Case Nos. 14-1167(L), 14-1169, 14-1173

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC, ET AL.,
Plaintiffs-Appellees,
and
JOANNE HARRIS, ET AL.,
Intervenors,

v.

GEORGE E. SCHAEFER, III,
Defendant-Appellant,
and
JANET M. RAINEY,
Defendant-Appellant,
and
MICHÈLE B. MCQUIGG,
Intervenor / Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, Norfolk Division
(No. 2:13-cv-00395-AWA-LRL)

BRIEF OF *AMICI CURIAE* MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DISTRICT OF COLUMBIA, ILLINOIS, IOWA, MAINE, MARYLAND, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OREGON, VERMONT, AND WASHINGTON IN SUPPORT OF PLAINTIFFS-APPELLEES, INTERVENORS, AND DEFENDANT-APPELLANT JANET M. RAINEY

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INTEREST OF *AMICI CURIAE*

Amici States Massachusetts, California, Connecticut, the District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Vermont, and Washington[1] file this brief in support of Appellees Timothy B. Bostic, et al., Intervenors Joanne Harris, et al., and Defendant-Appellant Janet Rainey as a matter of right pursuant to Fed. R. App. P. 29(a).

As in other cases raising constitutional challenges to state marriage laws, there is considerable agreement between *Amici* States and those States that defend exclusionary laws. All States agree that marriage is a core building block of society; as a result, they regulate entry into, responsibilities during and after, and exit from marriage. Moreover, States establish policies that encourage individuals to get and stay married because they recognize that marriage provides stability for families, households, and the broader community; that children are better off when they are raised by loving, committed parents; and that state resources are preserved when spouses provide for each other and their children. On all of these points—and many more—all States are in accord.

[1] The District of Columbia, which sets its own marriage rules, is referred to as a State for ease of discussion.

But disagreement exists about several points that are dispositive of the outcome of this case. *Amici* States file this brief in strong support of the right of same-sex couples to marry and to rebut certain assertions made by Appellants Schaefer and McQuigg, and their *amici*. Depriving individuals of the fundamental right to marry the partner of their choice cannot be justified by pointing to history or tradition, or by speculating about the potential negative outcomes that may result. *Amici* States speak from experience when describing the positive impact of the transition from marital exclusion to equality. The institution of marriage is strengthened when unnecessary and harmful barriers are removed, and our communities are enriched when all citizens have an equal opportunity to participate in civic life.

Based on our common goals of promoting marriage, protecting families, nurturing children, and eliminating discrimination, we join in asking the Court to affirm the judgment of the district court below.

SUMMARY OF ARGUMENT

Throughout our Nation's history, marriage has maintained its essential role in society and has been strengthened, not weakened, by removing barriers to access. In relatively recent history, societal advances have resulted in greater access to and equality within marriage, including by allowing interracial couples to marry. Over the past decade, this evolution has continued as same-sex couples have been permitted to wed. Virginia's exclusion of same-sex couples from the benefits and obligations of marriage is unconstitutional. Denying gays and lesbians the fundamental right to wed their partners offends basic principles of due process and equal protection, and fails to advance any legitimate governmental interest.

Since the Founding, the States have sanctioned marriages to support families, strengthen communities, and facilitate governance. All state interests are furthered by allowing same-sex couples to marry. Attempts to justify exclusionary laws by recasting the States' interests in marriage as singularly focused on the procreative potential of different-sex couples are misguided and lack any basis in law or history. Moreover, there is no rational relationship between encouraging responsible procreation by different-sex couples and excluding same-sex couples from marriage.

The laws at issue in this case cannot be upheld based on traditional ideas of marriage being between a man and a woman, nor can they be justified by speculation regarding the injuries same-sex marriage will inflict on the institution. The Supreme Court rejected similar conjecture in *Loving v. Virginia*, 388 U.S. 1 (1967), and the experience of *Amici* States belies such speculation. That experience demonstrates that the institution of marriage not only remains strong, but is invigorated by the inclusion of gays and lesbians. No State has suffered the threatened adverse consequences. Nor have equal marriage rights weakened the States' ability to impose reasonable regulations on marriage.

