Case Nos.: 14-14061-AA & 14-14066-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES D. BRENNER, et. al,

Plaintiffs/Appellees

v.

SECRETARY, FLORIDA DEPARTMENT OF HEALTH, et.al.

Defendants/Appellants

SLOAN GRIMSLEY, et. al.,

Plaintiffs/Appellees,

v.

SECRETARY, FLORIDA DEPARTMENT OF HEALTH, et.al.

Defendants/Appellants

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division, Hon. Robert L. Hinkle

Brief of Amicus Curiae Florida Family Action, Inc. In Support of Defendants-Appellants, Seeking Reversal

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INITIAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, Florida Family Action, Inc., pursuant to 11th Cir. R. 26.1-1, furnishes the following list of those who have an interest in the outcome of this case and/or appeal:[1]

American Civil Liberties Union of Florida, Inc., The

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc., The

Albu, Joyce

Andrade, Carlos

Armstrong, Dr. John H.

Ausley & McMullen, P.A.

Bazzell, Harold

Bledsoe, Schmidt & Wilkinson, P.A.

Bondi, Pamela Jo

[1] This certificate combines all persons interested in the outcome of Case Nos. 14-14061 and 14-14066.

Brenner, James Domer

Collier, Bob

Cooper, Leslie

Del Hierro, Juan

DeMaggio, Bryan E.

Emmanuel, Stephen C.

Fitzgerald, John

Florida Conference of Catholic Bishops, Inc.

Florida Family Action, Inc.

Gantt, Thomas, Jr.

Goldberg, Arlene

Goldwasser, Carol (deceased)

Goodman, James J., Jr.

Graessle, Jonathan W.

Grimsley, Sloan

Hankin, Eric

Hinkle, Hon. Robert L.

Hueso, Denise

Humlie, Sarah

Hunziker, Chuck

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Schmid, Daniel J.

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Sheppard, William J.

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

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Winsor, Allen C.

Amicus Curiae, Florida Family Action, Inc. is a nonprofit corporation that has no parent corporation and does not issue stock.

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INTEREST OF AMICUS CURIAE

Amicus Curiae Florida Family Action, Inc. (FFAI) is a non-profit corporation that was involved from the very beginning in the initiation, qualification, defense and passage of Florida's Marriage Protection Amendment ("FMPA"). Through its integral involvement in the development and passage of the FMPA and its continuing efforts to preserve and protect the institution of marriage, FFAI has developed a substantial body of information on marriage's importance as the foundational social institution and why the people of Florida voted overwhelmingly to memorialized marriage as the union of one man and one woman in the Constitution. FFAI believes that it is critical for this Court to have the information contained within this Brief in order to have a comprehensive perspective on the importance of marriage and how abandoning marriage for an artificial construct of "same-sex marriage" threatens fundamental constitutional rights and the very foundation of society.

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than Amicus Curiae FFAI, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

STATEMENT OF THE ISSUE

Whether the District Court abused its discretion in preliminarily enjoining enforcement of Florida's marriage laws based on that court's conclusion that the Fourteenth Amendment to the United States Constitution requires States to allow same-sex marriage.

INTRODUCTION

The issue before this Court is whether the democratic process begun when more than 5 million Florida voters memorialized marriage as the union of one man and one woman in their state Constitution will be permitted to continue, or whether this Court will end it now by requiring the state to extend the definition of marriage to encompass same-sex couples. *See DeBoer v. Snyder*, 2014 WL 5748990 at *1 (6th Cir. 2014). "[P]rocess and structure matter greatly in American government" and require that this Court take "seriously the route the United States Constitution

contemplates for making such a fundamental change to such a fundamental social institution." *Id.*

> Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea. Our judicial commissions did not come with such a sweeping grant of authority, one that would allow just three of us—just two of us in truth—to make such a vital policy call for the thirty-two million citizens who live within the four States of the Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee. What we have authority to decide instead is a legal question: Does the Fourteenth Amendment to the United States Constitution prohibit a State from defining marriage as a relationship between one man and one woman?

Id. Similarly, here, this Court ought to ask whether it should make such a vital policy call for the 20 million citizens who live in Florida, or for that matter the 10 million who live in Georgia, and 4.8 million who live in Alabama, who will also be affected by this Court's decision. Adhering to foundational constitutional principles requires a more judicious approach. *Id.* Under that approach, which focuses on the question of whether the Fourteenth Amendment prohibits Florida from affirming marriage as the union of one man and one woman, this Court's response should be an unequivocal "No."

