Nos. 14-14061-AA, 14-14066-AA

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER, et al.,

Plaintiffs-Appellees,

v.

JOHN ARMSTRONG, et al.,

Defendants-Appellants.

SLOAN GRIMSLEY, et al.,

Plaintiffs-Appellees,

v.

JOHN ARMSTRONG, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Florida

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

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Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

Amici States Massachusetts, California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Vermont, and Washington,[1] file this brief in support of Plaintiff-Appellees James D. Brenner et al., as a matter of right pursuant to Fed. R. App. P. 29(a).

As in other cases raising constitutional challenges to state marriage laws, there is considerable agreement between the *Amici* States and those States that defend exclusionary laws. All States agree that marriage is a core building block of society; 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.

But opponents of marriage equality argue that these important governmental interests are not furthered by extending the institution of marriage to include same-

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

sex couples. The *Amici* States file this brief in strong support of the right of same-sex couples to marry and to refute certain claims made by Appellants and their *amici*. Depriving individuals of the fundamental right to marry the partner of their choice cannot be justified by a history or tradition of exclusion, or by pure speculation as to the negative outcomes that may result. The *Amici* States draw on experience when describing the positive impact of the transition from marital exclusion to equality. The institution of marriage is strengthened when unnecessary and harmful barriers are removed, and our communities are enriched when all citizens have an equal opportunity to participate in civic life.

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

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 entry. In relatively recent history, societal advances have resulted in greater access to and equality within marriage. Over the past decade, this evolution has continued as same-sex couples have been permitted to wed. Against this history, Florida's continued exclusion of same-sex couples from the benefits and obligations of marriage 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 legitimate state interests in marriage 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. The exclusive focus on procreation also ignores the reality that the modern institution of marriage affords significant legal, economic, and social benefits to spouses and children, and serves as a core, organizing feature of civic society. Accordingly, any State's decision to categorically exclude an entire class from the institution of marriage must pass

constitutional muster. Because there is no rational relationship between encouraging responsible procreation by different-sex couples and excluding same-sex couples from marriage, Florida's marriage laws do not.

Nor can Florida's marriage laws be justified by the traditional definition of marriage as being between a man and a woman, or 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 the *Amici* States belies such speculation. Our experience demonstrates that the institution of marriage not only remains strong, but is invigorated by the inclusion of gays and lesbians. No State has suffered the imagined 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 of equal protection and due process require equal marriage rights for same-sex couples.

ARGUMENT

I. EXCLUDING SAME-SEX COUPLES FROM MARRIAGE DOES NOT ADVANCE ANY LEGITIMATE STATE INTEREST

Opponents of marriage equality argue that States have a legitimate interest in promoting marriage exclusively between different-sex couples who may produce children, intentionally or not, to ensure that children are raised in the "optimal" family setting. This reasoning fails even rational basis review. The *Amici* States agree that States have a number of legitimate interests in promoting and strengthening the institution of marriage, including an interest in the well-being of children. Prohibiting marriages between same-sex couples, however, simply does not advance *any* of those interests, least of all the interest in protecting children.[2]

Opponents' arguments to the contrary are so lacking in logic that they cannot survive constitutional scrutiny. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality . . . must find some footing in the realities of the subject addressed."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). Those arguments also degrade gays, lesbians, and their families,

[2] For reasons including those set forth in the brief of Appellees (pp. 5-11), marriage laws that discriminate on the basis of sexual orientation should be subject to heightened scrutiny. However, these laws fail even rational basis review.

distort our history and legal tradition, and are contrary to the facts and scientific consensus. In fact, the continued exclusion of same-sex couples (many of them parents) from the institution of marriage actually serves to harm adults, children, and the broader community. 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). Instead, this is a case where the exclusion of same-sex couples—a group that is similarly-situated in all material respects—irrationally undermines important governmental interests.

