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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES BRENNER, et al.,
Appellees,
v.
SEC'Y, FLA. DEP'T OF HEALTH, et al.
Appellants.

SLOAN GRIMSLEY, et al.,
Appellees,
v.
SEC'Y, FLA. DEP'T OF HEALTH and
SEC'Y, FLA. DEP'T OF MGMT. SERVS.,
Appellants.

On Appeal from the U.S. District Court for the Northern District of Florida

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BRIEF OF THE LIGHTED CANDLE SOCIETY, AMICUS CURIAE, IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Undersigned counsel of record for amicus curiae hereby certifies that the Lighted Candle Society is not a corporation that issues stock or has a parent corporation that issues stock. Counsel also certifies that, in addition to the parties, the following persons and entities have an interest in the outcome of this case:

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The Lighted Candle Society is a not-for-profit corporation based in Washington, D.C. and qualified as tax-exempt under the Internal Revenue Code, 26 U.S.C. § 501(c)(3).

The Lighted Candle Society was founded in 1998 by the Honorable John L. Harmer, former Lieutenant Governor and State Senator of California, and the Honorable Edwin Meese III, former Attorney General of the United States. Mr. Harmer is chairman of the organization and Messrs. Harmer and Meese serve as trustees.

The purposes of the Lighted Candle Society are to encourage the enforcement of obscenity laws and to support traditional values, including male-female marriage and family. The Lighted Candle Society regards these values as foundational to the survival and health of American society.

[1]Samuel S. Jacobson has consented on behalf of Plaintiffs-Appellees in Appeal No. 14-14061 and Daniel B. Tilley has consented on behalf on Plaintiffs-Appellees in Appeal No. 14-14066. Allen Winsor and James J. Goodman, Jr., have consented on behalf of Defendants-Appellants in both appeals. No counsel for a party authored the brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus and its members made such a monetary contribution.

SUMMARY OF ARGUMENT

Opposite-sex marriage is an essential foundation of our civilization. The recent movement to redefine marriage to eliminate its opposite-sex nature threatens this foundation.

In this case, Plaintiffs-Appellants contend that the opposite-sex definition of marriage contained in the Florida Constitution and state statutes violates the U.S. Constitution. Fl. Const. Art. I, § 27; Fl. Stat. §§ 741.04(1), 741.212. The Florida constitutional amendment was adopted in 2008 by a popular vote of 61.92% (4,890,883) in favor and 38.08% (3,008,026) against.

The Supreme Court has repeatedly emphasized that no right can be considered fundamental unless it is "deeply rooted in this Nation's history and tradition" and basic to our civil and political institutions. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

Same-sex marriage cannot be considered a fundamental right because it is not deeply rooted in this nation's history and is not basic to our civil and political institutions. Of course, opposite-sex marriage is deeply rooted. Thus, a compelling state interest is not required for the Florida definition of marriage to be upheld.

The opposite-sex definition of marriage satisfies the rational basis test of equal protection or due process review. The Lighted Candle Society emphasizes three rational bases. These and those presented in other briefs supporting reversal are sufficient, however, to satisfy even strict scrutiny.

First, the educational effect of existing marriage laws furnishes a strong rational basis for respecting and counting as constitutional Florida marriage definition laws. Law has an inevitable educational effect and changing the law to erase the opposite-sex nature of marriage will necessarily require that even small children be taught that same-sex marriage is a good thing. Of course, society may someday decide to embrace this message. But that is a decision for the voters acting through the political branches.

Second, a related rational basis for marriage definition laws flows from the states' substantial interest in protecting the rights of parents to supervise the development of their children. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). Parents who do not want their children to be taught that same-sex marriage is a good thing and a status to which they should aspire have a right to ask the states to respect their desires regarding their children's upbringing.

A *third* rational basis for maintaining the opposite-sex nature of marriage is that imposing same-sex or genderless marriage at the constitutional level will

unavoidably create strong pressure to redefine marriage further. This will include removal of the traditional understanding of marriage as involving two persons. Redefinition will also bring challenges against laws forbidding incestuous marriage.

Moreover, judicial redefinition of marriage usurps power from the political branches. This practice threatens democratic principles.

ARGUMENT

I. IMPORTANCE OF OPPOSITE-SEX MARRIAGE

The Supreme Court has in many cases recognized the paramount importance of male-female or opposite-sex marriage to the survival of our society. At the time of these cases, same-sex marriage had not even been seriously proposed. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court said: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id*. at 486. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court recognized, in an obvious reference to opposite-sex marriage: "Marriage and procreation are fundamental to the very existence and survival of the [human] race." *Id*. at 541. See also *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (marriage is the "relationship that is the foundation of the family in our society" and the "decision to marry and raise the child in a traditional family setting" is

entitled to constitutional protection); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress"); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) ("no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman . . . the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement").