Even while striking down Section 3 of the Defense of Marriage Act, the United States Supreme Court affirmed that **"[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and**

the enforcement of marital responsibilities." *United States v. Windsor*, 133 S.Ct. 2675, 2691 (2013) (emphasis added). "**The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens."** *Id.* (emphasis added). "[**T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."** *Id.* (emphasis added). **"The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States."** *Id.* (emphasis added). The Court also recently upheld citizens' "privilege to enact laws as a basic exercise of their democratic power," even on an issue as controversial as affirmative action. *Schuette v. BAMN*, 134 S.Ct. 1623, 1636 (2014). When joined with *Baker v. Nelson*, 409 U.S. 810 (1972), which also upheld states' right to define marriage, *Windsor* and *Schuette* establish that Florida's marriage laws not only do not violate the Fourteenth Amendment, but actually preserve the principles upon which the Nation was founded and millennia of history upon which civilization was built.

SUMMARY OF ARGUMENT

When, as occurred in this case, "a federal court denies the people suffrage over an issue long thought to be within their power, they deserve an explanation."

DeBoer 2014 WL 5748990 at *7. Some judges in three courts of appeal believe that citizens in Virginia, Oklahoma, Utah, Indiana and Wisconsin received adequate explanations. *Bostic v. Schaefer*, 760 F .3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) and *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014). However, other judges at the same appellate level have determined that the same explanations are not sufficient to deny the citizens in Ohio, Michigan, Kentucky, Tennessee, Puerto Rico and Louisiana their democratic rights. *DeBoer*, 2014 WL 5748990 at *7; *Conde–Vidal v. Garcia–Padilla*, 2014 WL 5361987 (D.P.R. Oct. 21, 2014); *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D.La. 2014). Neither are they sufficient for the citizens of Florida. When 5 million Florida voters enshrined marriage as the union of one man and one woman in their state Constitution, they acted in accordance with millennia of history in which marriage was recognized as the unique, comprehensive union of a man and a woman, and the foundational social institution upon which the future of the state and the nation depends. As was true with the plaintiffs in Ohio, Michigan, Kentucky, Tennessee, Puerto Rico and Louisiana, Plaintiffs here have not provided sufficient reason for dismantling the granite foundation of marriage and replacing it with the shifting sand of an undefined union of people who are "committed" to each other based upon an "emotional bond."

Florida voters properly exercised their democratic power in a way that should not be blithely set aside. *DeBoer,* 2014 WL 5748990 at *7. Preserving and protecting Florida voters' exercise of their power to amend the Constitution furthers compelling state interests in maintaining the foundational social institution that fosters stability, permanency, prosperity and the optimal healthy environment for children. Marriage is, always has been and always will be the willing, organic union of two complementary bodies aimed at furthering the social goods of procreation, stability and prosperity. Recent attempts to create an artificial construct of same-sex "marriage" erodes the social good. It was rejected by the people of Florida and should be rejected by this Court.

ARGUMENT

Florida voters exercised their democratic power to enact laws, *Schuette*, 124 S.Ct. at 1636, by memorializing in the state Constitution what John Locke described as "the First Society."[2] Locke defined marriage as:

> [A] voluntary Compact between Man and Woman; and tho' [sic] it consist chiefly in such a Communion and Right in one another's Bodies, as is necessary to its chief end, Procreation; yet it draws with it mutual Support, and Assistance, and a Community of Interest too, as necessary to unite not only their Care and Affection, but also necessary to their common Off-spring, who have a right to be nourished and maintained by them, till they are able to provide for themselves.[3]

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[2] John Locke, TWO TREATISES OF GOVERNMENT 179 (1698; Cambridge, U.K.: Cambridge University Press, 1965).

[3] *Id.*

In other words, the FMPA memorialized−but did not create−the definition of marriage. Marriage is defined by its nature and predates government, which is limited to regulating marriage in accordance with its natural, historical definition. Marriage is a comprehensive union of one man and one woman that fosters responsible procreation and child-rearing, and therefore is "fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). It "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." *Maynard v. Hill*, 125 U. S. 190 (1888).

> We deal with a right of privacy older than the Bill of Rights − older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Marriage, *i.e.*, the union of one man and one woman, has innate value.[4]

> Marriage is, *of its essence*, a comprehensive union: a union of will (by consent) and body (by sexual union); *inherently* ordered to procreation and thus the broad sharing of family life; and calling for permanent and exclusive commitment, ... it is also a *moral reality*: a

[4] Sherif Girgis, *et. al.* WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 50 (Encounter Books 2012).

> human good *with an objective structure*, which is *inherently good* for us to live out.[5]

These transcendental concepts and the societal benefits that emanate from them are legitimate purposes that more than satisfy the rational basis standard for an Equal Protection challenge to a citizen-enacted constitutional amendment. *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991). As was true about the enactment of Missouri's mandatory retirement law in *Gregory* and Michigan's prohibition on race-based preferences in *Schuette*, Florida's enactment of the FMPA is reasonably related to numerous legitimate interests and does not violate Equal Protection. *Gregory*, 501 U.S. at 471; *Schuette*, 134 S.Ct. at 1638. *See also*, *DeBoer*, 2014 WL 5748990 at *1 (upholding similar enactments in Ohio, Michigan, Kentucky and Tennessee).

