

Nos. 12-2335 & 12-2345

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA
CLARA SPYER,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendants-Appellants,

and

THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES
HOUSE OF REPRESENTATIVES,
Respondent.

Appeal from United States District Court for the Southern District of New York
Civil Case No. 10-8435 BSJ (Honorable Barbara S. Jones)

**BRIEF OF *AMICUS CURIAE*, AMERICAN COLLEGE OF
PEDIATRICIANS, IN SUPPORT OF INTERVENOR-APPELLANT
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES
HOUSE OF REPRESENTATIVES.**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that the *amicus* is not a corporation that issues stock or has a parent corporation that issues stock.

/s/ Vincent P. McCarthy
Vincent P. McCarthy
Counsel for the *Amicus*
August **, 2012

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Interest of the *Amicus* and Consent to File¹

The members of the American College of Pediatricians (“the College”) devote their professional lives to promoting the health and wellbeing of children. As a medical association, the College has an interest in the broad spectrum of factors that impact the physical, mental and social development of the young patients in their care. This interest extends to family structure and environment, which drives many of the outcomes for pediatric patients across a variety of key developmental categories.

The collective membership of the College has observed firsthand the effect of varied and changing family structures on the wellbeing of pediatric patients, and it is also familiar with the significant academic analysis and sociological data that augment understanding of these issues. The College submits this brief to present to the Court its professional perspective concerning the effect of various parenting models and family structures on the development and wellbeing of the children under the care of America’s pediatricians.

ARGUMENT

¹ This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party’s counsel authored the 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 the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

When Congress enacted the Defense of Marriage Act it retained, for purposes of federal law, a definition of marriage that has prevailed for millennia of human history. As a group of family scholars have noted:

Marriage exists in virtually every known human society. . . . At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society Marriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.²

In declining to have federal programs reflect novel definitions of marriage in states, Congress acted to preserve the goods marriage has provided through time and across cultures. The wisdom of the understanding of marriage is borne out by a large body of social science research which suggests that “family structure matters for children.”³

² William J. Doherty et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* 8-9 (1st edition, Institute for American Values 2002).

³ Kristin Anderson Moore, Susan M. Jekielek, and Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It?* CHILD TRENDS RESEARCH BRIEF (June 2002). For support of this proposition, see Lorraine Blackman et al., *The Consequences of Marriage for African-Americans: A Comprehensive Literature Review* (Institute for American Values, 2005); W. Bradford Wilcox et al., *Why Marriage Matters: 26 Conclusions from the Social Sciences* (2d edition, Institute for American Values 2005); Paul R. Amato, *Parental Absence During Childhood and Depression In Later Life* 32 *SOCIOLOGICAL QUARTERLY* 543, 547 (1991); SARA McLANAHAN AND GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 1-78, 134-55 (1994); Paul R. Amato, *The Impact of Family Formation Change on*

In dismissing the crucial policy interests advanced by DOMA, however, the court below relied on affidavits from an expert put forward by the Plaintiffs that the court said demonstrated “that same-sex parents are equally capable at parenting as opposite-sex parents,” “that parents’ genders are irrelevant to children’s developmental outcomes,” and “that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents.” Order at 26.

The court below was mistaken to so cavalierly discount the child-related interests served by marriage that amply justify the definition of marriage retained by DOMA for purposes of federal law. Social science evidence purporting to establish equivalence in child outcomes for children raised by a married mother and father compared to children raised by same-sex couples is severely limited and, in fact, may disclose significant differences in these outcomes. There is also important evidence suggesting children derive substantial benefits from the unique contributions of both men and women, mothers and fathers, as opposed to just any two adults. Finally, while social science data can be very helpful as a resource in resolving legal disputes, courts should be very cautious in interpreting and

the Cognitive, Social and Emotional Well-Being of the Next Generation 15 FUTURE OF CHILDREN 75, 89 (2005); Wendy D. Manning and Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families* 65 JOURNAL OF MARRIAGE AND FAMILY 876, 890 (2003); Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress through School* 47 DEMOGRAPHY 755 (2010).

applying this data especially where, as here, there seems to be no consensus about the content and implications of the data.

I.

Existing research on child outcomes for children raised by same-sex couples as compared to married husband-wife couples is significantly limited and actually suggests differences that do not bode well for children.