In recent years, the nature of marriage has become a matter of intense public debate. The primary factors in this process have been a number of strategic lawsuits before lower court judges friendly to the redefinition of marriage and President Obama's reversal in May 2012 of his previously-stated opposition to same-sex marriage, along with U.S. Attorney General Eric Holder's refusal to defend the federal Defense of Marriage Act (DOMA) and coordinated attack on state marriage definition laws. Only since 2009 has any state legislature or popular

referendum supported the redefinition of marriage to eliminate its opposite-sex nature.[2]

The first modern court decision supporting the redefinition of marriage was *Baehr v. Levin*, 852 P.2d 44 (Haw. 1993). The Hawaii Supreme Court ruled that, in order to limit marriage to opposite-sex couples, the state was required to show "compelling state interests" and that "the statute is narrowly drawn." *Id*. at 67. Since then a number of courts have ruled that, as a constitutional matter (either state and federal, depending on the case), states must license same-sex marriages. The first was the Supreme Judicial Court of Massachusetts. *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

The Supreme Court ruled in *United States v. Windsor*, 133 S.Ct. 2675 (2013) that Section 3 of federal DOMA, which defined "marriage" as "only a legal union between one man and one woman and husband and wife," 1 U.S.C. § 7, "violate[d] basic due process and equal protection principles" when applied to override the

[2]Public opinion has apparently grown more accepting of same-sex marriage, as evidenced by the results of popular votes on November 6, 2012 in Maryland, Maine, Minnesota, and Washington. In more than 30 states, previous ballot measures preserved the traditional opposite-sex nature of marriage. Geoffrey A. Fowler, *Gay Marriage Gets First Ballot Wins*, The Wall Street Journal (Nov. 7, 2012), p. A17 (available at: http://online.wsj.com/article/SB10001424052970204755404578102953841743658.html) (visited January 16, 2013). It is impossible to know where public opinion would be today if courts had not in many cases, in the view of the Lighted Candle Society, exceeded their authority.

New York state redefinition of marriage to include same-sex relationships. *Id*. at 2693. Although the Court included blunt dictum characterizing the federal DOMA as an expression of "animus," the Court emphasized that "[t]his opinion and its holding are confined to those lawful marriages" sanctioned in states where same-sex marriage is legal. *Id*. at 2696.

Windsor has unleashed an avalanche of attacks on state marriage definition laws and many lower federal courts have used its dictum as justification to strike down laws defining marriage as opposite-sex. This includes the Fourth, Seventh, Ninth, and Tenth Circuits, together with a number of district courts. These courts have convinced themselves that, although *Windsor* held that the State of New York was entitled to respect from the federal government for its redefinition of marriage, now post-*Windsor* the states ***must*** redefine marriage.

Exceptions to the *Windsor*-inspired trend are the Sixth Circuit's decision in *DeBoer v. Snyder*, ___ F.3d ___, 2014 U.S. App. LEXIS 21191 (6th Cir., Nov. 6, 2014), and district court decisions in Louisiana and Puerto Rico. *Robicheaux v. Caldwell*, 2 F.Supp.3d 910, 920 (E.D. La. 2014); *Conde-Vidal v. Garcia-Padilla*, 2014 U.S. Dist. LEXIS 150487 (D. P.R., Oct. 21, 2014)

In the present case, a Florida district court held, with little analysis, that the fundamental right to marry includes same-sex marriage. *Brenner v. Scott*, 999 F. Supp.2d 1278 (N.D. Fl. 2014)

Several courts have erroneously concluded that the U.S. Constitution delivers a fundamental right to same-sex marriage. As a result, they have applied "strict scrutiny" and concluded that state laws defining marriage as opposite-sex in nature are unconstitutional because they are not "narrowly tailored to serve a compelling state interest." See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193, 1218-19 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014).

II. THE ISSUE BEFORE THIS COURT IS WHETHER THERE IS A RATIONAL BASIS FOR LAWS DEFINING MARRIAGE AS OPPOSITE-SEX IN NATURE.

The Supreme Court has repeatedly emphasized that no right can be considered fundamental unless it is "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted), or "implicit in the concept of ordered liberty." *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969). See also *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934); *Rochin v. People of California*, 342 U.S. 165, 169 (1952). Identification of fundamental rights requires " 'careful

description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 720–21 (citation omitted).

Same-sex marriage cannot possibly be considered a fundamental right, triggering heightened or strict scrutiny, because it is not deeply rooted in this nation's history and is not basic to our civil and political institutions. The district court in the present case simply glides over the obvious difference in the opposite-sex definition of marriage, which certainly represents a fundamental right, and redefinition of marriage as genderless. In none of the precedents cited by the lower court, *Loving v. Virginia*, 388 U.S. 1 (1967) (right to inter-racial marriage), *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (right of persons with unpaid child-support to marry), and *Turner v. Safley*, 482 U.S. 78, 82, 94-99 (1987) (right of prisoners to marry), was marriage redefined to be genderless or anything other than opposite-sex in nature.. *Brenner*, 999 F. Supp.2d at 87-88. There was no suggestion in any of these cases that marriage should be redefined, as is proposed in the present case. The district court's fallacy is akin to inferring from the fact that copper conducts electricity (opposite-sex marriage is fundamental) to the conclusion that all matter conducts electricity (every relationship is fundamental).