Denying same-sex couples this fundamental right deprives them and their families of the many legal, social, and economic benefits of marriage—all without justification. Under any standard of review, the Constitution's guarantees compel the outcome of this case, and marriage equality must become the law.

ARGUMENT

I. EXCLUDING SAME-SEX COUPLES FROM MARRIAGE DOES NOT ADVANCE THE PROFFERED RATIONALES OR ANY OTHER LEGITIMATE STATE INTEREST

Opponents of same-sex marriage argue that States have a legitimate interest in promoting marriage between people of different sexes who may produce children, intentionally or not, to ensure children are raised in the "ideal" family setting. This argument fails rational basis review, because prohibiting marriages between same-sex couples does not advance the asserted interest in protecting children.[2] In fact, excluding same-sex couples from marriage does not help *any* child. This argument also degrades gays and lesbians, distorts history and our legal tradition, and is contrary to the facts and scientific consensus.

A. Opponents Distort History To Justify Their Singular Focus On Procreation

Opponents of same-sex marriage argue that the government's sole interest in recognizing and regulating marriage is the presumed physiological capacity of different-sex couples to produce children. *E.g.*, Indiana Br. 22. They seek to elevate procreation because it "singles out the one unbridgeable difference between

[2] For the reasons set forth in the brief of Appellees Bostic, et al. (pp. 33-39), Intervenors Harris, et al. (pp. 21-33), and Defendant-Appellant Rainey (pp. 24-38), laws that discriminate on the basis of sexual orientation should be subject to heightened scrutiny. However, these laws fail even rational basis review.

same-sex and opposite-sex couples, and transforms that difference into the essence of a legal marriage." *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003). However, encouraging procreation has never been the government's principal interest in recognizing and regulating marriage, and tradition alone cannot sustain discrimination. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008).

Marriage serves as a basic building block of society. Among other things, it helps create economic and health benefits, stabilize households, form legal bonds between parents and children, assign providers to care for dependents, and facilitate property ownership and inheritance. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 961-962 (N.D. Cal. 2010). Marriage thus provides stability for individuals, families, and the broader community. *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999). For example, the security of marital households creates a safety net that ensures that family members are not alone in a time of crisis, and limits the public's liability to care for the vulnerable. *In re Marriage Cases*, 183 P.3d at 423-424.

Marriage also provides couples with greater freedom to make decisions about education and employment knowing that, if one spouse provides the primary economic support, the other will be protected, even in the event of divorce or

death. *Perry*, 704 F. Supp. 2d at 961. Research has also established that married people enjoy greater physical and psychological health and greater economic prosperity than unmarried persons. *Id.* at 962. Recent studies demonstrate that gay men and lesbians also benefit from marriage.[3]

In sum, the *Amici* States favor—and therefore encourage—marriage over transient relationships because marriage promotes stable family bonds, fosters economic interdependence and security, and enhances the well-being of both the partners and their children. *See Goodridge*, 798 N.E.2d at 954. All of these interests are furthered by including same-sex couples in the institution of marriage. Thus, this is *not* a case where the "inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Instead, this is a case where the exclusion of a similarly-situated group undermines the important governmental interests States promote through marriage.

Opponents' exclusive focus on procreation amounts to an unavailing attempt to preserve tradition for its own sake. While it is true that, until recently, States

[3] Gay men experience a decrease in medical care visits, mental health visits, and mental health care costs following the legalization of same-sex marriage. Mark L. Hatzenbuehler et al., *Effect of Same-Sex Marriage Laws on Health Care Use and Expenditures in Sexual Minority Men: A Quasi-Natural Experiment*, Am. J. Pub. Health, Feb. 2012.

licensed marriages only between a man and a woman, such tradition cannot itself justify the continued exclusion of same-sex couples. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (discriminatory classification must serve an "independent and legitimate legislative end"). The Supreme Court rejected this rationale in *Loving*: "'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.'" *Lawrence v. Texas*, 539 U.S. 558, 577-578 (2003), quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

B. Excluding Same-Sex Couples From Marriage Does Not Promote The Well-Being Of Children

All States share a paramount interest in the healthy upbringing of children. Denying same-sex couples the benefits of marriage works against this interest by denying their families those benefits as well—an outcome that can harm children.

