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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES BRENNER, *et al.*,	SLOAN GRIMSLEY, *et al.*,
Plaintiffs-Appellees,	*Plaintiffs-Appellees*,
v.	v.
JOHN ARMSTRONG, *et al.*,	JOHN ARMSTRONG, *et al.*,
Defendants-Appellants.	*Defendants-Appellants*.

Appeals from the U.S. District Court for the Northern District of Florida

BRIEF OF *AMICI CURIAE* JOAN HEIFETZ HOLLINGER, COURTNEY JOSLIN, NANCY DOWD, AND FORTY-SEVEN OTHER FAMILY LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici curiae family law professors state, pursuant to Eleventh Circuit Rule 26.1.-1, that the following persons and entities have an interest in the outcome of this case and/or appeal:

de Aguirre, Carlos Martinez

Albu, Joyce

Allen, Dr. Douglas W.

Alliance Defending Freedom

Alvaré, Helen M.

American Civil Liberties Union of Florida, Inc., The

American Civil Liberties Union Foundation, Inc.

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Upham, Dr. David

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Watts, Gordon Wayne

Weaver, George M.

White, Elizabeth L.

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Wolfe, Dr. Christopher

Wood, Dr. Peter W.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, *Amici* family law professors hereby disclose that they sign as individuals, *see* Appendix A, and do not have any parent corporation or any publicly held corporation that owns 10% or more of its stock.

Dated: December 18, 2014

/s/ Sara Bartel

Sara Bartel

Counsel for Amici Curiae
Family Law Professors

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OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a),[1] *Amici Curiae*—all scholars of family law[2]—respectfully submit this brief in support of Plaintiffs-Appellees.[3] *Amici* wish to provide the Court with an exposition of Florida law, as expressed through statutes and case law, with respect to marriage, parentage, and the well-being of children—all of which are central to the issues before the Court.[4]

SUMMARY OF ARGUMENT

Florida Statutes sections 741.04 and 741.212, and Florida Constitution article I, section 27 (collectively the "marriage ban") preclude same-sex couples from entering civil marriage in Florida and deny recognition to marriages that same-sex couples have validly entered elsewhere.

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[1] Pursuant to Fed. R. App. P. 29(a), this brief is filed with party permission and without objection, in both *Brenner* and *Grimsley*. *See* e-mail from Beatrice Dohrn, Counsel for Plaintiffs Grimsley, *et al.*, to counsel for *Amici* (Dec. 9, 2014, 13:25 PST) (on file with counsel); e-mail from Sam Jacobson, Counsel for Plaintiffs Brenner, *et al.*, to counsel for *Amici* (Dec. 13, 2014, 12:18 PST) (on file with counsel); e-mail from Allen Winsor, Counsel for Defendant State of Florida, to counsel for *Amici* (Dec. 10, 2014, 6:41 PST) (on file with counsel); e-mail from Jeff Goodman, Counsel for Defendant Clerk of Court, to counsel for *Amici* (Dec. 10, 2014, 13:47 PST) (on file with counsel).

[2] *Amici* professors are listed in Appendix A.

[3] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

[4] While *Amici* agree with Appellees that Florida's marriage ban should be subject to heightened scrutiny, the ban is unconstitutional under any standard of review.

Appellants and their *amici* argue that the marriage ban furthers state interests, especially with regard to the well-being of children. As family law professors, *Amici* are committed to promoting the welfare of children and encouraging parents to be responsible for their children's well-being. *Amici* agree that marriage can benefit children by providing support and stability to their families. Florida's marriage ban, however, does not further child well-being or responsible parenting. As *Amici* demonstrate, arguments to the contrary lack any basis in history, law, or logic.

In Florida and elsewhere, couples marry for many reasons, including a desire for public acknowledgment of their mutual commitment to share their lives with each other through a legally binding union. Appellants' *amici* ignore the multiple purposes of marriage, and suggest that the ability to procreate without assistance is the *raison d'être* of marriage. (*See Amici Curiae* Brief of Robert P. George and Sherif Girgis in Support of Defendants-Appellants and Reversal ("George Br.") 12-13; 16, 20; *Amicus Curiae* Brief of Marriage Law Foundation in Support of Defendants-Appellants and Reversal ("MLF Br.") 7-8, 18.) But Florida does not and never has limited marriage to couples who can or want to have children through "natural[]" procreation. (MLF Br. 6.) Indeed, it would be constitutionally impermissible to limit marriage only to such couples.

