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 AMICI CURIAE TEXAS VALUES & LOUISIANA FAMILY FORUM IN SUPPORT OF DEFENDANTS-APPELLANTS AND 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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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.

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Neither Amicus Curiae Texas Values nor Louisiana Family Forum has any parent corporation or any publicly held corporation that owns 10% or more of its stock.

s/David Austin R. Nimocks
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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Texas Values and Louisiana Family Forum ("LFF") seek to preserve and advance a culture where families prosper and every human life is valued. They promote their core values of faith, family, and freedom through policy research, public education, and grassroots mobilization. *Amici* believe that strong families are founded on the ideal of a lifelong marriage of one man and one woman, and are firmly committed to preserving marriage as an institution inherently linked to procreation and childrearing, one that connects children to their mothers and fathers, for the good of children and society as a whole. Because this case directly questions the constitutionality of Texas's sovereign decision to preserve marriage as the union between one man and one woman, *Amici* have a significant interest in responding to the constitutional claims that Plaintiffs assert. LFF has an additional interest in this matter, since a similar case, *Robicheaux, et al. v. Caldwell, et al.*, No. 2:13-cv-05090, is currently pending in the U.S. District Court for the Eastern District of Louisiana, and will very likely be brought before this Honorable Court soon.

Plaintiffs, and supporters of same-sex marriage in general, claim that states like Texas and Louisiana have no rational basis for affirming marriage as a

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

man-woman union. This brief debunks that claim by outlining the myriad rational—indeed compelling—bases for preserving marriage as the union of man and woman.

SUMMARY OF ARGUMENT

The People throughout the various States are engaged in an earnest public discussion about the meaning, purpose, and future of marriage. As a bedrock social institution, marriage has always existed to channel the presumptive procreative potential of man-woman relationships into committed unions for the benefit of children and society. Some now seek to redefine marriage from a gendered to a genderless institution, while many others sincerely believe that redefining marriage as a genderless institution would obscure its animating purpose and thereby undermine its social utility. The United States Constitution does not settle this important question about the definition of marriage, but rather permits the People to decide that domestic-relations issue for themselves.

Yet those who seek to redefine marriage as a genderless institution disagree, effectively asserting that the Constitution itself mandates genderless marriage and that the People have no say in deciding the weighty social, philosophical, political, and legal issues implicated by this public debate. But that view is mistaken. The Constitution has neither removed this question from the People nor settled this critical social-policy issue entrusted to the States. Indeed, because the Fourteenth

Amendment does not compel States to adopt a genderless-marriage regime, Texas may constitutionally retain marriage as a man-woman union.

Plaintiffs' constitutional arguments are foreclosed by a proper understanding of the enduring public purpose of marriage. History confirms that marriage owes its existence to society's vital interest in channeling the presumptively procreative potential of man-women relationships into committed unions for the benefit of children and society. Marriage is inextricably linked to the fact that man-woman couples, and only such couples, are capable of naturally creating new life together, therefore furthering, or threatening, society's interests in responsibly creating and rearing the next generation. That fact alone bars Plaintiffs' claims because Supreme Court precedent makes clear that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]" *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

Marriage laws have been, and continue to be, about serving society's child-centered purposes, like connecting children to their biological mother and father, and avoiding the negative outcomes often experienced by children raised outside a stable family unit led by their biological parents. Redefining marriage would transform the institution, thereby threatening its ability to serve those interests. Faced with these concerns, Texans are free to "shap[e] the destiny of their own

times," *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (quotation marks omitted), by affirming the man-woman marriage institution, believing that, in the long run, it will best serve the well-being of the State's children and society as a whole.

ARGUMENT

I. The Fourteenth Amendment Does Not Forbid the Domestic-Relations Policy Reflected in Texas's Marriage Laws.

A. The Public Purpose of Marriage in Texas Is to Channel the Presumptive Procreative Potential of Man-Woman Couples into Committed Unions for the Good of Children and Society.

Evaluating the constitutionality of Texas's Marriage Laws begins with an assessment of the government's interest in, or purpose for, those laws. The government's purpose for recognizing and regulating marriage is distinct from the many private reasons that people marry—reasons that often include love, emotional support, or companionship.