If a state law does not burden a fundamental right or employ a suspect criterion, it satisfies the Fourteenth Amendment so long as it "bear[s] a rational

relationship to a legitimate governmental purpose." *Romer v. Evans*, 517 U.S. 620, 635 (1996). And the legitimate interest need only be conceivable or plausible. It is not required that the law actually have been enacted on the basis of the rational interest. In fact, it is usually impossible to establish the "motive" for a law when numerous legislators are involved or, with respect to voter initiatives, millions of people have cast ballots.

A law satisfies rational basis review if it is supported by a "reasonably conceivable state of facts." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993) (citation omitted). See also *FCC v. Beach Communications*, Inc., 508 U.S. 307, 313 (1993) (a law "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"). Rational basis review is not limited to "explanations of the statute's rationality that may be offered by the litigants or other courts." *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 463 (1988).

III. THE EDUCATIONAL EFFECT OF MARRIAGE LAWS FURNISHES A STRONG RATIONAL BASIS FOR LAWS DEFINING MARRIAGE AS OPPOSITE-SEX IN NATURE.

A. The Law Has an Inevitable Educational Effect.

When laws are enacted and promulgated that say "x is permitted" and "y is not permitted," those subject to the laws are thus instructed or taught that x is

proper conduct and y is not. The law teaches that there is no reason to avoid x, but y should be avoided.

The educational effect addressed here is the educational impact that a law (particularly a new one) has as a result of its very enactment. It is not that a new law will be used as an occasion by teachers and other authority figures to teach persons to act in accordance with it. Rather, the effect in question is that the law itself, apart from any instruction based on the law, will have an educational effect.

Because almost every law has an educational effect, countless instances exist. To take only one, the Sarbanes-Oxley Act was enacted by Congress in 2002. Among other things, the law made it illegal for an employer or supervisor to retaliate against an employee for providing information or assisting in an investigation regarding alleged securities fraud. 18 U.S.C. § 1514A. It is obvious that one effect of the enactment and promulgation of this law has been to instruct employers and supervisors not to engage in retaliation.

The educational effect is especially strong where the law is seen as carrying a moral imperative. Laws of this type have traditionally been described as

regulating "mala in se," whereas other laws have been described as regulating "mala prohibita."[3]

Legal theorists have long recognized that law has an educational effect and even encouraged lawmakers to use this effect to teach proper conduct to their citizens. In the *Nichomachean Ethics*, Aristotle urged that "the legislator makes the citizens good by habituating them . . . . habituation is what makes the difference between a good political system and a bad one."[4] In the same work, he added that "legislators should urge people towards virtue and exhort them to aim at what is fine . . . , but should impose corrective treatments and penalties on anyone who disobeys or lacks the right nature."[5]

One could argue that the educational effect of law is implicit in promulgation, which is a necessary element of law. In order for a command to be considered law, it must be promulgated or disseminated to those who are governed by it. The importance of promulgation is that it gives citizens the opportunity to learn what the law provides and to conform to it. Therefore, practices such as the Roman emperor Caligula's posting of severe tax statutes in minute letters in high

[3]Joycelyn M. Pollock, *Criminal Law* § 1.8 (Anderson Publishing, 2013).

[4]Aristotle, *Nicomachean Ethics*, bk. ii, ch. 2, ¶ 2.1 (1985 ed.) (trans. T. Irwin).

[5]*Id*. at bk. x, ch. 9, ¶ 14.22.

places "so that [they] should be read by as few as possible"[6] have been condemned.

St. Thomas Aquinas, who believed that promulgation was essential to law, wrote:

> [L]aw is laid on subjects to serve as a rule and measure. This means that it has to be brought to bear on them. Hence to have binding force, which is an essential property of a law, it has to be applied to the people it is meant to direct. This application comes about when their attention is drawn to it by the fact of promulgation. Hence this is required in order for a measure to possess the force of law.[7]

Hammurabi, the ancient lawgiver, says in his famous Code: "[L]et the oppressed, who have a lawsuit, come before my image as king of righteousness. Let him read the inscription on my monument, and understand my precious words." Hammurabi then adds that, when the oppressed is informed of the law he will "discover his rights, and . . . his heart be made glad."[8]

More recent thinkers have argued similarly. Hegel insisted in his *Philosophy of Right* that law must be made universally known: "If laws are to be binding force, it follows that, in view of the right of self-consciousness . . . they

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[6] *Dio's Roman History* 357 (59.28.11) (E. Cary trans. 1924).

[7] T. Aquinas, 28 *Summa Theologiae* 15-16 (Q 90, Art. 4) (Blackfriars ed. 1966).

[8] William Walter Davies, ed., *The Codes of Hammurabi and Moses* 108 (Jennings and Graham: 1095).

must be made universally known."[9] According to Thomas Hobbes, a law must "declar[e] publicly and plainly."[10] Hobbes also said that statute books should be circulated as widely as the Bible so that all who could read could have a copy.[11] And, according to Jeremy Bentham, persons should not be punished for the violation of a law "not sufficiently promulgated."[12]

The educational effect of the law is also implicit in the doctrine of stare decisis. Under this doctrine, courts follow precedent in order that people may order their affairs based on what they understand the law to be. Obviously, stare decisis assumes that citizens will endeavor to obey or follow the law as it is delivered from authoritative sources. In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), the Court stated the rationale for stare decisis: "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Id*. at 403.

