No. 14-5297

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VALERIA TANCO and SOPHY JESTY, et al.

Plaintiffs-Appellees,

v.

WILLIAM HASLAM, in his official capacity as Governor of the State of Tennessee, et al.,

Defendants-Appellants.

On Appeal from the U.S. District Court for the
Middle District of Tennessee
Honorable Aleta A. Trauger

BRIEF OF *AMICI CURIAE* JOAN HEIFETZ HOLLINGER, COURTNEY JOSLIN, SARAH ABRAMOWICZ, JAMIE ABRAMS, AND FIFTY-TWO OTHER FAMILY LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-5297 Case Name: *Tanco v. Haslam*

Name of counsel: Sara Bartel, for *Amici Curiae* family law professors

Pursuant to 6th Cir. R. 26.1, Courtney Joslin, Joan Heifetz Hollinger, Sarah Abramowicz, Jamie Abrams, and 52 Other Family Law Professors (see attach.)
Name of Party
make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on June 16, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ *Sara Bartel*

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As noted in the preceding form, and pursuant to FRAP 26.1 and Local Rule 26.1, this disclosure has been made on behalf of the following Professors, as signatories to this amicus brief:

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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 in the case captioned above, as well as in *DeBoer v. Snyder* and *Bourke v. Beshear*.[2] Specifically, *Amici* wish to provide the Court with an exposition of Michigan, Tennessee, and Kentucky 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 in these appeals.

SUMMARY OF ARGUMENT

Michigan,[3] Tennessee,[4] and Kentucky[5] all have enacted laws prohibiting same-sex couples from entering civil marriage in these states or denying

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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 consent of parties and pursuant to the Motion filed in *Bourke v. Beshear*. *See* Fed. R. App. P. 29(a)-(b); Blanket Consent of Appellants Snyder, *et al.* for *Amicus* 1, April 29, 2014, ECF No. 44; Blanket Consent of Appellees DeBoer, *et al.* for *Amicus* 1, April 29, 2014, ECF No. 45; Notification of Plaintiffs-Appellees Tanco, *et al.* Consent to Filing of Any *Amicus Curiae* Br. 1-4, May 13, 2014, ECF No. 40; E-mail from Martha A. Campbell, counsel for Defendant-Appellant William Haslam, to counsel for *amici* (Jun. 9, 2014 6:56 PST) (on file with counsel) (consenting to the filing); Mot. for Leave to File Br. for Family Law Professors as *Amici Curiae* Supporting Plaintiffs-Appellees, *Bourke v. Beshear* (No. 14-5291), filed June 16, 2014.

[3] Michigan law defines marriage as "a unique relationship between a man and a woman," Mich. Comp. Laws Ann. § 551.1, and as "the union of one man and one

(Footnote continues on next page.)

recognition to marriages that same-sex couples have validly entered elsewhere. *Amici* agree with Appellees that these provisions are all unconstitutional.

Appellants argue that these limitations on the marriage and family rights of same-sex couples further various state interests, including the well-being of children and procreation. (*See, e.g.*, Brief of Michigan Defendant-Appellant Richard Snyder ("Snyder Br.") 15–16, 40, 42–43, 46, 50–52 (promoting what is "beneficial for children"); Brief of Tennessee Defendant-Appellant William Haslam ("Haslam Br.") 17 ("protection of offspring"); Snyder Br. 4, 15–16, 38–40, 50–51, 55 (procreation); Beshear Br. 21–22, 24 (same); Brief of Kentucky Defendant-Appellant Steve Beshear ("Beshear Br.") 6, 15–16, 19–22, 24, 26 (same).[6]) 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. These states' restrictions on marriage, however, do not

(Footnote continued from previous page.)

woman," Mich. Const. art. I, § 25, which is "the only agreement recognized as a marriage or similar union for any purpose." *Id.*

[4] Tennessee only recognizes a marital contract "between one (1) man and one (1) woman." Tenn Const. art. XI, § 18; Tenn. Code. Ann. § 36-3-113.

[5] Kentucky only recognizes "a marriage between one man and one woman." Ky. Const. § 233A; *see* Ky. Rev. Stat. Ann. §§ 402.005, 402.020(1)(d), 402.040(2), 402.045.