Indeed, from the State's perspective, marriage is a vital social institution that serves indispensable public purposes. As the Supreme Court has stated, marriage is "an institution more basic in our civilization than any other[,]" *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), "fundamental to the very existence and survival of the [human] race." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quotations omitted); *see also Loving v. Virginia*, 388 U.S. 1, 12 (1967). "It is an institution, in the maintenance of which . . . the public is deeply interested, for it is

the foundation of the family and of society[.]" *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

Throughout history, marriage as a man-woman institution designed to serve the needs of children has been ubiquitous, spanning diverse cultures, nations, and religions. Anthropologists have recognized that "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." Claude Levi-Strauss, *The View From Afar* 40-41 (1985); *see also* G. Robina Quale, *A History of Marriage Systems* 2 (1988) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies.").

Marriage as a public institution exists to channel sex between men and women into stable unions for the benefit of the children that result and, thus, for the good of society as a whole. Indeed, scholars from a wide range of disciplines have acknowledged that marriage is "social recognition . . . imposed for the purpose of regulation of sexual activity and provision for offspring that may result from it." Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 Soc'y 25, 26 (2004); *see also* W. Bradford Wilcox et al., *Why Marriage Matters* 15 (2d ed. 2005).

By channeling sexual relationships between men and women into committed settings, marriage encourages mothers and fathers to remain together and care for the children born of their union. Marriage is thus "a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." James Q. Wilson, *The Marriage Problem* 41 (2002); *see also* Kingsley Davis, *Introduction: The Meaning and Significance of Marriage in Contemporary Society*, *in Contemporary Marriage: Comparative Perspectives on a Changing Institution* 1, 7-8 (Kingsley Davis ed., 1985).

The origins of our law affirm this enduring purpose of marriage. William Blackstone wrote that the "principal end and design" of marriage is to create the "great relation[]" of "*parent and child*," and that the parent-child relation "is consequential to that of marriage." 1 William Blackstone, *Commentaries* *410. Blackstone further observed that "it is by virtue of this relation that infants are protected, maintained, and educated." *Id.*

Before the recent political movement to redefine marriage, it was commonly understood and accepted that the public purpose of marriage is to channel the presumptively procreative potential of sexual relationships between men and women into committed unions for the benefit of children and society. Certainly no

other purpose can plausibly explain why marriage is so universal or even why it exists at all. *See* Robert P. George et al., *What is Marriage?* 38 (2012).

B. *Windsor* Emphasizes the State's Authority to Define Marriage and Thus Supports the Propriety of Texas's Marriage Laws.

Three principles from the *Windsor* decision, which at its heart calls for federal deference to the States' marriage policies, directly support the right of Texans to define marriage as they have.

First, the central theme of *Windsor* is the right of States to define marriage for their community. *See, e.g.*, 133 S. Ct. at 2689-90 ("the definition and regulation of marriage[]" is "within the authority and realm of the separate States[]"); *id.* at 2691 ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations"); *id.* at 2692 (discussing the State's "essential authority to define the marital relation"). *Windsor* stated, in no uncertain terms, that the Constitution permits States to define marriage through the political process, extolling the importance of "allow[ing] the formation of consensus" when States decide critical questions like the definition of marriage:

> In acting first to recognize and then to allow same-sex marriages, New York was responding to the initiative of those who sought a voice in shaping the destiny of their own times. These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

Id. (quotation marks, alterations, and citation omitted); *see also id.* at 2693 (mentioning "same-sex marriages made lawful by the unquestioned authority of the States").

Second, *Windsor* recognized that federalism provides ample room for variation between States' domestic-relations policies concerning which couples may marry. *See id.* at 2691 ("Marriage laws vary in some respects from State to State."); *id.* (acknowledging that state-by-state marital variation includes the "permissible degree of consanguinity" and the "minimum age" of couples seeking to marry).

Third, *Windsor* stressed federal deference to the public policy reflected in state marriage laws. *See id.* at 2691 ("[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations[,]" including decisions concerning citizens' "marital status"); *id.* at 2693 (mentioning "the usual [federal] tradition of recognizing and accepting state definitions of marriage").

