No. 13-4178

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEREK KITCHEN, *et al.*,

Plaintiffs-Appellees,

v.

GARY R. HERBERT, in his official capacity as Governor of Utah, *et al.*,

Defendants-Appellants,

and

SHERRIE SWENSEN, in her official capacity as Clerk of Salt Lake County,

Defendant.

On Appeal from the United States District Court for the District of Utah
Honorable Robert J. Shelby, No. 2:13-cv-00217-RJS

BRIEF OF *AMICI CURIAE* JOAN HEIFETZ HOLLINGER, COURTNEY JOSLIN, LAURA KESSLER, AND THIRTY-SEVEN OTHER FAMILY LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Rita F. Lin
Laura W. Weissbein
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105
Tel: (415) 268-6000
Fax: (415) 268-7522
Email: rlin@mofo.com

Counsel for Amici Curiae Family Law Professors

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INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), *Amici Curiae*[1]—all scholars of family law—respectfully submit this brief in support of Plaintiffs-Appellees.[2] Specifically, *Amici* wish to provide the Court with a reliable exposition of Utah law, as expressed both through statutes and case law, with respect to marriage, parentage, and the well-being of children—all of which are central to the issues now before the Court.[3]

SUMMARY OF ARGUMENT

Article I, Section 29 of the Utah Constitution and Utah Code Annotated sections 30-1-2(5) and 30-1-4.1(1)(a) (collectively "marriage ban") preclude same-sex couples from entering civil marriage in Utah and deny recognition to marriages that same-sex couples have validly entered elsewhere.[4]

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[1] *Amici* professors are listed in Appendix A.

[2] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. This brief is filed pursuant to the Joint Notice of Consent to File Brief of Amicus Curiae filed by Appellants and Appellees (ECF No. 01019191743, filed Jan. 24, 2014). *See* Fed. R. App. P. 29(a).

[3] *Amici* agree with Appellees that heightened scrutiny should be applied in this case and that under any standard of review the Utah marriage ban is unconstitutional.

[4] Utah's marriage ban also denies recognition to any other "domestic union" that purports to have the "same or substantially equivalent legal effect" as a marriage. *See* Utah Code Ann. § 30-1-4.1(1)(b).

Appellants argue that the marriage ban furthers state interests with regard to the wellbeing of children. As family law professors, *Amici* are committed to promoting the welfare of children and encouraging parents to be responsible for their children's well-being. *Amici* agree that marriage can benefit children by providing support and stability to their families. Utah's marriage ban, however, does not further child well-being or responsible parenting. As *Amici* demonstrate, Appellants' arguments to the contrary lack any basis in history, law, or logic.

In Utah and elsewhere, couples marry for many reasons, including a desire for public acknowledgment of their mutual commitment to share their lives with each other through a legally binding union. Appellants ignore the multiple purposes of marriage, and suggest that the ability to procreate without assistance is the *raison d'être* of marriage. But Utah does not and never has limited marriage to couples who can or want to have children through "natural procreation." Indeed, it would be constitutionally impermissible to limit marriage only to such couples.

Second, Appellants argue that marriage can be limited to those couples who provide the "optimal" childrearing setting, which they claim is "gender-differentiated" mother-father parenting of children by both of their biological parents. (Brief of Appellants Gary R. Herbert and Sean D. Reyes ("Herbert Br.") at 63-65.) The Appellants' "optimal parenting" argument is wholly unsupported by social science, which overwhelmingly demonstrates that it is the quality and nature

of the parental relationship, not the gender of the parent or his or her biological relationship to the child, that is critical to positive child adjustment and outcomes.[5] Appellants' assertion also conflicts with Utah law, which does not view biology as the sole criterion for parentage and rejects the notion that a parent's gender is legally relevant to determinations of the best interests of children. Further, a desire to encourage or require "gender complementarity" violates constitutional boundaries by basing law on conformity to sex- or gender-based stereotypes. Quite simply, these claimed interests cannot be credited even under rational basis review because they lack any "footing in the realities of the subject addressed by the legislation," *Heller v. Doe*, 509 U.S. 312, 321 (1993). Moreover, even if, *arguendo*, the State's claimed procreation and child welfare rationales were permissible, they would still fail as a matter of rational basis review, because there is no rational relationship between the exclusion of same-sex couples from marriage and the decisions of different-sex couples regarding marriage, procreation, or childrearing.[6]

Utah's marriage ban actually *undermines* its interests in children and child welfare. The ban does not assist children in any family, but it does inflict direct and palpable harms on same-sex couples and their children who are denied access to hundreds of important benefits under state and federal law. In addition, the

[5] *See* Amicus Curiae Brief of the American Psychological Association et al.

[6] And the ban clearly is not narrowly tailored to fulfill any of these interests.

categorical ban signals that the relationships of same-sex couples are deemed unequal to other couples.

Finally, even if there were any rational reason to believe that the ban would induce better behavior by different-sex couples, both Utah authorities and the U.S. Supreme Court have foreclosed the punishment of children as a means to influence adult behavior.

In sum, the purported state interests that Appellants and their *amici* rely on to justify disparate treatment of different-sex and same-sex couples do not reflect the policies that Utah law pursues regarding marriage, parentage, and the best interests of children. The marriage ban, therefore, is "inexplicable by anything but animus towards the class it affects." *Romer v. Evans*, 517 U.S. 620, 632 (1996).[7] As the U.S. Supreme Court recently reaffirmed, a desire to mark same-sex couples as less worthy of respect is an insufficient interest to sustain a law. *United States v. Windsor*, 133 S. Ct. 2675 (2013). Accordingly, under the federal Constitution, Appellants' claims provide no rational basis for denying same-sex couples the right to marry.