[6] Notably, Kentucky disclaims any interests related to the well-being of children. (Beshear Br. 26 ("The Commonwealth has not identified its interest as creating loving, nurturing family units 'capable of raising children' . . . .").) Instead, Kentucky relies solely on a purported "economic interest in procreation." (*Id.*)

further child well-being or responsible parenting. As *Amici* demonstrate, Appellants' arguments to the contrary lack any basis in history, law, or logic.

First, despite Appellants' suggestion to the contrary, procreation is not the central purpose of or a requirement for civil marriage. 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 social and statutory benefits of marriage, and suggest that the ability to procreate without assistance is its *raison d'être*. But these states have never limited marriage exclusively to couples who can or want to have children through "natural procreation." Indeed, such a limitation would be constitutionally impermissible.

Second, most Appellants argue that it is valid to exclude from marriage couples who do not provide the "optimal" or "ideal" childrearing setting, (Snyder Br. 16, 46), for the "protection of offspring," (Haslam Br. 17), which Appellants explicitly or implicitly claim is the parenting of children by their biological mothers and fathers. (*See, e.g.*, Snyder Br. 15–16, 40, 42–43, 46, 51–52; Haslam Br. 25 (stating that marriage is "inextricably linked to procreation and biological kinship").) Appellants' "optimal" parenting arguments are unsupported by empirical research, which overwhelmingly demonstrates that it is the quality and nature of the parent-child relationship—not the gender of the parent or a biological

relationship—that is critical to positive child adjustment and outcomes.[7] In addition, a desire to encourage or require "having both a man and a woman as part of the parenting team"—allowing only marriages that provide the benefits of both "mothering" and "fathering"—violates states' laws, as well as constitutional principles. (Snyder Br. 40, 42.) 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).[8]

Even if promoting "traditional" or "natural[]" procreation, (Haslam Br. 25; Beshear Br. 16, 20–21, 24, 26), and the "different benefits [of] mothering [and] fathering" were permissible state interests, (Snyder Br. 42), Michigan's, Tennessee's, and Kentucky's exclusion of same-sex couples from civil marriage bears no rational relationship to the decisions of different-sex couples regarding marriage, procreation, or childrearing.

Third, most Appellants argue that the marriage exclusions further state interests with regard to the well-being of children. In fact, these limitations on marital rights *undermine* states' interests in child welfare. While the restrictions fail to assist children in any family, they inflict direct and palpable harms on same-

[7] *See Amicus Curiae* Brief of the American Psychological Association.
[8] *Amici* agree with Appellees that heightened scrutiny should be applied in these cases and that under any standard of review the marriage restrictions are unconstitutional.

sex couples and their children. The members of these families are denied access to hundreds of important benefits under state and federal law. The restrictions also stigmatize the children of same-sex couples by treating them as less worthy of protection than children raised by different-sex couples.

Finally, even if there were any rational reason to believe that the restrictions would induce better behavior by different-sex couples, both state authorities and the 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 evident in Michigan, Tennessee, and Kentucky laws regarding marriage, parentage, and the best interests of children. The marriage bans, therefore, are "inexplicable by anything but animus toward the class [they] affect[]." *Romer v. Evans*, 517 U.S. 620, 632 (1996). A categorical ban signals that the relationships of same-sex couples are deemed unequal to the relationships of other couples. As the 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 fail to provide even a rational basis for denying same-sex couples the right to marry.

ARGUMENT

I. "NATURAL" PROCREATION IS NOT A NECESSARY ELEMENT OF MARRIAGE UNDER THESE STATES' LAWS OR CONSTITUTIONAL PRINCIPLES.

Appellants argue that the exclusion of same-sex couples from marriage is justified because, unlike many different-sex couples, they "cannot naturally procreate," (Beshear Br. 16; *see* Snyder Br. 39 ("[T]he sexual union of a man and a woman produces . . . the possibility, even the likelihood, of the creation of a third person.").) Appellants use this single, reductive difference—"biology alone," (Haslam Br. 25)—to justify denying same-sex couples the right to marry. Implicit in Appellants' arguments is the claim that because same-sex couples do not produce children "by accident," they do not need or deserve marriage. (Haslam Br. 26; *see* Snyder Br. 52–53.)

