APPEAL NO. 14-14061

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER; CHARLES DEAN JONES; STEPHEN SCHLAIRET; OZZIE RUSS; SLOAN GRIMSLEY; JOYCE ALBU; BOB COLLIER; CHUCK HUNZIKER; LINDSAY MYERS; SARAH HUMLIE; ROBERT LOUPO; JOHN FITZGERALD; DENISE HUESO; SANDRA NEWSON; JUAN DEL HIERRO; THOMAS GANTT, JR.; CHRISTIAN ULVERT; CARLOS ANDRADE; RICHARD MILSTEIN; ERIC HANKIN; ARLENE GOLDBERG; CAROL GOLDWASSER;

Plaintiffs-Appellees,

v.

ATTORNEY GENERAL, STATE OF FLORIDA,

Defendant,

JOHN H. ARMSTRONG, In His Official Capacity as Agency Secretary for the Florida Department of Management Services; CRAIG J. NICHOLS, In His Official Capacity as Agency Secretary for the Florida Department of Management Services; HAROLD BAZZELL, In His Official Capacity as Clerk of Court and Comptroller for Washington County Florida,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida
Civil Case No. 4:14-cv-00107-RH-CAS (Judge Robert L. Hinkle)

AMICUS CURIAE BRIEF OF NORTH CAROLINA VALUES COALITION AND LIBERTY, LIFE, AND LAW FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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v.

JOHN H. ARMSTRONG, et al.,

Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici Curiae NORTH CAROLINA VALUES COALITION and LIBERTY, LIFE, AND LAW FOUNDATION, pursuant to 11th Cir. R. 26.1-1, certify that the following persons and entities have an interest in the outcome of this case and/or appeal:

American Civil Liberties Union of Florida, Inc., The

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc.

Albu, Joyce

Andrade, Carlos

Armstrong, Dr. John H.

Ausley McMullen

Bazzell, Harold

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Defendants-Appellants.

Bledsoe, Jacobson, Schmidt, Wright & Wilkinson

Bondi, Pamela Jo, Attorney General of Florida

Brenner, James Domer

Citro, Anthony

Collier, Bob

Cooper, Leslie

Crampton, Stephen M.

Del Hierro, Juan

DeMaggio, Bryan E.

Dewart, Deborah J.

Emmanuel, Stephen C.

Fitzgerald, John

Florida Conference of Catholic Bishops, Inc.

Florida Family Action, Inc.

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JOHN H. ARMSTRONG, et al.,

Defendants-Appellants.

Gantt, Thomas, Jr.

Goldberg, Arlene Goldwasser, Carol (deceased)

Goodman, James J., Jr.

Graessle, Jonathan W.

Grimsley, Sloan

Hankin, Eric

Hinkle, Hon. Robert L.

Hueso, Denise

Humlie, Sarah

Hunziker, Chuck

Jacobson, Samuel

Jeff Goodman, PA

Jones, Charles Dean

Kachergus, Matthew R.

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Defendants-Appellants.

Kayanan, Maria

Liberty Counsel, Inc.

Liberty Counsel Action, Inc.

Liberty, Life, and Law Foundation

Loupo, Robert

Mihet, Horatio G.

Milstein, Richard

Myers, Lindsay

Newson, Sandra

Nichols, Craig J.

North Carolina Values Coalition

Podhurst Orseck, P.A.

Rosenthal, Stephen F.

Russ, Ozzie

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Defendants-Appellants.

Save Foundation, Inc.

Schlairet, Stephen

Scott, Rick

Sevier, Chris

Sheppard, White, Kachergus and DeMaggio, P.A.

Sheppard, William J.

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

Tanenbaum, Adam S.

Tilley, Daniel B.

Ulvert, Christian

White, Elizabeth L.

APPEAL NO. 14-14061

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Winsor, Allen C.

Amici Curiae, North Carolina Values Coalition and Liberty, Life, and Law Foundation, are both nonprofit corporations. Neither Amici has a parent corporation, and neither Amici issues stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae, North Carolina Values Coalition ("NCVC") and Liberty, Life, and Law Foundation ("LLLF"), respectfully urge this Court to reverse the District Court decision.

Amici are North Carolina nonprofit corporations. NCVC was established to preserve faith, family, and freedom by working in the arenas of public policy and politics. NCVC spearheaded the ballot initiative to pass North Carolina's marriage amendment.

LLLF was established to defend religious liberty, sanctity of human life, conscience, family, and other moral principles. LLLF founder, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in various federal courts.

Amici have an interest in this case because the issues are a matter of national urgency and the result will impact every state.

STATEMENT OF THE ISSUE

Does the United States Constitution mandate that the State of Florida redefine marriage to include same-sex as well as opposite-sex couples?

[1] This brief is filed with the consent of all parties. No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than amicus curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is not about the right to marry a person of the same sex. It is not about equal protection for an existing fundamental right. It is not about *who* may marry, but *what* marriage is.

