No. 14-50196

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLMES, and 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*; GERARD RICKHOFF, *in his official capacity as Bexar County Clerk*; and 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
Case 5:13-cv-00982

Re-filed Brief Supporting Defendants-Appellants of *Amici Curiae* U.S. Pastor Council and Coalition of African American Pastors

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Supplemental Certificate of Interested Persons

Case 14-50196, *Cleopatra DeLeon, et al., v. Rick Perry, et al.*

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.

Person or Entity	Connection to Case
Coalition of African American Pastors	*Amicus curiae*
Leif A. Olson	Counsel to *amici*
U.S. Pastor Council	*Amicus curiae*

/s/ Leif A. Olson

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Interest and Independence of the *Amici*

U.S. Pastor Council and Coalition of African American Pastors seek to preserve and restore basic spiritual, cultural, moral and legal principles that reflect a God-given respect for the value of every human life; revere the institution of marriage as a union only of one natural man and one natural women as it was created in the beginning and upon which our civilization rests; and promote essential human and civil rights that are truly endowed by our Creator.

Marriage is inherently linked to procreation and childrearing; it connects children to their mothers and fathers for the good of children and society as a whole. This case challenges the constitutionality of Texans' sovereign decision to codify the traditional definition of marriage. The *amici*'s goal of promoting the principles they described above is furthered if their members—and all Texans—can choose to maintain the definition of marriage with which humanity was blessed by its Creator because of that definition's rational relationship to the legitimate goals that Texas's government pursues on behalf of her citizens.

The parties consent to the filing of this brief. No counsel for a party wrote this brief in whole or in part. Only the *amici* contributed money to the preparation and submission of this brief.

Issue for Review

Did the trial court err in holding that the State of Texas has no rational basis for defining "marriage" as the union of one man and one woman?

Introduction and Summary of Argument

"A dependence on the people is, no doubt, the primary control on the government[.]" FEDERALIST No. 51. The district court's invalidation of Texas law in this case disabled this primary control and thus "[disabled] citizen involvement in democratic processes." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (citation and internal quotation marks omitted). Here, Texas voters "s[ought] a voice in shaping the destiny of their own times" by codifying a millennia-old definition of marriage. *Id.* The district court overlooked this foundational principle that the public controls the government, rendering those voices mute.

Whether the institution of marriage should be expanded to include same-sex couples is controversial. Whether the State of Texas chooses to recognize such unions will have a significant impact in the way that members of such a union plan and conduct their lives. But controversy and impact "do not justify removing ... issues from the voters' reach." *See Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014).

Codifying the traditional—even prehistorical—definition of marriage intrudes upon no fundamental right. Whatever the judiciary's "personal views regarding this political and sociological debate, [it] cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interests.'" *Citizens for*

Equal Protection v. Bruning, 455 F.3d 859, 867–868 (8th Cir. 2006), citing *Romer v. Evans*, 517 U.S. 620, 632 (1996). The district court should be reversed.

Argument

A. The district court's conjuration of a new fundamental right exceeded its authority.

A court that "create[s] substantive constitutional rights in the name of guaranteeing equal protection of the laws" has exceeded its authority. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). The district court did just that: The right to marry is fundamental, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). But the right to have the institution redefined is not. The Court should reverse.

Same-sex marriage has but the shallowest roots in our Nation's history and tradition. *See id.* at 720–721. Until very recently, "it was an accepted truth for almost anyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). From the founding of Jamestown, almost five full centuries passed before any American jurisdiction recognized any right to such a union. Even that

decision was forced to acknowledge that the definition of "marriage" as "a single man and a single woman tak[ing] each other as husband and wife" long predates the American republic. *Goodridge v. Mass. Dept. of Pub. Health*, 798 N.E. 941, 952–53 (Mass. 2003), citing *Milford v. Worcester*, 7 Mass. 48, 52 (1810).

