No. 14-14061

In the United States Court of Appeals for the Eleventh Circuit

JAMES DOMER BRENNER, *et al.*,
Plaintiffs— Appellees

v.

JOHN H. ARMSTRONG, *et al.*,
Defendants—Appellants

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

Civil Case No. 4:14-cv-00107-RH-CAS (Judge Robert L. Hinkle)

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF 64 SCHOLARS OF THE INSTITUTION OF MARRIAGE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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Smolin, David M.

Snell, R.J.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF 64 SCHOLARS OF THE INSTIUTUTION OF MARRIAGE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

Pursuant to Federal Rule of Appellate Procedure 29, 64 Scholars of the Institution of Marriage move for leave to file an *amicus* brief in support of Defendants-Appellants in the above-captioned case. The Defendant-Appellants and the *Grimsley* Plaintiffs-Appellees consented to the filing of the *amicus* brief, but the *Brenner* Plaintiffs-Appellees withheld their consent, thus requiring this Motion. In support of this Motion, Proposed *Amici* state as follows:

1. *Amici*, who are scholars of the institution of marriage from various disciplines—including sociology, psychology, demography, economics, history, literature, philosophy and family law—have a variety of views on sexual morality, theology, and natural law. But we are united in our conviction that redefining marriage—the country's most fundamental and valuable institution—will not well serve a state's children or its future. Our brief presents what we call the "institutional defense" of man-woman marriage laws.

2. The fundamental issue raised in this case—whether the Fourteenth Amendment forbids States from defining marriage as the union of a man and a woman—is of profound importance. Accordingly, dozens of amicus briefs have been filed in each of the similar cases that have recently been (or are currently being) litigated before the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits. *See, e.g.*,

Kitchen v. Herbert, 755 F.3d 1193, 1240-53 (10th Cir. 2014) (cataloguing all amici that filed briefs); *Baskin v. Bogan*, 766 F.3d 648, 651-653 (7th Cir. 2014) (listing the attorneys for all amici). Notably, many of the judges who have written opinions in those cases have referenced the many helpful amicus briefs that have been filed. *See, e.g.*, *Bostic*, 760 F.3d at 382 (referencing the "amicus brief filed by Dr. Gary J. Gates"); *Kitchen*, 755 F.3d at 1240 (Kelly, J., concurring and dissenting) (referencing "the scores of amicus briefs on either side"). Indeed, amicus briefs are so commonplace and useful in these cases that every party that litigated a marriage case before the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits consented to the filing of any and all amicus briefs.

3. *Amici*'s brief, in particular, explains the institutional defense by first discussing the social benefits of the man-woman understanding of marriage and its associated secular social norms. We then describe how redefining marriage in genderless terms would undermine those norms, and briefly outline the social costs and risks of doing so. Next, we explain why the limited available empirical evidence reinforces these risks. We then elucidate the flaws in recent appellate opinions that have attempted to deny or downplay these risks. Finally, we explain why a state's decision to retain the man-woman definition is narrowly tailored to compelling, secular governmental interests.

4. Under Federal Rule of Appellate Procedure 29(b), the proposed brief is being filed along with this motion.

For all these reasons, we respectfully request that the Court grant this motion.

Respectfully submitted,

/s Gene C. Schaerr

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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Dated: November 21, 2014.	

s/ Gene C. Schaerr

Gene C. Schaerr

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C1 OF 12

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C2 OF 12

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C3 OF 12

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C4 OF 12

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C5 OF 12

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C6 OF 12

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C8 OF 12

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C9 OF 12

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C10 OF 12

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C11 OF 12

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C12 OF 12

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

MISCELLANEOUS

COURT DOCUMENTS

INTRODUCTION, STATEMENT OF THE ISSUE, SUMMARY, AND INTERESTS OF *AMICI CURIAE*[1]

During argument in the California Proposition 8 case, Justice Kennedy noted that redefining marriage in genderless terms could be akin to jumping off a cliff: It is impossible to see all the dangers lurking at the bottom. Oral Argument at 47:19-24, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Justice Alito echoed that concern in *United States v. Windsor*, where he also noted that any empirical analysis of the effects of a redefinition calls for "[judicial] caution and humility." 133 S.Ct. 2675, 2715-16 (2013) (Alito, J. dissenting). That is because same-sex marriage in the United States is still too new—and the institution of marriage too complex—for a redefinition's impact to have fully registered. *Id.* And the risks associated with a redefinition are a powerful reason *not* to second-guess the people's considered judgment—expressed at the ballot box or through elected representatives—that the man-woman definition should be retained. *Id*. at 2716.

Despite those concerns, and although the Sixth Circuit recently went the other way, four federal appeals courts have held that state marriage laws violate the Fourteenth Amendment to the extent they limit marriage to opposite-sex unions. In so doing they have rejected concerns about the social impact of such a change,

[1] Undersigned counsel for the Sutherland Institute has authored this *amicus* brief in whole, and no other person or entity has funded its preparation or submission.

essentially adopting the motto of same-sex marriage advocates that "my marriage won't affect your marriage."

But the concerns expressed by Justices Kennedy and Alito were and remain well founded. Unless reversed, the rulings compelling states to recognize same-sex marriage will adversely alter the whole *institution* of marriage in the affected states—not because same-sex marriages will somehow set a "bad" example for man-woman marriages, but by undermining important social norms that are tied to the man-woman understanding of marriage and that typically guide the procreative and parenting behavior of *heterosexual* individuals and couples. By severing the critical link between the legal definition of marriage and the institution's long-established public meaning, those decisions will likely inflict—or at least pose a substantial risk of inflicting—significant long-term harm on the affected states and their citizens, especially children of heterosexual unions.