[7] "Animus" as used in *Romer* is a term of art and does not mean subjective dislike or hostility, but simply the absence of a rational reason for excluding a particular group from protections.

ARGUMENT

I. PROCREATION IS NOT A NECESSARY ELEMENT OF MARRIAGE.

Central to Appellants' efforts to justify the exclusion of same-sex couples from marriage is the fact that, unlike many opposite-sex couples, they cannot procreate biologically through a conjugal union with each other. This reductive difference is then used by Appellants to justify denying same-sex couples the right to marry. For example, Appellants argue that the marriage ban encourages different-sex couples who procreate or may accidentally procreate through sexual activity to marry and thus "link[s] mothers and fathers with their offspring so as to maximize the welfare of children." (Herbert Br. 52; *see id.* at 72–73.) Implicit in this reasoning is that same-sex couples do not need or deserve marriage, because of a single, purported essential difference between different-sex and same-sex couples.

Appellants also argue that many Utah residents adhere to this particular religious view of marriage as having as its essential purpose unassisted procreation and raising the children so conceived. (Herbert Br. 91-93.) Even if this describes the personal beliefs of many citizens in Utah, this view of marriage is not consistent with Utah's civil law, the laws of other states, or the federal Constitution. To the contrary, an ability or desire to procreate has never been a requirement of marriage in Utah, and even if such a requirement did exist, it would be unconstitutional. And, importantly, no other couples who are unable to procreate without assistance but

who are otherwise qualified are excluded from the right to marry.

A. The Ability or Desire to Procreate Has Never Been the Defining Feature of or a Prerequisite for a Valid Marriage.

Appellants' suggestion that the right to marry is inextricably intertwined with procreation is—in a word—wrong. Utah, like all other states, has never required prospective spouses to agree to procreate, to remain open to procreation, or even to be able to procreate as a condition of marrying. *See* Utah Code Ann. §§ 30-1-1 and 30-1-2 (listing void marriages). *See also Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."). Indeed, given that the choice whether or not to engage in procreative sexual activity is constitutionally protected from state intervention, *see, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965), it would also be constitutionally impermissible to condition marriage on such an ability or desire.

Utah statutory law establishes that an ability or desire to procreate is not a requirement to marry or for the marriage to be valid. For example, infertility (which is a very common condition)[8] is not a basis for voiding a marriage in Utah or any

[8] Data from 2002 show that approximately seven million women and four million men suffer from infertility. Michael L. Eisenberg, M.D. et al., *Predictors of not Pursuing Infertility Treatment After an Infertility Diagnosis: Examination of a Prospective U.S. Cohort*, 94 Fertility & Sterility 2369, 2369 (2010).

(Footnote continues on next page.)

other state, nor is consummation or sexual intimacy of any kind required to validate a marriage in Utah or in any other state. *See* Utah Code Ann. §§ 30-1-1 and 30-1-2 (listing void marriages); Amicus Curiae Brief of Historians of Marriage. Indeed, Utah prohibits certain different-sex couples from marrying unless they can prove they *cannot* procreate. *See, e.g.*, Utah Code Ann. § 30-1-1(2) (providing that first cousins can marry only if "both parties are 65 of age or older; or . . . if both parties are 55 years of age or older, upon a finding by the district court . . . that either parties is unable to reproduce"). Thus, nothing in Utah law suggests that an ability or a desire to procreate is necessary to have a valid marriage.

A review of Utah's statutory grounds for divorce reinforces the conclusion that procreation is not the core purpose of marriage, much less an essential requirement. Utah, like all other states, permits "no-fault" divorce.[9] No-fault divorce is premised on a failure of the spousal relationship, not on concerns about procreation or infertility. *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. Rev. 1669, 1704 (2011) ("no-fault divorce" means that a divorce can be obtained solely on the basis of the breakdown of the marital relationship without a showing of fault or misconduct). In

(Footnote continued from previous page.)

Approximately two to three million couples are infertile. Encyc. of Contemp. Am. Soc. Issues 1182 (Michael Shally-Jensen ed., 2011).

[9] Utah added the no-fault ground of "irreconcilable differences" to its divorce provisions in 1987. H.B. 139, 1987 Acts.

addition, with regard to fault-based grounds for divorce (which remain in Utah along with the more recently added no-fault grounds), infertility has never been a ground for fault-based divorce.[10]

Similarly, Appellants' insistence that the "meaning and purpose of marriage" in Utah is "child-centered," (Herbert Br. 59), gets no support from the Utah Supreme Court. Although "there is no single prototype of marriage that all married couples conform to, the "general hallmarks of marriage" the court identifies focus on the married pair, including "a shared residence, an intimate relationship, and a common household involving shared expenses and shared decisions." *Myers v. Myers*, 266 P.3d 806, 811 (Utah 2011). Other Utah Supreme Court cases likewise belie the claimed child-centric purpose of marriage. *See Clark v. Clark*, 27 P.3d 538, 542 (Utah 2001) (for a valid common law marriage, couples "mutually assumed marital rights, duties, and obligations" such as when they "filed joint income tax returns; established joint checking and credit accounts; jointly purchased real estate holdings, including a shared residence; jointly purchased vehicles and other personal belongings together; shared household expenses; and

[10] While impotency is a fault-based ground for divorce, Utah Code Ann. § 30-3-1(3)(a), its inclusion simply suggests that sexual intimacy is important to many married couples and that impotence is a permissible basis for ending a valid marriage. In any case, divorce on the ground of impotence has fallen into desuetude. It has not been discussed in case law for 65 years. *See Greener v. Greener*, 212 P.2d 194 (Utah 1949) (addressing impotence in dicta).

slept in the same bed.").

