

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 14-50196

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.

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

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Brief of Amicus Curiae Liberty Counsel in Support of Defendants-Appellants,  
Supporting Reversal

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## **CORPORATE DISCLOSURE STATEMENT**

Amicus Liberty Counsel states, pursuant to Fed. R. App. P. 26.1, that there is no parent corporation or publicly held corporation that owns 10 percent or more of their stock.

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## **INTEREST OF AMICUS CURIAE**

Liberty Counsel has been substantially involved in advocating for marriage and the religious liberty of Americans whose faith speaks to marriage being the union of one man and one woman. Liberty Counsel has developed a substantial body of information regarding the issues presented by the ultimate question in this case. Amicus believes that the information provided in this Brief regarding the role of marriage as the union of one man and one woman in preserving equality, various Constitutional freedoms, and the significant state interests served by marriage are critical to this Court's consideration of the important constitutional questions at issue.

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties.

### **STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)**

No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than Amicus Curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.



## LEGAL ARGUMENT

### I. SUPREME COURT PRECEDENT REQUIRES REVERSAL OF THE DISTRICT COURT'S DECISION.

The critical question that this Court must decide is whether the State of Texas has the right to continue, as it has since statehood, to recognize that marriage is the union of one man and one woman, or whether the voices of those who find the natural definition of marriage politically unpopular will persuade this Court to adopt an artificial construct of “same-sex marriage.” That issue, *i.e.*, states’ rights to regulate marriage, and not due process rights of same-sex couples, was at the center of the United States Supreme Court’s decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013). In both *Windsor*, and more recently, in *Schuette v. BAMN*, 134 S.Ct. 1623 (2014), the Supreme Court affirmed the primacy of states’ rights to make policy decisions, even (especially) politically controversial decisions, through legislation or constitutional amendments or, as Texas did here, both.

In *Windsor*, the Supreme Court affirmed that “[b]y history and tradition the definition and regulation of marriage ...has been treated as being within the authority and realm of the separate States.” 133 S.Ct. at 2689-90. In fact, “regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’” *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). “The definition of marriage [such as Art. I§ 32(a) of the Texas Constitution and Texas Family Code sections] is the foundation of the

State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Id.* "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Id.* As the Court said, "the States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits." *Id.* at 2692. That interest, and the concomitant power in defining the marital relation was "of central relevance" in *Windsor*, and was the impetus for its invalidation of Section 3 of DOMA, which upset that balance by superseding New York's determination that marriage was to be redefined to include same-sex couples. *Id.* at 2592, 2596. Here, the Texas marriage amendment and marriage statutes are the embodiment of state regulation of domestic relations, the polar opposite of Section 3 of DOMA. Consequently, *Windsor* requires validation, not invalidation of Article I, § 32(a) of the Constitution and Texas Family Code.

In *Schuette*, as in this case, voters amended their Constitution in response to governmental actions that were contrary to the citizens' public policy determinations. *Id.* at 1636-37. *Schuette* involved an issue as socially and

politically controversial, or perhaps more controversial, than the issue of memorializing the definition of marriage, *i.e.*, affirmative action in governmental programs. *Id.* The Supreme Court upheld the citizen-enacted constitutional amendment that prohibited racial preferences in public education, hiring and contracting. *Id.* at 1629. The Court found no Equal Protection violation and cited to federalism standards it had utilized when it overturned Section 3 of DOMA in *Windsor. Id.*

Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

*Id.* at 1637. Similarly here, this Court should not disrupt the First Amendment dynamics that were exercised by the people of Texas. Under *Windsor* and *Schuette*, the voters' exercise of their reserved power must be preserved and protected, not overturned.

Notably, in *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court summarily dismissed a direct appeal from a Minnesota Supreme Court decision rejecting a challenge to the state's definition of marriage. *Id.* That dismissal was a decision "reject[ing] the specific challenges presented in the statement of jurisdiction," and it "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

The Supreme Court has not expressly overruled *Baker*, and so it remains binding precedent on this Court. *Baker*, *Windsor* and *Schuette* require that the Texas marriage amendment and statutes be upheld against Plaintiffs' request for judicial repeal.

**II. TEXAS LAW MEMORIALIZES MILLENNIA OF HISTORY AND THE NATURAL CREATED ORDER WHICH HAS ESTABLISHED THAT MARRIAGE IS THE FOUNDATIONAL SOCIAL INSTITUTION.**

When Texas voters and legislature exercised the power reserved to them under the Texas Constitution to memorialize marriage as the union of one man and one woman in both the marriage amendment and Family Code, they affirmed millennia of history and the natural created and observable order that marriage is a union of the two sexes that fosters stability, permanency, fidelity and the very continuation of society. Texas' marriage laws memorialize—but do not create—the definition of marriage. Marriage is defined by its nature and predates government, which is limited to regulating marriage in accordance with its natural, historical definition.