Appellants purport to show that the fundamental purposes of the "traditional man-woman marriage model," (Beshear Br. 6; *see id.* at 20–21, 24, 26), are procreation and the raising of children by their biological parents. (*See* Snyder Br. 4, 39–40, 52; Haslam Br. 25–26; Beshear Br. 21.) While this may accurately describe the personal beliefs of some citizens of Michigan, Tennessee, and Kentucky, this view of marriage is not consistent with these states' laws, the laws of other states, or the federal Constitution. On the contrary, an ability or desire to

procreate has never been a requirement for marriage in these states—and even if such a requirement did exist, it would be unconstitutional.

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

The right to marry is not inextricably intertwined with procreation. Like all other states, Michigan, Tennessee, and Kentucky have 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* Mich. Comp. Laws. Ann. ("M.C.L.A.") §§ 551.1–552.1 (marriage eligibility, void marriages); Tenn. Code Ann. ("T.C.A.") § 36-3-101 (prohibited marriages); Ky. Rev. Stat. Ann. ("K.R.S.A.") §§ 402.020, 402.030 (prohibited and 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 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.

Statutes in these states do not require an ability or desire to procreate as a condition for a valid, civil marriage. Neither consummation nor sexual intimacy of any kind is required to validate a marriage. *See* M.C.L.A. §§ 551.1–552.1; T.C.A.

§ 36-3-101; K.R.S.A. §§ 402.020, 402.030[9]; *see also Amicus Curiae* Brief of Historians of Marriage. No state denies marriage rights to men or women based on their capacity or willingness to have children. *See, e.g.*, M.C.L.A. §§ 551.1, 551.3–551.4, 551.51 (existing and proposed limitations on marriage eligibility); T.C.A. § 36-3-101 (categories of prohibited marriages); K.R.S.A. § 402.020 (same). Similarly, infertility (a common condition[10]) is not a statutory basis for voiding a marriage in *any* state. *See* M.C.L.A. §§ 552.1–552.2; T.C.A. § 36-3-104[11]; K.R.S.A. §§ 402.010–402.030. Contrary to Appellants' claims, an ability or desire to have children is not a requirement for, much less the fundamental purpose of marriage in Michigan, Tennessee, or Kentucky.

A review of the statutory no-fault divorce provisions that have been enacted in all three states reinforces the conclusion that procreation need not be the core purpose of marriage, much less an essential requirement. *See generally* Courtney

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[9] Inability to consummate a marriage may be grounds for annulment in Kentucky, but only if the other spouse was unaware of the condition at the time of the marriage. K.R.S.A. § 403.120(1)(b).

[10] 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 No. 6 2369 (Nov. 2010). Approximately two to three million couples are infertile. *Encyc. of Contemp. Am. Soc. Issues* 1182 (Michael Shally-Jensen ed., 2011).

[11] The Tennessee provision allowing divorce on the ground of incapacity to procreate reinforces this point. T.C.A. § 36-4-101(a)(1). What this means is that in Tennessee, the inability to procreate can be the basis for ending a valid marriage if having children through procreation is important to one of the parties.

G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. Rev. 1669, 1670 n.5, 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). The no-fault divorce provisions in all three states are premised on the failure of the spousal relationship, not concerns about procreation or infertility. *See* M.C.L.A. § 552.6 (reformed in 1972) (provides for divorce based on "a breakdown of the marriage relationship . . . .")[12]; T.C.A. § 36-4-101 (amended in 1977) (divorce based on the breakdown of the spousal relationship); K.R.S.A. §§ 403.030 (repealed in 1972), 403.140 (reformed in 1972) (divorce based on the irretrievable breakdown of the spousal relationship).

Furthermore, Michigan, Tennessee, and Kentucky facilitate the creation of children and families through means other than "natural" procreation and offer legal protections to the many married couples who experience infertility. Specifically, the states permit couples to adopt children who are not their biological offspring. *See* M.C.L.A. § 710.24; T.C.A. § 36-1-102; K.R.S.A. § 199.470. The states also confer legal parentage on spouses who use assisted reproduction with donor gametes in order to have a child not biologically related to

[12] *See also Peltola v. Peltola*, 263 N.W.2d 25, 27 (Mich. Ct. App. 1977) ("While the facts in the instant case differ from the facts in *Cowsert* we reiterate our holding therein 'that a marriage is based on more than just sex.'").

one or both spouses. *See* M.C.L.A. §§ 333.2824(6) ("A child conceived by a married woman with the consent of her husband following the utilization of assisted reproductive technology is considered the legitimate child of the husband and wife."); T.C.A. §§ 68-3-306 ("A child born to a married woman as a result of artificial insemination, with consent of married woman's husband is deemed to be the legitimate child of the husband and wife."); K.R.S.A. § 406.011 (child born in, or within ten months of, marriage is presumed to be child of husband and wife).