Nor is Texas's definition of marriage a trespass upon the concept of ordered liberty or an indicator of the absence of liberty or justice within her borders. *Glucksberg*, 521 U.S. at 721.The democratic process—the heart of our system of ordered liberty and one that has brought about redefinition of marriage in several states—is still available. *See Sevcik v. Sandoval*, 911 F. Supp.2d 996, 1008, 1013 (D. Nev. 2012).

Nor do the Supreme Court's decisions on marriage "represent a compelling basis to extend the fundamental right to include same-sex marriage." *Conaway v. Deane*, 932 A.2d 571, 619 (Md. 2007). Why? Because the fundamental right to marriage is the fundamental right to participate in the institution as it has traditionally been defined. Indeed, "[a]ll" of the Supreme Court's cases imply "that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species." *Id.* at 619–21 (Md. 2007) (citing cases). And the Supreme Court itself has recognized that "the whole subject of the domestic relations of

husband and wife, parent and child, belongs to the laws of the state," *Simms v. Simms*, 175 U.S. 162, 167 (1899), which has the "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created." *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1877). Even its most recent pronouncements on marriage don't support the plaintiffs; just last year, the Supreme Court struck down a statute defining marriage as an "intrusion on state power" and a rejection of "the long-established precept that the incidents, benefits, and obligations of marriage" are established by each state. *U.S. v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

The borders of our Nation's guarantees of due process and equal protection are vague, and "[j]udges and laymen alike often disagree whether a particular law runs afoul of" them. *Sevcik*, 911 F. Supp.2d at 1012. When the district court was considering invalidating Texas's "democratically adopted law because of a conflict with one of these vaguer clauses," it should have "tread lightly, lest its rulings appear to the People not to constitute a fair and reasonable enforcement of constitutional restrictions…." *Id.* Instead, it handwaved Texans' rational bases for codifying the millennia-old definition of marriage. But simply calling some-

thing "irrational" doesn't make it so. The district court's judgment was unwise and beyond its authority. The Court should reverse.

B. Maintaining the traditional definition of marriage is rational.

1. Texas is accorded deference in legislating for itself.

Denying States the ability to draw distinctions between different people when those distinctions have a rational connection to that State's policy would "cripple the very process of legislating…." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 470 (1977). In all legislation, the line must be drawn somewhere, and "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 315 (1976)."A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Heller v Doe*, 509 U.S. 312, 320 (1993) (citation omitted).

Texas's laws survive because they have a rational basis. The district court itself acknowledged several rational bases for Texas's codification of the traditional definition of marriage—to

promote child-rearing, to promote procreation, to prevent the erosion of traditional respect for the marital institution. It simply waved them aside as irrational. *De Leon v. Perry*, 975 F. Supp. 2d 632, 642–646 (W.D. Tex. 2014). In doing so, it erased the line Texas had drawn in favor of drawing a line it preferred. But this leaves no principled stopping point in the contest to draw a line. And other litigants are already asking other courts to erase the district court's line to draw one to *that* court's liking. *See Brown v. Buhman*, 947 F. Supp.2d 1170 (D. Utah 2014) (upholding in part challenge to Utah's ban on polygamy). To permit the district court's obliteration of Texas's line is to condone obliteration of the legislature's job to legislate—to draw the boundaries of the law. The Court shouldn't permit that. The Court should reverse.

2. Texas could define "marriage" in any one of several ways.

Texas—through the Texans exercising their sovereign power in the voting booth—chose to codify as the definition of "marriage" the meaning that word had carried since before Tejas was a twinkle in the Spanish crown's eye—"only the union of one man and one woman." TEX. CONST. art. I, § 32; TEX. FAM. CODE § 6.204. Texas could have, as some states have done, adopted a definition drawing the line of "marriage" at two people of either sex—and excluding polygynists, polyandrists, and

first cousins from marriage. *See, e.g.*, WASH. REV. CODE §§ 26.04.010, 26.04.020; 2012 Wash. Sess. Laws 200–203. Or it could permit polygamy and first-degree-of-consanguinity marriages but not group or same-sex marriage. But so long as it makes a rational choice, Texas's law cannot be overturned simply because it "seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer*, 517 U.S. at 632.