These three principles—that States have the right to define marriage for themselves, that States may differ in their marriage laws concerning which couples are permitted to marry, and that federalism demands deference to state marriage policies—lead to one inescapable conclusion: that Texans (no less than citizens in States that have chosen to redefine marriage) have the right to define marriage for

their community. Any other outcome would contravene *Windsor* by federalizing a definition of marriage and overriding the policy decisions of States like Texas that have chosen to maintain the man-woman marriage institution.

Moreover, Plaintiffs' reliance on *Windsor*'s equal-protection analysis is misplaced. *Windsor* repeatedly stressed DOMA's "unusual character"—its novelty—in "depart[ing] from th[e] history and tradition of [federal] reliance on state law to define marriage." 133 S. Ct. at 2692-93 (referring to this feature of DOMA as "unusual" at least three times). The Court reasoned that this unusual aspect of DOMA required "careful" judicial "consideration" and revealed an improper purpose and effect. *Id.* at 2692; *see also id.* at 2693 ("In determining whether a law is motived by an improper animus or purpose, discriminations of an unusual character especially require careful consideration.") (quotation marks and alterations omitted). Texas's Marriage Laws, in contrast to DOMA, are neither unusual nor novel intrusions into state authority, but a proper exercise of that power; for Texas, unlike the federal government, has "essential authority to define the marital relation[.]" *Id*. at 2692. And Texas's Marriage Laws are not an unusual departure from settled law, but a reaffirmation of that law; for they simply enshrine the definition of marriage that has prevailed throughout the State's history and that continues to govern in the majority of States. Unusualness thus does not plague Texas's Marriage Laws or suggest any improper purpose or unconstitutional effect.

Additionally, *Windsor* "confined" its equal-protection analysis and "its holding" to the federal government's treatment of couples "who are joined in same-sex marriages made lawful by the State." *Id.* at 2695-96. Thus, when discussing the purposes and effects of DOMA, the Court focused on the fact that the federal government (a sovereign entity without legitimate authority to define marriage) interfered with the choice of the State (a sovereign entity with authority over marriage) to bestow the status of civil marriage on same-sex couples. *See id.* at 2696 ("[DOMA's] purpose and effect [is] to disparage and to injure those whom the State, by its marriage laws, sought to protect"). But those unique circumstances are not presented here.

C. Rational-Basis Review Applies to Plaintiffs' Claims.

Equal-protection analysis requires the reviewing court to precisely identify the classification drawn by the challenged law. *See Califano v. Boles*, 443 U.S. 282, 293-94 (1979) ("The proper classification for purposes of equal protection analysis . . . begin[s] with the statutory classification itself."). By defining marriage as the union of man and woman, diverse societies, including Texas, have drawn a line between man-woman couples and all other types of relationships (including same-sex couples). This is the precise classification at issue here, and it is based on an undeniable biological difference between man-woman couples and same-sex couples—namely, the natural capacity to create children.

This biological distinction, as explained above, relates directly to Texas's interests in regulating marriage. And this distinguishing characteristic establishes that Texas's definition of marriage is subject only to rational-basis review, for as the Supreme Court has explained:

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441-42 (1985). Relying on this Supreme Court precedent, New York's highest court and the Eighth Circuit "conclude[d] that rational basis scrutiny is appropriate[]" when "review[ing] legislation governing marriage and family relationships[]" because "[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best." *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006); *see also Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006) (quoting *Cleburne*, 473 U.S. at 441).

Even if this relevant biological difference between man-woman couples and same-sex couples were characterized as a sexual-orientation-based distinction rather than the couple-based procreative distinction that it is, this Court, like many

others, has concluded that sexual orientation is not a suspect or quasi-suspect classification. *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) ("[N]either the Supreme Court nor [this court] has recognized sexual orientation as a suspect classification [or protected class]."). Rational-basis review thus applied here. *See Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 350 (5th Cir. 2013) *cert. denied*, 134 S. Ct. 1365 (U.S. 2014) (indicating that rational-basis review applies where a law does not infringe a fundamental right or distinguish based on a suspect or quasi-suspect classification).

