Nos. 14-3779 & 14-3780

IN THE

# United States Courts of Appeals for the Eighth Circuit

KYLE LAWSON; EVAN DAHLGREN; ANGELA CURTIS; SHANNON MCGINTY,
*Plaintiffs – Appellees (No. 14-3779), Appellants (No. 14-3780)*
v.

ROBERT T. KELLY, in his Official Capacity as
Director of the Jackson County Department of Recorder of Deeds,
*Defendant (No. 14-3779), Appellee (No. 14-3880),* and

STATE OF MISSOURI,
*Intervenor Defendant – Appellant (No. 14-3779), Appellee (No. 14-3880)*

*On Appeal from the U. S. District Court, Western District of Missouri, Case No. 4:14-cv-00622-ODS*

**BRIEF OF *AMICI CURIAE* 114 SCHOLARS OF MARRIAGE IN SUPPORT OF INTERVENOR DEFENDANT-APPELLANT AND REVERSAL**

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## INTRODUCTION AND INTERESTS OF *AMICI* [1]

During argument in the California Proposition 8 case, Justice Kennedy noted that, in its potential impact on children and society, redefining marriage in genderless terms could be akin to jumping off a cliff: It is impossible to see all the dangers lurking at the bottom. Oral Argument at 47:19-24, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Justice Alito echoed that concern in *United States v. Windsor,* where he also noted that any analysis of the societal effects of a redefinition calls for "[judicial] caution and humility." 133 S.Ct. 2675, 2715-16 (2013) (Alito, J. dissenting). That is because same-sex marriage in the United States is still too new—and the institution of marriage too complex—for a redefinition's impact to have fully registered. *Id.* And the risks of a redefinition to children and society are a powerful reason *not* to second-guess the people's considered judgment—expressed at the ballot box or through representatives—that the man-woman definition should be retained. *Id.* at 2716.

Despite those concerns, and although the Sixth Circuit has gone the

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[1] This brief is filed with the consent of all parties. *Amici* and undersigned counsel have authored this brief in whole, and no other person or entity has funded its preparation or submission.

other way, four federal appeals courts have held that state marriage laws violate the Fourteenth Amendment when they limit marriage to man-woman unions. In so doing these courts have rejected concerns about the social impact of such a change—including its impact on children—and have instead essentially adopted the motto of same-sex marriage advocates that "my marriage won't affect your marriage."

But the concerns expressed by Justices Kennedy and Alito remain well founded. Any ruling compelling states to recognize same-sex marriage will adversely alter the whole *institution* of marriage—not because such marriages will themselves "set a bad example" for man-woman marriages, but by undermining important social norms that are tied to the man-woman understanding of marriage, that typically guide the procreative and parenting behavior of *heterosexual* individuals, and that are highly beneficial to their children. For example, redefining marriage will undermine the crucial norm that, wherever possible, a child should be raised by his or her two biological parents. Accordingly, a decision imposing same-sex marriage on the State will likely inflict—or pose a substantial risk of inflicting—significant long-term harm on both the State and its inhabitants, especially the children of man-

woman unions.

Taken together, these points constitute what we call the "institutional defense" of man-woman marriage laws. That defense does not depend on any particular views about sexual morality, theology, or natural law. *Amici*, who are scholars of marriage from various disciplines—including sociology, psychology, economics, history, literature, philosophy, pediatrics, and family law—have a variety of views on those matters. But we are united in our conviction that redefining marriage—our most fundamental and valuable institution—will seriously disserve the vast majority of a state's children and, hence, the state's future. We therefore urge the Court to reverse the decision below.

Here we elaborate the institutional defense by first discussing the benefits of the man-woman understanding of marriage and its associated secular social norms. We then describe how redefining marriage would undermine those norms, and briefly outline the social costs and risks. Next, we explain why the limited available empirical evidence reinforces these risks. We then elucidate the flaws in recent appellate opinions that have attempted to deny or downplay those risks. Finally, we explain why a state's decision to retain the man-woman definition is

narrowly tailored to compelling, secular governmental interests.

## ARGUMENT

### I. The man-woman understanding of marriage confers enormous benefits on society, especially on children of heterosexual couples.

Marriage is a complex social institution that pre-exists the law, but is supported by it in virtually all human societies. Levi-Strauss(a):40-41[2]; Quale:2; Reid:455; Bracton:27; Blackstone:410; Blankenhorn(a):100. Like other social institutions, marriage is "a complex set of personal values, social norms, … customs, and legal constraints," which together "regulate a particular intimate human relation over a life span." Allen(a):949-50.

In virtually all societies, moreover, although sex and procreation may occur in other settings, marriage marks the boundaries of procreation that is socially commended. Wax(b):1012; Girgis:38; Corvino:96. Thus, the most basic message conveyed by the traditional institution of marriage is that, where procreation occurs, *this* is the arrangement in which society prefers it to occur. And that message helps achieve a

[2] Because of the large number of scholarly studies cited, in-text citations are in shortened form, authors with more than one article have letters following their last names to distinguish publications, and publications by multiple authors are identified by only the last name of the first author. All sources appear in the Table of Authorities.

principal social purpose of marriage: increasing the likelihood that any children born as a result of sex between men and women will have a known mother and father with responsibility for caring for them. Minor:375-76; Blackstone:435; Wilson:41; Witte:17; Webster.

Thus, although marriage benefits its adult participants in countless ways, it is "*designed* around procreation." Allen(a):954. As famed psychologist Bronislaw Malinowski emphasized, "the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents." Malinowski:11. Indeed, as once remarked by Bertrand Russell, who was no friend of Judeo-Christian theology or traditional sexual mores, "[b]ut for children, there would be no need of any institution concerned with sex." Russell:77, 156; *accord* Llewellyn:1284.