3. The definition Texas chose is rational way to advance its legitimate interest..

a. Texas has a rational interest in couples' bearing children.

It is beyond question that a state has an interest in responsible procreation and childrearing. *See, e.g., Roe v. Wade*, 410 U.S. 113, 162 (1973) ("We repeat … that [the State] has still *another* important and legitimate interest in protecting the potentiality of human life" (emphasis in original)). Neither stigma nor error attaches to a policy favoring relationships that, through natural procreation, generate human life. If only to assure the continuation of society itself, Texas has an interest in channeling her citizens' relationships and sexual motivation toward unions that can produce society's next generation. Maintaining the definition of

marriage expresses Texas's policy—and the views of her citizens—of encouraging the beauty and potentiality of human life that by virtue of biology is naturally possible only between a man and a woman.

b. The distinction between same-sex couples and non-procreative married couples is rational.

Texas does not have to be neutral in favoring childbirth. This preference is rational, and it is furthered by encouraging opposite-sex unions—encouraging marriages. The district court found this preference "makes no sense" because it treats same-sex unions, which cannot produce children, differently from marriages that can't (or won't) result in children. Some spouses are infertile, some women have passed menopause, some couples simply choose not to have children. *De Leon*, 975 F. Supp.2d at 654. The district court is wrong.

First, its observation is unremarkable. Of course not all married couples can (or will) produce children; all rules are both over- and under-inclusive. *See, e.g.*, Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 986, 992 (1995). Courts already recognize that perfection "is neither possible nor necessary." *Murgia*, 427 U.S. at 315.

Second, there are good reasons to avoid laws that would require married couples to have (or be able to have) children. It requires little thought to manufacture questions that demonstrate the superiority of Texas's simple rule, the traditional definition of marriage:

- How would a couple prove fertility to a deputy county clerk?
- How would a woman prove that she hasn't passed menopause?
- How would a couple prove that they intended to have children?
- How would the state prove, in any of those cases, that the applicants weren't lying?
- How could the state enforce the requirement that fertile couples have children?
- Would the state force a divorce if a couple that appeared fertile in fact wasn't?
- Or force a divorce once a woman passed menopause?
- Or a man had a vasectomy?
- How would it even keep track?
- Is the intrusiveness of such a government consistent with a republican government, or a government that a free people would tolerate?

But the district court asked none of these before bulling ahead. If it had, it perhaps would have recognized the rational bases for Texas's codification of the traditional definition of marriage.

4. Texas's laws rationally favor having children raised by both their biological mother and a biological father.

In both this case and in similar cases across the country, those seeking to mandate a redefinition of marriage have depended upon social-science research to argue that there is no distinction between children raised by a same-sex couple and children raised by their married, biological parents. *De Leon*, 975 F. Supp.2d at 653; *Perry v. Schwarzenegger*, 704 F. Supp.2d 921, 980–81 (N.D. Cal. 2010); *Bostic v. Rainey*, 970 F. Supp.2d 456, 477–479 (E.D. Va. 2014). This is wrong for at least two reasons.

First, as Texas and other *amici* have pointed out, the social-science isn't unanimous. This by itself suggests that there is a rational basis for preferring marriage over same-sex unions. But, second, even if there were no scientific studies to the contrary, Texas and her voters "could rationally proceed on the commonsense premise that children will do best with a mother and father in the home." *Hernandez*, 855 N.E.2d at 8. Men and women—in general—have different body structures, different brain structures, and different ways of interacting with their children. Their bodies release different hormones into their systems, which influence their emotions and actions in different ways. They converse with others differently, they socialize differently.

