Case Nos. 13-4178, 14-5003, 14-5006

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DEREK KITCHEN, ET AL.,
Plaintiffs-Appellees,
v.
GARY R. HERBERT, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Utah (No. 2:13-cv-00217)

MARY BISHOP, ET AL.,
Plaintiffs-Appellees,
v.
SALLY HOWE SMITH, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Oklahoma (No. 4:04-cv-00848)

BRIEF OF *AMICI CURIAE* MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, ILLINOIS, IOWA, MAINE, MARYLAND, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON IN SUPPORT OF PLAINTIFFS-APPELLEES AND PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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INTEREST OF *AMICI CURIAE*

Amici States Massachusetts, California, Connecticut, Delaware, the District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington[1] file this brief in support of Appellees Derek Kitchen, et al. (No. 13-4178), Appellees Mary Bishop, et al. (No. 14-5003), and Cross-Appellants Susan G. Barton, et al. (No. 14-5006) as a matter of right pursuant to Fed. R. App. P. 29(a).

As in many other cases raising constitutional challenges to state marriage laws, there is considerable agreement between *Amici* States and those States that defend exclusionary laws. All States agree that marriage is a core building block of society, and, as a result, they regulate entry into, responsibilities during and after, and exit from marriage. Moreover, States establish policies that encourage individuals to get and stay married because they recognize that marriage provides stability for families, households, and the broader community; that children are better off when they are raised by loving, committed parents; and that state resources are preserved when spouses provide for each other and their children. On all of these points—and many more—all States are in accord.

[1] The District of Columbia, which sets its own marriage rules, is referred to as a State for ease of discussion.

But disagreement exists about a few points that are dispositive of the outcome of these cases. *Amici* States file this brief in strong support of the right of same-sex couples to marry, and to rebut certain assertions made by Oklahoma, Utah, and their *amici*. Most *Amici* States currently, or soon will, permit same-sex couples to marry. We speak from experience when describing the positive impact of the transition from marital exclusion to equality. We share a compelling interest in ensuring that all citizens have equal opportunity to participate in civic life, and we are committed to ensuring that the institution of marriage is strengthened by removing unnecessary and harmful barriers.

Based on our common goals of promoting marriage, protecting families, nurturing children, and eliminating discrimination, we join in asking the Court to affirm the judgments of the district courts below.

SUMMARY OF ARGUMENT

Throughout our Nation's history, marriage has maintained its essential role in society and has been strengthened, not weakened, by removing barriers to access. Over the past decade, this evolution has continued as same-sex couples have been permitted to marry. Against a history of greater inclusion and equality, Oklahoma and Utah marriage laws single out same-sex couples and exclude them from the benefits and obligations of marriage. This exclusion is unconstitutional. Denying gays and lesbians the fundamental right to wed their partners offends basic principles of due process and equal protection, and fails to advance any legitimate governmental interest.

Since the Founding, the States have sanctioned marriages to support families, strengthen communities, and facilitate governance. All state interests are furthered by allowing same-sex couples to marry. Attempts to justify exclusionary laws by recasting the States' interests in marriage as singularly focused on the procreative potential of different-sex couples are misguided and lack any basis in law or history. Moreover, there is no rational relationship between encouraging responsible procreation by different-sex couples and excluding same-sex couples from marriage.

These laws similarly cannot be justified by pure speculation regarding the injuries same-sex marriage will inflict on the institution. The Supreme Court

rejected similar conjecture in *Loving v. Virginia*, 388 U.S. 1 (1967), and the experience of *Amici* States belies such speculation. That experience demonstrates that the institution of marriage not only remains strong, but is invigorated by the inclusion of gays and lesbians. None has suffered the threatened adverse consequences. Nor have equal marriage rights weakened the States' ability to impose reasonable regulations on marriage.

Denying same-sex couples this fundamental right deprives them and their families of the many legal, social, and economic benefits of marriage—all without justification. Under any standard of review, the Constitution's guarantees compel the outcome of these cases, and marriage equality must become the law.

ARGUMENT

I. EXCLUDING SAME-SEX COUPLES FROM MARRIAGE DOES NOT ADVANCE THE PROFFERED RATIONALES OR ANY OTHER LEGITIMATE STATE INTEREST

Opponents of same-sex marriage argue that States have a legitimate interest in promoting marriage between people of different sexes who may produce children, intentionally or not, to ensure children are raised in the "ideal" family setting. This argument fails rational basis review, because prohibiting marriages between same-sex couples does not advance the asserted interest in protecting children.[2] In fact, excluding same-sex couples from marriage does not help *any* child. This argument also degrades gays and lesbians, distorts history and our legal tradition, and is contrary to the facts and scientific consensus.