Contrary to Appellants' narrow view of marriage, in Utah, as in every other state, marriage serves and has always served multiple purposes, the vast majority of which focus on enabling the spouses to protect and foster their personal, intimate, and mutually dependent relationship *to one another*. Under state law, married couples receive many protections and benefits and assume mutual responsibilities pertaining, for instance, to health care decisions, workers' compensation and pension benefits, property ownership, spousal support, inheritance, taxation, insurance coverage, and testimonial privileges.[11]

In sum, Appellants' attempts to reduce the meaning and purpose of marriage to facilitating and protecting the fruits of procreative sexual activity are not supported by Utah law. Moreover, as the U.S. Supreme Court has explained, this reductionist view of marriage demeans the institution and the relationship between the spouses. *See Lawrence v. Texas*, 539 U.S. at 567 ("[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

[11] *See, e.g.*, Utah R. Evid. 502(b) (spousal testimonial privilege); Utah Code Ann. § 30-2-11 (cause of action available to spouses for loss of consortium); *id.* § 75-2-202 (spousal right to take an elective share of 1/3 the value of the estate); *id.* § 75-2-102 (spousal right to intestate succession); *id.* § 30-3-5 (spousal rights to property division, maintenance, and health care, and division of debts); *id.* § 78B-5-510 (spousal right to assert tax exemption); *id.* § 59-10-503 (spousal right to file joint income taxes).

B. The Constitutional Rights to Marry and to Procreate Are Distinct and Independent.

As a matter of constitutional law, the U.S. Supreme Court declared in *Turner v. Safley*, 482 U.S. 78 (1987) that individuals cannot be excluded from the right to marry simply because they are unable to engage in procreation. The *Turner* Court recognized that incarcerated prisoners—even those with no right to conjugal visits, and thus no opportunity to procreate—have a fundamental right to marry, because many "important attributes of marriage remain . . . after taking into account the limitations imposed by prison life." *Id*. at 95. The Court explained that marriage has multiple purposes unrelated to procreation, such as "the expressions of emotional support and public commitment," "exercise of religious faith," "expression of personal dedication," and "the receipt of government benefits." *Id*. at 95–96.

Appellants' attempt to justify the marriage exclusion under the guise of promoting a particular method of procreation should be approached with caution. Procreative decisions are quintessential matters of individual liberty. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) ("[I]t is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as to the decision whether to bear or beget a child."); *Griswold*, 381 U.S. at 479, 485-86 (married couples have a constitutionally protected right to engage in non-procreative sexual intimacy).

In sum, there is no historical or legal justification to support Appellants'

claim that there is a "critical conceptual link between marriage and procreation." (Herbert Br. 72.)

II. A CLAIMED PREFERENCE FOR "DUAL GENDER" PARENTING BY BIOLOGICAL PARENTS IS BELIED BY UTAH LAW AND IS INCONSISTENT WITH CONSTITUTIONAL PRINCIPLES.

Appellants argue that it is permissible for Utah to limit marriage to different-sex couples, because families headed by two married biological parents are able to provide "*gender-differentiated*" parenting and establish the "optimal" environment in which to raise children. (Herbert Br. 63-65.)

This effort to justify the exclusion of same-sex couples from marriage by repeating the State's preference for married different-sex parents merely circles back to the challenged classification without justifying it. *Romer*, 517 U.S. at 633 (discriminatory classifications must serve some "independent and legitimate legislative end.").

Appellants' assertion about optimal childrearing is also at odds with the social science consensus demonstrating that the key factors for positive outcomes for children are the quality of the parent-child relationship, and the relationship and resources of the parents, not the parents' gender or sexual orientation. (*See* Amici Curiae Brief of American Psychological Association et al.; *and* Amicus Curiae Brief of the American Sociological Association.) As an Ohio District Court recently explained: "The overwhelming scientific consensus, based on decades of peer-

reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples." *Obergefell v. Wymyslo*, No. 1:13-CV-501, 2013 WL 6726688, at *20, n.20 (S.D. Ohio Dec. 23, 2013).

Appellants' childrearing contentions also flatly contradict Utah law, which (1) belies Appellants' argument that the state prefers children to be raised by their two biological parents, and (2) renders impermissible family law rules or decisions based on gender stereotypes.

A. Utah Does Not Require a Biological Relationship to Establish a Legal Parent-Child Relationship.

Under Utah law, there are many ways to establish a legal parent-child relationship. A biological relationship or genetic connection to a child is one means, but not a necessary prerequisite to establishing legal parentage. Parentage can be based on a biological tie, but it also can be based on some combination of an individual's intent to parent and his or her actual performance of parental responsibilities.[12] For example, Utah, like other states, presumes that a husband is a child's legal parent when the child is born during a marriage. *See* Utah Code Ann. § 78B-15-204. Thus, when a husband is not a child's biological father, Utah law will

[12] For example, Utah's Uniform Parentage Act has four separate definitions of a legal mother and six definitions of a legal father. *See* Utah Code. Ann. § 78B-15-201.

presumptively treat the husband as the child's legal father, even over an objection from the child's biological parent. *See, e.g.*, *Pearson v. Pearson*, 182 P.3d 353 (Utah 2008) (holding that biological father lacked standing to challenge the husband's paternity). Utah also confers legal parentage on spouses who use assisted reproduction with donor gametes and even when they use donor gametes and gestational carriers to carry and deliver a child. *See* Utah Code Ann. §§ 78B-15-703; 78B-15-801.