I. SUPREME COURT PRECEDENT ESTABLISHES THAT THE FMPA IS A PROPER EXERCISE OF DEMOCRACY WHICH THE COURT SHOULD NOT SET ASIDE.

As the Supreme Court did with Michigan's citizen-enacted constitutional amendment prohibiting racial preferences in hiring, *Schuette*, 134 S.Ct. at 1638, this Court should uphold Florida's citizen-enacted constitutional amendment memorializing marriage as the union of one man and one woman. Relying upon the federalism standards it affirmed in *Windsor*, the *Schuette* Court found the amendment did not violate Equal Protection *Id.*

[5] *Id.* at 6. (emphasis added).

> By approving Proposal 2 and thereby adding §26 to their State Constitution, the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power. In the federal system States "respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times." *Bond* [*v. United States*, 131 S.Ct. 2355, 2359 (2011)] 564 U.S., at —— (slip op., at 9).

Id. at 1636. Likewise here, Florida voters used the initiative system to ensure that the concerns of the majority regarding the abandonment of marriage in favor of an artificial construct of "same-sex marriage" were appropriately addressed and the definition of marriage memorialized in the Constitution. As the Supreme Court said in *Schuette*:

> Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

Id. at 1637. Similarly here, it would be a disservice to the dynamics of the Constitution if this Court were to overrule the people of Florida.

As the Sixth Circuit held in *DeBoer*, there is no authority in the Constitution or Supreme Court precedent for the judiciary to set aside centuries of history that have committed the issue of regulating marriage to the citizens of the states. 2014 WL 5748990 at *1. **"[R]egulation of domestic relations is 'an area that has long been regarded as a virtually exclusive province of the States.'**" *Windsor*, 133 S.Ct. at 2691(citation omitted) (emphasis added). The FMPA is the embodiment of

state regulation of domestic relations. Under *Windsor* and *Schuette*, the voters' exercise of their reserved power must be preserved and protected, not overturned.

II. THE NATURE AND FUNCTION OF MARRIAGE AS A FOUNDATIONAL SOCIAL INSTITUTION FOSTERING HEALTH, PROSPERITY AND SECURITY CREATES A COMPELLING INTEREST IN ITS PRESERVATION IN THE FMPA.

Preserving and protecting Florida voters' exercise of their power to amend the Constitution furthers not only rational, but even compelling, state interests that transcend the personal interests of these Plaintiffs or any other group of people. The historical understanding of the primacy of marriage as a foundational social institution, its inherent good, and the societal benefits emanating from protecting and preserving it greatly exceed the rational basis necessary to survive constitutional scrutiny. As the Supreme Court said in *Gregory*, parties seeking to invalidate a citizen-enacted constitutional amendment face a herculean task. 501 U.S. at 471. "In an equal protection case of this type ... those challenging the ... judgment [of the people] must convince the court that the ... facts on which the classification is apparently based could not reasonably be conceived to be true by the ... decisionmaker." *Id.* at 473 (citing *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). Utilizing that standard, the Supreme Court concluded that a state mandatory retirement law did not violate Equal Protection. *Id.*

Similarly here, as discussed more fully below, the people of Florida rationally could conclude that marriage is the foundational institution upon which

society is built and that promotes fidelity, permanency, more healthful relationships and optimal, complementary child-rearing, and could rationally memorialize marriage as the union of one man and one woman in their Constitution. To hold that the FMPA does not even pass rational basis would be to hold that 5 million Florida voters acted irrationally in voting for the Amendment. Furthermore, such holding would essentially proclaim that billions of people in every government and major religion worldwide, as well as every state in the union from the founding until 2003, were irrational in their universal support of man-woman marriage. *See DeBoer*, 2014 WL 5748990 at *1,*9 (marriage was defined as the union of one man and one woman by every government, world religion and state until 2003). Such a conclusion is breathtaking.

A. The FMPA Memorializes Millennia Of History Which Have Established That Marriage–The Union Of One Man And One Woman–Is The Essential Social Institution.

Since the early days of the Republic, the United States Supreme Court has embraced the millennia-old truth that marriage, *i.e.* the union of one man and one woman, is the foundational social institution.

> For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, 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* in the holy estate of matrimony; 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.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (emphasis added). "Marriage is the foundation of the home, and upon it is builded [sic] the entire superstructure of society." *United States v. Cannon*, 4 Utah 122, 7 P. 369, 382 *aff'd*, 116 U.S. 55 (1885). The Court has also recognized that "[t]here is far more to the marriage relation than the mere gratification of passion, or the procreation of children." *Id.* The union of man and woman "present[s] a *union not made by man*, and as they pass along life's pathway their very example is of infinite benefit to mankind." *Id.* (emphasis added).