Beyond the married couple, marriage improves children's well-being by honoring their parents' relationships and by strengthening their families through, for example, enhanced access to medical insurance, tax benefits, estate and homestead protections, and the application of predictable custody, support, and visitation rules. *See, e.g.*, *Goodridge*, 798 N.E.2d at 956. Children whose parents

are married simply have a better chance of living healthy, financially secure, and stable lives.

Even putting these rights and protections aside, the very status of marriage can have a benefit for a family and especially its children. As the Supreme Court recently recognized:

> The differentiation [between relationships] demeans the couple . . . And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for children to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives.

United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (citation omitted). Indeed, parties and experts on both sides of this debate acknowledge that children benefit when their parents are able to marry. David Blankenhorn, an expert employed by proponents of restrictive marriage laws, admitted that permitting same-sex marriage would likely improve the well-being of gay and lesbian households.[4] Other studies have confirmed this view. For example, a Massachusetts Department of Public Health survey found that the children of married same-sex couples "felt

[4] Lisa Leff, *Defense Lawyers Rest Case at Gay Marriage Trial*, Associated Press, Jan. 27, 2010, http://www.newsday.com/news/nation/defense-lawyers-rest-case-at-gay-marriage-trial-1.1727920 (last visited Apr. 18, 2014).

more secure and protected" and saw "their families as being validated or legitimated by society or the government."[5]

Furthermore, there is no basis for concluding that the exclusion of same-sex couples from marriage would somehow benefit children of different-sex couples. "Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples . . . are included." *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla. 2014). Rather than encourage biological parents to raise their children together, exclusionary marriage laws prevent a different set of parents—same-sex couples—from providing their children with stable family environments.[6] Thus, Virginia's laws work against efforts to ensure that all children are cared and provided for.

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[5] Christopher Ramos, et al., *The Effects of Marriage Equality in Massachusetts: A Survey of the Experiences and Impact of Marriage on Same-Sex Couples*, The Williams Institute, May 2009, at 9, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Ramos-Goldberg-Badgett-MA-Effects-Marriage-Equality-May-2009.pdf (last visited Apr. 18, 2014).

[6] *See, e.g.*, *Goodridge*, 798 N.E.2d at 963 ("[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."); *Andersen v. King Cnty.*, 138 P.3d 963, 1018-1019 (Wash. 2006) (Fairhurst, J., dissenting) ("[C]hildren of same-sex couples . . . actually do and will continue to suffer by denying their parents the right to marry.").

C. Same-Sex Parents Are As Capable As Different-Sex Parents Of Raising Healthy, Well-Adjusted Children

The contention that same-sex couples are somehow less suitable parents is contrary to the experience of the *Amici* States, scientific consensus, and the conclusions of federal courts. For more than 30 years, the *Amici* States have protected the rights of gays and lesbians to be parents.[7] It has been our experience that same-sex parents provide just as loving and supportive households for their children as different-sex parents do. In addition, expanding the number of couples who can legally marry creates more households where adults can raise children together, because some States only permit co-adoption by legally married adults. Given the number of children under state supervision (nearly 400,000 nationwide), all States benefit from having the largest pool of willing and supportive parents.

This experience is confirmed by the overwhelming scientific consensus, which establishes that children raised by same-sex couples fare as well as children raised by different-sex couples, and that gay and lesbian parents are equally fit and

[7] *See, e.g.*, *DiStefano v. DiStefano*, 401 N.Y.S.2d 636 (4th Dept. 1978) ("homosexuality, per se, did not render [anyone] unfit as a parent"); *In re Marriage of Cabalquinto*, 669 P.2d 886, 888 (Wash. 1983) ("homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation").

capable. *Perry*, 704 F. Supp. 2d at 980-981.[8] The most well-respected psychological and child-welfare groups in the nation agree that same-sex parents are as effective as different-sex parents.[9] *See also DeBoer v. Snyder*, 2014 WL 1100794, at *12-13 (E.D. Mich. Mar. 21, 2014) (rejecting optimal childrearing rationale following trial on merits).

