Case No. 14-50196

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLEOPATRA DELEON; 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 AMICUS CURIAE HELEN M. ALVARÉ IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL

Steven J. Griffin
MS Bar No. 103218
DANIEL COKER HORTON & BELL
4400 Old Canton Rd., Ste. 400
Jackson, MS 39211
Telephone: 601-914-5252 (Direct)
Facsimile: 601-969-1116

Attorney for Amicus Curiae

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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.

APPELLANTS:

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.

APPELLANTS' ATTORNEYS:

Jonathan F. Mitchell, Solicitor General
OFFICE OF THE SOLICITOR GENERAL FOR THE STATE OF TEXAS

Beth Ellen Klusmann
Michael P. Murphy
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF THE SOLICITOR GENERAL

APPELLEES:

Cleopatra DeLeon, Nicole Dimetman, Victor Holmes, Mark Phariss.

APPELLEES' ATTORNEYS:

Barry Alan Chasnoff
Jessica M. Weisel
Michael P. Cooley
Daniel McNeel Lane, Jr.
Andrew Forest Newman
Matthew Edwin Pepping
AKIN GUMP STRAUSS HAUER & FELD, L.L.P.

AMICI CURIAE IN SUPPORT OF APPELLANTS AND ATTORNEYS:

Amici Curiae:	*Attorneys:*
Concerned Women for America	Holly Carmichael BDO USA, LLP Steve Fitschen NATIONAL LEGAL FOUNDATION
Marriage Law Foundation	William Duncan
Professor Alan Hawkins Professor Jason Carroll	Robert Hogan

Becket Fund for Religious Liberty	Eric Rassback Asma Uddin
State of Indiana and Various other Amici States Supporting Marriage	Thomas M. Fisher SOLICITOR GENERAL OF INDIANA
Legal and Political Scholars	John Sauer CLARK & SAUER, LLC
National Association of Evangelicals The Ethics and Religious Liberty Commission of the Southern Baptist Convention The Church of Jesus Christ of Latter-Day Saints The United States Conference of Catholic Bishops The Lutheran Church-Missouri Synod	Alexander Dushku Shawn Gunnarson KIRTON & MCCONKIE
Professor Helen M. Alvaré	Steven J. Griffin DANIEL COKER HORTON & BELL
Alliance Defending Freedom	David Austin Robert Nimocks ALLIANCE DEFENDING FREEDOM
Concerned Women for America of Texas	Cecilia Wood
Social Science Professors	Jon R. Ker

Amicus Curiae Helen M. Alvaré has no parent corporation or any publicly held corporation that owns 10% or more of its stock.

/s/ Steven J. Griffin
Steven J. Griffin
Attorney of record for Amicus Curiae Helen M. Alvaré

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INTEREST OF AMICUS CURIAE[1]

Amicus Helen M. Alvaré is a law professor who has written extensively about family law, with a special focus on issues involving legislative and judicial treatment of marriage and parenting. She is committed to the public interest and in particular to the marriage and parenting circumstances of the least privileged Americans. Based upon her research into the history of constitutional marriage law and the evolving meaning of "marriage" among less-privileged Americans, she believes that states have a substantial interest in supporting and encouraging marriage among opposite-sex couples in order to highlight the procreative aspects of marriage, and in declining to extend similar recognition to same-sex couples.

SUMMARY OF ARGUMENT

The state has a substantial interest in *recognizing* and *encouraging* marriage between opposite-sex pairs of adults who commit to one another for exclusive, long-run, sexually intimate relationships, on the grounds of these pairs' intrinsically procreative capacity, and their fitness for childrearing. At the same time, the state has a substantial state interest in disclaiming a *similar* interest in same-sex pairs of adults who wish to commit to exclusive, long-run, sexually intimate relationships, but who explicitly deny the link between marriage and

[1] This brief is filed with the consent of all parties. No party's counsel authored the brief in whole or in part, and no one other than the amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

children, and who seek to portray marriage as merely a "capstone" for adults' emotional connection. To hold otherwise would not only undercut the state's important interests in marriage, but would undermine the common good and perpetuate a "retreat from marriage" that is already apparent among the most vulnerable Americans.

The Supreme Court has repeatedly described the state's interests in marriage as the interweaving of three benefits to society: (1) stable commitment between intimate, opposite-sex pairs of adults, (2) the procreation and rearing of children, and (3) the formation of a decentralized, democratic society. These holdings derive from historical observations about the shape and functions of the marital family. In the words of a leading expert on the history of marriage in Western law:

> For nearly two thousand years, the Western legal tradition reserved the legal category of marriage to monogamous, heterosexual couples who had reached the age of consent, who had the physical capacity to join together in one flesh, and whose joining served the goods and goals of procreation, companionship and stability at once.[2]

This "core understanding of the form and function of sex and marriage" appeared not only in various religious doctrines, but also in the works of the Greek Platonists and Aristotelians, Roman jurists, and Enlightenment philosophers.[3]

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[2] John Witte, Jr., *Response to Mark Strasser, in Marriage and Same-Sex Unions* 43, 45 (Lynn Wardle et al., eds., 2003).
[3] *Id*. at 45–46.

