

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* PROFESSORS ALAN J. HAWKINS AND
JASON S. CARROLL IN SUPPORT OF DEFENDANTS-APPELLANTS
AND SUPPORTING REVERSAL OF THE DISTRICT COURT**

Robert S. Hogan
State Bar No. 00796767
HOGAN LAW FIRM, PC
1801 13th Street
Lubbock, TX 79401
(806) 771-7900 (t)
(806) 771-7925 (f)

Attorney for Amici Curiae

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.

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:

Concerned Women for America

Marriage Law Foundation

Professor Alan Hawkins
Professor Jason Carroll

Attorneys:

Holly Carmichael
BDO USA, LLP

Steve Fitschen
NATIONAL LEGAL FOUNDATION

William Duncan

Robert S.Hogan
HOGAN LAW FIRM, PC

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	Alexander Dushku Shawn Gunnarson KIRTON MCCONKIE
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	
Professor Helen M. Alvaré	Steve 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
Robert P. George, Sherif Girgis, Ryan T. Anderson	Michael Smith THE SMITH APPELLATE LAW FIRM

Amici Curiae have no parent corporation or any publicly held corporation that owns 10% or more of its stock.

s/Robert S. Hogan

Robert S. Hogan
*Attorney of record for Amici
Curiae*

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF AUTHORITIES	vii
IDENTITY AND INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. Marriage Is A Social Institution With Practical Benefits That Depend On Its Social, Linguistic, And Legal Meaning; Altering That Meaning Will Necessarily Alter Those Benefits.	3
A. Marriage is a social institution that exists to encourage important human behaviors for vital public ends.	3
B. Because marriage is a social institution with a public purpose and not only a vehicle for accommodating private arrangements, altering its basic definition will necessarily alter the social benefits it produces.....	6
II. Recent Legal Changes To The Institution Of Marriage And To Marriage-Related Expectations Confirm That Altering The Meaning Of Marriage Would Likely Have Unintended And Negative Consequences For Children.....	9
III. Redefining Marriage In Non-Gendered Terms Will Likely Harm The Interests Of Children By Diminishing The Relevance And Value Of Marriage And Fatherhood To Heterosexual Men.	16
A. Traditional, gendered marriage is the most important way heterosexual men create their masculine identities. Marriage forms and channels that masculinity into the service of their children and society. Redefining marriage to include same-sex couples would eliminate gender as a crucial element of marriage and thus undermine marriage’s power to shape and guide masculinity for those beneficial ends.....	18
B. Abandoning the gendered definition of marriage, thereby weakening the connection of heterosexual men to marriage and	

fatherhood, will harm the State’s interests in maximizing the welfare of children.	23
CONCLUSION.....	28
CERTIFICATE OF SERVICE.....	31
CERTIFICATE OF COMPLIANCE.....	32

TABLE OF AUTHORITIES

Cases:

Goodridge v. Department of Public Health,
798 N.E.2d 941 (Mass. 2003) 8-9

Hernandez v. Robles,
855 N.E.2d 1 (N.Y. 2006)..... 6

Lewis v. Harris,
908 A.2d 196 (N.J. 2006) 8

United States v. Windsor,
133 S. Ct. 2675 (2013)..... 8-10

Williams v. North Carolina,
317 U.S. 287 (1942)..... 5

Other Authorities:

A.R. Radcliffe-Brown, *Structure and Function in Primitive Society* (1952) 3-4

Allen M. Parkman, *Good Intentions Gone Awry: No-Fault Divorce And The American Family* 848 (2004)..... 10, 13

Andrew Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marriage Fam. 848 (2004) 12, 22-23, 28

Barara Dafoe Whitehead, *The Divorce Culture: Rethinking Our Commitments To Marriage And Family* (1996) 4

Barbara Dafoe Whitehead, *The Experts’ Story of Marriage 7* (A Council on Families in America Working Paper for the Marriage in America Symposium, Working Paper No. WP14, 1992)..... 10-11

Betsey Stevenson & Justin Wolfers, *Bargaining In The Shadow Of The Law: Divorce Law And Family Distress*, 121 Q.J. Econ. 267 (2006)..... 10

Daniel Cere, *The Conjugal Tradition in Postmodernity: The Closure of Public Discourse?*, Paper Presented at Re-visioning Marriage in Postmodern Culture Conference (Dec. 2003) 6-8

Donald Moir, *A New Class Of Disadvantaged Children*, in *It Takes Two: The Family In Law And Finance* 63 (Douglas W. Allen & John Richards Eds., 1999)11

Douglass North, *Institutions, Institutional Change, And Economic Performance* (1990).....1

E. Mavis Hetherington & John Kelly, *For Better Or For Worse: Divorce Reconsidered* (2002)11

G. Robina Quale, *A History Of Marriage Systems* (1988) 5-6

James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Our Families* (2002)5

Jason S. Carroll & David C. Dollahite, “Who’s My Daddy?” *How the Legalization of Same-Sex Partnerships Would Further the Rise of Ambiguous Fatherhood in America*, in *What’s The Harm?: Does Legalizing Same-Sex Marriage Really Harm Individuals, Families Or Society* (Lynn D. Wardle Ed., 2008) 24-26

Judith S. Wallerstein et al., *The Unexpected Legacy Of Divorce: The 25 Year Landmark Study* (2000) 10, 13-14

Kathryn Edin & Timothy J. Nelson, *Doing The Best I Can: Fatherhood In The Inner City* (2013)22

