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

David Boyle
P.O. Box 15143
Long Beach, CA 90815
(734) 904-6132
dbo@boyleslaw.org
Pro Se Counsel for Amicus Curiae David Boyle

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

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

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

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.

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

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

Jacobson, Samuel

Jeff Goodman, PA

Jones, Charles Dean

Kachergus, Matthew R.

Kayanan, Maria

Liberty Counsel, Inc.

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.

Schlairet, Stephen

Scholars of the Institution of Marriage

Scott, Rick

Sevier, Chris

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

Sheppard, William J.

Smith, Michael F.

Smith, Hannah

Snider, Kevin T.

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

Tanenbaum, Adam S.

Tilley, Daniel B.

Trent, Edward

Ulvert, Christian

United States Conference of Catholic Bishops

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

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,

s/David Boyle
P.O. Box 15143
Long Beach, CA 90815
(734) 904-6132
dbo@boyleslaw.org
Pro se Counsel for Amicus Curiae David Boyle

CERTIFICATE OF SERVICE

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.

He also certifies that all parties or their counsel of record will be served through the CM/ECF system if they are registered CM/ECF users:

WILLIAM J. SHEPPARD
ELIZABETH L. WHITE
BRYAN E. DEMAGGIO
SHEPPARD, WHITE & KACHERGUS, P.A.
215 Washington Street
Jacksonville, Florida 32202
sheplaw@att.net
Counsel for Plaintiffs-Appellees in Case No. 14-14061

SAMUEL S. JACOBSON
BLEDSOE, JACOBSON, SCHMIDT, WRIGHT et al.
1301 Riverplace Boulevard, Suite 1818
Jacksonville, Florida 32207
sam@jacobsonwright.com
Counsel for Plaintiffs-Appellees in Case No. 14-14061

MARIA KAYANAN
DANIEL B. TILLEY
ACLU FOUNDATION OF FLORIDA, INC.
4500 Biscayne Blvd Ste 340
Miami, Florida 33137-3227
mkayanan@aclufl.org
dtilley@aclufl.org
Counsel for Plaintiffs-Appellees in Case No. 14-14066

STEPHEN F. ROSENTHAL

PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
srosenthal@podhurst.com
Counsel for Plaintiffs-Appellees in Case No. 14-14066

Allen C. Winsor
Adam Scott Tanenbaum
OFFICE OF THE ATTORNEY GENERAL
The Capitol PL-01
Tallahassee, FL 32399-1050
allen.winsor@myfloridalegal.com
adam.tanenbaum@myfloridalegal.com
Counsel for Defendants-Appellants in Cases Nos. 14-14061 and 14-14066

James J. Goodman, Jr.
JEFF GOODMAN, PA
946 Main St.
Chipley, FL 32428
office@jeffgoodmanlaw.com
Counsel for Defendant-Appellant in Case No. 14-14061

November 21, 2014 Respectfully submitted,

s/David Boyle
P.O. Box 15143
Long Beach, CA 90815
(734) 904-6132
dbo@boyleslaw.org
Pro se Counsel for Amicus Curiae David Boyle

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s/David Boyle
Pro se Attorney for Amicus Curiae David Boyle

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

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 ROBERT OSCAR LOPEZ SUPPORTING APPELLANTS AND REVERSAL

David Boyle
P.O. Box 15143
Long Beach, CA 90815
(734) 904-6132
dbo@boyleslaw.org
Counsel for Amicus Curiae Robert Oscar Lopez

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Robert Oscar Lopez, 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

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Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

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.

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Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

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

Jacobson, Samuel

Jeff Goodman, PA

Jones, Charles Dean

Kachergus, Matthew R.

Kayanan, Maria

Liberty Counsel, Inc.

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.

Schlairet, Stephen

Scholars of the Institution of Marriage

Scott, Rick

Sevier, Chris

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

Sheppard, William J.

Smith, Michael F.

Smith, Hannah

Snider, Kevin T.

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

Tanenbaum, Adam S.

Tilley, Daniel B.

Trent, Edward

Ulvert, Christian

United States Conference of Catholic Bishops

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

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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Whether the national Constitution requires Florida to allow same-sex marriage.

STATEMENT OF INTEREST OF AMICUS CURIAE

I, Robert Oscar Lopez,[1] write this Brief Supporting Appellants and Reversal, to ask that the Court respect Florida's upholding the original definition of marriage as between one man and one woman. My interest in these cases, *Brenner* and *Grimsley*, stems from my experience as a child raised by a lesbian with the help of her female partner for seventeen years, and from my experience as an outspoken university professor who challenged the social-science consensus that supposedly proved there were "no disadvantages" to being raised by gay or lesbian parents.