Contrary to Appellants' narrow representations of marriage, in Michigan, Tennessee, and Kentucky, 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 these states' laws, married couples receive many protections and benefits and assume mutual responsibilities unrelated to childrearing. These include, for instance, health care decisions, workers' compensation and pension benefits, property ownership, spousal support, inheritance, taxation, insurance coverage, and testimonial privileges.[13]

[13] *See, e.g.*, M.C.L.A. § 600.2162 (spousal testimonial privilege); K.R.S.A. § 504 (same); T.C.A. § 24-1-201 (same); M.C.L.A. § 600.5805 (loss of consortium as valid injury); K.R.S.A. § 411.145 (same); T.C. A. § 25-1-106 (same); M.C.L.A. § 700.2102 (intestate succession); K.R.S.A. § 391.010(4) (same); T. C. A. § 31-2-104 (same); M.C.L.A. § 700.5301 (authorization to make health care decisions); K.R.S.A. § 311.631(1)(c) (same); T.C.A. § 68-11-1806(c)(3)(A) (same) (proposed

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In sum, Appellants' attempts to reduce the meaning and purpose of marriage to facilitating the conception of children through sexual activity are not supported by Michigan, Tennessee, or Kentucky 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 that marriage is simply about the right to have sexual intercourse.").

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

The Supreme Court has held that individuals cannot be excluded from the right to marry simply because they are unable to procreate. *Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, the 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 "[m]any 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.

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legislation); M.C.L.A. § 206.508(3) (tax benefits); K.R.S.A. § 141.016 (same); T.C.A. § 67-8-105 (one of several tax benefits for married couples in Tennessee).

Moreover, Appellants' attempt to justify the marriage restrictions under the guise of promoting a particular method of procreation should be examined carefully because procreative decisions are quintessential matters of individual liberty. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("[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 the decision whether to bear or beget a child."); *Griswold*, 381 U.S. at 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' claims that marriage has "always been linked to procreation," (Snyder Br. 4), and cannot "be divorced from its traditional procreative purpose." (Haslam Br. 25.)

II. A CLAIMED PREFERENCE FOR GENDER-DIFFERENTIATED PARENTING IS CONTRADICTED BY SOCIAL SCIENCE AND BY STATE AND FEDERAL LAW.

Michigan and Tennessee Appellants[14] also argue that it is permissible to limit marriage to different-sex couples because "the intact marriage of a man and a woman [is] the ideal environment for raising children." (Snyder Br. 51; *see id.* at 46 (labeling that type of family as "the optimal environment for children").)[15]

[14] As noted earlier, Kentucky does not rely on optimal parenting arguments.

[15] 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

(Footnote continues on next page.)

"[D]ifferent sexes," Appellants argue, "bring different contributions to parenting." (Snyder Br. 42 (internal citations omitted).)[16] Rhetoric aside, these arguments run counter to well-established social science, as well as state and federal law.

A. Social Science Refutes Claims About Child Outcomes Based on Parents' Gender or Sexual Orientation.

Appellants' argument is flatly contradicted by more than thirty years of social science research. In dozens of studies, sociologists and psychologists have found no significant differences between the long-term outcomes for children of same-sex parents and those of different-sex parents. *See* Carlos A. Ball, *Social Science Studies and the Children of Lesbians and Gay Men: The Rational Basis Perspective*, 21 Wm. & Mary Bill Rts. J. 691, 716 (2013). These peer-reviewed studies have examined many factors related to children's well-being, including their attachment to parents, emotional adjustment, school performance, peer relations, cognitive functioning, and self-esteem. No study has found any differences based on the sexual orientation of children's parents. *Id.* at 716–17. Instead, the key factors correlated with positive outcomes for children are the quality of the parent-child relationship and the relationship and resources of the

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(discriminatory classifications must serve some "independent and legitimate legislative end.").