Kay Hymowitz et al, *Knot Yet: The Benefits And Costs Of Delayed Marriage In America* (2013).....27

Kristin Anderson Moore, Susan M. Jekielek, & Carol Emig, *Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do about It?*, Child Trends Research Brief (June 2002), www.childtrends.org/wp-content/uploads/2013/03/MarriageRB602.pdf..... 24

Linda J. Waite et al., *Institute For American Values, Does Divorce Make People Happy? Findings From A Study Of Unhappy Marriages* (2002)11

Linda J. Waite et al., *Marital Happiness and Marital Stability: Consequences for Psychological Well-Being*, 38 Soc. Sci. Res. 201 (2009)..... 12, 25

Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage As A Social Institution: A Reply To Andrew Koppelman*, 2 U. St. Thomas L. J. 33 (2004)4

Matthew D. Bramlett & William D. Mosher, CDC, *First Marriage Dissolution, Divorce and Remarriage: United States*, Advance Data No. 323 (2001)13

Monte Neil Stewart, *Judicial Redefinition of Marriage* 21 Can. J. Fam. L. 11 (2004)..... 6-7

Noah Webster, *An American Dictionary Of The English Language* (1828)6

Paul R. Amato & Alan Booth, *A Generation At Risk: Growing Up In An Era Of Family Upheaval* (1997)..... 11-12, 25

Paul R. Amato & Bryndl Hohmann-Marriott, *A Comparison Of High- And Low- Distress Marriages That End In Divorce*, 69 J. Marriage & Fam. (2007).....11

Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, Future of Children, Fall 2005, available at http://futureofchildren.org/futureofchildren/publications/docs/15_02_05.pdf..... 11-13, 28

Robert George et al., *What Is Marriage? Man And Woman: A Defense* (2012)8

Rose McDermott et al., *Breaking Up Is Hard to Do, Unless Everyone Else Is Doing It Too: Social Network Effects on Divorce in a Longitudinal Sample*, 92 Soc. Forces 491(2013).....14

Samuel Johnson, *A Dictionary Of The English Language* (1755)6

Sara Mclanahan, *Diverging Destinies: How Children Are Faring Under The Second Demographic Transition*, 41 Demography 607 (2004) 18, 20

Steven Nock, *Marriage in Men’s Lives* (New York: Oxford University Press 1998) 18-19

Victor Nee & Paul Ingram, *Embeddedness And Beyond: Institutions, Exchange, And Social Structure, in The New Institutionalism In Sociology* (Mary C. Brinton & Victor Nee Eds., 1998)4

William J. Doherty et al., Institute For American Values, *Why Marriage Matters: Twenty-One Conclusions From The Social Sciences* (2002)..... 4-5

William J. Doherty et al., *Responsible Fathering: An Overview and Conceptual Framework*, 60 J. Marriage & Fam. 277 (1998)..... 20

Marriage and the Public Good: Ten Principles (Princeton, N.J.: The Witherspoon Institute 2008), winst.org/wp-content/uploads/WI_Marriage_and_the_Public_Good.pdf 8

Rules:

Fed. R. App. P. 29 1

Fed. R. App. P. 32 32

IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Alan J. Hawkins and Jason S. Carroll are professors of Family Life at Brigham Young University. Professor Hawkins earned his Ph.D. in Human Development and Family Studies from Penn State University. Professor Carroll earned his Ph.D. in Family Social Science from the University of Minnesota. They have studied extensively and published widely on fatherhood, marital formation and dissolution, interventions to strengthen marriages, and how marriage as a social institution affects human behavior. Their expertise in these fields will assist the Court’s consideration of the issues presented by this case.

SUMMARY OF ARGUMENT

There is no dispute among social scientists that social institutions profoundly affect human behavior. They provide human relationships with meaning, norms, and patterns, and in so doing encourage and guide conduct. Nobel Laureate Douglass North has described institutions as the “humanly devised constraints that shape human interaction.” Douglass North, *Institutions, Institutional Change, And Economic Performance* 3 (1990). That is their function. And when the definitions

¹ This brief is filed with the consent of all parties, pursuant to Federal Rule of Appellate Procedure 29(a). No party or party’s counsel authored this brief in whole or in part or financially supported this brief, and no one other than amici curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(c)(5). The views expressed herein are those of the *amici* and not necessarily those of Brigham Young University.

and norms that constitute a social institution change, the behaviors and interactions that the institution shapes also change.

Marriage is society's most enduring and essential institution. From ancient times to the present, it has shaped and guided sexual, domestic, and familial relations between men, women, and their children. As with any institution, changing the basic definition and social understanding of marriage—such as by abandoning its gendered definition—will change the behavior of men and women in marriage and even affect whether they enter marriage in the first place. Whether deemed good or bad, redefining marriage away from its historically gendered purposes will have significant consequences.

We know this, as discussed below, not only as a matter of sound theory, logic, and common sense but from experience with other changes to marriage and marriage-related expectations. Specifically, the advent of no-fault divorce changed the legal and social presumption of permanence in marriage. That change had profound consequences. While affording adults greater autonomy and facilitating an easier end to dangerous or unhealthy relationships, it also resulted in increased numbers of divorces from low-conflict marriages, created a tangible sense of fragility for all marriages, and left more children to be raised without one of their parents, typically the father, with attendant adverse consequences.

