Nos. 14-14061-AA & 14-14066-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES BRENNER, CHARLES JONES, STEVEN SCHLAIRET, et al.,
APPELLEES,

v.

JOHN H. ARMSTRONG, CRAIG J. NICHOLS, AND HAROLD BAZZELL, IN THEIR RESPECTIVE OFFICIAL CAPACITIES AS: SEC'Y, FLA. DEP'T OF HEALTH; SEC'Y, FLA. DEP'T OF MGMT. SERVS.; AND CLERK OF CT. AND COMPTROLLER FOR WASHINGTON CNTY. FLA., APPELLANTS.

SLOAN GRIMSLEY, JOYCE ALBU, BOB COLLIER, et al., APPELLEES,

v.

JOHN H. ARMSTRONG AND CRAIG J. NICHOLS, IN THEIR RESPECTIVE OFFICIAL CAPACITIES AS: SEC'Y, FLA. DEP'T OF HEALTH; AND SEC'Y, FLA. DEP'T OF MGMT. SERVS., APPELLANTS.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, CIVIL CASES NOS. 4:14-CV-00107-RH-CAS & 4:14-CV-138-RH-CAS (HONORABLE ROBERT J. HINKLE)

BRIEF OF AMICUS CURIAE DAVID BOYLE SUPPORTING APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae David Boyle, pursuant to 11th Cir. R. 26.1-1, certifies that the following is a list of those who have an interest in the outcome of this case and/or appeal:

16 Scholars of Federalism and Judicial Restraint

Alvare, Helen M.

American Civil Liberties Union of Florida, Inc., The

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc.

American College of Pediatricians

Albu, Joyce

Alliance Defending Freedom

Anderson, Ryan T.

Andrade, Carlos

Armstrong, Dr. John H.

Ausley McMullen

Babione, Byron J.

Bazzell, Harold

Becket Fund for Religious Liberty

Bledsoe, Jacobson, Schmidt, Wright & Wilkinson

Bondi, Pamela Jo, Attorney General of Florida

Boyle, David

Bradley, Gerard V.

Brenner, James Domer

Church of Jesus Christ of Latter-day Saints

Citro, Anthony

Collier, Bob

Concerned Women for America

Cooper, Leslie

Crampton, Stephen M.

Del Hierro, Juan

DeMaggio, Bryan E.

Dewart, Deborah J.

Duncan, William C.

Emmanuel, Stephen C.

Ethics & Religious Liberty Commission of the Southern Baptist Convention

Fitschen, Steven W.

Fitzgerald, John

Florida Conference of Catholic Bishops, Inc.

Florida Family Action, Inc.

Gantt, Thomas, Jr.

George, Robert P.

Gibbs, David C. III

Girgis, Sherif

Goldberg, Arlene Goldwasser, Carol (deceased)

Goldberg , Suzanne B.

Goodman, James J., Jr.

Graessle, Jonathan W.

Grimsley, Sloan

Hankin, Eric

Hinkle, Hon. Robert L.

Hueso, Denise

Humlie, Sarah

Hunziker, Chuck

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Liberty Counsel Action, Inc.

Liberty, Life, and Law Foundation

Lopez, Robert Oscar

Loupo, Robert

Loukonen, Rachael Spring

Lutheran Church-Missouri Synod

Marriage Law Foundation

McAlister, Mary

McHugh, Dr. Paul

Mihet, Horatio G.

Milstein, Richard

Myers, Lindsay

National Association of Evangelicals

Newson, Sandra

Nichols, Craig J.

North Carolina Values Coalition

Picarello, Anthony

Podhurst Orseck, P.A.

Rosenthal, Stephen F.

Russ, Ozzie

Sauer, D. John

Save Foundation, Inc.

Schaerr, Gene C.

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Scholars of the Institution of Marriage

Scott, Rick

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Sheppard, William J.

Smith, Michael F.

Smith, Hannah

Snider, Kevin T.

Stampelos, Hon. Charles A.

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Staver, Mathew D.

Stevenson, Benjamin James

Tanenbaum, Adam S.

Tilley, Daniel B.

Trent, Edward

Ulvert, Christian

United States Conference of Catholic Bishops

White, Elizabeth L.

Winsor, Allen C.

This amicus does not know all the people above, or their positions, but is partially drawing on the interested-persons lists of others, and also adding in, e.g., new amici he did not see on others' lists. If anyone is missing from the list, or anyone is there but should not be, please feel free to let this amicus know.

This amicus is an individual who issues no stock, and who has or is no parent corporation, or any publicly held corporation that owns 10% or more of stock of that nonexistent parent corporation.

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STATEMENT OF THE ISSUE

Whether the national Constitution's Fourteenth Amendment requires Florida to allow same-sex marriage.

STATEMENT OF INTEREST OF AMICUS CURIAE

The present amicus curiae, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief Supporting Appellants and Reversal in *Brenner v. Sec'y, Fla. Dep't of Health* and *Grimsley v. Sec'y, Fla. Dep't of Health*, Nos. 14-14061-AA and 14-14066-AA (4:14-CV-00107-RH-CAS & 4:14-CV-138-RH-CAS, 999 F. Supp. 2d 1278 (N.D. Fla. 2014)) . Amicus has also filed briefs in other cases about mandatory legalized same-sex ("gay") marriage (available on request), and wishes to help the State of Florida defend laws—such as the state constitution's Article I, Section 27—, which ban gay marriage ("the Ban").