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[9]G. Hegel, *Philosophy of Right* 138, ¶ 215 (T. Know trans. 1942 & photo reprint 1949). See also *id*. at 134-36, ¶ 211.

[10]6 *The English Works of Thomas Hobbes* 26-28 (W. Molesworth ed. 1966).

[11]*Id*.

[12]J. Bentham, *An Introduction to the Principles of Morals and Legislation* 173 (C.XIII § 3, VIII.2) (1948). See also L. Fuller, *The Morality of Law* 19-51 (1964) (discussing *inter alia* reasons for promulgation); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 712 Harv. L. Rev. 630, 651-52 (1958).

In other contexts the Court has also recognized the educational influence of the law. In *Washington v. Glucksberg*, 521 U. 702 (1997), the Court refused to read into the Constitution a "right to die." The Court held: "If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs." *Id*. at 732. In other words, the Court acknowledged that creating a right to physician-assisted suicide might cause an increase in such suicides.

In *Ginsberg v. State of New York*, 390 U.S. 629 (1968), the Court upheld laws against the distribution to minors of materials obscene for them. In its decision, the Court quoted with approval from an article by Dr. William Gaylin of the Columbia University Psychoanalytic Clinic: " 'To openly permit [pornography] implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego.' " *Id*. at 642-43 n.10 (*quoting* William M. Gaylin, *The Prickly Problems of Pornography*, Book Review, 77 Yale L.J. 579, 592-593 (1968)).

Modern legal scholars have also discussed the educational effect of the law. John W. Ragsdale, Jr. recognizes: "Novel or innovative law, in place long enough without displacement or wholesale evasion, may have an educational effect and

inculcate new values or interpretations."[13] Another commentator acknowledges that tort law educates as to proper conduct: "Tort law, for example, establishes the appropriate standard for behaviour, serves as a reason for action for the subjects of a legal norm, and has symbolic and educational effects. . . ."[14]

In one incisive article, scholars discuss the "educational effect" of the law, using examples of smoking bans, helmet laws, and regulations against fireworks. They recognize that this educational effect can lead "individuals to change their own primary behavior." [15] Many other scholarly articles also recognize the educational effect of the law.[16]

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[13]John W. Ragsdale, Jr., *Possession: An Essay on Values Necessary for the Preservation of Wild Lands and Traditional Tribal Cultures*, 40 Urban Lawyer 903, 908 (2008).

[14]Tsachi Keren-Paz, *Private Law Redistribution, Predictability, and Liberty*, 50 McGill L.J. 327, 348 (2005).

[15] Dhammika Dharmapala and Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 Am. L. & Econ. Rev. 1, 5-6 (2003).

[16]*E.g.*, Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage As A Social Institution: A Reply to Andrew Koppelman*, 2 U. St. Thomas L.J. 33, 51 (2004) ("Laws do more than incentivize or punish . . .. They educate directly and indirectly."); Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 Review of Law and Economics 716, 725, 740 (2008) ("a law-abiding society may indeed need the law to support a social norm through its expressive function"); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 397-98 (1997); John A. Bozza, *Judges, Crime Reduction, and the Role of Sentencing*, 45 No. 1 Judges' J. 22, 28 (2006); Robert

B. Florida and Other States Could Rationally Decide that Changing the Definition of Marriage Would Deliver the Educational Message to All Citizens, Including Young Children, that Opposite-Sex Marriage is No Longer the Preferred Context for Family Formation.

What will kindergarteners be taught? This is a critical issue in the same-sex marriage debate. But it is seldom mentioned.

In kindergarten, five-year-old children discuss what marriage is and what a family is. The teacher guides their discussion and helps them understand these concepts.

Through the educational effect of their decisions applying the law, courts play a substantial role in writing the school curriculum. This educational impact is especially strong when the law is suddenly changed to protect behavior or create a status not previously recognized, as has occurred in some jurisdictions with same-sex marriage.

If marriage is legally redefined to eliminate the opposite-sex element and perhaps eventually to mean any relationship among consenting adults regardless of gender or number, i.e., polygamy and polyamory, the content of these kindergarten

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Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 Or. L. Rev. 1, 4, 11 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2024-25 (1996); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4 (1996); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. Rev. 961, 962 (1992).

discussions will necessarily change. The children will be taught that marriage and family are a matter of subjective taste. And it is not just that this message will be delivered in schools. It will be taught by the law itself at every street corner and in every level of society.