ARGUMENT

My personal life story is not the main source for my position before the Court. My position against same-sex marriage stems more from my experience as a scholar and archivist compiling the testimonials of people raised by same-sex couples (I affix here a collection of such), and my observations of how academic researchers have collaborated with gay activist organizations like the Gay and Lesbian Alliance Against Defamation and the Human Rights Campaign to commit

[1] I wrote the vast majority of this brief without help from any other party or its counsel, though my own counsel gave editing, formatting, or other help at the end; and no party or its counsel gave money to its writing or submission, *see* Fed. R. App. P. 29. All parties have sent permission to Amicus to write this brief.

character assassinations against such children who come forward with negative feedback.

American courts must change course and refocus debate on children's rights, rather than on eclectically defined "outcomes" that cannot capture the deep human significance of having a mother and father. In the present climate of suppressed expression it is unwise to place children under the power of same-sex couples since there are many parties in society devoted to erasing or hiding things that go wrong in their homes. Moreover, such harsh conditions mean that research into this area has to be thrown out—we cannot respect a social-science consensus based on an academic system that openly punishes people who truthfully challenge it. The failure of the academic establishment to foster free speech and honesty in this area is twofold: Not only have they allowed many people raised by same-sex couples to be persecuted by the organizations that claim to fight for them; also, they have destroyed the academic system on which we would have relied for guidance in determining whether children have a right to a mother and father.

I. My Experience Growing Up

I will explain my life history here to clarify where I developed a personal interest in same-sex parenting.

My mother was a Puerto Rican psychiatrist and my father was a Filipino psychiatrist. Their marriage was falling apart by 1971, when I was born. By my earliest memories, my father did not live in our home and had minimal contact with me. We did not practice regular shared custody. By the time I was two years old, my mother was in a stable, supportive, healthy lifelong relationship with another woman, whom I saw quite regularly and viewed as a third parental figure. Because my father was absent and my mother was not as emotionally interested in me as her partner was, I developed a stronger emotional attachment to her lesbian lover than I did to my own mother.

My mother and her partner were tactful and sensitive about assuring that their relationship did not cause me undue stress. They maintained separate houses in town until I was a teenager and only moved in together when I was finishing high school. They did share camping space in a recreational vehicle park about forty minutes away from our town, however, and we spent all our weekends together as a family. While my older siblings did not bond emotionally with my mother's partner, I did, and to me, for all intents and purposes, this was the family I grew up with.

Had I been formally studied by same-sex parenting "experts" in 1985, I would have confirmed their rosiest estimations of LGBT family life. During my childhood and adolescence I presented the outward signs of a successful

upbringing. Inducted into the National Honor Society, I was president of the French and Spanish clubs, editor-in-chief of the high school newspaper for two straight years, and graduated one year early from high school, ranking ninth out of hundreds of graduating seniors. I attended four proms; in fact I do not know of any other classmate in my Williamsville community that attended that many. I was accepted by Yale University and arrived there in 1988 as an emancipated seventeen-year-old. Today I am a tenured university professor, a published author, and going on fourteen years in my life's only marriage -- to the same woman who gave birth to my two children, a daughter, and recently, a newborn son.

Behind these façades of a happy "outcome" lay many problems.

Even in the conditions of my home, which represent in many ways the best possible conditions for a child raised by a same-sex couple, I experienced a great deal of sexual confusion. I had an inexplicable compulsion to have sex with older males, which manifested in 1984, when I had my first sexual encounter with two older teenage boys in my bedroom. One of the boys ended up having to go to the hospital for alcohol poisoning after my mother discovered us naked and entangled.

I was exposed to gay culture from an early age because my mother and her lover had a number of lesbian friends. My mother was a devotee of Catholic liberation theology and placed me in contact with priests and nuns who had radical

ideas about sexuality and gender, sometimes referring to God as “She” and speaking in frank terms about the beauty of homosexual relationships. In her work as a psychiatrist my mother also wanted to help poor lesbians and often blurred the boundaries between personal and professional work, sometimes offering our home as a safe refuge for mentally ill lesbians.

By 1985 and 1986, I had moved past teenagers and wanted to have sex with older men who were my father’s age, though at the time I could scarcely understand what I was doing. There was a bookstore in our neighborhood that had a pornography section where I went regularly to find older men. I believe it was around 1987 that I first had a man offer me payment in exchange for having sex in the back of his van. My first time being paid for sex brought me a mix of shame and further compulsion. I became a habitual sex worker by the age of sixteen in various cruising spots where older men told me I could find other customers; these included public parks, the bathrooms in 24-hour supermarkets, community sports centers, and certain spaces in Lockwood Library of the State University of New York at Buffalo, where I had sex with graduate students, janitors, and professors well over twice my age.

The money I received for sex certainly helped me financially because it allowed me certain spending money beyond what I earned with my teenage jobs at a pizzeria and in my mother’s clinic. But the money was not as impactful as the fact

that I needed to feel loved and wanted by an older male figure, even if for only as short as a half hour.