A. Opponents Distort History To Justify Their Singular Focus On Procreation

Opponents of same-sex marriage argue that the government's sole interest in recognizing and regulating marriage is the presumed physiological capacity of different-sex couples to produce children. They seek to elevate procreation because it "singles out the one unbridgeable difference between same-sex and

[2] For the reasons set forth in the brief of Appellees Derek Kitchen, et al. (pp. 48-55), laws that discriminate on the basis of sexual orientation should be subject to heightened scrutiny. However, these laws fail even rational basis review.

opposite-sex couples, and transforms that difference into the essence of a legal marriage." *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003). However, encouraging procreation has never been the government's principal interest in recognizing and regulating marriage, and tradition alone cannot sustain discrimination. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008).

In the United States, civil marriage has always been authorized and regulated by local governments in the exercise of their police powers to serve both political and economic ends. Kitchen Appendix ("App.") 2212 (Cott). In early America, the household formed by marriage was understood as a political subgroup (organized under male heads) and a form of efficient governance. App. 2214-2215 (Cott). Later came recognition of households' significance as economic sub-units of state governments, capable of supporting all household members and not strictly the children born of the marriage. App. 2216 (Cott).

Today, marriage serves as a basic building block of society. Among other things, it helps create economic and health benefits, stabilize households, form legal bonds between parents and children, assign dependents' care providers, and

facilitate property ownership and inheritance. App. 2214 (Cott).[3] Marriage thus provides stability for individuals, families, and the broader community. *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999). States therefore encourage marriages, regardless of whether they result in children, because these private relationships assist in maintaining public order. *Goodridge*, 798 N.E.2d at 954; App. 2214-2215 (Cott). All of these interests are furthered by including same-sex couples.[4]

At its core, a prohibition on same-sex marriage that focuses exclusively on procreation amounts to an unavailing attempt to preserve tradition for its own sake. Certainly, it is true that, until recently, States licensed marriages only between a man and a woman. However, such tradition cannot itself justify the continued exclusion of same-sex couples.[5] *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (discriminatory classification must serve an "independent and legitimate legislative

[3] *See also* Michael Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 Va. J. Soc. Pol'y & L. 291, 300-303 (2001).

[4] Thus, this is *not* a case where the "inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). This is a case where the government must treat "like cases alike." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (citation omitted).

[5] The tradition of marriage as between different-sex couples is based, in part, on presumptions regarding division of labor along gender lines—work for men and caretaking for women—and not only procreative abilities. App. 2219-2220 (Cott).

end"). The Supreme Court rejected such a rationale in *Loving*: "'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.'" *Lawrence v. Texas*, 539 U.S. 558, 577-578 (2003), quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

B. Excluding Same-Sex Couples From Marriage Does Not Promote The Well-Being Of Children

All States share a paramount interest in the healthy upbringing of children. Excluding same-sex couples from marriage works against this interest. Denying same-sex couples the benefits of marriage has the unavoidable effect of denying their families those benefits as well—an outcome that can harm children. In fact, some of the many rights and protections provided by marriage directly affect children. It strengthens the economic stability of families through, for instance, enhanced access to medical insurance, tax benefits, and estate and homestead protections. *See, e.g.*, *Goodridge*, 798 N.E.2d at 956. If a married couple divorces, the couple's children are protected by the application of rules of child custody, visitation, and support. *Id.*

Even putting these rights and protections aside, the very status of marriage can have a benefit for a family and especially its children. As the Supreme Court recently recognized:

> The differentiation [between relationships] demeans the couple . . . And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for children to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives.

United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (citation omitted). Indeed, parties and experts on both sides of this debate acknowledge that children benefit when their parents are able to marry. David Blankenhorn, an expert employed by proponents of restrictive marriage laws, admitted that allowing same-sex couples to marry would likely improve the well-being of gay and lesbian households.[6] Other studies have confirmed this view. For example, a Massachusetts Department of Public Health survey found that the children of married same-sex couples "felt more secure and protected" and saw "their families as being validated or legitimated by society or the government."[7]

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[6] Lisa Leff, *Defense Lawyers Rest Case at Gay Marriage Trial*, Associated Press, Jan. 27, 2010, http://www.boston.com/news/nation/articles/2010/01/27/witness_says_gay_marriage_would_help_children/ (last visited Mar. 4, 2014).

[7] Christopher Ramos, et al., *The Effects of Marriage Equality in Massachusetts: A Survey of the Experiences and Impact of Marriage on Same-Sex Couples*, The

Furthermore, there is no basis for concluding that the exclusion of same-sex couples from marriage would somehow benefit children of different-sex couples. "Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples . . . are included." *Bishop v. U.S. ex rel. Holder*, 2014 WL 116013, at *29 (N.D. Okla. Jan. 14, 2014). Rather than encourage biological parents to raise their children together, exclusionary marriage laws impede a different set of parents—same-sex couples—in their efforts to provide their children with stable family environments.[8] Thus, Oklahoma and Utah laws work against the States' efforts to ensure that all children are cared and provided for.

