the "fundamental right to marry . . . entails the ability to marry the partner of one's choosing." *De Leon v. Perry*, 975 F. Supp. 2d 632, 658 (W.D. Tex. 2014). *But see Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493, at *24 (4th Cir. July 28, 2014) (Niemeyer, J., dissenting) ("[N]owhere in *Loving* did the Court suggest that the fundamental right to marry includes the unrestricted right to marry whomever one chooses, as the plaintiffs claim. Indeed, *Loving* explicitly relied on *Skinner* and *Murphy*, and both of those cases discussed marriage in traditional, procreative terms.").

Other district courts have divined "the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the

[2] *See* Conn. Gen. Stat. § 46b-20, -20a; Del. Code tit. 13, § 129; Haw. Rev. Stat. § 572-1.8; 750 Ill. Comp. Stat. 5/201; Me. Rev. Stat. § 650-A; Md. Code Ann., Fam. Law § 2-201; Minn. Stat. § 517.01-.02; N.H. Rev. Stat. Ann. § 457:46; N.Y. Dom. Rel. § 10-A; R.I. Gen. Laws § 15-1-1; 15 V.S.A. § 8; Wash. Rev. Code § 26.04.010; D.C. Code § 46-401 (2010). Even at that, not all have stuck. In 2009, Maine voters repealed a 2009 statute enacted by its legislature that extended marriage to same-sex couples. Bureau of Corporations, Elections, and Commissions, Department of the Maine Secretary of State, *November 3, 2009 General Election Tabulations*, http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html (last visited Aug. 4, 2014).

person shares an intimate and sustaining emotional bond." *Bostic v. Rainey*, 970 F. Supp. 2d 456, 472 (E.D. Va. 2014) (quoting *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202-03 (D. Utah 2013)). Such a formless definition of marriage as a fundamental right defies *Glucksberg*'s mandate that a "careful description of the asserted fundamental liberty interest" is required, and courts must "exercise the utmost care whenever [they] are asked to break new ground in [the fundamental rights] field . . . ." *Glucksberg*, 520 U.S. at 720-21 (quotation marks omitted). By declaring that Plaintiffs sought "to exercise the right to marry the partner of their choosing, just as the plaintiffs in *Loving* did," *De Leon*, 975 F. Supp. 2d at 659, the district court left out the only part of Plaintiffs' asserted right that matters: that they seek this right as same-sex couples.

Glucksberg defined the asserted liberty interest from the specific statute at issue—there, a law prohibiting assisting another in committing suicide. *Glucksberg*, 520 U.S. at 722. While the lower courts and Glucksberg had defined the interest as the "right to die," the Court limited this to include the distinction that mattered—"the right to commit suicide and . . . assistance in doing so." *Id.* Plaintiffs' asserted interest, properly defined, is the right to state-sanctioned marriage for a same-sex couple—not the right to "marriage" the district court defines by *fiat*. *See Bostic*, 2014 WL 3702493 at *23 (Niemeyer, J., dissenting) ("To now define the previously recognized fundamental right to 'marriage' as a

concept that includes the new notion of 'same-sex marriage' amounts to a dictionary jurisprudence, which defines terms as convenient to attain an end."). Same-sex marriage is not a fundamental right—as the Supreme Court itself indicated in *Windsor*, 133 S. Ct. at 2689—and a State's refusal to provide it is therefore not subject to any form of heightened scrutiny.

B. Traditional marriage implicates no suspect classes because it does not discriminate on the basis of sexual orientation, and such a classification would not elicit heightened scrutiny in any event

Traditional marriage laws in no way target homosexuals as such, and the court below erred in suggesting otherwise. With traditional marriage, "the distinction is not by its own terms drawn according to sexual orientation. Homosexual persons may marry . . . but like heterosexual persons, they may not marry members of the same sex." *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1004 (D. Nev. 2012). While traditional marriage laws *impact* heterosexuals and homosexuals differently, they do not create classifications based on sexuality, particularly considering the benign history of traditional marriage laws generally. *See, e.g., Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disparate impact on a suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose).

