

Case Nos. 14-1167(L), 14-1169, 14-1173  
**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**TIMOTHY B. BOSTIC**, et al.,  
Plaintiffs-Appellees,  
And  
**CHRISTY BERGHOFF, JOANNE HARRIS, JESSICA DUFF,  
AND VICTORIA KIDD**, on behalf of themselves and all others similarly  
situated,  
Intervenors,  
v.  
**GEORGE E. SCHAEFER, III**, in his official capacity as the  
Clerk of Court for Norfolk Circuit Court,  
Defendant-Appellant,  
And  
**JANET M. RAINEY**, in her official capacity as State Registrar of Vital  
Records,  
Defendant-Appellant,  
And  
**MICHÈLE B. MCQUIGG**, in her official capacity as  
Prince William County Clerk of Circuit Court,  
Intervenor/Defendant-Appellant.

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On appeal from the United States District Court for the Eastern District of  
Virginia, Norfolk Division, Case No. 2:13-cv-00395-AWA-LRL  
The Honorable Arenda L. Wright Allen

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**AMICUS BRIEF OF LIBERTY COUNSEL SUPPORTING  
DEFENDANT-APPELLANT**

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## **CORPORATE DISCLOSURE STATEMENT**

Amicus Liberty Counsel states, pursuant to Fed. R. App. P. 26.1 that there is no parent corporation or publicly held corporation that owns 10 percent or more of its stock.

/s/ Mathew D. Staver

Mathew D. Staver

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## **INTEREST OF THE AMICUS CURIAE**

Amicus Liberty Counsel has been substantially involved in advocating for marriage and the religious liberty of Americans whose faith speaks to marriage being the union of one man and one woman. Amicus Liberty Counsel has developed a substantial body of information regarding the issues presented by the ultimate question in this case. Amicus believes that the information provided in this Brief regarding the role of marriage, as the union of one man and one woman, in preserving equality and various freedoms guaranteed by the Bill of Rights, and the significant state interests served by marriage are critical to this Court's consideration of the important constitutional question at issue.

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

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

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

## **SUMMARY OF ARGUMENT**

At issue in this case is the question of whether the state's definition of marriage impermissibly discriminates against individuals with a same-sex sexual orientation. It does not. Nothing in this state's laws or Constitution prevents a person who identifies as a homosexual from marrying; rather, all people, homosexuals and heterosexuals alike, are prevented from marrying persons of the same-sex. Thus, preserving marriage as a union of one man and one woman does not alter, undermine, or withhold a fundamental right from homosexuals, a group of people who do not even constitute a protected class under an equal protection analysis. In fact, preserving marriage as the union of one man and one woman preserves equality and the freedoms guaranteed in the Bill of Rights, like the free exercise of religion, and encourages healthy behaviors.

## **ARGUMENT**

There is no general right to marry anyone or anything.<sup>1</sup> Defining marriage as the union of a man and a woman does not single out homosexuals for disfavored treatment, infringe on any fundamental rights, or discriminate against a suspect class, and therefore is constitutional.

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<sup>1</sup> *See Roper v. Simmons*, 125 S.Ct. 1183, 1204 (2005) (Listing state statutes that establish a minimum age for marriage without parental or judicial consent, inferring there is no general right for anyone to marry at any time); *U.S. v. Windsor*, 133 S.Ct. 2675, 2714 (2013) (Alito, J., dissenting) (“The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.”).

## **I. DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN DOES NOT SINGLE OUT HOMOSEXUALS FOR DISFAVORED TREATMENT.**

As Mr. Blankenhorn observed, “marriage is institutionally deaf, blind and dumb” to sexual orientation. It doesn’t ask tell, require, record, stipulate, accept, judge, or reject on the basis of individual sexual desire.”<sup>2</sup> A man and a woman who are of legal age, unmarried and not closely related can get married regardless of their sexual orientation. The New York Court of Appeals agrees, states laws that define marriage as the union of one man and one woman are facially neutral:

individuals who seek marriage licenses are not queried concerning their sexual orientation and are not precluded from marrying if they are not heterosexual. Regardless of sexual orientation, any person can marry a person of the opposite sex. Certainly, the marriage laws create a classification that distinguishes between opposite-sex and same-sex couples and this has a disparate impact on gays and lesbians. However, a claim that a facially-neutral statute enacted without an invidious discriminatory intent has a disparate impact on a class (even a suspect class, such as one defined by race) is insufficient to establish an equal protection violation.<sup>3</sup>

In addition, in June of 2012, a man, Josh, who married to a woman, Lolly, received national attention when he revealed that he has been sexually attracted to males since he was a child.<sup>4</sup> He remains married to Lolly today

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<sup>2</sup> David Blankenhorn, *The Future of Marriage* 179 (2007).

<sup>3</sup> *Hernandez v. Robles*, 7 N.Y. 3d 338, 376-377 (2006).

<sup>4</sup> Josh Weed, *Club Unicorn: In which I Come Out of the Closet On Our Ten*

and explained on his blog that

If you choose a same-sex partner, you are sacrificing the ability to have a biological family with the one you love. ... I chose not to “live the gay lifestyle,” as it were, because I found that what I would have to give up to do so wasn’t worth the sacrifice for me.<sup>5</sup>

Virginia's amendment and statutes defining marriage as the union of one man and one woman do not discriminate against folks like Josh because of their homosexual sexual orientation -- each person remains permitted to marry a person of the opposite sex. Therefore, homosexuals are not singled out for disfavored treatment.

## **II. DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN DOES NOT DEPRIVE HOMOSEXUALS OF A FUNDAMENTAL RIGHT.**

Courts are generally “reluctant to expand the catalog of rights protected as fundamental.”<sup>6</sup> That is particularly true since “only rights that are ‘objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed,’ are regarded as fundamental.”<sup>7</sup>

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*Year Anniversary*, The Weed (June 7, 2012),  
<http://www.joshweed.com/2012/06/club-unicorn-in-which-i-come-out-of.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Glucksberg*, 521 U.S. 702, 720 (1997).

<sup>7</sup> *Id.* at 720-721.

While the Supreme Court of the United States did not directly address the question of fundamental rights in *United States v. Windsor*, the Court did not once refer to DOMA, which defined marriage for federal purposes as the union of one man and one woman, as infringing on a fundamental right.<sup>8</sup> Justice Scalia indicated he agrees there is no fundamental right to same-sex marriage, noting cases involving the constitutionality of laws that define marriage as the union of one man and one woman should be reviewed only for their “rationality,” and went on to say that as nearly as he could tell, “the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*.”<sup>9</sup> Justice Alito also agreed that the right to same-sex marriage is not a fundamental right, as ““the right to same-sex marriage is not deeply rooted in this Nation's history and tradition.”<sup>10</sup>

The Supreme Court of New York held,

While many U.S. Supreme Court decisions recognize marriage as a fundamental right protected under the Due Process Clause, all of these cases understood the marriage right as involving a union of one woman and one man.<sup>11</sup>

**[T]o ignore the meaning ascribed to the right to marry in**

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<sup>8</sup> *U.S. v. Windsor*, 133 S.Ct. 2675 (2013).