The man-woman understanding and definition are thus integral not only to the social institution of marriage that state marriage laws are intended to support, but also to the states' purposes in providing that support. Story:168; Kent:76; Bouvier:113-14; Bishop:§225. That is one reason why, until recently, all the states had rejected what Justice Alito has aptly called the relatively adult-centric, "consent-based" view of

marriage—focused principally on adult relationships—and had embraced instead the "conjugal" view, based primarily on the procreative potential of most man-woman unions. *Windsor*, 133 S.Ct. at 2718; Institute for American Values(a):7-8; Stewart(a):337; Yenor:253-73. Even today, not counting judicially-imposed definitions, most states have implemented the conjugal view of marriage by explicitly retaining the man-woman definition—despite decisions by some states to redefine marriage as the union of any two otherwise qualified "persons."[3]

By itself, the man-woman definition conveys and reinforces that marriage is centered primarily on procreation and children, which man-woman couples are uniquely capable of producing naturally. Davis:7-8; Wilson:23; Blackstone:422; Locke:§§78-79; Anthropological Institute:71; Wilcox(b):18-19; Girgis:38; Wax(b):1000. That definition also conveys that one purpose of marriage is to provide a structure to care for children that may be created unintentionally—an issue also unique to man-woman couples. Institute for American Values ("IAV")(b):6. Most obviously, by requiring a man and a woman, that definition conveys that this structure is expected to have both a "masculine" and a "feminine"

[3] *E.g., Marriage Equality Act* (NY), AB A08354 (June 24, 2011); *Civil Marriage Protection Act* (MD), House Bill 438 (March 1, 2012).

aspect, one in which men and women complement each other. Nock:*passim*; Levi-Strauss(b):5.

By implicitly referencing children, unintentional procreation, masculinity and femininity, the man-woman definition not only reinforces the idea that society prefers that procreation occur within marriage. It also "teaches" or reinforces certain procreation and child-related "norms." *Windsor*, 133 S.Ct. at 2718. Because only man-woman couples are capable of naturally producing children together, deliberately or accidentally, these norms are directed principally at heterosexual individuals and couples. They include the following specific norms governing procreation and parenting:

1. Where possible, every child has a right to be reared and supported by and to bond with its own biological father and mother (the "biological bonding" norm). *Convention on the Rights of the Child*, 1577 U.N.T.S. 3, 47; Somerville(a):179-201; Aristotle:§12; Locke:§78; Velleman:370-71; Young(b):154-55. This norm also encompasses the more mundane but important "maintenance" norm—i.e., that every child has a right whenever possible to be supported financially by the man and woman who brought it into the world. Brinig:110-11; Minor:375-78; Young(a):9.

2. Where possible, a child should at least be raised by *a* mother and father who are committed to each other and to the child, even where it cannot be raised by both biological parents (the "gender-diversity" norm). Erickson:2-21; Esolen:29-40; Palkovitz:234-37; Witherspoon:18; Pruett:17-57; Raeburn:121-158; Rhoads:8-45;

Byrd(a):227-29; Byrd(b):382-87; Young(a):9. As a corollary, men and women who conceive children together should treat marriage, and fatherhood and motherhood within marriage, as an important expression of their masculinity or femininity. Hawkins:16-20; Nock:58-59; Erickson:15-18.

3. Men and women should postpone procreation until they are in a stable, committed, long-term relationship (the "postponement" norm). Dwyer:44-76; Grossman:10; McClain:2133-84; Friedman:9-10; Schneider:495-532; Young(a):9.

4. Undertaken in that setting, creation and rearing of children are socially valuable activities (the "procreation/child-rearing norm"). Young(b):161-63; Wardle(a):784-86; Girgis:44.

5. Men and women should limit themselves to a single procreative partner (the "exclusivity norm"). Wilson:32-38; Blankenhorn(a):148-50; Plato:1086.

All of these specific norms are also grounded in a more general norm, namely, that in all their decisions, parents and prospective parents should give the interests of their children—present and future—at least equal priority to their own (the "child-centricity" norm). IAV(b):6.

States and their citizens—especially children—receive enormous benefits when man-woman couples heed these norms, which are central to the conjugal vision of marriage. Indeed, common sense and a wealth of social-science data teach that children do best emotionally, socially,

intellectually and economically when reared in an intact home by both *biological* parents. Wilcox(b):11; Moore; McLanahan(a):1; Lansford:842. Such arrangements benefit children of man-woman couples by (a) harnessing the biological or "kinship" connections that parents and children naturally feel for each other, and (b) providing gender complementarity or diversity in parenting. Erickson:passim; Popenoe:146; Witherspoon:18; Glenn:27; Lamb:246; Byrd(a); Byrd(b):382-87; *U.S. v. Virginia*, 518 U.S. 515, 533 (1996).

Compared with children of man-woman couples raised in any other environment, children raised by their two biological parents in a married family are *less* likely to commit crimes, experience teen pregnancy, have multiple abortions over their lifetime, engage in substance abuse, suffer from mental illness, or do poorly in school, and *more* likely to support themselves and their own children successfully in the future.[4] Accordingly, such children are at less risk of needing state assistance, and a higher likelihood of contributing to the state's economic and tax base. Amato(b).

Indeed, the evidence overwhelmingly establishes that, at least for

[4] Jeynes:85-97; Marquardt(a); Amato(c):26-46; Amato(a):543-56; Wallerstein(a):444-58; Wallerstein(b):545-53; Wallerstein(c):65-77; Wallerstein(d):199-211; Wallerstein(e); Wallerstein(f):593-604; Marquardt(b):5; Wax(a):579-80; Fagan:1-2.

children of heterosexual parents, no other parenting arrangement comes close (on average) to a combination of the child's biological mother and father. Wilcox(b):11; Moore; McLanahan(a):1; Lansford:842. That is true, not only because of the power of biological kinship, but also because of the value of gender diversity—i.e., having both a mom and a dad.