The principle that marriage is the foundation of society did not originate with the Supreme Court, but reflects millennia of history that have distinguished "those uniquely comprehensive unions consummated by coitus from all others."[6] In fact, "legal and philosophical traditions have, significantly, long termed [coitus] the *generative* act," as without coitus, organic conception is impossible.[7] Therefore, marriage, as a comprehensive union, predates civil government, and is "not peculiar to religion, or to any religious tradition."[8] In fact, "marriage is a *natural* bond that society or religion can only 'solemnize.'"[9] A "major function of

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6 Girgis, WHAT IS MARRIAGE? 50 (emphasis in original).
7 *Id*. at 26 (emphasis in original).
8 *Id*. at 10.
9 *Id*. at 2 (emphasis in original).

marriage laws is to bind *all third parties* (schools, adoption agencies, summer camps, hospitals; friends, relatives, and strangers) presumptively to treat a man as father of his wife's children, husbands and wives as entitled to certain privileges and sexually off-limits, and so on. This only the state can do with any consistency."[10] Thus, marriage laws protect the common good of health and safety and promote the common good of efficiency; "private efforts cannot adequately secure [these goods], and yet failure to secure them has very public consequences."[11] Consequently, marriage is not a legal construct with totally malleable contours−it is not "just a contract." Instead, it is a distinctive bond that has its own value and structure, which the state did not invent and "has no power to redefine."[12] "Whatever practical realities may draw the state into recognizing marriage in the first place (*e.g.*, children's needs), the state, once involved, must get marriage *right* to avoid obscuring the shape of this human good."[13]

That is what the people of Florida have done in reserving marriage for potentially procreative sexual unions that cannot be effectuated by a mere contract. "[G]overnments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most

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10 *Id.* at 41 (emphasis in original).
11 *Id.*
12 *Id.* at 80.
13 *Id.* (emphasis in original).

especially the intended and unintended effects of male-female intercourse." *DeBoer*, 2014 WL 5748990 at *9. "Imagine a society without marriage. It does not take long to envision problems that might result from an absence of rules about how to handle the natural effects of male-female intercourse: children." *Id.* "May men and women follow their procreative urges wherever they take them? Who is responsible for the children that result? How many mates may an individual have? How does one decide which set of mates is responsible for which set of children?" *Id.* "By creating a status (marriage) and by subsidizing it (*e.g.*, with tax-filing privileges and deductions), the States [Florida here] created an incentive for two people who procreate together to stay together for purposes of rearing offspring." *Id.* at *11. In so doing, Florida was not acting irrationally, but acknowledging "the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring." *Id.* "People may not need the government's encouragement to have sex[,a]nd they may not need the government's encouragement to propagate the species." *Id.* at *10. "But they may well need the government's encouragement to create and maintain stable relationships within which children may flourish." *Id.* "It is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative." *Id.* "And governments typically

are not second-guessed under the Constitution for prioritizing how they tackle such issues." *Id.* The Sixth Circuit did not second guess the citizens of Ohio, Michigan, Kentucky and Tennessee. *Id.*

Neither should this Court second guess the people of Florida who similarly affirmed that the objective complementary structure of marriage must be maintained in order to sustain an ordered society. The importance of maintaining marriage's complementary structure has been recognized in all of history. "[E]ven in cultures very favorable to homoerotic relationships (as in ancient Greece), something akin to the conjugal view [marriage as a comprehensive union] has prevailed−and nothing like same-sex marriage was even imagined."[14] The normalization of homosexuality as just one of many acceptable sexual "outlets" began only in 1948, with Alfred Kinsey's *Sexual Behavior in the Human Male*, and 66 years later it has now led to what even the homosexual-tolerant ancient Greeks could not imagine.[15]

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14 Girgis, WHAT IS MARRIAGE? at 11.

15 Paul Robinson, THE MODERNIZATION OF SEX, 58-59 (Harper & Row 1976). "The notion of outlet, for all its apparent innocence, performed important critical services for Kinsey. Principal among these was the demotion of heterosexual intercourse to merely one among a democratic roster of six possible forms of sexual release….[M]arital intercourse….received about one third the attention devoted to homosexual relations. . . . a remarkable feat of sexual leveling . . . the fundamental categories of his analysis clearly worked to undermine the traditional [marital] sexual order."