<sup>9</sup> *Id.* at 2707 (Scalia, J., dissenting).

<sup>10</sup> *Id.* at 2714-15 (Alito, J., dissenting).

<sup>11</sup> *Hernandez v. Robles*, 7 N.Y. 3d 338, 369 (2006) (Graffeo, J., concurring) (internal citations omitted).

**these cases and substitute another meaning in its place is to redefine the right in question and to tear the resulting new right away from the very roots that caused the U.S. Supreme Court and this Court to recognize marriage as a fundamental right in the first place.**<sup>12</sup>

Thus, the *Hernandez* court found “the right to marry someone of the same sex ... is not ‘deeply rooted’; it has not even been asserted until relatively recent times.”<sup>13</sup> The court noted the plaintiffs “seek from the courts access to a State-conferred benefit that the Legislature has rationally limited to opposite-sex couples,” and concluded “by defining marriage as it has, the New York Legislature has not restricted the exercise of a fundamental right.”<sup>14</sup> Defining marriage as the union of one man and one woman does not deprive homosexuals of a fundamental right.

### **III. DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN DOES NOT VIOLATE EQUAL PROTECTION, AS HOMOSEXUALS SEEKING MARRIAGE LICENSES DO NOT CONSTITUTE A PROTECTED CLASS.**

The mere occasion of exclusion does not create actionable discrimination.<sup>15</sup> While a man who would prefer to marry a man or a woman

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<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.* at 362-63; *see also Andersen v. King County*, 138 P.3d 963, 979 (Wash. 2006) (holding history and tradition do not support finding a fundamental right to same-sex marriage).

<sup>14</sup> *Id.*

<sup>15</sup> *See Warden v. State Bar*, 982 P.2d 154 (1999) (explaining that an equal protection violation requires more than merely an allegation that a certain group is not included in a definition).

who would prefer to marry a woman cannot satisfy his or her preferences, marriage is **not** offered to everyone so long as they are heterosexual. In fact, minors cannot marry, people cannot marry close relatives, and unemancipated minors cannot marry without the permission of their parents. “Laws that distinguish marriage from other bonds will *always* leave some arrangements out.”<sup>16</sup> In fact, to be admitted into the union states like Utah had to denounce polygamous relations and to accept the marital norm of one man and one woman unions.<sup>17</sup> Thus, maintaining that marital norm does not violate equal protection.

A protected, suspect or quasi suspect class is a class that 1) has “been subjected to discrimination,” 2) exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group” or define the class, and 3) is “a minority or politically powerless.”<sup>18</sup>

**A. Those with a Same-Sex Sexual Preference Who Seek Same-Sex Marriages, have Not been Subjected to the Type of Discrimination that Warrants Heightened Protection.**

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<sup>16</sup> Sherif Girgis et al., *What is Marriage? Man and Woman: A Defense* 80 (2012).

<sup>17</sup> Edwards Leo Lyman, *Struggle for Statehood*, Utah History to Go, [http://historytogo.utah.gov/utah\\_chapters/statehood\\_and\\_the\\_progressive\\_era/struggleforstatehood.html](http://historytogo.utah.gov/utah_chapters/statehood_and_the_progressive_era/struggleforstatehood.html) (last visited Nov. 8, 2013).

<sup>18</sup> *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313–314 (1976)).

“Statutes create many classifications which do not deny equal protection; it is only ‘invidious discrimination’ which offends the Constitution.”<sup>19</sup> “Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination.”<sup>20</sup>

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.<sup>21</sup>

The Court clarified that invidious discrimination was present when there was not “even a colorably valid justification or explanation” for the disparate statutory treatment of the sexes, and that the justification had to be “irrational” to be invidiously discriminatory.<sup>22</sup>

Contrary to the lower court's assertion, disapproval of behaviors that have historically been recognized as immoral is not necessarily an outgrowth of animus towards those who engage in those behaviors.

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<sup>19</sup> *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

<sup>20</sup> *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

<sup>21</sup> *Williams v. Rhodes*, 393 U.S. 23, 51 (1968) (citing *McGowan v. State of Maryland*, 366 U.S. 420, 425-426 (1961)).

<sup>22</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 246 (1995); *Craig v. Boren*, 429 U.S. 190, 215 (1976).

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. **A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.**<sup>23</sup>

In addition, as Justice Scalia noted,

[T]o defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. ... It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.<sup>24</sup>

Here, there is a rational and even compelling justifications for the Virginia amendment and statutes, namely, the inherent harms of living a homosexual lifestyle and the inherent benefits of encouraging intact biological families for the rearing of children.

1. *Homosexual behavior involves inherent risks that make defining marriage as the union of one man and one woman imperative in order to foster and preserve responsible individuals.*

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<sup>23</sup> *Hernandez v. Robles*, 7 N.Y.3d 338, 361 (2006) (emphasis added); see also *U.S. v. Windsor*, 133 S.Ct. 2675, 2689 (2013) (regarding the recent invent of the concept of same-sex marriage) .

<sup>24</sup> *U.S. v. Windsor*, 133 S.Ct. 2675, 2708 (2013).

While the essence of marriage requires exclusivity and permanence, statistically, same-sex unions are neither exclusive nor permanent.<sup>25</sup> The lack of exclusivity and permanence in same-sex relationships and the irresponsible sexual practices associated therewith greatly affect the health, safety, and welfare of homosexuals. “Among adolescent males aged 13–19 years, **approximately 91%** of all diagnosed HIV infections **are from male-to-male sexual contact**,” and between 2006 to 2009, young men who have sex with men had the greatest percentage increase in diagnosed HIV infections of all age groups.”<sup>26</sup> In addition, “[g]ay and bisexual men (who have sex with other men) are about **17 times more likely** to develop anal cancer than men who only have sex with women.”<sup>27</sup> There is a biological basis for this extraordinarily high incidence of anal cancer among men who have sex with men:

[T]he colonic and rectal mucosa has a barrier function that normally prevents overwhelming invasion by infective and toxic materials contained within the luminal contents. ... Human semen contains at least two components in sufficiently high concentrations to cause breakdown of the basement membrane

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<sup>25</sup> *Id.* at 71.

