APPEAL NO. 14-14061

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER; CHARLES DEAN JONES; STEPHEN SCHLAIRET; OZZIE RUSS; SLOAN GRIMSLEY; JOYCE ALBU; BOB COLLIER; CHUCK HUNZIKER; LINDSAY MYERS; SARAH HUMLIE; ROBERT LOUPO; JOHN FITZGERALD; DENISE HUESO; SANDRA NEWSON; JUAN DEL HIERRO; THOMAS GANTT, JR.; CHRISTIAN ULVERT; CARLOS ANDRADE; RICHARD MILSTEIN; ERIC HANKIN; ARLENE GOLDBERG; CAROL GOLDWASSER;

Plaintiffs-Appellees,

v.

ATTORNEY GENERAL, STATE OF FLORIDA,

Defendant,

JOHN H. ARMSTRONG, In His Official Capacity as Agency Secretary for the Florida Department of Management Services; CRAIG J. NICHOLS, In His Official Capacity as Agency Secretary for the Florida Department of Management Services; HAROLD BAZZELL, In His Official Capacity as Clerk of Court and Comptroller for Washington County Florida,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida
Civil Case No. 4:14-cv-00107-RH-CAS (Judge Robert L. Hinkle)

AMICUS CURIAE BRIEF OF MARRIAGE LAW FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER, et al.;

Plaintiffs-Appellees,

v.

JOHN H. ARMSTRONG, et al.,

Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Marriage Law Foundation, pursuant to 11th Cir. R. 26.1-1, certifies that the following persons and entities have an interest in the outcome of this case and/or appeal:

American Civil Liberties Union of Florida, Inc., The

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc.

Albu, Joyce

Andrade, Carlos

Armstrong, Dr. John H.

Ausley McMullen

Bazzell, Harold

Bledsoe, Jacobson, Schmidt, Wright & Wilkinson

APPEAL NO. 14-14061

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER, et al.;

Plaintiffs-Appellees,

v.

JOHN H. ARMSTRONG, et al.,

Defendants-Appellants.

Bondi, Pamela Jo, Attorney General of Florida

Brenner, James Domer

Citro, Anthony

Collier, Bob

Cooper, Leslie

Crampton, Stephen M.

Del Hierro, Juan

DeMaggio, Bryan E.

Duncan, William C.

Emmanuel, Stephen C.

Fitzgerald, John

Florida Conference of Catholic Bishops, Inc.

Florida Family Action, Inc.

Gantt, Thomas, Jr.

APPEAL NO. 14-14061

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JAMES DOMER BRENNER, et al.;

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v.

JOHN H. ARMSTRONG, et al.,

Defendants-Appellants.

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

Jacobson, Samuel

Jeff Goodman, PA

Jones, Charles Dean

Kachergus, Matthew R.

APPEAL NO. 14-14061

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FOR THE ELEVENTH CIRCUIT

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Defendants-Appellants.

Kayanan, Maria

Liberty Counsel, Inc.

Liberty Counsel Action, Inc.

Loupo, Robert

Marriage Law Foundation

Mihet, Horatio G.

Milstein, Richard

Myers, Lindsay

Newson, Sandra

Nichols, Craig J.

Podhurst Orseck, P.A.

Rosenthal, Stephen F.

Russ, Ozzie

Save Foundation, Inc.

APPEAL NO. 14-14061

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER, et al.;

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v.

JOHN H. ARMSTRONG, et al.,

Defendants-Appellants.

Schlairet, Stephen

Scott, Rick

Sevier, Chris

Sheppard, White, Kachergus and DeMaggio, P.A.

Sheppard, William J.

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

Tanenbaum, Adam S.

Tilley, Daniel B.

Ulvert, Christian

White, Elizabeth L.

Winsor, Allen C.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

In scholarship and advocacy, the Marriage Law Foundation and its officers have consistently sought to explain and defend the nearly universal and time-tested understanding of marriage as an institution uniting a husband and wife. Extensive research and publication have allowed for firm conclusions about the meaning and nature of marriage that are central to the questions raised in this case. *Amicus* respectfully suggests the historical evidence it will present in this brief can be invaluable to this court in considering the arguments asserted in support of a court mandate to the State of Florida that it redefine marriage.

STATEMENT OF THE ISSUES

Whether the Fourteenth Amendment to the United States Constitution requires States to abandon their legal recognition of marriage as the union of a husband and wife.