For example, one family scholar has offered the following compelling explanation of the unique importance of fathers to the healthy sexual and social development of their sons:

> What a boy gets from experiencing the dependable love of a father is a deep personal experience of masculinity that is pro-social, pro-woman, pro-child...Without this personal experience of maleness, a boy (who like all human beings is deeply driven to seek some meaning for masculinity) is vulnerable to a variety of peer and market-driven alternative definitions of masculinity, often grounded in…aggression, physical strength, and sexual proclivities… The importance of a father in giving a boy a deeply pro-social sense of his own masculinity may be one reason why one large national study found that boys raised outside of intact marriages were two to three times more likely to commit a crime leading to imprisonment.[5]

The same analyst offers a similarly compelling account of the unique importance of fathers to the sexual development of their daughters:

> [A] girl raised without a father does not come to adolescence with the same deep experience of what male love feels like when it is truly protective, not driven primarily by a desire for sexual gratification.

[5] Erickson:20 (quoting Gallagher(a):210-11)

> … [F]atherless girls may experience a hunger for masculine love and attention that leaves her particularly vulnerable to use and abuse by young adult males. Girls raised without fathers are at high risk for unwed motherhood.[6]

In short, as the famed anthropologist (and atheist) Margaret Mead noted, "[o]ne of the most important learnings [sic] for every human child is how to be a full member of its own sex and at the same time fully relate to the opposite sex. This is not an easy learning; it requires the continuing presence of a father and a mother to give it reality." Mead:359.

Besides ensuring that their children have both a father and a mother, heterosexual parents who embrace the norms of child-centricity and maintenance are also less likely to engage in behaviors—such as child abuse, neglect or divorce—that not only harm their children, but typically require state assistance or intervention. Popenoe; Blankenhorn(b); Manning; Flouri:63. People who embrace the procreative exclusivity norm are likewise less likely to have multiple children with multiple partners—a phenomenon that also leads to social, emotional and financial difficulties for children. Cherlin(a):137; Wilson:32-38; Wax(b):1006-07, 1012; Blankenhorn(a):148-50; Plato:1086. And people who embrace the postponement norm are less likely to have chil-

[6] *Id.*

dren without a second, committed parent—another well-established predictor of psychological, emotional and financial trouble. Oman:757; Bonell:502; Kantojarvi:205; Bachman:153.

By contrast, people who do not appreciate the social value of creating and rearing children are simply less likely to do so. And that view, if sufficiently widespread, would put at risk society's ability to reproduce itself—at least at levels sufficient to maintain intergenerational social welfare programs. Wardle(a):782,87-89; O'Brien:431-32,38-41.

For all these reasons, Judge Perez-Gimenez was correct in concluding recently that "[t]raditional marriage"—that is, man-woman marriage—"is the fundamental unit of the political order. And ultimately the very survival of the political order depends upon the procreative potential embodied in traditional marriage." Conde-*Vidal v. Garcia-Padilla*, No. 14-1254 (PG) (Oct. 21, 2014), slip op. at 20.

## II. Removing the man-woman definition of marriage creates enormous risks to society, especially to children of heterosexual couples.

Given the social significance of the man-woman understanding of marriage, it is not surprising that so many informed commentators on both sides have predicted that redefining marriage to accommodate same-sex couples—which necessarily requires removing the man-woman understanding and the associated definition—will change the institution of marriage profoundly.[7] Social institutions matter. Radcliffe-Brown:10-11; Searle(a):32,57,117; Lagerspetz(a):28; Lagerspetz(b):70,82; Nee&Ingram:19; Searle(b):89-122. And the law can alter institutions, and hence change social norms. Harrison:xxviii. Thus, as Oxford's prominent liberal legal philosopher Joseph Raz observed, "the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from … arranged to unarranged marriage." Raz(b):23.

*Erosion of Marital Norms*. For man-woman couples, the major effect of removing the procreation-focused, man-woman definition will be to

[7] Bix:112-13; Dalrymple:1,24; Blankenhorn(a):157; Stoddard:19; Cere:11-13; Farrow(a):1-5; McWhorter:125; Stacey:126-28; Young(c):48-56; Bolt:114; Carbado:95-96; Gallagher(b):53; Graff:12; Hunter:12-19; Sullivan:1-16; Widiss:778,781; Raz(a):161; Stewart(b):10-11; Searle:89-122; Reece:185; Stewart(c); Clayton:22; Stewart(d):503; Stewart(e):239-40; Bradley:193-96; Young(b):156-65.

erode the message that society prefers that procreation occur within marriage as well each of the specific norms that depend upon or are reinforced by that definition. IAV(b):18; Allen(b):1043. For example, as Professors Hawkins and Carroll have explained, the redefinition of marriage directly undermines the gender-diversity norm by putting in place a legal structure in which two women (or two men) can easily raise children together as a married couple, and placing the law's authoritative stamp of approval on such arrangements. Hawkins:13-16; Carroll:59-63. Such approval also obviously erodes the bonding or biological connection norm inherent in the man-woman definition of marriage.

Such legal changes are especially likely to undermine those norms among heterosexual men, who generally need more encouragement to marry than women. That is because such changes suggest that society no longer needs men to bond to women to form well-functioning families or to raise happy, well-adjusted children. Hawkins:14-16; Nock:58-59; Young(c):50-51; Young(b):158-59.

