Case No. 14-50196

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

De Leon, et al.,
Plaintiffs-Appellees; and

v.

Rick Perry, in his official capacity as Governor of the State of Texas; Greg Abbott, in his official capacity as Texas Attorney General; Gerard Rickhoff, in his official capacity as Bexar County Clerk; and David Lakey, in his official capacity as Commissioner of the Texas Department of State Health Services,
Defendants-Appellants

On appeal from the United States District Court for the
Western District of Texas
Cause No. SA-13-CA-00982-OLG
Honorable Orlando L. Garcia, Presiding

Brief of *Amici Curiae* North Carolina Values Coalition and Liberty, Life, and Law Foundation in Support of Defendant-Appellants and Reversal

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF INTERESTED PARTIES

Amici Curiae North Carolina Values Coalition and Liberty, Life, and Law Foundation each make the following identical disclosures:

1. Corporate Affiliations. The corporation is a tax-exempt, nonprofit organization that has no owners or members. The corporation has no parent corporation, no subsidiaries, and no affiliates. There is no publicly-owned corporation that owns 10% or more of its stock because the corporation does not issue stock.

2. Interested Parties. There are no parties that have a financial or other interest in this amicus brief.

/s/ Deborah J. Dewart
(Signature of counsel)

July 22, 2014
Date

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amici Curiae, North Carolina Values Coalition and Liberty, Life, and Law Foundation, respectfully urge this Court to reverse the District Court decision.

North Carolina Values Coalition ("NCVC") is a North Carolina nonprofit established to preserve faith, family, and freedom by working in the arenas of public policy and politics. NCVC spearheaded the ballot initiative to amend North Carolina's Constitution to protect the time-honored definition of marriage. Liberty, Life, and Law Foundation ("LLLF") is a North Carolina nonprofit established to defend religious liberty, sanctity of human life, conscience, family, and other moral principles.

Amici have an interest in this case because the issues involved in this and other circuit court decisions are expected to reach the U.S. Supreme Court, and the result will impact every state in the nation.

The parties have jointly filed a blanket consent for amicus briefs in this case. Counsel for *amici* authored this brief in whole. No party or party's counsel authored this brief in any respect, and no person or entity, other than amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is not about the right to marry a person of the same sex. It is not about equal protection for an existing right deeply rooted in American history and tradition. It is not about *who* may marry, but *what* marriage is.

When courts mandate marriage redefinition, they disenfranchise the American people, shatter the foundations of government, and threaten liberties of speech, religion, and even thought.

ARGUMENT

I. ADVOCATES OF MARRIAGE REDEFINITION PRESUPPOSE THE DEFINITION THEY SEEK TO ESTABLISH.

Words matter. Abraham Lincoln, discussing whether his war powers included authority to emancipate by executive order, "used to liken the case to that of the boy who, when asked how many legs his calf would have if he called its tail a leg, replied, 'Five,' to which the prompt response was made that *calling* the tail a leg would not *make* it a leg." *Reminiscences of Abraham Lincoln By Distinguished Men of His Time* (Allen Thorndike Rice ed., New York: Harper & Brothers Publishers, 1909) (Classic Reprint 2012) (1853-1889), 62.

Calling a triangle a "circle" or saying "two plus two equals five" does not make it so. Calling a same-sex relationship "marriage" does not make it so. Plaintiffs seek to fundamentally redefine marriage—the oldest institution in human history. One dissenting judge in Connecticut critiqued "the majority's unsupported

assumptions that the essence of marriage is a loving, committed relationship between two adults and that the sole reason that marriage has been limited to one man and one woman is society's moral disapproval of or irrational animus toward gay persons." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 515-516 (Conn. 2008) (Zarella, J., dissenting). This simple observation lies buried under a heap of eloquent sounding arguments that rely on the same "unsupported assumptions" about what marriage *is*.

The state has not "exclude[d] a group from exercising a right simply by manipulating a definition." *Wolf v. Walker*, 2014 U.S. Dist. LEXIS 77125, *57 (W.D. Wisc. June 6, 2014). This brief does not advance the circular argument that "the definition of marriage should remain the same for the definition's sake." *Geiger v. Kitzhaber*, 2014 U.S. Dist. LEXIS 68171, *34 (D. Or. May 19, 2014), quoting *Golinski v. Off. of Pers. Mgmt*, 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012). It is Plaintiffs who "manipulate a definition" using intrinsically circular arguments.