In addition, no scientific basis supports the assertion that children need so-called "traditional" male and female role models, or that children need mothers and fathers to perform distinct roles. *Perry*, 704 F. Supp. 2d at 980-981. Such views are disconnected from the "changing realities of the American family," *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality), and reinforce gender-based

[8] *See also Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 87 (Fla. Dist. Ct. App. 2010) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise."); *Varnum v. Brien*, 763 N.W.2d 862, 899 n.26 (Iowa 2009).

[9] These organizations include the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the Psychological Association, the American Psychoanalytic Association, the National Association of Social Workers, the Child Welfare League of America, and the North American Council on Adoptable Children.

stereotyping that courts have rejected in contexts varying from schooling to employment to parenting.[10]

Nor is there any basis for the suggestion that children necessarily benefit from being raised by two biological parents. The most important factors predicting the well-being of a child include (1) the relationship of the parents to one another, (2) the parents' mutual commitment to their child's well-being, and (3) the social and economic resources available to the family. *Perry*, 704 F. Supp. 2d at 980. These factors apply equally to children of same-sex and different-sex parents, and they apply regardless of whether the parents—one, both, or neither—are biological parents.[11] Different-sex and same-sex couples *both* become parents in a variety of ways, including through assistive technology, surrogacy, and adoption, and couples parent in an even greater variety of ways. Ultimately, it is in the States' interest to

[10] *See, e.g.*, *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 733-735 (2003) (finding unconstitutional stereotypes about women's greater suitability or inclination to assume primary childcare responsibility); *United States v. Virginia*, 518 U.S. 515, 533-534 (1996) (rejecting "overbroad generalizations of the different talents, capacities, or preferences of males and females" as justifying discrimination) (citations omitted); *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972) (striking down a statute that presumed unmarried fathers to be unfit custodians).

[11] Many children raised by same-sex parents are raised by one biological parent and his or her partner. Refusing to allow same-sex couples to marry will not increase the likelihood that the biological parent will marry his or her donor or surrogate.

promote the well-being of all these families, in part through the recognition of same-sex marriages.

In *Loving*, the Supreme Court rejected a similar argument advanced by Virginia, which defended its anti-miscegenation law based on its concern for the well-being of children "who become the victims of their intermarried parents." Brief for Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931, at *47-48. The argument made here—that marriage should be limited to different-sex couples because of the supposed disadvantage experienced by children raised in same-sex households, McQuigg Br. 36-39—is not as extreme on its terms, but also seeks to limit marriage rights based on the supposed harm to children. It likewise should be rejected here.

D. Promoting Responsible Procreation Does Not Justify Restricting Marriage To Different-Sex Couples

The notion that marriage is premised on the ability to procreate is antithetical to our legal tradition. Never before has the ability or desire to procreate been a prerequisite for entry into marriage. *See, e.g.*, *In re Marriage Cases*, 183 P.3d at 431. Nor has inability to produce children been grounds for annulment. *See, e.g.*, *Lapides v. Lapides*, 171 N.E. 911, 913 (N.Y. 1930). Some States expressly presume infertility after a certain age for purposes of allocating property, but do not disqualify these individuals from marriage. *See, e.g.*, N.Y.

Est. Powers & Trusts Law § 9-1.3(e) (women over age 55); Il. St. Ch. 765 § 305/4(c)(3) (any person age 65 or older). Individuals who are not free to procreate (prisoners, for example) still have the right to marry. *Turner v. Safley*, 482 U.S. 78, 94-99 (1987). Even parents who are "irresponsible" about their obligations to their children can marry. *Zablocki v. Redhail*, 434 U.S. 374, 389-391 (1978). This is so because States—and the courts—have recognized the autonomy to make personal choices about entry into marriage and procreation as separate fundamental rights. *Loving*, 388 U.S. 1; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Virginia's recognition of different-sex marriages that do not or cannot produce biological children pursues the supposed objective of promoting "responsible procreation" (by married heterosexual couples) in a manner that "[makes] no sense in light of how [it] 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, 447-450 (1985). Many different-sex couples either cannot procreate or choose not to, yet these marriage restrictions do not apply to them. If the States recognized marriage *solely* to further an interest in protecting the children born out of sexual intimacy, then States would not recognize marriages where one or both spouses are incapable or unwilling to bear children. Instead, States recognize marriage to advance *many*

important governmental interests, and allow couples to marry irrespective of their procreative ability or intent.