[16] The Michigan brief goes on to note that "[m]others tend to be more emotion focused, while [f]athers, in turn, are more playful and a little bit more task-oriented in their interactions." (Snyder Br. 42 (internal quotations omitted).).

parents. *Id.* at 733 n.286. In particular, having two involved parents rather than only one—an arrangement that would be supported, not hindered, by allowing parents to marry—is correlated with better outcomes for children, regardless of the sexual orientation or gender of the parents. *Id.*; *see also Amicus Curiae* Brief of the American Sociological Association.

In light of this mounting social science evidence, courts have increasingly rejected the optimal parenting argument proffered by Appellants. *See, e.g.*, *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 994 n.20 (S.D. Ohio 2013) (finding that "[t]he 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"); *DeBoer v. Snyder*, 973 F.Supp.2d 757, 761 (E.D. Mich. 2014) (noting that over 150 sociological and psychological studies have repeatedly confirmed that there is simply no scientific basis to differentiate between children raised in same-sex versus heterosexual households).

In contrast, Appellants' optimal parenting argument is grounded not in science but in outmoded stereotypes about how men and women behave and parent their children. Moreover, this argument is at odds with state and federal constitutional law, which foreclose family law statutes or decisions based on gender stereotypes.

B. States Have Eliminated Laws Based on Gender Stereotypes.

State law and policy in Michigan, Tennessee, and Kentucky contradict Appellants' claims that "mothering" and "fathering," (Snyder Br. 42), or any other gender-based marriage roles are important state objectives. Instead, under each state's law—consistent with the law of every other state in this regard—marriage is a union free of state mandated sex- or gender-based roles and without gender-based distinctions. The three states also prohibit courts from relying on gender stereotypes in making custody decisions.

Over time, Michigan, Tennessee, and Kentucky have gradually eliminated the sex-specific roles that were once codified and assumed to be a core component of civil marriage (and divorce). Their laws now acknowledge that all spouses, regardless of gender, are capable of both wage work and parenting, and have eliminated gender-based differences in the laws regulating entry into marriage, spousal relationships during marriage, and the consequences of divorce.

Other than the requirement that spouses be of different sexes, these states have removed gender-based distinctions concerning entry into marriage: the age requirement for validly entering a marriage is the same for males and females. *See* M.C.L.A. §§ 551.51, 551.103 (age 18, amended in 1978 to apply equally to both genders); T.C.A. § 36-3-105; K.R.S.A. § 402.030. Likewise, each state has removed gender-based disparities that defined the marital relationship under the

now-abolished doctrine of coverture.[17] *See* M.C.L.A. §§ 557.21–557.28 (established in 1844 as the Married Women's Property Acts, which became the 1982 Rights and Liabilities of Married Women Act, protecting married women's property, earnings, and full contract rights, as if unmarried); Mich. Const. art. X, § 1 (1963 edit officially abolished coverture); T.C.A. § 36-3-504 (established in 1919 as the Married Women's Act, permitting married women separate and full rights in real estate as if unmarried); K.R.S.A. §§ 404.020–404.030, 404.060 (established in 1894 as the Weissinger Act, and amended in 1942, granting married women the right to acquire, hold, and dispose of real and personal property, to contract, sue, and be sued as if unmarried). *See also People v. Wallace*, 434 N.W.2d 422, 426 (Mich. Ct. App. 1988) (married women had property rights "free from their husbands' interference"); *Preston v. Smith*, 293 S.W.2d 51, 57 (Tenn. Ct. App. 1955) ("[M]arriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition or disposition of property of any sort.").

Michigan, Tennessee, and Kentucky have also eliminated traditional gender distinctions governing the dissolution of marriage. The causes for divorce are the same for each spouse, and a dissolution action may be brought by either. *See*

[17] Under coverture, a married woman's identity was merged into that of her husband. Among other disabilities, a married woman could not sue or be sued, she could not enter into contracts without her husband's consent, and she could not enter a profession. Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* 219-20 (1968).