Logic matters. Court rulings – especially on an issue with such major legal and social repercussions – should be internally consistent. Recent marriage rulings resemble the incongruity between President Obama's Father's Day Proclamation ("there is no substitute for a father's presence, care, and support")[1] and his refusal

[1] http://www.whitehouse.gov/the-press-office/2014/06/13/presidential-proclamation-fathers-day-2014.

to defend the Defense of Marriage Act—ensuring the permanent severance of many father-child relationships. *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013) ("the President . . . instructed the Department [of Justice] not to defend the statute in *Windsor*").

A. Fundamental Rights Arguments Presuppose The Word Marriage Already Encompasses Same-Sex Couples.

Recent court rulings are incoherent without the assumption that marriage already has the new meaning Plaintiffs want to assign to it. *Bostic* concluded that "Virginia's Marriage Laws unconstitutionally deny Virginia's gay and lesbian citizens the fundamental freedom to choose to marry," specifically, the "right to choose to celebrate, *in marriage*, a loving, rewarding, monogamous relationship with a partner to whom they are committed for life." *Bostic v. Rainey*, 970 F. Supp. 2d 456, 483, 482 (E.D. Va. 2014). Courts concede that states may rightfully define marriage. *DeLeon v. Perry*, 975 F. Supp. 2d 632, 657 (W.D. Texas 2014) ("Texas has the 'unquestioned authority' to regulate and *define marriage*") (emphasis added); *Geiger*, at *37 ("A state's concern in regulating marriage includes the power to decide what marriage is and who may enter into it."). But these courts undertake the very role they decline. In this case, the district court casually dismissed the contention that an injunction for plaintiffs "would effectively change the legal definition of marriage in Texas, rewriting over 150 years of Texas law." *DeLeon*, 975 F. Supp. 2d at 665. But that is exactly what it

would do. In order to determine what rights are constitutionally protected and whether a state has impermissibly infringed them, the court must adopt *some* definition. The Utah district court crafted one to fit its desired conclusion—"the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202 (D. Utah 2013). *Kitchen*, taking its cue from *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), asserted that "[a] person's choices about marriage implicate the heart of the right to liberty that is protected by the Fourteenth Amendment." *Id.* at 1200. Those choices do implicate liberty, but *Casey* never suggests that liberty is a license to redefine the essence of marriage.

The New Mexico Supreme Court rejected arguments that Plaintiffs sought "the right to marry a person of the same gender," concluding the "correct question" was "whether the right to marry is a fundamental right requiring strict scrutiny." *Griego v. Oliver*, 316 P.3d 865, 885 (N.M. 2013). But as in other cases, the court must have a starting point—a definition of "marriage." Federal courts evade the crucial threshold issue of whether marriage *already encompasses* same-sex relationships, and if not, whether plaintiffs have the legal right to demand that it be redefined. The Tenth Circuit—after citing a string of cases holding that the right to marry does *not* include same-sex unions—casts precedent aside and "nonetheless

agree[s] with Plaintiffs that in defining the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right." *Kitchen v. Herbert*, 2014 U.S. App. LEXIS 11935, *55 (10th Cir. 2014); *see also Whitewood v. Wolf*, 2014 U.S. Dist. LEXIS 68771 (M.D. Pa. May 20, 2014) ("The right Plaintiffs seek to exercise is not a new right, but is rather a right that these individuals have always been guaranteed by the United States Constitution.")

B. Equal Protection Arguments Presuppose The Word Marriage Already Encompasses Same-Sex Couples.

Bostic criticized Virginia's marriage laws because they "limit the fundamental right to marry to only those Virginia citizens willing to choose a member of the opposite gender for a spouse." *Bostic*, 970 F. Supp. 2d at 472. Michigan's Marriage Amendment (Mich. Const. Art. I, § 25) allegedly "discriminates against same-sex couples." *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 768 (E.D. Mich. 2014). These pronouncements beg the question. To reach such conclusions, courts must assume the term "marry" already encompasses same-sex relationships.