It is the demands of marriage as a natural institution that helped to shape religious and societal traditions, not, as those seeking to redefine marriage claim, religion that has shaped marriage.<sup>1</sup> “[M]arriage is a *natural* bond that society or

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<sup>1</sup> Sherif Girgis et al., *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* 11 (2012) (emphasis in original).

religion can only ‘solemnize.’<sup>2</sup> Marriage laws do not “create” or “define” the institution, but serve to bind third parties “to treat a man as father of his wife’s children, husbands and wives as entitled to certain privileges and sexually off-limits, and so on. This only the state can do with any consistency.”<sup>3</sup> Marriage is “from its very nature a sacred obligation,” and a civil contract usually regulated by law, but it is much more. *Reynolds v. United States*, 98 U.S. 145, 165 (1878). “Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.” *Id.*

Those who were instrumental in developing the founding principles of the Republic recognized the fundamental importance of the union of one man and one woman to the building and continuation of society. In fact, John Locke described the union of one man and one woman, *i.e.*, marriage, as “the First Society.”<sup>4</sup> In 1698, Locke summarized the universal definition of marriage as:

[A] voluntary Compact between Man and Woman; and tho’ [sic] it consist chiefly in such a Communion and Right in one another’s Bodies, as is necessary to its chief end, Procreation; yet it draws with it mutual Support, and Assistance, and a Community of Interest too, as necessary to unite not only their Care and Affection, but also necessary to their common Off-spring, who have a right to be

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<sup>2</sup> *Id.* at 2 (emphasis in original).

<sup>3</sup> *Id.* at 41 (emphasis in original).

<sup>4</sup> John Locke, TWO TREATISES OF GOVERNMENT 179 (1698; Cambridge, U.K.: Cambridge University Press, 1965).

nourished and maintained by them, till they are able to provide for themselves.<sup>5</sup>

Similarly, James Wilson, a signer of the Declaration of Independence and Constitution and one of the United States' first justices, said:

Whether we consult the soundest deductions of reason, or resort to the best information conveyed to us by history, or listen to the undoubted intelligence communicated in holy writ, we shall find, that to the institution of marriage the true origin of society must be traced.... [T]o that institution, more than any other, have mankind been indebted for the share of peace and harmony which has been distributed among them.... The most ancient traditions of every country ascribe to its first legislators and founders, the regulations concerning *the union between the sexes*.<sup>6</sup>

In keeping with these foundational principles, the United States Supreme Court has consistently recognized that marriage, *i.e.*, the union of one man and one woman, is the foundational social institution. Statutes “regulate the mode of entering into the contract, but they do not confer the right.” *Meister v. Moore*, 96 U.S. 76, 78-79 (1877). “Marriage is the foundation of the home, and upon it is builded [sic] the entire superstructure of society.” *United States v. Cannon*, 4 Utah 122, 7 P. 369, 382 *aff'd*, 116 U.S. 55 (1885). “There is far more to the marriage relation than the mere gratification of passion, or the procreation of children.” *Id.*

When the man and woman are true to each other, “they present a union not made

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<sup>5</sup> *Id.*

<sup>6</sup> James Wilson, *Lectures on Law: Of the Natural Rights of Individuals* (1791), *reprinted in The Works of the Honourable James Wilson, L.L.D.*: Late One of the Associate Justices of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia 476 (Bird Wilson ed., 1883 (emphasis added)).

by man, and as they pass along life's pathway their very example is of infinite benefit to mankind." *Id.*

The Supreme Court, lower courts and the various states, including Texas, have acted in accordance with the adage that "[a]nything which lowers the popular appreciation of the relation, and destroys the good that marriage does the world by mere example, is an evil which the law should correct." *Id.* "Society, with all its ramifications, being founded upon marriage, it is upon grounds of public policy that it is regulated and protected." *Id.* By memorializing that marriage is the union of one man and one woman in Texas statutory and constitutional law, the citizens of Texas recognize that marriage has innate value.<sup>7</sup> Marriage is more than what Plaintiffs are trying to make it, *i.e.*, the name that society gives to a relationship between two adults, but is "*of its essence*, a comprehensive union: a union of will (by consent) and body (by sexual union); *inherently* ordered to procreation and thus the broad sharing of family life; and calling for permanent and exclusive commitment, ... it is also a *moral reality*: a human good *with an objective structure*, which is *inherently good* for us to live out."<sup>8</sup> That objective structure is necessary if there is to be any regulation of marriage at all. "The law, which deals in generalities, can regulate only relationships with a definite structure. Such regulation is justified only where more than private interests are at stake, and

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<sup>7</sup> Girgis at 50

<sup>8</sup> *Id.* at 6.

where it would not obscure distinctions between bonds that the common good relies on.”<sup>9</sup>

Consequently, “marriage is not a legal construct with totally malleable contours” that the state can reformulate as it wishes.<sup>10</sup> Instead, marriage is the name given to a distinctive sexual relationship “that has its own value and structure, which the state did not invent and has no power to redefine.”<sup>11</sup>

Throughout history, cultures throughout the world have acknowledged that the objective complementary structure of marriage must be maintained in order to sustain an ordered society. “[E]ven in cultures very favorable to homoerotic relationships (as in ancient Greece), something akin to the conjugal view [marriage as a comprehensive union] has prevailed—and nothing like same-sex marriage was even imagined.”<sup>12</sup> History also reveals that moving away from the objective complementary view of marriage diminishes the institution and societal stability. European countries that have permitted same-sex couples to “marry” for some time exemplify how moving away from the objective marriage structure delegitimizes marriage by not only removing the opposite-sex structure, but also moving toward the legitimization of polygamy and destabilization of other laws which help to

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<sup>9</sup> *Id.* at 92.