Taken together, these points constitute what we will call the "institutional defense" of man-woman marriage laws. That defense does not depend on any particular views about sexual morality, theology, or natural law. *Amici*, who are scholars of the institution of marriage from various disciplines—including sociology, psychology, demography, economics, history, literature, philosophy and family law—have a variety of views on those matters. But we are united in our conviction that redefining marriage—the country's most fundamental and valuable

institution—will not well serve a state's children or its future.

Here we elaborate the institutional defense by first discussing the social benefits of the man-woman understanding of marriage and its associated secular social norms. We then describe how redefining marriage in genderless terms would undermine those norms, and briefly outline the social costs and risks of doing so. Next, we explain why the limited available empirical evidence reinforces these risks. We then elucidate the flaws in recent appellate opinions that have attempted to deny or downplay those risks. Finally, we explain why a state's decision to retain the man-woman definition is narrowly tailored to compelling, secular governmental interests.

ARGUMENT

I. Social benefits of the man-woman understanding and associated norms

Marriage is a complex social institution that pre-exists the law, but is supported by it in virtually all human societies. Levi-Strauss(a):40-41[2]; Quale:2; Reid:455; Bracton:27; Blackstone:410; Blankenhorn(a):100. Like other social institutions, marriage is "a complex set of personal values, social norms, …

[2] Because of the number of scholarly studies cited, in-text citations are in shortened form, and authors with more than one article have letters following their last names to distinguish publications. All sources appear in the Table of Authorities.

customs, and legal constraints that regulate a particular intimate human relation"—specifically, procreative sex—"over a life span." Allen(a):949-50.

Moreover, in virtually all societies, although sex and procreation may be permitted in other settings, marriage marks the boundaries of socially *commended* procreation. Girgis,*etal*.:38; Corvino&Gallagher:96. Indeed, the most basic message conveyed by the traditional institution of marriage is that, where procreation occurs, *this* is the arrangement in which society prefers it to occur. And that message helps to achieve a principal purpose of marriage: to ensure, or at least increase the likelihood, that any children born as a result of sex between men and women would have a known mother and father with responsibility for caring for them. Minor:375-76; Blackstone:435; Wilson:41; Witte:17; Webster.

Thus, although marriage benefits its adult participants in countless ways, it is "*designed* around procreation." Allen(a):954. As famed psychologist Bronislaw Malinowski emphasized, "the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents." Malinowski:11. Indeed, Bertrand Russell—no friend of Judeo-Christian theology or traditional sexual mores—once remarked that, "[b]ut for children, there would be no need of any institution concerned with sex." Russell:77,156; *accord* Llewellyn:1284.

The man-woman definition is thus integral not only to the social institution

of marriage that state marriage laws are intended to support, but also to the states' purposes in providing that support—which they do at considerable cost. Story:168; Kent:76; Bouvier:113-14; Bishop:§225. Until recently, all the states had rejected what Justice Alito has aptly called the relatively adult-centric, "consent-based" view of marriage—focused principally on adult emotional relationships—and had embraced instead the "conjugal" view, based principally on the procreative potential of most man-woman unions. *Windsor*, 133 S.Ct. at 2718; Institute for American Values(a):7-8; Stewart(a):337; Yenor:253-73. Even today, not counting judicially-imposed definitions, most states have implemented the conjugal view of marriage by explicitly retaining the man-woman definition—despite decisions by other states to redefine marriage as the union of any two otherwise qualified "persons."[3]

By itself, the man-woman definition conveys and reinforces that marriage is centered on procreation and children, which man-woman couples are uniquely capable of producing. Davis:7-8; Wilson:23; Blackstone:422; Locke:§§78-79; Anthropological Institute:71; Wilcox,*etal*.:18-19; Girgis,*etal*.:38. That definition also conveys that one purpose of marriage is to provide a structure by which to care for children that may be created unintentionally—an issue that is also unique

[3] *E.g.*, *Marriage Equality Act* (NY), AB A08354 (June 24, 2011); *Civil Marriage Protection Act* (MD), House Bill 438 (March 1, 2012).

to man-woman couples. Institute for American Values(b):6. Most obviously, by requiring a man and a woman, that definition conveys to heterosexuals (at least) that this structure can be expected to have both a "masculine" and a "feminine" aspect, one in which men and women complement each other. Nock:*passim*; Levi-Strauss(b):5.[4]

By implicitly referencing children, unintentional procreation, masculinity and femininity, the man-woman definition not only reinforces the simple idea that society prefers that procreation occur within marriage. It also "teaches" or reinforces certain procreation and child-related "norms." *Windsor*, 133 S.Ct. at 2718; *Mason v. Breit*, No. 120159 25-26 (Va. Sup. Ct. 2013). Because only man-woman couples are capable of producing children together, deliberately or accidentally, these norms are directed principally at heterosexual individuals and couples, and include the following:

1. Where possible, every child has a right to be supported financially by the man and woman who brought it into the world (the "maintenance" norm). (This norm is reinforced by the state's creating and supporting, in its marriage laws, a legal structure conducive to such support.) Brinig:110-11; Minor:375-78.