I did not have psychological problems or drug problems, but the sexual problems of my adolescence became compounded after my mother died in 1990. Her inheritance was stuck in New York State's surrogate courts. She had appointed her female lover the executor of the estate and then signed a codicil about ten years later, appointing my father as executive of the estate. In the ensuing conflicts, my mother's lover had to move out of the house she had shared with my mother. I also ended up homeless.

In 1992 I was able to return to Yale for my final year. I completed my degree in Political Science with a B+ average and found consistent full-time work between 1993 and 1998.

In 1998, I found out I had cancer and had to be rushed into surgery at Montefiore Hospital in the Bronx. The tumor was severe, according to the doctor, and had to be removed right away. At that instant, I called my father rather than my mother's lover. After twenty-seven years of estrangement and absence, we rebuilt our relationship. He took care of me after the surgery and liberated me, in a sense, from the gay "family" that had been positive but also toxic. Being able to say, "you are my father" to him meant the world to me. I moved in with him while

I underwent extended treatment at Roswell Park Cancer Institute in Buffalo, and we were able to re-create my childhood between 1998 and 2000; in 2000 I moved in with my girlfriend who would later become my wife. (She still is today.)

As early as ten years ago, I developed a clear stance on homosexual relationships. A civil union or some kind of state recognition would have helped my mother and her partner. Yet the traditional marriage laws in New York State as they existed back then prevented my mother and her partner from entirely cutting my father out of my life. The latter reality proved pivotal because my re-establishment of ties to my father in 1998 led to a transition in my life, from being lost and sexually confused to being stable and romantically fulfilled. For that reason I can support same-sex civil unions and some kinds of foster care for gay couples, but I object strenuously to marriage and adoption for gay couples. Both marriage and adoption involve using the force of the state to force unwilling children into emotional relationships with people who are not their parents—and this coercion is permanent, hurtful, and discriminatory, insofar as all children have a mother and father but children placed in same-sex-couple homes are stripped of one of these two figures without their consent. Every stated goal of the gay marriage movement – to honor relationships, to respect how people are born (i.e., "born" gay), and to refrain from telling people whom they should love – leads me to oppose gay marriage. We must honor the universal relationship between

children and their father and mother. We must respect the fact that children are "born that way" with a mother and father, always. Lastly, we must not tell children that they have to love adults who are not their parents simply because these gay adults say they love them and want to have custodial powers over them.

II. The Impossibility of Finding a "Clean" Sampling of Kids Raised by Same-Sex Couples

In 2012, I went from privately holding these beliefs to publicly speaking out. My mother had died 22 years earlier and my honorable discharge from the U.S. Army Reserves on July 15, 2012, gave me the freedom to speak openly on sensitive matters without risking reprimands. The first step was publishing "Growing Up with Two Moms" in *Public Discourse*. Unfortunately at that time, most discussion of gay parenting focused on the controversial study conducted by Mark Regnerus at the University of Texas at Austin. It is my understanding that the rejection of his scholarship played a significant role in some lower courts' decisions to overturn various States' marriage laws.

I was not involved in Mark Regnerus's study and I do have serious objections to his confusing bisexual with gay and lesbian life histories. This is significant since both my mother and I lived bisexual lives. Nonetheless, I can speak to a few points about Mark Regnerus as a person and what I witnessed as a

friend of his during 2012 and 2013. Despite the flaws in Mark Regnerus's research model, he and Walter Schumm are the only scholars studying alternative family structures, who have ever agreed to speak with me. This holds true even though I know that many other researchers must know of my existence. I am on quite prominent blacklists published by the two most powerful gay rights organizations in the United States – Gay and Lesbian Alliance against Defamation, and Human Rights Campaign. Though I have a doctorate, went to Yale, have tenure, and have compiled dozens of life histories involving same-sex parenting, I have been dismissed, quite often rudely, by researchers who keep claiming to know a great deal about the impact of same-sex parenting on children.

Mark Regnerus has been attacked not for what he failed to find, but rather, for what he included. He found a large number of people of color who were involved in same-sex parenting homes, as well as people who lived real-life complexities that other researches peremptorily suppressed (more than two parental figures, living in separate houses, gay parents breaking up, etc.) In other words, unlike every other researcher in this field, Mark Regnerus seeks to understand every person he comes across who had a gay or bisexual parent. All the others go looking for families that suit a prescribed profile – they must be a stable, picture-perfect gay couple that doesn't have any of the complicating factors that actually happen in real life. Hence the rejection of Mark Regnerus's work is not a

defense of gay families; it is a slap in the face of the vast majority of us who come from gay families and cannot seem to be heard by researchers who expect us to fit a narrow and suffocating mold.