<sup>10</sup> *Id.* at 80.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 11.



order society.<sup>13</sup> “As we deprive marriage policy of definite shape, we deprive it of public purpose.”<sup>14</sup> In fact, this is already happening in Scandinavia:

Same-sex marriage has locked in and reinforced an existing Scandinavian trend toward the separation of marriage and parenthood. The Nordic family pattern – including gay marriage – is spreading across Europe. ... The separation of marriage from parenthood was increasing; gay marriage has widened the separation. Out-of-wedlock birthrates were rising; gay marriage has added to the factors pushing those rates higher. Instead of encouraging a society-wide return to marriage, **Scandinavian gay marriage has driven home the message that marriage itself is outdated, and that virtually any family form, including out-of-wedlock parenthood, is acceptable.**<sup>15</sup>

These trends reflect the fact that same-sex unions and comprehensive unions are not only distinct by nature, but also by how they are treated by those engaged in them. Researchers undertook a survey of same-sex couples in the 1980s with the intent to prove homosexual unions are exclusive, but instead found that **not one homosexual couple of those surveyed stayed sexually exclusive longer than five years.**<sup>16</sup> The study showed “[t]he expectation for outside sexual activity was the **rule for male couples and the exception for heterosexuals.**”<sup>17</sup> By contrast, 99 percent of heterosexual couples expect sexual exclusivity in their marriage, and violations of it are “the leading cause of divorce across 160 cultures and are one of

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<sup>13</sup> See Stanley Kurtz, *The End of Marriage in Scandinavia*, 9.20 THE WEEKLY STANDARD (February 2, 2004), <http://www.weeklystandard.com/Content/Public>

<sup>14</sup> Girgis at 21 (emphasis added).

<sup>15</sup> Kurtz, *The End of Marriage in Scandinavia*.

<sup>16</sup> David P. McWhirter & Andrew M. Mattison, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252-53 (1984) (emphasis added).

<sup>17</sup> *Id.* at 253 (emphasis added).

the most frequent reasons that couples seek marital therapy.”<sup>18</sup> Similarly, a survey found that the average number of sexual partners since the age of eighteen for men who identified as homosexual or bisexual was *over two and a half times as many* as the average for heterosexual men.<sup>19</sup> Consequently, social science studies of the behavior of homosexuals disprove the assertion that same-sex couples are similarly situated to opposite-sex couples.

Social science has also disproven the lower court’s conclusion that same-sex sexual orientation is an immutable characteristic akin to race for purposes of defining marriage. Even the APA has observed that **“to date there are no replicated scientific studies supporting any specific biological etiology for homosexuality.”**<sup>20</sup> A 1999 study summarized that **“more than 50 years of research has failed to demonstrate that biological factors are a major influence in the development of women’s sexual orientation . . . Contrary to popular belief, scientists have not convincingly demonstrated that biology determines women’s sexual orientation.”**<sup>21</sup> A 2010 study reported that “only” 7

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<sup>18</sup> Julie H. Hall & Frank D. Finchman, *Psychological Distress: Precursor or Consequence of Dating Infidelity*, PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1 (2009), available at <http://psp.sagepub.com/content/35/2/143.full.pdf+html>.

<sup>19</sup> Edward O. Laumann et al., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 314-16 (1994) (emphasis added).

<sup>20</sup> American Psychological Association, *Answers to your Questions for a Better Understanding of Sexual Orientation and Homosexuality* (1998).

<sup>21</sup> L. Peplau, et al., *The Development of Sexual Orientation in Women*, 10

percent of homosexual men reported experiencing a small amount of choice about their sexual orientation and slightly more than 5 percent reported having a fair amount or great deal of choice.<sup>22</sup> Lesbians reported rates of choice at 15 percent and 16 percent, respectively.<sup>23</sup> These statistics, which are not inconsequentially small, support the notion that sexual orientation is not immutable and again suggest the plausibility that modification of same-sex attractions and behaviors can and does occur. The findings for bisexuals lead to a similar conclusion and confirm the particular instability of a bisexual sexual orientation.<sup>24</sup> It is rational for the voters of Texas and Texas legislators to believe that marriage as the union of one man and one woman should be memorialized in the Constitution as a means of upholding the norms of permanence and exclusivity inherent in marriage that are vital to the stability of society as a whole. Studies regarding the differences between opposite-sex and same-sex relationships provide an ample basis for determining that redefining marriage to include same-sex couples would “erode the basis for those norms in *any* relationship.”<sup>25</sup>

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ANNUAL REVIEW OF SEX RESEARCH 70-99 (1990) (emphasis added).

<sup>22</sup> Gregory Herek, *Sexual Orientation Differences as Deficits: Science and Stigma in the History of American Psychology*, 5 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 693-99 (2010).

<sup>23</sup> *Id.*

<sup>24</sup> R.C. Savin-Williams, K. Joyner, & G. Rieger, *Prevalence and Stability of Self-Reported Sexual Orientation Identity During Young Adulthood*, 41 ARCHIVES OF SEXUAL BEHAVIOR 104 (2012).

<sup>25</sup> Girgis, WHAT IS MARRIAGE? 67 (emphasis in original).