D. Texas's Marriage Laws Satisfy Rational-Basis Review.

Rational-basis review constitutes a "paradigm of judicial restraint," under which courts have no "license . . . to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "A statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993) (quotation marks omitted); *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (noting that the challenged classification need not be "made with mathematical nicety") (quotation marks omitted). Thus, Texas's Marriage Laws "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" them. *Beach Commc'ns, Inc.*, 508 U.S. at 313. And because "marriage has always been, in our federal system, the

predominant concern of state government . . . rational-basis review must be particularly deferential" in this context. *Bruning*, 455 F.3d at 867.

1. Texas's Marriage Laws Further Compelling Interests.

By providing special recognition and support to man-woman relationships, the institution of marriage recognized by Texas seeks to channel potentially procreative conduct into stable, enduring relationships, where that conduct is likely to further, rather than harm, society's vital interests. The interests that Texas furthers through this channeling function are at least threefold: (1) providing stability to the types of relationships that result in unplanned pregnancies, thereby avoiding or diminishing the negative outcomes often associated with unintended children; (2) encouraging the rearing of children by both their biological mother and father; and (3) encouraging men to commit to the mothers of their children and jointly raise the children they beget. These interests promote the welfare of children and society, and thus they are not merely legitimate but compelling, for "[i]t is hard to conceive an interest . . . more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society[.]" *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004).

Unintended Children. Texas has a compelling interest in addressing the particular concerns associated with the birth of unplanned children. Nearly half of

all pregnancies in the United States, and nearly 70 percent of pregnancies that occur outside marriage, are unintended. Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 Contraception 478, 481 Table 1 (2011). Yet unintended births out of wedlock "are associated with negative outcomes for children." Elizabeth Wildsmith et al., *Childbearing Outside of Marriage: Estimates and Trends in the United States*, Child Trends Research Brief 5 (Nov. 2011).

In particular, children born from unplanned pregnancies where their mother and father are not married to each other are at a significant risk of being raised outside stable family units headed by their mother and father jointly. *See* William J. Doherty et al., *Responsible Fathering: An Overview and Conceptual Framework*, 60 J. Marriage & Fam. 277, 280 (1998) ("In nearly all cases, children born outside of marriage reside with their mothers[]" and experience "marginal" father presence). And unfortunately, on average, children do not fare as well when they are raised outside "stable marriages between [their] biological parents," as a leading social-science survey explains:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. . . . There is thus value for children in promoting strong, stable marriages between biological parents.

Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We do About It?*, Child Trends Research Brief 6 (June 2002).

In short, unintended pregnancies—the frequent result of sexual relationships between men and women, but never the product of same-sex relationships—pose particular concerns for children and, by extension, for society. And the State has a compelling interest in maintaining an institution like marriage that specifically addresses those concerns.

Biological Parents. Texas also has a compelling interest in encouraging biological parents to join in a committed union and raise their children together. Indeed, the Supreme Court has recognized a constitutional "liberty interest" in "the natural family," a paramount interest having "its source . . . in intrinsic human rights[.]" *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977). While that right vests in natural parents, *id.* at 846, "children [also] have a reciprocal interest in knowing their biological parents." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2582 (2013) (Sotomayor, J., dissenting); *see also* United Nations Convention on the Rights of the Child, art. 7, § 1, G.A. Res. 44/25 (Nov. 20, 1989), ("The child . . . shall have . . . , as far as possible, the right to know and be cared for by his or her parents.").

"[T]he biological bond between a parent and a child is a strong foundation" for "a stable and caring relationship[.]" *Adoptive Couple*, 133 S. Ct. at 2582 (Sotomayor, J., dissenting). The law has thus historically presumed that these "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *accord Troxel v. Granville*, 530 U.S. 57, 68 (2000); *see also* 1 William Blackstone, *Commentaries* *435 (recognizing the "insuperable degree of affection" for one's natural children "implant[ed] in the breast of every parent").