Some pundits have mocked the attempts of States like Florida to uphold their electorates' will. However, it is often actually the proponents of mandatory gay marriage who make illogical arguments. For example, if *Loving v. Virginia* (388 U.S. 1, 87 S. Ct. 1817 (1967)) really mandates gay marriage, then how come the U.S. Supreme Court's Justice Clarence Thomas, currently in an interracial marriage, dissented in *United States v. Windsor* (133 S. Ct. 2675, 2697 (2013))? Or

[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* Fed. R. App. P. 29. All parties have sent permission to Amicus to write this brief.

if gay-marriage bans are "segregation", then why couldn't polygamists, or other sexual minorities, argue similarly? *See, e.g.*, Richard A. Epstein, *Judicial Offensive Against Defense Of Marriage Act*, The Libertarian, Forbes.com, July 12, 2010, 1:28 p.m.[2] (saying marriage licenses must be extended to both polygamists and gays).

Moreover, a famous denizen of this Circuit, a former President who supports gay marriage and can hardly be called a "homophobe", nevertheless recently supported a democratic decision on the issue: "Jimmy Carter . . . . told the local ABC affiliate[:] '[I]f Texas doesn't want to have gay marriages then I think it's a right for Texas people to decide,' said Carter. 'People who happen to be gay…I think they ought to have equal rights to marry.'"[3] Carter's wise and moderate balance, *see id.*, of having his own views but not being willing to inflict them on the People if they disagree, is a valuable guiding star.

SUMMARY OF ARGUMENT

Gay-marriage bans, which are not "discriminatory" or "overinclusive/ underinclusive", whether by sex, fertility, or otherwise, steer sexually-fluid persons

[2] http://www.forbes.com/2010/07/12/gay-marriage-massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html (last visited Nov. 20, 2014, as with all other Internet links herein).

[3] Lauren McGaughy, *Jimmy Carter: States should decide on gay marriage*, Houston Chron., Oct. 27, 2014, http://blog.chron.com/texaspolitics/2014/10/jimmy-carter-states-should-decide-on-gay-marriage/.

towards heterosexual marriage. This increases the number of children, offers the spouses safe, procreative sexual opportunities instead of sodomy, and gives diverse-gender parents to children. All that, plus research evidence, and the pro-life, pro-gender-diversity expressive message of an exclusively-heterosexual two-person marriage institution, should let the bans pass the strictest level of scrutiny.

ARGUMENT

I. SANDRA DAY O'CONNOR IN *LAWRENCE V. TEXAS*: STATES HAVE LEGITIMATE REASONS TO PROHIBIT GAY MARRIAGE

First off: what has the Supreme Court said? Justice Sandra Day O'Connor's concurrence in *Lawrence v. Texas* (539 U.S. 558, 123 S. Ct. 2472 (2003)) notes, "Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations[,] other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.* at 585, 123 S. Ct. at 2487-88. The Justice is not generally noted as an ignorant bigot, so perhaps she is right.[4] She did not spell out precise reasons, but this brief makes some educated guesses. And most of the *Lawrence* Court did not disagree with her, either. (Justice Anthony Kennedy explicitly said his opinion "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to

[4] O'Connor may in the interim have officiated at a gay wedding, but in the District of Columbia, so that her officiation does not imply that any *State* may not find good reason to disallow gay marriage. Precision is important here.

enter." *Id.* at 578, 123 S. Ct. at 2484.) Thus, the burden is on mandatory-gay-marriage proponents *to disprove completely* what O'Connor said.

We shall start our educated guesses about what she meant, with the simple yet profound truth that men and women are not exactly the same, and some resulting consequences:

II. *TIGNER V. TEXAS* (AND *BALLARD V. UNITED STATES*) RE SAME-SEX COUPLES' THREE PHYSICAL IMPOSSIBILITIES: HAVING CHILDREN TOGETHER; HAVING REPRODUCTIVE SEX; AND PROVIDING DIVERSE-GENDER PARENTAGE AND ROLE-MODELING

For same-sex couples, some things are physically impossible. —First, they cannot get each other pregnant, i.e., can never have children by each other. Second, the only kind of sexual relations they can have is non-reproductive sex, a.k.a. "sodomy". And third, they can never provide gender-diverse parenting or role-modeling to children. Two men cannot breast-feed a child; two women cannot provide a little boy a male role model, since they are not male.

In other words: "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both[.]" *Ballard v. United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 264 (1946) (Douglas, J.). And, re that difference: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147, 60 S. Ct. 879, 882 (1940) (Frankfurter, J.).

These two preceding quotes alone should decide this case in favor of Florida's People, who seem to recognize the common-sense differences *supra* between diverse-gender and same-gender couples. (Moreover, if there are *no* legal distinctions allowable between same-sex couples and diverse-sex couples, e.g., if this Court declares that legal gay marriage is mandatory, this Court will thus arguably have *sub silentio* overruled *Ballard*, which is not permissible.)

III. BISEXUAL AND SEXUAL-ORIENTATION-FLUID PERSONS MAY CHOOSE OPPOSITE-SEX SPOUSES, AND HAVE HISTORICALLY DONE SO, WHEN GAY MARRIAGE IS UNAVAILABLE; THEREFORE, GAY-MARRIAGE BANS ARE RATIONAL, AND MEANINGFULLY PRODUCTIVE OF DIVERSE-GENDER MARRIAGES

A. Human Sexual Fluidity Comprises Many Bisexual or Sexual-Orientation-Fluid Americans Who Could Choose either Sex-Segregated or Diverse-Gender Marriage

But does a gay-marriage ban move anyone into a diverse-gender marriage? —One of the intellectual tragedies of the gay-marriage debate is that gay-marriage proponents have been largely silent about issues they should know well: e.g., widespread sexual fluidity in human beings. As gay-marriage proponents tend to present things, there are basically only two groups: heterosexuals and homosexuals. According to this false dichotomy, a gay-marriage ban—since it would not affect heterosexuals, nor would it make homosexuals enter heterosexual marriages—is not only meaningless but mean: an illegal instantiation of "animus".

However, the narrow binary model *supra* is outdated and reductive. Indeed, there is a "rainbow" of human sexual preference: traditional two-person heterosexual relationships; polygamy or polyandry; homosexuality; asexuality; and bisexuality, among others. The last of those, bisexuality, shows that a gay-marriage ban has a beneficial effect, if two-person gender-diverse marriages are beneficial. (Few religions or social traditions see them otherwise.) And there are many bisexuals in America.