Other courts have made similar errors of logic. *After* announcing that "[d]enying same-gender couples the right to marry...violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution," in the *remedies* section, the state supreme court decreed marriage redefinition: "'[C]ivil marriage'

shall be construed to mean the voluntary union of two persons to the exclusion of all others." *Griego,* at *889. The court had to redefine marriage in order to sustain plaintiff's arguments, i.e., *the court had to redefine marriage in order to redefine marriage*. Similarly, in order to conclude that Oklahoma's constitutional amendment violated equal protection through "an arbitrary exclusion based upon the majority's disapproval of the defined class," the court had to bypass the state's argument that it was "rational for Oklahoma voters to believe that *fundamentally redefining marriage* could have a severe and negative impact on the institution as a whole." *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1294 (N.D. Okla. 2014) (emphasis added). The court implicitly redefined marriage as a "loving, committed, enduring relationship" between any two persons. *Id*. at 1295. That newly minted definition has no roots in this nation's history or jurisprudence (Section IIA) and cannot be presupposed in a crucial ruling about marriage redefinition.

II. FUNDAMENTAL RIGHT ARGUMENTS MUST FAIL.

The right to marry is indeed fundamental. *DeLeon,* 975 F. Supp. 2d at 657. But frequently cited cases presuppose that marriage is the union of male and female:

- *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965) (striking down law forbidding married couples to use contraceptives)

- *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.")
- *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.")
- *Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]ost inmate marriages are formed in the expectation that they ultimately will be fully consummated.")

Same-sex couples have no use for contraceptives (*Griswold*). Same-sex unions are unnecessary to the survival of the human race (*Zablocki, Loving, Skinner*), and *Turner's* expectation of eventual consummation only makes sense if the Court presupposed the union of male and female.

Nations around the world join in affirming the definition of marriage:

> We declare that the family, a universal community based on the *marital union of a man and a woman*, is the bedrock of society, the strength of our nations, and the hope of humanity. As the ultimate foundation of every civilization known to history, the family is the proven bulwark of liberty and the key to development, prosperity, and peace.

World Family Declaration, endorsed by 120 countries (emphasis added).[2] Even a commentator who favors extending *legal* benefits to same-sex couples (but not the word "marriage") acknowledges that:

> *The social institution of marriage predates our legal system by millennia*. Although legal rights conferred and obligations imposed by civil marriage

[2] http://worldfamilydeclaration.org/WFD (last visited 07/09/14).

> have changed over the centuries, *sexuality remains the vital core*, and many of the central messages and expectations of the institution have remained largely constant.

Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 Alb. Govt. L. Rev. 552, 578 (2012) (emphasis added). Marriage is more than emotional bonding—it is a comprehensive union of mind and body that features sexual complementarity as a key ingredient.[3]

Moreover, *Lawrence v. Texas* did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). On the contrary: "Texas cannot assert any legitimate state interest here, such as national security or *preserving the traditional institution of marriage*. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—*other reasons exist to promote the institution of marriage* beyond mere moral disapproval of an excluded group." *Id*. at 585 (emphasis added).

The Supreme Court has repeatedly signaled caution about announcing new fundamental rights, thus placing matters beyond the reach of public debate and legislation. Courts must "exercise the utmost care...lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the

[3] For a full development of this argument, see *What is Marriage?Man and Woman: A Defense* (Girgis, Anderson, and George, New York: Encounter Books, 2012).

members of [the] Court." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), citing *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977). It is imperative that courts heed this warning before hastily redefining marriage—society's basic building block.

A. Plaintiffs' Proposed Redefinition Of Marriage Is Not Deeply Rooted In American History Or Tradition.

Fundamental rights are those "objectively, deeply rooted in this Nation's history and tradition...implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (internal citations and quotations omitted). Courts must ignore decades of precedent to place the right plaintiffs seek under that umbrella. Plaintiffs allegedly seek the "fundamental right to marry"—but must *first* redefine the institution to make their arguments.

Glucksberg was rooted in tradition and moral disapproval—the very factors courts now glibly cast aside. The Idaho district court trips over itself discussing *Glucksberg*, which "followed directly from the unbroken pattern of state laws and legal traditions disapproving suicide and assisted suicide." *Latta v. Otter*, 2014 U.S. Dist. LEXIS 66417, *37-38 (D. Id. May 13, 2014). *Latta* short-circuits history, stating it is "not aware of a similarly pervasive policy against marriage." *Id*. at 38. But there has been a "pervasive policy" upholding opposite-sex marriage and condemning homosexual acts, which until recently warranted criminal charges.