Social science has proven this presumption well founded, as the most reliable studies have shown that, on average, children develop best when reared by their married biological parents in a stable family unit. As one social-science survey has explained, "research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage." Moore, *supra*, at 6. "Thus, it is not simply the presence of two parents . . . , but the presence of *two biological parents* that seems to support children's development." *Id.* at 1-2.[2]

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[2] *See also* W. Bradford Wilcox et al., eds., *Why Marriage Matters* 11 (3d ed. 2011) ("***The intact, biological, married family remains the gold standard for family life in the United States,*** insofar as children are most likely to thrive—economically, socially, and psychologically—in this family form."); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, and Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003) ("Adolescents in married, two-biological-parent families generally fare better than children in any of the

In addition to these tangible deficiencies in development, children deprived of their substantial interest in "know[ing] [their] natural parents," as the Supreme Court has recognized, experience a "loss[] [that] cannot be measured," one that "may well be far-reaching." *Santosky v. Kramer*, 455 U.S. 745, 760 n.11 (1982). Indeed, studies reflect that "[y]oung adults conceived through sperm donation" (who thus lack a connection to, and often knowledge about, their biological father) "experience profound struggles with their origins and identities." Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation*, Institute for American Values, at 7, *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=7&cad=rja&uact=8&ved=0CE0QFjAG&url=http%3A%2F%2Famericanvalues.org%2Fcatalog%2Fpdfs%2FDonor_FINAL.pdf&ei=AgNxU4KAGMTboATs94LACA&usg=AFQjCNEjpcOSw1MetxzHT7cBcmkaDXgElA&bvm=bv.66330100,d.cGU.

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family types examined here, including single-mother, cohabiting stepfather, and married stepfather families. The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents. Our findings are consistent with previous work[.]"); Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 1 (1994) ("*Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parents' race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries*.").

Children thus have weighty tangible and intangible interests in being reared by their biological mother and father in a stable home. But they, as a class of citizens unable to advocate for themselves, must depend on the State to protect those interests for them.

Fathers. Texas also has a compelling interest in encouraging fathers to remain with their children's mothers and jointly raise the children they beget. "The weight of scientific evidence seems clearly to support the view that fathers matter." Wilson, *supra*, at 169; *see, e.g.*, Elrini Flouri and Ann Buchanan, *The role of father involvement in children's later mental health*, 26 J. Adolescence 63, 63 (2003) ("Father involvement . . . protect[s] against adult psychological distress in women."); Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 Child Dev. 801, 801 (2003) ("Greater exposure to father absence [is] strongly associated with elevated risk for early sexual activity and adolescent pregnancy."). Indeed, President Obama has observed the adverse consequences of fatherlessness:

> We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage parents themselves. And the foundations of our community are weaker because of it.

Barack Obama, *Obama's Speech on Fatherhood* (Jun. 15, 2008), *transcript available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html.

The importance of fathers reflects the importance of gender-differentiated parenting. "The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development[.]" David Popenoe, *Life Without Father* 146 (1996). Indeed, both commonsense and "[t]he best psychological, sociological, and biological research" confirm that "men and women bring different gifts to the parenting enterprise, [and] that children benefit from having parents with distinct parenting styles[.]" W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show About Complementarity of Sexes & Parenting*, Touchstone, Nov. 2005.

Recognizing the child-rearing benefits that flow from the diversity of both sexes is consistent with our legal traditions. *See Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) (acknowledging that "children have a fundamental interest in sustaining a relationship with their mother . . . [and] father" because, among other reasons, "the optimal situation for the child is to have both an involved mother and an involved father" (quotation marks and alterations omitted)). Our constitutional jurisprudence acknowledges that "[t]he two sexes are not fungible[.]" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quotation

marks omitted). And the Supreme Court has recognized that diversity in education is beneficial for adolescents' development. *See Grutter v. Bollinger*, 539 U.S. 306, 327-33 (2003). It thus logically follows that a child would benefit from the diversity of having both her father and mother involved in her everyday upbringing. *See Hernandez*, 855 N.E.2d at 7 (permitting the State to conclude that "it is better, other things being equal, for children to grow up with both a mother and a father."). The State, therefore, has a vital interest in fostering the involvement of fathers in the lives of their children.