To save an incongruous rationale, opponents argue that extending marriage to different-sex couples who lack the ability or desire to procreate nonetheless encourages responsible procreation by promoting the "optimal" or "ideal" family structure. *E.g.*, Indiana Br. 20. However, it defies reason to conclude that allowing same-sex couples to marry will diminish the example that married different-sex couples set for their unmarried counterparts. Both different- and same-sex couples model the formation of committed, exclusive relationships, and both establish stable families based on mutual love and support. At best, the "modeling" theory is so attenuated that the distinction it supposedly supports is rendered arbitrary and irrational. *Cleburne*, 473 U.S. at 446. At worst, the theory is a poorly disguised attempt to codify discriminatory views as to what constitutes an ideal family. This is a purpose the Constitution does not permit. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-535 (1973) (bare desire to harm unpopular group is not a legitimate governmental interest).

E. Federalism Considerations Cannot Justify This Marriage Restriction

Opponents contend that, due to considerations of federalism, federal courts should shy away from re-making state marriage policy. They assert that Virginia's

marriage laws are "a proper exercise of [state authority], which has "essential authority to define the marital relation," McQuigg Br. 26. They repeatedly cite to *Windsor* in support of this point.

Windsor, however, addressed the relationship between the States and Congressional power, and did not limit the courts' obligation to analyze state marriage laws in conjunction with constitutional guarantees. *See, e.g.*, *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 981 (S.D. Ohio 2013).[12] Nothing in *Windsor* disturbed the courts' authority to determine whether laws, including state marriage laws, conflict with the Constitution. *Windsor* simply resolved a dispute about Congress's authority to define marital status and affirmed long-standing precedent that marriage policy should be left exclusively to the States. Indeed, "[i]n discussing this traditional state authority over marriage, the Supreme Court repeatedly used the disclaimer 'subject to constitutional guarantees.'" *Bishop*, 962 F. Supp. 2d at 1278-1279, quoting *Windsor*, 133 S. Ct. at 2692.

[12] Even in *Loving*, the State "[did] not contend that its [State police] powers to regulate marriage [were] unlimited notwithstanding the commands of the Fourteenth Amendment." *Loving*, 388 U.S. at 7.

Federalism principles, in fact, dictate that States respect each other's marriage determinations.[13] Individuals do not typically become single when passing state borders. *See, e.g.*, *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958) (recognizing marriage between first cousins, despite Ohio statute to contrary, because Massachusetts allowed it). This is important, because marriage "generally involves long-term plans for how [couples] will organize their finances, property, and family lives." *Obergefell*, 962 F. Supp. 2d at 979. And couples frequently are obliged—whether for personal or professional reasons—to move across state lines. Yet this change in recognition is a common occurrence for same-sex couples. Never before have so many marriages of a *particular type* been categorically disqualified by so many States. The closest historical analogues are the statutes criminalizing interracial marriages by several States. *See, e.g.*, Va. Code § 20-59 (1950). However, even in those circumstances, "decisions concerning the validity of interracial marriages were surprisingly fact-dependent."[14]

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[13] *See, e.g.*, Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 Or. L. Rev. 433, 461 (2005) ("All jurisdictions follow[ ] some version of *lex loci contractus* in evaluating the validity of a marriage.").

[14] Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2152 (2005).

Recently, categorical bans on recognition of same-sex marriages have been called into serious doubt. Federal courts in Ohio, Kentucky, and Texas have ruled unconstitutional those States' refusal to recognize valid same-sex marriages from other States. *See Obergefell*, 962 F. Supp. 2d 968; *Bourke v. Beshear*, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *De Leon v. Perry*, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014).[15] In *Obergefell*, the court explained that "[w]hen a state effectively terminates the marriage of a same-sex couple in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." 962 F. Supp. 2d at 979. All three courts recognized that States have a limited interest (if any) in not recognizing marriages validated by other States, because the couples were already married. In fact, the States' non-recognition of these marriages closely resembles the federal government's non-recognition under DOMA, which the Supreme Court invalidated because it had the "principal purpose [of imposing] inequality."[16] *Windsor*, 133 S. Ct. at 2694.

[15] *See also Tanco v. Haslam*, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (entering preliminary injunction enjoining enforcement of Tennessee's same-sex marriage ban against six plaintiffs in case).