2. Where possible, every child has a right to be reared by and to bond with its own biological father and mother (the "biological bonding" norm). *Convention on the Rights of the Child*, 1577 U.N.T.S. 3, 47;

[4] *Accord* Westermarck:5; Simmel:131; Immerman:146; Lovejoy:348; Feldman:380-91; Nelson&Bosquet:37-59; DeWolff&Izjendoorn:571-91; Main&Solomon:95-124; Hofferth,*etal*.:81; Coltrane:54; Parke:5-7; Maccoby:266-67,273-75; Denham,*etal*.:23-45; Amato(c):267; Paquette&Bigras:33-50; Shulman&Klein:53; Powers,*etal*.:980-99; Amato&Rivera:375-84; Regnerus&Luchies:159-83.

Somerville:179-201; Aristotle:§12; Locke:§78; Velleman:370-71.

3. Where possible, a child should ideally be raised by *a* mother and father who are committed to each other and to the child, even where it cannot be raised by both biological parents (the "gender-diversity" norm). Erickson:2-21; Esolen:29-40; Palkovitz:234-37; Witherspoon:18; Pruett:17-57; Raeburn:121-158; Rhoads:8-45; Byrd:227-29; Byrd&Byrd:382-87. (This norm, in combination with the biological bonding norm, is sometimes called "optimal parenting.") As a corollary, heterosexual men and women who conceive children together should treat marriage, and fatherhood and motherhood within marriage, as an important expression of their masculinity or femininity. Hawkins&Carroll:16-20; Nock:58-59; Erickson:15-18.

4. Men and women should postpone procreation until they are in a stable, committed, long-term relationship (the "postponement" norm). Dwyer:44-76; Grossman&Friedman:10; McClain:2133-84; Friedman:9-10; Schneider:495-532. (This norm is sometimes called "responsible procreation." Dwyer:44-76.)

5. Undertaken in that setting, creation and rearing of children is a socially valuable activity (the "procreation/child-rearing norm"). Wardle(a):784-86; Girgis,*etal*.:44.

6. Men and women should limit themselves to a single procreative partner (the "procreative exclusivity norm")—a norm that is also reinforced by prohibitions on polygamy. Wilson:32-38; Blankenhorn(a):148-50; Plato:1086.

7. In all their decisions, parents and prospective parents should put the long-term interests of their children—present and future—ahead of their own interests (the "child-centricity" norm). Institute for American Values(b):6.

States and their citizens receive enormous benefits when heterosexual individuals heed these norms, which are central to the conjugal vision of marriage. Indeed, common sense and a wealth of social-science data teach that children do best emotionally, socially, intellectually and economically when reared in an intact

home by both *biological* parents. Wilcox,*etal*.:11; Moore,*etal*.; McLanahan&Sandefur:1; Lansford,*etal*.:842; O'Brien:31. Such arrangements benefit children of opposite-sex couples by (a) harnessing the biological or "kinship" connections that parents and children naturally feel for each other, and (b) providing what experts have called "gender complementarity" or diversity in parenting. Erickson; Popenoe:146; Witherspoon:18; Glenn:27; Lamb:246; Byrd; Byrd&Byrd:382-87; *U.S. v. Virginia*, 518 U.S. 515, 533 (1996). Compared with children of opposite-sex couples raised in any other environment, children raised by their two biological parents in a married family are *less* likely to commit crimes, engage in substance abuse, and suffer from mental illness, or do poorly in school, and *more* likely to support themselves and their own children successfully in the future. Jeynes:85-97; Marquardt; Amato&Keith:26-46; Amato(a):543-56; Wallerstein(a):444-58; Wallerstein(b):545-53; Wallerstein(c):65-77; Wallerstein(d):199-211; Wallerstein&Blakeslee; Wallerstein&Corbin:593-604; Marquardt,*etal*.:5. Accordingly, such children pose a lower risk of needing state assistance, and a higher likelihood of contributing to the state's economic and tax base. Amato(b).

Similarly, parents who embrace the norms of child-centricity and maintenance are less likely to engage in behaviors—such as child abuse, neglect or divorce—that typically require state assistance or intervention. Popenoe;

Blankenhorn(b); Manning&Lamb; Flouri&Buchanan:63. People who embrace the procreative exclusivity norm are likewise less likely to have multiple children with multiple partners—a phenomenon that also leads to social, emotional and financial difficulties for children. Cherlin:137; Wilson:32-38; Blankenhorn(a):148-50; Plato:1086. And people who embrace the postponement norm are less likely to have children without a second, committed parent—another well-established predictor of psychological, emotional and financial troubles. Oman,*etal*.:757; Bonell,*etal*:502; Kantojarvi,*etal*.:205; Bachman,*etal*.:153.

By contrast, people who do not appreciate the social value of creating and rearing children are simply less likely to do so. And that view, if sufficiently widespread, would put at risk society's ability to reproduce itself—at least at levels sufficient to maintain intergenerational social welfare programs.

For all these reasons, Judge Perez-Gimenez of Puerto Rico was correct in concluding that "[t]raditional marriage"—that is, man-woman marriage—"is the fundamental unit of the political order. And ultimately the very survival of the political order depends upon the procreative potential embodied in traditional marriage." *Conde-Vidal v. Garcia-Padilla*, No. 14-1254 (PG) (Oct. 21, 2014), slip op. at 20.

II. Social costs and risks of removing the man-woman definition

It is thus not surprising that so many informed commentators on both sides

have predicted that redefining marriage to accommodate same-sex couples—which necessarily requires removing the man-woman definition—will change the institution of marriage profoundly.[5] Institutions matter. Radcliffe-Brown:10-11; Searle(a):32,57,117; Lagerspetz(a):28; Lagerspetz(b):70,82; Nee&Ingram:19; Searle(b):89-122. And the law can alter institutions, and hence change social norms. Harrison:xxviii. Thus, as Oxford's prominent liberal legal philosopher Joseph Raz observed, "the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage." Raz(b):23.