Second, Appellants' *amici* argue that marriage can be limited to couples who can provide "optimal" childrearing, (MLF Br. 9; *Amicus Curiae* Brief of American College of Pediatricians in Support of Defendants-Appellants and Reversal ("ACP Br.") 3, 5, 12, 27), which they claim is "gender-differentiated" parenting of children by their biological mothers and fathers. (*See* ACP Br. 5 (quotation omitted).) However, these "optimal" parenting claims are wholly unsupported by social science, which overwhelmingly demonstrates that it is the quality and nature of the parental relationship—not a parent's gender or his or her biological relationship to the child—that is critical to positive child adjustment and outcomes.[5] These claims also conflict with Florida law and policy, which do not view biology as the sole criterion for parentage and reject the notion that a parent's gender or sexual orientation is legally relevant to determinations of children's best interests. Further, a desire to impose "the norm of sexual complementarity," (George Br. 1, 11, 16), on all couples who seek to marry offends constitutional principles by attempting to make marital protections contingent on conformity to sex- or gender-based stereotypes.

The purported interests that Appellants' *amici* claim are served by the marriage ban are not permissible state interests. Moreover, even if they were, the ban does not bear any rational relationship to the decisions of different-sex couples

[5] *See Amicus Curiae* Brief of the American Psychological Association, *et al*.

regarding procreation, marriage, or childrearing. Indeed, because *amici*'s asserted interests are legally insufficient, the State Appellants do not rely on them.

To the extent the State relies on an interest in the well-being of children, the marriage ban actually *undermines* this interest. While not assisting children in any family, the ban inflicts direct harms on same-sex couples and their children by denying them access to hundreds of important benefits under state and federal law. The ban also inflicts intangible harms by signaling that Florida deems the relationships of same-sex couples unequal to the relationships of other couples.

Finally, even if Appellants' *amici* believe that the ban would induce better behavior by different-sex couples, both Florida authorities and the Supreme Court have foreclosed punishing children as a means to influence adult behavior.

In sum, the purported state interests justifying disparate treatment of different-sex and same-sex couples do not reflect the policies that Florida law pursues regarding marriage, parentage, and children's well-being. As the Supreme Court recently reaffirmed, signaling that same-sex couples are less worthy of respect is an insufficient interest to sustain a law. *United States v. Windsor*, 133 S. Ct. 2675 (2013).[6] Accordingly, under the federal Constitution, Appellants and their

[6] *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (laws based solely on "animus" towards certain classes violate equal protection clause). "Animus" as used in *Romer* is a term of art and does not mean subjective dislike or hostility, but simply the absence of a rational reason for excluding a particular group from legal protections.

amici do not provide a rational basis for denying same-sex couples the right to marry.

ARGUMENT

I. PROCREATION IS NOT A NECESSARY ELEMENT OF MARRIAGE.

Appellants' *amici* argue that excluding same-sex couples from marriage is justified because, unlike many different-sex couples, they lack "procreative capacity." (MLF Br. 3; *see id.* at 8, 16.) This reductive difference is then invoked to deny same-sex couples the right to marry. Allegedly, marriage benefits are conferred solely on different-sex couples to "maximize[] the chances that children will be reared by their biological mother and father," (George Br. 12), "serving unique relational roles." (ACP Br. 5.) This view of marriage is not consistent with Florida's civil law, the laws of other states, or the federal Constitution.

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

The insistence by Appellants' *amici* that the right to marry is inextricably intertwined with procreation is simply wrong.[7] As in other states, in Florida, an ability or desire to procreate is not a requirement for a valid marriage. *See* Fla. Stat. Ann. § 741.04, *et seq.* (other than the different-sex requirement, the only

[7] As one district court appropriately stated, "[T]here is nothing conjugal or child-centric about the formality of obtaining a marriage license." *Latta v. Otter*, 19 F. Supp. 3d 1054, 1081 (D. Idaho 2014).

requirements for contracting and consenting to marriage are that a person be unmarried, at least eighteen years old, and not be marrying a close relative); *see also id.* § 741.0405 (ability to procreate is not a condition for persons under 18 years of age to obtain marriage license). Similarly, infertility (which is a very common condition)[8] is not a basis for voiding a marriage, *see Amicus Curiae* Brief of Historians of Marriage, nor is sexual intimacy required to sustain a marriage's validity.[9] *See also, Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."). Moreover, because choosing whether or not to engage in procreative sexual activity is constitutionally protected from state intervention, *see, e.g., Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), it would be constitutionally impermissible to condition marriage on such an ability or desire.

[8] Data from 2002 show that approximately seven million women and four million men suffer from infertility. Michael L. Eisenberg, M.D. et al., *Predictors of not Pursuing Infertility Treatment After an Infertility Diagnosis: Examination of a Prospective U.S. Cohort*, 94 Fertility & Sterility No. 6, 2369 (2010). Approximately two to three million couples are infertile. *Surrogacy: A Brief U.S. History*, 3 Family and Society, Encyc. of Contemp. Am. Soc. Issues, 1182 (Michael Shally-Jensen ed., 2011).