For similar reasons, a redefinition weakens the expectation that biological parents will take financial responsibility for any children they

participate in creating. It also weakens the expectation that parents will put their children's interests ahead of their own—a problem exacerbated by the reality that the redefinition movement is driven largely by a desire to accommodate adult interests. Hawkins:20.

Equally important, and for similar reasons, removing the gendered definition teaches that society now considers the natural family (a woman, a man, and their biological children), and the capacity of a woman and a man to create human life, to be of no special value. Knapp:626-28. That in turn will inevitably undermine the procreativity/child-rearing norm, the exclusivity norm, and the postponement norm.

Our prediction that redefining marriage will undermine all of these norms—and the overall preference that procreation occur within marriage—is consistent with the view often expressed by judges and scholars that the law can play a powerful "teaching" function. Hawkins:20; Sunstein(a):2027-28; Posner; Cooter; Lessig:2186-87; Sunstein(b). Indeed, a recent opinion by Justice Kennedy remarked on the power of democratically enacted disability laws to "teach" society the norm of treating persons with disabilities as full-fledged citizens. *University of*

*Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). The same teaching principle applies fully to laws defining and regulating marriage, which likewise serve to either reinforce or undermine the legitimate norms and societal preferences long associated with that institution.

*Resulting Harms to Children and Society.* Just as these norms benefit the state and society, their removal or weakening can be expected to harm the interests of the state and its citizens. For example, as fewer man-woman couples choose to limit procreation to marriage relationships, and as fewer embrace the norms of biological connection, gender diversity, maintenance and postponement, a higher percentage of children will be raised without both a mother and a father—usually a father. Hawkins:18-20. That in turn will mean a higher percentage being raised in poverty; experiencing psychological or emotional problems; experiencing teenage pregnancy; doing poorly in school; and committing crimes—all at significant cost to the state.[8] Furthermore, the National Survey of Family Growth showed that among the oldest group surveyed regarding abortion, 38-44 year old women, those who were least likely

[8] Popenoe:passim; Blankenhorn(b):passim; Manning:passim; Flouri:63; Ellis:passim; Bowling:13; Marquardt(b):5; Wu:passim; Wardle(b):passim; Harper:384-86; Young(c):49, 52-56; Wax(a):579-80.

to have had two or more abortions were those who had been raised by their married biological parents. Fagan:1-2.

Similarly, as fewer parents embrace the norm of child-centricity, more will make choices driven by personal interests rather than the interests of their children. Wax(b):1012. Many such choices will likewise impose substantial costs on the state. Wildsmith:5; Scafidi:9; Kohm:88. Moreover, by breaking the link between procreation and parenting, a redefinition will require additional changes to the legal and social institution of parenting—thereby creating another major source of societal risk. Morse(a); Morse(b); Farrow(b).

Furthermore, because a redefinition also poses a risk to aggregate fertility—by weakening the social norm favoring reproduction—such a redefinition poses even greater long-term risks to society. Zhang&Song; Brown&Dittgen; Martin:Table 12; Wardle(a):784-86. As Professor Allen has noted, "[s]ocieties incapable of replicating themselves in numbers and quality relative to competing societies simply die out…." Moreover, "[p]oorly designed laws"—including laws that undermine long-standing social norms—can "lead to… unsuccessful marriages, which in turn lead to low fertility… and ultimately a decline in the society." Allen(a):956.

And that is precisely what the redefinition of marriage threatens to do, by weakening several norms currently associated with that institution.

That is not to suggest that a redefinition will affect all social groups similarly. People who are more religious, for example, generally have religious reasons—beyond the "teaching" power of the law—for embracing both the man-woman understanding of marriage and the associated social norms. Similarly, regardless of religion, people who are relatively well-educated and wealthy tend to embrace in their personal lives the expectations and norms associated with traditional marriage to a greater extent than the relatively poor or uneducated. Wilcox(a):53; Cahn:3, 18-19, 166; Murray:149, 151-57, 163-67; Cherlin(b); Wax(a):570-71. Accordingly, we would expect to see the social costs of redefining marriage concentrated among the relatively non-religious and less well-to-do. As Professor Amy Wax has noted, "[m]arriage's long track record as a building block for families and a foundation for beneficial relations between the sexes suggests that ordinary people desperately need the anchor of clear expectations, and that they respond to them." Wax(b):1012.

In short, if the institution of marriage were a valuable hanging tapestry, the man-woman definition would be like a critical thread running

through it: Remove that thread and, over time, the rest of the tapestry will likely unravel. Schneider:498; Allen(a):963-65; Stewart(a):327-28. That will be a tragedy for society and, especially, its children.

## III. Available empirical evidence supports the conclusion that a redefinition would create substantial risks to children of heterosexual parents and, hence, to society.

What does the available empirical evidence tell us about these risks? Several pro-redefinition commentators have cited the experience of Massachusetts—which adopted same-sex marriage a decade ago—in claiming that such a change has no adverse effects. In fact, the most recent evidence shows an overall *increase* in divorce in the wake of Massachusetts' decision, and an overall *decrease* in marriage rates. See CDC(a); CDC(b). But more importantly, such small-sample, short-term results cannot reliably predict a redefinition's longer-term consequences. And studies relying upon longer experience and larger sample sizes strongly suggest that a redefinition is likely to have substantial adverse effects—or at least that it presents a serious risk of such effects.

*Requirements for Statistical Validity.* Obviously, one cannot fairly infer that a state's decision to redefine marriage *caused* (or did not cause) an increase in divorce or a reduction in marriage without control-

ling for other, potentially confounding factors. And only one study based on U.S. data of which we are aware has even attempted to do that—a very recent study by Marcus Dillender. While that study purports to find "no evidence" that allowing same-sex marriage has any effect on U.S. heterosexual marriage or divorce rates, Dillender:582, it has a number of fatal methodological flaws.