SUMMARY OF ARGUMENT

In this case, plaintiffs challenge the constitutionality of a provision of the Florida Constitution, art. I, sec. 27, ratified by voters in a statewide election in 2008. In doing so, they exercised the profoundly significant right and authority reserved to them by the United States Constitution to provide for the "regulation of domestic

[1] This brief is filed with the consent of all parties. No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than amicus curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

relations." *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (citing *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). This principle of electoral self-determination is foundational in our society.

When voters ratified the Marriage Amendment, they simply chose to retain the understanding of marriage that had prevailed throughout the history of the state, and likely universally throughout time and across cultures. *See Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) ("[t]he idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.") They did this in order to retain the benefits marriage has provided through time related to securing children's well-being.

These two crucial interests—protecting the self-determination of the people of the state and preserving the child-centered purposes of Florida's marriage law—provide rational, even compelling, reasons to find that the laws consistent with constitutional guarantees.

ARGUMENT

I. IN RETAINING THE DEFINITION OF MARRIAGE SHARED BY NEARLY ALL CULTURES THROUGH TIME, THE VOTERS OF

FLORIDA WERE ACTING REASONABLY TO RETAIN THE BENEFITS MARRIAGE HAS LONG PROVIDED TO SOCIETY.

The state, in recognizing marriage, does not write on a blank slate. Specifically, when Florida voters ratified the Marriage Amendment, they were not creating a new legal arrangement to accomplish novel purposes, and specifically not trying to send a message of stigma or exclusion. Rather, they reaffirmed an understanding of marriage consistently accepted across nearly all cultures throughout recorded history. Such remarkable consensus is due to the need for societies to advance important child-centered interests by encouraging the potentially procreative relationships of men and women to take place in a setting where the children who may result have the opportunity to know and be reared by a mother and father firmly bound to one another. As *amici* Scholars of the Institution of Marriage have shown, a large body of research demonstrates that marriage in fact advance these crucial interests.

A. Reflecting Biological and Social Realities, Marriage Has Widely Been Understood To Be the Union of a Man and a Woman and to Serve, Among Other Purposes, Interests Related to Procreation.

Marriage has been widely understood to be the union of an opposite-sex couple. This widely held understanding of marriage is inextricably bound to the basic realities of sex difference and the related procreative capacity of male-female couplings. Indeed, as the distinguished sociologist Claude Levi-Strauss explained, marriage is "a social institution with a biological foundation." Claude Levi-Strauss,

Introduction in A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (vol. 1, Andre Burguiere, et al., eds. 1996). And a group of respected family scholars similarly acknowledged that "as a virtually universal human idea, marriage is about regulating the reproduction of children, families and society." W. BRADFORD WILCOX, ET AL., WHY MARRIAGE MATTERS 15 (2d ed. 2005).

Marriage has, of course, served a variety of purposes across a variety of cultures and times, but this one purpose has been consistent. As Georg Simmel, an early sociologist, explained: "The peculiar combination of subjective and objective, personal and super-personal or general elements in marriage is involved in the very process that forms its basis—physiological pairing. It alone is common to all historically known forms of marriage, while perhaps no other characteristic can be found without exceptions." GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 131 (Kurt H. Wolff, ed. 1950).

This ubiquitous recognition of marriage as an opposite-sex coupling is not arbitrary, much less a multicultural, multi-millennial conspiracy to exclude identified groups. Rather, it is an acknowledgment that marriage should serve purposes directly connected to the nature of the relationship. More specifically, marriage has been universally recognized as a way to encourage those who are responsible for creating a child—a mother and father—to take responsibility for the child that their union may produce. A prominent sociologist explains this dynamic:

"[t]he genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents . . . the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring." Kingsley Davis, *The Meaning & Significance of Marriage in Contemporary Society* in CONTEMPORARY MARRIAGE: PERSPECTIVES ON A CHANGING INSTITUTION 7-8 (Kingsley Davis, ed. 1985). Another sociologist concurs: "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2003).

This reality has been so widely remarked upon as to become a truism. Professor Levi-Strauss noted that "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." CLAUDE LEVI-STRAUSS, THE VIEW FROM AFAR 40-41 (1985). Another historian noted that "[m]arriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies." G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988). The Anthropological Institute of Great Britain defined marriage "as a union between a man and a woman such that children borne by the woman are recognized

as the legitimate offspring of both partners." ANTHROPOLOGICAL INSTITUTE OF GREAT BRITAIN, NOTES AND QUERIES ON ANTHROPOLOGY 71 (6th ed. 1951).