[9] Prior to Florida's enactment of a divorce statute based solely on no-fault grounds, impotency of one spouse throughout the duration of the marriage was a fault-based ground for terminating a valid marriage. *See Cott v. Cott*, 98 So. 2d 379 (Fla. Dist. Ct. App. 1957).

A review of Florida's statutory grounds for divorce reinforces the conclusion that procreation is not the core purpose of marriage, much less an essential requirement. Florida has been a "pure" no-fault divorce state since 1971, *see* Fla. Stat. Ann. section 61.052(1)(a), (b) (divorce justified whenever a marriage is "irretrievably broken" or when one party is mentally incapacitated). No-fault divorce is premised on a failure of the spousal relationship, not on concerns about procreation or infertility. *See Ryan v. Ryan*, 277 So. 2d 266, 271 (Fla. 1973).

Contrary to the narrow views of marriage taken by Appellants and their *amici*, in Florida, as in every other state, marriage serves and has always served multiple purposes, the vast majority of which do not pertain to children, but to enabling spouses to protect and foster their personal, intimate, and mutually dependent relationship *to one another*. Under Florida law, spouses have a mutual obligation to support each other. *See Lashkajani v. Lashkajani*, 911 So. 2d 1154, 1157-58 and n.2 (Fla. 2005) (discussing duty of support owed by spouses to one another). Married couples enjoy protections and benefits and assume mutual responsibilities pertaining, for instance, to health care decisions, workers' compensation and pension benefits, property ownership, spousal support, inheritance, taxation, insurance coverage, and testimonial privileges.[10]

[10] *See, e.g.*, Fla. Stat. Ann. § 765.401 (spousal right to consent to medical care given priority over other parties' right to consent); *Orange County v. Piper*, 523 So. 2d 196, 198 (Fla. Dist. Ct. App. 1988) (loss of consortium as valid, direct spousal injury); Fla. Stat.
(Footnote continues on next page.)

In sum, the attempts to reduce the meaning and purpose of marriage to facilitating and protecting the fruits of procreative sexual activity are not supported by Florida law. As the Supreme Court has explained, "[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *See Lawrence*, 539 U.S. at 567.

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

As a matter of constitutional law, the Supreme Court declared in *Turner v. Safley*, 482 U.S. 78 (1987), that individuals cannot be excluded from the right to marry simply because they are unable to engage in procreation. The *Turner* Court recognized that incarcerated prisoners—even those with no opportunity to procreate—have a fundamental right to marry, because many "important attributes of marriage remain . . . after taking into account the limitations imposed by prison life." *Id*. at 95. The Court explained that marriage has multiple purposes unrelated to procreation, such as "the expressions of emotional support and public commitment," "exercise of religious faith," "expression of personal dedication," and "the receipt of government benefits." *Id*. at 95-96.

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Ann. § 689.15 (spousal property right to tenancy by the entirety and survivorship); Fla. Stat. Ann. §§ 732.102, 732.103 (giving priority of (1)(a), (b) (intestate succession to surviving spouse); Fla. Stat. Ann. §§ 61.075, 61.09 (spousal rights to maintenance, property division); I.R.C. § 6013(a) (spousal right to file joint income taxes); Fla. Stat. Ann. § 90.504(1) (spousal testimonial privilege).

The attempt to justify the marriage exclusion under the guise of promoting a particular method of procreation should be approached with caution. Procreative decisions are quintessential matters of individual liberty. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) ("[I]t is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as to the decision whether to bear or beget a child."); *Griswold*, 381 U.S. at 479, 485-86 (married couples have a constitutionally protected right to engage in non-procreative sexual intimacy).

In sum, there is no historical or legal justification to support Appellants' *amici*'s claims that "the nearly universal norm of sexual complementarity" explains the "purpose of marriage." (George Br. 16.)

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

Appellants' *amici* argue that it is permissible for Florida to limit marriage to different-sex couples because families headed by two married biological parents are able to provide "gender-differentiated" parenting and the "optimal" environment in which to raise children. (*See* ACP Br. 5.)[11] These claims run counter to both Florida and federal law and to social science research.

[11] This effort to justify the exclusion of same-sex couples from marriage by repeating a preference for married different-sex parents merely circles back to the challenged classification without justifying it. *Romer*, 517 U.S. at 633 (discriminatory classifications must serve some

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A. Florida Does Not Require a Biological Relationship to Establish a Legal Parent-Child Relationship.