Professor Lynn D. Wardle makes the point. He argues: "As a matter of elementary legal analysis, if the meaning of marriage changes, education laws and policies that require or allow teaching about marriage, family life, and marital sexuality compel that the curriculum change also."[17]

In American states and countries where same-sex marriage or its equivalent is legal (or supported by education policymakers), this very message is in fact now being delivered to five-year-olds. Johnny is being taught that before he marries a girl, he may want to consider marrying another boy. Susie is being taught that before she marries a boy, she may want to marry another girl. The lesson includes the message that marrying someone of the same gender is a "good thing." In states where same-sex marriage has been legalized, schools now teach children this lesson in elementary grades using books like "King and King," in which a boy marries another boy, and "Heather has Two Mommies," in which a girl has lesbian

[17]Lynn D. Wardle, *The Impacts on Education of Legalizing Same-Sex Marriage and Lessons from Abortion Jurisprudence*, 2 BYU Educ. & L. J. 593, 595 (2011).

parents. Because the redefinition process does not logically stop at same-sex marriage between two persons, the message will naturally evolve into questions about polygamy and polyamory.

In jurisdictions where the law has changed, usually by judicial decree, courts have ruled that parents cannot opt their children out of these "same-sex marriage is a good thing" lessons. These decisions against opting out are unsurprising. After all, the educational effect of the law cannot be avoided.

In *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), the First Circuit overruled objections to the use, without prior notice to parents, of "King and King" in public elementary schools in Massachusetts. Reflecting the inevitable educational effect from laws redefining marriage, the court ruled: "Given that Massachusetts has recognized gay marriage under its state constitution, it is entirely rational for its schools to educate their students regarding that recognition." *Id*. at 95.

A Ninth Circuit decision reinforces the point that parents have no control over public school curriculum. In *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), the court held that the parental right to control children's upbringing "does not extend beyond the threshold of the school door." Thus, "The constitution does not vest parents with the authority to interfere with a public school's decision as to how it will provide information to its students or what

information it will provide, in its classrooms or otherwise." *Id*. at 1206-07. See also *Morse v. Frederick*, 551 U.S. 393, 419-20 (2007) (Thomas, J., concurring).

But the American people have the right to decide not to deliver to kindergarteners this message redefining marriage. It is astounding that courts are asked to rule that the citizens of the United States must deliver to their kindergarteners the message that same-sex marriage is a "good thing" and equally desirable with opposite-sex marriage. But that is precisely what a change in the law will mandate. The Ninth Circuit cements this point. Having ruled in *Latta v. Otter*, ___ F.3d at ___, 2014 U.S. App. LEXIS 19620 (9th Cir. 2014), that same-sex marriage is somehow incorporated into the Constitution, it then logically holds that society cannot express an "official message of support . . . in favor of opposite-sex marriage." *Id*. at **26, 33. That is indeed a drastic and totalitarian result but it is the inevitable effect of decisions creating a constitutional right to same-sex marriage.

Of course, there are some messages that the U.S. Constitution does not allow even a majority of citizens to deliver through the educational effect of the law. For instance, the text of the Constitution does not allow laws to be enacted by the political branches that teach that one race is superior to another. The Reconstruction Amendments would plainly prohibit this. This explains why the

Court's decision was eminently correct in *Loving v. Virginia*, 388 U.S. 1 (1967), holding laws prohibiting interracial marriage unconstitutional. These laws had nothing to do with the definition of marriage. They did not define marriage as only between people of the same race, so that allowing interracial marriage redefined the institution. Rather, anti-miscegenation laws were blatant racial discrimination and rightly struck down.

It is impossible to know the precise effects of teaching every five-year-old child that same-sex marriage is a good thing and they should aspire to it. But society is warranted in being concerned about the effects on our crumbling society when Johnny has six fathers and no mother at all—after surrogate motherhood and two divorces of his male same-sex parents. As one scholar has said, the redefinition of marriage "will radically transform . . . the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative."[18] The political branches may well decide to take that chance, but the decision to do so should not be made by judges.

If the people of this country want to recognize same-sex marriage (and even plural marriage), they certainly may do so. But this change should come through

[18]Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 84 (2004).

the political branches, operating under democratic principles, and not be mandated by courts under the pretense of constitutional construction.

Those who are opposed to laws maintaining the opposite-sex nature of marriage assume that the meaning of marriage can simply be shifted or expanded to include same-sex relationships. But there is no evidence that this can be done without destroying the institution.

Many lower courts and commentators have asked how imposing same-sex marriage will harm opposite-sex marriage. In the present case, the district court said "[t]hose who enter opposite-sex marriages are harmed not at all" by same-sex marriage. 999 F.Supp.2d at 1291.

In *Herbert v. Kitchen*, the Tenth Circuit "emphatically" assured 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." 755 F.3d at 1223. The court even stated: "We cannot imagine a scenario under which recognizing same-sex marriages would 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." *Id*. at 1224.

It seems unlikely that many adults presently in opposite-sex marriages will suddenly abandon those marriages, in favor of same-sex marriage. The harm the

Lighted Candle Society is primarily concerned about is not to individual, presently-constituted opposite-sex marriages but rather to the *institution* of marriage and its future. This is where the educational effect of the law comes into play.