C. Same-Sex Parents Are As Capable As Different-Sex Parents Of Raising Healthy, Well-Adjusted Children

The contention that same-sex couples are somehow less suitable parents is contrary to the experience of the *Amici* States and scientific consensus. For more

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Williams Institute, May 2009, at 9, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Ramos-Goldberg-Badgett-MA-Effects-Marriage-Equality-May-2009.pdf (last visited Mar. 4, 2014).

[8] *See, e.g.*, *Goodridge*, 798 N.E.2d at 963 ("[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."); *Andersen v. King Cnty.*, 138 P.3d 963, 1018-1019 (Wash. 2006) (Fairhurst, J., dissenting) ("[C]hildren of same-sex couples . . . actually do and will continue to suffer by denying their parents the right to marry.").

than 30 years, the *Amici* States have protected the rights of gays and lesbians to be parents.[9] It has been our experience that same-sex parents provide just as loving and supportive households for their children as different-sex parents do. In addition, expanding the number of couples who can legally marry will create more households where adults can raise children together, because some States, including Utah, only permit co-adoption by legally married adults. *See, e.g.*, Utah Code § 78B-6-117(2). Given the number of children under state supervision (nearly 400,000 nationwide), all States benefit from having the largest pool of willing and supportive parents.

This experience is confirmed by the overwhelming scientific consensus, based on decades of peer-reviewed research, which establishes that children raised by same-sex couples fare as well as children raised by different-sex couples. App. 2259 (Patterson).[10] In fact, the research that has directly compared gay and lesbian

[9] *See, e.g.*, *DiStefano v. DiStefano*, 401 N.Y.S.2d 636 (4th Dept. 1978) ("homosexuality, per se, did not render [anyone] unfit as a parent"); *In re Marriage of Cabalquinto*, 669 P.2d 886, 888 (Wash. 1983) ("homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation").

[10] *See also Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 87 (Fla. Dist. Ct. App. 2010) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise."); *Varnum v. Brien*, 763 N.W.2d 862, 899 n.26 (Iowa 2009).

parents with heterosexual parents has consistently shown gay and lesbian parents to be equally fit and capable. App. 2253 (Patterson). The most well-respected psychological and child-welfare groups in the nation agree that same-sex parents are as effective as different-sex parents.[11]

In addition, no scientific basis supports the assertion that children need so-called "traditional" male and female role models, or that children need mothers and fathers to perform distinct roles in their lives. App. 2258-2260 (Patterson). Such views are disconnected from the "changing realities of the American family," *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality), and seek to reinforce gender-based stereotyping that courts have rejected in contexts varying from schooling to employment to parenting.[12]

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[11] These organizations include the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the Psychological Association, the American Psychoanalytic Association, the National Association of Social Workers, the Child Welfare League of America, and the North American Council on Adoptable Children.

[12] *See, e.g.*, *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 733-735 (2003) (finding unconstitutional stereotypes about women's greater suitability or inclination to assume primary childcare responsibility); *United States v. Virginia*, 518 U.S. 515, 533-534 (1996) (rejecting "overbroad generalizations of the different talents, capacities, or preferences of males and females" as justifying discrimination) (citations omitted); *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972) (striking down a statute that presumed unmarried fathers to be unfit custodians).

Nor is there any basis for the suggestion that children necessarily benefit from being raised by two biological parents. The most important factors predicting the well-being of a child include (1) the relationship of the parents to one another, (2) the parents' mutual commitment to their child's well-being, and (3) the social and economic resources available to the family. App. 2253 (Patterson). These factors apply equally to children of same-sex and different-sex parents, and they apply regardless of whether the parents—one, both, or neither—are biological parents.[13] Different-sex and same-sex couples *both* become parents in a variety of ways, including through assistive technology, surrogacy, and adoption, and couples parent in an even greater variety of ways. Ultimately, it is in the States' interest to promote the well-being of all these families, in part through the recognition of same-sex marriages.

In *Loving*, a similar argument about harm to children was advanced and rejected by the Supreme Court. Virginia defended its anti-miscegenation law based on its concern for the well-being of children "who become the victims of their intermarried parents." Brief for Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931, at *47-48. The argument made here—"the

[13] Many children raised by same-sex parents are raised by one biological parent and his or her partner. Refusing to allow same-sex couples to marry will not increase the likelihood that the biological parent will marry his or her donor or surrogate.

man-woman definition of marriage promotes the interests of children by fostering a generally child-centric marriage culture," Utah Br. 57—is not as extreme on its terms, but it is a similar means to achieve a similar end: limiting marriage rights based on the supposed harm to children. It likewise should be rejected here. *See also Palmore v. Sidoti*, 466 U.S. 429 (1984) (consideration of private bias not permissible in denying custody to mother who remarried man of another race).