In addition, Utah, like every other state, provides for the adoption of children by adults who are not a child's biological parents. *See* Utah Code Ann. § 78B-6-101 (Utah Adoption Act). Adoptive parents are treated as equal to all other legal parents. *See* Utah Code Ann. § 78B-6-139 (adoptive parents have all the rights and are subject to all the duties of a parent-child relationship); *Bonwich v. Bonwich*, 699 P.2d 760, 762 (Utah 1985) (custody presumption favoring natural parent was inapplicable in divorce action between biological father and adoptive mother; both parties are "on equal footing"). On the flip side, in a variety of contexts, Utah denies protection to biological parents. For example, in adoption proceedings, Utah has expressed a particularly strong preference for the interests of unwed mothers and prospective married adoptive parents as against the interests of unwed biological

fathers.[13]

In sum, the lack of a requirement of a biological tie as a condition of establishing legal parentage, and Utah's preference for non-biological parents in many instances, render implausible Appellants' contention that the marriage exclusion is premised on a preference for biological parenting by both parents.

B. Appellants' Alleged Interest in Promoting "Dual Gender" Parenting Is Inconsistent with Utah and Federal Constitutional Law.

Appellants claim that the optimal setting for the raising of children is a family that includes different-sex parents because fathers and mothers make "unique gender-based contributions . . . to their children's well-being." (Herbert Br. 63.) According to Appellants, "men and women parent children differently, and in so doing contribute distinctly to healthy child development." (Herbert Br. 64.)

Rhetoric aside, Utah law undermines Appellants' claim that "gender-differentiated" roles in marriage and parenting are important state objectives. As in all states, Utah law regards marriage as a union free of state mandated sex- or gender-based roles. In addition, Utah regards the gender of parents as legally

[13] Utah has one of the most onerous regulatory schemes in the country for unwed biological fathers who wish to establish their status as legal parents. Under Utah's Adoption Act, "An unmarried biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman: (i) is considered to be on notice that a pregnancy and an adoption proceeding regarding the child may occur; and (ii) has a duty to protect his own rights and interests." Utah Code Ann. § 78B-6-110(1)(a); *see also* § 78B-6-102(6).

irrelevant in custody law. Finally, as discussed in other amici briefs, these assertions are unsupported by robust social science literature discussing how parents—whatever their sex or gender—can take on "nurturing" or "playful" roles.[14]

Over the past 150 years, Utah law has gradually eliminated the sex-specific roles that were once a core part of marriage. Utah law now acknowledges that all spouses are able to be wage earners and caring parents. It has reversed the common law system of coverture by passing Married Women's Property Acts in 1888. *See, e.g.*, Utah Code Ann. §§ 30-2-2 to 30-2-4 (giving wives power to hold and enjoy their own property, contract, own their wages, sue and be sued, and maintain separate debts). Utah long ago recognized that "[t]he old common law fiction [of spousal unity] is not consonant with the realities of today." *Stoker v. Stoker*, 616 P.2d 590, 592 (Utah 1980).

At common law, a husband had a duty to provide for the necessary expenses of his wife. Now Utah and other states have extended the doctrine to render both spouses liable for the family expenses incurred by the other. *See* Utah Code Ann. § 30-2-9. Likewise, the age requirement for marriage is now the same for males and females. *See* Utah Code Ann. § 30-1-2 to -1-2(3); § 30-1-9. As in all other states, the causes for divorce are the same for each spouse. *See* Utah Code Ann. § 30-3-2.

[14] *See* Amici Curiae Brief of American Psychological Association et al.; *and* Amicus Curiae Brief of the American Sociological Association.

At divorce, Utah law treats marriage as an economic partnership between two individuals in which courts distribute the parties' accumulated assets as the equities of each case require, not solely according to who holds legal title. *See* Utah Code Ann. § 30-3-5(1) (providing for "equitable orders" relating to the property, debts, or obligations).

At common law, spousal support was only paid by the husband to the wife. Utah rejected this gender-based rule in 1977 through a statutory amendment, two years before the U.S. Supreme Court held that such rules constitute unconstitutional sex-discrimination in *Orr v. Orr*, 440 U.S. 268 (1979). *See* Equalization of Domestic Relations Laws, 1977 Utah Laws ch. 122, at 564-65, *available at* http://utah.ptfs.com/awweb/guest.jsp?smd=1&cl=all_lib&lb_document_id=65319.[15]

Time and again, Utah has stripped its family law of outmoded gender stereotypes. In 1977, Utah overhauled its entire family law code to codify a gender-neutral approach in virtually every area of family law, including marriage, divorce, and child custody. 1977 Utah Laws ch. 122, at 562-66. Consistent with this overarching goal, Utah law expressly states that the gender of the parent is not

[15] Utah courts are still confronting inappropriate gender-role considerations in family cases. *See, e.g., Mark v. Mark*, 223 P.3d 476, 482 (Utah Ct. App. 2009) (trial court abused its discretion in awarding only $1200 in rehabilitative alimony for one year to a 52-year-old husband with weak employment prospects).

relevant in custody disputes. *See* Utah Code Ann. § 30-3-10(1)(a) ("In determining any form of custody, including a change in custody, the court shall consider the best interests of the child without preference for either the mother or father solely because of the biological sex of the parent . . . ."); Utah Code Ann. § 30-3-10(1)(b) (creating a rebuttable presumption in favor of joint legal custody); *see also Pusey v. Pusey*, 728 P.2d 117, 119–20 (Utah 1986) (rejecting the "tender years presumption" favoring mothers in custody disputes involving young children); *Marchant v. Marchant*, 743 P.2d 199, 204 (Utah Ct. App. 1987) ("[T]his Court will not condone any finding of fact which might be interpreted as penalizing a woman for acquiring skills in other than the most fundamental and traditional areas necessary for functioning as a wife and mother.").