Although it is far too early to know exactly how redefining marriage to include same-sex couples will change marriage, Professor Hawkins and Professor Carroll demonstrate that such a significant change will likely further weaken heterosexual men's connection to marriage and their children. This, in turn, will likely increase the risk that more children will be raised without the manifest benefits of having their fathers married to their mothers and involved day to day in their lives. These risks justify States in cautiously hesitating before redefining marriage in non-gendered terms.

ARGUMENT

I. Marriage Is A Social Institution With Practical Benefits That Depend On Its Social, Linguistic, And Legal Meaning; Altering That Meaning Will Necessarily Alter Those Benefits.

A. Marriage is a social institution that exists to encourage important human behaviors for vital public ends.

Social institutions exist primarily to guide and channel human behavior in ways that benefit society. Preeminent social anthropologist A. R. Radcliffe-Brown described social institutions as a means for society to order “the interactions of persons in social relationships.” A.R. Radcliffe-Brown, *Structure And Function In Primitive Society* 10-11 (1952). In social institutions, “the conduct of persons in their interactions with others is controlled by norms, rules, or patterns.” *Id.* As a consequence, “a person [in a social institution] knows that he [or she] is expected to behave according to these norms and that the other person should do the same.”

Id. Through such rules, norms, and expectations—some legal, others cultural—social institutions become constituted by a web of public meaning. See Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *The New Institutionalism In Sociology* 19 (Mary C. Brinton & Victor Nee eds., 1998) (“An institution is a web of interrelated norms—formal and informal—governing social relationships.”). Social institutions, and the language we use to describe them, in large measure define relationships and how we understand them and act within them.

“[L]anguage—or more precisely, normative vocabulary—is one of the key cultural resources supporting and regulating any [social] institution. Nothing is more essential to the integrity and strength of an institution than a common set of understandings, a shared body of opinions, about the meaning and purpose of the institution. And, conversely, nothing is more damaging to the integrity of an institution than an attack on this common set of understandings with the consequent fracturing of meaning.”

Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage As a Social Institution: A Reply to Andrew Koppelman*, 2 U. St. Thomas L. J. 33, 52-53 (2004) (quoting Barbara Dafoe Whitehead, *The Experts’ Story of Marriage* 7 (Council on Families in Am. Working Paper No. WP14, 1992)).

Marriage is a vital institution—few dispute that. See, e.g., William J. Doherty et al., *Institute For Am. Values, Why Marriage Matters: Twenty-One Conclusions From The Social Sciences* 8-9 (2002) [hereinafter Doherty, *Why Marriage*] (“At least since the beginning of recorded history, in all the flourishing

varieties of human cultures documented by anthropologists, marriage has been a universal human institution.”). Courts have long recognized the institutional nature of marriage. See, e.g., *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (“[T]he marriage relation [is] an institution more basic in our civilization than any other.”).

Thus, although serving many private ends, marriage’s institutional nature means that it is not merely a private arrangement. It exists to shape and guide human behavior to serve public and social purposes. And those public purposes have always centered on uniting a man and a woman to order their sexual behavior and maximize the welfare of their children:

Marriage exists in virtually every known human society. . . . As a virtually universal human idea, marriage is about the reproduction of children, families, and society. . . . [M]arriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.

Doherty, *Why Marriage, supra*, at 8-9. That has been the social, linguistic, and legal meaning of marriage from ancient times and continues in contemporary society. See, e.g., James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Our Families* 24 (2002) (“[A] lasting, socially enforced obligation between man and woman that authorizes sexual congress and the supervision of children” exists and has existed “[i]n every community and for as far back in time as we can probe”); 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.”); Samuel Johnson, *A Dictionary Of The English Language* (1755) (marriage is the “act of uniting a man and woman for life”); Noah Webster, *An American Dictionary Of The English Language* (1828) (same).

Indeed, until very recently, “it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.” *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). And until a few years ago, the law universally reflected and reinforced that historical, cultural, and linguistic understanding.

B. Because marriage is a social institution with a public purpose and not only a vehicle for accommodating private arrangements, altering its basic definition will necessarily alter the social benefits it produces.

Abandoning marriage’s gendered definition and redefining it in non-gendered terms would fundamentally alter its meaning and many of its the public purposes. That necessarily follows from the very nature of marriage as a social institution. As Professor Daniel Cere of McGill University has explained: “Definitions matter. They constitute and define authoritative public knowledge. . . . Changing the public meaning of an institution changes the institution. [The change] inevitably shapes the social understandings, the practices, the goods, and the social selves sustained and supported by that institution.” Monte Neil Stewart,

Judicial Redefinition of Marriage, 21 Can. J. Fam. L. 11, 76-77 (2004) (footnotes omitted) (quoting Daniel Cere, *The Conjugal Tradition in Postmodernity: The Closure of Public Discourse?*, Paper Presented at Re-visioning Marriage in Postmodern Culture Conference, 4-5 (Dec. 2003)).

The current debate over marriage is frequently portrayed as a decision about whether to “expand” or “extend” the boundaries of marriage to include same-sex couples. This argument rests on the assumption that the basic nature of marriage will remain largely unchanged by granting marriage status to same-sex partnerships and that all this policy change would do is absorb same-sex partnerships within the boundaries of marriage and extend the benefits of marriage to a wider segment of society. Indeed, the very term “same-sex marriage” implies that same-sex couples in long-term committed relationships are *already* a type of marriage that should be appropriately recognized and labeled as such. But this understanding is flawed in that it fails to recognize how recognizing same-sex partnerships as marriages would signify a fundamental change in how marriage is collectively understood and the primary social purposes for which it exists.