Academics, legislators, and judges imagined it and immediately set about trying to convince the American people that marriage as the union of one man and one woman is archaic and should be redefined to reflect "modern" reality as painted by Kinsey's report. A prominent example is Seventh Circuit Chief Judge Richard Posner, who in 1992 called Kinsey's works the "high water mark" for sexuality research,[16] and in 1995 wrote, "[w]hile heterosexual marriage is closely connected to human biology, the recognition of marriage between homosexuals would not violate any biological imperative."[17] Further affirming Kinsey's "outlet" view of sexuality, Judge Posner considered the possibility of a "rape license," saying that only moral principles would prevent such a concept by assigning the rapist's utility a zero in cost benefit analysis.[18]

Following through on his premise that the recognition of "marriage" between homosexuals would not violate any biological imperative, on September 4, 2014, Judge Posner struck down Wisconsin's and Indiana's laws memorializing marriage as the union of one man and one woman, as irrational discrimination against same-sex couples. *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014). According to Judge Posner:

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16 Richard A. Posner, Sex and Reason, 19 (Harvard University Press, 1992)

17 Richard A. Posner, OVERCOMING LAW, 577 (Harvard University Press, 1995).

18 Richard A. Posner, ECONOMIC ANALYSIS OF LAW, 216 (Aspen Publishers, 6th ed. 2003).

> The challenged laws discriminate against a minority defined by an *immutable characteristic*, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't need marriage because same-sex couples can't produce children, intended or unintended—is so full of holes that it cannot be taken seriously.

Id. at 656. (emphasis added). However, the "immutability" upon which Judge Posner based his invalidation of marriage laws in Indiana and Wisconsin lacks evidentiary proof.[19] Even Kinsey, whose work Judge Posner and others have used to justify their dismantling of marriage, opined that human sexuality is a continuum and that most people (men in particular) move between heterosexuality and homosexuality throughout their lives.[20] Without evidence that homosexuality is "immutable," the foundation of Judge Posner's ruling disintegrates, as do the rulings by the Fourth and Tenth Circuits that "same-sex marriage" is a fundamental right implicitly based upon an immutable characteristic. *Bostic*, 760 F .3d at 376; *Bishop*, 760 F.3d at 1081; *Kitchen*, 755 F.3d at 1200-01. Since the explanation utilized by the Fourth, Seventh and Tenth Circuits to second guess the voters of

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[19] Jeffrey Satinover, M.D. *Homosexuality and the Politics of Truth,* 113-117 (Baker Books, 1996), *citing* W. Byne and B. Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised,* 50 ARCHIVES OF GENERAL PSYCHIATRY, 228-39 (1993) as establishing that even after decades of research scientists have failed to find a "gay gene."

[20] Alfred Kinsey, *et. al.* SEXUAL BEHAVIOR IN THE HUMAN MALE 639 (W.B. Saunders 1948). Kinsey's "scale" illustrating his theory that sexuality is fluid, along with the rest of his work upon which Judge Posner relied, was itself based upon "data" that involved systematic sexual abuse of children as young as two months old. *See, id.* at 175-80, Tables 31-34. *See* Judith Reisman, *Stolen Honor, Stolen Innocence* (New Revolution Press 2013).

Indiana, Wisconsin, Utah, Oklahoma and Virginia is without evidentiary basis, this Court should decline to follow suit. Instead, this Court should exercise the same judicial restraint shown by the Sixth Circuit and uphold the democratic rights of the people of Florida.

B. Marriage Is The Willing, Organic Union Of Two Complementary Bodies Coordinated To A Distinct And Inherently Good Biological Purpose That Fosters Optimal Health And Welfare.

Marriage requires a verbal commitment by both parties engaging in the union; historically, that verbal commitment attests to the life-long nature of the commitment. In addition to a union of the wills, marriage requires a union of bodies. While it is possible for same-sex couples to enter into a union of the wills, it is not possible for them to join in body in the way marriage has always required. Joining in body requires more than a sexual act. It is a natural, organic union that is "coordinated toward a common biological end of the whole that they form together."[21] By nature,

> [In] coitus, and there alone, a man and a woman's bodies participate by virtue of their sexual complementarity in a coordination that has the biological purpose of reproduction − a function that neither can perform alone. Their coordinate action is, biologically, the first step (the behavioral part) of the reproductive process. By engaging in it, they are united, and do not merely touch, much as one's heart, lungs, and other organs are united: by coordinating toward a biological good

[21] Girgis, WHAT IS MARRIAGE? at 25.

> of the whole that they form together. Here the whole is the couple; the single biological good, their reproduction.[22]

In fact, it is because of this natural aspect of a female-male union that, historically, consummation required sexual intercourse and not simply any sexual act between the couple − the idea was to join the parts that, together, have the potential to embody a whole.[23] Thus, laws protecting marriage as the union of one man and one woman are advocating for a social good. The "law reflected the rational judgment that unions consummated by coitus were valuable in themselves, and different in kind from other bonds."[24] "[T]wo men, two women, and larger groups cannot achieve organic bodily union: there is no bodily good or function toward which their bodies can coordinate," like procreation.[25]

Not only is there no bodily good or function toward which two same-sex bodies can coordinate, but there are in fact inherent *harms* associated with same-sex unions.[26] The Centers for Disease Control and Prevention ("CDC") reports that men who have sex with men (MSM) represent approximately 2 percent of the United States population, yet are the population most severely affected by HIV. In

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22 *Id.* at 26.