The most important is its assumption that the impact of redefining marriage would show up in measurable and statistically meaningful ways a very short time after the redefinition. As Justice Alito's remarks in *Windsor* suggest, that assumption is unrealistic in the context of an ancient and complex social institution like marriage. *Windsor*, 133 S.Ct. at 2715-16. Experts on marriage have frequently and correctly noted that such major social changes operate with a "cultural lag" that often requires a generation or two to be fully realized. Cherlin(a):142-43.

Another flaw is the study's failure to examine the impacts on groups that might be affected *differentially* by the redefinition—for example, those who are relatively less religious, educated or prosperous. The relatively more religious or wealthy could well embrace the norms associated with man-woman marriage with even greater determination

during and just after a state's decision to redefine marriage. And that effect could mask a negative impact of that redefinition on less religious or prosperous segments of the heterosexual population. Yet Dillender confesses that he cannot test these possibilities in his data. Dillender:568.

*The Netherlands Study.* The only credible study of which we are aware that has recognized and adjusted for this problem is a recent study of the Netherlands, which formally adopted same-sex marriage in 2001 but had already adopted all of its main elements by 1998. That study, by Mircea Trandafir, has more statistical credibility than Dillender's study because it examined the effect of a marriage redefinition over a much longer period—13 years. That study also shows a clear post-redefinition *decline* in marriage rates among man-woman couples in urban areas—which in the Netherlands tend to be less religious than rural areas. Trandafir:28-29. This study also suggests that the debate surrounding same-sex marriage caused a (likely) temporary increase in marriage rates among the more religious segments of society—which embraced traditional marriage with greater fervor—and that this tended to offset temporarily the decrease in man-woman marriages

among the more urban, less religious segments. Trandafir:28-29.

It was only by examining these populations separately that Trandafir was able to discover this differential effect. His study thus shows that, although the more religious segments of Dutch society may not have seen a reduction in man-woman marriages in the near term, other segments—those that lack a strong alternative source for the norms associated with man-woman marriage—have seen a reduction in marriage among man-woman couples. For those segments, that reduction will also impair the many social benefits—beginning with lower rates of fatherlessness—that man-woman marriage has long been known to produce.

*Studies of the Value of Dual-Biological Parenting.* The Dillender study also ignores the reality that a redefinition would likely result in fewer children being raised by their biological parents for reasons other than reduced marriage rates. For example, by weakening the biological bonding and gender-diversity norms associated with traditional marriage, over time a redefinition would likely lead more married parents either to divorce or to separate from their spouses and raise their children in new arrangements without going through the formality of a di-

vorce. Similarly, by weakening the exclusivity norm, a redefinition would likely lead more people to engage in what some have called "serial polygamy"—having children with multiple partners, with or without the formalities of marriage and divorce. Both of these effects would lead to more children of man-woman couples being raised outside the immediate presence of one or both biological parents.

The available empirical evidence shows that, in the aggregate, such an outcome would be very bad for children. *All* of the large-sample studies show that children raised by their two biological parents in intact marriages do better, in the aggregate, than children raised in any other parenting arrangement, including step-parenting, single parenting, mother-grandmother parenting, and even adoption—as valuable and important as those arrangements are. Significant differences appear across a wide range of outcomes, including freedom from serious emotional and psychological problems, Sullins(a):11, Sullins(b):996, McLanahan(b):399, Culpin:2615, Kantojarvi:205; Hofferth:53; avoidance of substance abuse, Brown:259; avoidance of behavioral problems generally, Osborne:1065, Cavanagh:551; and success in school, McLanahan(b):399, Bulanda:593; Gillette:309; Allen(d):955. Indeed,

the stark differences between children raised by their two biological parents and children raised by a biological parent and a heterosexual step-parent demonstrated that, at least for children of heterosexual couples, there simply is no substitute for biological connections between the child and *both* of his or her parents. McLanahan(a):1; Brown:259; Turner:39; Daly:197; Lenciauskiene:607; Case:301.

In short, given that the vast majority of parents are heterosexuals, Miller:16, any policy that leads to a larger percentage of *their* children being raised outside an intact marriage of two biological parents is likely to be catastrophic for children generally, and for society. That is why removing the man-woman definition is so dangerous.

*No-Fault Divorce.* These risks are reinforced by the history of no-fault divorce. Allen(a):965-66; Hawkins:6-12; Alvare:137-53. Before the no-fault divorce movement, marriage strongly conveyed an additional norm beyond the six discussed above—a norm of permanence: Marriage was considered, not just a temporary union of a man and a woman, but a permanent union. Parkman:91-150.

When no-fault divorce was first proposed, its advocates argued that it could be adopted without undermining that norm: Only those whose

marriages were irretrievably broken would use the new, streamlined (and less contentious) divorce procedures. Wallerstein(g). Those in happy marriages—and hence the institution of marriage itself—would not be adversely affected. Hawkins:7-11; Allen(a):966-67.

To put it mildly, such predictions proved overly optimistic. By permitting unilateral divorce for any or no reason, no-fault divorce soon undermined the norm of permanence, and thus led directly to an explosion in divorce. Parkman:93-99; Allen(a):967-69. That, in turn, led to a host of problems for the affected children—financial, academic, emotional and psychological. Allen(a):969.