[16] The suggestion that Section 2 of DOMA renders non-recognition rational is without basis. *See, e.g.*, *De Leon*, 2014 WL 715741, at *22, quoting *Graham v. Richardson*, 403 U.S. 365, 382 (1971) ("Whatever powers Congress may have

II. SPECULATION ABOUT ERODING THE INSTITUTION OF MARRIAGE IS DEMONSTRABLY FALSE

Opponents suggest harmful consequences will befall States permitting same-sex couples to marry. Yet the *Amici* States have seen only benefits from marriage equality. Extending rights to same-sex couples neither fundamentally alters the institution, nor threatens marriage, divorce, or birth rates. Allowing same-sex couples to marry also does not preclude States from otherwise regulating marriage. Instead, it strengthens the institution.

A. Allowing Same-Sex Couples To Marry Does Not Fundamentally Alter The Institution Of Marriage

Opponents characterize extending marriage to same-sex couples as a fundamental shift that "powerfully convey[s] that marriage exists to advance adult desires rather than serving children's needs." McQuigg Br. 48. These assertions are unsupported by history and demeaning to gays and lesbians and their families.

Over the past 200 years, societal changes have resulted in corresponding changes to marriage eligibility rules and to our collective understanding of the roles of persons within a marriage, by gradually removing restrictions on who can marry and promoting equality of the spouses. *See, e.g.*, *Goodridge*, 798 N.E.2d at 966-967 ("As a public institution and a right of fundamental importance, civil

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under the Full Faith and Credit Clause, 'Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.'")

marriage is an evolving paradigm."). Indeed, many features of marriage taken for granted today would once have been unthinkable. For example, until relatively recently, wives ceded their legal and economic identities to their husbands in marriage. *See, e.g.*, *United States v. Yazell*, 382 U.S. 341, 342-343 (1966) (applying law of coverture). Divorce was difficult, if not impossible, in early America. *Perry*, 704 F. Supp. 2d at 959.

In 1967, Virginia was one of 16 States that "prohibit[ed] and punish[ed] marriages on the basis of racial classification," imposing penalties that existed as remnants of slavery and colonialism. *Loving*, 388 U.S. at 6. If the *Loving* Court had accepted racial integrity as a "core marital norm" (McQuigg Br. 51), bans on interracial marriage might have been found to be constitutional. But that of course did not occur. Civil marriage has endured as a bedrock institution due to its ability to evolve in concert with social mores and constitutional principles. Allowing same-sex couples to wed is a movement in the direction of equality—not a wholesale "redefinition" of marriage.

Opponents' argument is little more than an unfounded suggestion that gays and lesbians are, as a group, more selfish than heterosexual parents and ill-equipped or disinclined to make sacrifices to ensure the well-being of their children. As discussed above, the assertion that same-sex couples make inferior parents is contradicted by a scientific consensus as well as the experience of the

Amici States. Moreover, even without the ability to marry, many same-sex couples are in relationships that are focused on raising children. In 2012, 25.3% of same-sex male couples and 27.7% of same-sex female couples were raising children in their homes throughout the country.[17]

B. The Institution Of Marriage Remains Strong In States That Allow Same-Sex Couples To Marry

Appellants ask the Court to afford deference to their "predictive judgments," even if "complete empirical support may be unavailable." McQuigg Br. 49. A basic review of the data that are available demonstrates that the alarmism about the unintended consequences of permitting same-sex marriage is unfounded. Moreover, the *Amici* States' actual experience with equal marriage rights should carry substantially more weight than surmise and conjecture in the analysis. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 228-229 (1982) (rejecting hypothetical justifications for law excluding undocumented children as unsupported); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("[P]arties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational[.]").

[17] U.S. Census, *Household Characteristics of Same-Sex Couple Households: ACS 2012*, http://www.census.gov/hhes/samesex/ (last visited Apr. 18, 2014).