23 *Id.* at 25.

24 *Id.*

25 *Id.* at 27.

26 John R. Diggs, Jr., *The Health Risks of Gay Sex*, Catholic Education Resource Center (2002), http://www.catholiceducation.org/articles/homosexuality/ho0075.html

2010, young MSB (men having sex with boys, aged 13-24 years) accounted for 72 percent of new HIV infections among all persons aged 13 to 24[27], and 30 percent of new infections among all MSM. At the end of 2010, an estimated 489,121 (56 percent) of persons living with an HIV diagnosis in the United States were MSM or MSM-IDU [MSM-injection drug use].[28] According to 2011 CDC statistics, male-to-male sexual contact (without any injection drug use) accounted for 90.8 percent of all HIV diagnoses for males age 20-24, and 92.8 percent of all HIV diagnoses for males age 13-19.[29] "Gay and bisexual men (who have sex with other men) are about 17 times more likely to develop anal cancer than men who only have sex with women."[30]

These increased rates of disease cannot be attributed to "stigma" or discrimination, since the rates of AIDS infections is the highest in California,

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[27] Since the incubation period for HIV can be 10-12 years, this means that they were first infected when they were 3 to 14 years old. *See* Dennis H. Osmond, Ph.D., *Epidemiology of Disease Progression in HIV*, HIV Insite, (University of California San Francisco1998) *http://hivinsite.ucsf.edu/InSite?page=kb-03-01-04#S2X* (last visited November 17, 2014).

[28] Centers for Disease Control and Prevention , *HIV Among Gay, Bisexual, and Other Men Who Have Sex With Men*, (Sep. 26 2013), available at http://www.cdc.gov/hiv/risk/gender/msm/facts.

[29] CDC, *HIV Surveillance in Adolescents and Young Adults. Rep., Centers for Disease Control and Prevention, National Center for HIV/AIDS, Viral Hepatitis, STD & TB Prevention* 7 (2011), available at http://www.cdc.gov/hiv/pdf/statistics_surveillance_Adolescents.pdf.

[30] CDC, *Sexually Transmitted Diseases (STDs): HPV and Men - Fact Sheet*, (Feb. 23, 2012), http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm (emphasis added).

which offers homosexuals broad protection from discrimination.[31] Instead, there is a biological basis for the high incidence of anal cancer and other diseases among those who engage in homosexual behavior:

> [T]he fragility of the anus and rectum, along with the immunosuppressive effect of ejaculate, make anal-genital intercourse a most efficient manner of transmitting HIV and other infections. The list of diseases found with extraordinary frequency among male homosexual practitioners as a result of anal intercourse is alarming: Anal Cancer, Chlamydia trachomatis, Cryptosporidium, Giardia lamblia, Herpes simplex virus, Human immunodeficiency virus, Human papilloma virus, Isospora belli, Microsporidia, Gonorrhea, Viral hepatitis types B & C, [and] Syphilis.[32]

Even homosexual advocates acknowledge that the nature of the sexual acts in which same-sex couples engage carry health risks that are not as prevalent, or in some cases, not present at all, in heterosexual individuals. For example, readers of *The Joy of Gay Sex* are warned about diseases beyond AIDS that are common to homosexuals, including those listed above and prostatitis, urethritis, scabies and venereal warts.[33] In Canada, advocates filed a complaint against the Canadian health service, alleging that the organization discriminates against homosexuals because it does not provide proper treatment for conditions which uniquely affect

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[31] In 2011, 5,973 people were diagnosed with HIV in California. CDC, *HIV Surveillance Report: Diagnoses of HIV Infection and AIDS in the United States and Dependent Areas*, 2011 http://www.cdc.gov/hiv/statistics/basics, volume 23.

[32] Diggs, *The Health Risks of Gay Sex*. http://www.catholiceducation.org/articles/ homosexuality/ho0075.html

[33] Dr. Charles Silverstein and Edmund White, THE JOY OF GAY SEX, 221-232 (Simon and Schuster 1978).

them, including lower life expectancy, suicide, higher rates of substance abuse, depression, inadequate access to care and HIV/AIDS.[34] One of the claimants was quoted as saying, "[t]here are all kinds of health issues that are endemic to our community…. We have higher rates of anal cancer in the gay male community, lesbians have higher rates of breast cancer. These are all issues that need to be addressed."[35] Members of the Gay and Lesbian Medical Association (GLMA) reported on "10 health care concerns men who have sex with men (MSM) should include in discussions with their physicians or other health care providers," including higher rates of substance abuse, depression, HIV/AIDS, sexually transmitted diseases, certain cancers and eating disorders.[36]

The personal, social and financial costs of these homosexual-specific health problems concern not just those who engage in homosexual activity, but also the larger community of citizens who help provide services and who must bear part of the burdens imposed by the health challenges. It is eminently rational, if not

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[34] Julia Garro, *Canada's healthcare system is homophobic, says group*, XTRA.CA (February 17, 2009), available at http://dailyxtra.com/canada/news/canadas-healthcare-system-homophobic-says-group (last visited November 17, 2014).