Marriage provides a framework for mutual benefits—financial, sexual and otherwise—and for affection. Marriage and emotional unions are distinct. An “emotional union cannot stand on its own. People really unite by *sharing a good*, but feelings are inherently private realities, which can be simultaneous but not really shared ... feelings cannot be central to a vow, for we have no direct control over them.”<sup>26</sup> Unlike emotional unions, marriage is inherently good for structuring families—which are the building blocks for a healthy society—and for encouraging permanency and exclusivity in relationships.

[A] good must be truly common and for the couple as a whole, but mental states are private and benefit partners, if at all, only individually. The good must be bodily, but pleasures as such are aspects of experience. The good must be inherently valuable, but pleasures are good in themselves only when they are taken in some other, independent good. So while pleasure and delight deepen and enrich a marital union where one exists, they cannot be its foundation.

As more people absorb the new law’s lesson that marriage is fundamentally about emotions, marriages will increasingly take on emotion’s tyrannical inconsistency. Because there is no reason that emotional unions – any more than the emotions that define them, or friendships generally – should be permanent or limited to two, these norms of marriage would make less sense.<sup>27</sup>

In other words, once sexual complementarity becomes optional, so do permanence and exclusivity.<sup>28</sup> The future of civilized society depends on protecting permanence and exclusivity in family structure. The risks that redefining

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<sup>26</sup> *Id.* at 55 (emphasis in original).

<sup>27</sup> *Id.* at 27, 56.

<sup>28</sup> *Id.* at 57 (emphasis added).

marriage pose to family stability create a compelling justification for memorializing the natural definition of marriage in the Texas Constitution.

Also of particular importance is whether, and if so, how, adopting a new construct of “same-sex marriage” will “contribute to promoting the public interests in marriage, and to achieving the social policy purposes for which laws establishing marriage have been enacted.”<sup>29</sup> The public purpose view of marriage reinforces key norms that are necessary to protect children and the reproduction of the family system and society.<sup>30</sup>

Marriage law is at its heart not simply a cluster of benefits given to people whose taste in sex or lifestyle we happen to personally approve; it is a set of obligations and rewards that serve important social, not merely personal, goals. Marriage serves a pointing function, elevating a certain type of relationship—permanent, exclusive, normally procreative—above all others. Marriage law demarcates certain public boundaries which social norms can then use to impose informal rewards or sanctions.<sup>31</sup>

Consequently, “marriage does not merely reflect individual desire, it shapes and channels it.”<sup>32</sup>

Preserving the definition of marriage, as Texas voters and legislators have done, is not about preserving a tradition of discrimination or exclusion, but

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<sup>29</sup> Lynn D. Wardle, “*Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*,” 24 HARV. J. L. & PUB. POL’Y 771, 779 (2001).

<sup>30</sup> See Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 778 (2002).

<sup>31</sup> *Id.* at 788-89.

<sup>32</sup> *Id.* at 790.

preserving a good, *i.e.*, the relationship upon which the future of society rests.<sup>33</sup> An objective structure for marriage assists all people in a society and understanding marriage to be a comprehensive union “respects same-sex attracted people’s equal dignity and basic needs.”<sup>34</sup> Viewed against this backdrop of history, sociology, biology and philosophy, there can be no question that memorialization of marriage as the union of one man and one woman fortifies the foundation of Texas law and the health, safety and well-being of its citizens.

**III. TEXAS’ MEMORIALIZATION OF MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN RECOGNIZES THE COMPLEMENTARITY OF MEN AND WOMEN, PROVIDES THE OPTIMAL CHILD-REARING ENVIRONMENT AND FOSTERS TRUE EQUALITY OF THE SEXES.**

Scientific research has affirmed what nature has always portrayed, *i.e.*, marriage as the union of one man and one woman acknowledges the inherent complementarity of the sexes, which permits the perpetuation of the species. Rather than, as those seeking to redefine marriage claim, promoting unequal treatment of the sexes or “discrimination,” marriage as the union of one man and one woman actually fosters true equality and value. Also, the lower court’s dismissive conclusion notwithstanding, research has demonstrated that children fare best when they are raised by their married biological parents.

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<sup>33</sup> *Id.* at 778.

<sup>34</sup> Girgis at 53.

**A. Marriage Reflects The Unique And Socially Necessary Complementarity Of The Sexes The Union Of Which Creates The Optimal Child-Rearing Environment.**

Marriage is a union of the wills that requires a union of bodies. While it is possible for same-sex couples to enter into a union of the wills, it is not possible for them to join in body in the way marriage has always required. Joining in body requires more than a sexual act. It is a natural, organic union that is “coordinated toward a common biological end of the whole that they form together.”<sup>35</sup> By nature,

[In] coitus, and there alone, a man and a woman's bodies participate by virtue of their sexual complementarity in a coordination that has the biological purpose of reproduction – a function that neither can perform alone. Their coordinate action is, biologically, the first step (the behavioral part) of the reproductive process. By engaging in it, they are united, and do not merely touch, much as one’s heart, lungs, and other organs are united: by coordinating toward a biological good of the whole that they form together. Here the whole is the couple; the single biological good, their reproduction.<sup>36</sup>

Because of this natural aspect of a female-male union, only sexual intercourse, not any sexual act between the couple, was necessary for a marriage to be consummated, *i.e.*, consummation represented the joining together of the parts that have the potential to embody a whole.<sup>37</sup> The “law reflected the rational judgment that unions consummated by coitus were valuable in themselves, and different in

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<sup>35</sup> *Id.* at 25.