If marriage is redefined to mean the union of two people without regard to gender, it will lose its *inherent* focus on children. Such a change, to be sure, would afford a few more children in same-sex unions the opportunity to grow up in what the law would deem a married household. But the law would then teach that

marriage is “essentially an emotional union” that has no inherent connection “to procreation and family life.” Robert George et al., *What Is Marriage? Man And Woman: A Defense* 7 (2012); see *United States v. Windsor*, 133 S. Ct. 2675, 2715, 2718 (2013) (Alito, J., dissenting) (citing George et al., *supra*). In a formal statement, seventy prominent academics from all relevant disciplines expressed “deep[] concerns about the institutional consequences of same-sex marriage for marriage itself,” concluding that “[s]ame-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage” and “undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget.” Witherspoon Institute, *Marriage And The Public Good: Ten Principles* 18-19 (2006). Defining marriage as merely the union of two persons, in short, would “distill[] marriage down to its pure close relationship essence.” Cere, *supra*, at 2.

Courts and jurists have likewise acknowledged the profound change in social meaning that would follow a change in marriage’s basic definition:

We cannot escape the reality that the shared societal meaning of marriage—passed down through the common law into our statutory law—has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin.

Lewis v. Harris, 908 A.2d 196, 222 (N.J. 2006); see also *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 981 (Mass. 2003) (Sosman, J., dissenting) (“[I]t is

surely pertinent to the inquiry to recognize that this proffered change affects not just a load-bearing wall of our social structure but the very cornerstone of that structure.”).

II. Recent Legal Changes To The Institution Of Marriage And To Marriage-Related Expectations Confirm That Altering The Meaning Of Marriage Would Likely Have Unintended And Negative Consequences For Children.

The conclusion that redefining marriage will materially alter the mix of social benefits marriage provides is supported not only by sound socio-institutional theory, logic, and common sense but by experience with other changes to marriage and marriage-related expectations. Of course, no one can know the precise, long-term consequences of redefining marriage to include same-sex couples. It is simply too soon and the ways it may affect marriage too complex to be understood without considerably more time and extensive conceptual and empirical inquiry.

Justice Alito recently made this point:

Past changes in the understanding of marriage . . . have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time. We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.

Windsor, 133 S. Ct. at 2715 (Alito, J., dissenting); *see also id.* at 2715 n.5 (“As sociologists have documented, it sometimes takes decades to document the effects of social changes—like the sharp rise in divorce rates following the advent of no-

fault divorce—on children and society.” (citing Judith S. Wallerstein et al., *The Unexpected Legacy Of Divorce: The 25 Year Landmark Study* (2000)).

But cautionary lessons can be drawn from recent changes to marriage law and marriage-related expectations. Perhaps the most relevant lesson comes from an analysis of the impact of no-fault divorce. No-fault divorce had unintended consequences that weakened marriage and fatherhood, and thus harmed children, *id.* at 297; Allen M. Parkman, *Good Intentions Gone Awry: No-Fault Divorce And The American Family* 91-150 (2000), and is a likely template for the effects of same-sex marriage.

There are many important reasons for no-fault divorce laws. The fault-based systems of the past undoubtedly created many problems and at times serious injustices. Among its benefits, no-fault divorce affords adults greater autonomy, Wallerstein et al., *supra*, at 297, and facilitates the end of dangerous, Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Law and Family Distress*, 121 Q.J. Econ. 267, 267 (2006), unhealthy, or necrotic unions.

Reformers were optimistic that no-fault divorce would have no detrimental effects on children. In fact, as Barbara Dafoe Whitehead has chronicled, many early “experts” provided extensive and intricate rationales for how divorce would benefit children—divorce “for the sake of the children.” Barbara Dafoe Whitehead,

The Divorce Culture: Rethinking Our Commitments To Marriage And Family 81 (1996); see also *id.* at 84-90 (discussing predictions of how divorce would benefit children). Empirically, however, this early optimism has proven short-sighted. See Donald Moir, *A New Class of Disadvantaged Children*, in *It Takes Two: The Family In Law And Finance* 63, 67-68 (Douglas W. Allen & John Richards eds., 1999). Reformers may have reasoned that children's exposure to harmful parental conflict would decrease and that their parents would readily find greater happiness that would improve parenting. But divorce often does not end parental conflict, E. Mavis Hetherington & John Kelly, *For Better Or For Worse: Divorce Reconsidered* 138 (2002), and the evidence suggests that parenting quality declines with divorce, *id.* at 126-140. Also, most divorces come from low-conflict marriages. Paul R. Amato & Alan Booth, *A Generation At Risk: Growing Up In An Era Of Family Upheaval* 220 (1997); Paul R. Amato & Bryndl Hohmann-Marriott, *A Comparison of High- and Low-Distress Marriages That End in Divorce*, 69 *J. Marriage & Fam.* 261 (2007). And divorce does not lead reliably to greater personal happiness. Linda J. Waite et al., *Institute For Am. Values, Does Divorce Make People Happy? Findings From A Study Of Unhappy Marriages* 4 (2002).

So as scholars acquired sufficient data to adequately assess the empirical realities of divorce, the evidence revealed decidedly less favorable outcomes, Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and*

Emotional Well-Being of the Next Generation, 15 *Future Of Children*, Fall 2005, at 75, 75. It is true that the children of chronic, high-conflict marriages actually do better when that relationship ends, Amato & Booth, *supra*, at 220, furthering societal interests in children's well-being. But this is not the typical divorce scenario; as mentioned above, most divorces come from low-conflict marriages, and these children do worse when their parents divorce compared to children whose parents are able to sustain the marriage. *Id.* And most unhappy marriages become happy again if given time, Linda J. Waite et al., *Marital Happiness and Marital Stability: Consequences for Psychological Well-Being*, 38 *Soc. Sci. Res.* 201, 201 (2009) [hereinafter Waite, *Marital Happiness*], redounding to the further benefit of their children.