[35] *Id.*

[36] *A Question of Cultural Competence in the Medical Community*, TEN THINGS GAY MEN SHOULD DISCUSS WITH THEIR HEALTH CARE PROVIDERS (July 17, 2002), available at http://zone.medschool.pitt.edu/sites/lgbt/Shared%20Documents/10ThingsGay_Doc.pdf (last visited November 17, 2014).

compelling, for the voters of Florida to seek to minimize the deleterious effects of these conditions on public health, safety and welfare by affirming that marriage in Florida remains the union of one man and one woman.

C. Marriage Is A Permanent, Exclusive Commitment That Fosters Stable, Healthy Relationships For Adults.

Same-sex unions and comprehensive unions are not only distinct by nature, but also by how they are treated by those engaged in them. In the 1980s, two homosexual professors undertook a survey of same-sex couples in an attempt to prove homosexual unions are exclusive. However, contrary to their hypothesis, *not one homosexual couple of those surveyed stayed sexually exclusive longer than five years*.[37] The study showed "[t]he expectation for outside sexual activity was the *rule for male couples and the exception for heterosexuals*."[38] By contrast, 99 percent of heterosexual couples expect sexual exclusivity in their marriage.[39]

In addition, same-sex relationships, particularly relationships involving two male partners, carry greater risks for domestic violence than do marriages. Two

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[37] David P. McWhirter & Andrew M. Mattison, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252-53 (1984) (emphasis added).

[38] *Id.* at 253 (emphasis added).

[39] Julie H. Hall & Frank D. Finchman, *Psychological Distress: Precursor or Consequence of Dating Infidelity*, Personality and Social Psychology Bulletin 1 (2009), *available at* http://psp.sagepub.com/content/35/2/143.full.pdf+html.

homosexual researchers estimated that "at least 500,000 gay men are abused by their lovers each year."[40]

> Men in heterosexual couples commit 95 percent of the battering. But, there are two men present in a gay couple…either member has the same possibility of being a batterer…the probability of violence occurring in a gay couple is mathematically double the probability of that in a heterosexual couple…the vast majority of men to not hit women. Not so with men however…*violence among gay men is nearly double that in the heterosexual population.*[41]

Marriage and emotional unions are distinct. An "emotional union cannot stand on its own. People really unite by *sharing a good*, but feelings are inherently private realities, which can be simultaneous but not really shared ... feelings cannot be central to a vow, for we have no direct control over them."[42] While emotional unions are not inherently good for structuring families, marriage is. Moreover, families are the building blocks for a healthy society, and for encouraging permanency and exclusivity in relationships. These benefits, or purposes, of marriage are inherently good.

> [A] good must be truly common and for the couple as a whole, but mental states are private and benefit partners, if at all, only individually. The good must be bodily, but pleasures as such are aspects of experience. The good must be inherently valuable, but pleasures are good in themselves only when they are taken in some

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40 David Island and Patrick Letellier, MEN WHO BEAT THE MEN WHO LOVE THEM, 16 (New York, Harrington Park Press, 1991).

41 *Id.* at 14 (emphasis added).

42 Girgis at 55 (emphasis in original).

> other, independent good. So while pleasure and delight deepen and enrich a marital union where one exists, they cannot be its foundation.
>
> As more people absorb the new law's lesson that marriage is fundamentally about emotions, marriages will increasingly take on emotion's tyrannical inconsistency. Because there is no reason that emotional unions − any more than the emotions that define them, or friendships generally − should be permanent or limited to two, these norms of marriage would make less sense.[43]

Once sexual complementarity becomes optional, so do permanence and exclusivity.[44] The future of civilized society depends on protecting permanence and exclusivity in family structure. Therefore, preserving the definition of marriage, as Florida voters have done through the FMPA, is not about preserving a tradition of discrimination or exclusion, but preserving a good, the relationship upon which the future of society rests.[45] An objective structure for marriage assists all people in a society and understanding marriage to be a comprehensive union "respects same-sex attracted people's equal dignity and basic needs."[46]

D. Marriage Is A Permanent, Exclusive Commitment That Creates Optimal, Stable, And Healthy Environments For Children.

Memorializing marriage as the union of one man and one woman in the Florida Constitution also memorializes what society has known for millennia, *i.e.*,

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43 *Id.* at 27, 56.

44 *Id.* at 57 (emphasis added).