<sup>36</sup> *Id.* at 26.

<sup>37</sup> *Id.* at 25.

kind from other bonds.”<sup>38</sup> “[T]wo men, two women, and larger groups cannot achieve organic bodily union: there is no bodily good or function toward which their bodies can coordinate,” like procreation.<sup>39</sup>

While not all unions of men and women create children, only that union can create children without artificial assistance and provide the optimal environment in which to nurture them into adulthood. Studies show that children raised by their wedded biological parents fare best in educational achievement, familial and sexual development and child and adult behavior.<sup>40</sup> Rutgers University sociologist David Popenoe has concluded that **“The two sexes are different to the core, each is necessary—culturally and biologically—for the optimal development of a human being.”**<sup>41</sup>

A peer-reviewed population-based cross-sectional study of 3,000 young adults between 18 and 39 (the “Regnerus study”) found that children raised by lesbian mothers (“LM”) and gay fathers (“GF”) fared far worse than children raised by their intact biological families (“IBF”).<sup>42</sup> The study revealed:

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 27.

<sup>40</sup> Girgis *What is Marriage?* at 42 (emphasis in original).

<sup>41</sup> David Popenoe, *Life without Father: Compelling New Evidence that Fatherhood and Marriage are Indispensable for the Good for Children and Society* 146, 197 (1996) (emphasis added).

<sup>42</sup> Mark Regnerus, *How Different are the Adult Children of Parents Who have Same-sex Relationships? Findings from the New Family Structures Study*, 41 JOURNAL OF SOCIAL SCIENCE RESEARCH 752, 755, 757, 761 (2012).



Just under half of all IBFs reported being employed full-time at present, compared with 26% of LMs. While only 8% of IBF respondents said they were currently unemployed, 28% of LM respondents said the same. LMs were statistically less likely than IBFs to have voted in the 2008 presidential election (41% vs. 57%), and more than twice as likely—19% vs. 8%—to report being currently (or within the past year) in counseling or therapy “for a problem connected with anxiety, depression, relationships, etc.,” an outcome that was significantly different after including control variables.<sup>43</sup>

The Regnerus study illustrates that children raised by intact biological families are more likely to become productive, employed citizens who vote, are mentally stable, and have more stable relationships than are children raised in alternative environments. Children raised by lesbians and homosexual men fare worse on educational attainment, family-of-origin safety/security, negative impact of family-of-origin, depression indexes, physical health, and household incomes than do children from still-intact biological families.<sup>44</sup> Children raised by lesbians and homosexual men were more likely to smoke, have been arrested, and to have pled guilty to non-minor offenses.<sup>45</sup> Consequently, “**children appear most apt to succeed well as adults—on multiple counts and across a variety of domains—when they spend their entire childhood with their married mother and father, and especially when the parents remain married to the present day.**”<sup>46</sup>

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<sup>43</sup> *Id.* at 761-62.

<sup>44</sup> *Id.* at 763.

<sup>45</sup> *Id.* at 764.

<sup>46</sup> *Id.* at 766 (emphasis added).

The Regnerus study has been recognized as one of the most methodologically sound studies on the influence of family structures on children for its sample size and its representative nature, but it does not purport to prove causality and is not longitudinal.<sup>47</sup> Critics of the study allude to its limitations, but maintain its methodological advantages make it “**probably the best that we can hope for**, at least in the near future.”<sup>48</sup> In addition, understanding the deficiencies of parenting by single parents, divorced parents, step-parents, and adopted parents makes clear that same-sex parents cannot provide the optimal environment for rearing children, and treating same-sex unions as marriages “would undermine marital stability in ways that we know do hurt children.”<sup>49</sup> The “state of economic and social development we call ‘**civilization**’ depends on healthy, upright, productive citizens; ... [thus,] civilization depends on strong marriages.”<sup>50</sup>

**B. Marriage Fosters True Equality And Recognizes The Inherent Value Of The Sexes.**

Encouraging parenting in an intact biological family unit does not just benefit the child, who needs both a mother and a father, but also fosters equality and optimal health and well-being between the sexes, an important societal goal. As Professor William Duncan explains, “marriage is necessary to bridge the

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<sup>47</sup> *Id.* at 766.

<sup>48</sup> Girgis at 61(emphasis added).

<sup>49</sup> *Id.* at 59.

<sup>50</sup> *Id.* at 38 (emphasis added).

differences between the sexes on a footing of equality for both.”<sup>51</sup>

[M]arriage provides two significant additional benefits to society which justify its preservation: First, marriage provides an institution where men and women are valued equally. As currently understood, there can be no marriage without both sexes. Neither sex can be excluded without impairing the institution. This equality is not compelled by lawsuits, as has been the case with the integration of sex-segregated private clubs, but is intrinsic to the nature of the institution. Because the very nature of marriage requires equal participation by men and women, it sends a powerful message about the importance of each sex to society's fundamental unit. Related to this reality of sex equality in marriage is the message that the law of marriage conveys about the relative worth of men and woman, particularly in their roles as fathers and mothers. Redefining marriage to include same-sex couples is a legal endorsement of the fungibility of men and women, mothers and fathers. In other words, when the state says that “any two persons” are equivalent to a mother and father, it is also saying that a mother or a father makes no unique contribution to child well-being. In the United States there are 16,473,000 children living in mother-only homes and 3,297,000 children in father-only homes. In the face of these numbers, it is eminently reasonable for the state to shrink from sending a legal message that men (fathers) are not essential to marriage or that women (mothers) can be dispensed with without consequences. Marriage advances these state interests by acknowledging that a marriage cannot exist without both a man and a woman.<sup>52</sup>

Professor Lynn Wardle agrees that “the assumption that same-sex unions are fungible with marriages in terms of social policy is wrong.”<sup>53</sup> “In reality, not all relationships are the same, and not all relationships are of equal value to children,

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<sup>51</sup> William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 171(2004) (emphasis added).