When courts mandate marriage redefinition, they disenfranchise the people, shatter the foundations of government, and threaten liberties of speech, religion, and thought. Moreover, no court, legislature, or voter initiative can alter the nature of reality.

ARGUMENT

I. ADVOCATES OF MARRIAGE REDEFINITION PRESUPPOSE THE DEFINITION THEY SEEK TO ESTABLISH.

Words matter. Abraham Lincoln, discussing the scope of his war powers, "liken[ed] the case to that of the boy who, when asked how many legs his calf would have if he called its tail a leg, replied, 'Five,' to which the prompt response was made that *calling* the tail a leg would not *make* it a leg." *Reminiscences of Abraham Lincoln By Distinguished Men of His Time* (Allen Thorndike Rice ed., New York: Harper & Brothers Publishers, 1909) (Classic Reprint 2012) (1853-1889), 62.

Calling a triangle a "circle" does not make it so. Redefining "water" as a combination of hydrogen and nitrogen does not alter its composition. Calling a same-sex relationship "marriage" does not make it so. These are word games.

Plaintiffs' goal is not "marriage equality" but marriage *redefinition*. One dissenting judge in Connecticut critiqued "the majority's unsupported *assumptions* that the essence of marriage is a loving, committed relationship between two adults and that the sole reason that marriage has been limited to one man and one woman is society's moral disapproval of or irrational animus toward gay persons." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 515-516 (Conn. 2008) (Zarella, J., dissenting). This simple observation lies buried under a heap of eloquent sounding arguments that rely on the same "unsupported assumptions."

Florida has not "exclude[d] a group from exercising a right simply by manipulating a definition." *Wolf v. Walker*, 986 F.Supp.2d 982, 1004 (W.D. Wisc. June 6, 2014). *Amici* do not argue that "the definition of marriage should remain the same for the definition's sake." *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1142 (D. Or. May 19, 2014), quoting *Golinski v. Off. of Pers. Mgmt*, 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012). It is plaintiffs who "manipulate a definition" using intrinsically illogical arguments.

Logic matters. Court rulings – especially those with such major legal and social repercussions – should be internally consistent. Recent marriage rulings resemble the incongruity between President Obama's Father's Day Proclamation

("there is no substitute for a father's presence, care, and support")[2] and his refusal to defend the Defense of Marriage Act—ensuring the permanent severance of many father-child relationships. *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013) ("the President . . . instructed the Department [of Justice] not to defend the statute in *Windsor*").

A. Fundamental Rights Arguments Presuppose The Word Marriage Already Encompasses Same-Sex Couples.

Federal courts often concede that states may rightfully define marriage. *See, e.g.*, *DeLeon v. Perry*, 975 F. Supp. 2d 632, 657 (W.D. Texas 2014) ("Texas has the 'unquestioned authority' to regulate and *define marriage*") (emphasis added). But these courts undertake the very role they decline. *DeLeon* casually dismissed the contention that an injunction for plaintiffs "would effectively change the legal definition of marriage in Texas, rewriting over 150 years of Texas law." *Id.* at 665. That is exactly what it would do.

In order to determine whether a state has impermissibly infringed a constitutional right, the court must *define* that right. Here, the district court claimed "[t]he right asserted by the plaintiffs is the right to marry" but struck down Fla. Cons. Art. I, § 27 ("Marriage Defined") without defining marriage. *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1287 (N.D. Fla. Aug. 21, 2014). Other courts

[2] http://www.whitehouse.gov/the-press-office/2014/06/13/presidential-proclamation-fathers-day-2014.

explicitly adopt an emotional definition to fit the desired result: "the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Bostic v. Rainey*, 970 F. Supp. 2d 456, 472 (E.D. Va. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202 (D. Utah 2013). *Kitchen*, taking its cue from *Planned Parenthood v. Casey*, 505 U.S. 833, 851, 112 S. Ct. 2791, 2807 (1992), asserted that "[a] person's choices about marriage implicate the heart of the right to liberty that is protected by the Fourteenth Amendment." *Id.* at 1200. These choices do implicate liberty, but *Casey* never equates that liberty with a license to redefine marriage.

Federal courts evade the crucial threshold issue of whether marriage *already encompasses* same-sex relationships, and if not, whether plaintiffs have the right to demand redefinition. The Tenth Circuit cited a string of cases holding the right to marry does *not* include same-sex unions—then cast precedent aside and "nonetheless agree[d] with Plaintiffs that in defining the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right." *Kitchen v. Herbert*, 755 F.3d 1193, 1215 (10th Cir. 2014).

B. Equal Protection Arguments Presuppose The Word Marriage Already Encompasses Same-Sex Couples.

Bostic criticized Virginia's marriage laws because they "limit the fundamental right to marry to only those Virginia citizens willing to choose a

member of the opposite gender for a spouse." *Bostic*, 970 F. Supp. 2d at 472. Marriage laws in Indiana and Wisconsin allegedly "discriminate" against same-sex couples. *Baskin v. Bogan*, 766 F.3d 648, *27 (7th Cir. 2014). These pronouncements conceal the underlying presupposition that "marriage" already embraces same-sex relationships.