According to the Wikipedia article *Bisexuality*,[5] studies show figures ranging from 0.7 to 5 percent of Americans being bisexuals, *see id.* There may be even more bisexuals than homosexuals: "*The Janus Report on Sexual Behavior*, published in 1993, showed that 5 percent of men and 3 percent of women considered themselves bisexual and 4 percent of men and 2 percent of women considered themselves homosexual." *Id.* (footnote omitted) Thus, since there are so many people who could be attracted to either sex, the myth of "total immutability of sexual preference" goes out the window.

In fact, the number may be far larger than 5%: "Alfred Kinsey's 1948 work *Sexual Behavior in the Human Male* found that '46% of the male population had engaged in both heterosexual and homosexual activities[.]" *Id.* (footnote omitted)

[5] http://en.wikipedia.org/wiki/Bisexuality (as of Nov. 3, 2014, at 15:36 GMT).

See also, e.g., "A 2002 survey in the United States by National Center for Health Statistics found that [:] 2.8 percent of women ages 18–44 considered themselves bisexual, 1.3 percent homosexual, and 3.8 percent as 'something else'", *id.* (footnote omitted); therefore, 6.6 percent of women 18-44 who were either *per se* bisexual, or "sexually flexible".

So, if we conservatively assume that not even 5%, but only 4%, of the population is bisexual, either *per se* or *de facto*; and if there are c. 315 million Americans right now, then c. 12.6 million Americans are bisexual. If even half of those marry, that is 6.3 million people, with roughly 3.15 million of them marrying opposite-sex partners, and 3.15 million marrying same-sex partners, if gay marriage were available.

But if same-sex marriage were unavailable, then, at least c. 3.15 million more people, if they marry, would marry opposite-sex partners. Over three million people moved into diverse-gender marriage provides far more than a mere "rational basis" for laws banning gay marriage, but rather, an extremely compelling state interest.

If the real-life numbers are anywhere close to those hypothetical figures—or even if lower—, they make the case that opponents of gay-marriage bans have long claimed cannot be made. I.e., instead of there being no nexus between gay-marriage bans and the channeling of people into heterosexual marriages, there is

actually a direct and very strong nexus. Thus, the test of "rational basis" (or higher scrutiny) is definitively passed.

B. A Revelatory Law-Review Article Admitting Gay-Marriage Bans' Channeling of People into Diverse-Gender Marriages

Even some proponents of gay marriage admit, and lament, that laws like the Florida ban "channel" bisexuals into heterosexual marriages. *See* Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 San Diego L. Rev. 415 (2012): "This Article proposes that same-sex marriage bans channel individuals, particularly bisexuals, into heterosexual relations and relationships[.]" *Id.* at 416. Boucai believes (wrongly) that gay-marriage bans violate fundamental rights, *see id. passim*. So he is basically "admitting against interest" when he acknowledges the channeling effect.

Some mechanisms by which laws channel the sexually-flexible into traditional marriages include "proscription of competing institutions[,] vast material support, and symbolic valorization", *id.* at 418 (footnote omitted). (Polygamy is one "proscribed competing institution", so gay marriage is not alone in that respect.)

The article has other insightful observations. Bisexuals are a "class of individuals, amorphous yet numerous", *id.* at 438; "72.8% of all homosexually active men identify as heterosexual", *id.* at 440; certain "trends describe only self-identified bisexuals. It would be startling if bisexuals' true rates of heterosexual

coupling and marriage were not significantly higher", *id.* at 450; bisexuals are "by some estimates an 'invisible majority' of LGBT people", *id.* at 483-84 (footnote omitted); and, "With regard to procreation, this Article's argument implicitly concedes one way in which same-sex marriage bans advance the state's interest: by increasing the number of bisexuals who pursue same-sex relationships, legalization presumably will decrease these individuals' chances of reproducing." *Id.* at 482. All these observations reinforce that bans on same-gender marriage indeed move the huge class of bisexual persons into diverse-gender marriages.

And Boucai's article not only supports gay marriage, but also shows far more extreme views. For example: "[What if the] impressionable psychosexual development of children is a basis for widening, not limiting, the range of 'lifestyle choices' to which they are exposed[?]", with a citation "urging advocates to affirm that nonheterosexual parents 'create an environment in which it is safer for children to openly express their own sexual orientations'". *Id.* at 484 & n.456. I.e., Boucai posits nonheterosexual parenting as *better than* heterosexual parenting, *see id.* Boucai's article is so far to the left that it criticizes typical defenses of gay marriage as being too conservative, *see id. passim*. Thus, the article has an "insider's credibility" which rings true when Boucai criticizes gay-marriage-supporting litigants.

And the criticism is extensive. "Bisexuality is 'virtually invisible' in same-sex marriage litigation." *Id.* at 452. In fact: "Bisexual invisibility in same-sex marriage litigation tends to be a negative phenomenon—erasure by mere omission—but sometimes it happens through affirmative, active deletion." *Id.* at 455 (footnotes omitted). Intentional or not, the omission of a discussion of bisexuality's pervasiveness and effects is a gross material omission in any gay-marriage case.

After all, the LGBT community privately acknowledges sexual flexibility, using terms like "yestergay", *see* Wiktionary, *yestergay*,[6] "1. (slang, LGBT) A former gay male who is now in a heterosexual relationship", *id.*, or the terms "hasbian" and "lesbians until graduation". Our courts should publicly acknowledge what gays privately acknowledge.