<sup>26</sup> *HIV and Young Men Who Have Sex with Men*, Centers for Disease Control and Prevention 1 (June 2012), [http://www.cdc.gov/HealthyYouth/sexualbehaviors/pdf/hiv\\_factsheet\\_ymsm.pdf](http://www.cdc.gov/HealthyYouth/sexualbehaviors/pdf/hiv_factsheet_ymsm.pdf) (emphasis added).

<sup>27</sup> *Sexually Transmitted Diseases (STDs): HPV and Men - Fact Sheet*, Centers for Disease Control and Prevention (Feb. 23, 2012), <http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm> (emphasis added).

that supports the colonic epithelial cell layer: collagenase ... and spermine. Spermine permeates through the colonic mucosa and neutralizes glycoaminoglycans within the intestinal matrix -- this triggers the activation of endogenous collagenases which leads to loss of mucosal barrier function -- this allows seminal collagenase to penetrate the mucosa and hence to cause further damage and breakdown of the barrier function. ... Thus it is apparent that the colorectal mucosa is particularly susceptible to biochemical as well as the normally assumed mechanical t[r]auma consequent upon anal intercourse.<sup>28</sup>

Dr. Diggs, a practicing medical doctor, an Internist, draws similar conclusions:

The rectum is significantly different from the vagina with regard to suitability for penetration by a penis. The vagina has natural lubricants and is supported by a network of muscles. It is composed of a mucus membrane with a multi-layer stratified squamous epithelium that allows it to endure friction without damage and to resist the immunological actions caused by semen and sperm. In comparison, the anus is a delicate mechanism of small muscles that comprise an “exit-only” passage. With repeated trauma, friction and stretching, the sphincter loses its tone and its ability to maintain a tight seal. Consequently, anal intercourse leads to leakage of fecal material that can easily become chronic.

The potential for injury is exacerbated by the fact that the intestine has only a single layer of cells separating it from highly vascular tissue, that is, blood. ... The single layer tissue cannot withstand the friction associated with penile penetration, resulting in traumas that expose both participants to blood, organisms in feces, and a mixing of bodily fluids.

Furthermore, ejaculate has components that are immunosuppressive. In the course of ordinary reproductive physiology, this allows the sperm to evade the immune

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<sup>28</sup> Richard J. Naftalln, *Correspondence: Anal Sex and AIDS*, 360.6399 Nature 10 (Nov. 5, 1992).

defenses of the female. Rectal insemination of rabbits has shown that sperm impaired the immune defenses of the recipient. Semen may have a similar impact on humans.

The end result is that the fragility of the anus and rectum, along with the immunosuppressive effect of ejaculate, make anal-genital intercourse a most efficient manner of transmitting HIV and other infections. The list of diseases found with extraordinary frequency among male homosexual practitioners as a result of anal intercourse is alarming: Anal Cancer, Chlamydia trachomatis, Cryptosporidium, Giardia lamblia, Herpes simplex virus, Human immunodeficiency virus, Human papilloma virus, Isospora belli, Microsporidia, Gonorrhea, Viral hepatitis types B & C, [and] Syphilis.<sup>29</sup>

The Centers for Disease Control and Prevention reports:

[T]he rate of new HIV diagnoses among MSM, [men who have sex with men], is **more than 44 times** that of other men, while the rate of primary and secondary syphilis among MSM is **more than 46 times** that of other men.<sup>30</sup>

Sadly, not only are homosexual males at higher risk of disease, but some cancers and diseases, such as Bacterial Vaginosis, are also “more common in lesbian and bisexual women than in other women.”<sup>31</sup>

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<sup>29</sup> John R. Diggs, Jr., *The Health Risks of Gay Sex*, Catholic Education Resource Center (2002), <http://www.catholiceducation.org/articles/homosexuality/ho0075.html> (internal citations omitted).

<sup>30</sup> *Gay and Bisexual Men's Health: For Your Health: Recommendations for A Healthier You*, Centers for Disease Control and Prevention (Jan. 21, 2011), <http://www.cdc.gov/msmhealth/for-your-health.htm> (emphasis added).

<sup>31</sup> *Lesbian and Bisexual Health Fact Sheet*, Womenshealth.gov (Feb. 17, 2011), <http://womenshealth.gov/publications/our-publications/fact-sheet/lesbian-bisexual-health.cfm#d>.

In addition, not only are homosexuals of all sexes and ages more likely to contract a sexually transmitted disease, and thus, have more **physiological** problems than their heterosexual counterparts, but they're also statistically more likely to have **psychological** disorders. Studies show

LGBQ individuals are **1.87 times as likely** to have a lifetime anxiety disorder and a full two times as likely to have a lifetime mood disorder compared to heterosexuals.<sup>32</sup>

Recent surveys also suggest that “lesbian and gay youth and young adults are at greater risk for suicide ideation, suicide attempts, and completed suicides than their heterosexual counterparts.”<sup>33</sup> In one study of men aged 17 to 39 years, NHANES III, suggests homosexuals are “**more than 5 times as likely** to have attempted suicide” than those reporting only opposite-sex sexual partners.<sup>34</sup> Other studies have reported worse findings: “[In] a case-control study of students in Minnesota, 28% of self-identified homosexual/bisexual male students reported a history of suicide attempts. ... Furthermore, 41% of men with same-sex experience reported suicide at

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<sup>32</sup> Jordan Simonson, *Toward Understanding Elevated Depression and Anxiety Symptoms in LGBQ Youth: Integrating Minority Stress Theory and the Common Vulnerabilities Hypothesis 2* (June 12, 2012) (internal citations omitted) (emphasis added).

<sup>33</sup> Susan D. Cochran & Vickie M. Mays, *Lifetime Prevalence of Suicide Symptoms and Affective Disorders Among Men Reporting Same-Sex Sexual Partners: Results from NHANES III*, 90 Am. J. of Pub. Health 573, 573 (Apr. 2000) (discussing the rates of suicidality in homosexual males).

<sup>34</sup> *Id.* at 577 (discussing the rates of suicidality in homosexual males) (emphasis added).

some point in the past in NHANES III.”<sup>35</sup> In addition, according to NHANES III, “as many as 1 in 5 homosexually active men may have a lifetime history of an affective disorder, primary recurrent depression, and that the onset of these depressive symptoms occurs at a younger age than in exclusively heterosexually experienced men.”<sup>36</sup>

Heightened rates of psychological disorders are prevalent in homosexuals of all ages. In one study, “people with same-sex contact tended to report **higher levels of both depressive symptoms and drug use, ... [and] higher levels of stress exposure....**”<sup>37</sup> Additionally, studies show,

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<sup>35</sup> *Id.* at 575 (discussing the rates of suicidality in homosexual males).