As these examples demonstrate, and contrary to Appellants' claim, Utah does not support "gender differentiated" roles in marriage or parenting (Herbert Br. 64, 72), and instead affirmatively requires a gender-neutral approach to constructing and implementing family law rules.

Beyond its inconsistency with Utah law, any effort to enforce gender-differentiated roles in marriage or parenting would be unconstitutional. Appellants seek to justify the marriage ban by insisting that mothers and fathers make "unique, gender-based contributions … to their children's well-being," (Herbert Br. 63), but this is precisely the type of "overbroad generalization about the different talents,

capacities, or preferences of males and females" that the Constitution prohibits. *United States v. Virginia*, 518 U.S. 515, 533 (1996). The U.S. Supreme Court has repeatedly held that it is impermissible to premise laws on outmoded sex-based stereotypes. *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199 (1977) (holding unconstitutional Social Security Act provisions that were premised on the "archaic and overbroad" generalizations that "wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives"); *Weinberger v. Wisenfeld*, 420 U.S. 636 (1975) (social security benefits); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military benefits). These principles have been applied with full force to family law. *See, e.g.*, *Orr v. Orr*, 440 U.S. 268 (holding unconstitutional a state law that imposed support obligations on husbands but not on wives); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (striking down state law that gave husbands the unilateral right to dispose of jointly owned community property without his spouse's consent). Indeed, the Court recently approved of Congress's effort to combat "[s]tereotypes about women's domestic roles [and] parallel stereotypes presuming a lack of domestic responsibilities for men." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

Implied but unstated is Appellants' attempt to base their arguments on a desire to ensure that children will be socialized into appropriate gender-roles for

their biological sex.[16] (*See, e.g.*, Herbert Br. 7 (expressing a concern about the "'socialization of the next generation'").) This is exactly the kind of thinking that is suspect under constitutional principles. Almost forty years ago, the U.S. Supreme Court struck down a Utah law that provided different child support obligations for girls than for boys based on presumptions about their respective roles and destinies. *Stanton v. Stanton*, 421 U.S. 7 (1975). As the Court explained, "A child, male or female, is still a child . . . . No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Id.* at 14-15. *See also Stanley v. Illinois*, 405 U.S. 645, 653, 657 (1972) (holding unconstitutional a state law that conclusively presumed that all unmarried fathers were "unqualified to raise their children"). *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (rejecting stereotypes about how female and male jurors differ); *Miss.*

[16] Appellants suggest that children raised by same-sex couples will not be so socialized. The social science briefs also address why this contention is lacking.

Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982) (rejecting stereotype that only women should be nurses).

In addition, there are powerful common law traditions, bolstered by constitutional decisions, that protect parental autonomy, including the rights of parents to control the care and raising of their children, and socialize them as they see fit. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (parental liberty right to "direct the upbringing and education of [their] children"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right to "marry, establish a home and bring up children" is a protected liberty).

C. Marriage Is Open to Virtually Any Different-Sex Couple, Irrespective of Their Ability to Be "Optimal" Parents.

As demonstrated above, the "optimal childrearing" claim is unsupported by social science and is inconsistent with Utah law and equal protection principles. Even if, *arguendo*, there were differences in how children fare between those raised by married heterosexual couples and those raised by cohabiting same-sex couples, any such difference is not a permissible grounds for singling out same-sex couples and excluding only them from the right to marry. No other couples are denied the right to marry based on a belief that those couples will not provide an optimal setting for the raising of children. As referenced in other *amici* briefs, parental resources are associated with better outcomes for children, but no one would suggest that lower- or middle-income people should be barred from marrying.

Again, even assuming *arguendo* that children of same-sex couples fare worse on some measure, the complete bar on marriage for all same-sex couples "[makes] no sense in light of how [Utah] treat[s] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001), citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-450 (1985).

The U.S. Supreme Court has also recognized that whether members of a couple would be good parents, or whether they could even provide support for children, are not permissible bases upon which to deny them the right to marry. The Court's decision in *Zablocki v. Redhail*, 434 U.S. 374 (1978), is instructive on this point. In *Zablocki*, Wisconsin sought to deny the right to marry to parents the state considered to be irresponsible because they had failed to pay child support, but the Court held that conditioning marriage on a person's parenting conduct was an unconstitutional infringement of the right to marry. *Id.* at 386, 388–89. In this vein, courts have rejected the "optimal" child-rearing theory in part because marriage is not and cannot be restricted to individuals who would be "good" parents. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 900 (Iowa 2009) (noting that Iowa did "not exclude from marriage other groups of parents—such as child abusers, sexual predators, parents neglecting to provide child support, and violent felons—that are undeniably less than optimal parents").

D. A Desire to Mark Same-Sex Couples as Less Worthy Is a Constitutionally Impermissible Interest.

Because the procreation and optimal parenting interests invoked by Appellants have no "footing in the realities of the subject addressed by the legislation," *Heller v. Doe*, 509 U.S. at 321, Utah's marriage ban "seems inexplicable by anything but animus towards the class it affects." *Romer*, 517 U.S. at 632. A desire to mark the relationships of same-sex couples as less worthy of respect is an impermissible interest, under any standard of constitutional review. *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013). *See also id.* at 2693 ("The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group.") (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–535 (1973)).