The litigation challenging the Defense of Marriage Act has typically relied on assertions about child outcomes related to family structure. These claims usually have nothing to do with the questions raised in the case. The child-centered purpose of marriage does not depend on assertions, which have not been disputed by any party to this case, that individuals in same-sex couples are *incapable* of being good parents or that either men or women are superior to one another as to parenting capacity. DOMA's challengers imply additionally, however, that research suggests there are no differences in child outcomes between children raised by same-sex couples and those raised by married mothers and fathers. This assertion is mistaken.

First, much of the research on this point is significantly flawed. An important new study critiques assertions made in an official brief of the American Psychological Association and demonstrates "not one of the 59 studies referenced in the 2005 APA brief compares a large, random, sample of lesbian or gay parents and their children with a large, random, representative sample of married parents and their children. The available data, which are drawn primarily from small,

convenience samples, are insufficient to support a strong generalizable claim either way. Such a statement would not be grounded in science. To make a generalizable claim, representative, large-sample studies are needed—many of them.”⁴ The article also noted previous research had not assessed “multiple concerns of societal importance, including drug and alcohol abuse, education (truancy), sexual activity, and criminality.”⁵ Other research has likewise found that studies purporting to show no difference between children raised by same-sex couples and those raised by married mothers and fathers have significant flaws such as insufficient sample sizes, reliance on volunteer rather than random samples, a lack of longitudinal research, inappropriate comparisons (i.e. comparing children raised by same-sex couples to children raised by divorced mothers) and other problems.⁶ One very relevant problem is the near total absence of research on children raised by two

⁴ Loren D. Marks, *Same-Sex Parenting and Children’s Outcomes: A Closer Examination of the American Psychological Association’s Brief on Lesbian and Gay Parenting* 41 SOCIAL SCIENCE RESEARCH 735, 748 (2012).

⁵ *Id.* at 744.

⁶ The most complete critique of the research was conducted by Dr. Steven Nock of the University of Virginia. Affidavit of Professor Steven Lowell Nock, *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ontario Sup. Ct. Justice 2001). See also Norval D. Glenn, *The Struggle for Same Sex Marriage* 41 SOCIETY 25, 26-27(2004); Walter R. Schumm, *What Was Really Learned from Tasker & Golombok’s (1995) Study of Lesbian & Single Parent Mothers?* 94 PSYCHOLOGICAL REPORTS 422, 423 (2004); ROBERT LERNER & ALTHEA K. NAGAI, NO BASIS: WHAT THE STUDIES DON’T TELL US ABOUT SAME-SEX PARENTING (Washington DC: Marriage Law Project, 2001).

men rather than two women.⁷ The Eleventh Circuit has addressed this seriously flawed body of research noting “significant flaws in the studies’ methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents.”⁸

The court below did not have at its disposal the most current research on child outcomes for children raised by same-sex couples. A brand new study in the peer-reviewed journal *Social Science Research* uses a large random national sample to assess these outcomes.⁹ The study is based on interviews with 3,000 respondents, 175 of whom were raised by a mother who had been in a same-sex relationship and 73 by a father who had been in a same-sex relationship. It looked at “social behaviors, health behaviors, and relationships” comparing child outcomes (as reported by the adult children rather than by those who raised them) among various groups including married biological parents (labeled as IBF for “intact biological family”) and parents who had been in same-sex relationships

⁷ Fiona Tasker, *Lesbian Mothers, Gay Fathers and Their Children; A Review* 26 DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS 224, 225 (2005) (“[s]ystematic research has so far not considered developmental outcomes for children brought up from birth by single gay men or gay male couples (planned gay father families), possibly because of the difficulty of locating an adequate sample.”).

⁸ *Lofton v. Secretary of the Department of Children and Family Services*, 358 F.3d 804, 825 (11th Cir. 2004).

⁹ Mark Regnerus, *How Different are the Adult Children of Parents who have Same-Sex Relationships? Findings from the New Family Structures Study* 41 SOCIAL SCIENCE RESEARCH 752 (2012).