1. *Marriage Rates*: Marriage rates in States that permit same-sex couples to marry have generally improved. Despite a pre-existing national downward trend in marriage rates, the most recent national data available indicate an increase in all seven States with marriage equality at the time (Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont).[18] The average marriage rate in each of these seven States was 6.96 marriages per thousand residents, compared to the national rate of 6.8.[19]

In six of the seven States that permitted same-sex couples to marry as of 2011, the marriage rate remained at or above the level it was the year preceding same-sex marriage.[20] Meanwhile, the national average marriage rate declined steadily from 2005 to 2011.[21] In addition, States allowing same-sex couples to

[18] Centers for Disease Control and Prevention, National Vital Statistics System, *Marriage Rates by State: 1990, 1995, and 1999-2011*, http://www.cdc.gov/nchs/data/dvs/marriage_rates_90_95_99-11.pdf (last visited Apr. 18, 2014) [hereinafter CDC Marriage Rates].

[19] Centers for Disease Control and Prevention, *National Marriage and Divorce Rate Trends*, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited Apr. 18, 2014) [hereinafter CDC National Trends].

[20] CDC Marriage Rates, *supra* note 18. The six States were Connecticut, the District of Columbia, Iowa, Massachusetts, New York, and Vermont.

[21] CDC National Trends, *supra* note 19; Chris Kirk & Hanna Rosin, *Does Gay Marriage Destroy Marriage? A Look at the Data*, Slate.com, May 23, 2012, http://www.slate.com/articles/double_x/doublex/2012/05/does_gay_marriage_affe

wed have not seen decreases in the rate at which different-sex couples marry. In fact, in some States, the number of different-sex marriages increased in the years following the State's recognition of same-sex marriages.[22]

2. *Divorce Rates*: The *Amici* States' experience contradicts the suggestion that allowing same-sex couples to marry leads to increased rates of divorce. In four of the seven States that allowed same-sex couples to marry as of 2011, divorce rates for the years following legalization stayed at or below the divorce rate for the preceding year, even as the national divorce rate increased.[23] In addition, six of the seven jurisdictions that permitted same-sex couples to marry as of 2011 (Connecticut, the District of Columbia, Iowa, Massachusetts, New York, and Vermont) had a divorce rate that was at or below the national average. In fact, four of the ten States with the lowest divorce rates in the country were

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ct_marriage_or_divorce_rates_.html [hereinafter Kirk & Rosin] (last visited Apr. 18, 2014); CDC Marriage Rates, *supra* note 18.

[22] Alexis Dinno & Chelsea Whitney, *Same Sex Marriage and the Perceived Assault on Opposite Sex Marriage*, PloS ONE, Vol. 8, No. 6 (June 2013), http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0065730 (last visited Apr. 18, 2014).

[23] Kirk & Rosin, supra note 21.

States that allowed same-sex couples to marry; Iowa and Massachusetts had the lowest and third-lowest rates, respectively.[24]

Appellant McQuigg attempts to analogize the recognition of same-sex marriage to the advent of no-fault divorce. *See* McQuigg Br. 51-53. She suggests that, much like no-fault divorce, same-sex marriage will lead to unintended consequences, including changed attitudes about the purpose and role of marriage in our society. Similar speculation was offered by in *Loving*. Brief for Appellees, 1967 WL 113931 at *48 ("the 'odds' do not favor intermarriages, in that almost two to four times as many intermarriages as intramarriages end in divorce, separation or annulment"). Beyond the fact that the data do not support this assertion, the comparison of same-sex marriage to the States' adoption of no-fault divorce laws rings hollow. That legal development was advanced precisely to make divorce a more realistic option for married couples. It simply does not follow that permitting more committed and loving couples to *enter* into marriage will have the same effect as no-fault divorce laws, which made it easier for couples

[24] Centers for Disease Control and Prevention, National Vital Statistics System, *Divorce Rates by State: 1990, 1995, and 1999-2011*, http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf (last visited Apr. 18, 2014); CDC National Trends, *supra* note 19; Kirk & Rosin, *supra* note 21. By contrast, States that have excluded same-sex couples from marriage have some of the highest divorce rates in the country.

to *exit* marriage. *See* Austin Caster, "Why Same-Sex Marriage Will Not Repeat The Errors of No-Fault Divorce," 38 W. St. U. L. Rev. 43, 45 (2010).