D. Promoting Responsible Procreation Does Not Justify Restricting Marriage To Different-Sex Couples

The notion that marriage is premised on the ability to procreate is antithetical to our legal tradition. Never before has the ability or desire to procreate been a prerequisite for entry into marriage. App. 2215 (Cott); *see also In re Marriage Cases*, 183 P.3d at 431. Nor has inability to produce children been grounds for annulment. *See, e.g.*, *Lapides v. Lapides*, 171 N.E. 911, 913 (N.Y. 1930). Similarly, some States expressly presume infertility after a certain age for purposes of allocating property, but do not disqualify these individuals from marriage. *See, e.g.*, N.Y. Est. Powers & Trusts Law § 9-1.3(e) (women over age 55); Il. St. Ch. 765 § 305/4(c)(3) (any person age 65 or older). Individuals who are not free to procreate (prisoners, for example) still have the right to marry. *Turner v. Safley*, 482 U.S. 78, 94-99 (1987). Even parents who are "irresponsible" about their obligations to their children have the right to marry. *Zablocki v. Redhail*, 434

U.S. 374, 389-391 (1978). This is so because States—and the courts—have recognized the autonomy to make personal choices about entry into marriage and procreation as separate fundamental rights. *Loving*, 388 U.S. 1; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Oklahoma's and Utah's recognition of different-sex marriages that do not or cannot produce biological children not only creates an "imperfect fit between means and ends," *Heller*, 509 U.S at 321, but pursues the supposed objective of promoting "responsible procreation" (by married heterosexual couples) in a manner that "[makes] no sense in light of how [those states] treat 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). Many different-sex couples either cannot procreate or choose not to, yet these marriage restrictions do not apply to them. If the States recognized marriage *solely* to further an interest in protecting the children born out of sexual intimacy, then States would not recognize marriages where one or both spouses are incapable or unwilling to bear children. Instead, States recognize marriage to advance *many* important governmental interests.

To save an incongruous rationale, opponents argue that extending marriage to different-sex couples who lack the ability or desire to procreate nonetheless encourages responsible procreation by promoting the "optimal" or "ideal" family

structure. However, it defies reason to conclude that allowing same-sex couples to marry will diminish the example that married different-sex couples set for their unmarried counterparts. Both different- and same-sex couples model the formation of committed, exclusive relationships, and both establish stable families based on mutual love and support. At best, the "modeling" theory is so attenuated that the distinction it supposedly supports is rendered arbitrary and irrational. *Cleburne*, 473 U.S. at 446. At worst, the theory is a poorly disguised attempt to codify discriminatory views as to what constitutes an ideal family. This is a purpose the Constitution does not permit. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-535 (1973) (bare desire to harm unpopular group is not a legitimate governmental interest).

E. Federalism Considerations Cannot Justify These Marriage Restrictions

Opponents contend that, due to considerations of federalism, federal courts should shy away from "re-making" state marriage policy. States, they assert, have "broad[ ] authority to regulate the subject of domestic relations. . . ." Utah Br. 3, quoting *Windsor*, 133 S. Ct. at 2690. *Windsor*, however, addressed the relationship between State and Congressional power, and did not limit the courts' obligation to analyze state marriage laws in conjunction with constitutional guarantees. *See, e.g.*, *Bostic v. Rainey*, 2014 WL 561978, at *17 (E.D. Va. Feb. 13, 2014) ("[T]his

Court must perform its constitutional duty in deciding the issues currently presented before it.").

Nothing in *Windsor* disturbed the courts' authority to determine whether laws, including state marriage laws, conflict with the Constitution. *Windsor* simply resolved a dispute about Congress's authority to define marital status and affirmed long-standing precedent that marriage policy should be left exclusively to the States. Indeed, "[i]n discussing this traditional state authority over marriage, the Supreme Court repeatedly used the disclaimer 'subject to constitutional guarantees.'" *Bishop*, 2014 WL 116013, at *18, quoting *Windsor* 133 S. Ct. at 2692, which in turn cited *Loving*.

Federalism principles, in fact, dictate that States respect each other's marriage determinations.[14] Individuals do not typically become single when passing state borders. *See, e.g.*, *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958) (recognizing marriage between first cousins, despite Ohio statute to contrary, because Massachusetts allowed it). This is important, because marriage "generally involves long-term plans for how [couples] will organize their finances,

[14] *See, e.g.*, Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 Or. L. Rev. 433, 461 (2005) ("All jurisdictions follow[ ] some version of *lex loci contractus* in evaluating the validity of a marriage.").

property, and family lives." *Obergefell v. Wymyslo*, 2013 WL 6726688, at *6 (S.D. Ohio Dec. 23, 2013). And couples frequently are obliged—whether for personal or professional reasons—to move across state lines. Yet this change in recognition is a common occurrence for same-sex couples.