The wisdom of the Supreme Court's precedents recognizing the states' interests in childbirth, childrearing, and societal stability is today more apparent than ever. New empirical studies reveal the consequences of diminishing the procreative aspects of marriage in favor of adults' interests.

In the United States, especially over the last 50 years, the links between sex, marriage, and procreation have weakened considerably in both law and culture, with repercussions for adults, children, and society as a whole. Marriage is understood less as the gateway to adult responsibilities, centered most often upon the needs of children, and more as the "capstone" for establishing a "soulmate" relationship with another adult.

The harmful consequences of this adult-centered understanding of marriage have not been equally distributed across society. Rather, the most vulnerable Americans—those without a college education, the poor, and minority groups—have suffered more: they marry less, divorce more, experience lower marital quality, and have far more nonmarital births. Both adults and children suffer, as does the social fabric generally, with the "marriage gap" acting as a major engine of social inequality.

Plaintiffs ask this Court to declare that Texas has no interest in the procreative aspects of marriage generally: bearing and rearing biologically related children. They ask the Court (and Texas) to re-frame marriage simply as the

government's and society's stamp of approval for two persons' mutual emotional and romantic attachments. Yet the new understanding of marriage advocated by Plaintiffs is dangerous, particularly for under-privileged Americans, because it is closely associated in a substantial body of literature with the retreat from marriage among the poor, the less-educated, and minority groups. States have a strong interest in affirming opposite-sex marriage, without any animus toward gays and lesbians, in order to preserve the vital link between sex, marriage, and children, and to avoid further harm to the common good and rupture of the social fabric between the privileged and less-privileged.

ARGUMENT

I. The Supreme Court has regularly recognized with approval the importance of states' interests in the procreative aspects of opposite-sex marriage.

The Supreme Court has written a great deal on the nature of the states' interests in the context of evaluating state laws affecting entry into or exit from marriage, or concerning parental rights and obligations. Typically, these statements recognize that states are vitally interested in marriage because marriage furthers the common good by affording advantages not only to adults but also to children and to the larger society. Children replenish communities, and communities benefit when children are reared by their biological parents because those parents best assist children to become well-functioning citizens. The Court

does not give special attention to adults' interests or accord them extra weight. Nor does the Court vault the interests of some children over the interests of all children generally.

The following subsections consider the various manners in which the Supreme Court has discoursed approvingly about marriage and parenting as expressing states' interwoven interests in the flourishing of adults, children, and society.

A. States have a substantial interest in the birth of children.

One central theme in the Supreme Court's cases discussing marriage focuses on the importance of perpetuating the next generation of citizens. In the case refusing to allow polygamy on the grounds of the Free Exercise Clause, *Reynolds v. United States*, the Court explained states' interests in regulating marriage with the simple declaration: "Upon [marriage] society may be said to be built."[4] Nearly 100 years later in *Loving v. Virginia*, striking down a state's anti-miscegenation law, the Court referred to marriage as "fundamental to our very existence and survival," necessarily endorsing the role of marriage in propagating society through childbearing.[5]

[4] 98 U.S. 145, 165 (1879).
[5] 388 U.S. 1, 12 (1967).

Even in cases where *only* marriage or childbearing was at issue, but not both, the Court has referred to "marriage and childbirth" together in the same phrase, nearly axiomatically. The following cases illustrate:

- In *Meyer v. Nebraska*, which vindicated parents' constitutional right to have their children instructed in a foreign language, the Court referred not merely to parents' rights to care for children, but to citizens' rights "to marry, establish a home and bring up children."[6]
- In *Skinner v. Oklahoma ex rel. Williamson*, concerning a law punishing certain classifications of felons with forced sterilization, the Court opined: "Marriage and procreation are fundamental to the very existence and survival of the race."[7]
- In *Zablocki v. Redhail*, which struck down a Wisconsin law restricting marriage for certain child support debtors, the Court wrote: "[I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[8] As in *Loving*, *Zablocki* reiterated that marriage is

[6] 262 U.S. 390, 399 (1923).
[7] 361 U.S. 535, 541 (1942).
[8] 434 U.S. 374, 386 (1978).