A few pages later, *Latta* discarded Idaho's marriage laws because "their history demonstrates that moral disapproval of homosexuality was an underlying, animating factor" (*id*. at 62)—the same sort of moral disapproval the court found relevant in *Glucksberg*.

Another court tossed *Glucksberg* because it "involved the question whether a right to engage in certain conduct (refuse medical treatment) should be expanded to include a right to engage in different conduct (commit suicide)" whereas "[i]n this case, the conduct at issue is exactly the same as that already protected: getting married." *Wolf v. Walker*, *50. This court presupposes its desired result and, with its dismissal of *Glucksberg*, essentially erases the "deeply rooted" criteria for fundamental rights.

Case law overwhelmingly confirms that marriage—*as redefined by plaintiffs*—is not "deeply rooted" in American history or tradition. Even one early marriage case conceded that:

> The everyday meaning of "marriage" is "the legal union of a man and woman as husband and wife," Black's Law Dictionary 986 (7th ed. 1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law. See, e.g., *Milford v. Worcester*, 7 Mass. 48, 52 (1810) (marriage "is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife"). This definition of marriage, as both the department and the Superior Court judge point out, derives from the common law. See *Commonwealth v. Knowlton*, 2 Mass. 530, 535 (1807) (Massachusetts common law derives from English common law except as otherwise altered by Massachusetts statutes and Constitution).

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 952 (Mass. 2003). Other courts agree:

- *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) ("[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.")
- *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) ("[A]ppellants [two women] are prevented from marrying, not by the statutes of Kentucky . . . but rather by their own incapability of entering into a marriage as that term is defined.")
- *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003) ("The history of the law's treatment of marriage as an institution involving one man and one woman . . . leads invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.")

- *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005) (Indiana Constitution does not mandate same-sex "marriage" but *legislature* may grant legal benefits)
- *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005) ("[N]o federal court has recognized that this right [marriage] includes the right to marry a person of the same sex.")
- *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006) ("In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution.")
- *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) ("The right to marry is unquestionably a fundamental right.... The right to marry someone of the same sex, however, is not 'deeply rooted'; it has not even been asserted until relatively recent times. The issue then becomes whether the right to marry must be defined to include a right to same-sex marriage.")
- *Andersen v. King Cnty.*, 138 P.3d 963, 990 (Wash. 2006) (marriage laws do not infringe fundamental right to marry or equal protection)

- *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (same—but *legislature* may extend rights)
- *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 977 (S.D. Ohio 2013) ("[M]ost courts have not found that a right to same-sex marriage is implicated in the fundamental right to marry.")
- *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1094-98 (D. Haw. 2012) ("Other courts considering claims that same-sex couples have a fundamental right to marry, have concluded that the right at issue is not the existing fundamental right to marry.")

Most of these state cases predate *Windsor*, but as one court recently admitted, "language in *Windsor* indicates that same-sex marriage may be a 'new' right, rather than one subsumed within the Court's prior 'right to marry' cases." *Bishop*, 962 F. Supp. 2d at 1286 n. 33, quoting *Windsor*:

> For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. . . . The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Windsor, 133 S. Ct. at 2689.

Words and definitions matter. As *Bishop* concedes, "whether or not the right in question is deemed fundamental turns in large part upon how the right is defined." *Bishop*, 962 F. Supp. 2d at *1286 n. 33. *Bishop* declined to determine

whether Okla. Const. art. 2, § 35 burdened the same-sex couple's "fundamental right to marry a person of their choice," recognizing that age, number, and other restrictions might also be impacted. *Id*. The Tenth Circuit glosses right over that glitch, arguing that Utah's ban on plural marriage is justified because monogamy is "inextricably woven into the fabric of our society...the bedrock upon which our culture is built"—neglecting to mention that the monogamy historically woven into the fabric of America is a union of male and female. *Kitchen*, 2014 U.S. App. LEXIS 11935, *67. The right plaintiffs assert is not the right to marry that is "deeply rooted" in our nation's history.

B. There Is No Fundamental Right To Redefine The Word Marriage.

Judicially imposed marriage redefinition has cataclysmic implications, as even some advocates admit:

> A court's insistence that the legal recognition of same-sex couples be designated "marriage" imposes an intellectual and social view that may not be held by a majority of citizens within its jurisdiction, and does so through the creation of not simply "a brand-new 'constitutional right'" but a disquieting new breed—a "right" to a *word*, an unprecedented notion having inauspicious potential for regulating speech and thought.