Legal terms demand clear, consistent definitions—not cleverly disguised alteration midstream. "Many precedents gauging individual rights and national power, leading to all manner of outcomes, confirm the import of original meaning in legal debates." *DeBoer v. Snyder*, 2014 U.S. App. LEXIS 21191, *35 (6th Cir. 2014) (collecting cases). No one contends that those who adopted the Fourteenth Amendment understood it to mandate marriage redefinition. *Id*.

In recent marriage litigation, logical errors abound. *After* announcing that "[d]enying same-gender couples the right to marry...violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution," in the *remedies* section, the state supreme court decreed marriage redefinition: "'[C]ivil marriage' shall be construed to mean the voluntary union of two persons to the exclusion of all others." *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013). The court had to redefine marriage to sustain plaintiffs' arguments: *The court had to redefine marriage in order to redefine marriage*. Similarly, to conclude that Oklahoma violated equal protection through "an arbitrary exclusion based upon the majority's

disapproval," another court had to bypass the argument that it was "rational for Oklahoma voters to believe that *fundamentally redefining marriage* could have a severe and negative impact on the institution as a whole." *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1294 (N.D. Okla. 2014) (emphasis added). The court implicitly redefined marriage as a "loving, committed, enduring relationship" between any two persons. *Id*. at 1295. That newly minted definition has no roots in American history or jurisprudence and cannot be presupposed in these crucial rulings.

II. FUNDAMENTAL RIGHT ARGUMENTS FAIL.

The right plaintiffs assert is not "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." *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S. Ct. 2258, 2268 (1997).

> "The institution of marriage . . . is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause . . . is not a charter for restructuring it by judicial legislation."

DeBoer, 2014 U.S. App. LEXIS 21191 at *25-26, quoting *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

The district court obscures this, claiming the Supreme Court defines the right to marry in broad terms without qualifiers—"*interracial* marriage" (*Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967)) or the "right to marry while in prison"

(*Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987)). *Id*. at 1287-88. Yet case law unfailingly presupposes male and female:

- *Griswold v. Connecticut*, 381 U.S. 479, 485-486, 85 S. Ct. 1678, 1682 (1965) (striking down law against contraceptives)
- *Zablocki v. Redhail*, 434 U.S. 374, 383, 98 S. Ct. 673, 679 (1978), quoting *Loving v. Virginia*, 388 U.S. at 12, 87 S. Ct. at 1824 ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.")
- *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.")
- *Turner v. Safley*, 482 U.S. at 96, 107 S. Ct. at 2265 ("[M]ost inmate marriages are formed in the expectation that they ultimately will be fully consummated.")

Same-sex couples have no use for contraceptives (*Griswold*) and are unnecessary to human survival (*Zablocki*, *Loving*, *Skinner*). *Turner's* rationale is only coherent if the Court presupposed the union of male and female. The Indiana district court cited an early state holding that "the presumption in favor of matrimony is one of the strongest known to law." *Baskin v. Bogan*, 2014 U.S. Dist. LEXIS 86114, *10 (S.D. Ind. June 25, 2014), quoting *Teter v. Teter*, 101 Ind. 129, 131-32 (Ind. 1885).

Teter involved two half-brothers disputing the validity of their mother's second marriage—to a *man*. No competing definition was on the horizon.

> Nations around the world join in affirming the definition of marriage:
>
> We declare that the family, a universal community based on the *marital union of a man and a woman*, is the bedrock of society, the strength of our nations, and the hope of humanity.

World Family Declaration, endorsed by 120 countries (emphasis added).[3] Even a commentator who favors extending *legal* benefits to same-sex couples (but not the word "marriage") acknowledges that:

> *The social institution of marriage predates our legal system by millennia*. Although legal rights conferred and obligations imposed by civil marriage have changed over the centuries, *sexuality remains the vital core*....

Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 Alb. Govt. L. Rev. 552, 578 (2012) (emphasis added). Marriage is a comprehensive union of mind and body that transcends emotional bonds and requires sexual complementarity.[4]

Moreover, *Lawrence* did not involve formal recognition of same-sex relationships. *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484 (2003). On the contrary:

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[3] http://worldfamilydeclaration.org/WFD (last visited 07/09/14).

[4] For a full development of this argument, see *What is Marriage?Man and Woman: A Defense* (Girgis, Anderson, and George, New York: Encounter Books, 2012).

> Texas cannot assert any legitimate state interest here, such as national security or *preserving the traditional institution of marriage*. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—*other reasons exist to promote the institution of marriage* beyond mere moral disapproval of an excluded group.

Id. at 585, 2487-88 (emphasis added).