Accordingly, the potential salutary benefits of no-fault divorce for one subset of children and parents have been greatly diminished by the harms it imposes on another and likely much larger subset of children and parents. A prolonged period of greater instability is a primary contributor to these harms. For most children (and adults), marital dissolution begins a prolonged process of residential and relational instability, as families move and new romantic interests move in and out of the household and many children lose contact with their fathers. Andrew J. Cherlin, *The Marriage-Go-Round: The State Of Marriage And The Family In America Today* 16-24 (2009) [hereinafter Cherlin, *Marriage-Go-Round*].

While there is a long list of caveats, and while most children are resilient, the fact remains that, on average, children whose parents divorce are at significantly greater risk for a host of economic, behavioral, educational, social, and psychological problems. Amato, *supra*, at 75.

Moreover, the impact of no-fault divorce must also be assessed at the institutional level, not just the personal level. Scholars have debated the specific effects of no-fault divorce on subsequent divorce and marriage rates. It certainly contributed to a short-term increase in divorce in the 1970s, but evidence suggests it has also contributed modestly to increased divorce rates above its long-term historical trends. Parkman, *supra*, at 91 (summarizing research). Psychologically, high rates of divorce have contributed greatly to a climate of marital fragility, which may be influencing current declines in our overall marriage rate as well as further increases in divorce rates. Judith Wallerstein concluded from her 25-year study of the effects of divorce that changes to family life, including the high incidence of divorce, have “created new kinds of families in which relationships are fragile and often unreliable.” Wallerstein et al., *supra*, at 297. Nearly half of all marriages now end in divorce, Matthew D. Bramlett & William D. Mosher, CDC, *First Marriage Dissolution, Divorce and Remarriage: United States*, Advance Data No. 323, at 5 (2001), making marriage seem like a risky proposition for all. This discourages some from entering into marriage at all, Wallerstein et al., *supra*,

at xvi, and keeps the specter of divorce ever-present during times of marital discontent. Research also has found a contagion effect for divorce, such that a divorce in one's social circle increases one's own risk of divorce. Rose McDermott et al., *Breaking Up Is Hard to Do, Unless Everyone Else Is Doing It Too: Social Network Effects on Divorce in a Longitudinal Sample*, 92 Soc. Forces 491, 491 (2013).

The advent of no-fault divorce (with accompanying shorter waiting periods) did not just make it procedurally easier to exit an unsatisfying relationship. It changed the legal and social presumption of permanence in marriage. Intentionally or not, no-fault divorce diminished the institutional and social expectation of marital permanence. It changed the public meaning of marriage from a legally binding life-long union that was expected to weather the inevitable disappointments and challenges of romantic unions (“for better or for worse”), to a union whose duration depended on the subjective choice of one spouse—“for as long as we both shall live” has been replaced by “as long as we both shall love.” Before no-fault divorce, our laws reinforced the ideal that divorce should not be a ready option, although it may be a necessity. After no-fault divorce, our laws teach that divorce is always a ready option, even if not a necessity.

The legal change of no-fault divorce has to some extent tipped the scales of marriage in favor of adult emotional interests and personal choice over its

institutional, child-centered elements. It weakened permanence as a fundamental public meaning of marriage and contributed to a generational shift in attitudes and behaviors within individual marriages in ways that harmed overall child interests. Permanence was not just an element of the legal definition of marriage; it was a primary mechanism by which marriage produced its benefits for children (and adults). The expectation of permanence provides a strong incentive for parents to work through their problems to achieve a satisfying relationship; it encourages parents to prioritize their children's long-term needs above their own short-term desires; it helps to harness two adults in the rearing of their children. Weakening the expectation of permanence in the legal and cultural understanding of marriage unexpectedly weakened each of these child-centered factors, on average harming the wellbeing of children.

The no-fault divorce experience serves as a warning, especially with respect to child welfare. The definition of the institution of marriage—its legal rules and norms and the social and personal meanings and expectations that flow from them—affects the behavior of all couples within marriage. And that in turn can have profound effects on the overall wellbeing of children, even if the immediate rationale of the change is to benefit a specific subset of children and adults.

III. Redefining Marriage In Non-Gendered Terms Will Likely Harm The Interests Of Children By Diminishing The Relevance And Value Of Marriage And Fatherhood To Heterosexual Men.

As with early advocates for no-fault divorce, proponents of eliminating the gendered definition and understanding of marriage confidently predict that such a change will have no adverse consequences for heterosexual marriages or their children. What could be the harm to marriage-related interests of allowing same-sex couples to marry? Indeed, for the vast majority of people, the argument goes, nothing would change: “If you like your marriage, you can keep your marriage.”

This recalls the optimistic early thinking about no-fault divorce. Yet some humility is in order. It is unlikely that contemporary thinkers attempting to divine the consequences of another major change to the legal definition of marriage—the removal of gender as a defining pillar—are more gifted at secular prophecy than were thinkers in the early years of the no-fault divorce revolution. Indeed, in our view, the no-fault divorce revolution provides the clearest precedent for rational predictions about the effects of redefining marriage in genderless terms.