Having said all that, Mark Regnerus's study ends up falling prey to what ruined all the other research into children of gay parents. The question being asked was always whether children of gay parents made a good impression on adults – do they have good grades, are they well-liked by peers, do they seem confident and "well adjusted"? All of these measurements reflect what adults want out of children. None of these measurements can possibly capture the grave injustice being done to a child whose father or mother has been permanently taken away.

A child can go to Harvard and still have lost something very precious, which adults did not have the right to take away. Grades, incomes, and "well-adjusted" appearances are superficial and unimportant when it comes to human dignity. The question is not whether a child needs a mother and father, as if adults with agendas can ever be sensible about defining how much a child ought to have. Every child *has* a mother and father, even if one of these was someone who abandoned the child, died, was a mere sperm donor, or gestated the child for pay.

For the child of a same-sex couple, this individual is not a number or a hypothetical – this is a real person with a face, a name, a history, an origin story,

and a cultural meaning. In my case, the missing father was an entirely different race. I found myself, in college, longing so badly to know about the Philippines that I helped to found the Filipino Intercollegiate Network for Dialogue.

For other children of same-sex couples, the longing and yearning for the lost parent of the opposite sex takes other forms, because their situation is different.

Some of them are adoptees who, like so many other adoptees, feel an inexplicable need to find their original parents, often with a mix of anger and longing. For adoptees placed in same-sex couple homes, the long-recognized challenges felt by adoptees are compounded by the gender imbalance of the adoptive home. It is not necessary, given the long waiting lists of heterosexual couples who wish to adopt, ever to place a child in the adoptive home of two same-sex individuals.

According to the Dave Thomas Foundation for Adoption, there were 101,719 foster children in the United States eligible for adoption, as of August 9, 2013. (*See* map at *INFOGRAPHIC: US CHILDREN IN FOSTER CARE WAITING TO GET ADOPTED* (citation omitted), Aug. 9, 2013, https://www.davethomasfoundation.org/news_story/infographic-u-s-children-in-foster-care-waiting-to-get-adopted/.)

Yet in 2010, NBC News reported that 1.1 million American women sought fertility treatment in any given year, so there is clearly an inexhaustible number of heterosexual homes that could be recruited as adoptive homes for these children. (*See* Jennifer Wolff Perrine's article, *Many couples struggle with infertility in silence*, Women's Health on NBC News, updated Aug. 5, 2010, 9:47:19 a.m., www.nbcnews.com/id/38311820/ns/health-womens_health/t/many-couples-struggle-infertility-silence/#.U3Ofl21dBzw.)

Given that placement in same-sex couple homes is not necessary, it is unjust to force a child who has been entrusted to the state to live without a mother or without a father. The moment the adoption becomes legal, then the chance of having a mother or father is permanently foreclosed, and the adoptee can never reverse this act of deprivation, which is then added to the initial trauma that caused the loss of his birth family. The child grows up knowing that everyone else has a mother and father, but he doesn't, because the people who are raising him and say they love him took one of those away from him, forever.

In a case where one member of the same-sex couple is the child's biological parent and the couple wants to "jointly" adopt the child, the adoption is a form of coercion. Now the child, in addition to having permanently lost the link to a biological parent of the opposite sex, must submit to the authority and control of a new parent who may or may not dispense of such power with generosity. In my

conversations with over thirty people raised by a biological parent and a non-biologically related gay partner, I have identified a clear trend: children don't want to be forced into an emotional relationship with the non-related gay partner. Notwithstanding some fondness that may develop, they adapt to that person and do their best to respect him or her, so that they can nurture their relationship with their parent. But they almost never feel comfortable calling this essential step-parent "Mom" or "Dad," and do not like being ordered around by the step-parent or expected to speak with the same intimacy they show to their original parent. So the entire notion that gay people must get married so they can adopt each other's children is fatally flawed. This is the state forcing kids into emotional situations they do not want to be in. It isn't freedom or "protection," but rather, coercion.

After compiling the testimonials and stories of people raised by same-sex couples, I reject entirely the social-science consensus. My main rejection of the social-science consensus comes from the reality that:

(1) their metrics cannot reflect the deeper, unquantifiable pains experienced by children in such homes even if they look happy on paper;

(2) many children of same-sex couples are under pressure to make their parents look good and internalize this pressure, so they cannot be trusted to provide frank answers, plus we know from various press accounts of child abuse by same-sex

couples that often children raised in such homes are actively coached to provide answers to outsiders;

(3) the quantifiable negative outcomes on children often do not manifest until they are adults, particularly in their late twenties and beyond, at which time most of the social-science researchers are no longer willing to include them in their studies; and

(4) the social-science researchers like to exclude the life histories of children raised by same-sex couples who do not fit rigid particulars, which end up misrepresenting the likely experience of children who are forced by the state into the care of gay couples. In my case, when I debated same-sex parenting, people have repeatedly suggested that my case is not applicable in any general sense, due to the fact that my mother and her partner chose to live in separate houses despite co-parenting me, and the fact that my mother died when I was still a teenager. Because Mark Regnerus and Doug Allen *did* include such complicated cases in their sample, they were pilloried rather than credited for reversing a long-standing problem with social-science methodology in this area (*see* Loren Marks' study published in July 2012, *Same-sex parenting and children's outcomes: A closer examination of the American Psychological Association's brief on gay and lesbian parenting*, 41 Soc. Sci. Res. 4, at 735-751).