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 599-600. Dunson, who distinguishes between legal recognition (legal benefits) and official designation (use of the word "marriage"), explains that "[t]his 'right' to a *word* (in this case, one which has traditionally reflected social approval) is not only new; its character and

scope are unprecedented." *Id*. at 604 n. 226. The ominous First Amendment implications "impact countervailing liberty interests, which have been virtually ignored by proponents of court-ordered gender-blind marriage." *Id*. at 555.

III. EQUAL PROTECTION ARGUMENTS MUST FAIL.

Equal Protection arguments rely on the presumption—contrary to case law and logic—that "marriage" already subsumes same-sex relationships. There is no constitutional right to redefine marriage in order to squeeze same-sex relationships within its confines. Nor is there a constitutional right to compel social approval under the rubric of equal protection, which "concerns equal rights and protections that allow people to be who they are and live as they choose**,** *not* equal social stature, which requires other members of the community to think of them in certain ways." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 599.

A. Earlier Equal Protection Cases Did Not Redefine Marriage.

Frequently cited Supreme Court cases have dealt with issues—race, incarceration, failure to pay child support—irrelevant to the essence of marriage. None challenged the nature of the institution or did violence to its existing definition. Rather, these cases consistently presupposed that marriage is, *by definition*, the union of one man and one woman.

Loving v. Virginia struck down restrictions on interracial marriage. Marriage is not—and never has been—a *racial* institution. But marriage has everything to do with sex.

> With regard to sexual institutions, distinguishing between couples on the basis of hair color would be arbitrary. But, distinguishing on the basis of gender composition is hardly arbitrary, inasmuch as such composition determines the nature of sexual relations constituting the vital core of each institution, and the gender composition-dependent differences in the nature of sexual relations are neither trivial nor superficial.

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 597. *Loving* served "[t]he clear and central purpose of the Fourteenth Amendment," which "was to eliminate all official state sources of invidious racial discrimination in the States.... There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Loving*, 388 U.S. at 10, 12.

Turner held that prisoners retain the right to marry—as marriage has historically been defined—while incarcerated. The restriction on inmate marriages did not serve legitimate interests in rehabilitation and security. *Turner v. Safley*, 482 U.S. at 97-98.

Zablocki struck down a statute that prevented Wisconsin residents from marrying if they were behind in child support payments. The Court described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Zablocki v. Redhail*, 434 U.S. at 384,

quoting *Maynard* v. *Hill*, 125 U.S. 190, 211 (1888). *Zablocki* did not disturb the definition of marriage. Civilizations have progressed for millennia without official recognition of same-sex relationships.

B. The State Does Not Discriminate By Limiting Marriage To One Man And One Woman.

Recent rulings describe plaintiffs as same-sex couples who co-own property, live together, make medical decisions for one another, and assume other rights and responsibilities. *Bishop*, 962 F. Supp. 2d at 1296; *Whitewood*, at *7.

Plaintiffs' proposed definition empties the term "marriage" of meaning. It would disintegrate into the "loving, committed" relationship of any two people with no principled basis on which to find that *any* two people are not "similarly situated" with respect to marriage.[4] This nebulous definition leaves no foundation for restrictions based on age, number, or other factors. Moreover, if marriage is built on nothing more than emotional attachment, it is difficult to see why the state has any interest in defining it, regulating it, or granting legal benefits.

Society recognizes and values many personal, loving relationships between two persons of the same sex: mother-daughter, father-son, sister-sister, brother-

[4] In May 2010, a 72-year-old grandmother and 26-year-old grandson, reunited years after an adoption, reportedly fell in love and hired a surrogate to enable them to have a child together. This is an opposite sex union—but Plaintiffs' redefinition leaves no foundation to deny this couple's right to marry. http://www.telegraph.co.uk/news/newstopics/howaboutthat/7662232/Grandmother-and-grandson-to-have-child-together.html.

brother, aunt-niece, uncle-nephew, grandmother-granddaughter, grandfather-grandson, friend-friend, and others. There are comparable non-marital opposite-sex relationships: father-daughter, mother-son, brother-sister, and others. These persons engage in many of the same activities as married couples. They may live together, co-own property, bequeath property to each other, name one another as agents under powers of attorney for finances or health care. Two men, two women, or other combinations of unmarried persons may share a residence to minimize expenses in a troubled economy, and may appoint one another to act in emergencies. They might even share responsibility for children—e.g., a grandmother may offer financial assistance or babysitting to help her daughter who is a single mom.