3. *Nonmarital Births*: The suggestion that allowing same-sex couples to marry will lead to an increase in nonmarital births is unsupported. Massachusetts's nonmarital birth rate has been well below the national average for years, and that continued after same-sex couples began to marry. In fact, as of 2011, the most recent year for which comprehensive data are available, five of the seven States that allowed same-sex couples to marry (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) had nonmarital birth rates below the national average.[25] The total number of births to unmarried women nationally increased from 1940 through 2008. Notably, it has declined every year since, totaling 11% from 2008 to 2011, a period by the end of which eight States had extended marriage to same-sex couples.[26] More fundamentally, opponents' position is illogical, as allowing same-sex couples to marry allows more children to be born into marriages.

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[25] Centers for Disease Control and Prevention, *Births: Preliminary Data for* 2012, 62 National Vital Statistics Report No. 3, Table I-1 (Sept. 6, 2013), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_03_tables.pdf (last visited Apr. 18, 2014).

[26] Centers for Disease Control and Prevention, *Births: Final Data for* 2011, 62 National Vital Statistics Report No. 1, (June 28, 2013), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_01.pdf (last visited Apr. 18, 2014).

C. Allowing Same-Sex Couples To Marry Does Not Threaten The States' Ability To Regulate Marriage

It is untrue that it will become virtually impossible for States to limit entry to marriage in any meaningful way if the Constitution obliges them to license same-sex marriages. Rather, as *Loving* instructs, States simply may not circumscribe access to marriage, and thus restrict a fundamental right, based on a personal trait that itself has no bearing on one's qualifications for marriage. States can otherwise continue to exercise their sovereign power to regulate marriage.

In *Loving*, the Supreme Court characterized Virginia's anti-miscegenation laws as "rest[ing] solely upon distinctions drawn according to race," and proscribing "generally accepted conduct if engaged in by members of different races." 388 U.S. at 11. Virginia's current marriage laws similarly restrict the right to marry by drawing distinctions according to gender (and, implicitly, sexual orientation) and using that personal characteristic to define an appropriate category of marital partners.[27] When viewed this way, the suggestion that the argument in

[27] It is a well-established practice to apply heightened scrutiny to disparate treatment based on personal characteristics that typically bear no relationship to an individual's ability to contribute to society. *See*, *e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686-687 (1973). Although *Amici* States contend that sexual orientation discrimination should be subject to heightened scrutiny, *see supra* note 2, it is not necessary to accept that Virginia's laws involve suspect classifications for purposes of this analysis. These laws define eligibility based on a personal

favor of recognizing same-sex marriage "contains no limiting principle for excluding other groupings of individuals," is clearly wrong. Indiana Br. 3.

Applying this principle does not result in all groupings of adults having an equal claim to marriage. States limit marriage based on other interests. For example, to further the interest in maintaining the mutuality of obligations between spouses, States may continue to lawfully limit the number of spouses one may have at any given time. Unlike race or gender, marital status is not an inherent trait, but rather is a legal status indicating the existence (or not) of a marital contract, the presence of which renders a person temporarily ineligible to enter into additional marriage contracts. States similarly may continue to lawfully prohibit marriage between certain relatives in order to guard against a variety of public health outcomes. Consanguinity itself is not a personal trait, but rather defines the nature of the relationship between particular individuals and thus exists only when an individual is considered in relation to others.[28] Finally, in order to protect children against abuse and coercion, States may regulate entry into marriage by establishing

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characteristic unrelated to one's qualification for marriage (*i.e.*, ability to consent or current marital status).

[28] States may preclude marriages between close relatives, even those incapable of procreating with each other (Schaefer Br. 38-39), due to the possibility of exploitation, whether economic or otherwise.

an age of consent.[29] Likewise, age is not an intrinsic trait, as it changes continually and the restriction is therefore temporary. Thus, even after gender is removed from consideration, other state regulations continue to advance important governmental interests and remain valid.

* * * *

Accordingly, there is no reason to believe that the speculated negative consequences of allowing same-sex couples to wed will come to pass. Instead, the laws of Virginia prevent gays and lesbians from fully realizing what the Supreme Court described as "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. This result is in clear conflict with our Constitution.

[29] For similar reasons, States may regulate entry into marriage based on mental capacity because that bears upon an individual's ability to consent.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court below.

Respectfully submitted,

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