In my travels working with children from alternative family structures, I find it impossible to come across a pristine case of a child raised by two same-sex adults without any mitigating factor like a divorce, third-party reproduction, adoption, or death of a parent; therefore I argue that the subject pools gathered by social-science researchers are at best rarified and handpicked or at worst the product of basic academic fraud.

Below I attach a partial bibliography of testimonials, stories, and news items about children raised by same-sex couples, to show the repeated pattern of complexities. (There are many more examples which there is not room to put here.) These family structures are so complex and specific that it is virtually impossible to reduce them to statistics, meaning that the social-science consensus is, at this point, utterly worthless.

III. Annotated Bibliography

A. ADULTS

1)** ***Jean-Dominique Bunel **(raised by lesbians):**

> . . . "You see, two rights collide: the right to a child for gays, and the right of a child to a mother and father. The international convention on the rights of the child stipulates in effect that "the highest interest of the child should be a primary consideration" (article 3, section 1). Here this 'higher interest' leaves no doubt … **I would have jumped into the fray and would have brought a complaint before the French state and before the European Court of the rights of man,**

> **for the violation of my right to a mom and a dad."** Le Figaro (10/01/13)

R.O. López, *Le Figaro runs confessional of man raised by lesbians, who opposes gay marriage now*, English Manif, Jan. 11, 2013, 8:58 a.m., http://englishmanif.blogspot.com/2013/01/le-figaro-runs-confessional-of-man.html (last visited November 20, 2014, as with all other Internet links herein).

***2) Dawn Stefanowicz (raised by gay father)**:

> . . . Though I was deeply disappointed with my father and his partners' sexual behaviors, I couldn't say anything negative about my dad or the homosexual lifestyle. For a time, I coped by being performance oriented and denying the influences around me, pretending I could rise above everything.

Test. by Dawn Stefanowicz, Conn. Gen. Assemb. Judiciary Comm. Pub. Hr'g, Mar. 26, 2007, *available at* http://www.dawnstefanowicz.org/docs/R000326-DawnTMY.pdf.

***3) Katy Faust (raised by lesbians)**:

> In addition to the distinct and complimentary ways that men and women parent, children need both sexes in their immediate world as they develop their own gender identity. It's strongly held within the social sciences that beginning as early as age three, children can (and should) identify with their same-sex parent.

Askme, *You're only against gay marriage because of your religion. Part 3 Gender Identity*, asktheBigot, Aug. 20, 2012, http://askthebigot.com/2012/08/20/gender-identity/;

> Flip this around- not every marriage produces children, but every child had a father and a mother. Our definition of the family unit should reflect this biological reality and developmental necessity.

Askme, *You're only against gay marriage because of your religion. Part 4-Biology Matters*, asktheBigot, Aug. 20, 2012, http://askthebigot.com/2012/08/20/biology-matters/.

***4) Rivka Edelman (raised by lesbians)**:

> But I think that what Dawn was saying is that no matter which way you slice it, whether it was the social or the political or the sexual, it was always about *them.* When you sent me the questions, I looked up some stuff. One thing I found was this tiny quote from this woman, somewhere in New England, some scholar in New England, and she says something to the effect of, "gay parents tend to be more motivated and committed than heterosexual parents, because they really want those kids." And I thought to myself, that just shows how this woman supposedly – I guess she's heterosexual, I don't know – this woman academic absorbs the gay community's hatred of women. And even the lesbians, in a weird way, they hated heterosexual women.

R.O. López, *La Joie de Vivre 2:10 -- Kids of Gay Couples Speak Out, Part 2 of 4-- RIVKA EDELMAN, BOBBY LOPEZ, DAWN STEFANOWICZ*, Mar. 24, 2014, 7:49 p.m., http://englishmanif.blogspot.com/2014/03/la-joie-de-vivre-210-kids-of-gay.html.

***5) Robert Oscar Lopez (raised by lesbians)**:

> Quite simply, growing up with gay parents was very difficult, and not because of prejudice from neighbors. People in our community didn't really know what was going on in the house. To most outside

> observers, I was a well-raised, high-achieving child, finishing high school with straight A's.
>
> Inside, however, I was confused. . . .