(labeled LM for lesbian mothers and GF for gay fathers).¹⁰ On the forty outcomes measured, there were significant differences between those in the IBF and LM groups on twenty of those measures (the smaller sample size for fathers did not allow for as many findings of significance).¹¹ Some of the statistically significant differences where children who reported their mothers having been in a same-sex relationship fared worse than children raised by married biological parents included: cohabitation (9% of the IBF and 24% of the LM group), receiving welfare while growing up (17% of the IBF and 69% of the LM group), currently receiving public assistance (10% of the IBF and 38% of the LM group), current employment (49% of the IBF and 26% of the LM group), current unemployment (8% of the IBF and 28% of the LM group), having an affair while married or cohabiting (13% of the IBF and 40% of the LM group), having been touched sexually by a parent or other adult (2% of the IBF and 23% of the LM group), and ever having been forced to have sex against their will (8% of the IBF and 31% of the LM group).¹² In addition, the children who reported their mothers having been in a same-sex relationship were significantly less likely to identify as heterosexual (90% of the IBF and 61% of the LM group).¹³ Other measures where the children whose mothers had been in same-sex relationships had significantly greater

¹⁰ Id. at 755-756.

¹¹ Id. at 764.

¹² Id. at 761 table 2.

¹³ Id.

experience than the children of married biological parents include marijuana use, smoking, being arrested, and numbers of sex partners.¹⁴

A less ambitious new longitudinal study found that compared to children raised by married, biological parent couples, children raised by same-sex couples had poorer math assessment scores though this effect was only significant when the instability of the children's lives related to household structure were factored out (the existence of such instability is significant in itself).¹⁵

Though the court below was likely not aware of this study, the research that existed previously already contained suggestions of important differences, even though these studies have been relied on as support for the proposition that such differences do not exist, as the court below claimed. One such study found that children raised by same-sex couples were more likely to become drunk, be involved in binge drinking, use marijuana, engage in sexual behavior while intoxicated and be involved in delinquent behavior than children raised by opposite-sex couples.¹⁶ A very recent study also found a higher incidence of alcohol and marijuana use for children of same-sex couples and higher use of

¹⁴ Id. at 762 table 4.

¹⁵ Daniel Potter, *Same-Sex Parent Families and Children's Academic Achievement* 74 JOURNAL OF MARRIAGE & FAMILY 556 (2012).

¹⁶ Jennifer L. Wainwright, *Delinquency, Victimization, and Substance Use Among Adolescents with Same Sex Parents* 20 JOURNAL OF FAMILY PSYCHOLOGY 526, 528 table 1 (2006).

hallucinogen use for boys from these households.¹⁷ A 2010 study found adolescent girls raised by female couples “were significantly more likely to have had sexual contact with other girls, more likely to have used emergency contraception, and less likely to have used other forms of contraception” than girls raised in other kinds of households.¹⁸ An article reporting a British study found a “significant difference . . . with a greater proportion of fathers than co-mothers showing raised levels of emotional involvement with their children.”¹⁹ A 1997 study found: “[c]hildren in father-absent families perceived themselves to be less cognitively competent . . . and less physically competent . . . than children in father-present families.”²⁰ A book published the same year found women with lesbian mothers were more likely to be involved in promiscuous sex before marriage.²¹ One of the few studies that focused on gay fathers (not necessarily in couples) found their adult daughters “were significantly less comfortable with closeness and intimacy,

¹⁷ Naomi Goldberg, et al., *Substance Use by Adolescents of the USA National Longitudinal Lesbian Family Study* 16 JOURNAL OF HEALTH PSYCHOLOGY 1, 5 (2011).

¹⁸ Nanette Gartrell, et al., *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Sexual Orientation, Sexual Behavior, and Sexual Risk Exposure* 40 ARCHIVES OF SEXUAL BEHAVIOR 1199, 1202-1204 (2011).

¹⁹ Susan Golombok, et al., *Children With Lesbian Parents: A Community Study* 39 DEVELOPMENTAL PSYCHOLOGY 20, 26 (2003).

²⁰ Susan Golombok, et. al, *Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers* 38 JOURNAL OF CHILD PSYCHOLOGY & PSYCHIATRY 783, 788 (1997).

²¹ FIONA TASKER & SUSAN GOLOMBOK, *GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT* 133 (Gulliford Press 1997).

less able to trust and depend on others, and experienced more anxiety in relationships than women with heterosexual fathers.”²²

This kind of research does not provide the answers to policy questions such as whether to recognize same-sex unions in the law and what form such recognition might take. It does suggest, however, that Congress’ decision not to jettison the definition of marriage that applied in federal law for the entire preceding history of the nation is wisely cautious and advances state interests in child well-being the court below did not adequately consider.