All the states, moreover, eventually adopted no-fault divorce without waiting to observe its actual effects in one or two jurisdictions for a sustained period. Wardle(c). Moreover, although some scholars have argued divorce has been stable or declining from its peak, new research shows this is true only among 20-35-year olds due to increased selectivity of entering into marriage, and among those over 35 divorce rates from 1990-2008 have substantially increased. Kennedy:587. That reality signals an apparently permanent, adverse change in the marriage institution itself. Parkman:91. Especially in light of that recent experi-

ence, many states are understandably reluctant to adopt yet another change—genderless marriage—that seems likely to undermine, not just one marital norm, but several.

In short, the available evidence reinforces Justice Kennedy's fear that, insofar as most children are concerned, redefining marriage may be akin to jumping off a cliff. Indeed, although it is impossible to see with *complete* accuracy all the dangers one might encounter at the bottom, we already know enough to predict with confidence that the landing will not be a soft one.

## IV. Judicial responses to the institutional defense have been deeply flawed.

Some of these points have been addressed to some extent by the federal appellate judges who have invalidated state marriage laws. But all of them ignore the principal point: like no-fault divorce, redefining marriage in genderless terms will change the *social institution* of marriage in a way that will adversely affect the behavior of *heterosexual individuals and couples*—whether or not they choose to get and stay married under the new regime. Giddens:98. It is only by ignoring the impact of redefining marriage on the marriage institution that courts can claim—as some of them have—that the man-woman definition does

not advance any of the state interests described above. *E.g., Bostic v. Schaefer*, 760 F.3d 352, 382-83 (4th Cir. 2014).

*Diversions.* Rather than address the institutional defense head-on, most judges have offered diversions. For example, Judge Lucero argued that "it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014). This observation ignores that legally recognizing same-sex marriage requires more than a mere "*recognition* of the love and commitment between same-sex couples." Same-sex marriage requires instead a *redefinition* of the marital relationship that eliminates its man-woman character—replacing "man" and "woman" with "persons," *see supra* note 3—and thus establishes (among other things) that children have *no* right to be reared by both a mother and a father, much less their own biological parents. Somerville(b). For the reasons discussed above, a belief that removing the gendered aspect of marriage will harm the institution is more than merely "logical." Indeed, it would be "wholly *illogical"* to believe that a major social institution can be redefined without any collateral damage to the institution

and to those who benefit from it—especially children.

In a similar diversion, Judge Reinhardt claimed that the institutional defense of man-woman marriage is based on the idea that "allowing same-sex *marriages* will adversely affect opposite-sex marriage …." *Latta v. Otter*, No. 14-35420 (9th Cir. Oct. 7, 2014), Slip Op. at 15-16. But it's not the existence or even "recognition" of same-sex marriages that is of principal concern. Again, it's the *redefinition* that such marriages require—replacing the man-woman definition "any qualified persons"—and the resulting impact of that redefinition on the *institution* of marriage, as perceived and understood, over a long period, in our social norms and values. As explained, a large body of social science affirms that, contrary to Judge Lucero's speculation, such a radical institutional change can and often *will* "affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen,* 755 F.3d at 1223.

Similarly, Judge Reinhardt summarily dismissed the idea that "a father will see a child being raised by two women and deduce that because the state has said it is unnecessary for that child … to have a father, it is also unnecessary for *his* child to have a father." *Id.* at 19.

But it's not a father's "*see*[ing] a child being raised by two [married] women" that is likely to reduce heterosexual males' enthusiasm for marriage. It's the fact that, even before they become fathers, marriage will have *already* been redefined—legally and institutionally—in a way that signals to them that their involvement is less important and valuable. Hawkins:12-20; Young(b):159. And although not all heterosexual fathers or potential fathers will have less interest in marriage because of that change, *some* of them—especially those at the margins of commitment to marriage and fatherhood—will undoubtedly do so. *Id.*

*Parenting by Gays and Lesbians.* Most of the adverse opinions have also misunderstood the institutional defense as somehow casting aspersions on gays and lesbians—including their fitness or ability as parents. *E.g., Latta*, slip op. at 27. In fact, the institutional defense neither depends upon nor advocates any particular view about the impact of sexual orientation on parenting. To be sure, there is a lively academic debate on the differences in outcomes for children raised by man-woman versus same-sex couples.[9] But the institutional defense is focused on something different: the impact of removing the man-woman

[9] See Regnerus(a):752-770; Regnerus(b):1367; Allen(c):30; Schumm(a):79-120; Schumm(b):329-40; Schumm(c):2165; Marks:735-51; Allen(d):955-61; Sarantakos:23-31; Lerner; *compare* Golombok:20; Wainright:1886; Biblarz:3.

definition on the marriage *institution*—i.e., the public meaning of marriage—and the resulting impact on children of people who consider themselves heterosexuals.

This misunderstanding of the institutional defense is likewise evident in Judge Reinhardt's reaction to the point that "[b]ecause opposite-sex couples can accidentally conceive … marriage is important because it serves to bind such couples together and to their children." *Latta*, slip op. at 21. After acknowledging that this "makes some sense," Reinhardt still rejected the institutional defense because (he says) it "suggests that marriage's stabilizing and unifying force is unnecessary for same-sex couples …" *Latta*, slip op. at 21-22. But again, that's not the point. Even if same-sex couples and their children would benefit from an "any two persons" redefinition—and the evidence on that is not conclusive—no state can responsibly ignore the potential impact on the far larger population composed of children of man-woman couples. Regardless of the definition of marriage, those children will constitute the vast majority in the foreseeable future. Allen(c):635-58; Sullins; Miller. For that reason, no state can responsibly ignore the impact of removing the man-woman definition on the *institution* of marriage.