"fundamental to our very existence and survival,"[9] and recognized the right to "deci[de] to marry and raise the child in a traditional family setting."[10]

- The 1977 opinion in *Moore v. City of East Cleveland*, announcing a blood-and-marriage-related family's constitutional right to co-reside, nonetheless referenced the procreative aspect of family life stating: "[T]he institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[11]
- Similarly, in *Parham v. J.R.*, a case treating parents' rights to direct their children's health care, the Court stated: "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."[12]

B. States have substantial interest in the way marriage socializes children.

A second prominent theme in the Supreme Court's cases touching upon marriage is the unique importance of the marital family for forming and educating citizens for the continuation of a free, democratic society.

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[9] *Id.* at 383.
[10] *Id*. at 386.
[11] 431 U.S. 494, 503-04 (1977).
[12] 442 U.S. 584, 602 (1979).

Preliminarily, in cases in which natural parents' interests in directing children's upbringing have conflicted with the claims of another, the Court has approvingly noted the importance of the bond between parents and their natural children. This is found in its observations that states presume that biological parents' "natural bonds of affection" lead them to make decisions for their children that are in the children's best interests. Statements in this vein have been made in *Parham v. J.R.* ("historically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children"[13]), in *Smith v. Organization of Foster Families for Equality & Reform* (families' "blood relationship" forms part of the "importance of the familial relationship, to the individuals involved and to the society"[14]), and in the "grandparents' rights" case *Troxel v. Granville* ("there is a presumption that fit parents act in the best interests of their children"[15]).

Moreover, for over 100 years, the Supreme Court has reiterated the relationship between marriage and childrearing for the benefit of a functioning democracy. In *Murphy v. Ramsey*, for example, the Court opined:

> For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one

[13] *Id.* at 602.
[14] 431 U.S. 816, 844 (1977).
[15] 530 U.S. 57, 68 (2000).

> man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[16]

The 1888 decision of *Maynard v. Hill* referred to marriage as "having more to do with the morals and civilization of a people than any other institution," and thus marriage is continually "subject to the control of the legislature."[17] And in 1943, in the course of an opinion affirming parents' authority over their children within the limits of child labor laws, the Supreme Court explicitly linked good childrearing practices to a healthy society, saying: "A democratic society rests, for its continuance, upon the healthy well-rounded growth of young people into full maturity as citizens, with all that implies."[18]

Reflecting upon states' continual interest in marriage legislation, in a case concerning the affordability of divorce process, Justice Black's dissenting opinion (objecting to the expansion of the federal Due Process Clause) in *Boddie v. Connecticut* asserted that: "The States provide for the stability of their social order, for the good morals of all their citizens and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain and dissolve marriages."[19]

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[16] 114 U.S. 15, 45 (1885).
[17] 125 U.S. 190, 205 (1888).
[18] *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).
[19] 401 U.S. 371, 389 (1971) (Black, J., dissenting).

In the 1977 case in which the Supreme Court refused to extend equal parental rights to foster parents, the Court wrote about the relationships between family life and the common good, stating: "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, as well as from the fact of blood relationship."[20]

And in the 1983 single father's rights case, *Lehr v. Robertson*, the Court referenced the social purposes of the family explicitly in terms of states' legitimate interest in maintaining the link between marriage and procreation. Refusing to treat an unmarried father identically to a married father with respect to rights concerning the child, the Court wrote: "marriage has played a critical role . . . in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family."[21]

In summary, it is fair to conclude, upon a review of the Supreme Court's family law jurisprudence, that states' interests in the procreational aspects of

[20] *Org. of Foster Families*, 431 U.S. at 844 (citation omitted).
[21] 463 U.S. 248, 257 (1983).

marriage have been both recognized by the Court and affirmed to be not only legitimate, but essential to furthering the common good of society.

The Supreme Court's recent decision in *United States v. Windsor*[22] is not to the contrary. There, the majority did not devote even a single line of its opinion to any state's interests in marriage recognition. Instead, the Court disclaimed what it found to be the federal government's interest in directing states' policy on marriage, a subject within the states' "virtually exclusive province" and over which they "possess[] full power."[23] Stated differently, *Windsor* did not grapple with the states' interest in adopting one marriage policy over another, but rather "confined" its "opinion *and* its holding" to the federal government's interest in refusing to recognize a class of marriages deemed lawful in a minority of states.[24] *Windsor* thus does not undo the Supreme Court's persistent affirmation of states' interest in linking marriage to childbearing and childrearing.

C. The view of marriage advocated by Plaintiffs focuses on adult interests.

Undoubtedly the state also values adults' interests in marriage: adult happiness, mutual commitment, increased stability, and social esteem. Yet a view of marriage that focuses solely on these personal adult interests is incomplete and denies the Court's decisions affirming the states' interests in procreation and

[22] 133 S. Ct. 2675 (2013)
[23] *Id.* at 2691.
[24] *Id.* at 2696.

healthy childrearing by biological parents for the common good of society as a whole. It also risks institutionalizing, in law and culture, a notion of marriage that is at the core of an alarming "retreat from marriage" among disadvantaged Americans.