M.C.L.A. § 552.11; T.C.A. §§ 36-4-101, 36-4-103; K.R.S.A. §§ 403.140, 403.170. When spouses divorce, the states treat marriage as an economic partnership between two individuals in which courts distribute the parties' accumulated assets as the equities of each case require, without regard to gender. *See, e.g.*, M.C.L.A. §§ 552.18, 552.19; T.C.A. §§ 36-5-101, 36-4-121; K.R.S.A. § 403.190. And either party, regardless of gender, is permitted to seek spousal support. *See, e.g.*, M.C.L.A. §§ 552.13, 552.23; K.R.S.A. §§ 403.160, 403.200.

With regard to child custody, each state requires courts to identify the allocation that best promotes the child's best interest, without regard to gender. *See, e.g.*, M.C.L.A. § 722.23; *Freeman v. Freeman*, 414 N.W.2d 914 (Mich. Ct. App. 1987) (reversing trial court decision granting custody of daughter to mother because the mother and child were of the same sex); T.C.A. § 36-6-106; *Jones v. Jones*, 577 S.W.2d 43, 45 n.1 (Ky. Ct. App. 1979) ("The statute now requires that each party in a custody dispute be given equal consideration."). These states also have statutorily eliminated the "tender years" doctrine which presumed that mothers should have custody of their young children. *See Lewis v. Lewis*, 252 N.W.2d 237, 238 (Mich. Ct. App. 1977) (explaining that the Child Custody Act of 1970 eliminated former gender-specific custody presumptions); T.C.A. § 36-6-101 ("It is the legislative intent that the gender of the party seeking custody shall not give rise to a presumption of parental fitness or cause a presumption or constitute a

factor in favor or against the award of custody to such party."); K.R.S.A. § 403.270 (enacted in 1978 to give equal consideration to each parent).

As these examples demonstrate, and contrary to Appellants' claims, the state laws of Michigan, Tennessee, and Kentucky do not support an alleged state interest in gender-differentiated roles in marriage or parenting, (*see* Snyder Br. 42), and instead apply a gender-neutral approach to constructing and implementing family law rules.

C. A Desire to Promote "Different Sex[]" Parenting Is a Constitutionally Impermissible Interest.

Beyond its inconsistency with governing state law, any effort to enforce gender-differentiated roles in marriage or parenting would be unconstitutional. Appellants seek to justify the marriage restrictions by insisting that "different sexes bring different contributions to parenting," and that "there are different benefits to mothering versus fathering." (Snyder Br. 42 (original citations omitted)), 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, 205 (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. Wiesenfeld*, 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 (1979) (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. (*See, e.g.*, Snyder Br. 44 (noting the benefits of having "living models of what both a man and a woman are like") (original citation omitted); *id.* at 52 (expressing a concern about needing both a mom and a dad to "prepare [a child] to be [a] mature member[] of society").)[18] This is exactly the kind of

[18] Appellants imply that children raised by same-sex couples will not be so socialized. The social science briefs show why this contention lacks merit.

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

In addition, the Constitution recognizes the strong liberty interest in parental autonomy—based in common law traditions—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).

D. The Potential for "Optimal" Parenting Is Not a Prerequisite to Marriage.

As demonstrated above, Appellants' claim that restrictions on marriage rights are justified by the need to promote "ideal" or "optimal" environments for childrearing, (*see, e.g.*, Snyder Br. 16, 46), is inconsistent with Michigan, Tennessee, and Kentucky law, with equal protection principles, and with the social science evidence. Even if, *arguendo*, there were differences in how children fare between those raised by married different-sex couples and those raised by co-habiting same-sex couples, it is not permissible to rely on any such difference as grounds for singling out same-sex couples and excluding only them from the right to marry.

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 [these

states] treat[] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala.*, 531 U.S. 356, 366 n.4 (2001) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447–50 (1985)).

The 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 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").

III. THE STATES' RESTRICTIONS ON MARRIAGE RIGHTS BEAR NO RATIONAL RELATIONSHIP TO THE CREATION AND WELL-BEING OF CHILDREN.

It is utterly implausible to believe that barring same-sex couples from marrying increases the power of marriage to incentivize procreation or improves the well-being of children raised by different-sex couples. The marriage exclusions do, however, cause clear and direct harm to the children of same-sex parents.