If children are taught starting in kindergarten that marriage is not opposite-sex in nature and that same-sex relationships (and perhaps eventually polygamous/polyamorous ones) are fully equivalent and desirable to opposite-sex marriage, the states may reasonably be concerned that the *institution* of marriage will be irreparably damaged and perhaps destroyed. The assurances of courts like the district court here and the Fourth, Ninth, and Tenth Circuits that there will be no harm to opposite-sex marriage are naïve and hollow. *See Brenner*, 999 F.Supp.2d at 1291; *Bostic*, 760 F.3d at 381; *Latta*, 2014 U.S. App. LEXIS 19620, at **33-35; *Herbert*, 755 F.3d at 1223.

The State of Florida could rationally decide to withhold the term "marriage" from same-sex relationships because it wishes to convey the message to its citizens, particularly children, that opposite-sex marriage remains the preferred context for family formation. Legal scholars have recognized that the law may properly be used to protect institutions considered critical to the survival of society. In the words of Basil Mitchell, "The function of the law is not only to protect

individuals from harm, but to protect the essential institutions of society. These functions overlap, since the sorts of harm an individual may suffer are to some extent determined by the institutions he lives under."[19]

Monte Neil Stewart demonstrates that a social institution comprises a complex network of "shared meanings."[20] And to transform marriage into a genderless creature would effectively deinstitutionalize it. As Stewart says, "A social institution defined at its core as the union of any two persons is unmistakably different from the historic marriage institution between a man and a woman."[21] Indeed, persons of the same gender, due to their lack of biological complementarity, cannot form a union akin to that of a man and woman (which union may of course result in a child).

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[19]Basil Mitchell, Law, *Morality and Religion* 134 (Oxford, 1967). *See also* Patrick Devlin, *The Enforcement of Morals* 22 (Oxford, 1965) ("But the true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together."); Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, 556 (Harvard, 1983) ("Law is also an expression of moral standards as understood by human reason.").

[20] Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke J. of Const. L & Public Policy 1, 8 (2006).

[21]*Id*. at 20.

Deinstitutionalization of traditional marriage is precisely what many proponents of same-sex marriage want. Professor Ellen Willis says,

> Marriage . . . should not have legal status. . . . Feminism and gay liberation have already seriously weakened marriage as a transmission belt of patriarchal, religious values; conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart, further promoting the democratization and secularization of personal and sexual life. . .. Legalizing same-sex marriage would be an improvement over the status quo. But let's see it for what it is—a step toward the more radical solution of civil unions, not vice versa.[22]

The goal appears to be to fashion a substitute along the lines of polyamory.[23]

Courts should not sacrifice their credibility in order to serve the agenda of those who seek to deinstitutionalize marriage. If deinstitutionalization of marriage is what society wants, it can and should accomplish it through the political branches. It should not be imposed by judicial fiat.

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[22]Ellen Willis, contribution to *Can Marriage be Saved? A forum*, Nation 16-17 (July 5, 2004).

[23]*See* Martha L. Minow, *Redefining Families: Who's in and Who's Out?*, 62 U. Colo. L. Rev. 269, 278 (1991) ("I favor functional definitions of families that expand beyond reference to biological or formal marriage or adoptive relationship because the people involved have chosen family-like roles.").

IV. FLORIDA AND OTHER STATES COULD RATIONALLY DECIDE THAT PRESERVING THE DEFINITION OF MARRIAGE AS OPPOSITE-SEX PROTECTS THE RIGHTS OF PARENTS TO SUPERVISE THE DEVELOPMENT OF THEIR CHILDREN.

States have a substantial interest in protecting the rights of parents to supervise the development of their children. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court recognized that the right or parents to "direct the rearing of their children is basic in the structure of our society." *Id*. at 639. The Court added: "The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id*. Moreover, in *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983), the Court described the governmental interest in "aiding parents' efforts to discuss birth control with children" as "substantial." *Id*. at 73. See also *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

As shown, due to the educational effect of the law, changing the legal definition of marriage as proposed by appellees will inevitably teach all children that same-sex marriage is fully equivalent to, and equally desirable with, opposite-sex marriage. We know from ballot initiatives that most voters in the United States do not want their children to be taught this lesson.

Court decisions like those of the Fourth, Seventh, Ninth, and Tenth Circuits force the message of the equivalence and desirability of same-sex marriage into every home in this country. The result is that parents lose the ability to raise their children as they see fit, not as the government (or the courts) want. Again, this message is not merely what is taught in school. It is essentially the lesson the law delivers—both inside and outside of school. This loss of parental influence over the upbringing of their children is of profound concern to the Lighted Candle Society.

V. FLORIDA AND OTHER STATES COULD RATIONALLY DECIDE THAT THE OPPOSITE-SEX DEFINITION OF MARRIAGE SHOULD BE PRESERVED IN ORDER TO PREVENT FURTHER REDEFINITION.

The corollaries of redefining marriage to eliminate its opposite-sex nature will certainly include plural and incestuous marriage. Challenges are already being presented by those who want plural marriage, i.e., polygamy and polyamory.[24] If same-sex or genderless marriage is imposed, the drive for plural marriage will necessarily include opposite-sex, same-sex, and bisexual varieties. In other words, polygamy will morph into polyamory, which is the concept that any group of

[24] Drucilla Cornell, *Fatherhood and Its Discontents: Men, Patriarchy, and Freedom*, in *Lost Fathers: The Politics of Fatherlessness in America*, ed. Cynthia Daniels 199 (St. Martin's Press, 1998) (arguing that adults should be allowed to "choose consensual polygamy" including same-sex polygamy).

consenting persons (presumably adults) may form the equivalent of an opposite-sex marriage under current law.