Same-sex marriage proponents take great pains to excise references to children when quoting the Supreme Court's family law opinions. Plaintiffs, for example, reference from *Loving v. Virginia* the language about marriage as a "vital personal right[] essential to the orderly pursuit of happiness by free men,"[25] while leaving out *Loving*'s immediately adjoining reference to marriage as the fount of society—"fundamental to our very existence and survival."[26] Perhaps the most egregious example of Plaintiffs' selectively quoting from the Supreme Court's opinions addressing marriage is their misuse of *Turner v. Safley*, the case in which the Court held that certain prisoners were required to have access to state-recognized marriage.[27] Plaintiffs cite *Turner* for the proposition that civil marriage is an "expression[] of emotional support and public commitment."[28] However, *Turner* explicitly acknowledged, in two ways, both the adults' *and* the procreative

[25]Pls.' Motion for Preliminary Injunction at 1, 15, *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (No. 13-00982), ECF No. 28.
[26] 388 U.S. at 12.
[27] 482 U.S. 78 (1987).
[28] Pls.' Motion for Preliminary Injunction at 45, *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (No. 13-00982), ECF No. 28.

interests in marriage. First, *Turner* concluded that adults' interests were only "elements" or "an aspect" of marriage,[29] and that marriage had other "incidents" that prisoners would eventually realize, referring specifically to consummation, *i.e.* heterosexual intercourse with a spouse.[30] Second, *Turner* distinguished the situation of prisoners who would someday be free, from that of prisoners who were imprisoned for life and thus were foreclosed from parenting children.[31] *Turner* noted that in *Butler v. Wilson*[32] the Supreme Court had summarily affirmed the case of *Johnson v. Rockefeller*,[33] in which inmates imprisoned for life were denied marriage, in part upon the rationale that they would not have the opportunity to procreate or rear children. Said the *Johnson* court: "In actuality the effect of the statute is to deny to Butler only the right to go through the formal ceremony of marriage. Those aspects of marriage which make it 'one of the basic civil rights of man'—cohabitation, sexual intercourse, and the begetting and raising of children—are unavailable to those in Butler's situation because of the fact of their incarceration."[34]

In reality, Plaintiffs ask this Court to insist that Texas enact and convey a *new* understanding of marriage. This new understanding would signify that what

[29] 482 U.S. at 95–96.
[30] *See id*. at 96.
[31] *Id.*
[32] 415 U.S. 953 (1974).
[33] 365 F. Supp. 377 (S.D.N.Y. 1973).
[34] *Id*. at 380 (citation omitted).

the state values about sexually intimate couples is their emotional happiness and willingness to commit to one another, exclusively, for a long time.[35] However, this understanding completely disregards the procreative aspects of marriage that the Supreme Court has recognized as vital to the common good. At the same time, it paints a picture of marriage closely associated with a retreat from marriage among the most vulnerable Americans.

Notably, proponents of same-sex marriage acknowledge the power of marriage laws to affect citizens' perceptions and behavior. Indeed, a change of perceptions and behaviors is precisely what Plaintiffs sought in bringing suit.[36]

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[35] Well-known same-sex marriage advocates urge a similar understanding of marriage. *See, e.g.*, Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, New Republic (Aug. 28, 1989, 1:00 AM), http://www.tnr.com/article/79054/here-comes-the-groom# (describing marriage as a "deeper and harder-to-extract-yourself from commitment to another human being"); *Talking about Marriage Equality With Your Friends and Family*, Human Rights Campaign, www.hrc.org/resources/entry /talking-about-marriage-equality-with-your-friends-and-family (last visited Jan. 24, 2013) (describing marriage as "the highest possible commitment that can be made between two adults").

[36] *See, e.g.*, Pls.' Motion for Preliminary Injunction at 1, 3, *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (No. 13-00982), ECF No. 28 (arguing that Texas' marriage laws "deem[] them unworthy to be married" and urging the district court to recognize that "governments must give all of its citizens' choice of spouses the 'same status and dignity'") (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013))); *id*. at 3 (arguing that courts are "uniquely charged to afford . . . Plaintiffs relief [because] '[u]nder our constitutional system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.'" (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940))).

Plaintiffs essentially urge that marriage *not* be understood to imply procreation or to further any social good beyond the purely personal interests of the spouses.

Indeed, only one group of children consistently features in Plaintiffs' and other same-sex marriage advocates' arguments: children currently reared in same-sex households. Plaintiffs claim that these children will be helped, indirectly, via the social approval that would flow to the same-sex partners in the children's household if their "parents" were married. Yet this children-based argument is flawed.