*Empirical Studies.* In response to the social risks that would result from removing the man-woman definition (and social understanding) of marriage, Judge Reinhardt cited a single study suggesting that Massachusetts' decision to adopt same-sex marriage in 2004 had no *immediate* impact on marriage or divorce rates in that state. *Latta*, slip op. at 18. But as noted, a decade is not enough time for the effects of a major institutional change like redefining marriage to be fully manifest. Regardless, the study's conclusions have been hotly disputed, and indeed the evidence shows that, in the wake of Massachusetts' decision, there ensued a longer-term increase in divorce and decrease in marriage rates. CDC(a); CDC(b).

Judge Posner also relied upon the flawed Dillender study, but without acknowledging that study's lack of statistical rigor or its unrealistic assumption about the speed with which the effects of a major institutional change will likely be felt. Moreover, neither he nor Reinhardt addressed the much more relevant and credible Netherlands evidence showing a clear connection between the adoption of same-sex marriage and decreased marriage rates among the less religious.

Most important, with the gratifying exception of the Sixth Circuit, all

of the appellate opinions thus far disregard Justice Alito's wise call for "[judicial] caution and humility" in assessing the impacts of a redefinition. *Windsor*, 133 S.Ct. at 2715. He is undoubtedly correct that same-sex marriage is still far too new—and the institution of marriage too complex—for a full assessment of those impacts. *Id.* at 2715-16. However, for reasons previously explained, such evidence as now exists shows that removal of the man-woman definition poses real dangers to children, to governments of all stripes, and to society.

## V. Man-woman marriage laws satisfy any level of judicial scrutiny.

Based upon the benefits conferred on the state and its citizens by the man-woman definition and understanding of marriage, and the harms—or at least risks—to the state and its citizens of eliminating that definition, a state's decision to retain it passes muster under any legal standard. And that includes strict scrutiny, which requires that a law be "narrowly tailored" to achieve "compelling governmental interests." See, *e.g., Grutter v. Bollinger,* 539 U.S. 306, 326 (2003).

There can be no doubt that the man-woman definition substantially advances compelling interests—including the interest in the welfare of the vast majority of its children who are born to heterosexual couples.

Miller:16. That is not to say that states that opt to retain the man-woman definition are unconcerned with same-sex couples or the children they raise. But no state can responsibly ignore the long-term welfare of the many when asked to make a major change that might benefit at most a few—no matter how valuable and important they are.

Like many advocates of same-sex marriage, the opinions issued by the Fourth, Seventh, Ninth and Tenth Circuits respond to this point, not by disputing the importance of the state's interests, but by claiming that the man-woman definition pursues those interests in a manner that in Judge Reinhardt's words is "grossly over- and under-inclusive …" *Latta*, slip op. at 23; *Bostic*, 760 F.3d at 381-82; *Baskin v. Bogan*, 766 F.3d 648, 661, 672 (7th Cir. 2014); *Kitchen*, 755 F.3d at 1219-21. But from a social-science perspective, that argument is irrelevant for two reasons.

First, it once again ignores the real issue, which is the impact of redefining marriage on the *institution* itself and, hence on the norms it reinforces. A state can easily allow infertile man-woman couples to marry (and avoid invading their privacy) without having to change the man-woman definition and thus lose the benefits provided by the associated

social norms. Indeed, allowing such marriages *reinforces* rather than undermines the norms of marriage for other man-woman couples who can reproduce accidentally. Girgis:73-77; Somerville(b):63-78. Allowing infertile man-woman couples to marry is thus fully consistent with the institutional norms of marriage, even if those couples are an exception to the biological reality that man-woman couples naturally procreate.

Conversely, taking *other* measures to further the state interests underlying the man-woman definition—such as Judge Reinhardt's suggestion to "rescind the right of no-fault divorce, or to divorce altogether"—would not materially reduce the adverse impact of removing the man-woman definition. *Latta*, slip op. at 24. Nor would it materially reduce the resulting harms and risks—elaborated above—to the state's children and the state itself. Again, because many of the norms and social benefits associated with marriage flow from the man-woman definition, removing it will have adverse consequences no matter what *else* a state might do to strengthen marriage.

Second, this argument ignores that the choice a state faces here is binary: A state can *either* preserve the benefits of the man-woman definition *or* it can remove that definition—replacing it with an "any two

qualified persons" definition—and risk losing those benefits. It cannot do both. Thus, a state's choice to preserve the man-woman definition is narrowly tailored—indeed, perfectly tailored—to its interest in preserving those benefits and in avoiding the enormous societal risks accompanying a genderless-marriage regime.

In short, the risks outlined above—to the institution of marriage and consequently to a state's children and the state itself—amply justify a decision to retain the traditional man-woman definition. And they do so independent of any particular views on theology, natural law or sexual morality.

* * * * *

What does this analysis imply for the states that have adopted genderless marriage through democratic means? As the Supreme is Court held in *Windsor*, they have a right to do that, free from any interference or second-guessing by the federal government. But states that make that choice are subjecting their children—and hence themselves—to enormous long-term risks. Those include serious risks of increased fatherlessness, reduced parental financial support, reduced performance in school, increased crime, and greater psychological problems—with

their attendant costs to the state and its citizens. Fortunately, a state that makes that choice on its own can always change its mind. And if it reintroduces the man-woman definition—even if it "grandfathers" existing same-sex marriages—it can largely recapture the social norms driven by that definition and, hence, the associated social benefits.

By contrast, a state ordered by a court to abandon the man-woman definition cannot simply re-enact that definition once the perils of the genderless marriage regime become more apparent. Like a public figure falsely accused of wrongdoing, a state might well ask, "Where do I go to get my marriage institution back?" Unfortunately, a court that is willing to second-guess the people's judgment about the risks of abandoning the man-woman definition won't likely have the humility to recognize its error. And so the state—and its people—will be stuck with the consequences.