A. A Singular Focus On Procreation Distorts History

Marriage "is a great public institution, giving character to our whole civil polity." *Maynard v. Hill*, 125 U.S. 190, 213 (1888). While it has always been an anchor for an ordered society, civil marriage has never been a static institution. Societal changes have resulted in corresponding changes to marriage eligibility rules and to our collective understanding of the relative roles of persons within a marriage. Nevertheless, generations of Americans have consistently valued marriage as "a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003). States, too, have long valued marriage for its many benefits to individuals, households, and the community at large, and therefore have transformed the

personal commitment inherent in marriage into publicly recognized rights and obligations.

Opponents of marriage equality suggest that the government's sole interest in recognizing and regulating marriage is the presumed physiological capacity of different-sex couples to produce children. *E.g.*, Marriage Law Foundation Br. 3. They seek to elevate procreation because it "singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage." *Goodridge*, 798 N.E.2d at 962. Their argument stands at odds with the full history of marriage in our country. Procreation has never been the government's principal interest in recognizing and regulating marriage, and tradition alone cannot sustain discrimination. And, even if some governments once were primarily concerned with the "basic realities of sex difference and the related procreative capacity of male-female couplings," (Marriage Law Foundation Br. 3) the fact is that the modern institution of marriage serves as a core organizing feature of civic society that reserves significant legal, economic, and social benefits for married couples and their families alone. The desire to encourage responsible sexual behavior by different-sex couples does not justify its wholesale exclusion of same-sex couples and their families from the legal rights, protections, and certainty that marriage affords.

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. In early America, the household formed by marriage was understood as a governable, political subgroup (organized under male heads) and a form of efficient governance. As a political unit, the household included not only the married couple and their children, but also extended family. Later came recognition of the household's significance as an economic sub-unit of state governments, responsible for supporting all household members and not strictly the children born of the marriage.

Today, marriage continues to serve 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 providers to care for dependents, and facilitate property ownership and inheritance. Marriage thus provides stability for individuals, families, and the broader community. *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999). States therefore encourage marriage, regardless of whether it results in children, because these private relationships assist in maintaining public order. *Goodridge*, 798 N.E.2d at 954.

For example, the security of marital households creates a safety net that ensures that family members are not alone in a time of crisis, and limits the public's liability to care for the vulnerable. *In re Marriage Cases*, 183 P.3d 384,

423-424 (Cal. 2008). Marriage also provides couples with greater freedom to make decisions about education and employment knowing that, if one spouse provides the primary economic support, the other will be protected, even in the event of divorce or death. As a result, married couples can specialize their labor and invest in each other's education and career, which has long-term benefits for both the couple and the State. Married people, including gay men and lesbians, also enjoy greater physical and psychological health and greater economic prosperity than unmarried persons. *Perry v. Schwarzegger*, 704 F. Supp. 2d 921, 962 (N.D. Cal. 2010).[3]

In sum, the *Amici* States favor—and therefore encourage—marriage over transient relationships because marriage promotes stable family bonds, fosters economic interdependence and security, and enhances the well-being of both the partners and their children. *See Goodridge*, 798 N.E.2d at 954. All of these interests are furthered by including same-sex couples in the institution of marriage.

Opponents' exclusive focus on procreation attempts to preserve tradition for its own sake. While it is true that, until relatively recently, States licensed

[3] Recent studies show that gay men experience a decrease in medical care visits, mental health visits, and mental health care costs following the legalization of same-sex marriage. Mark L. Hatzenbuehler et al., *Effect of Same-Sex Marriage Laws on Health Care Use and Expenditures in Sexual Minority Men: A Quasi-Natural Experiment*, Am. J. Pub. Health (Feb. 2012).

marriages only between a man and a woman, tradition alone cannot justify the continued exclusion of same-sex couples. *See, e.g.*, *Heller*, 509 U.S. at 326 ("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 at 432. Opponents' claim that preserving the historical definition of marriage is necessary in order to avoid the deconstruction of civil marriage boils down to a mere attempt to preserve, for its own sake, one common, long-held view of what marriage means. However, the Supreme Court has rejected the argument that a prevailing social or moral conviction, without more, justifies upholding an otherwise constitutionally infirm law: "[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) (citing *Loving*, 388 U.S. 1) (internal quotations omitted). To survive constitutional scrutiny, Florida's marriage laws must be reasonably tethered to a legitimate governmental interest that is independent of the disadvantage imposed on a particular group—but it is not.[4] *See Romer v. Evans*,

[4] Opponents argue that the "traditional" definition of marriage was not invented to "make a statement about sexual orientation." Marriage Law Foundation Br. 12; *see also* USCCB Br. 8-9. However, the fact that the historical definition of

517 U.S. 620, 633 (1996) (discriminatory classification must serve an "independent and legitimate legislative end").

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. Denying same-sex couples the benefits of marriage works against this interest by denying their families those benefits—an outcome that can harm children.