Erosion of Marital Norms. For opposite-sex couples, the major effect of removing the procreation-focused, man-woman definition will be to erode the simple message that society prefers that procreation occur within marriage, as well each of the specific norms that depend upon or are reinforced by that definition. Institute for American Values(b):18; Allen(b):1043. For example, as Professors Hawkins and Carroll have explained, the redefinition of marriage directly undermines the gender-diversity norm by putting in place a legal structure in which two women (or two men) can easily raise children together as a married couple,

[5] Bix:112-13; Dalrymple:1,24; Blankenhorn(a):157; Stoddard:19; Cere:11-13; Farrow:1-5; McWhorter:125; Stacey:126-28; Young&Nathanson:48-56; Bolt:114; Carbado:95-96; Gallagher(b):53; Graff:12; Hunter:12-19; Sullivan:1-16; Widiss:778,781; Raz(a):161; Stewart(b):10-11; Searle(b):89-122; Reece:185; Stewart(c); Clayton:22; Stewart(d):503; Stewart(e):239-40; Bradley:193-96.

and placing the law's authoritative stamp of approval on such arrangements. Hawkins&Carroll:13-16; Carroll&Dollahite:59-63. Such approval also obviously erodes the bonding or biological connection norm that is inherent in the man-woman definition of marriage.

Such legal changes are especially likely to undermine those norms among men, who generally need more encouragement to marry than women. That is because such changes suggest that society no longer needs men to bond to women to form well-functioning families or to raise happy, well-adjusted children. Hawkins&Carroll:14-16; Nock:58-59.

For similar reasons, a redefinition of marriage in genderless terms weakens the expectation that biological parents will take financial responsibility for any children they participate in creating—a problem exacerbated by the fact that sperm donors and surrogate mothers aren't expected to do that. And at least for opposite-sex parents, a redefinition weakens the expectation that parents will put their children's interests ahead of their own—a problem likewise exacerbated by the fact that the redefinition movement is being driven largely by a desire to accommodate adult interests. Hawkins&Carroll:20.

Equally important, and for similar reasons, removing the gendered definition of marriage teaches people that society now places less value on natural procreation and childrearing. Indeed, by extending marriage to a class of

relationships that are intrinsically sterile, a redefinition teaches that society now considers the natural family (a woman, a man, and their biological children), and the capacity of a woman and a man to create human life, to be of no special value. Knapp&Williams:626-28. That in turn will inevitably undermine the procreativity/child-rearing norm, the procreative exclusivity norm, and the postponement norm.

Our prediction that redefining marriage will undermine all of these norms—and the overall preference that procreation occur within marriage—is consistent with the view often expressed by judges and scholars that, even where the law has not created a social institution, the law still plays a powerful "teaching" function. Hawkins&Carroll:20; Sunstein(a):2027-28; Posner,E.; Cooter; Lessig:2186-87; Sunstein(b). Indeed, a recent opinion by Justice Kennedy remarked on the power of democratically enacted disability laws to "teach" society the norm of treating persons with disabilities as full-fledged citizens. *University of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). The same teaching principle applies to laws defining and regulating marriage, which likewise serve to either reinforce or undermine the legitimate norms and societal preferences long associated with that institution.

Resulting Harms to Children and Society. Just as these norms benefit the state and society, their removal or weakening can be expected to harm the interests

of the state and its citizens. For example, as fewer opposite-sex couples choose to limit procreation to marriage relationships, and as fewer embrace the norms of biological connection, gender diversity, maintenance and postponement, more children will be raised without both a mother and a father—usually a father. Hawkins&Carroll:18-20. That in turn will mean more children being raised in poverty; more children who experience psychological or emotional problems; more children who do poorly in school; and more children and young adults committing crimes—all at significant cost to the state. Popenoe; Blankenhorn(b); Manning&Lamb; Flouri&Buchanan:63; Ellis,*etal*.; Bowling&Werner-Wilson:13; Marquardt,*etal*.:5; Wu&Martinson; Wardle(b); Harper&McLanahan:384-86. Similarly, as fewer parents embrace the norm of child-centricity, more will make choices driven by personal interests rather than the interests of their children. Many such choices will likewise impose substantial costs on the state. Wildsmith,*etal*.:5; Scafide:9; Kohm&Toberty:88. Moreover, by breaking the link between procreation and parenting, a redefinition will require additional changes to the legal and social institution of parenting—thereby creating another major source of societal risk. Morse(a); Morse(b); Farrow(b).

Furthermore, because a redefinition also poses a risk to aggregate fertility—by weakening the social norm favoring reproduction—such a redefinition poses even greater long-term risks to society. Zhang&Song; Brown&Dittgen;

Martin,*etal*.:Table 12; Wardle(a):784-86. As Professor Allen has noted, "[s]ocieties incapable of replicating themselves in numbers and quality relative to competing societies simply die out…." Moreover, "[p]oorly designed laws"—including laws that undermine long-standing social norms—can "lead to… unsuccessful marriages, which in turn lead to low fertility… and ultimately a decline in the society." Allen(a):956. And that is precisely what the redefinition of marriage threatens to do, by weakening several norms currently associated with that institution.