2. Texas's Marriage Laws Are Rationally Related to Furthering Compelling Interests.

Under the rational-basis test, a State establishes the requisite relationship between its interests and the means chosen to achieve those interests when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]" *Johnson*, 415 U.S. at 383. Similarly, a State satisfies rational-basis review if it enacts a law that makes special provision for a group because its activities "threaten legitimate interests . . . in a way that other [groups' activities] would not." *Cleburne*, 473 U.S. at 448.

Therefore, the relevant inquiry here is not whether excluding same-sex couples from marriage furthers the State's interest in steering man-woman couples into marriage, but rather "whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by

allowing same-sex couples to marry." *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1107 (D. Haw. 2012); *accord Andersen v. King Cnty.*, 138 P.3d 963, 984 (Wash. 2006) (plurality opinion); *Morrison v. Sadler*, 821 N.E.2d 15, 23, 29 (Ind. Ct. App. 2005); *Standhardt v. Super. Ct.*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003).

Other principles of equal-protection jurisprudence confirm that this is the appropriate inquiry, for the Constitution does not compel Texas to include groups that do not advance a legitimate purpose alongside those that do. This commonsense rule represents an application of the general principle that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (quotation marks and citation omitted). "[W]here a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (quotation marks omitted).

Under this analysis, Texas's Marriage Laws plainly satisfy constitutional review. Sexual relationships between men and women, and only such relationships, naturally produce children, and they often do so unintentionally. *See* Finer, *supra*, at 481 Table 1. By granting recognition and support to man-woman couples, marriage generally makes those potentially procreative relationships more stable

and enduring, increasing the likelihood that each child will be raised by the man and woman whose sexual union brought her into the world. *See, e.g.*, Wildsmith, *supra*, at 5; Wendy D. Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 Population Research & Pol'y Rev. 135, 135 (2004) (hereafter "Manning, *Stability*").

Sexual relationships between individuals of the same sex, by contrast, do not unintentionally create children as a natural byproduct of their sexual relationship; they bring children into their relationship only through intentional choice and pre-planned action. Moreover, same-sex couples do not provide children with both their mother and their father. Those couples thus neither advance nor threaten society's public purpose for marriage in the same manner, or to the same degree, that sexual relationships between men and women do. Under *Johnson* and *Cleburne*, that is the end of the analysis: Texas's Marriage Laws should be upheld as constitutional.

In short, it is plainly reasonable for Texas to maintain an institution singularly suited to address the unique challenges and opportunities posed by the procreative potential of sexual relationships between men and women. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 109 (1979) (stating that a law may "dr[aw] a line around those groups . . . thought most generally pertinent to its objective[]"); *Johnson*, 415 U.S. at 378 (stating that a classification will be upheld if

"characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups."). Consequently, the "commonsense distinction," *Heller*, 509 U.S. at 326, that Texas law has always drawn between same-sex couples and man-woman couples "is neither surprising nor troublesome from a constitutional perspective." *Nguyen v. INS*, 533 U.S. 53, 63 (2001).

That is why "a host of judicial decisions" have concluded that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455 F.3d at 867; *see, e.g.*, *Jackson*, 884 F. Supp. 2d at 1112-14; *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, 630-34 (Md. 2007); *Andersen*, 138 P.3d at 982-85 (plurality opinion); *Hernandez*, 855 N.E.2d at 7-8; *Morrison*, 821 N.E.2d at 23-31; *Standhardt*, 77 P.3d at 461-64; *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971).

II. Redefining Marriage Presents a Significant Risk of Adverse Social Consequences.

Although, as explained above, Texas is not constitutionally required to show that redefining marriage will bring about harms or adverse social consequences, Texas's Marriage Laws should be upheld even if this Court requires the State to make such a showing here.

A. Legally Redefining Marriage as a Genderless Institution Would Have Real-World Consequences.

Complex social institutions like marriage comprise a set of norms, rules, patterns, and expectations that powerfully (albeit often unconsciously) affect people's choices, actions, and perspectives. *See* A.R. Radcliffe-Brown, *Structure and Function in Primitive Society* 10-11 (1952) ("[T]he conduct of persons in their interactions with others is controlled by norms, rules or patterns" shaped by social institutions). Marriage in particular is a pervasive and influential social institution, entailing "a complex set of personal values, social norms, religious customs, and legal constraints that regulate . . . particular intimate human relation[s.]" Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 Harv. J.L. & Pub. Pol'y 949, 949-50 (2006).