II.
Children benefit from the unique parenting contributions of both men and women.

Justice William Brennan argued “the optimal situation for the child is to have both an involved mother and an involved father.”²³ Indeed, the expert relied on by the court below has written: “Both mothers and fathers play crucial and qualitatively different roles in the socialization of the child.”²⁴ These conclusions are in line with a large body of social science evidence. A group of family scholars explains: “empirical literature on children suggests that the two sexes bring

²² Theodore Sirota, *Adult Attachment Style Dimensions in Women Who Have Gay or Bisexual Fathers* 23 ARCHIVES OF PSYCHIATRIC NURSING 289 (2009).

²³ *Bowen v. Gilliard*, 483 U.S. 587, 614 (1987)(Brennan, J. dissenting).

²⁴ Michael E. Lamb, *Fathers: Forgotten Contributors to Child Development* 18 HUMAN DEVELOPMENT 245, 246 (1975).

different talents to the parenting enterprise.”²⁵ In his testimony in the Proposition 8 trial, plaintiff’s expert Michael Lamb admitted he had previously stated men and women are not “completely interchangeable with respect to skills and abilities” and that “data suggests that the differences between maternal and paternal behavior are more strongly related to either the parents’ biological gender or sex roles, than to either their degree of involvement in infant care or their attitudes regarding the desirability of paternal involvement in infant care.”²⁶

A number of studies outline unique contributions mothers make to their children. For instance, a mother’s responsiveness to her child promotes brain development, including the ability to interact, in the child.²⁷ Mothers provide crucial direction to fathers on childcare tasks.²⁸ Mothers are typically closer to their

²⁵ WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 18 (2008).

²⁶ Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), trial transcript at 1064 & 1068.

²⁷ See C.A. Nelson and M. Bosquet, *Neurobiology of Fetal and Infant Development: Implications for Infant Mental Health*, in HANDBOOK OF INFANT MENTAL HEALTH 37 (2d ed., C.H. Zeanah Jr., editor, 2000); M. DeWolff and M. van Ijzendoorn, *Sensitivity and Attachment: A Meta-Analysis on Parental Antecedents of Infant Attachment* 68 CHILD DEVELOPMENT 571 (1997); M. Main and J. Solomon, *Discovery of an Insecure-Disorganized Disoriented Attachment Pattern*, in AFFECTIVE DEVELOPMENT IN INFANCY 95 (T.B. Brazelton and M.W. Yogman eds., 1986).

²⁸ Sandra L. Hofferth et al., *The Demography of Fathers: What Fathers Do*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 81 (Catherine Tamis-Lamonda and Natasha Cabrera eds., 2002); SCOTT COLTRANE, FAMILY MAN 54 (1996).

children emotionally and have more and more open communication than fathers.²⁹ Women play with their children differently than do men, emphasizing interaction, predictability and joint problem-solving.³⁰ Mothers impose limits and discipline more frequently, but with greater flexibility, than do fathers.³¹ The role of mothers in helping children develop language and communication skills is usually greater than that of fathers.³² Mothers help their children develop empathy for others by helping them understand the emotions of others as well as their own.³³ Mothers provide an important role in getting children to connect to extended family and their peers.³⁴

Eminent sociologist James Q. Wilson has said: “The weight of scientific evidence seems clearly to support the view that fathers matter.”³⁵ To take one example, plaintiff expert Dr. Lamb explained: “boys growing up without fathers

²⁹ ROSS D. PARKE, *FATHERHOOD* 7 (1996).

³⁰ ELEANOR MACOBY, *THE TWO SEXES* 266-67 (1998); PARKE, *FATHERHOOD* at 5; KYLE D. PRUETT & MARSHA KLINE PRUETT, *PARTNERSHIP PARENTING: HOW MEN AND WOMEN PARENT DIFFERENTLY – WHY IT HELPS YOUR KIDS AND CAN STRENGTHEN YOUR MARRIAGE* 18-19 (2009).

³¹ MACOBY, *THE TWO SEXES* at 273.

³² PARKE, *FATHERHOOD* at 6.

³³ Suzanne A. Denham *et al.*, *Prediction of Externalizing Behavior Problems From Early to Middle Childhood: The Role of Parental Socialization and Emotion Expression*, in *DEVELOPMENT AND PSYCHOPATHOLOGY* 23 (2000); MACOBY, *THE TWO SEXES* at 272.

³⁴ Paul Amato, *More Than Money? Men’s Contributions to Their Children’s Lives?* in *MEN IN FAMILIES, WHEN DO THEY GET INVOLVED? WHAT DIFFERENCE DOES IT MAKE?* 267 (Alan Booth and Ann C. Crouter, eds. 1998).