Beyond the married couple, marriage improves the quality of children's lives in many ways:

> [M]arital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.

Goodridge, 798 N.E.2d at 956-957. Marriage improves children's well-being by honoring their parents' relationships and by strengthening their families through, for example, enhanced access to medical insurance, tax benefits, estate and homestead protections, and the application of predictable custody, support, and

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marriage was not born of a desire specifically to exclude same-sex couples does not negate the need to scrutinize Florida's recent marriage amendment in the context of modern social mores and constitutional principles.

visitation rules. *See*, *e.g.*, *id.* at 956. Children whose parents are married simply have a better chance of living healthy, financially secure, and stable lives.

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

> The differentiation [between relationships] demeans the couple . . . [a]nd 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 in 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 permitting same-sex couples to marry would likely improve the well-being of gay and lesbian households.[5] 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

[5] Lisa Leff, *Defense Lawyers Rest Case at Gay Marriage Trial*, Associated Press, Jan. 27, 2010, http://www.newsday.com/news/nation/defense-lawyers-rest-case-at-gay-marriage-trial-1.1727920 (last visited December 22, 2014).

more secure and protected" and saw "their families as being validated or legitimated by society or the government."[6]

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*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla. 2014), *aff'd*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014). Rather than encourage biological parents to raise their children together, exclusionary marriage laws only make it more difficult for a different set of parents—same-sex couples—to provide their children with stable family environments.[7]

Exclusionary laws also limit unnecessarily the number of households where adults can raise children together because, for example, some States only permit

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[6] 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 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 December 22, 2014).

[7] *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.").

co-adoption by legally married adults. Given the number of children under state supervision (nearly 400,000 nationwide), all States would benefit from expanding the pool of willing and supportive parents. Thus, Florida's marriage laws actually undermine legitimate State interests, including the interest in ensuring 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, scientific consensus, and the conclusions of numerous federal courts. For many years, the *Amici* States have protected the rights of gays and lesbians to be parents.[8] It has been our experience that same-sex parents provide just as loving and supportive households for their children as different-sex parents do. This experience is confirmed by the overwhelming scientific consensus, which establishes that children raised by same-sex couples fare as well as children raised by different-sex couples, and that gay

[8] *See*, *e.g.*, *DiStefano v. DiStefano*, 401 N.Y.S.2d 636, 637 (N.Y. App. Div. 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").

and lesbian parents are equally fit and capable.[9] The most well-respected psychological and child-welfare groups in the nation agree that same-sex parents are as effective as different-sex parents.[10]

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. Such views are disconnected from the "changing realities of the American family." *Troxel v. Granville*, 530 U.S. 57, 64 (2000) (plurality). More importantly, the Supreme Court has repeatedly rejected governmental efforts to codify gender-based stereotyping in contexts varying from schooling to employment to parenting.[11]

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[9] *See, e.g., 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).

[10] 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.

[11] *See, e.g., Nevada Dep't of Human 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 about the

Nor is there any basis for the suggestion that children necessarily benefit from being raised by two biological parents. The combination of factors that affect the well-being of children, including the parents' relationship and commitment to their children and the social and economic resources available to the family, apply equally to children of same-sex and different-sex parents and regardless of whether one or both of the parents are biological parents.[12] *See, e.g.*, *Perry*, 704 F. Supp. 2d at 980-981. 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. In fact, 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.[13] Ultimately, it is in the States'

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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 statute that presumed unmarried fathers to be unfit custodians).

[12] 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.

[13] U.S. Census, *Household Characteristics of Same-Sex Couple Households: ACS 2012*, http://www.census.gov/hhes/samesex/ (last visited December 22, 2014).

interest to promote the well-being of all these families, including by permitting same-sex marriages.