A. The Marriage Restrictions Do Nothing to Further Procreation or the Well-Being of Children Raised by Different-Sex Couples.

Appellants claim that limiting marriage rights for individuals in same-sex relationships is related to the states' interests in influencing sexual activity and procreation between different-sex couples. (*See* Beshear Br. 6; Haslam Br. 25 ("[M]arriage was instituted . . . for the purpose of preventing the promiscuous intercourse of the sexes . . . ." (original citation omitted).). They stress that marriage has "an exclusive role in . . . insuring the survival, protection, and thriving of the human race," (Haslam Br. 26 (original citation omitted); *see* Beshear Br. 22 (promoting procreation also important to support "long-term economic stability through stable birth rates").)

Insofar as marriage laws encourage different-sex couples to marry in order to procreate when they otherwise would not have done so, 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. 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 stop procreating, care less about their children, or divorce more frequently. (*See* Snyder Br. 16, 37, 43, 48, 52; *id.* at 51 (promoting the link between procreation and marriage to enforce "the social norms that encourage husbands to stay with their wives and children, or for men and women to marry before having children"); Haslam Br. 17, 25–26; Beshear Br. 21–22, 26.) These suppositions make sense only if same-sex relationships are so abhorrent as to contaminate the institution of marriage to the point that different-sex couples would 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 doing so 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. *Bishop v. U.S. ex rel. Holder*, 962 F.Supp.2d 1252, 1291 (N.D. Okla. 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*, 975 F.Supp.2d 632,

655 (W.D. Tex. 2014) (similar); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1215 (D. Utah 2013) (similar).

B. The Marriage Restrictions Harm the Well-Being of Children Raised by Same-Sex Couples.

Although there is no rational reason to think that the marriage restrictions will have any positive effect on the children of different-sex couples, it is absolutely clear that the restrictions affirmatively harm the children of same-sex couples by denying their families access to hundreds of critical state and federal marital benefits that facilitate stable and secure environments for raising children.[19]

The marriage restrictions also amount to official statements "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). 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 restrictions do significant tangible and intangible

[19] 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.

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 Parental Behavior.

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

The function of these states' marriage restrictions 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 many 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.

Since the late 1960s, however, the 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 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, Michigan, Tennessee, and Kentucky laws now recognize that children of unmarried parents have the same rights and responsibilities as children born to married parents. For example, nonmarital children may receive child support and may inherit from their fathers once paternity has been established. *See, e.g.*, M.C.L.A. § 700.2114(1)(c) (inheritance rights under rules of intestate succession); T.C.A. § 36-2-313 (inheritance from father when not married to mother); *S. Ry. Co. v. Sanders*, 246 S.W.2d 65, 66 (Tenn. 1952) (statutes regarding rights of nonmarital children were enacted "solely for the purpose of fixing the status of natural children under certain circumstances"); K.R.S.A. § 391.105.

In sum, the laws of Michigan, Tennessee, and Kentucky, in addition to constitutional principles, make it clear that it is impermissible to deny critical benefits and security to some children in order to make the families of other children more prolific, stable, or secure, or in order to encourage adults to change

their behavior. Accordingly, Appellants' arguments that these state restrictions on marriage rights can be justified as an effort to encourage births and "different sex[]" parenting by making marriage exclusively available to different-sex couples are fundamentally at odds with these states' strong policy of equal treatment for *all* children. In exchange for a wholly speculative benefit for the children of different-sex 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."

IV. THE MARRIAGE RESTRICTIONS ARE INEXPLICABLE BY ANYTHING OTHER THAN ANIMUS.

Because the procreation, optimal parenting, and child-welfare interests invoked by Appellants have no "footing in the realities of the subject addressed by the legislation," *Heller*, 509 U.S. at 321, these marriage restrictions "seem[] inexplicable by anything but animus towards the class [they] affect[]." *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. at 2695–96; *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 do not have biologically related children or because they allegedly are unable to 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.

CONCLUSION

As the Massachusetts high court so eloquently concluded a little more than a 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 this action.

Dated: June 16, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 6,978 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Word 2010.

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No. 14-5297

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE

I certify that on June 16, 2014 the foregoing document was filed with the Clerk of Court for the Sixth Circuit Court of Appeals and served on all parties or their counsel of record through the CM/ECF system.

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