None of this renders these relationships the equivalent of marriage—but under Plaintiff's construction of "marriage," every one of these "couples" would be eligible to marry, and there is no principled reason to deny them that "right."

Contrary to the recent conclusions that traditional marriage laws "fail to display a rational relationship to a legitimate purpose" (*Bostic*, 970 F. Supp. 2d at 482; *see also DeBoer*, at 768), it is hardly irrational for a state to reserve a unique word and legal status for the complementary union of male and female that is necessary for human survival—even if some married couples are childless. One court asserts that "it would demean a married couple were it to be said marriage is

simply about the right to have sexual intercourse." *Bostic*, 970 F. Supp. 2d at 480 n. 14, quoting *Lawrence v. Texas*, 539 U.S. at 567. Marriage is not *simply* about the right to have intercourse, but the *ability* to do so is a rational distinction. Humanity is a gendered species. The union of male and female differs from other loving, committed two-person relationships. Not every marriage produces children, just as not every for-profit corporation actually earns a profit. That does not mean we must redefine what constitutes a corporation—or a marriage.

IV. COURT-ORDERED MARRIAGE REDEFINITION THREATENS CORE AMERICAN LIBERTIES.

As *Bourke* correctly admitted:

> This court's role is not to impose its own political or policy judgments on the Commonwealth or its people. Nor is it to question the importance and dignity of the institution of marriage as many see it.

Bourke, at *2. True—but that is exactly what courts are doing. This ominous development in American jurisprudence jeopardizes the people's right of self-governance, along with core freedoms of thought, speech, and religion. One court gives lip service to this principle—"personal beliefs, anxiety about change and discomfort about an unfamiliar way of life must give way to a respect for the constitutional rights of individuals"—citing the rights of the Amish, Jehovah's Witnesses, and interracial couples vindicated in earlier cases. *Wolf v. Walker*, at *8. But this obscures the inevitable damage to the rights of Americans who cannot conscientiously endorse marriage redefinition.

A. Court-Ordered Marriage Redefinition Threatens The Right Of "The People" To Govern Themselves And Set Public Policy.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities" so that certain rights "may not be submitted to vote." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). *See Bostic*, 970 F. Supp. 2d at 477; *DeLeon*, 975 F. Supp. 2d at 657; *DeBoer*, at 774-775; *Wolf v. Walker*, at *27-28.

The right to impose marriage redefinition is not among the subjects the Bill of Rights withdrew from the reach of majorities. Federal courts disenfranchise millions of voters and destroy the initiative process "the people" have used to amend their state constitutions. The Tenth Circuit even admits that "[a]s a matter of policy, it might well be preferable to allow the national debate on same-sex marriage to play out through legislative and democratic channels"—then abruptly dismisses its own concession by mandating marriage redefinition. *Kitchen*, 2014 U.S. App. LEXIS 11935, *93. Judges may not unilaterally dictate public policy. "A court is not competent to speak for the people as to how they value biologically distinct relationships." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 592.

Federalism is one key component of the current marriage crisis. The Constitution creates a federal government "powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of

Independence." *Shelby v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012). Formerly independent states "bound themselves together under one national government," delegating only a few specific powers to the newly formed federal administration. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964). States "remain[ed] independent and autonomous within their proper sphere of authority." *Printz v. United States*, 521 U.S. 898, 928 (1997); *see Texas v. White*, 74 U.S. 700, 725 (1869). Federalism permeates the Constitution, with residual state sovereignty implicit in Art. I, § 8 and explicit in the Tenth Amendment. There is a critical need to preserve this structure: "The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.... Without the States in union, there could be no such political body as the United States." *Id.*, quoting *County of Lane v. Oregon*, 74 U.S. 71, 76 (1869).

Federalism safeguards individual liberty, allowing states to "respond to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, 131 S. Ct. 2355 (2011). The "federalist structure of joint sovereigns...increases opportunity for citizen involvement in democratic processes." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Federally mandated marriage redefinition suppresses those opportunities. It intrudes on the

prerogatives of state governments and abridges the rights of citizens to participate in shaping public policy.