Further, deducing any such discriminatory intent (unaccompanied by any actual statutory classification) is highly anachronistic. Modern-day accusations of

"homosexual animus" quite plainly have no historical purchase. There is no plausible argument that the traditional definition of marriage was invented as a way to discriminate against homosexuals or to maintain the "superiority" of heterosexuals vis-à-vis homosexuals. Indeed, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court examined only the past fifty years for the history of laws directed at homosexuals because "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." *Id.* at 568. Implicit in this statement is an acknowledgement that a traditional marriage definition is *not* a "law[] directed at homosexual conduct as a distinct matter."

Even if the traditional marriage definition does discriminate based on sexual orientation, the Supreme Court has never held that homosexuality constitutes a suspect class, and the law in this circuit is that homosexual persons do not constitute a suspect class. *See Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) ("Neither the Supreme Court nor this court has recognized sexual orientation as a suspect classification [or protected group.]"); *James v. Hertzog*, 415 F. App'x 530, 532 (5th Cir. 2011) (unpublished opinion) (per curiam). The same holds true in other circuits. *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot. v.*

Bruning, 455 F.3d 859, 866-67 (8th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see also Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (applying rational basis scrutiny to classification based on sexual orientation). *But see SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (applying heightened scrutiny to *Batson* challenges based on sexual orientation).

Furthermore, neither *Windsor*, *Lawrence*, nor *Romer* supports heightened scrutiny for legislation governing marriage. *Romer* expressly applied rational basis scrutiny, while *Lawrence* and *Windsor* implied the same. *Romer*, 517 U.S. at 631-32; *Lawrence*, 539 U.S. at 578; *Windsor*, 133 S. Ct. at 2696. In *Windsor*, the Court invalidated Section 3 of DOMA as an "unusual deviation from the usual tradition of *recognizing and accepting state definitions of marriage*," 133 S. Ct. at 2693 (emphasis added), which required analyzing whether DOMA was motivated by improper animus. It further found that "no legitimate purpose" saved the law—a hallmark of rational basis review. *Id.* at 2696. There is nothing about Texas's adherence to the traditional definition of marriage—which has prevailed since before statehood—that either targets sexual orientation or constitutes an "unusual

deviation from tradition." Until the past decade, every State in the Union adhered to this same traditional definition of marriage.

In 2005, to be sure, voters affirmed that definition through a constitutional amendment, but recent political affirmation of longstanding law and tradition does not invite heightened scrutiny that would not otherwise apply. Plaintiffs challenge both Article I, Section 32 of the Texas Constitution and its corresponding statutes. A fundamental problem for Plaintiffs is that because traditional marriage is historically legitimate, a recent legislative or popular choice to reaffirm that definition via constitutional amendment cannot be illegitimate. Again, the Supreme Court in *Windsor* examined the motivations behind Section 3 of DOMA not because it adhered to traditional marriage, but because it was an "unusual deviation from the usual tradition" of deferring to state marriage definitions. *Windsor*, 133 S. Ct. at 2693.

Given the benign purposes of traditional marriage and the lack of any "unusual deviations" at work, the motivations behind any particular recent perpetuation of the status quo are irrelevant. Otherwise States adhering to traditional marriage could face different litigation outcomes depending on the record of recent public debate. The meaning of the Constitution surely does not vary from one State to another. The legitimate basis for traditional marriage is what matters, not recent debates over whether to adhere to it.

II. The Concept of Traditional Marriage Embodied in the Laws of Thirty-One States Satisfies Rational Basis Review

Because traditional marriage laws do not impinge a fundamental right or burden a suspect class, the proper test under the federal due process and equal protection clauses is rational basis review. With rational basis review, courts must examine the issue from the State's perspective, not the challenger's perspective, and the challenged law benefits from a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). The laws must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" between opposite-sex couples and same-sex couples. *See id.* at 320 (quoting *FCC v. Beach Commc'ns, Inc*., 508 U.S. 307, 313 (1993)). The exclusive capacity and tendency of heterosexual intercourse to produce children, and the State's need to ensure that those children are cared for, provides that rational basis.