Whatever the precise origin and contours of the marriage relationship over time and across societies, it is clear that this social institution is rooted in deep realities and oriented towards a purpose uniquely tied to its nature as the union of the sexes—a pairing that alone may naturally create a child and provide that child with a social context that accounts for his or her biological origins.

Notably, in 1967, when the Supreme Court first applied the right to marry to invalidate a state regulation dealing with marriage, it cited two cases as precedent, both of which centered upon procreation and the family. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The first was *Skinner v. Oklahoma*, which had explicitly linked marriage and procreation: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The second was *Maynard v. Hill*, which called marriage "the foundation of the family." *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

State courts addressing arguments for redefining marriage have noted the links between marriage and procreation in the right to marry cases. The Washington Supreme Court recognized that "[n]early all United States Supreme Court decisions declaring marriage to be a fundamental right expressly link marriage to fundamental

rights of procreation, childbirth, abortion, and childrearing." *Andersen v. King County*, 138 P.3d 963, 978 (Wash. 2006). And Maryland's highest court concurred in this recognition:

> All of the cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species. . . . Thus, virtually every Supreme Court case recognizing as fundamental the right to marry indicates as the basis for the conclusion the institution's inextricable link to procreation, which necessarily and biologically involves participation (in ways either intimate or remote) by a man and a woman. *Conaway v. Deane*, 932 A.2d 571, 621 (Md. 2007).

In short, our Nation's law, along with the law of our antecedents from ancient to modern times, has consistently recognized the biological and social realities of marriage, including its nature as a male-female unit advancing purposes related to procreation and childrearing.

B. The Florida Marriage Laws Marriage Amendment Should Be Understood as an Effort to Preserve the Interests Historically Served by the State's Recognition of Marriage.

Consistent with these historical understandings, Texas has always understood marriage as the union of a husband and wife. Thus, when voters ratified the Marriage Amendment in 2005, they were acting to preserve the interests marriage has always been understood to serve. This is not to say, of course, that marriage does not serve other important interests, only that marriage has never been understood to be totally divisible from interests grounded in child well-being.

In trying to preserve a pre-existing understanding of marriage, Florida marriage laws sought to preserve the social goods marriage has produced across time and cultures—the goods that help explain the remarkable universality of the institution. This is not to say that voters were merely trying to keep the status quo for its own sake. It is, of course, true that the longevity of a practice, in itself, does not settle the question of its constitutionality. *See Heller v. Doe*, 509 U.S. 312, 326 (1993). But the Supreme Court has noted: "That the law has long treated the classes as distinct, however, suggests that there is commonsense distinction between" those the law in that case affected. *Id*. In other words, a longstanding practice is not unassailable but ought to be given great deference if it reflects lessons of experience as Texas' marriage laws clearly do.

The relevance of this observation to the question of marriage is obvious. A number of federal and state cases have recognized that state marriage laws are constitutionally valid because they ensure these benefits to society. Recently, the Sixth Circuit held that a state's creation of "an incentive for two people who procreate together to stay together for purposes of rearing offspring. . . . does not convict the States of irrationality, only of awareness of 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" *DeBoer v. Snyder*, Case No. 14-1341 at 21 (6th Cir. 2014) (slip op.). The Eighth

Circuit has noted that Nebraska's marriage amendment was justified by the purpose of "encourag[ing] heterosexual couples to bear and raise children in committed marriage relationships." *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006). The New York Court of Appeals said New York "could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born." *Hernandez v. Robles*, 7 N.Y.3d 338, 350 (N.Y. 2006). Maryland's highest court said: "marriage enjoys its fundamental status due, in large part, to its link to procreation. This 'inextricable link' between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding)." *Conaway v. Deane*, 932 A.2d 571, 630-631 (Md. 2007) (citations omitted). Washington's Supreme Court similarly held that "limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both." *Andersen v. King County*, 138 P.3d 963, 985 (Wash. 2006). In a case involving a separate legal matter, adoption, the Eleventh Circuit endorsed a Massachusetts' judge's statement that "the Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children." *Lofton v. Secretary of Department of Children*

& Family, 385 F.3d 804, 825 n. 26 (11th Cir. 2004) (quoting *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 999 (2003) (Cordy, J., dissenting).