That is not to suggest that a redefinition will affect all social groups similarly. People who are more religious, for example, generally have religious reasons—beyond the "teaching" power of the law—for embracing both the man-woman understanding of marriage and the associated social expectations and norms. Similarly, regardless of religion, people who are relatively educated and wealthy tend to embrace in their personal lives the expectations and norms associated with traditional marriage—to a greater extent than the relatively poor or uneducated. Wilcox:53; Cahn&Carbone:3,188-19,166; Murray:149,151-57,163-67. Thus, we would expect to see the social costs of redefining marriage concentrated among the relatively non-religious and less well-to-do segments of society.

In short, if we were to compare the institution of marriage to a valuable

hanging tapestry, the man-woman definition is like a critical thread running through it: Remove that thread and, over time, the rest of the tapestry will likely unravel. Schneider:498; Allen(a):963-65; Stewart(a):327-28. That will be a tragedy for society and, especially, its children.

III. Empirical evidence

What does the available empirical evidence tell us about these issues? Several pro-redefinition commentators have cited the experience of Massachusetts—which adopted same-sex marriage a decade ago—in claiming that such a change has no adverse effects. But putting aside more recent evidence showing a longer-term overall *increase* in divorce in the wake of Massachusetts' decision, and a concomitant overall *decrease* in marriage rates, see Centers for Disease Control and Prevention(a); Centers(b), such small-sample, short-term results cannot reliably predict a redefinition's longer-term consequences. And studies relying upon longer experience and larger sample sizes strongly suggest that a redefinition is likely to have substantial adverse effects—or at least that it presents a serious risk of such effects.

Requirements for Statistical Validity. Obviously, one cannot fairly infer that a state's decision to redefine marriage *caused* (or did not cause) an increase in divorce or a reduction in marriage without controlling for other, potentially confounding factors. And only one study based on U.S. data of which we are

aware has even attempted to do that—a very recent study by Marcus Dillender. While that study purports to find "no evidence" that allowing same-sex marriage has any effect on U.S. heterosexual marriage rates, Dillender:582, it has a number of methodological flaws.

The most important is its assumption that the impact of redefining marriage would show up in measurable ways a very short time after the redefinition. As Justice Alito's remarks in *Windsor* suggest, that assumption is unrealistic in the context of an ancient and complex social institution like marriage. *Windsor*, 133 S.Ct. at 2715-16. Experts on marriage have frequently and correctly noted that major social changes—such as changes to the marriage institution—operate with a "cultural lag" that often requires a generation or two to be fully realized. Cherlin:142-43.

Another important flaw is more technical: Because same-sex marriage had been available for so short a time at the cutoff date Dillender chose—six years for Massachusetts and two years or less for all the other states, Dillender's study lacks any meaningful ability to detect real-world effects. Its methodology is simply incapable of determining whether same-sex marriage had any impact on marriage in the affected states.

Yet another flaw is the study's failure to examine the impacts on social groups that might be affected *differentially* by the redefinition—for example, those

who are relatively less religious, educated or prosperous. The relatively more religious or wealthy segments of the population could well embrace the norms associated with man-woman marriage with even greater fervor during and just after a state's decision to redefine marriage in genderless terms. And that effect could mask a negative impact of that redefinition on less religious or prosperous segments of the heterosexual population. Yet Dillender merely throws up his hands, confessing that he cannot test these possibilities in his data. Dillender:568.

The Netherlands Study. The only credible study of which we are aware that has recognized and adjusted for this problem is a recent study of the Netherlands, which formally adopted same-sex marriage in 2001 but had already adopted all of its main elements by 1998. That study, by Mircea Trandafir, has much more statistical credibility than Dillender's study because it examined the effect of a marriage redefinition over a much longer period—13 years. That study also shows a clear decline in marriage rates among man-woman couples in urban areas—which in the Netherlands tend to be less religious than rural areas—in the wake of the adoption of same-sex marriage. Trandafir:28-29. Indeed, the Netherlands study also suggests that the debate surrounding same-sex marriage caused a (likely) temporary *increase* in marriage rates among the more religious segments of society—which embraced traditional marriage with greater fervor—and that this increase tended to offset the decrease in man-woman marriages among the more

urban, less religious segments. Trandafir:28-29.

It was only by examining these populations separately that Trandafir was able to discover this differential effect. His study thus shows that, although the more religious segment of Dutch society may not see a reduction in man-woman marriages in the near term, other segments—those that lack a strong alternative source for the social norms traditionally associated with man-woman marriage—have seen and likely will continue to see a reduction in marriage among opposite-sex couples. And for those populations, that will mean a substantial reduction in the many social benefits—beginning with lower rates of fatherlessness—that man-woman marriage has long been known to produce.

Studies of the Value of Dual-Biological Parenting. The Dillender study also ignores the reality that a redefinition of marriage would likely result in fewer children being raised by their biological parents for reasons other than reduced marriage rates. For example, by weakening the biological bonding and gender-diversity norms associated with traditional marriage, over time a redefinition would likely lead more married parents to separate from their spouses and raise their children in new arrangements without going through the formality of a divorce. Similarly, by weakening the procreative exclusivity norm, a redefinition would likely lead more people to engage in what some have called "serial polygamy"—having children with multiple partners. Both of these effects would

lead to more children of opposite-sex couples being raised outside the immediate presence of one or both biological parents.