<sup>36</sup> *Id.* at 577; see also *Gay and Bisexual Men's Health: Suicide and Violence Prevention*, Centers for Disease Control and Prevention (May 15, 2013), <http://www.cdc.gov/msmhealth/suicide-violence-prevention.htm>.

<sup>37</sup> Koji Ueno, *Mental Health Differences between Young Adults with and without Same-Sex Contact: A Simultaneous Examination of Underlying Mechanisms*, 51(4) *Journal of Health and Social Behavior* 392, 397 (2010) (emphasis added); see also Jordan Simonson, *Toward Understanding Elevated Depression and Anxiety Symptoms in LGBTQ Youth: Integrating Minority Stress Theory and the Common Vulnerabilities Hypothesis* 8 (June 12, 2012) (internal citations omitted), Martha W. Waller & Rebecca P. Sanchez, *The Association Between Same-Sex Romantic Attractions and Relationships and Running Away Among a Nationally Representative Sample of Adolescents*, 28 *Child Adolescent Social Work Journal* 475, 477-78 (Aug. 6, 2011) (“Studies of LGBTQ youth found youth often have a poor relationship with their parents (Remafedi 1987b; Rew et al. 2005; Savin-Williams 1994), a high incidence of substance use (Garofalo et al. 1998; Russell et al. 2002), and worse mental health outcomes such as depression, suicidal ideation and attempts, low self-esteem, conduct disorders, and generalized anxiety disorders (Consolacion et al. 2004; D’Augelli and Hershberger 1993; Fergusson et al. 1999; Garofalo et al. 1998; Lock and

when compared with the general population, gay and bisexual men, lesbian, and transgender individuals are **more likely to: Use alcohol and drugs; [h]ave higher rates of substance abuse; [a]re less likely to abstain from alcohol and drug use; [and,] [a]re more likely to continue heavy drinking into later life.**<sup>38</sup>

A 2009 study of a nationally representative sample showed:

Self-identified lesbians displayed **greater odds of past-year marijuana use, drug use, alcohol dependence, marijuana dependence, and other drug dependence** than heterosexual women did, and bisexual women displayed greater odds of past-year heavy drinking, marijuana use, other drug use, and alcohol dependence compared to heterosexual women. ... Men who identified as homosexual had **higher odds of past year marijuana use, other drug use, alcohol dependence, and other drug dependence** compared to heterosexual men. Adjusted odds of past-year other drug use, alcohol dependence, and other drug dependence among homosexual identified men were **more than three times** that of heterosexually identified men.<sup>39</sup>

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Steiner 1999; Noell and Ochs 2001; Russell et al. 2002; Russell et al. 2001)."), T. Frisell, P. Lichtenstein, Q. Rahman, & N. Langstrom, *Psychiatric Morbidity Associated with Same-Sex Sexual Behaviour: Influence of Minority Stress and Familial Factors*, 40 *Psychological Medicine* 315, 318 (2010) ("Both men and women with any same-sex sexual partner had higher prevalences of psychiatric disorder than individuals with only opposite-sex sexual partners. After adjusting for age, education and relationship status, the risk increases remained for depression, GAD, eating disorder, alcohol dependence and ADHD among men and women with any same-sex sexual partner compared with individuals with only opposite-sex sexual partners.").

<sup>38</sup> *Gay and Bisexual Men's Health: Substance Abuse*, Centers for Disease Control and Prevention (March 22, 2013), <http://www.cdc.gov/msmhealth/substance-abuse.htm> (emphasis added).

<sup>39</sup> Maurice N. Gattis, Paul Sacco, & Renee M. Cunningham-Williams, *Substance Use and Mental Health Disorders Among Heterosexual Identified Men and Women Who Have Same-sex Partners or Attraction: Results from*

In an analysis of the data from the National Epidemiological Survey of Alcohol and Related Conditions (NESARC), researchers looked at the alcohol and drug use and mental stability of persons in three distinct categories, homosexuals, heterosexuals, and the discordant, defined as those who identified as heterosexual but reported being attracted to people of the same sex (attraction discordance) or having sex with people of the same sex (behavior discordance).<sup>40</sup> In regard to behavior discordance in men,

Rates of lifetime alcohol dependence were lower among discordant men than among both heterosexual and gay men. ... Discordant males had lower rates of having a lifetime depressive episode, generalized anxiety disorder, and post-traumatic stress disorder than gay individuals, but higher than heterosexual participants. ... Heterosexual men had the highest levels of social support and lowest stress, while discordant men had lower support and higher stress, and **gay/bisexual men had the highest levels of stress** and the lowest levels of social support.<sup>41</sup>

In regard to behavior discordant females,

Substance use disorders were present in higher percentages in the discordant women than in heterosexual women; lesbians or bisexual women experienced lifetime [substance use disorders]

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*the National Epidemiological Survey on Alcohol and Related Conditions*, 41 Archives of Sexual Behavior 1185, 1186 (2012) (emphasis added).

<sup>40</sup> Maurice N. Gattis, Paul Sacco, & Renee M. Cunningham-Williams, *Substance Use and Mental Health Disorders Among Heterosexual Identified Men and Women Who Have Same-sex Partners or Attraction: Results from the National Epidemiological Survey on Alcohol and Related Conditions*, 41 Archives of Sexual Behavior 1185, 1187 (2012) (emphasis added).

<sup>41</sup> *Id.* at 1189-90 (emphasis added).

at the highest rates. Rates of major depressive episode showed a similar pattern, but discordant women experienced lifetime Generalized Anxiety Disorder and PTSD at lower rates than both heterosexual and lesbian/bisexual women did. ... Discordant women reported higher levels of stress than heterosexual women did, but **lesbian women had the highest mean levels of stress**. ... Overall, mental health functioning was the lowest among lesbians with progressively higher levels in discordant and heterosexual women.<sup>42</sup>

In regard to attraction discordance in men,

Discordant men had lower rates of life-time substance use disorders than both heterosexual and gay/bisexual men. Rates of mental health diagnoses were lower among heterosexual men and discordant men including lifetime major depressive episode, generalized anxiety disorder, and PTSD; **higher rates were present among gay/bisexual men**. ... Discordant men drank less on average and exceeded drinking guidelines at lower rates than both heterosexual and gay/bisexual men. ... Discordant and gay men reported higher levels of perceived stress and lower levels of social support than heterosexual men.<sup>43</sup>

In regard to attraction discordance in women,

Discordant women had significantly lower rates of alcohol, stimulant, cannabis, and inhalant disorders (lifetime) than heterosexuals and lesbians. The same pattern was found in mental health. Discordant women had the lowest rates of Major Depressive Episode, Generalized Anxiety Disorder, and PTSD, and few differences were found on health measures. ...