The state can also reasonably assume that some or all of the functions that have demonstrably been served by recognition of marriage from time immemorial would be at risk if marriage is redefined to become government endorsement of private agreements. The brief of Scholars of the Institution of Marriage elucidates the mechanisms by which these benefits would be lost. For instance, When Maine's legislature enacted a new definition of marriage as the union of any two people, it also struck out the official purpose statement in the previous marriage law. 2009 Maine LD1020. The deleted provision read:

> The union of one man and one woman joined in traditional monogamous marriage is of inestimable value to society; the State has a compelling interest to nurture and promote the unique institution of traditional monogamous marriage in the support of harmonious families and the physical and mental health of children; and that the State has the compelling interest in promoting the moral values inherent in traditional monogamous marriage. 19-A Maine Rev. Stat. §650.

It's clear that one change that will come as a result of redefining marriage is diluting or eliminating its formerly child-centered nature.

The redefinition could also more directly work to separate a child from at least one of her parents. For instance, a trial court in New Jersey concluded that "a child born within the context of a marriage with two female spouses" was the child of the mother and the mother's female partner. *In re Parentage of Robinson*, 890 A.2d

1036, 1042 (N.J. Super. 2005). A Massachusetts court granted joint legal custody to a child's mother and the mother's former same-sex spouse, even though the state's paternity presumption for artificial insemination referred to "husbands." *Della Corte v. Ramirez*, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012). Citing the state's same-sex marriage case, an Iowa court held: "As parents, a mother's wife is identical to a mother's husband in every common and ordinary sense except for biology." *Buntemeyer v. Iowa Dep't of Pub. Health*, No. CV 9041, slip op. at 15 (Iowa Super 2012). Another Iowa case held the state constitution required the state's paternity presumption to apply to a female spouse of a child's mother because of the same-sex marriage of the two. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335 (Iowa 2013).

Thus, same-sex marriage becomes a means of separating children, by operation of law, from at least one of their parents, not as a result of the parent's unfitness or inability to care for the child but in order to facilitate the adult arrangement of the other parent.

Voters could clearly conclude that the experience of millennia suggests that it will matter whether its laws (1) recognize the institution of marriage as having a larger social purpose related to promoting the welfare of children or (2) redefine marriage to create a vehicle for bestowing government approbation on private

relationship for purposes of sending a message about the worth of alternate family arrangements.

Indeed, the state's recognition of marriage cannot plausibly be attributed to a desire to be either inclusive or exclusive of alternative family forms. As New York's appellate division has noted, marriage is "not primarily about adult needs for official recognition and support." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (N.Y. App. 2005). Rather, it is about "the well-being of children and society." *Id*. It hardly seems likely Texas voters were trying to make a statement about sexual orientation by retaining laws that predate the state when, as the Supreme Court has noted, "according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century." *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

C. Attempts to Downplay the Significance of the State Interests in Marriage Related to Procreation are Misguided.

Advocates of redefining marriage seek to dilute the centrality of marriage's male-female requirement by suggesting that it is like other historically rejected legal elements of marriage. But unlike the examples they invoke, the historical record demonstrates that the male-female understanding of marriage is fundamental to its very definition and tied directly to its animating purpose of binding children to the mothers and fathers whose sexual relationships brought them into the world.

Some compare current marriage laws to the racist anti-miscegenation laws of times gone by. But the history of these racially-discriminatory laws makes clear that race restrictions, unlike the sex of the parties, were never central to marriage.[2] For instance, "[u]nder the common law of England, difference in race was not a disability rendering parties incapable of contracting marriage." Robert Kovach, Note, *Miscegenation Statutes and the Fourteenth Amendment* 1 CASE W. RES. L. REV. 89, 89 (1949); Irving G. Tragen, *Statutory Prohibitions Against Interracial Marriage*, 32 CAL. L. REV. 269, 269 & n.2 (1944). Nearly half of the thirteen colonies did not have these laws; some states never enacted them; and even in the Southern states it was only during Reconstruction that anti-miscegenation laws "spread to a number of Southern states for the first time." Jill Elaine Hasday, *Federalism and the Family Reconstructed* 45 UCLA L. REV. 1297, 1345 n. 172 (1998); Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s* 70 CHI.-KENT L. REV. 371, 372 (1994); Lynn Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the 'Loving Analogy' for Same-Sex Marriage*, 51 HOW. L.J. 117, 180-81 (2007). Additionally, "many states repealed their anti-miscegenation laws after ratification of the Civil War amendments." James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy* 73 B.U. L.