Men and women are, in short, different—and children learn much about the world and living in it from seeing how their two models of humanity's two sexes deal with it. This is evident from personal anecdote. *See* Julie Bosman, "Obama Sharply Assails Absent Black Fathers," *New York Times*, June 16, 2008. It is evident from statistics gathered by the federal government. *See, e.g.* "Father Facts," National Fatherhood Initiative (http://www.fatherhood.org/father-absence-statistics) (last visited Aug. 4, 2014). It is evident from academic research. *See, e.g.*, Bruce J. Ellis, *et al.*, "Impact of fathers on risky sexual behavior in daughters: A genetically and environmentally controlled sibling study," 24 DEV. & PSYCHOPATHOLOGY 317 (Feb. 2012); Cliff McKinney & Kimberly Renk, "Differential Parenting Between Mothers and Fathers: Implications for Late Adolescents," 29 J. FAM. ISSUES 806 (June 2008). Recognizing these differences is rational. Acting on that recognition in the voting booth to codify a definition of marriage that recognizes those differences is rational.

5. The district court's injunction was error.

Texas's definition of marriage is entitled to a presumption of constitutionality. *See, e.g., Heller v. Doe*, 509 U.S. 312, 319 (1993).

Similarly, courts must give statutes every reasonable construction to save them from unconstitutionality. *Natl. Fedn. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2014). The dual sovereignty of our federal system means that state laws, too, enjoy a "presumption of constitutionality [that] can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Rodriguez*, 411 U.S. at 41.

But rather than indulge the presumption of constitutionality—rather than presume that Texas had a rational basis to codify the traditional definition of marriage—the district court lurched toward a policy end. The district court wasn't to sit as a superlegislature passing on the wisdom or desirability of Texas's definition of marriage. *FM Props. Operg. Co. v. City of Austin*, 93 F.3d 167, 175 (5th Cir. 1996). If there is a reasonable disagreement over that definition, the government can adopt either position, *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992), and "that reasonable minds can disagree on legislation … suffices to prove the law has a rational basis." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 594 (5th Cir. 2014).

That is the district court's exact error. Texas buttressed her definition—the definition of marriage espoused by a supermajority of her voters—by describing the rational bases for it. The district court simply waved them off, dismissing each of Texas's arguments as "irrational" or in service of no legitimate government end. The district court was unable to imagine a legitimate government reason for Texas's codification of the traditional definition of marriage. Whether that inability was real or feigned, those legitimate reasons exist, and the net effect of the district court's failure refusal to believe in the legitimacy of those reasons led to its dubbing the views of 1.7 million Texans who had exercised their sovereign power as "irrational." Disagreement with a district judge isn't a mark of irrationality. The district court's conclusion otherwise is wrong. The Court should reverse.

C. Texas's codification of the definition of marriage attaints no one.

Neither is Texas's codification of the traditional definition of marriage a "legislative Act[] inflicting punishment other than execution." *See Nixon*, 433 U.S. at 474 (citation omitted). Marriage as an institution did not evolve to punish those who wished to wed someone of the same sex. Nor was codifying that tradition punitive; "there is no fundamental right to be free of the political barrier a validly enacted constitutional amendment erects."

Bruning, 455 F.3d at 868. Texas can—and did—erect a political obstacle requiring those who would redefine the institution to amass significant public support. The district court's demolition of that obstacle was error, and the Court should reverse.

Conclusion and Prayer

The district court's injunction is erroneous. Texas—the 1.7 million Texans who acted as the Texas government in voting to engross the traditional definition of marriage in the Texas Constitution—has a rational basis for adopting that definition. The Court should reverse.

Respectfully submitted,

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Certificate of Compliance

I certify that:

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- This brief has margins of 1 inch on the top and bottom and 1.75 inches on each side;
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/s/ Leif A. Olson

Certificate of Service

I certify that on August 8, 2014, I served a copy of this brief on all counsel of record through the Court's CM/ECF system.

/s/ Leif A. Olson