First, it is not at all clear that granting marriage to same-sex partners equates with bringing marriage into the lives of such children's "parents." It appears from at least one nationally representative sample of children who lived in same-sex households before the age of 18,[37] and a recent analysis of the U.S. Census,[38] that the vast majority of children—approximately 84%[39]—were conceived in heterosexual relationships and are presently living with one biological parent and that person's same-sex partner. Tremendous uncertainty, therefore, surrounds the

[37] Mark Regnerus, *How different are the adult children of parents who have same-sex relationships? Findings from the new family structures study*, 41 Soc. Sci. Research 752 (2012).

[38] Gary J. Gates, *Family Focus on . . . LGBT Families: Family formation and raising children among same-sex couples*, National Council on Family Relations Report, Issue FF51, 2011.

[39] Daphne Lofquist, *Same-Sex Couple Households*, American Community Survey Briefs, U.S. Census Bureau, Sept. 2011, *available at* http://www.census.gov/prod/2011pubs/acsbr10-03.pdf.

questions whether state recognition of same-sex marriage would bring "married parents" to a large number of children and whether social approbation would follow.

Second, the "jury is still out" on whether parenting in a same-sex household advances the state's critical interest in children's, and therefore society's, formation. Recently, a peer-reviewed journal issued the first nationally representative study of children reared in a same-sex household.[40] These children's outcomes across a host of emotional, economic and educational outcomes were diminished as compared with children reared by their opposite-sex parents in a stable marriage. The author of the study acknowledged that the question of causation remains unknown; however, the children's outcomes might indicate problems with same-sex parenting, or even problems with family structure instability, given that most children were conceived in a prior heterosexual relationship by one of the adults later entering a same-sex relationship. The latter possibility raises further questions about the overall stability of same-sex couples and about the role played by bisexuality. This is relevant to child well-being given

[40] *See* Mark Regnerus, *supra*.

that a consensus is emerging among social scientists that many poor outcomes for children might be explained by instability in their parents' relationships.[41]

Importantly, same-sex marriage proponents' attempt to redefine "marriage" to excise childbearing and childrearing comes at a time in history when new empirical data shows that childbearing and childrearing in marriage is threatened—a threat disproportionately visited upon the most vulnerable populations. States have responded to the data. In fact, over the past 20 years, the legislatures in all 50 states have introduced bills to reform their marriage and divorce laws to better account for children's interests in their parents' marriages.[42] The federal government has done the same via the marriage-promotion sections of the landmark "welfare reform" law passed in 1996 by bipartisan majorities and signed into law by President Clinton.[43] Furthermore, Presidents Bush and Obama, in particular, have promoted extensive federal efforts on behalf of marriage and fatherhood.[44]

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[41] Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 Law & Policy 87, 94 (2004).

[42] *See, e.g.*, Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 Fam. L.Q. 783, 790 (1999); Karen Gardiner et al., *State Policies to Promote Marriage: Preliminary Report*, The Lewin Group (Mar. 2002).

[43] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (1996).

[44] *See* Helen M. Alvaré, *Curbing Its Enthusiasm: U.S. Federal Policy and the Unitary Famil*y, 2 Int'l J. Jurisprudence Fam. 107, 121-24 (2011).

In sum, the Supreme Court has repeatedly supported the states' interests in childbearing, childrearing, and social stability that are advanced by opposite-sex marriages. That states may have ignored children's interests too much in the past is not a reason to prevent states from legislating to better account for both children's and society's empirically supported interests in marriage.

II. Redefining marriage in a way that de-links sex, marriage and children threatens to harm the most vulnerable Americans and exacerbate the "marriage gap" responsible for increasing levels of social inequality in America.

The disappearing of children's interests in marriage, both at law and in culture, and the vaulting of adults' emotional and status interests, are associated with a great deal of harm to the common good, particularly among the most vulnerable Americans. This, in turn, has led to a growing gap between the more and less privileged, threatening our social fabric. Recognizing same-sex marriage would confirm and exacerbate these trends. Consequently, states legitimately may wish to reconfirm their commitment to opposite-sex marriage and refuse to grant marriage recognition to same-sex couples.

Speaking quite generally, law and culture before the 1960s normatively held together sex, marriage, and children. Obviously, this was not true in the life of every citizen or family, but social and legal norms widely reflected it. In the ensuing decades, however, these links deteriorated substantially.

First, the link between sex and children weakened with the introduction of more advanced birth control technology and abortion, both of which came to the fore in the 1960s and were announced to be constitutional rights by the Supreme Court in the 1960s and 1970s. Then, the link between marriage and children was substantially weakened by the passage of no-fault divorce laws during the 1970s. The transcripts of debates concerning the uniform no-fault divorce law reveal the degree to which children's interests were minimized in favor of adult interests, sometimes with mistaken beliefs about children's resiliency and sometimes on the false assertion that most failing marriages were acrimonious such that divorce would benefit, not harm, children.[45]

New reproductive technologies further separated children from marriage and sex from children. Since the creation of the first "test tube baby" in 1978, which spawned a billion-dollar industry in the United States, neither the federal government nor any states have passed meaningful restraints on such practices. There are today, still, almost no laws affecting who may access these technologies or obtain "donor" sperm, oocytes, or embryos.[46] This persists despite troubling

[45] *See* Helen M. Alvaré, *The Turn Toward the Self in Marriage: Same-Sex Marriage and its Predecessors in Family Law*, 16 Stan. L. & Pol'y Rev. 101, 137-53 (2005).