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<sup>42</sup> *Id.* at 1190 (emphasis added).

<sup>43</sup> Maurice N. Gattis, Paul Sacco, & Renee M. Cunningham-Williams, *Substance Use and Mental Health Disorders Among Heterosexual Identified Men and Women Who Have Same-sex Partners or Attraction: Results from the National Epidemiological Survey on Alcohol and Related Conditions*, 41 *Archives of Sexual Behavior* 1185, 1192 (2012).

Discordant women had lower support and perceived stress, but less mental health disability.<sup>44</sup>

Thus, those with homosexual attractions, but who did not **act** on those attractions, instead pursuing heterosexual romantic and sexual relationships, fare better psychologically than even heterosexuals, and heterosexuals fare significantly better than homosexuals. Engaging in homosexual conduct is dangerous physiologically and psychologically, and endorsing and subsidizing same-sex unions does not benefit society, but harms it by enabling irresponsible and unhealthy lifestyles.

2. *Defining marriage as the union of one man and one woman promotes the optimal environment for rearing children.*

Numerous courts have recognized that a state's purpose of defining marriage to further procreation, where both the mother and father are present to raise the child, is at least rational, if not compelling:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. **The law does not create families**, it creates a structure in which family life can be legally recognized and protected. Redefining marriage by court decree would change this orientation. It would shift the legal posture of the state from recognizing a naturally recurring relationship (the joining of men and women in a relationship open to creating new life) to creating the institution (any two people whom the law

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<sup>44</sup> *Id.* at 1192.

chooses to recognize).<sup>45</sup>

The Washington Supreme Court held that “the legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a ‘traditional’ nuclear family where children tend to thrive.”<sup>46</sup> The New York Court of Appeals discussed in detail how defining marriage as the union of one man and one woman is rationally related to the state’s interest in promoting the welfare of children.

First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement -- in the form of marriage and its attendant benefits -- to opposite-sex couples who make a solemn, long-term commitment to each other. The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a

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<sup>45</sup> *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (emphasis added).

<sup>46</sup> *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006).

greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. This is one reason why the Legislature could rationally offer the benefits of marriage to opposite-sex couples only.

There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule-some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes-but the Legislature could find that the general rule will usually hold.<sup>47</sup>

In fact, studies show children raised by their wedded biological parents fare best in

*educational achievement*: literacy and graduation rates, *emotional health*: rates of anxiety, depression, substance abuse, and suicide, *familial and sexual development*: strong sense of identity, timing of onset of puberty, rates of teen and out-of-wedlock pregnancy, and rates of sexual abuse, and *child and adult behavior*: rates of aggression, attention deficit disorder, delinquency, and incarceration.”<sup>48</sup>

In addition, Rutgers University sociologist David Popenoe concluded, “**The two sexes are different to the core, each is necessary -- culturally and biologically -- for the optimal development of a human being.**”<sup>49</sup>

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<sup>47</sup> *Hernandez v. Robles* (N.Y. 2006) 7 N.Y.3d 338, 359-360.

<sup>48</sup> Sherif Girgis et al., *What is Marriage? Man and Woman: A Defense* 42 (2012) (emphasis in original).

<sup>49</sup> David Popenoe, *Life without Father: Compelling New Evidence that*

The “Regnerus study,” published in the Journal of Social Science Research, also found that children raised by lesbian mothers (“LM”) and gay fathers (“GF”) fared far worse than children raised by their biological intact families (“IBF”).<sup>50</sup> The Regnerus study is a population-based cross-sectional study of 3000 young adults between the ages of eighteen and thirty-nine.<sup>51</sup>

The study revealed:

Just under half of all IBFs reported being employed full-time at present, compared with 26% of LMs. While only 8% of IBF respondents said they were currently unemployed, 28% of LM respondents said the same. LMs were statistically less likely than IBFs to have voted in the 2008 presidential election (41% vs. 57%), and more than twice as likely --19% vs. 8%--to report being currently (or within the past year) in counseling or therapy 'for a problem connected with anxiety, depression, relationships, etc.,' an outcome that was significantly different after including control variables.<sup>52</sup>

Children raised by biological intact families are more likely to become productive, employed citizens who vote, are mentally stable, and have more stable relationships.

In addition, children raised by lesbians fare worse on educational attainment, family-of-origin safety/security, negative impact of family-of-

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*Fatherhood and Marriage are Indispensable for the Good for Children and Society* 146, 197 (1996) (emphasis added).

<sup>50</sup> Mark Regnerus, *How Different are the Adult Children of Parents Who have Same-sex Relationships? Findings from the New Family Structures Study*, 41 *Journal of Social Science Research* 752, 761 (2012).

<sup>51</sup> *Regnerus, supra* note 105, at 755, 757.

<sup>52</sup> *Regnerus, supra* note 105, at 761-62.

origin, a depression index, physical health, and household incomes than to do respondents from still-intact biological families.<sup>53</sup> They also think their current romantic relationships are in trouble more frequently.<sup>54</sup> Those raised by gay fathers also reported less education, worse scores on the family-of-origin safety/security indexes, greater depression, and think their current relationship is in trouble more frequently.<sup>55</sup> In addition, those raised by both lesbian mothers and gay fathers were more likely than those raised in biological intact families to smoke, have been arrested, and to have pled guilty to non-minor offenses.<sup>56</sup> Thus, “children appear most apt to succeed well as adults -- on multiple counts and across a variety of domains -- when they spend their entire childhood with their married mother and father, and especially when the parents remain married to the present day.”<sup>57</sup>

While the Regnerus study is one of the most methodologically sound studies on the influence of family structures on children, for its sample size and its representative nature, the Regnerus study does not purport to prove causality and it is not longitudinal.<sup>58</sup> Even so, in critiquing the Regnerus study and analyzing its “limitations, Pennsylvania State University Professor

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<sup>53</sup> *Regnerus, supra* note 105, at 763.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Regnerus, supra* note 105, at 764.

<sup>57</sup> *Regnerus, supra* note 105, at 766.

<sup>58</sup> *Regnerus, supra* note 105, at 766.