Just as the innovation of no-fault divorce benefited men and women in irretrievably broken marriages, same-sex couples may benefit from being able to marry and from the non-gendered understanding of marriage that such a redefinition would create. And it is reasonable to assume—although it is hardly a certainty—that some existing children in same-sex couple households would also

benefit from marriage if it brings greater stability to their family. But as the history of no-fault divorce suggests, there are strong reasons not to fully credit such predictions. And importantly, one has to look beyond the effects within same-sex families alone to accurately gauge the full impacts of a de-gendered understanding of marriage.

Benign predictions about the effects of such a redefinition, moreover, are based on the assumption that legalizing same-sex marriage would not be a significant change in the core definition of marriage, or that, even if it is, such a change will have little or no adverse consequences on marriage as an institution and on those who depend on its current definition. But in fact, the legalization of same-sex marriage would eliminate gender as a definitional pillar of the social institution of marriage. That would not just expand or extend marriage to another class of relationships leaving unchanged the basic institution for its traditional members; it would effect a fundamental change in its meaning. And changing its meaning most likely will change behavior. To deny this likelihood is intellectually untenable—it is to deny that meaning matters to social institutions, and that marriage matters as a social institution.

How the new, de-gendered meaning of marriage will change attitudes toward and behaviors within marriage cannot be known with precision. But based on what is known about marriage as an institution and the roles it has long played

in society, we can make some highly reasonable projections. We focus here on one in particular: that stripping marriage of its gendered meaning will likely diminish the relevance and meaning of marriage and fatherhood to heterosexual men, weakening their connection to marriage and to the children they father.

A. Traditional, gendered marriage is the most important way heterosexual men create their masculine identities. Marriage forms and channels that masculinity into the service of their children and society. Redefining marriage to include same-sex couples would eliminate gender as a crucial element of marriage and thus undermine marriage's power to shape and guide masculinity for those beneficial ends.

Far from being a relic of history or a quaint custom that has outgrown its usefulness in modern society, gender is a crucial component of not only the definition of marriage but of how marriage produces its benefits for children and society. In fact, it may be more crucial now than it has ever been because of changes that have occurred in the meaning of marriage over the past five decades that have dramatically weakened men's ties to their children and their children's mother. Sara McLanahan, *Diverging Destinies: How Children Are Faring Under The Second Demographic Transition*, 41 *Demography* 607, 607 (2004).

According to eminent family sociologist Steven L. Nock, marriage is a primary means of shaping men's identities and behaviors (*e.g.*, sexual, economic, etc.) from self-centered in nature to child- and family-centered in orientation:

Historically, masculinity has implied three things about a man: he should be the father of his wife's children, he should be the provider

for his wife and children, and he should protect his family. Accordingly, the male who refused to provide for or protect his family was not only a bad husband, he was somehow less of a man. In marriage, men do those things that are culturally accepted as basic elements of adult masculinity. . . . [M]arriage changes men because it is the venue in which adult masculinity is developed and sustained.

Steven L. Nock, *Marriage In Men's Lives* 4 (1998). Moreover, Nock argues that, “by calling for behaviors of a certain type [socially valuable behaviors], the expectations of normative marriage also reinforce and maintain [generative] masculine identities. In this sense, normative marriage is a masculinity template. . . . In their marriages, and by their marriages, men define and display themselves as masculine.” *Id.* at 58-59. “When we ask why marriage appears to be beneficial to men [and women and children], one possible answer is that the institution of marriage, at least in its traditional form, is a socially approved mechanism for the expression of [mature] masculinity.” *Id.* at 59.

Marriage is the most important social mechanism we have to channel young men's adult identity into other-oriented behaviors of sacrifice, generosity, and protection for their own children and even for all children. Marriage is a transformative act, but especially so for men, because of how it directs men's adult identity into service to their families and to society.

But fatherhood is more socially constructed and more contextually sensitive than motherhood, according to a landmark report to the U.S. Department of Health and Human Services, which was later published in a leading peer-reviewed journal.

William J. Doherty et al., *Responsible Fathering: An Overview and Conceptual Framework*, 60 J. Marriage & Fam. 277 (1998) [hereinafter Doherty, *Responsible Fathering*]. Fatherhood is more problematic than motherhood because men's commitment to and investment in parenting is far more difficult to achieve. Many of the historical supports that have traditionally preserved men's involvement in their children's lives have been eroding for contemporary families. Historically high rates of non-marital cohabitation, out-of-wedlock childbirth, and marital divorce, McLanahan, *supra*, have dramatically altered the landscape of fathering, leaving unprecedented numbers of children growing up with uncertain or non-existent relationships with their fathers.

While these demographic trends have changed family life in general, they have been particularly grim for father-child relationships, which are more sensitive than mother-child relationships to contextual forces and supports. Doherty, *Responsible Fathering, supra*, at 277. Accordingly, any signal that men's contributions are not central to children's well-being threatens to further decrease the likelihood that they will channel their masculine identities into responsible fathering. We believe the official de-gendering of marriage sends just such a signal. A gender-free definition of marriage risks eliminating the achievement of mature, other-centered masculinity (as opposed to immature, self-centered masculinity) as a primary motivation for generative fathering.