Fortunately, the question presented in this case is one on which social science, tradition, and common sense converge: They all establish that the benefits of the man-woman understanding and definition of marriage to individuals and societies are immense. To be sure, there are those who take a different view, but if we were "to insist upon *una-*

*nimity* in the social science literature before finding a compelling interest, we might never find one." *Parents Involved in Community Schools v. Seattle School District No. 1,* 551 U.S. 701, 845 (2007) (Breyer, J., dissenting) (emphasis added). All the more reason to exercise the "judicial humility" urged by Justice Alito, and thus to refrain from second-guessing the people's considered judgment on the existentially crucial issue of how best to define marriage.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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## APPENDIX A: List of *Amici*[1]

Aguirre, Dr. Maria S., Professor of Economics, The Catholic University of America

Allen, Dr. Douglas W., Professor of Economics, Simon Fraser University

Araujo, Dr. Robert John, University Professor Emeritus, Loyola University Chicago

Baptist, Dr. Errol C., Clinical Professor of Pediatrics, University of Illinois

Basset, Dr. Ursula C., Professor of Family Law, Pointificia Universidad Catolica Argentina

Bateman, Dr. Michael, Assistant Professor of Pediatrics, University of Minnesota

Beckwith, Dr. Francis J., Professor of Philosophy and Church-State Studies, Baylor University

Benne, Dr. Robert D., Emeritus Professor of Religion and Philosophy, Roanoke College

Bleich, Dr. J. David, Professor of Jewish Law and Ethics, Cardozo Law School, Yeshiva University

Bouvier, Dr. Joseph, Clinical Assistant Professor of Child Health (Pediatrics) and Emergency Medicine, University of Arizona College of Medicine

Bradford, Dr. Kay, Associate Professor of Family, Consumer & Human Development, Utah State University

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[1] Institutions listed for identification purposes only. Opinions expressed are those of the individual *amici,* and not necessarily of their affiliated institutions.

Bradford, Dr. Nathan F., Associate Professor of Family Medicine, AnMed Health Oglesby Center

Busby, Dr. Dean, Professor of Family Life, Brigham Young University

Carlson, Jr., Dr. Alfred J., Associate Faculty in Pediatrics, University of Pennsylvania Medical School

Carroll, Dr. Jason S., Professor of Family Life, Brigham Young University

Cavadini, Dr. John, Professor of Theology, University of Notre Dame

Christensen, Dr. Bryce, Associate Professor of English, Southern Utah University

Collett, Teresa S., Professor of Law, University of St. Thomas School of Law

Corral, Dr. Hernan, Professor of Private Law, University of the Andes (Santiago, Chile)

Crosby, Dr. John F., Professor of Philosophy, Franciscan University of Steubenville

de Aguirre, Carlos Martinez, Professor of Civil Law, University of Zaragoza

De Jesus, Ligia M., Associate Professor of Law, Ave Maria School of Law

Deneen, Dr. Patrick J., Associate Professor of Political Science, University of Notre Dame

Dennis, Dr. Steven A., Professor of Human Development, Brigham Young University-Idaho

Dent, Jr., George W., Professor of Law, Case Western Reserve University School of Law

DeWolf, David K., Professor of Law, Gonzaga University

Duncan, Dwight, Professor of Law, University of Massachusetts

Erickson, Dr. Jenet J., former Assistant Professor of Family Studies, Brigham Young University, currently full-time mother and free-lance writer

Esolen, Dr. Anthony M., Professor of English, Providence College

Farnsworth, Dr. Richard Y., Adjunct Associate Professor of Pediatrics, University of Utah School of Medicine

Field, Dr. Scott, Adjunct Faculty in Pediatrics, University of Alabama-Huntsville

Fields, Dr. Stephen M., Associate Professor of Theology, Georgetown University

Finnis, Dr. John M., Professor of Law, Notre Dame University, Chaired Professor of Law Emeritus, Oxford University

FitzGibbon, Scott T., Professor of Law, Boston College

Fitzgibbons, Dr. Richard, Director, Institute for Marital Healing

Foley, Dr. Michael P., Associate Professor of Patristics, Baylor University

Franck, Dr. Matthew J., Professor Emeritus of Political Science, Radford University

Garcimartin, Dr. Carmen, Professor of Law, University of La Courna

George, Dr. Robert P., Professor of Jurisprudence, Princeton University

George, Dr. Timothy, Dean, Beeson Divinity School, Samford University

Girgis, Sherif, Research Scholar, Witherspoon Institute

Gombosi, Dr. Russell, Adjunct Professor of Pediatrics, Commonwealth Medical University (Scranton, PA)

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Hafen, Bruce C., Emeritus Dean and Professor of Law, Brigham Young University

Hawkins, Dr. Alan J., Professor of Family Life, Brigham Young University

Henry, Dr. Douglas, Associate Professor of Philosophy, Baylor University

Hill, Dr. E. Jeffrey, Professor of Family Life, Brigham Young University

Hitchcock, Dr. James, Professor of History Emeritus, St. Louis University

Hoffman, Dr. Robert P., Professor of Pediatrics, The Ohio State University

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Miller, Dr. Jerry A., Clinical Professor of Pediatrics, Medical College of Georgia

Morse, Dr. Jennifer Roback, President, Ruth Institute; formerly Economics Department, Yale University & George Mason University; Research Fellow, Hoover Institution at Stanford University

Moschella, Dr. Melissa, Assistant Professor of Philosophy, The Catholic University of America

Myers, Richard S., Professor of Law, Ave Maria School of Law

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Pakaluk, Dr. Catherine R., Assistant Professor of Economics, Ave Maria University

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## CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the 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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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 font Century Schoolbook.

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