Paul Amato maintained that the study's methodological advantages still make it 'probably the best that we can hope for, at least in the near future.'"<sup>59</sup> In addition, understanding the deficiencies of parenting by single parents, divorced parents, step-parents, and adopted parents makes it clear that same-sex parents cannot provide the optimal environment for rearing children, and treating same-sex unions as marriages "would undermined marital stability in ways that we know do hurt children."<sup>60</sup>

So, "not only does childrearing deepen and extend a marriage; children also benefit from marriage."<sup>61</sup> The "state of economic and social development we call '**civilization**' depends on healthy, upright, productive citizens; ... [thus,] civilization depends on strong marriages."<sup>62</sup>

Thus, despite the lower court's disregard for the "for-the-children" arguments, children have historically and continue to provide rational, and even compelling, justification for defining marriage as the union of one man and one woman, as does the health of individuals with same-sex attraction. In fact, there are countless loving, compassionate, and logical reasons to

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<sup>59</sup> Sherif Girgis et al., *What is Marriage? Man and Woman: A Defense* 61 (2012).

<sup>60</sup> *Id.* at 59.

<sup>61</sup> *Id.* at 32.

<sup>62</sup> *Id.* at 38 (emphasis added).

maintain the historical, legal, philosophical, and cultural definition of marriage as the union of one man and one woman.

**B. Those with a Same-Sex Sexual Preference who Seek Same-Sex Marriages do Not have an Obvious or Immutable Characteristic that Warrants Heightened Protection.**

Only race, ethnicity, national origin, and lawful resident alienage have been held to be immutable characteristics deserving of strict scrutiny.<sup>63</sup> The Supreme Court held characteristics that are the product of “conscious” actions are not absolutely immutable.<sup>64</sup> In *Plyler*, the Court examined whether undocumented immigrant status was an immutable characteristic.<sup>65</sup> The Court ultimately determined the undocumented status of adults who chose to engage in unlawful behavior that created their status was not immutable.<sup>66</sup> Whether to engage in a homosexual relationship is similarly a choice. In fact, the Federal Circuit Court of Appeals, when faced with a group of homosexuals urging recognition as a suspect class, observed:

Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable

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<sup>63</sup> *Washington v. Davis*, 426 U.S. 229 (1976); *Castenada v. Partida*, 430 U.S. 482 (1977); *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

<sup>64</sup> *Plyler v. Doe*, 457 U.S. 202, 220 (1992).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

characteristics, whereas **homosexuality is primarily behavioral in nature.**<sup>67</sup>

The court further noted that whereas homosexuals are defined based on their conduct, “[t]he conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups.”<sup>68</sup>

Not only is homosexuality not immutable, but sexual orientation is not immutable and in fact, is very fluid. The American Psychological Association report states: “Same-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and for some, **sexual orientation identity ... is fluid** or has an indefinite outcome.”<sup>69</sup>

The fact that sexual orientation is not immutable is underscored by large scale studies of identical twins. These studies indicate when one twin sibling has a non-heterosexual orientation, the other sibling shares this

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<sup>67</sup> *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (emphasis added).

<sup>68</sup> *Id.*

<sup>69</sup> *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, American Psychological Association 2 (2009), available at <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> (last visited September 27, 2013) (emphasis added).

orientation only about 11% of the time.<sup>70</sup> If factors in common, like genetics or conditions in the womb, overwhelmingly caused same-sex attractions, identical twins would always have the same sexual orientation. However, these studies suggest the largest influence in the development of same-sex attractions is environmental factors that affect one twin sibling but not the other.

Additionally, courts have explicitly rejected claims that *Loving* supports a finding that statutes defining marriage as the union of one man and one woman discriminate on the basis of an immutable characteristic, and thus, have held such statutes did not violate Equal Protection or Due Process under the United States Constitution.<sup>71</sup>

Defining marriage as the union of one man and one woman is not an exclusionary rule akin to the anti-miscegenation laws that were borne of animus toward racial minorities. As David Blankenhorn observes, “two men

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<sup>70</sup> Michael Bailey, Michael Dunne, & Nicholas Martin, *Genetic and Environmental Influences on Sexual Orientation and its Correlates in an Australian Twin Sample*, 78(3) *Journal of Personality and Social Psychology* 524-536 (2000); Peter Bearman & Hannah Brueckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, 107 *American Journal of Sociology* 1179-1205 (2002); Niklas Langstrom, Qazi Rahman, Eva Carlstrom, & Paul Lichtenstein, *Genetic and Environmental Effects on Same-Sex Sexual Behavior: A Population Study of Twins in Sweden*, 39 *Archives of Sexual Behavior* 75-80 (2010).

<sup>71</sup> *Hernandez v. Robles*, 7 N.Y.3d 338, 360-361 (2006); *Baker v. Nelson*, 291 Minn. 310, 314 (1971), *appeal dismissed for want of substantial federal question*, 409 U.S. 810 (1972); *Baker v. State*, 170 Vt. 194, 215 n.13 (1999).

(or two women) seeking to marry one another is not remotely similar to a black person of one sex seeking to marry a white person of the other sex.”<sup>72</sup>

If a white person of one sex aims to marry a black person of the other sex, we have not the slightest reason to believe that marriage’s fundamental forms are being weakened or violated, or that the institution’s fundamental purposes are being challenged or denied. On the contrary, we have every reason to assume that such a marriage would be fully consistent with the core forms, meanings, and purposes of marriage as a human and social institution. But whenever someone seeks to *prevent* an interracial couple from marrying – say, by passing anti-miscegenation laws – that person is weakening the institution of marriage .... They are manipulating marriage for their own purposes, turning an institution designed to bring women and men together into one that often keeps them apart.<sup>73</sup>

Defining marriage as the union of one man and one woman simply acknowledges that human beings are comprised of two sexes – male and female – and that society has built an institution upon the integration of those two sexes. Centuries of human history have demonstrated that marriage is a social institution aimed at bridging the sexual divide so as to provide for the perpetuation of society.<sup>74</sup> It is the latter view that is memorialized in the Virginia amendment and statutes and which should inform this Court’s analysis. Thus, there is sound justification for the definition and it does not discriminate on the basis of an immutable

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<sup>72</sup> Blankenhorn at p. 174.

<sup>73</sup> *Id.* at 175-176 (emphasis in original).

<sup>74</sup> *See Id.*

characteristic. It is therefore subject only to rational basis review.

**C. Those with a Same-Sex Sexual Preference who Seek Same-Sex Marriages do Not Constitute a Class for Purposes of Protected Class Status.**

All persons with a same-sex sexual preference are not “cut from the same pattern.”<sup>75</sup> In *City of Cleburne*, the Supreme Court used this phrase in its equal protection analysis of laws regarding persons with mental disabilities, and the Court noted that persons of disabilities have unique problems that the government was addressing; that such qualities did not merit heightened scrutiny.<sup>76</sup> The same is true here. Not all persons with same-sex attraction are interested in living out homosexual lifestyles and having states recognize same-sex unions as marriages.<sup>77</sup> Some same-sex partners are satisfied with civil unions, domestic partnerships, and other legal constructs that afford persons with same-sex sexual preferences with certain legal classifications. Still others are content with no legal recognition of their relationships. Thus, not all persons with a homosexual sexual orientation are cut from the same pattern and therefore, homosexuals do not make up a class that merits heightened scrutiny.