Thus, the legal recognition of same-sex marriage is not just an extension or expansion of marriage's borders to accommodate a new kind of family form; it is fundamental change to the meaning of marriage and fatherhood. In our opinion, to legally proclaim that gender is not an essential component of marriage undermines in a profound, far-reaching, and official way the very mechanism that creates many of the benefits that marriage produces. If marriage is redefined as two committed partners regardless of their gender, then marriage's connection to men's role as fathers is necessarily ambiguous. A genderless meaning of marriage puts at risk the cultural sense that marriage and fatherhood are central to defining men's identities. It invites, even demands, new ways of understanding families that make men's unique contributions to family life and their children entirely optional. It deepens the destructive, decades-long cultural trend of questioning the necessity and importance of fathers as nurturers, providers, and protectors within families, which has weakened father-child bonds and familial ties.

In sum, if men are legally defined as optional to marriage and childrearing, then marriage will likely struggle to maintain its primacy as a means for men to establish their masculine identity in ways that serve children best. A gender-free definition of marriage—where gender is officially irrelevant to its structure and meaning—will likely have less social power to draw heterosexual men into marriage and thus less power to serve marriage's vital child-welfare purposes. And

no doubt these potential effects, like many others, would be felt most keenly and quickly by the children and families of the most disadvantaged men in our society—men who already are struggling with a sense that they are of secondary importance within their families and whose masculinity is already challenged by their tenuous participation in our economic system. Kathryn Edin & Timothy J. Nelson, *Doing The Best I Can: Fatherhood In The Inner City* 216-28 (2013).

To be sure, these risks associated with same-sex marriage may be difficult to disentangle from negative effects from other strong social changes. After all, we believe a de-gendered understanding of marriage is an additional force in a larger trend that is uncoupling sexuality, marriage, and parenthood and making men's connections to children weaker. Thus, it may be difficult to separate statistically the potential effects of de-gendering marriage from the effects stemming from powerful forces to which it is related, such as the sexual revolution, the divorce revolution, and the single-parenting revolution. That these effects are intertwined with the effects of other powerful forces, however, does not diminish their importance or the harms they can impose on marriage.

Removing gender from the legal meaning of marriage will deepen the grand social experiment of the past 50 years of deinstitutionalizing marriage and fatherhood. Andrew Cherlin, *The Deinstitutionalization of American Marriage*, 66

J. Marriage Fam. 848, 848 (2004). And we fear its consequences will only add to the problems this change in family life is producing.

B. Abandoning the gendered definition of marriage, thereby weakening the connection of heterosexual men to marriage and fatherhood, will harm the State’s interests in maximizing the welfare of children.

We have demonstrated how abandoning the gendered definition of marriage will tend to further alienate heterosexual men from marriage and fatherhood. Although precise effects cannot be known with certainty at this early stage, that alienation is likely to harm the State’s interests in securing the welfare of children—and specifically in maximizing the likelihood that children will be reared by a father as well as a mother—in at least four concrete and predictable ways.

1. Fewer and shorter marriages. Redefining marriage in genderless terms will undermine the State’s interest in encouraging heterosexual fathers to marry the mothers of their children. If men no longer view marriage as central to defining their adult identities—if they see themselves as unnecessary to the intrinsic meaning and purpose of marriage and thus view marriage as unrelated to their sense of maleness—they will be less likely to marry, even when they become fathers. Marriage, in other words, will simply be less relevant to men and thus less attractive to them. In an already highly individualistic culture such as ours, men will be more likely to seek to establish their adult identities through other means,

such as career and financial success, personal pursuits, and leisure activities and non-marital sexual relationships. The children of such men will be far less likely to be raised by their fathers as well as their mothers, and as a result will suffer. See Kristin Anderson Moore et al., Child Trends, *Marriage From A Child's Perspective: How Does Family Structure Affect Children And What Can We Do About It?* 6 (June 2002), http://www.childtrends.org/files/Marriage_RB602.pdf (children born and raised without a married father and mother suffer increased risks of poor outcomes).

Redefinition will also undermine the State's interest in encouraging married heterosexual fathers to remain married for the benefit of their children despite marital difficulties. "Until the current generation, the widely held (and now empirically supported) belief that children needed their fathers was a central tenet in social norms encouraging men to work through marital troubles with their wives. . . ." Jason S. Carroll & David C. Dollahite, *"Who's My Daddy?" How the Legalization of Same-Sex Partnerships Would Further the Rise of Ambiguous Fatherhood in America*, in *What's The Harm?: Does Legalizing Same-Sex Marriage Really Harm Individuals, Families Or Society* 62 (Lynn D. Wardle ed., 2008). "This retreat from the ideal may be particularly devastating for [the family involvement and parenting of] men who, according to research, are more reliant on such social and relationship supports to foster their healthy involvement in family

life and parenting.” *Id.* As we noted previously, research studies have found that most divorces come from low-conflict marriages and that the children in these families do worse when their parents’ divorce compared to children whose parents are able to sustain the marriage. Amato & Booth, *supra*, at 220. Also, most unhappy marriages become happy again if given time, Waite, *Marital Happiness*, *supra*, at 201, redounding to the further benefit of their children. A gendered definition of marriage and parenting emphasizes that fathers are important and unique in the lives of their children. This perspective helps men see that their children are stakeholders in their marriages and discourages divorce. Same-sex marriage denies that men are essential to marriage and thus that fathers are essential in the lives of their children, which will increase the likelihood that fewer heterosexual fathers stay married for the sake of their children.