³⁵ JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 169 (2002).

seemed to have ‘problems’ in the areas of sex-role and gender-identity development, school performance, psychosocial adjustment, and perhaps in the control of aggression.”³⁶ Fathers’ play with children emphasizes spontaneity and limits simultaneously.³⁷ They are more likely to allow children to explore and take risks by supervising rather than intervening in children’s play.³⁸ Fathers are more likely to encourage children’s exploration of novelty.³⁹ Fathers help children develop their independence from the family by giving adolescents a sense that the child can be relied on.⁴⁰ When father’s provide discipline it is less frequent but more predictable.⁴¹ Children also seem more likely to comply with fathers’

³⁶ Michael W. Lamb, *Fathers and Child Development: An Introductory Overview and Guide* in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 1, 10 (Michael E. Lamb, editor, third edition 1997).

³⁷ DAVID POPENOE, LIFE WITHOUT FATHER 144 (1996); *see also* Linda Carroll, “Dads Empower Kids to Take Chances”, MSNBC, June 18, 2010 (available at <http://www.msnbc.msn.com/id/37741738>).

³⁸ Daniel Paquette & Mark Bigras, *The Risky Situation: A Procedure for Assessing the Father-Child Activation Relationship*, 180 EARLY CHILDHOOD DEVELOPMENT & CARE 33 (2010).

³⁹ PARKE, FATHERHOOD at 6.

⁴⁰ Shmuel Shulman & Moshe M. Klein, *Distinctive Role of the Father in Adolescent Separation - Individuation* 1993 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEVELOPMENT 41, 53 (1993).

⁴¹ Thomas G. Powers et al., *Compliance and Self-Assertion: Young Children’s Responses to Mothers Versus Fathers*, 30 DEVELOPMENTAL PSYCHOLOGY 980 (1994).

requests.⁴² Fathers seem to have a greater impact on mothers on the delinquency and sexual behavior of children.⁴³

Surely, if children benefit from a relationship with a mother and father, Congress' is acting rationally in treating the union of a man and a woman differently from other types of relationships.

III.

Courts should act with extreme caution in making social and constitutional policy when relying on provisional social science data.

When courts are asked to resolve contentious disputes involving important social and policy considerations, they should of course proceed cautiously. This caution is, if possible, even more necessary when relying upon social science research.

As the U.S. Supreme Court has explained, “arguably, there are no certainties in science.”⁴⁴ As the Court further noted, the conclusions of science “are subject to

⁴² MACOBY, *THE TWO SEXES* at 274-275.

⁴³ Paul R. Amato and Fernando Rivera, *Paternal Involvement and Children's Behavior Problems* 61 *JOURNAL OF MARRIAGE & FAMILY* 375 (1999); Mark D. Regnerus and Laura B. Luchies, *The Parent-Child Relationship and Opportunities for Adolescents' First Sex* 27 *JOURNAL OF FAMILY ISSUES* 159 (2006); Bruce J. Ellis, *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?* 74 *CHILD DEVELOPMENT* 801 (2003); Bruce J. Ellis, *Quality of Early Family Relationships and Individual Differences in the Timing of Pubertal Maturation in Girls: A Longitudinal Test of an Evolutionary Model* 77 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 387 (1999).

⁴⁴ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).

perpetual revision” while courts “must resolve disputes finally and quickly.”⁴⁵ This creates the problem of “unavailable data” because science is “under few or no time constraints” and so may not have information that would aid a court in a matter that needs immediate resolution or may have information that will be significantly altered or amended or given proper context in the future.⁴⁶ Thus, for instance, the court below quoted one expert as saying there existed “no empirical support for the notion that the presence of both male and female role models in the home promotes children’s adjustment or well-being.” Order at 26. As discussed above, that was probably not true at the time and has now been directly challenged by a very significant study with results suggesting the contrary. At the very least, we can confidently say there exists no informed consensus as to the child outcomes of same-sex marriages.

It is also beyond question that science is affected by political and cultural trends. “Science does not operate in a vacuum; it is subject to social forces, both within and without the scientific world. . . . The relationships both within and beyond the scientific community exert influence on the creation of scientific

⁴⁵ Id. at 597.