Under Florida law, there are many ways to establish a legal parent-child relationship. A biological or genetic connection to a child is one such means, but it is not always a necessary or sufficient one. For example, Florida, like other states, presumes that a husband is a legal parent of a child born to his wife during their marriage. *See* Fla. Stat. Ann. § 382.013(2)(a); *Slowinsky v. Sweeney*, 64 So. 3d 128, 130 (Fla. Dist. Ct. App. 2011) (refusing to recognize paternity of alleged biological father when the child was born into intact marriage); *see also Tijerino v. Estrella*, 843 So. 2d 984, 985 (Fla. Dist. Ct. App. 2003) ("The presumption of the legitimacy of a child born in wedlock is one of the strongest presumptions known to the law and is deeply rooted in this Nation's history and tradition."). Although the marital presumption may be rebutted by an affidavit of nonpaternity or genetic tests disproving parentage, *see* Fla. Stat. Ann. section 382.013(2)(c), it may be sustained even though the husband is not the biological father if he has had a caring and supportive parental relationship to the child. *See, e.g.*, *C.G. v. J.R.*, 130 So. 3d 776, 782 (Fla. Dist. Ct. App. 2014) (marital presumption sustained against the interests of the biological father, even in light of husband's later, attempted disavowal of parental responsibility). Likewise, non-biological fathers may be

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"independent and legitimate legislative end").

estopped from repudiating their parental roles. *See id.*; *Wade v. Wade*, 536 So. 2d 1158, 1160 (Fla. Dist. Ct. App. 1988) (ex-husband estopped from repudiating his paternity of non-biological, non-adoptive child after assuming role of father from birth to age nine). Florida statutory law establishes a number of stringent requirements before a husband can "disestablish" his legal paternity. Fla. Stat. Ann. § 742.18.

Florida also allows married different-sex spouses, as well as unmarried different- and same-sex "commissioning couples" to be the legal parents of children born as a result of assisted reproduction with donor eggs or sperm. *See* Fla. Stat. Ann. § 742.13(2) (commissioning couple defined as "the intended mother and father of a child" conceived "using the eggs or sperm of at least one of the intended parents"); *D.M.T. v. T.M.H.*, 129 So. 3d 320, 343 (Fla. 2013) ("Consistent with equal protection, a same-sex couple must be afforded the equivalent chance as a heterosexual couple to establish their intentions in using assisted reproductive technology to conceive a child."). Additionally, married couples may become legal parents through gestational surrogacy agreements. Fla. Stat. Ann. §§ 742.15, *et seq.*

Florida, like every other state, allows adults to adopt children who are not their biological offspring. Fla. Stat. § 63.042(2), *et seq.*[12] Adoptive parents have all

[12] Florida's statutory ban on adoption by "homosexual persons," enacted in 1977, Fla. Stat. Ann. section 63.042, was struck down in 2010 as violating the Equal Protection provisions of the Florida Constitution. *Florida Dep't of Children & Families v. Adoption of*

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the rights, privileges, and obligations of other legal parents. *See* Fla. Stat. Ann. § 63.172(1)(c). Indeed, Florida explicitly recognizes that adoptive parents have constitutional rights in their parent-child relationship. *See, e.g.*, Fla. Stat. Ann. § 63.022(1)(d) ("Adoptive parents have a constitutional privacy interest in retaining custody of a legally adopted child.").

In some circumstances, Florida, like all other states, recognizes that a biological or genetic tie is not by itself sufficient to establish legal parentage. Consistent with federal constitutional treatment of unwed fathers,[13] Florida statutory and case law make clear that an unmarried biological father cannot assert parental rights unless he has manifested substantial concern for his child's welfare. *See Kendrick v. Everheart*, 390 So. 2d 53, 59-60 (Fla. 1980). For example, an unwed biological father's consent to his child's adoption is not required unless he has filed a timely paternity claim with the State Putative Father Registry and developed a "substantial relationship" to the child. Fla. Stat. Ann. §§ 63.053, *et seq.*; *see id.* §§ 63.054, 63.062(2); *J.C.J. v. Heart of Adoptions, Inc.*, 989 So. 2d 32, 35 (Fla. Dist. Ct. App. 2008), *review denied*, 5 So. 3d 669 (Fla. 2009) ("mere existence of a biological link" is insufficient to merit protection of parental rights,

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X.X.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

[13] *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 254-55 (1978) (best interests standard for child in adoption proceeding does not violate Due Process rights of biological father who showed no commitment to parental responsibilities); *Lehr v. Robertson*, 463 U.S. 248, 261-62 & n.19 (1983) ("biological link" does not automatically afford biological father adoption veto rights).

when father otherwise made no provision for support or efforts at a relationship) (citation omitted). In sum, the lack of a requirement of a biological tie as a condition for establishing legal parentage, and Florida's preference for non-biological parents in some instances, render implausible any contention that the marriage ban is based on a preference for biological parenting.