Challenges against laws forbidding incestuous marriage have also been advanced.[25] If the gender element of marriage is eliminated, logic will dictate the extension of constitutional protection to marriages among consenting adult relatives.

Inevitable pressure to expand a right is one good reason not to recognize the right. For example, the Court in 1997 cited as one reason not to recognize a constitutional right to physician-assisted suicide "avoiding a possible slide towards euthanasia." The Court labeled this as one of several "valid and important public interests [that] easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end." *Vacco v. Quill*, 521 U.S. 793, 808-09 (1997). Amicus submits that this is particularly important where the right has little connection to the text of the Constitution. Such rights have no ascertainable boundaries.

[25]Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 Kan. J.L. & Pub. Pol'y 262, 271 (2000) ("Individuals denied marriage under the incest statutes may therefore find themselves disenfranchised in the same manner as homosexual partners who are denied the right to marry and cohabitants who choose not to marry.").

Florida could rationally decide that preserving the opposite-sex definition of marriage is necessary in order to avoid further redefinition of marriage and erosion of the institution.

VI. JUDICIAL REDEFINITION OF MARRIAGE TO ELIMINATE ITS OPPOSITE-SEX NATURE HAS A DESTABILIZING EFFECT ON THE LAW.

The decisions of some courts to redefine marriage to eliminate its opposite-sex nature is having a destabilizing effect on the law. When public policy is made by the political branches, all views are considered and a compromised result is reached that reflects all input. Moreover, unlike judge-made policy, politically-made policy creates no doctrinal imperative for the creation of new or expanded rights.

Inappropriate judicial usurpation of political power undermines our democratic processes in several ways. It reduces respect for the law. It has wisely been said that "the voice of the judiciary on constitutional questions must ultimately draw its authority from the public's acceptance of its institutional role."[26] If this is so, judicial redefinition of marriage and decisions like *Roe v. Wade*, 410 U.S. 113 (1973), threaten the authority of the courts.

[26]Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder, *Keeping Faith with the Constitution* 24 (Oxford, 2010).

Since *Roe* was handed down, there has been a growing backlash against it. There are annual massive protests in multiple cities and there have been repeated efforts to overturn *Roe*. Tragically, abortion clinics and providers have even been the targets of violence.

When *Roe* was decided, the political branches were in the process of modifying abortion laws. As Justice Ginsberg has said, "The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[27]

Creating a constitutional right to same-sex marriage again subverts the process of democratic change and could create another backlash. Impatience with the slow pace of legislative change does not warrant the creation of a new previously-unknown constitutional right and the bulldozing of one of the bedrock institutions of our society and the moral standards supporting it.

Several lower courts have been strongly influenced by the Supreme Court's thesis in *Windsor* that the federal DOMA, by defining marriage as opposite-sex in

[27]Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 385-86 (1985).

nature, "humiliates tens of thousands of children now being raised by same-sex couples" by making "it even more difficult for the 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." *Windsor*, 133 S. Ct. at 2694. The Court offered no support for this statement. Nevertheless, the Fourth, Seventh, and Tenth Circuits quoted it in their decisions. *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th C. 2014); *Baskin v. Bogan*, 766 F.3d 648, 659 (7th Cir. 2014); *Herbert v. Kitchen*, 755 F.3d 1193, 1207, 1215 (10th Cir. 2014).

In striking down the marriage definition laws of Wisconsin and Indiana, the Seventh Circuit pushed forward the humiliation thesis, offering the following scenario:

> Consider now the emotional comfort that having married parents is likely to provide to children adopted by same-sex couples. Suppose such a child comes home from school one day and reports to his parents that all his classmates have a mom and a dad, while he has two moms (or two dads, as the case may be). Children, being natural conformists, tend to be upset upon discovering that they're not in step with their peers. If a child's same-sex parents are married, however, the parents can tell the child truthfully that an adult is permitted to marry a person of the opposite sex, or if the adult prefers as some do a person of his or her own sex, but that either way the parents are married and therefore the child can feel secure in being the child of a married couple. Conversely, imagine the parents having to tell their child that same-sex couples can't marry, and so the child is not the child of a married couple, unlike his classmates.

Baskin, 766 F.3d at 663-64. In effect the court said that a child's being able to tell his/her peers that the same-sex adults in his/her home are married is consolation for the child not being able to say that he/she has both a mother and a father. Just as the Supreme Court cited no support for its humiliation thesis in Windsor, the Seventh Circuit also offered none for this hypothetical.

In his dissent in *Kitchen v. Herbert*, Judge Kelly questioned the *Windsor* humiliation thesis. He incisively noted:

> The Court's conclusion that children raised by same-gender couples are somehow stigmatized, see *Windsor*, 133 S. Ct. at 2694, seems overwrought when one considers that 40.7% of children are now born out of wedlock. Of course, there are numerous alternative family arrangements that exist to care for these children. We should be hesitant to suggest stigma where substantial numbers of children are raised in such environments. Moreover, it is pure speculation that every two-parent household, regardless of gender, desires marriage.