[2] Even the most radical district court opinion on marriage admits that race "restrictions were never part of the historical core of the institution of marriage." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010).

REV. 93, 98 (1993) (citing ROBERT J. SICKELS, RACE, MARRIAGE AND THE LAW 64 (1972)). Throughout history, then, race has never been a central feature of the definition of marriage.

By contrast, the same cannot be said of gender, which has always been at the core of the marriage definition. Indeed, just five years after the Supreme Court invalidated Virginia's anti-miscegenation law, it summarily and unanimously rejected a claim that the Fourteenth Amendment required a state to redefine marriage to include same-sex couples. *Baker v. Nelson*, 409 U.S. 810 (1972). This result is not surprising because throughout history the requirement "that the parties should be of different sex," unlike racial restrictions on marriage, "has always . . . been deemed requisite to the entire validity of every marriage." JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE §225 (1st ed. 1852).

Common objections to the social interests in marriage related to procreation are similarly flawed. An oft-used tactic for avoiding the historical lesson of marriage's universal link to procreation and childrearing has been to suggest that it is irrelevant because of instances where married couples cannot or do not have children. But this is a complete red herring.

The existence of infertile married couples does not vitiate the child-centered purposes of marriage, universally recognized through time and across cultures. All of the cultures that have recognized marriage have understood that some couples

cannot or will not have children. *Wendel v. Wendel*, 30 A.D. 447, 449 (N.Y. App. 1898) ("it has never been suggested that a woman who has undergone [menopause] is incapable of entering the marriage state"). But the fact that the traditional marriage model might include some male-female couples who do not fulfill marriage's primary social function does not mean that such unions either undermine that function or fail to fulfill other valuable and related functions.

Marriage is an essential social paradigm, a model, a norm that teaches, guides, and molds, albeit imperfectly and incompletely. As one of the dissenters in Massachusetts' same-sex marriage case noted: "Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined (particularly in the modern age of widespread effective contraception and supportive social welfare programs), but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism." *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting). Allowing infertile couples to marry does not change this central purpose of marriage in the least.

One obvious practical reason government does not limit marriage to fertile couples is that it would be difficult (if not impossible), and certainly inappropriately intrusive, to determine ahead of time which couples are fertile. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J.,

dissenting). Whether a couple is fertile is often unknowable, and it is not uncommon to hear of married couples who learn that they cannot have children, adopt a child, and are then surprised to learn that the wife has become pregnant. Moreover, some couples who do not initially plan to have children may later change their minds or conceive unintentionally. *Morrison v. Sadler*, 821 N.E2d 15, 24-25 (Ind. App. 2005). Even in an age of easily-available contraception, a large majority of births are reportedly "unintended" by either the mother or father.[3]

The Indiana Court of Appeals already addressed and cogently rejected the fertility arguments raised by those seeking to redefine marriage, characterizing such contentions as little more than a defective "overbreadth argument":

> A reasonable legislative classification is not to be condemned merely because it is not framed with such mathematical nicety as to include all within the reason of the classification and to exclude all others . . . There was a rational basis for the legislature to draw the line between opposite-sex couples, who as a generic group are biologically capable of reproducing, and same-sex couples, who are not. This is true, regardless of whether there are some opposite-sex couples that wish to

[3] Joyce C. Abma, et al., *Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth* 23 VITAL HEALTH STATISTICS 28, table 17 (1997) (70.4 percent of births to married women were intended by both parents, compared to just 28 percent of births to unmarried mothers). *See also* Stanley K. Henshaw, *Unintended Pregnancies in the United States* 30 FAMILY PLANNING PERSPECTIVES 24, 28, table 3 (1998); Haishan Fu, et al., *Contraceptive Failure Rates: New Estimates from the 1995 National Survey of Family Growth* 31 FAMILY PLANNING PERSPECTIVES 55, 56 (1999); James Trussel & Barbara Vaughn, *Contraceptive Failure, Method-Related Discontinuation and Resumption of Use: Results from the 1995 National Survey of Family Growth* 31 FAMILY PLANNING PERSPECTIVES 64, 71 (1999).