A. The definition of marriage is too deeply imbedded in our laws, history, and traditions for a court to hold that adherence to that definition is illegitimate

As an institution, marriage has always and everywhere in our civilization enjoyed the protection of the law. Until recently, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). The Supreme Court has observed the longstanding importance of traditional marriage in its substantive due process

jurisprudence, recognizing marriage as "the most important relation in life," and as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888). The Court recognized the right "to marry, establish a home and bring up children" as a central component of liberty protected by the Due Process Clause, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), marriage was described as "fundamental to the very existence and survival of the race."

All of these pronouncements, recognizing the procreative function of marriage and family, implicitly contemplate and confirm the validity of the historic definition of marriage. *See Bostic*, 2014 WL 3702493 at *18 (Niemeyer, J., dissenting) (dismissing the inclusion of same-sex marriage within the traditional definition of marriage as "linguistic manipulation"). Consequently, it is utterly implausible to suggest, as the legal argument for same-sex marriage necessarily implies, that States long-ago invented marriage as a tool of invidious discrimination based on same-sex love interest. Another rationale for state recognition of traditional marriage must exist, and it is the one implied by *Maynard*, *Meyer*, and *Skinner*: to encourage potentially procreative couples to raise children produced by their sexual union together. *See id.* at *24 ("[W]hen the Supreme Court has recognized, through the years, that the right to marry is a

fundamental right, it has emphasized the procreative and social ordering aspects of traditional marriage.").

B. States recognize opposite-sex marriages to encourage responsible procreation, and this rationale does not apply to same-sex couples

Civil marriage recognition arises from the need to protect the only procreative sexual relationship that exists and to make it more likely that unintended children, among the weakest members of society, will be cared for. Rejecting this fundamental rationale undermines the existence of *any* legitimate state interest in recognizing marriages.

1. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships

Civil recognition of marriage historically has not been based on state interest in adult relationships in the abstract. Marriage was not born of animus against homosexuals but is predicated instead on the positive, important, and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. It is no exaggeration to say that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner*, 316 U.S. at 541.

Traditional marriage protects a norm where sexual activity that *can* beget children should occur in a long-term, cohabitive relationship. *See, e.g.*, *Hernandez*

v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677 (Tex. App. 2010) ("The state has a legitimate interest in promoting the raising of children in the optimal familial setting. It is reasonable for the state to conclude that the optimal familial setting for the raising of children is the household headed by an opposite-sex couple.").

States have a strong interest in supporting and encouraging this norm. Social science research shows that children raised by both biological parents in low-conflict, intact marriages are at significantly less risk for a variety of negative problems and behaviors than children reared in other family settings. "[C]hildren living with single mothers are five times more likely to be poor than children in two-parent households." Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 333 (New York: Crown Publishers 2006). Children who grow up outside of intact marriages also have higher rates of juvenile delinquency and crime, child abuse, emotional and psychological problems, suicide, and poor academic performance and behavioral problems at school. *See, e.g.*, Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 783-87 (2002); Lynn D. Wardle, *The Fall of Marital*

Family Stability & The Rise of Juvenile Delinquency, 10 J.L. & Fam. Stud. 83, 89-100 (2007).

Through civil recognition of marriage, society channels sexual desires capable of producing children into stable unions that will raise those children in the circumstances that have proven optimal. Gallagher, *supra*, at 781-82. Traditional marriage provides the opportunity for children born within it to have a biological relationship to those having original *legal* responsibility for their well-being, and accordingly is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget.