B. Florida Has Eliminated Marriage Laws Based on Gender Stereotypes.

Florida law and policy contradict the claims that sexual-complementarity and gender-differentiation in marriage and parenting are important state objectives. Instead, as in every other state, marriage under Florida law is a union free of state-mandated, sex- or gender-based distinctions in spousal roles or the incidents of marriage. Florida's child custody laws also treat parents equally, regardless of sex or gender.

Since the 1940s, Florida has gradually eliminated the sex-specific roles that were once central to marriage. Married men and women now have equal rights to own and control their separate property. Fla. Const. art. X, § 5 (as amended in 1968) ("There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal…."); *Steinhauer v. Steinhauer*, 252 So. 2d 825, 831 (Fla. Dist. Ct. App. 1971) ("We cannot accept the concept that a wife is anything less than an equal partner with the husband in the marital relationship. Our own Constitution and

statutes place the woman on a status equal (not inferior) to the man."); Fla. Stat. Ann. § 708.08, *et seq.* (married women empowered in legal and property rights, "as fully as if she were unmarried").

Florida has eliminated gender-based distinctions upon divorce or the death of a spouse. As in all other states, the causes for divorce are the same for each spouse. Fla. Stat. Ann. § 61.052 (grounds for dissolution of marriage). At divorce, Florida law presumes an equitable division of property without regard to gender. *See* Fla. Stat. Ann. § 61.075(1)(j) (factors for asset distribution make no distinctions based on gender, and prioritize "equity and justice between the parties"). Florida has rejected the gender-based rule that spousal support was only paid by the husband to the wife—now either spouse may qualify for or be held liable for support. Fla. Stat. Ann. § 61.08 (alimony may be awarded to and paid by either spouse, based on need and ability to pay, without respect to gender); *see Canakaris v. Canakaris*, 382 So. 2d 1197, 1203-04 (Fla. 1980) (providing for "basic fairness" in evaluating contributions of both spouses when determining distribution of marital assets and alimony obligations). Similarly, upon death, spousal rights are equal; dower and curtesy were previously extended to both spouses, *see* former Fla. Stat. Ann. §§ 731.34, 731.35, and were abolished in 1973. Fla. Stat. Ann. § 732.111.

Regardless of gender, both parents are equally obligated to provide care and support for their children. Fla. Stat. Ann. §§ 61.13, 61.30 (support statutes make

no distinction between parents based on gender); *Kendrick*, 390 So. 2d at 57 (Florida paternity law does not violate equal protection because it "contemplates the imposition of child support obligations on either or both parents depending on their ability and other relevant circumstances" without respect to gender). Under Florida's Shared Parental Responsibility Act, custody arrangements, as determined under court-approved "parenting plans," are based on the best interests of the child, without regard to the gender of the parents. *See* Fla. Stat. Ann. § 61.13, *et seq.* (setting forth factors for court to consider in determining best interests, including a presumption of joint custody); *id.* § 61.13(3)(c)(1) ("There is no presumption for or against the father or mother of the child when . . . creating or modifying the parenting plan of the child.").

As these examples demonstrate, Florida law does not inscribe "gender-differentiated" roles in marriage or parenting. Instead, Florida has sought to eliminate family law rules based on sex or gender stereotypes.

C. A Desire to Promote "Gender-Differentiated" Parenting Is a Constitutionally Impermissible Interest.

Beyond its inconsistency with Florida law, any effort to enforce gender-differentiated roles in marriage or parenting would be unconstitutional. Appellants' *amici* seek to justify the marriage ban by detailing at length the "unique relational roles" that men and women play in the development of their children, (*see* ACP Br. 5-12), but this is precisely the type of "overbroad generalization[] about the

different talents, capacities, or preferences of males and females" that the Constitution prohibits. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

The Supreme Court has repeatedly held that it is impermissible to premise laws, including family laws, on outmoded sex-based stereotypes. *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 205, 207 (1977) (holding unconstitutional Social Security Act provisions that were premised on the "archaic and overbroad" generalizations that "wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives"); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (social security benefits); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military benefits); *Orr v. Orr*, 440 U.S. 268 (1979) (holding unconstitutional a state law imposing support obligations on husbands but not on wives); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (striking down state law that gave husbands the unilateral right to dispose of jointly owned community property without his spouse's consent); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (approving Congress's effort to combat "[s]tereotypes about women's domestic roles [and] parallel stereotypes presuming a lack of domestic responsibilities for men."). The Florida Supreme Court has reached the same conclusion:

> To extend or restrict this privilege [jury service] solely on the basis of gender is to foster the sex-based stereotypes that have long impeded the progress of women in our judicial system. We join the Supreme Court of the United

> States in rejecting the common law's erroneous belief that women should not serve as jurors because of "*propter defectum sexus*," the defect of sex.

Abshire v. State, 642 So. 2d 542, 544 (Fla. 1994) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132 (1994)).