C. The Successful Heterosexual Marriages of Some Bisexual Mormons: Further Proof that Gay-Marriage Bans Are Effective

Theory aside, there are multifarious real-life examples of how channeling people into diverse-gender marriages works. *See, e.g.*, Carrie A. Moore, *Gay LDS men detail challenges: 3 who are married give some insights to therapist group*, Deseret News, Mar. 30, 2007, 12:22 a.m.,[7]

> Speaking to a standing-room-only audience, three LDS couples described their experiences with their heterosexual marriages, despite

[6] http://en.wiktionary.org/wiki/yestergay (as of May 22, 2014, at 23:54 GMT).
[7] http://www.deseretnews.com/article/660207378/Gay-LDS-men-detail-challenges.html.

> the fact that each of the husbands experience what they call same-sex attraction, or SSA. . . .
>
> . . . .
>
> Because of the nature of the discussion, none of the participants wanted their identities publicized. . . .
>
> . . . .
>
> "[M]arriage and family . . . . was always the goal, even when I [one husband] was in the wilderness."
>
> . . . .
>
> [I]t took years for them to be able to discuss [one husband's] attraction to men. He said he "made a lot of mistakes" and the two of them talked about divorce, but he praised his wife for "hanging in there with me."
>
> The wives said they see their husbands as much more than their same-sex attraction. Despite the challenges and public perception to the contrary, one said, "there are people who are married and dealing with this."

Id. This revelatory story of courage and persistence teaches us much. It shows, *see id.*, that sexually-fluid people (whether "gay", "bisexual", or "heteroflexible") can be channeled into successful diverse-gender relationships. It also shows, *see id.*, the fear and anonymity that such people go through, perhaps obscuring their true, massive numbers.

D. The Defeat of the Lower Court's Argument for the Ineffectiveness of a Gay-Marriage Ban, by the Facts Above

At this point, the lower court's argument that "[t]hose who enter opposite-sex marriages are harmed not at all when others, including these plaintiffs, are given the liberty to choose their own life partners and are shown the respect that comes with formal marriage", *Brenner v. Scott*, 999 F. Supp. 2d at 1291 (Hinkle, J.), is destroyed, or irrelevant, at least respecting the number of opposite-sex marriages.

If same-sex couples are not allowed State-recognized marriage, then huge numbers of people, e.g., the sexually-fluid Mormon men noted *supra*, *will* be, and *have* been, incentivized, massively so, to enter gender-diverse marriages. (Even those already in gay relationships may change course. For example, Ellen DeGeneres' former lesbian lover Anne Heche later married a man, Coleman Laffoon, *see, e.g.*, Wikipedia, *Mixed-orientation marriage*.[8])

Again, an intellectual tragedy of the gay-marriage debate is the pretense that gay-marriage prohibitions are ineffective at reaching their goals. They are, and have long been, very effective; and if we can stipulate that they are, we can avoid the further tragedy of wasting time, and move onto "step 2", which is whether the prohibitions are constitutional.

IV. THE FAILURE OF THE "UNDERINCLUSIVENESS RE FERTILITY" ARGUMENT AGAINST THE BAN

The prohibitions are in fact quite constitutional, despite weakly-reasoned arguments like "underinclusiveness re fertility". The lower court says,

> [I]ndividuals who are medically unable to procreate can marry in Florida. If married elsewhere, their marriages are recognized in Florida[, as with] individuals who are beyond child-bearing age. And individuals who have the capacity to procreate when married but who voluntarily or involuntarily become medically unable to procreate[,] are allowed to remain married.

[8] http://en.wikipedia.org/wiki/Mixed-orientation_marriage (as of Sept. 10, 2014, at 20:26 GMT).

999 F. Supp. 2d at 1289. However, the categories mentioned, *see id.*, are very difficult to police. What constitutes "infertility", especially when advancing medical technology may cure infertility previously thought incurable? (Some people sterilize themselves; but they may have new surgery and become fertile again. Should a "Fertility Police" give everyone frequent examinations before and during marriage?)

Too, as for elderly/post-menopausal people, what age is that, precisely? Again, medicine may assist fertility at later ages than previously possible. As well, men are often fertile longer than women, so that any "Senior-Citizen Fertility Police" would run into equal-protection problems, in that old men might be allowed to marry, while old women would not: an outrage.

As for individuals who may choose to refrain from procreating: millennia of ribald literature, plus common sense, confirm that even sincere desire to remain celibate—or consistently use birth control—, between two romantic partners, may last as long as a dandelion blown into pieces by a warm summer wind. (That takes care of any objection re "whether or not heterosexual marriages are reproductive in effect or motivation": "motivation" may mean nothing. As for "effect": is a "Birth Police" going to make sure there is issue, progeny, born from a marriage?)

By contrast, gender is very easy to understand and police. You may not know your full racial background, true age, or fertility status: but unless you have *very*

poor eyesight, you need only undress and you'll quickly discover your gender. This may be too common-sense an observation for some people; but Amicus is trying to bring some badly-needed Florida-style common sense to the debate.

So, "underinclusion" re fertility fails as an objection.

V. *GRUTTER* AND CHILDREN'S BENEFIT FROM DIVERSE-GENDER PARENTAGE; AND THE BAN'S SOCIALLY-BENEFICIAL, LIFE-AFFIRMING EXPRESSIVE CONTENT RE *CASEY* AND *CARHART*

There is another socially positive aspect to gay-marriage bans besides increased fertility. That is, *Grutter v. Bollinger* (539 U.S. 306, 123 S. Ct. 2325 (2003)) upholds diversity, including gender diversity, as a compelling state interest, *see id.* at 325, 123 S. Ct. at 2337. (The Sixth Circuit iteration of *Grutter*, 288 F.3d 732 (2002), cites with favor the use of gender as an allowable consideration in giving preferred treatment, *see id.* at 745.) Since it would be ludicrous to say diversity is compelling in formal education but cannot even be rationally relevant in 18 years of child-nurture, then a gender-diverse parentage is worthy of special favor by the State. (*See, e.g.*, HHS, *Promoting Responsible Fatherhood—Promoting Responsible Fatherhood Home Page* (last revised July 21, 2011),[9] "Involved fathers provide practical support in raising children *and serve as models for their development*." *Id.* (emphasis added))

[9] http://www.fatherhood.hhs.gov/.