The Supreme Court repeatedly signals caution about announcing new fundamental rights, thus placing matters beyond the reach of public debate and legislation. Courts must "exercise the utmost care...lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of [the] Court." *Washington v. Glucksberg*, 521 U.S. at 720, 117 S. Ct. at 2268, citing *Moore v. City of East Cleveland*, 431 U.S. 494, 502, 97 S. Ct. 1932, 1937 (1977). It is imperative that courts heed this warning before hastily redefining marriage. The Sixth Circuit wisely acknowledged its limits and declined to "condemn as unconstitutionally irrational" the one-man, one-woman view of marriage shared by virtually all civilizations throughout all human history—and most States today. *DeBoer*, 2014 U.S. App. LEXIS 21191 at *37.

A. Plaintiffs' Proposed Redefinition Of Marriage Is Not Deeply Rooted In American History Or Tradition.

Courts must discard decades of precedent to place plaintiffs' claims under *Glucksberg's* umbrella. Plaintiffs allegedly seek the "fundamental right to marry"—but must *first* redefine marriage to make their arguments.

Glucksberg relied on tradition and moral disapproval—factors courts now glibly cast aside. The Idaho district court trips over itself discussing *Glucksberg*, which "followed directly from the unbroken pattern of state laws and legal traditions disapproving suicide and assisted suicide." *Latta v. Otter*, 2014 U.S. Dist. LEXIS 66417, *37-38 (D. Id.), *aff'd*, 2014 U.S. App. LEXIS 19620 (9th Cir. 2014). *Latta* short-circuits history, stating it is "not aware of a similarly pervasive policy against marriage" (*id.* at 38) while ignoring the "pervasive policy" upholding opposite-sex marriage and condemning (even criminalizing) homosexual acts. *Latta* discards Idaho's marriage laws because "their history demonstrates that moral disapproval of homosexuality was an underlying, animating factor" (*id.* at 62)—the same sort of moral disapproval *Glucksberg* deemed relevant to *uphold* the law.

Another court tossed *Glucksberg* because it "involved the question whether a right to engage in certain conduct (refuse medical treatment) should be expanded to include a right to engage in different conduct (commit suicide)" whereas "[i]n this case, the conduct at issue is exactly the same as that already protected: getting married." *Wolf v. Walker*, 986 F.Supp.2d at 1002. This court presupposes marriage redefinition and, with its dismissal of *Glucksberg*, essentially erases the "deeply rooted" criteria for fundamental rights.

Case law overwhelmingly confirms that marriage—*as plaintiffs redefine it*—is not "deeply rooted" in American history or tradition:

> The everyday meaning of "marriage" is "the legal union of a man and woman as husband and wife," Black's Law Dictionary 986 (7th ed. 1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law.

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 952 (Mass. 2003), citing *Milford v. Worcester*, 7 Mass. 48, 52 (1810); *Commonwealth v. Knowlton*, 2 Mass. 530, 535 (1807) (Massachusetts common law derives from English common law except as otherwise altered by state statutes or Constitution). Other courts agree: *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993); *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 990 (Wash. 2006); *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1094-98 (D. Haw. 2012); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 977 (S.D. Ohio 2013).

Most of these cases predate *Windsor*, but the "language in *Windsor* indicates that same-sex marriage may be a 'new' right, rather than one subsumed within the

Court's prior 'right to marry' cases." *Bishop*, 962 F. Supp. 2d at 1286 n. 33, quoting *Windsor*:

> For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. . . .

Windsor, 133 S. Ct. at 2689.

Words and definitions matter. "[W]hether or not the right in question is deemed fundamental turns in large part upon how the right is defined." *Bishop*, 962 F. Supp. 2d at *1286 n. 33. *Bishop* declined to determine whether Okla. Const. art. 2, § 35 burdened the same-sex couple's "fundamental right to marry a person of their choice," recognizing the potential impact on age, number, and other restrictions. *Id*. The Tenth Circuit glossed over that glitch, concluding that Utah's ban on plural marriage is justified because monogamy is "inextricably woven into the fabric of our society...the bedrock upon which our culture is built"—neglecting to mention that the monogamy historically woven into American fabric presumes a union of male and female. *Kitchen*, 755 F.3d at 1219-20.

B. There Is No Fundamental Right To Redefine The Word Marriage.

Judicially imposed marriage redefinition has cataclysmic implications, as even some advocates admit:

> A court's insistence that the legal recognition of same-sex couples be designated "marriage" imposes an intellectual and social view that may not be held by a majority of citizens within its jurisdiction, and

> does so through the creation of not simply "a brand-new 'constitutional right'" but a disquieting new breed—a "right" to a *word*, an unprecedented notion having inauspicious potential for regulating speech and thought.

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 599-600. Dunson explains that the "character and scope" of this right to a *word* are not only new but "unprecedented." *Id*. at 604 n. 226. The ominous First Amendment implications "impact countervailing liberty interests, which have been virtually ignored by proponents of court-ordered gender-blind marriage." *Id*. at 555.

III. EQUAL PROTECTION ARGUMENTS FAIL.

Courts deny reality when they mandate marriage redefinition:

> The purpose of language is no longer to apprehend things as they are, but to transform them into what we want them to be...just as when a black man was called a piece of property and used as an "article of merchandise" rather than a human being. An injustice of similar magnitude is perpetrated by naming same-sex couplings "marriage."