Appellants overlook that marriage and its mutual responsibilities and protections apply to the married couple and most have nothing to do with children. Excluding same-sex couples from marriage and all of its attendant legal protections because they allegedly do not provide a certain kind of parenting, when different sex couples are not required to have children at all, much less biological children, imposes a colossal burden on same-sex couples. As the Supreme Court made clear in *Romer*, rational basis review will invalidate a measure whose "sheer breadth" is "discontinuous with the reasons offered for it." 517 U.S. at 632.

III. UTAH'S MARRIAGE BAN BEARS NO RATIONAL RELATIONSHIP TO THE WELL-BEING OF CHILDREN.

Although the answers are clear, this Court need not resolve the issues Appellants raise about child welfare because there is no rational connection between the marriage ban and advancing the welfare of children in any family. It is utterly implausible to believe that barring same-sex couples from marrying somehow improves the well-being of children raised by different sex couples.

A. The Marriage Ban Does Nothing to Further the Well-being of Children Raised by Different-Sex Couples.

Even under rational basis review, there simply is no rational or logical connection between the marriage ban and any of the purported interests identified by Appellants.

Appellants claim that Utah has an interest in ensuring that sexual activity between heterosexual couples occurs within marriage (*see* Herbert Br. 52), and encouraging these couples, once married, to engage in "adequate reproduction" so that birth rates do not fall below "replacement levels." (Herbert Br. 82-83.) Appellants also claim that the state has an interest in "encourag[ing] parents to subordinate their own interests to the needs of their children." (Herbert Br. 51.)

Insofar as marriage laws encourage different-sex couples to marry in order to channel unplanned pregnancies into a marital household, there is no basis in logic or social experience to suppose that such couples will lose respect for the institution

if same-sex couples are permitted to marry in Utah. Likewise, there is no logical reason to believe that permitting same-sex couples to marry would have *any* influence on the marital or procreative decisions of different-sex couples, much less cause these couples to care less about their children, suffer a decline in fertility, have more extramarital affairs, work longer hours, or drink more. (Herbert Br. 60, 83–86). These suppositions, which are central to Appellants' argument, make sense only if same-sex relationships are so abhorrent as to contaminate the institution of marriage to the point that different-sex couples will shun it. Appellants ask this Court to bar committed couples from marriage, stigmatize them and their children, and deny them access to substantial state and federal benefits, on the imaginary basis that this will make marriage more attractive to different-sex couples.

Because there is no logical connection between the means and the purported end, numerous courts have rejected these arguments. *See*, *e.g.*, *Bishop v. U.S. ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *29 (N.D. Okla. Jan. 14, 2014) ("[T]here is no rational link between excluding same-sex couples from marriage and the goals of encouraging 'responsible procreation' among the 'naturally procreative' and/or steering the 'naturally procreative' toward marriage."); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *16 (W.D. Tex. Feb. 26, 2014) ("[T]he Court finds the argument that allowing same-sex couples to marry will undermine procreation is nothing more than an

unsupported 'overbroad generalization' that cannot be a basis for upholding discriminatory legislation."); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014) (rejecting "purported legitimate interests including: responsible procreation and childrearing, steering naturally procreative relationships into stable unions [and] promoting the optimal childrearing environment"); *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978, at *22 (E.D. Va. Feb. 13, 2014) (rejecting proffered purpose of "endors[ing] 'responsible procreation'").

B. The Marriage Ban Harms the Well-being of Children Raised by Same-Sex Couples.

Although there is not even a rational reason to think that the marriage ban will have any positive effect on the children of different-sex couples, it is absolutely clear that it harms the children of same-sex couples by denying their families access to hundreds of critical state and federal marital benefits that are conducive to providing stable and secure environments for raising children.[17]

The marriage ban also amounts to an official statement "that the family relationship of same-sex couples is not of comparable stature or equal dignity" to that of married couples. *In re Marriage Cases*, 183 P.3d 384, 445, 452 (Cal. 2008).

[17] As of 2011, about one in five same-sex couples are raising children under age 18. Gary J. Gates, Same-Sex and Different-Sex Couples in the American Community Survey: 2005-2011 (Williams Institute, 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf.

This stigma leads children to understand that the State considers their gay and lesbian parents to be unworthy of participating in the institution of marriage and devalues their families compared to families that are headed by married heterosexuals. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003).

In this way, the marriage ban does significant tangible and intangible harm to the interests of children born to, adopted by, and raised in families headed by couples of the same sex.

C. Denying Rights and Protections to Children Is a Constitutionally Impermissible Means of Influencing Their Parents' Behavior.

Even if there were some reasonably conceivable connection between the marriage ban and increasing the marriage rates of heterosexual couples or the number of children born to married heterosexual couples, punishing innocent children is an impermissible means of trying to influence the behavior of adults.

Utah's marriage ban functions in a way that is remarkably similar to the manner by which children born out-of-wedlock were denied legal and economic protections and stigmatized under now-repudiated laws in Utah and most other states regarding "illegitimate" children. Historically, state parentage laws saddled the children of unwed parents with the demeaning status of "illegitimacy" and denied these children important rights in an effort to shame their parents into marrying one another. *See* Melissa Murray, *Marriage As Punishment*, 112 Colum.