Some critics have said that gay-marriage bans presume same-sex couples can never be good parents. However, Florida may only be "presuming" that diverse-sex couples have something special to offer in parenting, as opposed to saying, "All gays make bad parents." On that note: the two *Grutter* cases *supra* show how gender diversity matters; and part of the rationale States may adopt per *Grutter*, 539 U.S. 306, is, *see id. passim*,

1) a bonus for diversity

2) that allows exclusion of others.

Thus, a diversity bonus in university admissions to members of some groups, may exclude certain others (e.g., white males). But this of course does not mean white males cannot be good students; similarly, even though the gay-marriage ban excludes gays from marriage, it does not at all mean that same-sex couples can't be good parents. (*See* once more, "[T]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both[.]" *Ballard*, 329 U.S. at 193, 67 S. Ct. at 264.) Also, no "sex stereotyping" is going on here: in fact, if a child has "nontraditional-occupation" male and female parents, e.g., a homemaker father and a Marine Corps sniper mother, that may help break down gender stereotypes.

In addition, although the State may not employ animus or false information e.g., claiming that "All gay parents abuse children", the State may still uphold the value

of life: and gay parents simply cannot have children with each other. (Artificial insemination and such may let gays have someone else's child—at least, half someone else's—and employ the social fiction of calling it their own.)

See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (2003): "Regulations . . . by which the State . . . . may express profound respect for the life of the unborn are permitted", *id.* at 877, 112 S. Ct. at 2821; *Gonzales v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610 (2007): "The [Partial-Birth Abortion Ban] Act expresses respect for the dignity of human life. . . . The government may use its voice and its regulatory authority to show its profound respect for the life within the woman", *id.* at 157, 127 S. Ct. at 1633. The instant case is not about abortion, but it does involve procreation and human life. So, Florida may "show its profound respect for . . . life", *id.*, by passing the Ban, which honors only those marriages, dual-gender ones, that create life between two partners.

Some may rejoin that *Casey* and *Carhart*, *supra*, still permit some abortions, while the ban prohibits all gay marriages. However, this analogy is not apt. Gays are still permitted to live their private sexual and relational lives any way they want, following *Lawrence*, *supra* at 3. They are just not automatically given a State blessing and funding for doing so. This is similar to how abortion is treated: Americans are usually allowed to perform that physical act, but sans government

endorsement, *see Casey* and *Carhart* (allowing government to take actions and send messages favoring children's lives), and without government money, *see, e.g.*, the Hyde Amendment[10] (massively limiting federal abortion funding).

Thus, the Ban, including its expressive elements, constitutionally promotes new life, gender equity and desegregation, and diversity.

VI. FLORIDIANS MAY WEIGH THE BALANCE OF COST AND BENEFIT FROM GAY MARRIAGE; AND, "FINANCIAL OR STATUS HARM" TO CHILDREN OR THE PUBLIC

Some say that due to the Ban, children being raised by same-sex couples are needlessly deprived of protection. However, polygamous families, too, produce children outside a legal marriage relationship; yet a polygamy ban is legal, and those children are "deprived", despite Florida's *overall* desire to promote children being born into marriage. A child should have an optimal environment, which a State may determine is provided by a two-gender marital relationship, *cf., e.g.*, either iteration of *Grutter*, *supra*. (The People, not courts, should decide between the contending social-science evidence from both sides of the issue, and also consider common-sense wisdom encapsulated in sources like *Grutter*. *See, e.g., Carhart, supra* at 16 (disregarding medical professionals' opinions and upholding Congress on partial-birth-abortion ban).)

[10] Pub. L. 94-439, tit. II, § 209, 90 Stat. 1434 (1976; amended 2009).

If children raised by gays allegedly suffer some financial harm from a gay-marriage ban: any financial harm has been strongly alleviated by federal activism, since *Windsor*, in extending tax breaks and other benefits to gay couples, even if their State does not recognize gay marriage.

And speaking of fiscal harm: if something honored as "marriage" can never naturally produce posterity, that "marriage" may spend public social capital and money on a non-productive relationship that the People consider wasteful. How could it be irrational for a poor, minority, heterosexual mother of five to decide that draining the public fisc to give gay couples (many of whom may be white and wealthy) an additional tax break is not right?

As for "humiliation of children": if any, it is probably no worse than polyamorists' children may suffer. *See, e.g.*, Arin Greenwood, *Who Are 'The Polyamorists Next Door'? Q&A With Author Elisabeth Sheff* ("Sheff Article"), Huffington Post, updated Mar. 5, 2014, 10:59 a.m.,[11] "[K]ids in poly families [must] deal[ ] with stigma from society", *id.* Yet few people cry that polygamy must be legalized. As well: what about children who feel stigmatized or horrified *by being children of a same-sex relationship*; who despise that sex-segregated upbringing? Those children may fear physical or emotional abuse if they speak out.

[11] http://www.huffingtonpost.com/2014/03/05/elisabeth-sheff-polyamory_n_4898961.html.

Moreover, in America, as of 2010, "[T]here are approximately 125,000 same-sex couples raising nearly 220,000 children."[12] 220,000 may be far less than the number of *new* children born of the possibly 3.15 million people moved into fruitful marriage by gay-marriage bans, *see supra* at 7. If those 3.15 million had an average of one child each, that would be over three million children, far more than the 220,000 children raised by same-sex couples. (Of course, the 3-million-some new children would be spread out over a number of years.)

Thus, if gay marriage is unavailable, so that gay couples lack State financial or status benefits, many sexually-fluid people, even some currently in gay relationships, will likely move into heterosexual marriages instead. Not only will this let some children who dislike a nontraditional upbringing, have a traditional two-gender upbringing instead: it will let more children be born, period, as noted *supra* at 9 (Boucai on gay-marriage bans' raising the fertility rate). Not a court, but Floridians, should weigh the comparative cost of not letting some gays' children receive certain financial or societal entitlements, with the benefit of having many more children born at all, and many moved under a diverse-gender parentage.