Robert Oscar Lopez, *Growing Up With Two Moms: The Untold Children's View*, Public Discourse, The Witherspoon Inst., Aug. 6th, 2012, http://www.thepublicdiscourse.com/2012/08/6065/.

***6) Bronagh Cassidy (raised by lesbian mothers):**

> Back in 1976, Cassidy's mom had a religious ceremony with a woman named Pat. To make Cassidy, they did artificial insemination at home, mixing the sperm of two gay friends "to make sure nobody would ever know who the father was," says Cassidy. (That was in the days before widespread DNA testing.) The two women stayed together for 16 years, until Pat died. Three years later, Cassidy's mother married a man.
>
> What was it like for Cassidy being raised by two women she called "Mom" and "My Pat"? . . .
>
> "When growing up, I always had the feeling of being something unnatural," Cassidy says. "I came out of an unnatural relationship; it was something like I shouldn't be there. On a daily basis, it was something I was conflicted with. I used to wish, honestly that Pat wasn't there."
>
> Why does she oppose same-sex marriage? "It's not something that a seal of approval should be stamped on: We shouldn't say it is a great and wonderful thing and then you have all these kids who later in life will turn around and realize they've been cheated. The adults choose to have that lifestyle and then have a kid. They are fulfilling their emotional needs — they want to have a child — and they are not taking into account how that's going to feel to the child; there's a clear difference between having same-sex parents and a mom and a dad."

Maggie Gallagher, *Adult Children Speak Out About Same Sex Parents*, Cath. Exch., 2004 (and copyright 2014), http://catholicexchange.com/adult-children-speak-out-about-same-sex-parents.

***7) Jeremy Deck (raised by gay father)**:

> It is this side of the story that I feel compelled to tell. Children of homosexuals have a unique vantage point on the complexities of the issue. Homosexuals are often able to surround themselves with like-minded individuals in the thriving gay culture. Spouses, parents, or siblings of homosexuals do not usually immerse themselves in a homosexual environment once their loved ones "come out." Children, however, are in a sense forced to live a lifestyle they have not chosen. . . .

Jeremy Deck, *My Father's Closet*, Boundless Webzine (courtesy of Internet Archive Wayback Machine), undated but apparently from c. 2000, http://web.archive.org/web/20120109091049/http://www.boundless.org/2000/features/a0000417.html.

***8) Denise Shick (raised by gay father**):

> My dad was a cross dresser when I was a child. This made me feel very uncomfortable around him growing up. This confused me with his role of a father in my childhood. I just wanted him to be my "dad".
>
> I learned after his passing that he was in a homosexual relationship. This was another dilemma for me to deal with. Even though he had passed on, it seemed like another chapter of his life was revealed to me. I had questioned this to myself growing up. I never told anyone about myself questioning "if he was gay". Now the truth was there on pen and paper.

> There are many of us going though [sic] this situation. There are many of us out there. Don't think the Gender Identify Disorder does not exist or hurt people.

Denise Shick, *Denise's Story*, courtesy of Internet Archive Wayback Machine, 2011, http://web.archive.org/web/20120404123248/http://www.help4families.com/crisis.htm.

***9) "Debbie Smith" (raised by gay father)**:

> How is a young woman supposed to deal with homosexual pornography that she finds in her father's closet? Is this something that one talks about in private conversations? I never talked about it until I got into counseling years later. Or what does one do when dear old Dad asks you to type up some things that he's written, and it turns out to be pornographic in nature? The desire to please and obey parents is overridden by the disgust felt upon reading this trash. How can your own father think like this? It is difficult not to feel polluted by the experience and wonder if, somehow, you are not damaged goods because of the corruption of your father's mind.
>
> What about the lack of positive feedback regarding females and femininity? As I look back, even when my brother and I were young, there was little interaction between my father and I. There were few compliments about the way I dressed or acted in ways that were affirming. Expressions of emotion were rare, unless they were angry rants about his job, his relationships or other challenges in his life.

"Debbie Smith", *A Daughter's Reflections About A Gay Father* (undated), DawnStefanowicz.org, http://www.dawnstefanowicz.org/pdfs/DebbieSmith's AUTOBIOGRAPHY.pdf.

B. KIDS

***1) Manuel Half (raised by gay father)**:

> You stand up for the idea of a father without a mother, which is, without a mother, no father at all, but something else. And it, that mother, you say, matters for nothing--don't think of her at all: And don't look for her among people made from fathers and mothers, since you say they suffer with their fathers and mothers.
>
> And you say that I am the example and model that proves your full and healthy wholeness, which you built at the cost of my my full and healthy wholeness.