45 *See* Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 778 (2002).

46 Girgis, WHAT IS MARRIAGE? at 53.

that a family comprised of married biological parents provides the optimal environment for children. Studies have shown that children raised by their wedded biological parents fare best in:

> *…educational achievement*: literacy and graduation rates, *emotional health*: rates of anxiety, depression, substance abuse, and suicide, *familial and sexual development*: strong sense of identity, timing of onset of puberty, rates of teen and out-of-wedlock pregnancy, and rates of sexual abuse, and *child and adult behavior*: rates of aggression, attention deficit disorder, delinquency, and incarceration."[47]

A recent comprehensive peer-reviewed study has confirmed these findings and confirmed that same-sex households pose increased risks for children.[48] For example, 31 percent of "lesbian mothered" (LM) children and 25 percent of "homosexually fathered" (GF) children said they had been forced to have sex against their will, compared to 8 percent of children in "biologically parented" (IBF) homes.[49] In addition, 20 percent of children from LM homes and 25 percent from GF homes reported having sexually transmitted diseases compared to 8 percent of the IBF children.[50] Twelve percent of LM children and 24 percent of GF

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47 *Id.* at 42. (emphasis added)

48 Mark Regnerus, *How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study*, 41 SOCIAL SCIENCE RESEARCH 761 (2012).

49 *Id.*

50 *Id.*

children had recently contemplated suicide, compared to 5 percent of IBF children.[51]

Similar evidence led a French parliamentary commission to conclude:

> Because of the filiative nature of marriage, it is essential that the male-female nature of marriage be preserved. This reflects the natural fecundity of couples and is best suited to help the child develop his/her identity. The Mission refuses to change the nature of marriage. The purpose of adoption is not to provide a child to a family but rather provide a family to a child. Children require the judicial and affective security that only marriage provides. Same sex parenting clearly introduces additional discontinuity for the adopted child. Favoring equality for adults would affect a greater inequality towards children. As in the case of medically assisted reproduction, the report rejects the right to a child.[52]

Consequently, globally recognized evidence of the optimal environment created by marriage provides an ample basis for determining that redefining marriage to include same-sex relationships would "erode the basis for those norms in *any* relationship,"[53] and therefore is not a price that the people of Florida are willing to pay.

Of primary importance in the analysis of the FMPA is whether, and if so, how, adopting a new construct of "same-sex marriage" will "contribute to

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51 *Id.*

52 Summary of the French Parliamentary Commission Report On the Family And the Rights of Children Presented to the French National Assembly, Paris, January 26, 2006 http://www.familywatchinternational.org/fwi/France_Report_Family_exec_summary.pdf (last visited November 13, 2014).

53 Girgis at 67 (emphasis in original).

promoting the public interests in marriage, and to achieving the social policy purposes for which laws establishing marriage have been enacted."[54] "Marriage law is not enacted to promote private, personal interests, but to protect and promote those individual interests that are shared in common with society as a whole, *i.e.*, social interests."[55]

> Marriage law is at its heart not simply a cluster of benefits given to people whose taste in sex or lifestyle we happen to personally approve; it is a set of obligations and rewards that serve important social, not merely personal, goals. Marriage serves a pointing function, elevating a certain type of relationship–permanent, exclusive, normally procreative–above all others. Marriage law demarcates certain public boundaries which social norms can then use to impose informal rewards or sanctions. [56]

Consequently, "marriage does not merely reflect individual desire, it shapes and channels it,"[57] and as the foregoing discussion demonstrates, it shapes and channels it in a way that provides for optimal physical and psychological health, safety and welfare for the married partners, their children and society at large.

CONCLUSION

The FMPA's memorialization of marriage as the union of one man and one woman fortifies the foundation of Florida law and the health, safety and well-being

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54 Lynn D. Wardle, *"Multiply and Replenish:" Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL'Y 771, 779 (2001).

55 *Id.* at 778.

56 *See* Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 788-89 (2002).

57 *Id.* at 790.

of its citizens. As is true of marriage laws and amendments in Michigan, Ohio, Kentucky and Tennessee, the FMPA is a proper, rationally based exercise of the peoples' "privilege to enact laws as a basic exercise of their democratic power" when they overwhelmingly approved the FMPA. *DeBoer*, 2014 WL 5748990 at *1.

The FMPA does not violate the Constitution. This Court should overturn the district court's contrary ruling.

Dated: November 21, 2014.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7)(C)

I hereby certify that this brief complies with the type-face and volume limitations set forth in F.R. App. P. 32(a)(7) in that it was prepared in Times New Roman 14 point font.

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/s/ Mary E. McAlister
Mary E. McAlister

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on November 21, 2014 via the Court's CM/ECF system. Service will be effectuated upon all parties and counsel of record via the Court's electronic notification system.

/s/ Mary E. McAlister
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