Never before have so many marriages of a *particular type* been categorically disqualified by so many States. The closest historical analogues are the statutes criminalizing interracial marriages by several States. However, even in those circumstances, "decisions concerning the validity of interracial marriages were surprisingly fact-dependent."[15]

Recently, categorical bans on recognition of same-sex marriages have been called into serious doubt. In the past three months, federal courts in Ohio, Kentucky, and Texas have ruled unconstitutional their refusal to recognize valid same-sex marriages from other States. *See Obergefell*, 2013 WL 6726688; *Bourke v. Beshear*, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *De Leon v. Perry*, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014). In *Obergefell*, the court explained that "[w]hen a state effectively terminates the marriage of a same-sex couple in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." 2013 WL 6726688, at *7.

[15] Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2152 (2005).

All three courts recognized that States have a limited interest (if any) in not recognizing marriages validated by other States, because the couples were already married. In fact, the States' non-recognition of these marriages closely resembles the federal government's non-recognition under DOMA, which the Supreme Court invalidated because it had the "principal purpose [of imposing] inequality." *Windsor*, 133 S. Ct. at 2694.

II. SPECULATION ABOUT ERODING THE INSTITUTION OF MARRIAGE IS DEMONSTRABLY FALSE

Opponents suggest harmful consequences will befall States permitting same-sex couples to marry. Yet the *Amici* States have seen only benefits from marriage equality. Extending rights to same-sex couples neither fundamentally alters the institution, nor threatens marriage, divorce, or birth rates. Allowing same-sex couples to marry also does not preclude States from otherwise regulating marriage. And opponents' suppositions regarding potential "civic strife" and interference with religious freedoms are both contradicted by *Amici* States' experience and inconsequential as a constitutional matter.

A. Allowing Same-Sex Couples To Marry Does Not Fundamentally Alter The Institution Of Marriage

Opponents characterize extending marriage to same-sex couples as a fundamental shift that "redefin[es] marriage as a genderless, adult-centric institution," Utah Br. 59, and posit that children will be harmed as a result. These

assertions are unsupported by history and demeaning to gays and lesbians and their families.

Over the past 200 years, societal changes have resulted in corresponding changes to marriage eligibility rules and to our collective understanding of the roles of persons within a marriage, gradually removing restrictions on who can marry and promoting equality of the spouses. App. 2216-2218 (Cott); *see also Goodridge*, 798 N.E.2d at 966-967 ("As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm."). Indeed, many features of marriage taken for granted today would once have been unthinkable. Until relatively recently, men and women were treated unequally, with wives ceding their legal and economic identities to their husbands. *See, e.g.*, *United States v. Yazell*, 382 U.S. 341, 342-343 (1966) (applying law of coverture). Divorce was difficult, if not impossible, in early America. App. 2224-2225 (Cott). That civil marriage has endured as a core institution is a testament to the value of the institution and its ability to evolve in concert with social mores and constitutional principles. Allowing same-sex couples to wed is a movement in the direction of equality—not a wholesale "redefinition" of marriage.

Opponents' argument is little more than an unfounded suggestion that gays and lesbians are, as a group, more selfish than heterosexual parents and ill-equipped or disinclined to make sacrifices to ensure the well-being of their

children. As discussed above, the assertion that same-sex couples make inferior parents is contradicted by a scientific consensus as well as the experience of the *Amici* States. Moreover, even without the ability to marry, many same-sex couples are in relationships that are focused on raising children. In 2012, 25.3% of same-sex male couples and 27.7% of same-sex female couples were raising children in their homes throughout the country.[16]

B. The Institution Of Marriage Remains Strong In States That Allow Same-Sex Couples To Marry

Opponents attempt to make a statistical case that marriage equality leads to lower marriage rates, higher divorce rates, and lower birth rates, among other negative outcomes. Utah Br. 72-74, 82-86. As a threshold matter, they vastly oversimplify the analysis—for example, by presuming that the *only* factor affecting such rates is a change in the legal status of same-sex marriage. Clearly, however, other variables influence these rates, including economic factors and the increasing average age of first-time marriages, to name only two. In any event, even a simple

[16] U.S. Census, *Household Characteristics of Same-Sex Couple Households: ACS 2012*, http://www.census.gov/hhes/samesex/ (last visited Mar. 4, 2014).

overview of the available data demonstrates that opponents' alarmism is unfounded.[17]

1. *Marriage Rates*: Marriage rates in States that permit same-sex couples to marry have generally improved. Despite a pre-existing national downward trend in marriage rates, the most recent national data available (from 2011) indicate an increase in all seven States with marriage equality at the time (Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont).[18] The average marriage rate in each of these seven States was 6.96 marriages per thousand residents, compared to the national rate of 6.8.[19]

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[17] The *Amici* States' actual experience with equal marriage rights should carry substantially more weight than surmise and conjecture in the analysis. *See*, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 228-229 (1982) (rejecting hypothetical justifications for law excluding undocumented children as unsupported); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("[P]arties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational[.]").