Although the law did not create marriage, its recognition and regulation of that institution has a profound effect on "mold[ing] and sustain[ing]" it. *See* Carl E. Schneider, *The Channelling Function in Family Law*, 20 Hofstra L. Rev. 495, 503 (1992). Plaintiffs ask this Court to use the law's power to redefine marriage, but such redefinition would transform it in the public consciousness from a gendered to a genderless institution. That conversion would be swift and unalterable, the gendered institution having been declared unconstitutional. *See Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006). Scholar and genderless-marriage supporter Joseph Raz has written about this "great . . . transformation in the nature of marriage":

> When people demand recognition of gay marriages, they usually mean to demand access to an existing good. In fact they also ask for the transformation of that good. For there can be no doubt that the recognition of gay marriages will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage.

Joseph Raz, *Ethics in the Public Domain* 23 (1994); *see also Windsor*, 133 S. Ct. at 2715 n. 6 (Alito, J., dissenting) (citing other genderless-marriage advocates who admit that redefining marriage would change marriage and its public meaning).

The newly instated genderless-marriage regime would permanently sever the inherent link between procreation (a necessarily gendered endeavor) and marriage—a link that has endured throughout the ages. And that, in turn, would powerfully convey that marriage exists to advance adult desires rather than to serve children's needs, and that the State is indifferent to whether children are raised by their own mother and father. The law's authoritative communication of these messages would transform social norms, views, beliefs, expectations, and (ultimately) choices about marriage. George, *supra*, at 40. In this way redefining marriage would undoubtedly have real-world ramifications. And while "the process by which such consequences come about" would "occur over an extended period of time," *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting), those consequences, in the long run, pose a significant risk of negatively affecting children and society.

B. Predictive Judgments about the Anticipated Effects of Redefining Marriage Are Entitled to Substantial Deference.

When reviewing a law's constitutionality even under heightened scrutiny, "courts must accord substantial deference to . . . predictive judgments." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (hereinafter *Turner II*) (quotation marks omitted); *see also Grutter*, 539 U.S. at 328 (deferring to a public university's "judgment that [racial] diversity [was] essential to its educational mission"). "Sound policymaking often requires [democratic decisionmakers] to forecast future events and to anticipate the likely impact of [those] events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality opinion). Because Texans "are the individuals who . . . have . . . firsthand knowledge" about marriage and its operation in the State, they may make reasonable "judgments about the . . . harmful . . . effects[]" of redefining it. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297-98 (2000) (plurality opinion).

This substantial deference to the State's predictive judgments is warranted for at least three reasons. First, the complexity of marriage as a social institution demands deference to projections regarding its future. *See Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting) ("[T]he process by which such [changes to marriage] come about is complex, involving the interaction of numerous factors[]"). Indeed, deference has "special significance" when the government makes predictive

judgments regarding matters "of inherent complexity and assessments about the likely interaction of [institutions] undergoing rapid . . . change." *Turner II*, 520 U.S. at 196; *see also Grutter*, 539 U.S. at 328 (deferring to the State's "complex educational judgments").

Second, respect for the separation of powers warrants deference to the State's projections concerning "the harm to be avoided and . . . the remedial measures adopted for that end[.]" *Turner II*, 520 U.S. at 196. Affording such deference appropriately values the People's right to decide important questions of social policy for their community. *See Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637-38 (2014) (noting that "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds[,]" and that "[d]emocracy does not presume that some subjects are either too divisive or too profound for public debate.").

Third, federalism demands an additional measure of deference because the "regulation of domestic relations," including "laws defining . . . marriage," is "an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S. Ct. at 2691 (quotation marks omitted). Hence, federal courts applying the federal constitution should be "particularly deferential" when

scrutinizing state laws that define marriage. *Cf. Bruning*, 455 F.3d at 867 (discussing rational-basis review).

C. Genderless Marriage Would Convey the Idea that Marriage Is a Mere Option (Not an Expectation) for Childbearing and Childrearing, and That Would Likely Lead to Adverse Consequences for Children and Society.