VII. A SEX-DISCRIMINATION CLAIM IS NOT VIABLE

[12] Gary J. Gates, *LGBT Parenting in the United States*, The Williams Inst., Feb. 2013, http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf, at 3.

Speaking of gender: a sex-discrimination claim is invalid. —If Amicus said there are public facilities that utterly exclude women: this would sound horrible, except when Amicus explains that the "facilities" are men's bathrooms. Context is key here, as with gay marriage. (Incidentally, re out-of-context assertions: various commentators have said that gays and lesbians are just as able as heterosexuals to form lasting relationships. But that assertion is irrelevant to gay-marriage bans, because any number of people can form committed, long-term relationships, whether polygamists, underage couples, adult incestuous couples, etc.)

Inter alia, how does it constitute sex discrimination for the ban to *prohibit* a sex-segregated environment for children? To claim otherwise turns the idea of "sex discrimination" on its head. One is tempted to say that instead, any unhappy *children* of a same-sex couple might have a sex-discrimination or sex-segregation claim. *See, e.g.*, *Brown v. Bd. of Educ*. (347 U.S. 483, 74 S. Ct. 686 (1954)) (condemning segregated learning environments for children).

VIII. A SEXUAL-ORIENTATION-DISCRIMINATION CLAIM IS NOT VIABLE; AND, UPHOLDING THE BAN WOULD NOT PRECLUDE COURT INTERVENTION IN ALLEGED EMPLOYMENT, OR OTHER, DISCRIMINATION AGAINST GAYS

And upholding Florida's chosen gay-marriage ban would not estop this Court from finding that gays suffer illegal discrimination in employment or other fields unrelated to marriage. For example, since a gay person can presumably flip a hamburger as well as a heterosexual, it might be considered irrational for a

restaurateur to fire the burger-flipper for being gay. But gay marriage is distinguishable from business-related laws or private decisions.

After all, gay athletes Michael Sam and Jason Collins of the NFL and NBA might be superb at their sports, but that does not mean they can get pregnant, breast-feed, or serve as female role models. And those latter things may be more important than being a champion athlete.

The Court could, if desired, adopt heightened scrutiny re homosexuality *vis-à-vis* employment or other issues besides marriage. (Amicus is not recommending the Court adopt higher scrutiny, only saying that rational-basis scrutiny re gay marriage does not rule out higher scrutiny elsewhere.) This kind of bifurcated scrutiny has been done before, *see, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432, 439, 102 S. Ct. 735, 739 (1982) (applying strict scrutiny to alienage, but a lower level of scrutiny re political classifications).

See also, e.g., Dan Chmielewski, *Ronald Reagan on Gay Rights*, Liberal OC, June 9, 2008,[13] on the Briggs Initiative, a 1978 California ballot measure banning gay teachers from public schools,

> Reagan met with initiative opponents[,] and, ultimately, at the risk of offending his anti-gay supporters in the coming presidential election, wrote in his newspaper column: "I don't approve of teaching a so-called gay life style in our schools, but there is already adequate legal machinery to deal with such problems if and when they arise."

[13] http://www.theliberaloc.com/2008/06/09/ronald-reagan-on-gay-rights/.

Id. However, Reagan was only protecting some employment for gays, and said explicitly, "I don't approve of teaching a so-called gay life style[.]" *Id.* And when a State declares that a gay union deserves the honor of marriage, that teaches children and others that, *inter alia*, the sexual lifestyle which is the physical base of gay marriage is just as healthy as a heterosexual lifestyle. *See Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 575 (1928): "Our government is the potent, the omnipresent teacher." (Brandeis, J., dissenting from the judgment)

IX. SODOMY AS CANCER, AIDS, AND INJURY VECTOR

On the note of "healthiness", *supra*: another reason to disallow gay marriage is that to subsidize relations based on sodomy may increase their number, and show *de facto* government endorsement of such practices (as noted *supra*), although they are a risk factor for disease, injury, or death. E.g.,

> Anal sex is considered a high-risk sexual practice because of the vulnerability of the anus and rectum[, which] can easily tear and permit disease transmission[, resulting in] the risk of HIV transmission being higher for anal intercourse than for vaginal intercourse[.]

Wikipedia, *Anal sex*[14] (citations, including internal, omitted).

There are other deadly problems with sodomy besides HIV/AIDS, such as cancer. *See, e.g.*, Matt Sloane, *Fewer teens having oral sex*, The Chart, CNN, Aug.

[14] http://en.wikipedia.org/wiki/Anal_sex (as of Nov. 18, 2014, at 12:14 GMT).

17, 2012, 10:41 a.m.,[15] "'It's widely accepted that there is an increased number of head and neck cancers today due to changes in sexual practices in the '60s, '70s and '80s,' -- specifically, an increase in oral sex, said Dr. Otis Brawley, the chief medical officer of the American Cancer Society." *Id.*

See also Gay Men's Health Crisis, *The Bottom Line on Rectal Microbicide Research* (undated, but concerning a Jan. 23, 2013 presentation),[16] "Unprotected anal intercourse is 10 to 20 times more likely to result in HIV infection compared to unprotected vaginal intercourse[, and] is a significant driver in the global HIV epidemic among gay men and transgender women[.]" *Id.*

Disease-transmission aside, sodomy also causes physical injury, since it includes practices like "fisting", i.e., putting a fist—or two—, into the birth canal, since women lack certain anatomy men have that would substitute for a fist. *See, e.g.*, Nat'l Ctr. for Biotech. Info., U.S. Nat'l Libr. of Med., Nat'l Insts. of Health, *Vaginal "fisting" as a cause of death.*, PubMed.gov (undated)[17] (young woman dies from vaginal fisting) (citation omitted).