The available empirical evidence shows that, in the aggregate, such an outcome would be very bad for the affected children. *All* of the large-sample studies show that children raised by their two biological parents in intact marriages do better, in the aggregate, than children raised in any other parenting arrangement, including single parenting arrangements, mother-grandmother arrangements, step-parent arrangements, and even adoptive arrangements—as valuable and important as those are. That is true, moreover, across a wide range of outcomes, including freedom from serious emotional and psychological problems, Sullins:11, McLanahan,*etal*., Culpin,*etal*., Kantojarvi,*etal*.; avoidance of substance abuse, Brown&Rinelli; avoidance of behavioral problems generally, Osborne&McLanahan, Cavanagh&Huson; and success in school, McLanahan,*etal*., Bulanda&Manning; Gillette&Gudmunson; Allen,*etal*.

In short, given that the vast majority of parents are heterosexuals, any policy that leads a larger percentage of *their* children to be raised outside an intact marriage of two biological parents is likely to be catastrophic for children generally, and for society. And that is why removing the man-woman definition is so dangerous.

No-Fault Divorce. The reality of these risks to the institution of marriage is buttressed by the history of no-fault divorce. Allen(a):965-66;Hawkins&Carroll:6-12; Alvare:137-53. Before the no-fault divorce movement, the institution of marriage conveyed an additional norm beyond the seven norms discussed above—a norm of permanence. Marriage was considered, not just a temporary union of a man and a woman, but a permanent union. Parkman:91-150.

Moreover, when no-fault divorce was first proposed, its advocates argued that it could be adopted without undermining that norm: Only those whose marriages were irretrievably broken would use the new, streamlined (and less contentious) divorce procedures. Wallerstein,*etal*. Those in happy marriages—and hence the institution of marriage itself—would not be adversely affected. Hawkins&Carroll:7-11; Allen(a):966-67.

To put it mildly, such predictions proved overly optimistic. By permitting unilateral divorce for any or no reason, no-fault divorce soon undermined the norm of permanence, and thus led directly to an explosion in divorce. Parkman:93-99; Allen(a):967-69. That, in turn, led to a host of problems for the affected children—financial, academic, emotional and psychological. Allen(a):969.

All the states, moreover, eventually adopted no-fault divorce without waiting to observe its actual effects in one or two jurisdictions for a sustained period. Wardle(c). Moreover, although divorce has recently declined somewhat from its

peak, at least among 20-35-year olds, it has never returned to the much lower levels that prevailed before the no-fault revolution. Kennedy&Ruggles. And that reality signals an apparently permanent, adverse change in the marriage institution itself. Parkman:91. Especially in light of that recent experience, many states are understandably reluctant to adopt yet another change—genderless marriage—that seems likely to undermine, not just one marital norm, but several.

In short, the available evidence reinforces Justice Kennedy's fear that the redefinition of marriage may be akin to jumping off a cliff. Indeed, although it is impossible to see with *complete* accuracy all the dangers one might encounter at the bottom, we already know enough to predict with confidence that the landing will not be a soft one.

IV. The flawed judicial responses

Some of these points have been addressed to some extent by the federal appellate judges who have invalidated state marriage laws. But all of them ignore the principal point, which is that, like no-fault divorce, redefining marriage in genderless terms will change the *social institution* of marriage in a way that will adversely affect the behavior of *heterosexual individuals and couples*—whether or not they choose to get (and stay) married under the new regime. Giddens:98. It is only by ignoring the impact of redefining marriage on the marriage institution that courts can claim—as some of them have—that the man-woman definition does not

further or advance any of the state interests described above. *E.g.*, *Bostic v. Schaefer*, 760 F.3d 352, 382-83 (4th Cir. 2014).

Diversions. Rather than address the institutional defense head-on, most of these judges have offered diversions. For example, Judge Lucero argued that "it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014). This observation ignores that legally recognizing same-sex marriage requires more than a mere "*recognition* of the love and commitment between same-sex couples." A civil-union regime would do that. Same-sex marriage requires instead a *redefinition* of the marital relationship that eliminates its man-woman character—replacing "man" and "woman" with "persons," *see supra* note 3—and thus establishes (among other things) that children have *no* right to be reared by both a mother and a father, much less their own biological parents. Somerville(b). For the reasons just discussed, a belief that removing the gendered aspect of marriage will harm the institution is more than merely "logical." Indeed, it would be "wholly *illogical"* to believe that a major social institution can be redefined without any collateral damage to the institution and to those who benefit from it—especially children.

In a similar diversion, Judge Reinhardt claims the institutional defense of man-woman marriage is based on the idea that "allowing same-sex *marriages* will adversely affect opposite-sex marriage …." *Latta v. Otter*, No. 14-35420 (9th Cir. Oct. 7, 2014), Slip Op. at 15-16. But it's not the existence or even "recognition" of same-sex marriages that is of principal concern. Again, it's the redefinition that such marriages require—replacing the man-woman definition with an "any qualified persons" definition—and the resulting impact of that redefinition on the *institution* of marriage, especially as perceived and understood, over a long period, in our social norms and values. As previously explained, a large body of social-science literature affirms that, contrary to Judge Lucero's speculation, such a radical institutional change can and in many cases *will* "affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen*, 755 F.3d at 1223.