Implied but unstated in Appellants' briefs is an apparent desire to ensure that children will be socialized into allegedly "appropriate" gender-roles for their biological sex. (*See, e.g.*, ACP Br. 6 (emphasizing distinct contributions of fathers and mothers to parenting, in accordance with their "biological gender or sex roles").) This is exactly the kind of thinking that is suspect under constitutional principles.

Almost forty years ago, the Supreme Court struck down a state law that provided different child support obligations for girls than for boys based on presumptions about their respective roles and destinies. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) ("A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."); *see also Stanley v. Illinois*, 405 U.S. 645, 653, 657 (1972) (holding unconstitutional a state law that conclusively presumed that all unmarried fathers were "unqualified to raise their children"); *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate

employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'") (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (rejecting stereotypes about how female and male jurors differ); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (rejecting stereotype that only women should be nurses).

In addition, there are powerful common law traditions—bolstered by constitutional decisions—that protect parental autonomy, including the rights of parents to control the care and raising of their children, and to socialize them as they see fit. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (parents have a right to "direct the upbringing and education of [their] children"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right to "marry, establish a home and bring up children" is a protected liberty); *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made.").

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

Appellants' *amici's* argument about optimal childrearing is also flatly contradicted by decades of social science research. In dozens of studies, sociologists and psychologists have found no significant differences between the long-term outcomes for children of same-sex parents and the children of different-sex parents. *See* Carlos A. Ball, *Social Science Studies and the Children of Lesbians and Gay Men: The Rational Basis Perspective*, 21 Wm. & Mary Bill Rts. J. 691, 715-16 (2013). These peer-reviewed studies have examined a stunning array of factors related to children's well-being, including their attachment to parents, emotional adjustment, school performance, peer relations, cognitive functioning, and self-esteem. No study has found any differences based on the sexual orientation of children's parents. *Id.* at 716-17. Instead, the key factors correlated with positive outcomes for children are the quality of the parent-child relationship and the relationship and resources of the parents. *Id.* at 733, n.286. In particular, having two involved parents rather than only one—an arrangement that would be supported by allowing parents to marry—is correlated with better outcomes for children, regardless of the sexual orientation or genders of the parents. *Id.*; *see also Amicus Curiae* Brief of the American Sociological Association.

In light of this social science consensus, courts have increasingly rejected the optimal parenting argument. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d

921, 980 (N.D. Cal. 2010), reinstated in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) ("The gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology."). The vast majority of the district court rulings issued since the Supreme Court's 2013 decisions in *Windsor*, 133 S. Ct. 2675, and *Hollingsworth*, 133 S. Ct. 2652, have echoed the *Perry* court's conclusions. *See, e.g.*, *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 770 (E.D. Mich. 2014) (noting that over 150 sociological and psychological studies have repeatedly confirmed that there is no scientific basis to differentiate between children raised in same-sex versus heterosexual households).

Florida law and policies have similarly repudiated the claim that a parent's sexual orientation is relevant to a person's parenting abilities. In striking down the 1977 statute that prohibited adoption by "homosexual persons," the Florida Court of Appeal accepted the trial court's findings "that there are no differences in the parenting of homosexuals or the adjustment of their children." *Adoption of X.X.G.*,

45 So. 3d at 87.[14] Indeed, the State defendants in the *X.X.G.* case conceded that "gay people and heterosexuals make equally good parents." *Id.* at 87. Florida courts have also accorded full faith and credit to adoptions granted to same-sex couples by courts in other states, *Embry v. Ryan*, 11 So. 3d 408 (Fla. Dist. Ct. App. 2009), and have held that, in the absence of harm to the child, a parent's sexual orientation is not a relevant factor in resolving custody and visitation disputes. *See, e.g.*, *Maradie v. Maradie*, 680 So. 2d 538 (Fla. Dist. Ct. App. 1996); *Jacoby v. Jacoby*, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000).

Notably, the State Appellants in this case do not attempt to justify Florida's marriage ban on the basis of the optimal and gender-differentiated parenting arguments proffered by their *amici.*

E. Marriage Is Open to Virtually Any Different-Sex Couple, Irrespective of Their Ability to Be "Optimal" Parents.

Even if, *arguendo*, there were differences in how children fare between those raised by married heterosexual couples and those raised by cohabiting same-sex couples, it is not permissible to rely on any such differences as justification for singling out and excluding same-sex couples from the right to marry. No other couples are denied the right to marry based on a belief that they will not provide an

[14] Relying on state policy that once favored dual-gender adoptive parenting but has subsequently been repudiated by Florida state officials and courts, this Court had earlier upheld the 1977 statute. *See Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

optimal setting for raising children. To obtain a marriage license under Florida law, couples do not have to prove their ability to have children, raise them in any particular family structure, or achieve specific state-approved outcomes for their children. *See Kitchen v. Herbert*, 755 F.3d 1193, 1224-25 (10th Cir. 2014) ("The state does not restrict the right to marry or its recognition of marriage based on compliance with any set of parenting roles, or even parenting quality."). As referenced in other *amici* briefs supporting Appellees, parental resources are associated with better outcomes for children, but no one would suggest that lower- or middle-income people should be barred from marrying. The complete bar on marriage for same-sex couples "[makes] no sense in light of how [Florida] treat[s] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985)).