L. Rev. 1, 33 n.165 (2012) (marriage was offered as a way to lead unwed mothers away "from vice towards the path of virtue"). Rights that were denied to "illegitimate" children included the right to a relationship with and support from their fathers, intestate succession, and compensation for wrongful death or injury to their fathers. Although Utah's territorial legislature extended some rights to out-of-wedlock children to inherit from their fathers, *see Chapman v. Handley*, 24 P. 673 (Utah 1890) (citing Comp. Laws 1876, pp. 268, 269, § 677, Congress later repealed these laws. From then on until the 1960s, Utah generally subjected out-of-wedlock children to the same harsh treatment they endured in other states.[18]

Since the late 1960s, however, the U.S. Supreme Court has repudiated laws that discriminate against children based on outmoded concepts of "illegitimacy." In *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), for example, the Court found that

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his

[18] In the first half of the 20th century, Utah courts occasionally departed from the harsh treatment to which nonmarital children were subjected under the common law. *See, e.g.*, *Utah Fuel Co. v. Indus. Comm'n of Utah*, 234 P. 697, 699 (Utah 1925) ("Why should a child which is the fruit of a void marriage be punished for the wrongful act of its parents? If any punishment is to be inflicted, let it fall upon those who are the actors in the drama and not upon the innocent and helpless.").

> birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Id. at 175. See also *Levy v. Louisiana*, 391 U.S. 68 (1968).

Consistent with the directive of the Supreme Court, Utah no longer denies protections to nonmarital children. Under Utah's version of the Uniform Parentage Act (UPA), Utah Code Ann. § 78B-15-101 et seq., "[a] child born to parents who are not married to each other whose paternity has been determined under this chapter has the same rights under the law as a child born to parents who are married to each other." *Id.* § 78B-15-202. Nonmarital children also have the same inheritance rights as children of married parents. Utah Code Ann. § 75-2-114.

Utah imposes child support obligations on all parents regardless of their gender or marital status. *Id.* § 78B-12-105; *see also id.* (expenses incurred on behalf of a minor child for necessary medical, dental, and other expenses are chargeable to the parents, regardless of marital status). Utah law does not support the proposition that it is permissible to deny critical benefits and security to some children in order to make the families of other children more stable or secure. Accordingly, Appellants' argument that Utah's marriage ban can be justified as an effort to discourage out-of-wedlock births and encourage biological, "child-centered," "gender differentiated" parenting by making marriage exclusively available to heterosexuals is fundamentally at odds with Utah's strong policy of equal treatment

for *all* children. In exchange for a wholly speculative benefit for the children of heterosexual couples, other children —those raised by same-sex couples—pay the price. This is a legally unacceptable result for the same reasons that led to the changes in the prior treatment of "illegitimacy."

CONCLUSION

As the Massachusetts high court so eloquently concluded almost one decade ago:

> The [State] has offered purported justifications for the civil marriage restriction that are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children. It has failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex.

Goodridge v. Dep't of Pub. Health, 798 N.E.2d at 968. *Amici* ask that this Court affirm the district court's decision in the above-captioned action.

Dated: March 4, 2014

Respectfully submitted,

MORRISON & FOERSTER LLP

By: *s/ Rita F. Lin*
Rita F. Lin

Attorney for Amici Curiae
Family Law Professors

APPENDIX A[19]

MARIANNE BLAIR
PROFESSOR OF LAW
UNIVERSITY OF TULSA COLLEGE OF LAW

CHRISTOPHER L. BLAKESLEY
BARRICK DISTINGUISHED SCHOLAR & COBEAGA LAW FIRM PROFESSOR OF LAW
UNIVERSITY OF NEVADA LAS VEGAS, BOYD SCHOOL OF LAW

GRACE GANZ BLUMBERG
DISTINGUISHED PROFESSOR OF LAW EMERITA
UCLA SCHOOL OF LAW

CYNTHIA GRANT BOWMAN
PROFESSOR OF LAW
CORNELL LAW SCHOOL

KATHRYN WEBB BRADLEY
PROFESSOR OF THE PRACTICE OF LAW
DUKE LAW SCHOOL

NAOMI R. CAHN
HAROLD H. GREENE PROFESSOR OF LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

PATRICIA A. CAIN
PROFESSOR OF LAW
SANTA CLARA UNIVERSITY
ALIBER FAMILY CHAIR IN LAW, EMERITA, UNIVERSITY OF IOWA

KAREN CZAPANSKIY
FRANCIS & HARRIET IGLEHART RESEARCH PROFESSOR OF LAW
UNIVERSITY OF MARYLAND FRANCIS KING CAREY SCHOOL OF LAW

ANNE C. DAILEY
EVANGELINE STARR PROFESSOR OF LAW
UNIVERSITY OF CONNECTICUT SCHOOL OF LAW

NANCY E. DOWD
DAVID H. LEVIN CHAIR IN FAMILY LAW, DIRECTOR, CENTER ON CHILDREN & FAMILIES, PROFESSOR OF LAW
UNIVERSITY OF FLORIDA, LEVIN COLLEGE OF LAW

DR. JENNIFER A. DROBAC
PROFESSOR
INDIANA UNIVERSITY ROBERT H. MCKINNEY SCHOOL OF LAW

IRA MARK ELLMAN
CHARLES J. MERRIAM DISTINGUISHED PROFESSOR OF LAW, AFFILIATE PROFESSOR OF PSYCHOLOGY, FACULTY FELLOW, CENTER FOR LAW, SCIENCE & INNOVATION
SANDRA DAY O'CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY

LINDA HENRY ELROD
RICHARD S. RIGHER DISTINGUISHED PROFESSOR OF LAW
WASHBURN UNIVERSITY SCHOOL OF LAW

MARTHA M. ERTMAN
CAROLE & HANAN SIBEL RESEARCH PROFESSOR
UNIVERSITY OF MARYLAND CAREY LAW SCHOOL

[19] University affiliation of the professors is given for identification purposes only, and implies no endorsement by the universities.