Making Gay OK: How Rationalizing Homosexual Behavior is Changing (Robert R. Reilly, Ignatius Press), 47. Slavery was made plausible by *redefining* African-American persons as property rather than human beings. Such flights from reality destroy the human equality that marriage redefinition proponents claim to defend.

Equal Protection arguments rely on the presumption that "marriage" already subsumes same-sex relationships. These verbal gymnastics contradict law, logic, and reality:

> No doubt, many people, many States, even some dictionaries, now define marriage in a way that is untethered to biology. But that does not transform the fundamental-rights decision of *Loving* under the old definition into a constitutional right under the new definition. The question is whether the old reasoning applies to the new setting, not whether we can shoehorn new meanings into old words. Else, evolving-norm lexicographers would have a greater say over the meaning of the Constitution than judges.

DeBoer, 2014 U.S. App. LEXIS 21191 at *58.

There is no constitutional right to redefine marriage in order to squeeze same-sex relationships within its confines. Nor is there a constitutional right to compel social approval under the rubric of equal protection, which "concerns equal rights and protections that allow people to be who they are and live as they choose**,** *not* equal social stature, which requires other members of the community to think of them in certain ways." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 599.

A. Earlier Equal Protection Cases Did Not Redefine Marriage.

Frequently cited Supreme Court cases deal with issues irrelevant to the essence of marriage—race, incarceration, failure to pay child support. None challenged the nature of the institution or did violence to its existing definition. All uniformly presupposed that marriage is—*by definition*—the union of one man and one woman. *Loving* struck down racial restrictions on marriage. Marriage has never been a *racial* institution, but rather a *sexual* institution where hair color distinctions would be arbitrary, but distinctions in gender composition—the "vital

core" of the institution—"are neither trivial nor superficial." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 597. *Loving* served the Fourteenth Amendment's central purpose "to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U.S. at 10, 87 S. Ct. at 1823. "[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12, 1823. No one argues that a gay African-American male and gay Caucasian male could have obtained a marriage license in 1968:

> The denial of the license would have turned not on the races of the applicants but on a request to change the *definition* of marriage. Had *Loving* meant something more when it pronounced marriage a fundamental right, how could the Court hold in *Baker* five years later that gay marriage does not even raise a substantial federal question? *Loving* addressed, and rightly corrected, an unconstitutional eligibility requirement for marriage; it did not create a new *definition* of marriage.

DeBoer, 2014 U.S. App. LEXIS 21191 at *56-57 (emphasis added).

The same is true of *Zablocki* and *Turner*: "It strains credulity to believe that a year after each decision a gay indigent father could have required the State to grant him a marriage license for his partnership or that a gay prisoner could have required the State to permit him to marry a gay partner." *Id*. at *58. *Turner* held that restrictions on inmate marriage did not serve legitimate interests in rehabilitation and security. *Turner v. Safley*, 482 U.S. at 97-98, 107 S. Ct. at 2266. *Zablocki* struck down a statute that denied marriage to Wisconsin residents who

owed delinquent child support. The Court described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Zablocki v. Redhail*, 434 U.S. at 384, 98 S. Ct. at 680, quoting *Maynard v. Hill*, 125 U.S. 190, 211, 8 S. Ct. 723, 729 (1888). Civilizations have progressed for millennia without official recognition of same-sex relationships.

B. Plaintiffs' Approach Has No Limiting Principle.

"[T]he district court viewed marriage as any union between any two people, as though same-sex marriage were a necessary component of marriage as historically defined." App. Op. Br. 24.

Plaintiffs presuppose a definition that empties the term "marriage" of meaning. "To say that the *only* relationship that is procreative is the same as one that never is, or ever can be, is a leap into the void." *Making Gay OK*, at 106. Plaintiffs' approach "would create line-drawing problems of its own." *DeBoer*, 2014 U.S. App. LEXIS 21191 at *44. "Marriage" would disintegrate into the "loving, committed" relationship of any two people with no principled basis on which to find that *any* two people are not "similarly situated" with respect to marriage.[5] This nebulous definition leaves no foundation for other restrictions. "If

[5] In May 2010, a 72-year-old grandmother and 26-year-old grandson, reunited years after an adoption, reportedly fell in love and hired a surrogate to enable them to have a child together. This is an opposite sex union—but Plaintiffs' redefinition leaves no foundation to deny this couple's right to marry.

it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage. Plaintiffs have no answer to the point." *Id.* at *45. Other factors—e.g., age, number, consanguinity—would be equally insupportable. *Id.* at *59-61. Indeed, if marriage is merely emotional attachment, it is difficult to see why the state has any interest in defining it, regulating it, or granting legal benefits.