2. Less parenting by fathers. Abandoning the gendered definition of marriage will also diminish the likelihood of men, even married men, being responsible fathers, or being fathers at all. Indeed, it is likely that redefining marriage would support a retreat from fatherhood altogether among some American men. One aspect of a self-defined parenting ideology in society is the option of not being a parent at all. If fathering is not a cultural ideal, the potential exists for an increase in men who live outside marriage and parenthood altogether. Given the data on the negative social consequences of a large number of unmarried

men (e.g., higher rates of crime and other anti-social behavior), we should resist movement toward a parenting culture that would suggest that men can be viewed as “sperm donors” whose only essential “parenting role” is conception and then women can do it alone, either as single parents or as a lesbian couple. The loss of a cultural ideal for men to become responsible fathers could lead to increased numbers of men and children who live in non-generative contexts. Carroll & Dollahite, *supra*, at 62-63. This would harm the State’s interest in encouraging the optimal mother-father, biological parenting model, resulting in more children being raised without the benefits of a biological father—or any father at all.

3. More conception outside marriage rather than inside marriage. For similar reasons, abandoning the gendered definition of marriage would make it more likely that men will engage in sex outside marriage, and will thus produce comparatively more children who will likely be raised by their mothers alone. For many men, the current cultural expectation that they will be active fathers to any children they help conceive serves as a natural deterrent to engaging in extra-marital sex and thus risking the incursion of such an obligation. By weakening or removing that cultural expectation—*i.e.*, by making the father’s role optional—redefining marriage in genderless terms will reduce that deterrent and, therefore, likely increase the relative number of children conceived and born outside of marriage, with no expectation that the father will be actively involved in rearing

them. In short, redefinition will likely increase the *proportion* of fatherless children in two ways: by reducing the number of children born within marital unions, and by increasing the number born outside of such unions.

Of course, current increases in non-marital childbirth rates reflect large increases in the number of cohabiting couples having children, which is increasingly being seen by many as another culturally viable form of family formation. And, if young mothers and fathers were actually marrying each other a year or two after the arrival of their first child and remaining together, non-marital childbirth rates might not be much to worry about. But that is not what's happening. Nearly 40 percent of cohabiting twenty-something parents who had a baby between 2000 and 2005 split up by the time their child was five—three times the rate for twenty-something parents who were married when they had a child. Cohabiting parents were also more than three times more likely than married parents to move on to another cohabiting or marital relationship with a new partner if their relationship did break up. Kay Hymowitz, et al., *Knot Yet: The Benefits And Costs Of Delayed Marriage In America* (2013), available at <http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf>. Research paints a sobering picture of the effect these disruptions have. Children suffer emotionally, academically, and financially when they

experience this type of relationship carousel. *See* Cherlin, *Marriage-Go-Round*, *supra*; Amato, *supra*.

4. Less self-sacrificing by fathers. Finally, further alienating men from marriage and fatherhood by redefining it to make their presence unnecessary would likely diminish self-sacrificing behavior by men for their wives and children. If, as we show above, a genderless definition of marriage undermines marriage and fatherhood as a primary vehicle for adult identity-creation, then men will be less likely to sacrifice their self-interests for the child-centric interests inherent in traditional male-female marriage and fatherhood. When faced with choices regarding career, housing and neighborhood decisions, long-term saving, child educational needs, personal recreational activities, activities with friends, sexual fidelity to spouse, alcohol and drug use, and a host of other decisions affecting the welfare of their children, fathers will be more likely to choose their own selfish interests over those of their wives and children. As child interests take a back seat, the welfare of children is likely to suffer in a host of ways.

CONCLUSION

This Court should not make the mistake of believing that redefining marriage to include same-sex couples is merely a matter of extending to such couples the benefits of marriage. Social institutions are constituted by legal and social meanings that shape and guide human behavior. Marriage, foremost among

our social institutions, has profound connections with child welfare and adult male identity. Indeed, both are integrally related. We believe marriage cannot simply be redefined in non-gendered terms without significant consequences for children.

Likewise, it is important that the legal meaning of the core social institution of marriage reflect the values and understanding of the people whose relationships the law is to regulate. In state (and nation) whose system of government is “of the people, by the people, and for the people,” as President Lincoln put it in his Second Inaugural Address, the meaning of the core social institution certainly should reflect the understanding and meaning of marriage that is pervasive in the society. Texas’s marriage law, like that of most nations on earth today, defines marriage as a male-female union only. (Currently, only 16 nations allow same-sex marriage; 177 of 193 sovereign nations do not allow same-gender marriage.) That dual-gender definition of marriage reflects the strong, constant, consistent understanding of marriage in this state (not to mention in over 90% of the sovereign nations on earth) as an essential gender-integrating institution only.

For these reasons, we urge the Court to reject arguments advocating the judicial redefinition of marriage and reverse the district court below.

Respectfully submitted this 4th day of August, 2014.

By: *s/ Robert S. Hogan*

Robert S. Hogan
State Bar No. 00796767
HOGAN LAW FIRM, PC
1801 13th Street
Lubbock, TX 79401
(806) 771-7900 (t)
(806) 771-7925 (f)

Attorney of record for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 4, 2014, all parties listed on this certificate of service will receive a copy of the foregoing Brief of *Amici Curiae* Alan J. Hawkins and Jason S. Carroll filed electronically with the United States Court of Appeals for the Fifth Circuit, with notice of case activity to be generated and ECF notices to be sent electronically by the Clerk of the Court.

Date: August 4, 2014

s/ Robert S. Hogan

Robert S. Hogan

Attorney of record for Amici Curiae

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 6,891 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

s/ Robert S. Hogan

Robert S. Hogan

Attorney of record for Amici Curiae