Similarly, Judge Reinhardt summarily dismisses the idea that "a father will see a child being raised by two women and deduce that because the state has said it is unnecessary for that child … to have a father, it is also unnecessary for *his* child to have a father." *Id.* at 19. But it's not the fact that father "will *see* a child being raised by two [married] women" that is likely to reduce heterosexual males' enthusiasm for marriage. It's the fact that, even before they become fathers, marriage will have *already* been redefined—legally and institutionally—in a way

that signals to them that their involvement is less important and valuable. Hawkins&Carroll:12-20. And although not all heterosexual fathers or potential fathers will have less interest in marriage as a result of that change, *some* of them—especially those at the margins of commitment to marriage and fatherhood—will undoubtedly do so. *Id.*

Contrary to Judge Reinhardt's and Judge Lucero's suggestions, moreover, the concern here is not that allowing gays and lesbians to marry will somehow "contaminate" marriage for heterosexual individuals or cause them to disrespect it, either because of latent "homophobia" or because expanding the class of eligible couples will make marriage seem less exclusive. The point, again, is that changing the *definition* of marriage will undermine the legitimate—indeed, beneficent—pro-child social norms that depend upon or are reinforced by the man-woman definition. That is the real long-term problem. And it is far from hypothetical or speculative.

Finally, some judges have rejected the institutional defense because, they claim, it ignores important aspects of marriage beyond procreation and child-rearing—such as facilitating companionship, commitment and mutual support—which are valuable and important in their own right. *Kitchen*, 755 F.3d at 1212-13. But that argument is a non-sequitur. No one denies that marriage embodies important social norms in addition to the specific norms identified above. And the

fact that the institution embodies *some* norms that are not focused exclusively on procreation and child-rearing does not undermine the reality that a number of its norms *are* focused on those things. Similarly, the fact that redefining marriage in genderless terms might not undermine other marital norms does not refute the reality that such a redefinition *will* undermine the institution's procreation- and parenting-related norms, to the serious detriment of the children.

Parenting by Gays and Lesbians. Most of the adverse opinions have also misunderstood the institutional defense as somehow casting aspersions on gays and lesbians—including their fitness or ability as parents. *E.g.*, *Latta*, slip op. at 27. In fact, the institutional defense neither depends upon nor advocates any particular view about the impact of sexual orientation on parenting. To be sure, there is a lively academic debate on the differences in outcomes for children raised by opposite-sex versus same-sex couples. Regnerus(a):752-770; Regnerus(b):1367; Allen(c):30; Schumm(a):79-120; Schumm(b):329-40; Marks:735-51; Allen,*etal*.:955-61; Sarantakas:23-31; Lerner&Nagai. And two aspects of the institutional defense—the biological bonding and gender diversity norms—might have some conceivable bearing on policies toward adoptions by same-sex couples. Yet properly understood, the institutional defense is focused on something different: the impact of removing the man-woman definition on the marriage *institution*—i.e., the public meaning of marriage—and the resulting impact on

children of people who consider themselves heterosexuals.

This misunderstanding of the institutional defense is likewise evident in Judge Reinhardt's reaction to the point that "[b]ecause opposite-sex couples can accidentally conceive … marriage is important because it serves to bind such couples together and to their children." *Latta*, slip op. at 21. After acknowledging that this "makes some sense," Reinhardt still rejects the institutional defense because (he says) it "suggests that marriage's stabilizing and unifying force is unnecessary for same-sex couples …" *Latta*, slip op. at 21-22. But again, that's not the point. Even if same-sex couples or the children they are raising would benefit from an "any two persons" redefinition—and the evidence on that is by no means conclusive—no state can responsibly ignore the potential impact on the far larger population composed of children of opposite-sex couples, who (regardless of the definition of marriage) are likely to constitute the vast majority of children in the foreseeable future. Allen(c):635-58; Sullins. For that reason, no state can responsibly ignore the impact of removing the man-woman definition on the *institution* of marriage.

No-Fault Divorce. Some judges have likewise been too cavalier in dismissing the analogy to no-fault divorce. For example, Judge Lucero argues that no-fault divorce is not relevant to same-sex marriage because the latter "causes an increase in the number of married individuals," whereas no-fault divorce

"decreases the number of marriages in a state." *Kitchen*, 755 F.3d at 1224. But that misses the point: No-fault divorce is relevant, not because of its direct impact on the "number of married individuals," but because of its impact on the *institution* of marriage—specifically, its effect in weakening a social norm that had long been an important part of that institution.

Moreover, like Judge Floyd's opinion in *Bostic*, 760 F.3d at 380-81, and Judge Posner's opinion in *Baskin v. Bogan*, 766 F.3d 648, 666-67 (7th Cir. 2014), Judge Lucero's response simply ignores the specific, adverse effects on the marriage institution of removing the man-woman definition—especially on the heterosexual population. Since that population comprises at least 96 percent of parents and potential parents, any impact on that population is likely to have an enormous effect on future generations.

Empirical Studies. In response to the social risks that would result from removing the man-woman definition (and social understanding) of marriage, Judge Reinhardt cites a single study suggesting that Massachusetts' decision to adopt same-sex marriage in 2004 had no *immediate* impact on marriage or divorce rates in that state. *Latta*, slip op. at 18. But as noted, a decade is not enough time for the effects of a major institutional change like redefining marriage to be fully manifest. In any event, the conclusions of that study have been hotly disputed, and indeed the evidence shows a longer-term increase in divorce in the wake of

Massachusetts' decision—and a decrease in marriage rates. Centers for Disease Control and Prevention(a); Centers(b).

For his part, Judge Posner also relies upon the flawed Dillender study—but without acknowledging that study's lack of statistical rigor or its unrealistic assumption about the speed with which the effects of a major institutional change will likely be felt. Moreover, neither he nor Reinhardt addresses the much more relevant and credible Netherlands evidence showing a clear connection between the adoption of same-sex marriage and decreased marriage rates among the more non-religious segments of the Dutch population.