Society values many loving relationships between two persons of the same sex, e.g., father-son, sister-sister, aunt-niece, grandfather-grandson, friend-friend. There are comparable non-marital opposite-sex relationships, e.g., father-daughter, mother-son, brother-sister. These persons may live together, co-own property, bequeath property to each other, name one another as agents under powers of attorney for finances or health care. Two men, two women, or some other combination of unmarried persons may share a residence and appoint one another to act in emergencies. They might share responsibility for children—e.g., a grandmother may offer financial assistance or babysitting to help her single-mom daughter.

None of this renders these relationships equivalent to marriage—but applying Plaintiffs' logic, every one of these "couples" would be eligible to marry.

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http://www.telegraph.co.uk/news/newstopics/howaboutthat/7662232/Grandmother-and-grandson-to-have-child-together.html.

There is no limiting principle to deny them that "right." Indeed, the deconstruction extends even further:

> Ironically, the logic behind this process of legitimization of homosexual behavior undercuts any objective standards by which we could judge the moral legitimacy of anything. This is the ultimate danger it poses—including to America's political foundations.

Making Gay OK, at 12. It might even be "discrimination" for the state to deny benefits to a couple (or group) merely because their relationship is platonic.

Recent rulings have found traditional marriage laws irrational. *Bostic v. Schaefer*, 760 F. 3d 352, 382 (4th Cir. 2014). The Indiana district court could identify only "one extremely limited difference" between same-sex and opposite-sex couples. *Baskin*, 2014 U.S. Dist. LEXIS 86114 at *40. The lower court in *Bostic* asserts that "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Bostic*, 970 F. Supp. 2d at 480 n. 14, quoting *Lawrence v. Texas*, 539 U.S. at 567, 123 S. Ct. at 2478. But it is hardly irrational to reserve a unique word and legal status for the complementary male-female union required for human survival—even if some couples are childless. Marriage is not *simply* about the right to have intercourse, but the *ability* to do so is a rational distinction. Humanity is a gendered species. The union of male and female differs from other two-person relationships. Not every marriage produces children, just as not every for-profit corporation actually earns a profit. That does not mean we must redefine what constitutes a corporation—or a

marriage. Moreover, in view of the obvious fact that two persons of the same sex cannot "have" a child without involving a member of the opposite sex, the "families" headed by same-sex couples are broken by both definition and design. The ensuing personal and legal entanglements are what should cause grave concern for the welfare of children—not the failure to redefine marriage.

IV. COURT-ORDERED MARRIAGE REDEFINITION THREATENS CORE AMERICAN LIBERTIES.

The *Bourke* district court admitted its role was "not to impose its own political or policy judgments on the Commonwealth or its people" (*Bourke v. Beshear*, 996 F. Supp. 2d 542, 543 (W.D. Ky. 2014))—but that is exactly what courts do. This ominous development jeopardizes core freedoms of self-governance, thought, speech, and religion, and obscures the inevitable damage to Americans who cannot conscientiously endorse marriage redefinition.

A. Court-Ordered Marriage Redefinition Threatens Rights Of "The People" To Govern Themselves And Set Public Policy.

After the Civil War, the Reconstruction Amendments carved out an exception to America's balance of powers because "states too could threaten individual liberty." *Shelby v. Holder*, 679 F.3d at 853. These Amendments protect individual liberties, including the right to vote. *Ironically, the Fourteenth Amendment is the very provision judges now use to annul millions of votes on a matter of intense public concern and debate*.

"The [Fourteenth] [A]mendment was added to the Constitution after the Civil War for the express purpose of protecting rights against encroachment by state governments." *Brenner v. Scott*, 999 F. Supp. 2d at 1286. Certain rights may not be submitted to vote. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S. Ct. 1178, 1185-86 (1943).

The Bill of Rights has not withdrawn the right to set marriage policy. Judges have no right to unilaterally dictate public policy. Federal courts improperly disenfranchise millions of voters when they mandate marriage redefinition. "If a federal court denies the people suffrage over an issue long thought to be within their power, they deserve an explanation. We, for our part, cannot find one...." *DeBoer*, 2014 U.S. App. LEXIS 21191 at *32-33. "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id*. at *51, quoting *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014). The Tenth Circuit admits that "[a]s a matter of policy, it might well be preferable to allow the national debate on same-sex marriage to play out through legislative and democratic channels"—then mandates marriage redefinition. *Kitchen*, 755 F.3d at 1228. The Sixth Circuit had the humility to acknowledge its limits:

> Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea. Our judicial commissions did not come with such a sweeping grant of authority,

> one that would allow just three of us—just two of us in truth—to make such a vital policy call for the thirty-two million citizens who live within the four States of the Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee.

DeBoer, 2014 U.S. App. LEXIS 21191 at *15-16.

Federalism is a critical component in the current marriage crisis. Residual state sovereignty is implicit in Art. I, § 8 and explicit in the Tenth Amendment to the United States Constitution. Federalism safeguards individual liberty, allowing states to "respond to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, 131 S. Ct. 2355 (2011). The federalist structure "increases opportunity for citizen involvement in democratic processes." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 2399 (1991). Federally mandated marriage redefinition suppresses those opportunities and abridges the right of citizens to shape public policy. It may also empower Congress to encroach even further on state authority over domestic relations, using its Section 5 enforcement powers. Such expansion would destroy basic principles of federalism:

> How odd that one branch of the National Government (Congress) would be reprimanded for entering the fray in 2013 and two branches of the same Government (the Court and Congress) would take control of the issue a short time later.