[46] *See* The President's Council on Bioethics, *Reproduction and Responsibility: The Regulation of New Biotechnologies* (2003).

indications that "donor children" experience an enhanced risk of physical and psychological difficulties.[47]

Interwoven with these developments is the declining stigma of nonmarital sex, and even nonmarital pregnancies and births, which further separate sex from marriage.

The effects of these legal and social developments are not evenly distributed across all segments of the population. A robust and growing literature indicates that more privileged Americans—*i.e*. non-Hispanic Whites, and Americans with a college education—are economically and educationally pulling away from other social classes to an alarming degree.[48]

In the words of prominent sociologists W. Bradford Wilcox and Andrew J. Cherlin:

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[47] *See* Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults Conceived through Sperm Donation*, Commission on Parenthood's Future (2010); Jennifer J. Kurinczuk & Carol Bower, *Birth defects in infants conceived by intracytoplasmic sperm injection: an alternative explanation*, 315 Brit. Med. J. 1260 (1997).

[48] *See, e.g*., *The Decline of Marriage and Rise of New Families*, Pew Research Center (Nov. 18, 2010), http://www. pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/; Richard Fry, *No Reversal in Decline of Marriage*, Pew Research Center (Nov. 20, 2012), http://www.pewsocialtrends.org/2012/11/20/no-reversal-in decline-of-marriage/; Pamela J. Smock & Wendy D Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 Law & Pol'y 87 (2004); The National Marriage Project and the Institute for American Values, *When Marriage Disappears: The Retreat from Marriage in Middle America*, State of Our Unions (2010), http://stateofourunions.org/2010/when-marriage-disappears.php (last visited Jan. 24, 2013).

> In the affluent neighborhoods where many college-educated American[s] live, marriage is alive and well and stable families are the rule . . . . [T]he divorce rate in this group has declined to levels not seen since the early 1970s. In contrast, marriage and family stability have been in decline in the kinds of neighborhoods that we used to call working class . . . . More . . . of them are having children in brittle cohabiting unions. . . . [T]he risk of divorce remains high. . . .[49]

By the numbers, Americans with no more than a high school degree, African Americans, and some groups of Hispanic Americans, cohabit more, marry less often, divorce more, have lower marital quality, and have more nonmarital births (sometimes by very large margins) than those possessing a college degree. A few comparisons portray the situation.

- Among Americans with a college degree, the nonmarital birth rate is a mere 6%. Among those with only a high school degree, the rate is 44%, and among those without a high school degree, the rate is 54%.[50]
- Poor men and women are only half as likely to marry as those with incomes at three or more times the poverty level.[51]
- The children of these less-privileged groups are far less likely to be living with both their mother and their father, more likely to have a

[49] W. Bradford Wilcox & Andrew J. Cherlin, *The Marginalization of Marriage in Middle America*, Brookings, Aug. 10, 2011, at 2.
[50] *Id*.
[51] Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage among the Disadvantaged*, The Future of Children, Fall 15(2) 2005, at 117-18.

> nonmarital pregnancy, and less likely to graduate college or obtain adequate employment as an adult.[52]

Experts analyzing this retreat from marriage have considered the impact of economic factors, such as the decline in adequately paying work for men, and a belief by both sexes that a man should have a stable job before entering marriage. But economic factors cannot explain the entire retreat, given that prior severe economic downturns in the United States were not accompanied by the same retreat from marriage or increases in nonmarital childbearing.[53]

Evaluating this issue, Law professor Amy Wax has observed that "the limited research available suggests that men who were once regarded as marriageable and were routinely married—including many men with earnings in the lower end of the distributions—are now more likely to remain single than in the past." Furthermore, she points out that even though marriage brings certain gains to any two persons—two incomes, economies of scale, divisions of labor,

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[52] Wilcox & Cherlin, *supra*, at 6; The National Marriage Project, *supra*, at 10–11, 17 (citing Ron Haskins & Isabel Sawhill, *Creating an Opportunity Society* (2009); Nicholas H. Wolfinger, *Understanding the Divorce Cycle: The Children of Divorce in Their Own Marriages* (2005)).