> marry but one or both partners are physically incapable of reproducing. *Morrison*, 821 N.E.2d at 27.

Further, a married husband and wife who cannot or do not have a child through their own sexual relationship still advance the historically-recognized procreative purposes of marriage. The interest in responsible procreation and childrearing is not solely in the birth of children, but in the rearing of children by a mother and father in a family unit once they are born. As the New York Court of Appeals explained, the state's interest in procreation includes more than just biological reproduction. The state can "rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father" because "[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006). And while "[i]t is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes— . . . the Legislature could find that the general rule will usually hold." *Id*.

Legal historian John Witte agrees, explaining that:

> Procreation . . . means more than just conceiving children. It also means rearing and educating them for spiritual and temporal living—a common Stoic sentiment. The good of procreation cannot be achieved in this fuller sense simply through the licit union of husband and wife in sexual intercourse. It also requires maintenance of a faithful, stable, and permanent union of husband and wife for the sake of their children.

> John Witte, Jr., *Propter Honoris Respectum: The Goods and Goals of Marriage* 76 NOTRE DAME L. REV. 1019, 1035 (2001).

A number of historical sources clearly note that the purposes served by marriage include child well-being in addition to mere propagation. *Conaway v. Deane*, 932 A.2d 571, 633 (Md. 2007). As Maryland's Court of Appeals explained, marriage is "conferred on opposite-sex couples not because of a distinction between whether various opposite-sex couples actually procreate, but rather because of the possibility of procreation." *Conaway v. Deane*, 932 A.2d 571, 633 (Md. 2007).

In addition, the law is concerned with encouraging those who might create children to take responsibility for them and not to create children in unstable nonmarital settings. As one commentator has explained, the law's "concern with illegitimacy was rarely spelled out, but discerning it clarifies why courts were so concerned with sex within marriage and renders logical the traditional belief that marriage is intimately connected with procreation even as it does not always result in procreation." Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage* 102 COLUM. L. REV. 1089, 1114-15 (2002). As Massachusetts Justice Cordy explains, "[t]he institution of marriage encourages parents to remain committed to each other and to their children as they grow, thereby encouraging a stable venue for the education and socialization of children." *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

Furthermore, couples who rear children via adoption are serving part of marriage's procreation and childrearing functions. For children who would otherwise be deprived of a mother or father because of death, abuse, neglect, or abandonment still have that opportunity with another married man and woman.

Even couples who neither have nor rear children set an important example for those that may. Their observance of vows of faithfulness reinforces the social norm that men and women in a sexual relationship should join together in stable and committed marital relationships.

* * *

When the voters of Florida adopted the marriage amendment, they acted to retain in their law an understanding of marriage that, until very recently, was recognized universally and without exception throughout time and across cultures. That conception of the institution of marriage has consistently been understood to advance crucial social interests in the bearing and rearing of children. The remarkable consistency of this understanding makes clear that the decision of the voters of Florida was anything but irrational.

II. THE FLORIDA MARRIAGE AMENDMENT ALSO ADVANCES AN IMPORTANT STATE INTEREST IN PRESERVING CITIZEN SELF-DETERMINATION IN AN AREA OF TRADITIONAL STATE CONCERN.

The interest in "increase[d] opportunity for citizen involvement in democratic processes" (*Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)) is particularly important

in a case such as this in which the court is asked to second-guess a decision arrived at through a process which involved the citizens of a state acting in their direct and representative capacities. As Justice Black said, "the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights." *In re Winship*, 397 U.S. 358, 385 (1970) (Black, J., dissenting).

As the U.S. Supreme Court has explained, "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The constitutional system of federalism rests on two conceptual pillars. First is that the powers of the national government are "delegated" rather than inherent powers. Second is that the powers of the States are "reserved" powers. As James Madison explained: "The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite." THE FEDERALIST No. 45, at 241 (George W. Carey & James McClellan, eds. 2001). This system is founded on the understanding that "the people are the source of authority [and] the consequence is, that they . . . can distribute one portion of power, to the more contracted circle, called state governments: they can also furnish another proportion to the government of the United States." *James Wilson Replies to Findley*, Dec. 1, 1787, *in* 1 DEBATES ON THE CONSTITUTION 820 (Bernard

Bailyn ed., 1993). "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2577 (2012).