755 F.3d at 1239 (citations omitted).

Out-of-wedlock births and unmarried cohabitation have exploded in this country. According to one recent article, "Demographers say the cohabiting trend among new parents is likely to continue. Social stigma regarding out-of-wedlock births is loosening . . . ."[28] Indeed, many modern opposite-sex celebrity couples

[28]Hope Yen, *More Couples Who Become Parents are Living Together But Not Marrying, Data Show*, Wash. Post (Jan. 7, 2014).

openly cohabit and have children outside of wedlock, without any apparent stigma or humiliation. Moreover, it could well be that many children of unmarried couples would be more embarrassed and humiliated if their parents were married.

In effect, with this unsupported humiliation thesis, some courts have inserted themselves into the culture as "National Psychologist"—purporting, without evidence, to divine the psychological effect of the traditional opposite-sex definition of marriage on children living in households with same-sex adults. What is even more embarrassing is that this amateur psychology passes for constitutional law.

But suppose there is a balance of effects to be considered: The benefits of same-sex marriage for some children and the harms of same-sex marriage for other children. How should these effects be balanced? That is exactly what the political branches are supposed to do. Courts should not usurp that function.

Speaking of the "humiliation" of children, what about the humiliation of voters? We do not know how many children, if any, are actually humiliated because the adults in their homes are not married. But we do know that millions of voters have been humiliated by the contempt of some federal courts for their views. Of course, behind every statute preserving the opposite-sex definition of marriage that has been adopted by Congress or a state legislature, stand millions of

voters. Putting those aside for the moment, consider only the states that have adopted constitutional amendments by popular referenda. In those 33 states, some 43,524,736 citizens of the United States have voted to define marriage as opposite-sex in nature—with 26,348,234 voting against it.[29]

These millions of voters have been told by a number of federal courts that their vigorous efforts to make democracy work and the countless hours they have invested in expressing their views and organizing are worthless. And the courts have also said that these voters are irrational, i.e., they believe in the historical opposite-sex definition of marriage without any rational basis. Further, some courts have announced that voters who support the male-female definition are infected with "animus" or hatred.

Here's a question for the courts. How much public opinion do courts think they can ignore and ridicule without destroying the legitimacy of the judiciary and even destabilizing the democratic basis of this republic?

Our President and other leaders make somber pronouncements and even send our young soldiers to fight in distant parts of the globe in order, we say, to secure the rights of other people to "self-determination" and "majority rule." But

[29]http://en.wikipedia.org/wiki/Same-sex_marriage_legislation_in_the_United_States (visited Nov. 7, 2014).

in the United States apparently self-determination and majority rule do not count for much. When the United States is finally swept into the dust bin of history, one of the primary reasons will likely be judicial usurpation of power from the political branches and disregard for the right of self-determination.

Why are well-meaning judges willing to usurp power from the political branches and disregard the public's right of self-determination? Apparently, they have bought into the false analogy to the civil rights movement, in which courageous judges finally overturned laws and practices infected with racial discrimination. But those judges were applying previously-ignored textual provisions of constitutions and laws (themselves a majoritarian product—showing that majorities should not always be distrusted) that forbade race discrimination. There is no analogy to the temptation of judges to substitute their social views, without a clear constitutional command, for the policy choices of the people.

Some say the "arc of history" bends toward same-sex marriage and polyamory. But, after only 10 years of experience in redefining marriage into a genderless phenomenon in a few states (against 6,000 years of recorded history under the opposite-sex definition), we do not know that. History documents many now-disfavored practices that were at one time thought inevitable and on the "right side of history." These include National Socialism, Marxism, nuclear power, racial

eugenics, and pedophilia. A much better prediction is that the arc of history bends toward the right of citizens to self-determination and freedom in making their own public policy choices, without interference by an autocratic judiciary or other rulers.

The Lighted Candle Society is truly frightened for the future of marriage, family, and our democratic system. They are all at risk.

VII. CONCLUSION

The decision of the district court should be reversed and Florida's opposite-sex definition of marriage upheld as constitutional.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because, according to the word-processing system used to prepare it, it contains 7,000 words, exclusive of parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman, 14-point font.

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES BRENNER, et al.,
Appellees,
v.
SEC'Y, FLA. DEP'T OF HEALTH, et al.
Appellants.

SLOAN GRIMSLEY, et al.,
Appellees,
v.
SEC'Y, FLA. DEP'T OF HEALTH and
SEC'Y, FLA. DEP'T OF MGMT. SERVS.,
Appellants.

CERTIFICATE OF SERVICE

I hereby certify that I have this date filed electronically using the CM/ECF system, which will automatically send email notification of such filing to all registered attorneys of record, and served a copy of the foregoing BRIEF OF THE LIGHTED CANDLE SOCIETY, AMICUS CURIAE, IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL upon the parties by mailing copies, with sufficient postage attached, to:

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