[18] Centers for Disease Control and Prevention, National Vital Statistics System, *Marriage Rates by State: 1990, 1995, and 1999-2011*, http://www.cdc.gov/nchs/data/dvs/marriage_rates_90_95_99-11.pdf (last visited Mar. 4, 2014) [hereinafter CDC Marriage Rates].

[19] Centers for Disease Control and Prevention, *National Marriage and Divorce Rate Trends*, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited Mar. 4, 2014) [hereinafter CDC National Trends].

In six of the seven States that permitted same-sex couples to marry as of 2011, the marriage rate remained at or above the level it was the year preceding same-sex marriage.[20] Meanwhile, the national average marriage rate declined steadily from 2005 to 2011.[21] Thus, contrary to predictions, there appears to have been a general *improvement* in marriage rates, or at least a deceleration of the national downward trend, in States allowing same-sex couples to marry.[22] In addition, States allowing same-sex couples to wed have not seen decreases in the rate at which different-sex couples marry. In fact, in some States, the number of different-sex marriages increased in the years following the State's recognition of same-sex marriages.[23]

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[20] CDC Marriage Rates, *supra* note 18. The six States were Connecticut, the District of Columbia, Iowa, Massachusetts, New York, and Vermont.

[21] CDC National Trends, *supra* note 19.

[22] Chris Kirk & Hanna Rosin, *Does Gay Marriage Destroy Marriage? A Look at the Data*, Slate.com, May 23, 2012, http://www.slate.com/articles/double_x/doublex/2012/05/does_gay_marriage_affect_marriage_or_divorce_rates_.html [hereinafter Kirk & Rosin] (last visited Mar. 4, 2014); CDC Marriage Rates, *supra* note 18.

[23] Alexis Dinno & Chelsea Whitney, *Same Sex Marriage and the Perceived Assault on Opposite Sex Marriage*, PloS ONE, Vol. 8, No. 6 (June 2013), http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0065730 (last visited Mar. 4, 2014).

2. *Divorce Rates*: The *Amici* States have also not seen an increased divorce rate following the legalization of same-sex marriage. As of 2011, six of the seven jurisdictions that permitted same-sex couples to marry (Connecticut, the District of Columbia, Iowa, Massachusetts, New York, and Vermont) had a divorce rate that was at or below the national average. In fact, four of the ten States with the lowest divorce rates in the country were States that allowed same-sex couples to marry; Iowa and Massachusetts had the lowest and third-lowest rates, respectively.[24] Beyond the data, Oklahoma's comparison of same-sex marriage to the States' adoption of no-fault divorce laws rings hollow. Okla. Br. 69-71. That legal development was advanced precisely to make divorce a more realistic option for married couples. It does not, however, follow that permitting more committed and loving couples to marry will have the same effect.

3. *Birth Rates*: Opponents suggest that same-sex marriage represents an actual threat to human existence, by causing the fertility rate to dive below self-

[24] Centers for Disease Control and Prevention, National Vital Statistics System, *Divorce Rates by State: 1990, 1995, and 1999-2011*, http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf (last visited Mar. 4, 2014) [hereinafter CDC Divorce Rates] ; CDC National Trends, *supra* note 19; Kirk & Rosin, *supra* note 22. By contrast, States that have excluded same-sex couples from marriage have some of the highest divorce rates in the country. As of 2011, States with bans on marriage between same-sex couples comprised 19 of the 24 States (79%) with the highest divorce rates in the country. CDC Divorce Rates.

sustaining levels. Utah Br. 83-85. However, their cherry-picked data show no causal relationship between the two. The national birth rate has decreased every year since 2008, with birth rate decreases in every State between 2008 and 2012, except North Dakota.[25] Though the six New England States had the lowest birth rates in 2012, this proves very little, as all six were in the bottom ten in 2000. Meanwhile, Texas and Utah, two States without same-sex marriage, had the largest declines in birth rates between 2000 and 2012.[26]

In addition, there is simply no discernible correlation between same-sex marriage and an increase in nonmarital births. The total number of births to unmarried women nationally increased from 1940 through 2008. Notably, it has declined every year since, totaling 11% from 2008 to 2011, a period by the end of which eight States had extended marriage to same-sex couples. More

[25] *See* Centers for Disease Control and Prevention, National Vital Statistics Reports, *Births: Final Data for 2008*, 59 National Vital Statistics Report No. 1, Table 12, http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_01.pdf (last visited Mar. 4, 2014) *and* Centers for Disease Control and Prevention, National Vital Statistics Reports, *Births: Final Data for 2012*, 62 National Vital Statistics Report No. 9, Table 12, http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_09.pdf (last visited Mar. 4, 2014) [hereinafter 2012 Birth Data].