<sup>52</sup> *Id.* at 171-172 (emphasis added).

<sup>53</sup> Lynn D. Wardle, *The “End” of Marriage*, 44 FAM. CT. REV. 45, 53(2006).

to families, and to society.”<sup>54</sup> Marriage has a moral dimension that transforms it into a truly unique institution and can transform the individual men and women into caring and “other-committed” husbands and wives, at the same time.<sup>55</sup>

Despite the overwhelming evidence of the unique value and superior benefits of marriage as compared to other intimate adult relationships, Plaintiffs and others throughout the country insist that same-sex relationships and the union of one man and one woman are functionally equivalent.<sup>56</sup> However, the evidence shows that “[m]arried couples live longer, are healthier, report that they are happier, have lower rates of mental illness, have lower rates of substance abuse, earn more, save more, have more enjoyable sexual intercourse, [and] experience less physical and emotional abuse”<sup>57</sup> than do same-sex couples. This evidence offers ample justification for Texas’ memorialization of marriage as the union of one man and one woman.

#### **IV. PHYSICAL AND PSYCHOLOGICAL HARMS CAUSED BY HOMOSEXUAL CONDUCT PROVIDE AMPLE BASES FOR NOT CONDONING SUCH CONDUCT BY ACCORDING IT LEGAL BENEFITS.**

Memorializing the definition of marriage as the union of one man and one woman in the Texas Constitution and Family Code not only preserves and protects

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<sup>54</sup> *Id.* at 52.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (emphasis added).

<sup>57</sup> *Id.* (emphasis added).

the social goods of marriage, *e.g.* stability, permanency, fidelity, sexual equality and the continuation of society, but also furthers the state's interests in protecting public health, safety and welfare. Social science, medical science and even homosexual rights activists have established that there are inherent *harms* associated with same-sex unions,<sup>58</sup> harms that would be financially and socially costly to the entire state.

For example, on May 9, 2014, the Centers for Disease Control and Prevention published a report documenting significant increases in sexually transmitted diseases in homosexual men for the period 2005-2013, calling the trend a “major public health concern.”<sup>59</sup> Numerous other reports from the CDC catalog health risks associated with homosexual conduct. Homosexual males are at exponentially higher risk of developing a variety of sexually transmitted diseases

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<sup>58</sup> John R. Diggs, Jr., *The Health Risks of Gay Sex*, Catholic Education Resource Center (2002), <http://www.catholiceducation.org/articles/homosexuality/ho0075.html> (internal citations omitted); *see also HIV and Young Men Who Have Sex with Men*, Centers for Disease Control and Prevention 1 (June 2012), [http://www.cdc.gov/HealthyYouth/sexualbehaviors/pdf/hiv\\_factsheet\\_ymsm.pdf](http://www.cdc.gov/HealthyYouth/sexualbehaviors/pdf/hiv_factsheet_ymsm.pdf); Richard J. Naftalln, *Correspondence: Anal Sex and AIDS*, 360.6399 *Nature* 10 (Nov. 5, 1992); *Gay and Bisexual Men's Health: For Your Health: Recommendations for A Healthier You*, Centers for Disease Control and Prevention (Jan. 21, 2011), <http://www.cdc.gov/msmhealth/for-your-health.html>; *Lesbian and Bisexual Health Fact Sheet*, Womenshealth.gov (Feb. 17, 2011), <http://womenshealth.gov/publications/our-publications/fact-sheet/lesbian-bisexual-health.cfm#d>.

<sup>59</sup> *Primary and Secondary Syphilis—United States, 2005–2013*, available at [http://www.cdc.gov/mmwr/preview/mmwrhtmlmm6318a4.htm?s\\_cid=mm6318a4\\_w#tab](http://www.cdc.gov/mmwr/preview/mmwrhtmlmm6318a4.htm?s_cid=mm6318a4_w#tab) (last visited May 14, 2014).

and have increased risks of developing various cancers and medical conditions because of the nature of same-sex sex.<sup>60</sup> According to 2011 CDC statistics, male-to-male sexual contact (without any injection drug use) accounted for 90.8 percent of all HIV diagnoses for males aged 20-24, and 92.8 percent of all HIV diagnoses for males aged 13-19.<sup>61</sup> CDC reports show that:

[T]he rate of new HIV diagnoses among MSM is more than 44 times that of other men, while the rate of primary and secondary syphilis among MSM is more than 46 times that of other men. Many factors contribute to the higher rates of HIV and STDs among gay and bisexual men compared to the general population of men. These factors include high prevalence of HIV and other STDs among MSM, which increases the risk of disease exposure, and limits access to prevention services.<sup>62</sup>