[53] *See* Wilcox & Cherlin, *supra*, at 3.

and gains from cooperation—the less advantaged in society appear unmoved by such benefits, for themselves or for their children.[54]

What best explains these trends among the disadvantaged are changes in norms regarding the relationships between sexual activity, births and marriage. Among these, researchers note legal changes emphasizing parenthood but not marriage (*e.g.*, strengthened child support enforcement laws), and emphasizing individual rights as distinguished from marriage. They also point to the declining stigma of nonmarital sex, particularly among the lesser educated, and the availability of the pill for separating sex and children.[55] As Professor Cherlin has noted, law and culture have made living arrangements other than marriage more socially acceptable and practically feasible.[56]

Among the lesser privileged, a love relationship and stable employment for the man are the precursors for marriage. The disadvantaged are far less concerned than the more privileged about having and raising children outside of marriage.

Other evidence shows that this disconnect between marriage and children is becoming characteristic not only of the disadvantaged, but also of the "millennial

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[54] Amy L. Wax, *Diverging family structure and "rational" behavior: the decline in marriage as a disorder of choice, in Research Handbook on the Economics of Family Law* 29-30, 31, 33 (Lloyd R. Cohen & Joshua D. Wright, eds., 2011).
[55] Wilcox & Cherlin, *supra*, at 3-4.
[56] Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, The Future of Children, Fall 15(2) 2005, at 41.

generation."[57] Professor Cherlin confirms that among young adults who are not necessarily poor, the idea of "soulmate" marriage is spreading. 94% of never-married Millennials report that "when you marry, your [sic] want your spouse to be your soul mate, first and foremost." They hope for a "super relationship," an "intensely private, spiritualized union, combining sexual fidelity, romantic love, emotional intimacy, and togetherness."[58]

Emerging evidence concerning both the young and the less-privileged indicates that marriage—once the gateway to adulthood and parenting—is viewed by the less-privileged as a "luxury good." In the words of sociologists Kathryn Edin and Joanna Reed: "Marriage has become a luxury, rather than a necessity, a status symbol in the true meaning of the phrase." These authors explain that the socially disadvantaged place very high expectations upon relationship quality within marriage. "If this interpretation is correct, the poor may marry at a lower rate simply because they are not able to meet this higher marital standard." And

[57] *See* Wendy Wang & Paul Taylor, *For Millennials, Parenthood Trumps Marriage*, Pew Research Center, 2 (Mar. 9, 2011), http://www.pewsocialtrends.org/2011/03/09/for-millennials-parenthood-trumps-marriage/ (on the question of a child's need for two, married parents, 51% of Millennials disagreed in 2008, compared to 39% of Generation Xers in 1997).

[58] Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. of Marriage & Fam. 848, 856 (2004).

there is a sense among the disadvantaged that marriage is reserved to those who have "arrived" financially.[59]

Analyzing the decline of stable marriage in this country, Professor Cherlin points to an emphasis on emotional satisfaction, romantic love and an "ethic of expressive individualism that emerged around the 1960s." There is a focus on purely personal bonds of sentiment, and the emotional satisfaction of spouses becomes an important criterion for marital success.[60] Professor Cherlin also observes that in the later 20th century, "an even more individualistic perspective on the rewards of marriage took root." It was about the "development of their own sense of self and the expression of their feelings, as opposed to the satisfaction they gained through building a family and playing the roles of spouse and parent. The result was a transition from the companionate marriage to what we might call the individualized marriage."[61]

If this is all marriage means, why then do people continue to marry at all? Professor Cherlin opines that they may be seeking what he calls "enforceable trust," a lowering of the risk that one's partner will renege on agreements.[62] Rather

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[59] Edin & Reed, *supra*, at 117, 121-22; *see also* Pamela J. Smock, *The Wax and Wane of Marriage: Prospects for Marriage in the 21st Century*, 66 J. of Marriage & Fam. 966, 971 (2004) ("[C]urrent thinking [is] . . . that our high expectations for marriage are part of what is behind the retreat from marriage").
[60] Cherlin, *The Deinstitutionalization of American Marriage*, *supra*, at 851.
[61] *Id*. at 852.
[62] *Id*. at 854.

than a foundation on which to build a family life, marriage becomes the "capstone" of a preexisting, emotionally close relationship, with the wedding as a "symbol" of the couple's financial status and of their level of self development.[63] Yet marriage as a symbol of personal achievement is often beyond the experience or reach of the lesser privileged. Expert literature thus confirms that shifting cultural norms about marriage and procreation, the weakening of institutional structures, and changes in notions of role responsibilities affect the least advantaged to a greater degree than the privileged.[64] Particularly for the disadvantaged, there is an "underappreciated role for traditional institutions in guiding behavior."[65] In short, they require the kind of robust, external affirmation about the importance of linking marriage and children that leading institutions such as the law can provide.