The Supreme Court has also recognized that whether members of a couple would be good parents, or whether they could even support children, are not permissible bases upon which to deny them the right to marry. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), Wisconsin sought to deny marriage licenses to parents the State considered irresponsible because they had failed to pay child support, but the Court held that conditioning marriage on a person's parenting behavior was an unconstitutional infringement of the right to marry. *Id*. at 386, 388-

89. In this vein, courts have rejected the "optimal" child-rearing theory in part because marriage is not and cannot be restricted to individuals who would be "good" parents. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 900 (Iowa 2009) (noting that Iowa did "not exclude from marriage other groups of parents—such as child abusers, sexual predators, parents neglecting to provide child support, and violent felons—that are undeniably less than optimal parents").

Excluding same-sex couples from marriage and its attendant legal protections because they allegedly do not provide a certain kind of parenting, when different sex couples are not required to have children at all—much less biological children—imposes a colossal burden on same-sex couples. A desire to mark the relationships and parenting abilities of same-sex couples as less worthy of respect is an impermissible interest, under any standard of constitutional review. *Windsor*, 133 S. Ct. at 2695-96.

III. FLORIDA'S MARRIAGE BAN BEARS NO RATIONAL RELATIONSHIP TO THE WELL-BEING OF CHILDREN.

There is no rational or logical connection between Florida's marriage ban and any of the purported interests identified by its proponents. It is utterly implausible to believe that barring recognition of married same-sex couples and their children improves the well-being of children raised by different-sex couples. The ban does, however, cause palpable and direct harm to the children of same-sex parents.

A. The Marriage Ban Does Nothing to Further the Well-being of Children Raised by Different-Sex Couples.

Appellants' *amici* claim that Florida has an interest in preserving "the principle of sexual-reproductive complementarity" in marriage, (George Br. 7), in order "to link children to their own mother and father and to vindicate their moral claim to be reared by [them.]" (*Id.* at 10.)

Insofar as marriage laws may encourage different-sex couples to marry, there is no basis in logic or social experience to suppose that such couples will lose respect for the institution if same-sex couples are permitted to marry in Florida. Likewise, there is no logical reason to believe that permitting same-sex couples to marry would have *any* influence on the marital or procreative decisions of different-sex couples, much less cause these couples to care less about their children, suffer a decline in fertility, have more extramarital affairs, work longer hours, or drink more. (*See, e.g.*, George Br. 8-9, 12-13; ACP Br.) These suppositions make sense only if same-sex relationships are so abhorrent as to contaminate the institution of marriage to the point that different-sex couples will shun it. Appellants ask this Court to bar committed same-sex couples from marriage, stigmatize them and their children, and deny them access to substantial state and federal benefits, on the imaginary basis that this will make marriage more attractive to different-sex couples.

Because there is no logical connection between the means and the purported end, numerous courts have rejected these arguments. *See, e.g.*, *Kitchen*, 755 F.3d at 1223 ("[I]t 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."); *De Leon v. Perry*, 975 F. Supp. 2d 632, 655 (W.D. Tex. 2014) ("[T]he Court finds the argument that allowing same-sex couples to marry will undermine procreation is nothing more than an unsupported 'overbroad generalization' that cannot be a basis for upholding discriminatory legislation.") (citation omitted); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1145 (D. Or. 2014) ("Opposite-gender couples will continue to choose to have children responsibly or not, and those considerations are not impacted in any way by whether same-gender couples are allowed to marry.").

B. The Marriage Ban Harms the Well-being of Children Raised by Same-Sex Couples.

Although there is not even a rational reason to think that the marriage ban will have any positive effect on the children of different-sex couples, it is certain to harm the children of same-sex couples by denying their families access to hundreds of critical state and federal benefits that are conducive to providing stable and secure environments for raising children.[15] As one District Court summarized, "[i]n

[15] As of 2011, about one in five same-sex couples are raising children under age 18. Gary J. Gates, *Same-Sex and Different-Sex Couples in the American Community Survey: 2005-*

(Footnote continues on next page.)

this most glaring regard, [state marriage bans] fail to advance the State's interest because they withhold legal, financial, and social benefits from the very group they purportedly protect—children." *Latta*, 19 F. Supp. 3d at 1082.