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<sup>75</sup> *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

<sup>76</sup> *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442-43 (1985).

<sup>77</sup> Josh Weed, *The Weed: All Kinds of Real* (June 7, 2012), <http://www.joshweed.com/2012/06/club-unicorn-in-which-i-come-out-of.html>

**D. Those with a Same-Sex Sexual Preference who Seek Same-Sex Marriages are Not so Politically Powerless that they Warrant Heightened Protection.**

“Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.”<sup>78</sup> In *City of Cleburne*, the Supreme Court discredited the argument that the mentally disabled were politically powerless and deserving of heightened scrutiny by highlighting the public support and legislative responses to the desires of the mentally disabled.<sup>79</sup> The homosexual lobby is also not politically powerless and should not be granted heightened scrutiny. The Human Rights Campaign, a homosexual activist organization, reported total contributions and grants in the amount of **\$28,939,547** in 2012,<sup>80</sup> and boasts more than a million members and supporters nationwide.<sup>81</sup> Lambda Legal Defense & Education Fund, Inc., a legal organization dedicated exclusively to assisting homosexuals and those with HIV, reported total contributions

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<sup>78</sup> *Id.* at 445.

<sup>79</sup> *Id.* at 445.

<sup>80</sup> James M. Rinefierd, *Form 990: Return of Organization Exempt from Income Tax*, Human Rights Campaign, Inc. (Aug. 14, 2013), [http://www.hrc.org/files/assets/resources/HRC\\_990\\_2012.pdf](http://www.hrc.org/files/assets/resources/HRC_990_2012.pdf).

<sup>81</sup> *The HRC Story: About Us*, Human Rights Campaign, <https://www.hrc.org/the-hrc-story/about-us> (last visited Nov. 8, 2013).

and grants in the amount of **\$16,008,476** in 2012.<sup>82</sup> The White House has an entire page dedicated to LGBT efforts, and the President of the United States regularly meets with members of the LGBT community.<sup>83</sup> The homosexual activist movement is very well funded and very politically powerful.

#### **IV. A REDEFINITION OF MARRIAGE WOULD CREATE MORE INEQUITY AND DISPARITY THAN A REDEFINITION WOULD ELIMINATE.**

Attempting to redefine marriage presents a serious threat to religious liberty. If same-sex attraction or orientation is determined to require the heightened scrutiny that is currently applied when laws target people on the basis of sex, race, and ethnicity, people endorsing marriage as a comprehensive union, “believing what virtually every human society once believed about marriage,” will soon be treated like racists, marginalized and stigmatized.<sup>84</sup>

A number of individuals who withhold professional endorsement of same-sex unions because of religious convictions have contacted Liberty Counsel after being threatened with lawsuits from homosexuals. In fact,

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<sup>82</sup> Kevin M. Cathcart, *Form 990: Return of Organization Exempt from Income Tax*, Lambda Legal Defense & Education Fund, Inc. (April 8, 2013), [http://www.lambdalegal.org/sites/default/files/anf\\_fy2012\\_990.pdf](http://www.lambdalegal.org/sites/default/files/anf_fy2012_990.pdf)

<sup>83</sup> *Winning the Future: President Obama and the LGBT Community*, The White House: President Barack Obama, <http://www.whitehouse.gov/lgbt> (last visited Nov. 8, 2013).

<sup>84</sup> *Id.* at 63.

there is a growing body of public cases addressing this issue as well.

In 2013, a Christian couple in Oregon, which operated Sweet Cakes by Melissa, was forced to close its doors after a lesbian couple filed a complaint with the state alleging discrimination when the couple cited religious reasons for refusing to bake a cake for their lesbian wedding.<sup>85</sup>

The Oregon Bureau of Labor and Industry ("BOLI") reviewed the case and determined Sweet Cakes by Melissa violated a non-discrimination law, and the lesbian couple and Sweet Cakes by Melissa were ordered to settlement negotiations.<sup>86</sup> If the parties do not reach an agreement, the bureau may bring formal charges and move the issue to BOLI's Administrative Prosecution Unit, responsible for processing contested civil rights division cases pursuant to the Administrative Procedures Act (APA) and BOLI contested case hearing rules.<sup>87</sup> In its press release, BOLI noted "[p]ublic

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<sup>85</sup> Cheryl K. Chumley, *Christian Bakers Who Refused Cake Order for Gay Wedding Forced to Close*, The Washington Times (September 2, 2013), <http://www.washingtontimes.com/news/2013/sep/2/christian-bakers-who-refused-cake-order-gay-wedding/>.

<sup>86</sup> Press Release, Oregon Bureau of Labor and Industry, BOLI Finds Substantial Evidence of Unlawful Discrimination in Bakery Civil Rights Complaint (January 17, 2014), [http://www.oregon.gov/boli/Audio%20and%20video/1\\_17\\_14\\_BOLI%20finds%20substantial%20evidence%20of%20unlawful%20discrimination%20in%20bakery%20civil%20rights%20complaint.pdf](http://www.oregon.gov/boli/Audio%20and%20video/1_17_14_BOLI%20finds%20substantial%20evidence%20of%20unlawful%20discrimination%20in%20bakery%20civil%20rights%20complaint.pdf)

<sup>87</sup> *Id.*

accommodations complaints under the equality act are rare;"<sup>88</sup> however, that is likely to change with government affirmation of same-sex unions and the influx of same-sex ceremonies that are likely to follow a transition in the government's position on the importance of marriage and biological intact family units.

Similarly, a cake shop in Colorado also faced charges. In December, Colorado Administrative Law Judge Robert Spencer determined a Christian cake-baker in Colorado who owns Masterpiece Cakeshop, Inc., is required to bake cakes for same-sex weddings.<sup>89</sup> Judge Spencer ruled that despite the fact that the laws of Colorado do not recognize same-sex marriages, folks who provide public accommodations are required to provide their services for same-sex couples' weddings.<sup>90</sup>

In Washington, on April 9, 2014, the Washington Attorney General filed a complaint against Arlene's Flowers, Inc., after the florist declined to provide flowers for a same-sex wedding.<sup>91</sup> The florist provided flowers to the gay couple, knowing they were gay, but when she was asked to provide

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<sup>88</sup> *Id.*

<sup>89</sup> *Craig v. Masterpiece Cakeshop, Inc.*, Case No. CR 2013-0008 (Col. Admin. Ct. Dec. 6, 2013), *available at* [https://www.aclu.org/sites/default/files/assets/initial\\_decision\\_case\\_no.\\_cr\\_2013-0008.pdf](https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf).