In fact, Professor Wax concludes that a "strong marriage norm" is an opportunity to "shape[] the habits of mind necessary to live up to its prescriptions, while also reducing the need for individuals to perform the complicated calculations necessary to chart their own course."[66] Of course, individuals' decisions will be influenced by individual characteristics and circumstances, but "nonetheless, by replacing a complex personal calculus with simple prudential

[63] *Id*. at 855, 857.
[64] *See*, *e.g*., Wax, *supra*, at 15, 59-60.
[65] *Id*. at 60.
[66] *Id*.

imperatives, a strong expectation of marriage will make it easier . . . for individuals to muster the restraint necessary to act on long-term thinking."[67]

A strong prescription in favor of marriage as the gateway to adult responsibilities and to caring for the next generation would therefore likely influence behavior in favor of bearing and rearing children by stably linked, biological parents, ready and able to prepare children for responsible citizenship. Simple rules and norms "place[] less of a burden on the deliberative capacities and will of ordinary individuals." If, however, individuals are left to guide sexual and reproductive choices in a culture of individualism, "people faced with a menu of options engage in a personal calculus of choice. Many will default to a local [short-term, personal gain] perspective."[68]

The "retreat from marriage" and marital childbearing affects not only individuals and their communities; there is evidence that its problematic effects on the common good are being felt even at the national level. Largely as a consequence of changes to family structure, including the intergenerational effects of the absence or breakdown of marriage, there is a growing income and wealth gap in the United States among the least educated, the moderately educated, and the college educated. According to a leading study of this phenomenon, family structure changes accounted for 50% to 100% of the increase in child poverty

[67] *Id*.
[68] *Id*. at 61.

during the 1980s, and for 41% of the increase in inequality between Americans from 1976 to 2000.[69] The National Marriage Project even suggests that "it is not too far-fetched to imagine that the United States could be heading toward a 21st century version of a traditional Latin American model of family life, where only a comparatively small oligarchy enjoys a stable married and family life."[70]

In conclusion, marriage historian John Witte Jr. has observed that:

> The new social science data present older prudential insights about marriage with more statistical precision. They present ancient avuncular observations about marital benefits with more inductive generalization. They reduce common Western observations about marital health into more precise and measurable categories. These new social science data thus offer something of a neutral apologetic for marriage.[71]

The purely personal notion of marriage that same-sex advocates are describing, and demanding from this Court and from the State of Texas, closely resembles the adult-centric view of marriage associated with the "retreat from marriage" among disadvantaged Americans. It would intrinsically and overtly separate sex and children from marriage, for every marriage and every couple and every child. It promotes a meaning of marriage that empties it of the procreative interests understood and embraced by Supreme Court precedents (and every prior

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[69] Molly A. Martin, *Family Structure and Income Inequality in Families With Children, 1976-2000*, 43 Demography 421, 423-24, 440 (2006).
[70] The National Marriage Project and the Institute for American Values, *supra*, at 17.
[71] John Witte, Jr., *The Goods and Goals of Marriage*, 76 Notre Dame L. Rev. 1019, 1070 (2001).

generation). Rather, as redefined by Plaintiffs, marriage would merely become a symbolic capstone and a personal reward, not a gateway to adult responsibilities, including childbearing, childrearing, and inculcating civic virtues in the next generation for the benefit of society as a whole.

Of course, it is not solely the fault of same-sex marriage proponents that we have come to a "tipping point" regarding marriage in the United States—where if the procreational aspects of marriage are not explicitly preserved and highlighted, additional harm will come upon vulnerable Americans and our social fabric itself. The historic institution of marriage was already weakened, likely emboldening same-sex marriage advocates to believe that a redefinition of marriage was only a step, not a leap, away. But in its essence, and in the arguments used to promote it, same-sex marriage would be the *coup de grâce* to the procreative meanings and social roles of marriage. It is hoped that the necessary movement for equality and nondiscrimination for gays and lesbians will choose a new path, and leave marriage to serve the crucial social purposes it is needed to serve.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court.

Dated: August 4, 2014

Respectfully submitted,

/s/ Steven J. Griffin .
Counsel for Amicus Curiae
Helen M. Alvaré

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: August 4, 2014

/s/ Steven J. Griffin
Steven J. Griffin
MS Bar No. 103218
Daniel Coker Horton & Bell
4400 Old Canton Rd., Ste. 400
Jackson, MS 39211
Telephone: 601-914-5252 (Direct)
Facsimile: 601-969-1116
Counsel for Amicus Curiae
Helen M. Alvaré

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Dated: August 4, 2014

/s/ Steven J. Griffin

Steven J. Griffin
MS Bar No. 103218
Daniel Coker Horton & Bell
4400 Old Canton Rd., Ste. 400
Jackson, MS 39211
Telephone: 601-914-5252 (Direct)
Facsimile: 601-969-1116
Counsel for Amicus Curiae
Helen M. Alvaré

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