[26] Texas declined from 17.8 to 14.7; Utah declined from 21.9 to 18.0. *See* Centers for Disease Control and Prevention, *Births: Final Data for 2000*, 50 National Vital Statistics Report No. 5, Table 10, http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_05.pdf (last visited Mar. 4, 2014) *and* 2012 Birth Data, *supra* note 25.

fundamentally, opponents' position is illogical, as allowing same-sex couples to marry allows more children to be born into marriages.

4. *Child Poverty Rates*: Utah asserts that its low public costs associated with family fragmentation, and its low rate of children growing up in poverty, are correlated to its prohibition on same-sex marriage. On its face, such a causal claim seems attenuated. In any event, data from beyond Utah undermines any such claim. Seven of the ten States that spend the highest amount of state and local taxpayer dollars on fragmented families do not allow same-sex couples to marry.[27] Meanwhile, in 2012, Utah achieved the fourth-lowest rate of children growing up in poverty—tied with Connecticut, Massachusetts, and Vermont, all States that allow same-sex couples to wed.[28]

C. Allowing Same-Sex Couples To Marry Does Not Threaten The States' Ability To Regulate Marriage

It is similarly untrue that it will become virtually impossible for States to limit entry to marriage in any meaningful way if the Constitution obliges them to

[27] Benjamin Scafidi, Institute for American Values, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States* (2008), Table A5, http://www.marriagedebate.com/pdf/ec_div.pdf (last visited Mar. 4, 2014).

[28] Kids Count Data Center, Annie E. Casey Foundation, *Children in Poverty* (2012), http://datacenter.kidscount.org/data/tables/43-children-in-poverty?loc=1&loct=2#ranking/2/any/true/868/any/322 (last visited Mar. 4, 2014).

recognize same-sex marriage. *See* Indiana Br. 27 ("[N]o adult relationship can be excluded *a priori* from making claims upon the government for recognition."). Rather, as *Loving* instructs, States simply may not circumscribe access to marriage, and thus restrict a fundamental right, based on a personal trait that itself has no bearing on one's qualifications for marriage. States can otherwise continue to exercise their sovereign power to regulate marriage.

In *Loving*, the Supreme Court characterized Virginia's anti-miscegenation laws as "rest[ing] solely upon distinctions drawn according to race," and proscribing "generally accepted conduct if engaged in by members of different races." 388 U.S. at 11. Oklahoma and Utah marriage laws similarly restrict the right to marry by drawing distinctions according to gender (and, implicitly, sexual orientation) and using that personal characteristic to define an appropriate category of marital partners. Yet there is no rational basis for States to limit an individual's ability to enter into marriage or choice in spouse based on an inherent, personal characteristic that does not bear upon his or her capacity to consent to the marriage contract.[29]

[29] It is a well-established practice to apply heightened scrutiny to disparate treatment based on personal characteristics that typically bear no relationship to an individual's ability to contribute to society. *See*, *e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686-687 (1973). Although *Amici* States contend that sexual orientation discrimination should be subject to heightened scrutiny, *see supra* note 2, it is not

Applying this principle does not result in all groupings of adults having an equal claim to marriage. For example, to further the interest in maintaining the mutuality of obligations between spouses, States may continue to lawfully limit the number of spouses one may have at any given time. Unlike race or gender, marital status is not an inherent trait, but rather is a legal status indicating the existence (or not) of a marital contract, the presence of which renders a person temporarily ineligible to enter into additional marriage contracts. States similarly may continue to lawfully prohibit marriage between certain relatives in order to guard against a variety of public health outcomes. Consanguinity itself is not a personal trait, but rather defines the nature of the relationship between particular individuals and thus exists only when an individual is considered in relation to others. Finally, in order to protect children against abuse and coercion, States may regulate entry into marriage by establishing an age of consent.[30] Likewise, age is not an intrinsic trait, as it changes continually and the restriction is therefore temporary. Thus, even

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necessary to accept that the Oklahoma and Utah laws involve suspect classifications for purposes of this analysis. These laws define eligibility based on a personal characteristic unrelated to one's qualification for marriage (*i.e.*, ability to consent or current marital status).

[30] For similar reasons, States may regulate entry into marriage based on mental capacity because that bears upon an individual's ability to consent.

after gender is removed from consideration, other state regulations continue to advance important governmental interests and remain valid.