DeBoer, 2014 U.S. App. LEXIS 21191 at *66.

Windsor is often trumpeted as a call to redefine marriage. It is not:

> *Windsor* hinges on the Defense of Marriage Act's unprecedented intrusion into the States' authority over domestic relations. *Id*. at 2691-92. Before the Act's passage in 1996, the federal government had traditionally relied on state definitions of marriage instead of purporting to define marriage itself. *Id*. at 2691. That premise does not work—it runs the other way—in a case involving a challenge in federal court to state laws defining marriage.

Id. at *28. *Windsor* quotes several earlier cases supporting the states' authority to regulate marriage: *Sosna* v. *Iowa*, 419 U.S. 393, 404, 95 S. Ct. 553, 560 (1975) ("virtually exclusive province of the States"); *Williams v. North Carolina*, 317 U.S. 287, 298, 63 S. Ct. 207, 213 (1942) (the definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations); *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383-384, 50 S. Ct. 154, 155 (1930) ("when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States"); *Haddock* v. *Haddock*, 201 U.S. 562, 575, 26 S. Ct. 525, 529 (1906) (Constitution grants no federal authority on the subject). *Windsor*, 133 S. Ct. at 2691. "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage." *Id*. at 2692.

Despite the pro-homosexual rhetoric that peppers the opinion, *Windsor* did not mandate marriage redefinition at the state level, and its respect for state rights warrants extreme caution. As one court put it, "DOMA's federal intrusion into

state domestic policy is more 'unusual' than Oklahoma setting its own domestic policy." *Bishop*, 962 F. Supp. 2d at 1278.

Courts have created a massive judicial crisis by overturning millions of votes. "[The right to vote] is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 1071 (1886). Judicially mandated marriage redefinition endangers key elements of America government—federalism, public policy, and core liberties of *the people*.

B. Court-Ordered Marriage Redefinition Threatens Core First Amendment Rights—Free Speech, Thought, And Religion.

"For all of the power that comes with the authority to interpret the United States Constitution, the federal courts have no long-lasting capacity to change what people think and believe about new social questions." *DeBoer*, 2014 U.S. App. LEXIS 21191 at *74. Moreover, it is "dangerous and demeaning to the citizenry" to assume that only the judiciary can understand the arguments about marriage redefinition. *Id*. at *75.

Marriage redefinition is purportedly about "liberty and equality, the two cornerstones of the rights protected by the United States Constitution." *Wolf v. Walker*, 986 F.Supp.2d 987. But "[w]hen judges start telling people what words they must use, *beware*." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 588. Courts have "neither the constitutional power nor the moral authority" to coerce the

social esteem and approval same-sex couples desire. *Id*. at 594. Such a court order "misrepresents community views and regulates speech so as to regulate thought in an effort to change those views." *Id*. at 591.

Marriage redefinition by judicial fiat "impacts countervailing liberty interests, which have been virtually ignored by proponents of court-ordered gender-blind marriage." *Id*. at 555.[6] Same-sex couples may "call themselves married," but the question is "whether everyone else must do so as well." *Id*. at 556. The American system avoids government regulation of speech and thought. *Id*. at 586.

> If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment.

Schneiderman v. United States, 320 U.S. 118, 144, 63 S. Ct. 1333, 1346 (1943).

Marriage has deep religious significance for many. Federal courts barely give a passing nod to religious liberty implications. The Tenth Circuit "note[d] that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage." *Kitchen*, 755 F.3d at 1227; *see also Geiger*, 994 F. Supp. 2d 1128 at 1143; *Latta*, at *78-79; *Bourke*, 996 F. Supp. 2d at 555. These courts

[6] This commentator supports legal rights and benefits for same-sex couples but acknowledges that "official recognition" threatens the liberties of others and should not be decreed by a court.

dismiss deep concerns and barely touch the tip of the iceberg. Just as courts rebuff concerns about morality, they spurn the religious values of multitudes of Americans. *Bishop*, 962 F. Supp. 2d at 1289 ("moral disapproval often stems from deeply held religious convictions" but such convictions are "not a permissible justification for a law"); *Bourke*, 996 F. Supp. 2d at 554 ("[The government] cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it.").

"Tolerance," like respect and dignity, is best traveled on a "two-way street." *DeBoer*, 2014 U.S. App. LEXIS 21191 at *53, quoting *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). It is woefully inadequate to brush aside the convictions of—and challenges faced by—religious organizations and citizens. Courts redefining marriage barely mention the spiraling threats. The judicial intrusion on thought and speech encroaches heavily on religion—a right that, unlike even traditional marriage, the Constitution explicitly guarantees. Anti-discrimination mandates have already spawned a multitude of legal actions,[7] and that threat will escalate exponentially unless the political process is allowed to carve out exemptions to respect rights of conscience.