This all proves that sodomy is a comparative vector of injury and disease. (And because of science, not relying on moralistic or Biblical reasons, *pace Brenner* at 1289, "The undeniable truth is that the Florida ban on same-sex marriage stems

[15] http://thechart.blogs.cnn.com/2012/08/17/fewer-teens-having-oral-sex/.
[16] http://www.gmhc.org/news-and-events/events-calendar/the-bottom-line-on-rectal-microbicide-research.
[17] http://www.ncbi.nlm.nih.gov/pubmed/2929548.

entirely, or almost entirely, from moral disapproval of the practice", *id.* One does need to be religious to fear AIDS.)

Thus, while under the "negative liberty" of *Lawrence*, a State cannot outlaw consensual non-commercial adult sodomy, *see id.*, a State is not obliged to *endorse or subsidize* an activity, gay marriage, whose physical base is sodomy. While marriage is not only about sex, it is still *substantially* about sex. Traditional marriage implicitly valorizes heterosexual sex, *see, e.g.*, "[M]arriage . . . . is the foundation of the family", *Maynard v. Hill*, 125 U.S. 190, 211, 8 S. Ct. 723, 729 (1888). Thus, State-blessed gay marriage implicitly valorizes homosexual sex, the only type of sex anatomically possible given the synergy of two women or two men together. The People have a right to withhold such valorization. (*Cf.* the continuing U.S. ban on gay men's blood donations. Also, consider that the incest prohibition is partly about the "health reason" of avoiding genetically-damaged offspring. Therefore, health is allowable as a restrictive factor re marriage.)

A State has compelling reason for not raising to the status of marriage a lifestyle which, unless chaste, is based in inherently risky or deadly behaviors. (By contrast: policing, for disease, heterosexuals who want to get married or stay married, would be impractical for essentially the reasons *supra* at 13-14 on policing fertility.) Floridians' health is a very compelling matter.

X. MANY ARGUMENTS FOR MANDATORY GAY MARRIAGE WOULD ALSO SUPPORT LEGALIZING POLYGAMY

And there are few arguments for gay marriage that could not be made for polygamy. *See, e.g.*, Patricia, *Our America with Lisa Ling – "Modern Polygamy" a New Perspective on an Old Taboo*, The Daily OWN, Oct. 24, 2011,[18] "Lisa [Ling] introduced a group of all women who were meeting with a gay activist for training. They were determined to fight for their rights and lifestyle[, and] claim to want the ability to have their children not feel like second class citizens." *Id.* So, polygamists are actually training with gay activists, *see id.*, and using "rights" or "protecting our children from animus" arguments to legalize polygamy. Sauce for the goose may cover the gander too.

Some may claim that polygamy/polyamory is inherently dangerous and unequal in a way that a pair of married gay people is not. However, what if, say, there were an isogamous multipair marriage ("IMM"), "iso" ("equal") plus "gamous" ("marriage"), which had an even, sex-balanced number of partners? E.g., a tetrad of two men marrying two women in group marriage: an "intimate quadrilateral". A State could set an upper bound, e.g., ten people (five pairs) would be too many. But "equality" would reign, and gender balance. How, then, could someone who believes in the fallacious "fundamental right to non-traditional marriage" the lower

[18] http://www.thedailyown.com/our-america-with-lisa-ling-modern-polygamy-a-new-perspective-on-an-old-taboo.

court proffers ("[T]he right to marry—to choose one's own spouse—is just as important to an individual regardless of whom the individual chooses to marry", 999 F. Supp. 2d at 1288), complain about an "IMM"? *See, e.g.*, Martha Nussbaum, *A Right to Marry? Same-sex Marriage and Constitutional Law*, Dissent, Summer 2009[19] (not only supporting gay marriage but also claiming "legal restriction . . . . would not tell against a regime of sex-equal polygamy").

See also, e.g., Sheff Article, *supra* at 18, where academic Sheff, having researched polyamorous families for 15 years, concludes, "The kids who participated in my research were in amazingly good shape", *id.* (Though many polyamorous families were white and wealthy, many were far from wealthy, *see id.*) So if, *see id.*, some social science shows polyamory is not harmful to children: then, logically, polyamorists' "fundamental right to marry" should not be impeded, especially since their children might be "harmed and humiliated" by banning polyamory. And *see* Hilary White, *Group marriage is next, admits Dutch 'father' of gay 'marriage'*, LifeSiteNews, Mar. 12, 2013, 5:58 p.m.: "Boris Dittrich, the homosexual activist called the 'father' of . . . Dutch gay 'marriage', has admitted

[19] http://www.dissentmagazine.org/article/a-right-to-marry-same-sex-marriage-and-constitutional-law.

that group marriages of three or more people, is the next, inevitable logical step[.]"[20] *Id.* The Court should avoid the slippery slope presented.

XI. RATIONAL BASIS IS THE RIGHT LEVEL OF SCRUTINY, THOUGH THE BAN PASSES HIGHER LEVELS; AND THE REASONS ADDUCED HERE COMPRISE A VERY COMPELLING STATE INTEREST

But even if heightened scrutiny were somehow necessary instead of rational basis "with a bite" (disallowing legislation motivated solely by animus), the various bases adduced *supra*, either singly or together, form a very compelling government interest.

Even strict scrutiny is met. E.g., the interest in gender diversity of parents seems at least compelling as racial or gender diversity at colleges, and is met in a narrowly-tailored manner. People aren't arrested for *not* entering opposite-sex marriages, or harassed by State billboards or mandatory "get married" classes; rather, people are just not actively subsidized and lionized by government for entering another type of marriage, same-sex marriage.