D. Fears Of Encroaching On Religious Freedom And Spurring Civil Strife Are Unfounded

As a final salvo, opponents claim that interests in "accommodating religious freedom and reducing the potential for civil strife" justify the marriage restrictions. Utah Br. 90. Like all of the justifications before them, these also fail. In fact, the preservation of "social harmony" is an insufficient justification to deprive individuals of their constitutional rights. The Supreme Court rejected this asserted interest in response to resistant cities in desegregation cases. For example, in *Watson v. City of Memphis*, the Court found the city's interests regarding "community confusion and turmoil" to be insufficient to justify delaying desegregation of public parks and recreational facilities. 373 U.S. 526, 535 (1963). The Court stated that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Id.* Moreover, the governmental interests in the "maintenance of domestic peace," *cf.* Utah Br. 90, citing *Bill Johnson's Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983), pertains to the actual exercise of police powers to maintain public safety and order in the streets when combating crowds, not simply to avoid "vague disquietudes." *Watson*, 373 U.S. at 536.

Opponents have not seriously suggested that riotous turmoil would occur, nor could they. However, Utah does seem to argue that it is uniquely situated in this regard, due to its population's overwhelming, religiously-based opposition to same-sex marriage. One could similarly speculate about "social strife" in Massachusetts, based purely on a review of demographic information. Only six percent of Massachusetts's population belongs to the five religious denominations identified by Utah as supporting same-sex marriage, while the vast majority of the population adheres to the Catholic faith (78%).[31] However, no civil unrest has broken out in the decade since same-sex couples began to wed in Massachusetts. This, of course, is true because religious affiliation tells only a part of the story. For example, a recent survey of Utah residents reveals that the population appears to be split on the issue, with 44% of respondents in favor and 44% against the legalization of same-sex marriage.[32]

[31] *Compare* Ass'n of Religion Data Archives, *State Membership Report* (2010), http://www.thearda.com/rcms2010/r/s/25/rcms2010_25_state_name_2010.asp *with* Pew Research Religion & Pub. Life Project, *Religious Groups' Official Positions on Same-Sex Marriage* (Dec. 7, 2012), http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/ (last visited Mar. 4, 2014).

[32] Brooke Adams, *Poll: Utahns evenly split on same-sex marriage*, The Salt Lake Tribune, http://www.sltrib.com/sltrib/news/57391605-78/marriage-sex-percent-state.html.csp (last visited Mar. 4, 2014).

In addition, opponents appear to misapprehend the very purpose of the Establishment Clause, by confusing religious strife with religious freedom. The Establishment Clause positively *forbids* establishing one religion—even if it is the dominant religion. As Justice Breyer explained in his dissent in *Zelman v. Simmons-Harris* (cited at Utah Br. 97): "The [Establishment and Free Exercise] Clauses embody an understanding . . . that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . . ." 536 U.S. 639, 718 (2002) (Breyer, J., dissenting). Insofar as there is any remote threat of "establishing" certain religious principles, the threat comes from Oklahoma's and Utah's enactment of laws restricting marriage.

Finally, opponents' concern that extending marriage to same-sex couples would infringe others' religious freedom is likewise unfounded. *Cf.* Utah Br. 94-97. Opponents of same-sex marriage certainly will not be required to change their religious views or enter into such unions themselves. *Braunfeld v. Brown*, 366 U.S. 591, 603 (1961) ("The freedom to hold one's own religious beliefs is absolute."). Moreover, a well-established constitutional framework exists to protect the Free Exercise rights of both individuals and religious organizations, and same-sex marriage will not affect these guarantees. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 697 (2012) (law "gives special solicitude to the rights of religious organizations"). Some such

protections are so strong that they exempt civil court review entirely. *See*, *e.g.*, *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655 (10th Cir. 2002) (barring sexual harassment suit regarding comments made about plaintiffs' sexual orientation in ecclesiastical discussions).

Furthermore, Utah's arguments are particularly speculative given that Utah's Antidiscrimination Act does not provide express protections based on sexual orientation. Utah Code § 34A-5-106; *see also* Okla. Stat. tit. 25, § 1350. In fact, the law entirely exempts organizations that are "in whole or in substantial part, owned, supported, controlled or managed by a particular religious corporation, association or society . . . ." Utah Code § 34A-5-106(3)(a)(ii). Thus, Utah's concerns that religious institutions will be forced to change their modes of operation are unfounded.

* * * *

Accordingly, there is no reason to believe that the speculated negative consequences of allowing same-sex couples to wed will come to pass. Instead, the laws of Oklahoma and Utah prevent gays and lesbians from fully realizing what the Supreme Court described as "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. This result is in clear conflict with our Constitution.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgments of the district courts below.

Respectfully submitted,

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