In *Loving*, the Supreme Court rejected similar arguments advanced by Virginia, which 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 basic argument made here—that children "reared in family structures other than the stable husband-wife home with both biological parents" are "disadvantaged"—is not as extreme on its terms, but also attempts to justify discrimination based on the supposed best interests of children. USCCB Br. 17. It likewise should be rejected. The fact remains that, *even if* some Florida voters could rationally have concluded that children are best raised by a married biological mother and father, that conclusion as to the "ideal" family is not rationally related to the exclusion of same-sex couples from marriage.

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. *See, e.g., In re Marriage Cases*, 183 P.3d at 431. Nor has the inability to produce children been grounds for

annulment. *See, e.g.*, *Lapides v. Lapides*, 171 N.E. 911, 913 (N.Y. 1930). 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 can 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).

Florida's recognition of different-sex marriages that do not or cannot produce biological children pursues the supposed objective of promoting "responsible procreation" (by heterosexual couples) in a manner that "[makes] no sense in light of how [it] treat[s] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (citing *Cleburne*, 473 U.S. at 447-450). Many different-sex couples either cannot procreate or choose not to, yet Florida allows these couples to marry. If the States licensed marriage *solely* to further an interest in protecting the children born out of sexual intimacy, then States would not permit marriages where one or both spouses

are incapable or unwilling to bear children. Instead, States license marriage to advance *many* important governmental interests, and thus allow couples to marry irrespective of their procreative ability or intent.

To save an illogical argument, opponents argue that extending marriage to different-sex couples who lack the ability or desire to procreate nonetheless helps to preserve "an essential social paradigm" that encourages responsible procreation by promoting the "optimal" or "ideal" family structure. *E.g.*, Marriage Law Foundation Br. 15-19; USCCB Br. 18. 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, once married, model the formation of committed, exclusive relationships for their unmarried counterparts, 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 Discrimination by the States

Opponents miss the mark when they contend that, due to considerations of federalism, federal courts should not "short-circuit the political process." Florida Br. 9. They argue that the Court "should 'exercise great caution when asked to take sides in an ongoing public policy debate,' and it should leave Florida's important policy determination to Florida's citizens." Florida Br. 9 (internal citations omitted). They repeatedly cite to *Windsor* in support of this point. In *Windsor*, however, the Supreme Court addressed the balance of power between the States and Congress, and did not limit the courts' ability—indeed obligation—to analyze state marriage laws in conjunction with constitutional guarantees. 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*, 962 F. Supp. 2d at 1278-1279 (quoting *Windsor*, 133 S. Ct. at 2692).[14]

[14] Basic principles of comity also require that States respect each other's marriage determinations. *See, e.g.*, Joanna L. Grossman, *Resurrecting Comity:*

Opponents' reliance on *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), is similarly misguided. Many opponents of same-sex marriage point to *Schuette* as support for the assertion that overturning Florida's constitutional amendment banning same-sex marriage disrespects the will of the Florida electorate and "political self-determination." *E.g.*, Marriage Law Foundation Br. 23-26; USCCB Br. 28. In their brief, Appellants similarly argue that by invalidating Florida's marriage laws, the district court undermined the democratic process and constitutionalized what is properly a matter of public policy. Florida Br. 11-13. However, the will of the electorate is subject to the same constitutional guarantees and protections that circumscribe the power of state legislatures. Despite the substantial freedoms inherent in self-governance, "majority rule is not without limit" and there are "some things the Constitution

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Revisiting the Problem of Non-Uniform Marriage Laws, 84 Or. L. Rev. 433, 461 (2005). Marriage "generally involves long-term plans for how [couples] will organize their finances, property, and family lives." *Obergefell v. Wymysle*, 962 F. Supp. 2d 968, 979 (S.D. Ohio 2013), *rev'd sub nom. DeBoer v. Snyder*, 2014 WL 5748990 (6th Cir. Nov. 6, 2014). And couples frequently are obliged—whether for personal or professional reasons—to move across state lines. Thus, one State's refusal to recognize a valid marriage from another State intrudes into the realm of private and intimate relations. Moreover, 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' refusal to recognize these marriages closely resembles the federal government's discrimination against same-sex marriages pursuant to DOMA, which the Supreme Court invalidated because it had the "principal purpose [of imposing] inequality." *Windsor*, 133 S. Ct. at 2694.

forbids even a majority of citizens to do." *Schuette*, 134 S. Ct. at 1667 (Sotomayor, J., dissenting).