<sup>90</sup> *Id.* at 6.

<sup>91</sup> Complaint at 3, *Washington v. Arlene's Flowers, Inc.*, No. 13-2-0081-5 (Was. Sup. Ct. April 9, 2013).

flowers for their wedding, she cited her religious beliefs and declined to provide her services.<sup>92</sup> The Attorney General filed a complaint under the Unfair Business Practices-Consumer Protection Act, RCW 19.86, asking the court to force business like Alrene's Flowers, Inc. to provide their services for same-sex weddings, to impose a \$2,000 fine on the florist, and to have the florist pay the Attorney General's court fees.<sup>93</sup> Thereafter, the homosexual man seeking flowers for his wedding, also filed suit; these cases were consolidated and are ongoing.<sup>94</sup>

In Hawaii and Illinois, Bed and Breakfasts were sued for declining to issue a room to a homosexual couple and declining to provide the Bed and Breakfast as wedding venues for a same-sex wedding, respectively.<sup>95</sup> The Hawaiian court found for the homosexual couple and issued an order requiring the Bed and Breakfast to allow homosexuals to rent rooms; the

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<sup>92</sup> *Id.* at 1.

<sup>93</sup> *Id.* at 4.

<sup>94</sup> Complaint at 4-6, *Ingersoll v. Arlene's Flowers, Inc.*, No. 13-2-0081-5 (Was. Sup. Ct. May 13, 2013).

<sup>95</sup> Order Granting Plaintiffs and Plaintiff-Intervenors' Motion for Partial Summary Judgment for Declaratory and Injunctive Relief and Denying Defendant's Motion for Summary Judgment at 3, *Cervelli v Aloha Bed and Breakfast*, No. 11-1-3103-12 (Haw. Cir. Ct. Apr. 15, 2013), *available at* [http://www.lambdalegal.org/in-court/legal-docs/cervelli\\_hi\\_20130415\\_order](http://www.lambdalegal.org/in-court/legal-docs/cervelli_hi_20130415_order); Complaint at 2-7, *Wathen v. Timber Creek Bed and Breakfast*, No. 2011-SP-2486 (Ill. Human Rights Comm. November 1, 2011), *available at* <http://www.aclu-il.org/wp-content/uploads/2013/05/Wathen-Complaint-Beall-Mark.pdf>.

Illinois case is ongoing.<sup>96</sup>

These cases are increasing in frequency and are costing Christian business owners their livelihoods. This is occurring despite the fact that 85 percent of Americans agree that, if a Christian wedding photographer has deeply held religious beliefs opposing same-sex marriage, the wedding photographer should have the right to say no if asked to work a same-sex wedding ceremony.<sup>97</sup> Further erosion of the objective standard of marriage as the union of one man and one woman will only exacerbate the unequal treatment between religious adherents and non-adherents.

The Supreme Court of the United States is even involved in discussions of threats to the religious liberties of wedding vendors, as the *Elane Photography* case, regarding whether the First Amendment protects the right of a photographer to refuse to take a photograph, currently awaits a decision regarding certiorari.<sup>98</sup> In *Elane Photography*, the Supreme Court of New Mexico determined the rights of the same-sex couple wanting photography services trumped the religious and artistic liberties of the

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<sup>96</sup> *Id.*

<sup>97</sup> Tyler O'Neil, *Most Americans Say Christian Photographer Has Right to Deny Gay Wedding Request*, The Christian Post (July 17, 2013, 6:29 PM), <http://www.christianpost.com/news/most-americans-say-christian-photographer-has-right-to-deny-gay-wedding-request-100334/>.

<sup>98</sup> Petition for a Writ of Certiorari at i, *Elane Photography, LLC v. Vanessa Willock*, No. 13-585 (S.Ct. Dec. 13, 2013).

Christian photographers.<sup>99</sup>

If the courts redefine marriage, which is not a power of the courts but of the people and their representatives, those with a religious objection to same-sex unions being recognized as marriages will suffer. The Becket Fund for Religious Liberty conducted a survey and found “350 separate state anti-discrimination provisions would likely be triggered by recognition of same-sex marriage. The survey found that ... sexual orientation laws are [] far more likely to feature religious or conscience exemptions than laws governing gender or marital status discrimination.”<sup>100</sup> Thus, while many anti-discrimination statutes currently protect the consciences of religious people who wish to withhold professional endorsement of a particular sexual orientation,<sup>101</sup> such exemptions are not available based on marital status discrimination.

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<sup>99</sup> Todd Starnes, *NM Court Says Christian Photographers Must Compromise Beliefs*, FOX News and Commentary (August 22, 2013), <http://radio.foxnews.com/toddstarnes/top-stories/nm-court-says-christian-photographers-must-compromise-beliefs.html>.

<sup>100</sup> *Becket Fund for Religious Liberty Issues Brief: Same-Sex Marriage and State Anti-Discrimination Laws*, The Becket Fund for Religious Liberty (January 2009), <http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendices.pdf>.

<sup>101</sup> In the past year states have injected themselves into the relationship between minors and their professional counselors by prohibiting counselors, despite the religious convictions and consciences of the professionals, their minor patients, and the minors’ parents, from counseling minor patients

If the state recognizes same-sex unions as marriages, the state would imply that viewing marriage as a comprehensive union “makes *arbitrary* distinctions,” and “marriage supporters would become, in the state's eyes, champions of ‘invidious discrimination.’ This idea would lead to violations of the rights of conscience and religious freedom, and of parents’ rights to direct their children's education.”<sup>102</sup>

## CONCLUSION

Civil government has profound interests in preserving marriage for the benefit of society. Defining marriage as the union of one man and one woman does not discriminate against any particular class of people; rather, maintaining a traditional definition of marriage helps to preserve a healthy society and the rights and freedoms of all people. Should the civil government divert to a subjective structure of marriage in the interest of equality, all of society will suffer.

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about how to choose a heterosexual sexual orientation. Cal. Bus. and Prof. Code §§ 865, 865.1, 865.2; N.J. Rev. Stat. §§ 45:1-54, 55 (2013). Thus, while many anti-discrimination statutes do protect religious liberty, the fight for the religious liberty of professional counselors, their minor patients, and the parents of those minors is currently raging in the courts.

<sup>102</sup> Sherif Girgis et al., *What is Marriage? Man and Woman: A Defense* 63 (2012).

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**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C)**

I hereby certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7). The brief contains 6,878 words.

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Mathew D. Staver

## **CERTIFICATE OF SERVICE**

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

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