In addition, “[g]ay and bisexual men (who have sex with other men) are about 17 times more likely to develop anal cancer than men who only have sex with women.”<sup>63</sup> A recent comprehensive review found an overall 1.4 percent per-act probability of HIV transmission for anal sex and a 40.4 percent per-partner probability, rates that are roughly 18-times greater than that which has been

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<sup>60</sup> *Id.*

<sup>61</sup> *HIV Surveillance in Adolescents and Young Adults. Rep.*, Centers for Disease Control and Prevention, National Center for HIV/AIDS, Viral Hepatitis, STD & TB Prevention 7 (2011), available at [http://www.cdc.gov/hiv/pdf/statistics\\_surveillance\\_Adolescents.pdf](http://www.cdc.gov/hiv/pdf/statistics_surveillance_Adolescents.pdf).

<sup>62</sup> *Gay and Bisexual Men's Health: For Your Health: Recommendations for A Healthier You*, Centers for Disease Control and Prevention (Jan. 21, 2011), <http://www.cdc.gov/msmhealth/for-your-health.htm> (emphasis added).

<sup>63</sup> *Sexually Transmitted Diseases (STDs): HPV and Men - Fact Sheet*, Centers for Disease Control and Prevention (Feb. 23, 2012), <http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm> (emphasis added).

estimated for vaginal intercourse.<sup>64</sup> A 2004 study showed that 88 percent of all anal cancer was directly tied to human papillomavirus, a sexually transmitted disease.<sup>65</sup> That same study also reported that “men who were not exclusively heterosexual were at increased risk of anal cancer. In this study, nearly half of the men with anal cancer (47.1 percent) were not exclusively heterosexual, compared with 6 percent of male controls.”<sup>66</sup>

Scientists have explained the physiology behind the high incidence of anal cancer among those who engage in homosexual behavior:

[T]he colonic and rectal mucosa has a barrier function that normally prevents overwhelming invasion by infective and toxic materials contained within the luminal contents. ... Human semen contains at least two components in sufficiently high concentrations to cause breakdown of the basement membrane that supports the colonic epithelial cell layer: collagenase ... and spermine....[I]t is apparent that the colorectal mucosa is particularly susceptible to biochemical as well as the normally assumed mechanical t[r]auma consequent upon anal intercourse.<sup>67</sup>

In addition:

Anal intercourse is the sine qua non of sex for many gay men. Yet human physiology makes it clear that the body was not designed to

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<sup>64</sup> C. Beyer, et al., *Global Epidemiology of HIV Infection in Men who have Sex with Men*, 380 THE LANCET 366-77 (July 28, 2012).

<sup>65</sup> Janet R. Daling, Ph.D., *Human Papillomavirus, Smoking, and Sexual Practices in the Etiology of Anal Cancer* 101.2 (2004): p. 270. *Wiley Online Library*. Wiley Interscience, available at <http://onlinelibrary.wiley.com/doi/10.1002/cncr.20365/full>.

<sup>66</sup> *Id.*

<sup>67</sup> Richard J. Naftalln, *Correspondence: Anal Sex and AIDS*, 360.6399 NATURE 10 (Nov. 5, 1992).

accommodate this activity. The rectum is significantly different from the vagina with regard to suitability for penetration by a penis. The vagina has natural lubricants and is supported by a network of muscles. ...In comparison, the anus is a delicate mechanism of small muscles that comprise an “exit-only” passage.

The end result is that the fragility of the anus and rectum, along with the immunosuppressive effect of ejaculate, make anal-genital intercourse a most efficient manner of transmitting HIV and other infections. The list of diseases found with extraordinary frequency among male homosexual practitioners as a result of anal intercourse is alarming.

Sexual transmission of some of these diseases is so rare in the exclusively heterosexual population as to be virtually unknown. Others, while found among heterosexual and homosexual practitioners, are clearly predominated by those involved in homosexual activity.<sup>68</sup>

Some cancers and diseases are also “more common in lesbian and bisexual women than in other women.”<sup>69</sup>

Even homosexual activists acknowledge that the nature of the sexual acts in which same-sex couples engage carry health risks that are not as prevalent, or in some cases, not present at all, in heterosexual individuals. For example, in Canada, advocates allege that the Canadian health service discriminates against homosexuals because it does not provide proper treatment for conditions which

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<sup>68</sup> John R. Diggs, Jr., *The Health Risks of Gay Sex*, Catholic Education Resource Center (2002), <http://www.catholiceducation.org/articles/homosexuality/ho0075.html> (internal citations omitted).