The district court erroneously concluded that "[t]he procreation argument . . . fails" because it "threatens the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating" and that "[s]ame-sex marriage does not make it more or less likely that heterosexuals will marry and engage in activities that can lead to procreation." *De Leon*, 975 F. Supp. 2d at 654 (citation omitted). The fact that non-procreating opposite-sex couples may marry does not undermine marriage as the optimal procreative context. *See Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (confirming marriage "as a protected legal institution primarily because of societal values associated with the propagation of the human race . . . even though married couples are not required to become parents and even though

some couples are incapable of becoming parents and even though not all couples who produce children are married").

Even childless opposite-sex couples reinforce and exist in accord with the traditional marriage norm. "By upholding marriage as a social norm, childless couples encourage others to follow that norm, including couples who might otherwise have illegitimate children." George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581, 602 (1999).

Besides, it would obviously be a tremendous intrusion on individual privacy to inquire of every couple wishing to marry whether they intended to or could procreate. States are not required to go to such extremes simply to prove that the purpose behind civil recognition of marriage is to promote procreation and child rearing in the traditional family context.

Nor does the ideal of combining the biological with the legal disparage the suitability of alternative arrangements where non-biological parents have legal responsibility for children. "Alternate arrangements, such as adoption, arise not primarily in deference to the emotional needs or sexual choices of adults, but to meet the needs of children whose biological parents fail in their parenting role." Gallagher, *supra*, at 788. The State may rationally conclude that, all things being equal, it is better for the natural parents to also be the legal parents, and establish civil marriage to encourage that result. *See Hernandez*, 855 N.E.2d at 7.

Moreover, unlike opposite-sex couples, the sexual activity of same-sex couples implies no unintentional pregnancies. Whether through surrogacy or reproductive technology, same-sex couples can become biological parents only by deliberately choosing to do so, requiring a serious investment of time, attention, and resources. *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005). Consequently, same-sex couples do not present the same potential for unintended children, and the State does not necessarily have the same need to provide such parents with the incentives of marriage. *Id.* at 25; *see also In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677 ("Because only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage.").

In brief, the mere existence of children in households headed by same-sex couples does not put such couples on the same footing as opposite-sex couples, whose general ability to procreate, even unintentionally, legitimately gives rise to state policies encouraging the legal union of such sexual partners. The State may rationally reserve marriage to one man and one woman to enable the married persons—in the ideal—to beget children who have a natural and legal relationship to each parent and serve as role models of both sexes for their children.

2. Courts have long recognized the responsible procreation purpose of marriage

From the very first legal challenges to traditional marriage, courts have refused to equate same-sex couples with opposite-sex couples. In *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court observed that limiting marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Id.*

Marriage exists "to encourage 'responsible procreation' by opposite-sex couples." *Morrison*, 821 N.E.2d at 29. This analysis has been dominant in our legal system since the first same-sex marriage claims emerged over forty years ago and should continue to carry the day. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818-19 (11th Cir. 2004); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1015-16 (D. Nev. 2012); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1112-13 (D. Haw. 2012); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *aff'd in part, vacated in part*, 477 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004); *Adams v. Howerton*, 486 F. Supp.

1119, 1124 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. App. 2010); *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 982-83 (Wash. 2006) (en banc); *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 463- 65 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (opinion of Ferren, J.); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

Accordingly, state and federal courts have also rejected the theory that restricting marriage to opposite-sex couples evinces unconstitutional animus toward homosexuals as a group. *Standhardt*, 77 P.3d at 463-65 ("Arizona's prohibition of same-sex marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 680 (rejecting argument that Texas laws limiting marriage and divorce to opposite-sex couples "are explicable only by class-based animus"). The plurality in *Hernandez* observed that "the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind." *Hernandez*, 855 N.E.2d at 8. As those judges explained, "[t]he idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in

any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Id.*

The Fourth and Tenth Circuits admittedly have recently broken away from the widespread judicial acceptance of the responsible procreation theory, but they have done so under the narrow tailoring requirement of strict scrutiny. *See Bostic*, 2014 WL 3702493 at *14 (holding that Virginia's traditional marriage definition is "woefully underinclusive" because it permits infertile opposite-sex couples, but not same-sex couples, to marry); *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *22 (10th Cir. June 25, 2014) ("Such a mismatch between the class identified by a challenged law and the characteristic allegedly relevant to the state's interest is precisely the type of imprecision prohibited by heightened scrutiny."); *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847, at *6 (10th Cir. July 18, 2014) (same).