Moreover, *Schuette* put a very different question before the Court than does this case. At the outset of his opinion, Justice Kennedy made clear that the majority did not view the case as being about "the constitutionality, or the merits, of race-conscious admissions policies in higher education." *Id.* at 1630. In fact, the Court did not view the state constitutional amendment at issue as discriminating against or limiting in any way the rights of certain citizens as compared to others. *Id.* at 1637. Instead, the Court viewed the question presented in *Schuette* as whether, and in what manner, voters themselves may make sensitive policy judgments about racial considerations in governmental decisionmaking. *Id.* at 1638. In this case, the question is not whether the voters themselves may decide sensitive policy questions, but whether it is rational for a state government—whether by popular vote or legislative enactment—to deny a fundamental right to an entire class of citizens. Regardless of the method of enactment, such a denial violates the Constitution.

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. Instead, it strengthens the institution.

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

Opponents argue that the extension of marriage to same-sex couples amounts to a "redefinition" of marriage to a "government endorsement of private agreements" that "dilute[es] or eliminat[es] its formerly child-centered nature." Marriage Law Foundation Br. 10. This assertion, and others like it, is 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, by gradually removing restrictions on who can marry and promoting equality of the spouses. *See, e.g.*, *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. For example, until relatively recently, wives ceded their legal and economic identities to their husbands in marriage. *See, e.g.*, *United States v. Yazell*, 382 U.S. 341, 342-343 (1966)

(applying law of coverture). Divorce was also difficult, if not impossible, in early America. As recently as 1967, Virginia was one of 16 States that continued to "prohibit and punish marriages on the basis of racial classification," imposing penalties that existed as remnants of slavery and colonialism. *Loving*, 388 U.S. at 6. Civil marriage has endured as a bedrock institution due to 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 "redefinition" of marriage.

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

Opponents ask the Court to credit "rational" concerns regarding the effects of marriage equality. A basic review of the available data demonstrates that these concerns are unfounded. Moreover, the *Amici* States' actual experience with equal marriage rights should carry substantially more weight in the analysis than bare surmise and conjecture. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 228-229 (1982) (rejecting unsupported hypothetical justifications for law excluding undocumented children from public schools); *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[.]").

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 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).[15] 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.[16]

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.[17] Meanwhile, the national average marriage rate declined steadily from 2005 to 2011.[18] In addition, States allowing same-sex couples to

[15] 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 December 22, 2014) [hereinafter CDC Marriage Rates].

[16] Centers for Disease Control and Prevention, *National Marriage and Divorce Rate Trends*, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited December 22, 2014) [hereinafter CDC National Trends].

[17] CDC Marriage Rates, *supra* note 15. The six States were Connecticut, the District of Columbia, Iowa, Massachusetts, New York, and Vermont.

[18] CDC National Trends, *supra* note 16; 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_affe

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.[19]

2. *Divorce Rates*: The *Amici* States' experience contradicts the suggestion that allowing same-sex couples to marry leads to increased rates of divorce. In four of the seven States that allowed same-sex couples to marry as of 2011, divorce rates for the years following legalization stayed at or below the divorce rate for the preceding year, even as the national divorce rate increased.[20] In addition, six of the seven jurisdictions that permitted same-sex couples to marry as of 2011 (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

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ct_marriage_or_divorce_rates_.html [hereinafter Kirk & Rosin] (last visited December 22, 2014); CDC Marriage Rates, *supra* note 15.

[19] Alexis Dinno & Chelsea Whitney, *Same Sex Marriage and the Perceived Assault on Opposite Sex Marriage*, PloS ONE, Vol. 8, No. 6 (June 11 2013), http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0065730 (last visited December 22, 2014).