As over 70 prominent scholars from all relevant academic fields have acknowledged, transforming marriage into a genderless institution would undermine the intrinsic link between marriage and procreation. *See* Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18 (2008). Genderless marriage thus would promote "the mistaken view that civil marriage has little to do with procreation[.]"*Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 1002 (Mass. 2003) (Cordy, J., dissenting). Under this novel conception, the social connection between marriage and procreation would wane over time. As this occurs, the social expectation and pressure for man-woman couples having or raising children to marry would likely decrease further. *See* George, *supra*, at 62 (noting that it might be "more socially acceptable . . . for unmarried parents to put off firmer public commitment[s]").

These developments, over time, would lodge in the public mind the idea that marriage is merely an option (rather than a social expectation) for man-woman couples raising children. That, in turn, would likely result in fewer fathers and mothers marrying each other, particularly in lower-income communities where the

immediate impact of marriage would be financially disadvantageous to the parents. *See* Julien O. Teitler et al., *Effects of Welfare Participation on Marriage*, 71 J. Marriage & Fam. 878, 878 (2009) (concluding that "the negative association between welfare participation and subsequent marriage reflects temporary economic disincentives"). And without the stability that marriage provides, more man-woman couples would end their relationships before their children are grown, *see* Manning, *Stability*, at 135, and more children would be raised outside a stable family unit led by their married mother and father.

These adverse anticipated effects would not be confined to children whose parents separate—the costs would run throughout society. Indeed, as fewer man-woman couples marry and as more of their relationships end prematurely, the already significant social costs associated with unwed childbearing and divorce would continue to increase. *See* Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States* 5 (2008) (indicating that divorce and unwed childbearing "cost[] U.S. taxpayers at least $112 billion each and every year, or more than $1 trillion each decade.") (emphasis omitted); *see also* George, *supra*, at 45-46 (discussing other studies).

D. Genderless Marriage Undermines the Importance of Both Fathers and Mothers, Leading to Adverse Consequences for Children and Society.

A genderless-marriage institution would prevent the State from conveying the message that, all things being equal, it is best for a child to be reared by her biological mother and father. *See* George, *supra*, at 58. Instead, it would communicate indifference to whether children are raised by their mother and father, and endorse the idea that there is nothing intrinsically valuable about fathers' or mothers' roles in rearing their children. *See* Witherspoon Institute, *supra*, at 18-19; Glenn, *supra*, at 25.

It is logical to project that conveying these messages will over time adversely affect fathers' involvement in the lives of their children. Researchers have observed that "the culture of fatherhood and the conduct of fathers change from decade to decade as social and political conditions change." Doherty, *supra*, at 278. This inconstant history of fatherhood has led many scholars to conclude that fathering is "more sensitive than mothering to contextual forces[.]" *Id.*

Thus, as the State undermines the importance of fathers, it would likely, over time, "weaken[] the societal norm that men should take responsibility for the children they beget," Witherspoon Institute, *supra*, at 18-19, and "soften the social pressures and lower the incentives . . . for husbands to stay with their wives and children[.]" George, *supra*, at 8. In these ways, a genderless-marriage institution

directly undermines marriage's core purpose of encouraging men to commit to the mothers of their children and jointly raise the children they beget, with the anticipated outcome that fewer children will be raised by their mother and father in a stable family unit.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's decision.

Dated: August 4, 2014

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.

Date: August 4, 2014

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(A)(7)(B) because this brief contains 6,999 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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

Date: August 4, 2014

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NO. 14-50196

DeLeon, et al. (Plaintiff) vs. Perry, et al. (Defendant)

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Name of Lead Counsel (Type or Print) David Austin R. Nimocks

A. Name of any Circuit Judge of the Fifth Circuit who participated in this case in the district or bankruptcy court.

N/A

B. Inquiry of Counsel

To your knowledge:

(1) Is there any case now pending in this court, which involves the same, substantially the same, similar or related issue(s)?

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Number and Style of Related Case

Robicheaux, et al. v. Caldwell, et al., No. 2:13-cv-05090

Name of Court or Agency

U.S.D.C. E.D. La.

Status of Appeal (if any)

N/A

Other Status (if not appealed)

N/A

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