After the Civil War, the Reconstruction Amendments carved out an exception to America's balance of powers because "states too could threaten individual liberty." *Shelby v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012). These Amendments protect individual liberties, including the right to vote. *Ironically, the Fourteenth Amendment is the very provision judges now use to annul millions of votes on a matter of intense public concern and debate.*

Windsor is often trumpeted as a call to redefine marriage. That reliance is misplaced, because *Windsor* is heavily grounded in federalism:

- "Regulation of marriage is 'an area that has long been regarded as a virtually exclusive province of the States.'" *Windsor*, 133 S. Ct. at 2691, quoting *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975).
- "The definition of marriage 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.'" *Windsor*, 133 S.Ct. at 2691, quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942).
- "[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." *Windsor,* 133 S.Ct. at 2691, quoting *Haddock* v. *Haddock*, 201 U.S. 562, 575 (1906); see also *In re Burris*, 136 U.S. 586, 593-594 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States").

- "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Windsor,* 133 S.Ct. at 2691, quoting *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383-384 (1930).
- "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage." *Windsor,* 133 S.Ct. at 2692.

Windsor's reliance on federalism is undeniable—space does not permit quotation of every example. In spite of the pro-homosexual rhetoric that peppers the opinion, *Windsor* did not mandate marriage redefinition at the state level, and its respect for state rights warrants extreme caution in lower courts. As one court put

it, "DOMA's federal intrusion into state domestic policy is more 'unusual' than Oklahoma setting its own domestic policy." *Bishop*, 962 F. Supp. 2d at 1278.

Courts have created a massive judicial crisis by overturning millions of votes. "[The right to vote] is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Judicially mandated marriage redefinition endangers key elements of America government—federalism, public policy, and core liberties of *the people*.

B. Court-Ordered Marriage Redefinition Threatens Core First Amendment Rights—Free Speech, Thought, And Religion.

Marriage redefinition is purportedly about "liberty and equality, the two cornerstones of the rights protected by the United States Constitution." *Wolf v. Walker*, *6. But "[w]hen judges start telling people what words they must use, *beware*." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 588. Courts cannot force people to grant same-sex couples the social esteem and approval they desire. They have "neither the constitutional power nor the moral authority" to do so. *Id.* at 594.

> [T]he fundamental problem, which the judges do not acknowledge, is that they cannot speak for the community as to what is "unreservedly approved and favored." If judges impose the designation "marriage" against the will of the community, the designation no longer describes "a union unreservedly approved and favored by the community." The court's order misrepresents community views and regulates speech so as to regulate thought in an effort to change those views.

Id. at 591.

Marriage redefinition by judicial fiat, mandating "official recognition" for same-sex couples, "impacts countervailing liberty interests, which have been virtually ignored by proponents of court-ordered gender-blind marriage." *Id*. at 555.[5] Same-sex couples may "call themselves married," but the question is "whether everyone else must do so as well." *Id*. at 556. The American system avoids government regulation of speech and thought. *Id*. at 586.

> If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment.

Schneiderman v. United States, 320 U.S. 118, 144 (1943).

Marriage is infused with deep religious significance for many. Federal courts give barely a passing nod to religious liberty implications. "[N]o court can require churches or other religious institutions to marry same-sex couples or any other couple, for that matter." *Bourke*, at *37. The Tenth Circuit "note[d] that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage." *Kitchen*, 2014 U.S. App. LEXIS 11935, *90; *see also Geiger*, at *37; *Latta*, at *78-79. These comments dismiss deep concerns and barely touch the tip of the iceberg. Just as courts rebuff concerns about morality, they spurn the

[5] This commentator supports "legal recognition" (rights and benefits) for same-sex couples but acknowledges that "official recognition" poses real threats to the liberties of others and should not be decreed by a court.

religious values held by a multitude of Americans. *Bishop*, 962 F. Supp. 2d at 1289 ("moral disapproval often stems from deeply held religious convictions" but such convictions are "not a permissible justification for a law"); *Bourke*, at *35 ("[The government] cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it."); *Deboer*, at 773 ("many Michigan residents have religious convictions whose principles...inform their own viewpoints about marriage").