⁴⁶ David L. Faigman, *Legal Alchemy: The Use and Misuse of Science in the Law* 2 YALE SYMPOSIUM ON LAW & TECHNOLOGY 3 (2000); M. Neil Browne & Ronda R. Harrison-Spoerl, *Putting Expert Testimony In Its Epistemological Place: What Predictions of Dangerousness in Courts Can Teach Us* 91 MARQUETTE LAW REVIEW 1119, 1128 (2008).

knowledge.”⁴⁷ Edward Phillips of the University of Greenwich similarly notes that “scientific knowledge, like other forms of knowledge, does not exist in a political or institutional vacuum” so an “expert may well be operating from a theoretical or intellectual base which involves predetermined conclusions” and his or her “conclusions drawn may involve interpretative value judgments.”⁴⁸ Two of the more enthusiastic academic supporters of family change including redefining marriage admit: “[T]he political stakes of this body of research are so high that the ideological ‘family values’ of scholars play a greater part than usual in how they design, conduct, and interpret their studies.”⁴⁹ They note further: “[T]oo many psychologists who are sympathetic to lesbian parenting seem hesitant to theorize at all” and are apt to “downplay the significance of any findings of differences.”⁵⁰

These kinds of influences are joined by more prosaic matters such as the interests and inclinations of a researcher, the availability of samples on which to work,⁵¹ the accessibility of colleagues with similar interests and other matters.

⁴⁷ Browne & Harrison-Spoerl, at 1160-1161.

⁴⁸ Edward Phillips, *Testing the Truth: The Alliance of Science and Law* in CRIMINAL JUSTICE IN CRISIS 229, 239-240 (Mike McConville & Lee Bridges, eds., 1994) as quoted in Browne & Harrison-Spoerl, at 1160 note 187.

⁴⁹ Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?* 66 AMERICAN SOCIOLOGICAL REVIEW 159, 161 (2001).

⁵⁰ *Id.*

⁵¹ Thus, for instance, one family scholar has explained:

[O]ne has to be very careful in interpreting research on homosexual issues and be wary of outcomes when samples are very small and often nonrandom, so the null hypothesis is not rejected but is used for

Perhaps most importantly there may be, for whatever reason, a similarity of opinion on matters within a profession so that advancement and participation might seem to be threatened (or actually be denied) to those who follow a research agenda or announce findings contrary to the majority position.

The limitations of scientific evidence are particularly acute in regards to the social sciences. As the Eighth Circuit has noted: “There is some question as to whether the *Daubert* analysis should be applied at all to ‘soft’ sciences such as psychology, because there are social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies.”⁵²

The particular limitations of social science evidence may result from the more necessarily theoretical presuppositions of the field, since the objects of study—human and social interactions and decisions—are complex, multi-factored and have idiosyncratic qualities shared by the researcher (making objectivity difficult). Thus, for instance, expert testimony about the speed of an object might be reasonably straightforward since the factors involved could be identified and

political purposes as if a meaningful result had been obtained. Such a result may reflect poor methodology or selective review of the literature rather than valid science. Policy makers should interpret research on gays and family life (or any very small subset of any population) with extreme caution.

Walter Schumm, *What was Really Learned from Tasker & Golombok’s (1995) Study of Lesbian & Single Parent Mothers?* 95 PSYCHOLOGICAL REPORTS 422, 423 (2004).

⁵² *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1297 (8th Cir. 1997).

isolated while testimony about the nature or effects of historical trends in family life will, of necessity, involve a multitude of factors hard to isolate and perhaps even to know. Social science usually lacks “controlled experimentation, which is what allows science positively to settle certain kinds of debates.”⁵³ Thus, “we should be very skeptical of claims for the effectiveness of new, counterintuitive programs and policies, and we should be reluctant to trump the trial-and-error process of social evolution in matters of . . . social policy.”⁵⁴

Thus, while scientific evidence, including social scientific evidence, will be useful and helpful, it ought to be approached with caution and carefully examined including for the possibility that it may reflect cultural or political, rather than empirical, assumptions.

What is disconcerting, however, is that the court below treated this inherently contingent body of research (as relayed to the court by an expert whose own view of the matter appears to have changed over time) as a justification for dismissing the inherited wisdom of millennia about marriage and children’s needs. This court should not repeat that mistake.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this

⁵³ Jim Manzi, *What Social Science Does—and Doesn’t—Know* CITY JOURNAL (Summer 2010) at <http://city-journal.org/printable.php?id=6330>.

⁵⁴ *Id.*

Honorable Court uphold the constitutionality of the Defense of Marriage Act and reverse the judgment of the district court.

Respectfully submitted,

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August **, 2012

Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,641 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August **, 2012.

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