The marriage ban also amounts to an official statement "that the family relationship of same-sex couples is not of comparable stature or equal dignity" to that of married couples. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008). This stigma leads children to understand that the State considers their gay and lesbian parents to be unworthy of participating in the institution of marriage and devalues their families compared to families that are headed by married heterosexuals. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003). Despite Appellant's *amici*'s claim to the contrary, it implicitly and inherently tells these children that their families do not count. (*See, e.g.*, George Br. 4-6, 20.)

In this way, the marriage ban does significant tangible and intangible harm to the children of same-sex couples.

C. Denying Rights and Protections to Children Is a Constitutionally Impermissible Means of Influencing Their Parents' Behavior.

Even if there were a reasonably conceivable connection between the marriage ban and increasing the marriage rates of heterosexual couples or the

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(Footnote continued from previous page.)

2011 (Williams Institute, 2013) at 1, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf.

number of children born to married heterosexual couples, punishing innocent children is an impermissible means of trying to influence the behavior of adults.

Florida's marriage ban functions in a way that is remarkably similar to the manner by which children born out-of-wedlock were denied legal and economic protections and stigmatized under now-repudiated laws in Florida and most other states regarding nonmarital children. Historically, state parentage laws saddled the children of unwed parents with the demeaning status of "illegitimacy" and denied these children important rights in an effort to shame their parents into marrying one another. *See* Melissa Murray, *Marriage As Punishment*, 112 Colum. L. Rev. 1, 33 n.165 (2012) (marriage was offered as a way to lead unwed mothers away "from vice towards the path of virtue"). Florida generally subjected out-of-wedlock children to the same harsh treatment they endured in other states, including denial of rights to a relationship with and support from their fathers, intestate succession, and compensation for their fathers' wrongful death or injury. *See* Steven S. Stephens, 23 Fla. Prac., Florida Family Law § 5:3 (describing the "considerable social stigma attached to being born to an unmarried mother" and the legal disabilities associated with "illegitimacy" during Florida's "bastardy era").

Since the late 1960s, however, the Supreme Court has repudiated laws that discriminate against children based on outmoded concepts of "illegitimacy." In

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), for example, the Court found that

> imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Id. at 175; *see also Levy v. Louisiana*, 391 U.S. 68 (1968).

Consistent with this directive, Florida now recognizes that children of unmarried parents are entitled to the same rights as children born to married parents. *See, e.g.*, Fla. Stat. Ann. § 732.108(2) (inheritance rights from established or acknowledged father, regardless of marital status); *In re Estate of Burris*, 361 So. 2d 152, 155-56 (Fla. 1978) (holding unconstitutional on equal protection grounds different inheritance rights for "illegitimate" and "legitimate" children). In custody disputes, the same factors are considered for determining the best interests of nonmarital and marital children. *See, e.g., Barnes v. Frazier*, 509 So. 2d 401, 402 (Fla. Dist. Ct. App. 1987) (holding that the shared parental responsibility law—"designed to achieve [the] goal" of "treat[ing] both sexes equally"—applies to unmarried parents as well as to married ones). Florida imposes child support and other parental obligations on all parents regardless of their marital status. *See* Fla. Stat. Ann. §§ 61.13, 61.29-61.30, 742.031, 742.10 (support obligations

irrespective of marital status); *Coleman v. Mackey*, 424 So. 2d 170, 171 (Fla. Dist. Ct. App. 1983) (rights to child support "on an equal basis" for marital and nonmarital children).

Florida law and policy no longer support the proposition that it is permissible to deny critical benefits and security to nonmarital children in order to provide more benefits and security to the children of married couples. Accordingly, Appellants' *amici's* argument that Florida's exclusion of same-sex couples from marriage can be justified as an effort to encourage biological, "gender-differentiated" parenting by heterosexuals is fundamentally at odds with Florida's strong policy of equal treatment for *all* children. In exchange for a wholly speculative benefit for the children of heterosexual couples, the children born to and raised by same-sex couples pay the price. This is a legally unacceptable result. As the District Court in *Latta* concluded, "[f]ailing to shield [] children in any rational way, [state marriage bans] fall on the sword they wield against same-sex couples and their families." 19 F. Supp. 3d at 1082-83.

CONCLUSION

Amici ask that this Court affirm the district court's decision in the above-captioned action.

Dated: December 18, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 6,946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the requirements of Fed. R. App. P. 32(a)(5)–(6). It has been prepared using Microsoft Word 2010 in proportionally-spaced 14-point Times New Roman, with footnotes in 12-point Times New Roman.

Dated: December 18, 2014

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I certify that on December 18, 2014 the foregoing document was filed electronically with the Clerk of Court for the Eleventh Circuit Court of Appeals and automatically served on all parties or their counsel of record through the CM/ECF system.

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