<sup>69</sup> *Lesbian and Bisexual Health Fact Sheet*, Womenshealth.gov (Feb. 17, 2011), <http://womenshealth.gov/publications/our-publications/fact-sheet/lesbian-bisexual-health.cfm#d>.



uniquely affect them.<sup>70</sup> The homosexual-specific health issues that are the subject of the complaint include lower life expectancy, suicide, higher rates of substance abuse, depression, inadequate access to care and HIV/AIDS.<sup>71</sup> One of the claimants was quoted as saying, “[t]here are all kinds of health issues that are endemic to our community.... We have higher rates of anal cancer in the gay male community, lesbians have higher rates of breast cancer. These are all issues that need to be addressed.”<sup>72</sup> A survey of members of the Gay and Lesbian Medical Association (GLMA) reported on “10 health care concerns men who have sex with men (MSM) should include in discussions with their physicians or other health care providers,” including higher rates of substance abuse, depression, HIV/AIDS, sexually transmitted diseases, certain cancers and eating disorders.<sup>73</sup>

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<sup>70</sup> Julia Garro, *Canada's healthcare system is homophobic, says group*, XTRA.CA (February 17, 2009), available at <http://dailyxtra.com/canada/news/canadas-healthcare-system-homophobic-says-group> (last visited May 12, 2014).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *A Question of Cultural Competence in the Medical Community, Ten Things Gay Men Should Discuss With Their Health Care Providers* (July 17, 2002), available at [http://zone.medschool.pitt.edu/sites/lgbt/Shared%20Documents/10ThingsGay\\_Doc.pdf](http://zone.medschool.pitt.edu/sites/lgbt/Shared%20Documents/10ThingsGay_Doc.pdf) (last visited May 12, 2014).

Various studies have shown that homosexuals are also more likely to have psychological disorders than are heterosexuals.<sup>74</sup> The CDC's National Health and Nutrition Examination Survey (NHANES) shows that "lesbian and gay youth and young adults are at greater risk for suicide ideation, suicide attempts, and completed suicides than their heterosexual counterparts."<sup>75</sup> Forty-one percent of men with same-sex experience reported suicide ideation at some point in the past.<sup>76</sup> In addition, "as many as 1 in 5 homosexually active men may have a lifetime history of an affective disorder, primary recurrent depression, and that the onset of these depressive symptoms occurs at a younger age than in exclusively heterosexually experienced men."<sup>77</sup>

Social science research "points to higher risk of mood disorders, anxiety disorders, and suicidality among homosexual individuals compared to heterosexuals."<sup>78</sup> The association between psychological problems and sexual

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<sup>74</sup> Jordan Simonson, *Toward Understanding Elevated Depression and Anxiety Symptoms in LGBQ Youth: Integrating Minority Stress Theory and the Common Vulnerabilities Hypothesis 2* (June 12, 2012).

<sup>75</sup> Susan D. Cochran & Vickie M. Mays, *Lifetime Prevalence of Suicide Symptoms and Affective Disorders Among Men Reporting Same-Sex Sexual Partners: Results from NHANES III*, 90 *Am. J. of Pub. Health* 573, 573 (Apr. 2000) (discussing the rates of suicidality in homosexual males).

<sup>76</sup> *Id.* at 575.

<sup>77</sup> *Id.* at 577.

<sup>78</sup> Maurice N. Gattis, Paul Sacco, & Renee M. Cunningham-Williams, *Substance Use and Mental Health Disorders Among Heterosexual Identified Men and Women Who Have Same-sex Partners or Attraction: Results from the National*

orientation is not simply the result of discrimination.<sup>79</sup> “Men with same-sex attractions and behaviors were found to have a higher risk for suicidal ideation and acute mental and physical health symptoms than heterosexual men in Holland, **despite that country’s highly tolerant attitude towards homosexuality.**”<sup>80</sup>

The personal, social and financial costs of these homosexual-specific health problems concern not just those who engage in homosexual activity, but also the larger community of citizens who help provide services and who must bear part of the burdens imposed by the health challenges. It is eminently rational for the voters of Texas to seek to minimize the deleterious effects of these conditions on public health, safety and welfare by affirming that marriage remains the union of one man and one woman.

## CONCLUSION

Texas’ marriage laws memorialize that marriage is and always has been the union of one man and one woman, a union that has inherent social good and which

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*Epidemiological Survey on Alcohol and Related Conditions*, 41 ARCHIVES OF SEXUAL BEHAVIOR 1185, 1185 (2012).

<sup>79</sup> V.M. Mays & S.D. Cochran, *Mental Health Correlates of Perceived Discrimination among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AMERICAN JOURNAL OF PUBLIC HEALTH 1869-76 (2001).

<sup>80</sup> T.G.M. Sandfort, F. Bakker, F.G. Schellevis, & I. Vanwesenbeeck, *Sexual Orientation and Mental and Physical Health Status: Findings from a Dutch Population Survey*, 96 AMERICAN JOURNAL OF PUBLIC HEALTH 1119-25 (2006); R. de Graaf, T.G.M. Sandfort, & M. ten Have, *Suicidality and Sexual Orientation: Differences between Men and Women in a General Population-based Sample from the Netherlands*, 35 ARCHIVES OF SEXUAL BEHAVIOR 253-62 (2006) (emphasis added).

fosters equality between the sexes, optimal child-rearing, fidelity and stability. It also preserves and protects the health, safety and welfare of all Texas citizens.

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

Dated: July 23, 2014.

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**CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7)(C)**

I hereby certify that this brief complies with the type-face and volume limitations set forth in F.R. App. P. 32(a)(7) in that it was prepared in Times New Roman 14 point font.

The brief contains 6,914 words according to the word count feature in Microsoft Word 2010.

/s/ Mary E. McAlister  
Mary E. McAlister

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on July 23, 2014 via the Court's CM/ECF system. Service will be effectuated upon all parties and counsel of record via the Court's electronic notification system.

/s/ Mary E. McAlister  
Mary E. McAlister