Under our federal system, "the powers reserved to the States consist of the whole, undefined residuum of power remaining after taking account of powers granted to the National Government." *United States v. Comstock*, 560 U.S. 1951, 1967 (2010) (Kennedy, J., concurring).

For this court to rule that the United States Constitution mandates that the state redefine marriage would unnecessarily federalize a question that is undoubtedly within the "residuum" of power reserved to the states. As the Supreme Court has noted: "One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 12 (2004). To intervene in state regulation of marriage would "thrust the Federal Judiciary into an area previously left to state courts and legislatures." *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 73 note 4 (2009). It would create "a federal intrusion on state power" and "disrupt[] the federal balance." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). All without any clear textual or precedential direction to do so.

As the Supreme Court forcefully reiterated last term: "By history and tradition the definition and regulation of marriage . . . has been treated as being within the

authority and realm of the separate States." *Id*. at 2689-2690. The Court noted "[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens." *Id*. at 2691. Further, "[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.'" *Id*.

It has been so since the beginning: "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*. at 2680-2681 (quoting *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, 383–384 (1930)). The Court explained that, "'the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.'" *Id*. at 2691 (quoting *Haddock* v. *Haddock*, 201 U. S. 562, 575 (1906)).

"Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state law policy decisions with respect to domestic relations." *Id*. Thus, it is a "long established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though

they may vary, subject to constitutional guarantees[4], from one State to the next." *Id*. at 2692.

There is no reason for this court to depart from this "long established precept" by holding that the federal courts now have the authority to superintend the domestic relations laws of the states.

As Justice Kennedy explains, the federalist "theory that two governments accord more liberty than one requires for its realization two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). He continued:

> Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power. *Id*. (citations omitted).

The Supreme Court's recent decision striking down the federal Defense of Marriage Act, which the Court said "departs from this history and tradition of

[4] The constitutional guarantees referenced are not applicable here since all of the cases that have constrained the state's regulation of marriage have involved laws that prevented individuals otherwise qualified for marriage from marrying, and have not gone to the essentials of what marriage means as the claim in this case does. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

reliance on state law to define marriage," stresses this important value of political self-determination. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). In that case, the Court spoke of the New York legislature's decision in terms that stressed the importance of citizen involvement: "After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage." *Id*. at 2689. The Court said the decision "reflects . . . the community's considered perspective" (*id*. at 2692-2693) and that "New York was responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.'" *Id*. at 2692 (quoting *Bond* v. *United States*, 131 S.Ct. 2355, 2359 (2011). The majority could not have been clearer when it said: "The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other." *Id*.

This term, the Court has spoken even more emphatically about the importance of allowing state citizens to set policy on controversial matters. Weeks ago, a Supreme Court majority upheld a Michigan constitutional amendment enacted, like the state's marriage amendment, "[a]fter a statewide debate." *Schuette v. BAMN*, 572 U.S. __ (2014), slip op at 2. Writing for the plurality, Justice Kennedy made clear that the federal courts "may not disempower the voters from choosing which path to

follow" when "enacting policies as an exercise of democratic self-government." *Id*. at 13. The plurality characterized the voters' action as "exercis[ing] their privilege to enact laws as a basic exercise of their democratic power." *Id*. at 15. So, too, with the Amendment challenged in this case. Justice Kennedy's words fit well the Texas Marriage Amendment: "freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id*. at 15-16. This is true even though the issue "raises difficult and delicate issues" and embraces "a difficult subject." *Id*. Justice Kennedy rejected the idea "that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate." *Id*. at 16. To accept this idea would have been "an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common . . . the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id*. He concluded: "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id*. at 17. In his concurrence, Justice Breyer explains "the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits" of race-conscious programs. *Id*. at 3 (Breyer, J, concurring). This passage too is instructive

in this case where the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of preserving marriage as the union of a husband and wife or redefining it to include same-sex couples.

Clearly, state decisions reflecting the consensus of citizens about a matter as fundamental as the definition of marriage—the foundation of the family which is, in turn, the most basic unit of society—ought to be entitled to a high degree of respect.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this court reverse the decision of the court below.

Dated: November 21, 2014.

Respectfully submitted,

/s William C. Duncan
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(c)

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,379 words.

Dated: November 21, 2014.

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CERTIFICATE OF SERVICE

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

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