The reasonably-least-restrictive means are used as well. For example, re diverse-gender role models, would it really be less restrictive to have the Government provide gay male married couples a visiting female breast-feeder and

[20] http://www.lifesitenews.com/news/group-marriage-is-next-admits-dutch-father-of-gay-marriage.

role model for children? or give lesbian couples a "rent-a-man" as a male role model? Probably not.

Similarly, with the disease- and injury-risking practice of nonreproductive sex—and reduction of AIDS and cancer is a compelling interest—, *Lawrence* prohibits punishing sodomy, so how can sodomy be not encouraged? By…being not *encouraged*: i.e., no State "merit badge" or financial benefit is given to gay marriage. (People are legally free to engage in nonreproductive sex in private all they want, or marry at any church or synagogue which marries gays.)

Also, a law mandating that gay couples use rubber prophylactics or "dental dams" might seem intrusive and insulting. By contrast, the lack of gay marriage doesn't even mention or do anything; it is just a gap, a lack of State approval and reward. (And gays remain perfectly free to vote and lobby for gay marriage: "[Re] personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing[, gays] may seek autonomy for these purposes." *Lawrence*, 539 U.S. at 574, 123 S. Ct. at 2481-82 (Kennedy, J.))

XII. MIRCEA TRANDAFIR'S STUDIES RE SAME-SEX MARRIAGE'S NEGATIVE IMPACT ON DIFFERENT-SEX MARRIAGE

As a coda, Amicus will return to the idea that the arguments of same-sex-marriage proponents (or sources they cite), not opponents, may be confused or inconsistent. —An academic, Mircea Trandafir, authored a November 2009 study, *The effect of same-sex marriage laws on different-sex marriage: Evidence from the*

Netherlands.[21] It says, "I [Trandafir] find that the marriage rate rose after the registered partnership law but fell after the same-sex marriage law." *Id.* at title/ Abstract page.

Also:

> One relatively straightforward way to gauge the decline in the marriage rate is to compare the largest gap between the actual marriage rate in the Netherlands and the synthetic control . . . . This [evidence] suggests that the decline in the marriage rate after 2001 is rather significant, being at least twice as large (relatively) than any difference between the synthetic control and the real marriage rate in the previous periods.
>
> The aggregate analysis above suggests that the marriage rate did not decline after the introduction of registered partnership, but it did after the legalization of same-sex marriage.

Id. at 24. Trandafir offers as one plausible explanation for the marriage-rate decline, "the end-of-marriage argument: the same-sex marriage law changes the value of marriage for some couples, who choose not to marry anymore." *Id.*

Finally, some especially significant statistics:

> The marriage rate of men over the 1995—2005 period is, on average, 2.99 percent and is estimated to fall by 0.06 percentage points after the registered partnership law and by 0.16 percentage points after the same-sex marriage law, compared to a long-term downward trend of 0.05 percentage points per year. In the case of women, the average marriage rate is 4.07 percent and the decline is 0.14 percentage points and 0.65 percentage points, respectively, while the downward trend is 0.05 percentage points per year.

[21] *Available at* http://www.iza.org/conference_files/TAM2010/trandafir_m6039.pdf (courtesy of Institute for the Study of Labor).

Id. at 16-17. Amicus is not a statistician, but 0.65 percentage points compared to 4.07 percentage points, *id.* at 17, seems to be a pretty steep and significant drop in the female marriage rate, almost one-sixth.

The bizarre part of the story is that Trandafir then "updated" the study, but to say nearly the exact opposite thing, *see* the version at 51 Demography 317 (2014).[22] The 2014 study claims "an insignificant decrease [in either different-sex marriages or marriages in general] after the same-sex marriage law", *id.* at 3. So, while acknowledging damage to traditional marriage, *see id.*, Trandafir calls it "insignificant"—which is directly contradicted by his 2009 study, which calls the damage "significant", *see id.* at 24. The 2014 study, *see id.*, completely and unexplainedly omits, *inter alia*, the 2009 study's statistic re the huge 0.65 percentage-point decline from the 4.07 percentage-point female marriage rate, 2009 Study at 17. This gross material omission is incomprehensible, and makes the 2014 report more of a near-polar opposite to the 2009 report, not an "update".

Amicus accuses no one of bad faith, but the exceedingly strange contradiction between Trandafir's two reports reminds Amicus of what Boucai said, *supra* at 10, about gay-marriage advocates' omitting or distorting the record re bisexuality. Mandatory-gay-marriage proponents have not told the full story, and Amicus hopes this honorable Court takes account of crucial information like, "The results

[22] *Available at* http://findresearcher.sdu.dk:8080/portal/files/80662951/MS_2012_063.pdf (courtesy of Syddansk Universitet).

suggest that same-sex marriage leads to a fall in the different-sex marriage rate," Trandafir 2009 Rep. at title/Abstract page.

* * *

Genuine animus towards gays is deplorable, as we all know. However, when Professor Boucai admits that gay-marriage bans do channel bisexuals to heterosexual marriages, that admission is not "animus". Nor is it "animus" for Gay Men's Health Crisis to note that sodomy is far more dangerous than regular sex. When gays themselves have admitted these facts, it is hardly irrational, much less "animus", to cite those true admissions, and let the People weigh the evidence. Once more, President Jimmy Carter, while supporting gay marriage, trusts the considered judgment of the People of each State, *see supra* at 2.

Or, as noted previously: "[A] legitimate state interest [is] preserving the traditional institution of marriage. [R]easons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence*, 539 U.S at 585, 123 S. Ct. at 2487-88. Appellees have not disproven O'Connor's wise words.

Thus, the People of Florida have shown plausible foresight by denying a novel right to State-sanctified same-sex marriage, and should no longer be denied their voters' rights in doing so.

CONCLUSION

Amicus respectfully asks the Court to reverse the judgment of the court below; and humbly thanks the Court for its time and consideration.

November 21, 2014 Respectfully submitted,

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The undersigned certifies that he electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on November 21, 2014.

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Dated: November 21, 2014 Thank you for your time.