ZANITA E. FENTON
PROFESSOR OF LAW
UNIVERSITY OF MIAMI SCHOOL OF LAW

LESLIE J. HARRIS
DOROTHY KLIKS FONES PROFESSOR
UNIVERSITY OF OREGON SCHOOL OF LAW

JOAN HEIFETZ HOLLINGER
JOHN AND ELIZABETH BOALT LECTURER IN RESIDENCE
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW

LISA C. IKEMOTO
PROFESSOR
UNIVERSITY OF CALIFORNIA – DAVIS SCHOOL OF LAW

COURTNEY G. JOSLIN
PROFESSOR OF LAW
UNIVERSITY OF CALIFORNIA – DAVIS SCHOOL OF LAW

HERMA HILL KAY
BARBARA NACHTRIEB ARMSTRONG PROFESSOR OF LAW
SCHOOL OF LAW (BOALT HALL),
UNIVERSITY OF CALIFORNIA, BERKELEY

LAURA T. KESSLER
PROFESSOR OF LAW
UNIVERSITY OF UTAH, S.J. QUINNEY COLLEGE OF LAW

CHARLES KINDREGAN
PROFESSOR OF FAMILY LAW
SUFFOLK UNIVERSITY LAW SCHOOL

KRISTINE S. KNAPLUND
PROFESSOR OF LAW
PEPPERDINE UNIVERSITY SCHOOL OF LAW

ELIZABETH L. MACDOWELL
ASSOCIATE PROFESSOR OF LAW AND DIRECTOR, FAMILY JUSTICE CLINIC
WILLIAM S. BOYD SCHOOL OF LAW,
UNIVERSITY OF NEVADA, LAS VEGAS

MAYA MANIAN
PROFESSOR
UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW

NANCY G. MAXWELL
PROFESSOR OF LAW
WASHBURN UNIVERSITY SCHOOL OF LAW

JENNIFER B. MERTUS
DIRECTOR, CENTER FOR CHILDREN'S RIGHTS
WHITTIER LAW SCHOOL

MELISSA MURRAY
PROFESSOR OF LAW
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW

DOUGLAS NEJAIME
PROFESSOR OF LAW
UC IRVINE SCHOOL OF LAW

ANGELA ONWUACHI-WILLIG
CHARLES M. AND MARION J. KIERSCHT PROFESSOR OF LAW
UNIVERSITY OF IOWA COLLEGE OF LAW

KERMIT ROOSEVELT
PROFESSOR OF LAW
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

LAURA A. ROSENBURY
PROFESSOR OF LAW
WASHINGTON UNIVERSITY SCHOOL OF LAW

REBECCA L. SCHARF
ASSOCIATE PROFESSOR OF LAW
WILLIAM S. BOYD SCHOOL OF LAW,
UNIVERSITY OF NEVADA, LAS VEGAS

JULIE SHAPIRO
PROFESSOR OF LAW
SEATTLE UNIVERSITY SCHOOL OF LAW

CATHERINE E. SMITH
ASSOC. DEAN OF INSTITUTIONAL DIVERSITY AND INCLUSIVENESS, PROFESSOR OF LAW
UNIVERSITY OF DENVER STURM COLLEGE OF LAW

MICHAEL S. WALD
JACKSON ELI REYNOLDS PROFESSOR OF LAW, EMERITUS
STANFORD LAW SCHOOL

D. KELLY WEISBERG
PROFESSOR OF LAW
UC HASTINGS COLLEGE OF LAW

LOIS A. WEITHORN
PROFESSOR OF LAW
UC HASTINGS COLLEGE OF THE LAW

WENDY WEBSTER WILLIAMS
PROFESSOR EMERITA
GEORGETOWN UNIVERSITY LAW CENTER

BARBARA BENNETT WOODHOUSE
L. Q. C. LAMAR PROFESSOR OF LAW AND DIRECTOR OF THE CHILD RIGHTS PROJECT
EMORY UNIVERSITY SCHOOL OF LAW

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Dated: March 4, 2014

s/ Rita F. Lin

Rita F. Lin

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2014 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

David C. Codell
dcodell@nclrights.org

Kathryn Kendell
kkendell@nclrights.org

Shannon Price Minter
sminter@nclrights.org

James E. Magleby
magleby@mgpclaw.com

Jennifer Fraser Parrish
parrish@mgpclaw.com

Peggy Ann Tomsic
tomsic@mgpclaw.com

Attorneys for Plaintiffs-Appellees

John J. Bursch
jbursch@wjn.com

Philip S. Lott
phillot@utah.gov

Stanford E. Purser
spurser@utah.gov

Gene C. Schaerr
gschaerr@gmail.com

Monte Neil Stewart
stewart@stm-law.com

Attorneys for Defendants-Appellants

Ralph E. Chamness
rchamness@slco.org

Darcy Marie Goddard
dgoddard@sclo.org

Attorneys for Defendant Swenson

Date: March 4, 2014

/s Rita F. Lin
Rita F. Lin

CERTIFICATE OF DIGITAL SUBMISSION

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/s Rita F. Lin
Rita F. Lin