It is woefully inadequate for courts to brush aside the convictions of religious organizations and the challenges some have already faced. But courts redefining marriage do not even mention the increasing religious liberty threats to individuals who cannot in good conscience recognize a same-sex couple as being "married." The judicial intrusion on thought and speech encroaches on freedom of religion—a right that, unlike even traditional marriage, the Constitution explicitly guarantees. Anti-discrimination laws and policies have already spawned a multitude of legal actions,[6] and that threat will escalate exponentially unless the political process is allowed to operate so that exemptions can be carved out to respect rights of conscience.

[6] See, e.g., *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (U.S., Apr. 7, 2014) (Christian photographer subjected to draconian financial penalties for refusing to photograph a same-sex commitment ceremony).

V. ALL LAWS ARE GROUNDED IN MORAL PRINCIPLES.

America's founders spoke passionately about the moral and religious underpinnings of our judicial system. Benjamin Franklin forewarned:

> If a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid? We've been assured in the sacred writing that, "Except the Lord build the house, they labor in vain that build it."

James Madison, *The Papers of James Madison*, (Henry Gilpin ed., Washington: Langtree and O'Sullivan, 1840) (Vol. II, June 28, 1787), 185.

Morality has a legitimate role in legislation:

> In a democracy, the majority routinely enacts its own moral judgments as laws. Kentucky's citizens have done so here.... It is true that the citizens have wide latitude to codify their traditional and moral values into law. In fact, until after the Civil War, states had almost complete power to do so, unless they encroached on a specific federal power.

Bourke, at *21, 37. As another court recently proclaimed, "[o]ur courts are duty-bound to define and protect 'the liberty of all, not to mandate our own moral code.' *Lawrence v. Texas*, 539 U.S. at 571 (quoting *Casey*, 505 U.S. at 850)." *Bostic*, 970 F. Supp. 2d at 475. But that is exactly what the court did. Courts have unilaterally nullified the moral judgment of the people and mandated a novel "moral code."

All laws have some moral foundation and many are based on "moral disapproval." The question is *whose* morality will prevail. Ignoring the inescapable fact that moral judgments must be made in order to legislate, courts embrace *Lawrence's* "moral code" language to eschew morality as a factor in defining

marriage. *Griego*, at *886; *Geiger*, at *35. Advocates of marriage redefinition celebrate this as a victory for their cause:

> Preclusion of "moral disapproval" as a permissible basis for laws aimed at homosexual conduct or homosexuals represents a victory for same-sex marriage advocates, and it forces states to demonstrate that their laws rationally further goals other than promotion of one moral view of marriage.

Bishop, 962 F. Supp. 2d at 1290. And yet—these advocates have as their goal the "promotion of one moral view of marriage"—a view that conflicts with a majority of the people in most states.

Our judicial system seems to be allergic to religious expression or influence in the public square, banishing moral concerns to the private fringes. In *Bostic*, the court gave short shrift to the "faith-enriched heritage" of Virginia's marriage laws—laws admittedly "rooted in principles embodied by men of Christian faith." *Bostic*, 970 F. Supp. 2d at 464. The court shoved morality aside, contending that marriage has "evolved into a civil and secular institution sanctioned by the Commonwealth of Virginia." *Id.* But this secularization poses new threats. Over the last few decades, courts have ordered the government to exit the bedroom and respect private sexual choices. Now activists thrust those private choices back into the public realm and demand massive government interference with the rights of those who cannot in good conscience affirm their "private" decisions. Plaintiffs' redefinition of marriage improperly mandates social approval, imposing heavy burdens on persons and organizations who cannot in good conscience approve:

> There is no constitutionally protected right to moral or social approbation. Due process and equal protection require according each person a level of passive respect and dignity, but *not* esteem or approbation.

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 592-593.

CONCLUSION

This Court should reverse the decision of the District Court.

Dated: July 22, 2014

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it brief contains **6,881** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 2010.

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 Microsoft Office Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2014, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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No. 14-50196 Cleopatra DeLeon, et al v. Rick Perry, et al
USDC No. 5:13-CV-982

Dear Ms. Dewart,

We filed your brief. However, you must make the following corrections within the next 14 days.

You need to correct or add:

Caption on the brief does not agree with the caption of the case in compliance with FED R. APP. P. 32(a)(2)(C). (See attachment)

**Once you have prepared your sufficient brief, you must email it to: renee mcdonough@ca5.uscourts.gov for review. If the brief is in compliance, you will receive a notice of docket activity advising you that the sufficient brief has been filed.

Sincerely,

LYLE W. CAYCE, Clerk

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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