R.O. López, *La Joie de Vivre 1:3 -- The Manifesto of Manuel Half, son of a gay father and surrogate mother*, Nov. 16, 2013, 9:56 p.m., http://englishmanif.blogspot.com/2013/11/la-joie-de-vivre-13-manifesto-of-manuel.html.

***2) Anonymous Girl, "Donor Conceived" (raised by lesbians)**:

> I have gay parents.
>
> I spend most of my time at my best friends house. I hang out with her Dad cuz I never had one and he is this awesome guy. My friends Dad is a lot like Charlie from Twilight! I cried when I read about Bellas father in the books and in all his scenes in the movies. Mostly at my friend's house it feels like I can just be myself. Someone has to say it cuz I dont hear it but gay parents are selfish in a way. They dont think what it's going to be like for me to live in their world.
>
> Am I the only one who feels this way? Am I a bad daughter because I wish I had a Dad? Is there anyone else who has 2 Moms or 2 Dads who wonders what it would be like if they were born into a normal family? Is ther anyone else who wants to be able to use the word normal without gettin a lecture on what is normal???
>
> I dont know my real father and never will. Its weird but I miss him. I miss this man I will never know. Is it wrong for me to long for a father like my friends have? She has two brothers I play basketball with all the time. It feels so amazing to be included in their family. When I am there I think this is what its like to be in a family that has a

> Mom and a Dad. Then I have have to go home to my own world. I just dont fit in it anymore.

Donor Conceived, *Child of lesbian parents*, AnonymousUs.org, July 17, 2013, http://anonymousus.org/stories/story.php?sid=1554#.UpmL7FCUQ4y.

C. CHILD ABUSE BY GAY PARENTS WHO WERE NOT INITIALLY INVESTIGATED THOROUGHLY, SINCE AUTHORITIES FEARED APPEARING "BIGOTED AGAINST GAYS"

*1) Gay Couple Left Free to Abuse Boys Because Social Workers Feared Being Branded Homophobic:

> A homosexual foster couple were left free to sexually abuse vulnerable boys in their care because social workers feared being accused of discrimination if they investigated complaints, an inquiry concluded yesterday.
>
> Craig Faunch and Ian Wathey were one of the first homosexual couples in the country to be officially approved as foster parents.
>
> . . . .
>
> Even when the mother of two of the children reported her suspicions to the council, officials accepted the men's explanations and did nothing.
>
> . . . .
>
> In a scathing report published yesterday, Wakefield Metropolitan District Council was condemned for treating the men as "trophy carers".
>
> The children's charity Kidscape said those in charge of overseeing the safety of children in the care of Faunch and Wathey had allowed political correctness to override common sense.
>
> The report, following an independent review of the case, said: "One manager described the couple as 'trophy carers' which led to 'slack arrangements' over placement.

> "Another said that by virtue of their sexuality they had a 'badge' which made things less questionable.
>
> "The sexual orientation of the men was a significant cause of people not 'thinking the unthinkable'.
>
> "It was clear that a number of staff were afraid of being thought homophobic.
>
> "The fear of being discriminatory led them to fail to discriminate between the appropriate and the abusive."
>
> . . . .
>
> Wathey, 42, was jailed for five years in June last year after being convicted of four counts of sexual activity with a child and one offence of causing a child to watch sexual activity.
>
> Faunch, 33, received a six-year jail sentence after he was found guilty of five charges of engaging in sexual activity with a child and two of taking indecent photographs of a child.

Paul Sims, *Gay couple left free to abuse boys - because social workers feared being branded homophobic*, Daily Mail (United Kingdom), Sept. 5, 2007, updated 9:53 p.m., http://www.dailymail.co.uk/news/article-480151/Gay-couple-left-free-abuse-boys--social-workers-feared-branded-homophobic.html#ixzz2RccQApyQ.

***2) My Adoptive Dad Abused Me for Years but Social Workers Ignored My Complaints Because He's Gay**:

> A boy sexually abused by his adoptive father and his gay partner was labelled an 'unruly child' by social workers who ignored his complaints for years, a damning report has revealed.
>
> . . . .
>
> Mr [Andy] Cannon said: 'I believe if my adoptive dad was in a heterosexual relationship then my complaints would have been listened to earlier.
>
> 'It seems the council didn't want to be seen as victimising gay people – they would rather look politically correct and let them get away with it to avoid any repercussions.[']

Steve Robson, *Andy Cannon, 23, was sexually abused by his gay adoptive parents*, Daily Mail (United Kingdom), Mar. 28, 2013, updated 6:39 p.m., http://www.dailymail.co.uk/news/article-2300779/My-adoptive-dad-abused-years-social-workers-ignored-complaints-hes-gay.html#ixzz2Rcaydhzw.

IV. The Rhetorical Climate for Critics of Same-Sex Parenting

In addition to the testimonials or news items affixed in the list *supra*, there are dozens of other people raised by same-sex couples who have communicated with me, but they do not want to reveal their names or even have their stories recorded.