[20] Kirk & Rosin, *supra* note 18.

States that allowed same-sex couples to marry; Iowa and Massachusetts had the lowest and third-lowest rates, respectively.[21]

3. *Nonmarital Births*: The suggestion that allowing same-sex couples to marry will lead to an increase in nonmarital births is likewise unsupported. Massachusetts's nonmarital birth rate has been well below the national average for years, and that continued after same-sex couples began to marry. In fact, as of 2011, the most recent year for which comprehensive data are available, five of the seven States that allowed same-sex couples to marry (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) had nonmarital birth rates below the national average.[22] 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

[21] 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 December 22, 2014); CDC National Trends, *supra* note 16; Kirk & Rosin, *supra* note 18. By contrast, States that have excluded same-sex couples from marriage have some of the highest divorce rates in the country.

[22] Centers for Disease Control and Prevention, *Births: Preliminary Data for* 2012, 62 National Vital Statistics Report No. 3, Table I-1 (Sept. 6, 2013), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_03_tables.pdf (last visited December 22, 2014).

extended marriage to same-sex couples.[23] More fundamentally, speculation that nonmarital births will increase is illogical, as allowing same-sex couples to marry actually permits more children to be born into marriages.

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

It is untrue that it will become virtually impossible for States to limit entry to marriage in any meaningful way if the Constitution obliges them to license same-sex marriages. 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.[24] States can otherwise continue to exercise their sovereign power to regulate marriage without threatening the fundamental right to marry.

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

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[23] Centers for Disease Control and Prevention, *Births: Final Data for* 2011, 62 National Vital Statistics Report No. 1 (June 28, 2013), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_01.pdf (last visited December 22, 2014).

[24] Even in *Loving*, the State "[did] not contend that its [police] powers to regulate marriage [were] unlimited notwithstanding the commands of the Fourteenth Amendment." *Loving*, 388 U.S. at 7.

races." 388 U.S. at 11. Florida's marriage laws similarly restrict the right to marry by drawing distinctions according to gender and using that personal characteristic to define an appropriate category of marital partners.[25] When viewed this way, the suggestion that the argument in favor of recognizing same-sex marriage contains no limiting principle for excluding other groupings of individuals is clearly wrong. Florida Br. 26.

Removing gender from consideration does not result in all groupings of adults having an equal claim to marriage. States limit marriage based on other compelling interests. 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.

[25] 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 necessary to accept that Florida's laws involve suspect classifications for purposes of this analysis. The amendment defines eligibility based on a personal characteristic unrelated to one's qualification for marriage (*i.e.*, ability to consent or current marital status).

States similarly may continue to lawfully prohibit marriage between certain relatives in order to guard against a variety of public health outcomes. Consanguinity itself depends not on a separable personal trait such as race or gender, but rather defines the nature of the relationship between particular and identifiable individuals, and thus exists only when one individual is considered relative to a small number of other specific individuals.

Likewise, in order to protect children against abuse and coercion, States may regulate entry into marriage by establishing an age of consent.[26] Age, too, is not an intrinsic trait. Because age changes continually, age-based restrictions are inherently temporary. Thus, even after gender is removed from consideration, other state regulations continue to advance important governmental interests and remain valid.

Finally, Florida's reliance on gender to regulate marriage is not saved by the argument that its marriage amendment does not actually discriminate based on gender or sexual orientation because "they apply equally to men and women." Florida Br. 27. The Supreme Court rejected a similar argument in *Loving*. 388 U.S. at 8. Like the anti-miscegenation laws invalidated in *Loving*, Florida's marriage laws effectively, and unconstitutionally, deny a minority group the full

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

measure of citizenship by denying them the freedom to marry the partner of their choice.

* * * *

In sum, without any rational basis, Florida's marriage laws 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. Under any standard of review, this result is in clear conflict with our Constitution.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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Dated: December 22, 2014

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I hereby certify that I electronically filed a true, correct, and complete copy of the foregoing *Brief of Amici Curiae Massachusetts, California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Vermont, and Washington in Support of Plaintiffs-Appellees James D. Brenner, et al.* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on December 22, 2014.

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