Most important, with the exception of the Sixth Circuit, all of the appellate opinions thus far disregard Justice Alito's wise call for "[judicial] caution and humility" in assessing the impacts of a redefinition. *Windsor*, 133 S.Ct. at 2715. He is undoubtedly correct that same-sex marriage is still far too new—and the institution of marriage too complex—for a full assessment of those impacts. *Id.* at 2715-16. However, for reasons previously explained, such evidence as now exists indicates that removal of the man-woman definition in fact poses real dangers to children, to governments of all stripes, and to society at large.

V. Why man-woman marriage laws satisfy any level of judicial scrutiny

Based upon the benefits conferred on the state and its citizens by the man-woman definition of marriage, and the harms—or at least risks—to the state and its

citizens of eliminating that definition, a state's decision to retain it passes muster under any legal standard. And that includes "strict scrutiny," under which a law must be "narrowly tailored" to achieve "compelling governmental interests." *Roe v. Wade*, 410 U.S. 113 (1973).

There can be no doubt that the man-woman definition substantially advances compelling interests—including the state's overall interest in the welfare of the vast majority of its children who are born to heterosexual individuals and couples. That is not to say that states that opt to retain the man-woman definition are unconcerned with same-sex couples or the children they raise. But no state can responsibly ignore the long-term welfare of the many when asked to make a major change that might arguably benefit the few—no matter how valuable and important they are.

Like many advocates of same-sex marriage, the opinions issued by the Fourth, Seventh, Ninth and Tenth Circuits respond to this point, not by disputing the importance of the state's interests, but by claiming that the man-woman definition pursues those interests in a manner that in Judge Reinhardt's words is "grossly over- and under-inclusive …" *Latta*, slip op. at 23; *Bostic*, 760 F.3d at 381-82; *Baskin*, 766 F.3d at 661, 672; *Kitchen*, 755 F.3d at 1219-21. But from a social-science perspective, that argument is irrelevant for two reasons.

First, it once again ignores the real issue, which is the impact of redefining

marriage on the *institution* itself and, hence on the norms it reinforces. A state can easily allow infertile couples to marry (and avoid invading their privacy) without having to change the man-woman definition and thus lose the benefits provided by the associated social norms. Indeed, allowing infertile and elderly opposite-sex couples to marry still reinforces rather than undermines the norms of marriage for other opposite-sex couples who can reproduce accidentally. Girgis,*etal*:73-77; Somerville(b):63-78. In other words, allowing infertile couples to marry is fully consistent with the institutional norms of marriage, even if those couples are an exception to the biological reality that opposite-sex couples naturally procreate.

Conversely, taking *other* measures in pursuit of the state interests underlying the man-woman definition—such as Judge Reinhardt's suggestion to "rescind the right of no-fault divorce, or to divorce altogether"—would not materially reduce the adverse impact on the marriage institution of removing the man-woman definition. *Latta*, slip op. at 24. Nor would it materially reduce the resulting harms and risks—elaborated above—to the state's children and the state itself. Again, because many of the norms and social benefits associated with marriage flow from the man-woman definition, removing it will have adverse consequences no matter what *else* a state might do in an effort to strengthen marriage.

Second, this argument ignores that the choice a state faces here is binary: A state can *either* preserve the benefits of the man-woman definition, *or* it can

remove that definition—replacing it with an "any two qualified persons" definition—and risk losing those benefits. It cannot do both. Thus, a state's choice to preserve the man-woman definition is narrowly tailored—indeed, perfectly tailored—to its interest in preserving those benefits and in avoiding the enormous soci*etal* risks accompanying a genderless-marriage regime. *Turner Broadcasting Sys. Inc., v. FCC*, 512 U.S. 622, 665-66 (1994) (Kennedy, J. plurality opinion).

In short, the risks outlined above—to the institution of marriage and consequently to a state's children and the state itself—amply justify a decision to retain the traditional man-woman definition. And they do so independent of any particular views on theology, natural law or sexual morality.

* * * * *

What does this analysis imply for the states that have adopted genderless marriage through democratic means? As the Supreme Court held in *Windsor*, they have a right to do that, free from any interference or second-guessing by the federal government. But states that make that choice are subjecting their children—and hence themselves and their citizens generally—to enormous long-term risks. Those include serious risks of increased fatherlessness, reduced parental financial support, increased crime, and greater psychological problems—with their attendant costs to the state and its citizens. Fortunately, a state that makes that choice on its

own, without being ordered to do so by a court, can always change its mind. And if it reintroduces the man-woman definition—even if it "grandfathers" existing same-sex marriages—it can largely recapture the social norms associated with that definition and, hence, the associated social benefits.

By contrast, a state that is ordered by a court to abandon the man-woman definition of marriage cannot simply re-enact that definition once the perils of the genderless marriage regime become more apparent. Like a public figure falsely accused of wrongdoing, a state might well ask in that circumstance, "Where do I go to get my marriage institution back?" Unfortunately, a court that is willing to second-guess the people's judgment about the risks of abandoning the man-woman definition won't likely have the humility to recognize its error. And so the state—and its people—will be stuck with the consequences. All the more reason to exercise the "judicial humility" urged by Justice Alito, and thus to refrain from second-guessing the people's considered judgment on the existentially crucial issue of how best to define marriage.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 6998 words.

Dated: November 21, 2014

s/ Gene C. Schaerr

Gene C. Schaerr

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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