[7] See, e.g., *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (U.S., Apr. 7, 2014) (Christian photographer subjected to draconian financial penalties for refusing to photograph a same-sex commitment ceremony).

V. ALL LAWS ARE GROUNDED IN MORAL PRINCIPLES.

Echoing other recent pronouncements, the district court proclaims that "moral disapproval, standing alone, cannot sustain a provision of this kind." *Brenner v. Scott*, 999 F. Supp. 2d at 1289. But America's founders spoke passionately about the moral and religious underpinnings of our judicial system. Benjamin Franklin forewarned:

> If a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid? We've been assured in the sacred writing that, "Except the Lord build the house, they labor in vain that build it."

James Madison, *The Papers of James Madison*, (Henry Gilpin ed., Washington: Langtree and O'Sullivan, 1840) (Vol. II, June 28, 1787), 185.

Morality has a legitimate role in legislation:

> In a democracy, the majority routinely enacts its own moral judgments as laws. Kentucky's citizens have done so here.... It is true that the citizens have wide latitude to codify their traditional and moral values into law. In fact, until after the Civil War, states had almost complete power to do so, unless they encroached on a specific federal power.

Bourke, 996 F. Supp. 2d at 550, 555. *Lawrence* and *Casey* proclaim the courts' duty to define and protect "the liberty of all, not to mandate our own moral code." *Lawrence v. Texas*, 539 U.S. at 571, 123 S. Ct. at 2480, quoting *Casey*, 505 U.S. at 850, 112 S. Ct. at 2806. But that is exactly what courts do when they nullify the people's moral judgment. As the Sixth Circuit highlights, it is an "evolution in

society's values, not evolution in *judges*' values," that justifies changes in the law. *DeBoer*, 2014 U.S. App. LEXIS 21191 at *69-70. When *Lawrence* was decided, most states no longer prohibited sodomy. *Id*. at *70.

Every law has a moral foundation and many are based on "moral disapproval." The question is *whose* morality will prevail. Even equality—a valid legal principle—is also a *moral* principle. Advocates of so-called "marriage equality" implicitly argue that it is wrong—i.e., *immoral*—to retain the time-honored definition of marriage. Ignoring that inescapable reality, courts embrace *Lawrence's* "moral code" language to eschew morality in defining marriage. *Griego*, at *886; *Geiger*, 994 F. Supp. 2d at 1142. Advocates of marriage redefinition celebrate this as a victory for their cause:

> Preclusion of "moral disapproval" as a permissible basis for laws aimed at homosexual conduct or homosexuals represents a victory for same-sex marriage advocates, and it forces states to demonstrate that their laws rationally further goals other than promotion of one moral view of marriage.

Bishop, 962 F. Supp. 2d at 1290. Yet these advocates promote "one moral view of marriage"—a view that conflicts with a majority of the American people.

Our judicial system seems to be allergic to religious expression or influence in the public square, banishing moral concerns to the private fringes. In *Bostic*, the district court gave short shrift to the "faith-enriched heritage" of Virginia's marriage laws—laws admittedly "rooted in principles embodied by men of

Christian faith." *Bostic*, 970 F. Supp. 2d at 464. The court shoved morality aside, contending that marriage has "evolved into a civil and secular institution sanctioned by the Commonwealth of Virginia." *Id*. But this secularization poses new threats. Over the last few decades, courts have ordered the government to exit the bedroom and respect private choices. Now activists thrust those private choices back into the public realm and demand massive government interference with the conscience rights of those who cannot affirm their "private" decisions. Plaintiffs' redefinition of marriage improperly mandates social approval, imposing heavy burdens on those who disagree:

> There is no constitutionally protected right to moral or social approbation. Due process and equal protection require according each person a level of passive respect and dignity, but *not* esteem or approbation.

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 592-593.

VI. THE PRESERVATION OF MARRIAGE IS BASED ON BIOLOGY—NOT BIGOTRY. EVEN "THE PEOPLE" CANNOT REVISE THE NATURE OF REALITY—INCLUDING MARRIAGE.

The Sixth Circuit recognized its inability to attribute animus to millions of voters: "If assessing the motives of multimember legislatures is difficult, assessing the motives of *all* voters in a statewide initiative strains judicial competence." *DeBoer*, 2014 U.S. App. LEXIS 21191 at *51.

Certain realities are given to us and cannot be altered by legal action. The unmistakable facts of biology distinguish opposite-sex and same-sex couples in a

manner no legislation or court decree can alter—any more than voters could repeal the law of gravity.

Courts protect the "inalienable rights" referenced in America's Declaration of Independence—rights that precede the state and preempt human law, rights that do not change over time. Plaintiffs trample these rights in order to manufacture new "rights" that conflict with the nature of reality.

CONCLUSION

This Court should reverse the decision of the District Court.

Dated: November 20, 2014

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(c)

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains **6,994** words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2014, I 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. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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