Precise fit is ordinarily irrelevant to rational basis analysis, however. Since same-sex marriage is not a fundamental right, *see* Part I.A., *supra*, and traditional marriage definitions are not subject to any heightened scrutiny, *see* Part I.B., *supra*, the State is not required to draw its marriage definition lines so tightly to exclude non-procreative opposite-sex couples. Regardless, neither the Fourth Circuit nor the Tenth Circuit ever identified an alternative plausible, coherent *state*

justification for marriage of any type. To be sure, they identified personal interests in marriage, such as "unparalleled intimacy, companionship, emotional support, and security." *Bostic*, 2014 WL 3702493 at *16; *accord Kitchen*, 2014 WL 2868044 at *15. Having identified mutual dedication as one of the central *incidents* of marriage, however, these opinions do not explain why the State should care about that commitment in a sexual context any more than it cares about other voluntary relationships.

III. The District Court Failed to Address the Proper Rational Basis Issue and Offered No Limiting Principle of Marriage

The district court's arguments against the traditional marriage definition suffer from at least two incurable vulnerabilities. First, it insists that the State explain how *excluding* same-sex couples from marriage advances legitimate state interests. *De Leon*, 975 F. Supp. 2d at 660 ("[The State] failed to identify any rational . . . reason that is served by denying same-sex couples the fundamental right to marry."). This formulation of the issue, however, improperly presupposes a right to marriage recognition. With no fundamental right as the starting point, there is no "exclusion" that requires explaining. Second, neither the district court nor Plaintiffs ever explain why secular civil society has any interest in recognizing marriage as a special status or offer defensible definitions of marriage as a finite set of relationships.

A. By casting the issue as a matter of government's exclusion of same-sex couples rather than government's unique interest in opposite-sex couples, the district court defies the rational basis standard

States have compelling interests in the benefits afforded to the institution of marriage. Rather than recognize that these compelling interests—namely, to encourage potentially procreative couples to stay together for the sake of offspring produced by their sexual union—simply do not extend to same-sex couples (which would have ended the constitutional discussion) the court imposed a different test. Rather than focus on whether extending marriage benefits to heterosexual couples serves a legitimate governmental interest, the district court focused on whether it was permissible to "den[y] same-sex couples the benefits, dignity and value of celebrating marriage and having their out-of-state marriages recognized." *De Leon*, 975 F. Supp. 2d at 656.

This formalism equates with heightened scrutiny, not rational basis. Because no fundamental right to same-sex marriage exists (*see* Part I.A., *supra*), the constitutional question can have nothing whatever to do with denying same-sex couples "the legal, social, and financial benefits" of marriage, *id.* at 659, which inherently *presupposes* the existence of a right to such benefits. Shorn of any pre-existing right to marital recognition, the plaintiffs' "substantive" due process argument is reduced to nothing more than a general right to claim government benefits. It is no more rigorous than asking whether a State has a legitimate

interest in not recognizing *any* group, including carpools, garden clubs, bike-to-work groups, or any other associations whose existence might incidentally benefit the State, but whom the State may nonetheless choose not to recognize.

For purposes of equal protection, the lack of a fundamental right (or suspect class) requires a court to address whether there is a legitimate reason for treating two classes (same-sex couples and opposite-sex couples) differently. It is therefore critical to understand, in the first instance, *why* a State grants marriage recognition to opposite-sex couples before evaluating the comparative legitimacy of doing so without also granting the same recognition and benefits to anyone else, including same-sex couples. And when the core reason for recognizing traditional marriage (*i.e.*, ameliorating the frequent consequences of heterosexual intercourse, namely the unintended issuance of children) has no application to same-sex couples, there is a legitimate reason for government to recognize and regulate opposite-sex relationships but not same-sex relationships. *See Bostic*, 2014 WL 3702493 at *27 (Niemeyer, J., dissenting) (Recognizing opposite-sex couples, but not same-sex couples, "is no different from the subsidies provided in other cases where the Supreme Court has upheld line-drawing, such as Medicare benefits, or veterans' educational benefits[.]" (citations omitted)).

The rational basis test requires that courts examine the issue from the State's perspective, not the challenger's perspective. *See Johnson v. Robison*, 415 U.S.

361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."). The court below formalistically demanded a reason to deny access to a predetermined set of benefits. But this inquiry asks why the State may deprive a citizen of an *a priori* entitlement, and it accordingly amounts to a rejection of rational-basis review, not an application of it.

B. The district court's new definition of marriage contains no principle limiting the relationships that can make claims on the State

In light of the inability of same-sex couples to procreate, one would expect those rejecting the traditional definition of marriage to propose a new rationale for civil marriage that justifies extending it to same-sex couples. Unfortunately—but also unsurprisingly—neither Plaintiffs nor the court below have offered any meaningful alternative rationale or definition of State-recognized marriage. The district court observed that "same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners." *De Leon*, 975 F. Supp. 2d at 653 (quoting *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010)). It then declared that any "public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond" is entitled to marriage

recognition. *Id*. at 659 (quoting *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202-03 (D. Utah 2013)).

This proposal for redefinition, however, in no way explains why secular civil society has any interest in recognizing or regulating marriage. Nothing in the district court's characterization inherently requires a sexual, much less procreative, component to the marriage relationship. The district court speaks of "an intimate and sustaining emotional bond," but never says why that—or exclusivity—matters to the State. If the desire for social recognition and validation of self-defined "intimate" relationships are the bases for civil marriage, no adult relationships can be excluded *a priori* from making claims upon the government for recognition. *See Bostic*, 2014 WL 3702493 at *25 (Niemeyer, J., dissenting) ("The plaintiffs also largely ignore the problem . . . that [the] liberty [they seek] would also extend to individuals seeking state recognition of other types of relationships that States currently restrict, such as polygamous or incestuous relationships."). A brother and sister, a father and daughter, an aunt and nephew, business partners, or simply two friends could decide to live with each other and form a "family" based on their "intimate and sustaining emotional bond," even if not sexual in nature—indeed *especially* if not sexual in nature—and demand "marriage" recognition.

For that matter, while the district court speaks approvingly of the ability to form an "exclusive relationship," *De Leon*, 975 F. Supp. 2d at 659, it offers no

justification for excluding groups of three or more, whether they include sexual intercourse or not. Such groups could equally form "families" with "intimate and sustaining emotional bond[s]." The implication of the court's reasoning is that States would be required as a matter of federal constitutional law to recognize all such relationships as "marriages" if the parties so desired. Once the link between marriage and responsible procreation is severed and the commonsense idea that children are optimally raised in traditional intact families rejected, there is no fundamental reason for government to prefer couples to groups of three or more.

It is no response to say that the State *also* has an interest in encouraging those who acquire parental rights without procreating (together) to maintain long-term, committed relationships for the sake of their children. Such an interest is not the same as the interest that justifies marriage as a special status for sexual partners *as such*. Responsible *parenting* is not a theory supporting marriage for same-sex couples because it cannot answer two critical questions: Why two people? Why a sexual relationship?

Marriage is not a device traditionally used simply to acknowledge acceptable sexuality, living arrangements, or parenting structures. It is a means to encourage and preserve something far more compelling and precise: the relationship between a man and a woman in their natural capacity to have children. Marriage attracts and then regulates couples whose sexual conduct may create

children in order to ameliorate the burdens society ultimately bears when unintended children are not properly cared for. Neither same-sex couples nor any other social grouping presents the same need for government involvement, so there is no similar rationale for recognizing such relationships.

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2014, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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