The reason for people's fear of being named can be illustrated by what happened to me since I published "Growing up with two moms" in *Public Discourse* in 2012. Scott Rosenzweig (or "Rose"), a blogger who was then with the *New Civil Rights Movement*, sent over ten emails to my university accusing me of "hate speech," "bullying," and "gay bashing," usually copying dozens of other people including high officials in the California State University and parties in the state capital. Rosenzweig placed an open records request to my university and was able to gain access to many of my work emails that I had never intended to make public. It was only through pressure from my pro bono lawyer that we were able to prevent the names and personal details of over eighty individuals who had emailed me about their experiences from being released to Rosenzweig. Rosenzweig is not a minor player in this conflict – he was the one who filed a complaint with the

University of Texas at Austin and was able to place Mark Regnerus's entire data set under investigation (which cleared Mark Regnerus in the end).

In August 2012, Karen Ocamb, a blogger at *Frontiers LA,* posted a photograph of me with a headline saying, "perhaps you know this man," then naming my workplace—it felt to me like an invitation for people to harass or even attack me physically. Jeremy Hooper, Zack Ford, and Wayne Besen are all powerful gay bloggers with a high national profile, who have followed my blogs and social media and written articles accusing me of being "anti-gay." Jeremy Hooper often writes to people to say that I compared gay parents to slave-owners, which is a gross oversimplification of work I did applying my scholarly expertise in early African American literature to the history of family formation. Now people who Google me pull up links to countless postings that define me as anti-gay.

The Human Rights Campaign lists me on the "Regnerus Fallout" page *The Regnerus Fallout—Who Was Involved* (2013), http://www.regnerusfallout.org/who-was-involved, detailing the ostensible misdeeds of people who collaborated with Mark Regnerus to demean same-sex parents. Though I had no involvement in the study except that I published one essay that contained eight paragraphs addressing Darren Sherkat's dismissal of Mark Regnerus's findings, I am listed under HRC's compilation of "Who was involved" in the Regnerus study, and my picture is affixed there along with the repeated claim that I compared gay parents

to slave-owners. The Gay and Lesbian Alliance Against Defamation placed me on their Commentator Accountability Project list. When this list was published, Rosenzweig sent an alarmist email to my university president and a host of other school officials, saying that I was insane and students should not be willing to study with me.

When I was invited to speak at the College of Holy Cross, I was later told by the students who wanted to bring me there that administrators would not approve my visit. Students at Stanford invited me to speak at a conference and were quickly barraged with alarming emails from GLAAD, again claiming that I compared gay parents to slave-owners, and saying that I was anti-gay and intimating that inviting me to campus was akin to bigotry. Due to this smear campaign, Stanford's undergraduate and graduate student bodies denied funding to the student group that invited me.

At the department level, I had to be reviewed for tenure by a committee member who is openly gay and who received all the accusatory emails from Scott Rosenzweig. During the tenure review I was repeatedly pressured to explain my politics and told that my "personal revelations" posed a problem for my teaching. This went into the record even though the department did vote to give me tenure.

The references to "personal revelations" appeared again in letters at higher levels of review so these have become part of my personnel file.

Children raised by same-sex couples face a gauntlet if they break the silence about the "no disadvantages" consensus. In such a climate, I must conclude that placing children in same-sex couples' homes is dangerous, because they have no space or latitude to express negative feelings about losing a mom or dad, and in fact they have much to fear if they do. It is clear to me that almost nobody will be willing to report abuses in such homes or even listen to the children who are receiving the abuse.

I must also conclude that the same-sex parenting consensus is not a consensus at all. We cannot in good faith accept the findings of sociologists who undertook work in a climate marked by repression and persecution of children raised by same-sex couples who have information running contrary to the desired conclusion that same-sex parenting is safe and uniformly positive.

The same-sex parenting positions put forward by politically compromised groups such as the American Psychiatric Association and the American Sociological Association are misleading and should be thrown out. We have ample reasons based on humanitarian grounds to respect the relationship of a child to his mother and father, especially in the context of a debate in which gay activists are

asking for people to respect their sexual relationship to each other. It is not necessary to do additional research to find that something precious and important has been taken from a child who is forced to live without a mother or father, and the state has no business encouraging such a taking.

For these reasons, please abide by the Florida marriage laws.

CONCLUSION

This amicus respectfully asks the Court to reverse the judgment of the court below.

November 21, 2014 Respectfully submitted,

s/David Boyle
P.O. Box 15143
Long Beach, CA 90815
(734) 904-6132
dbo@boyleslaw.org
Counsel for Amicus Curiae Robert Oscar Lopez

CERTIFICATE OF SERVICE

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.

He also certifies that all parties or their counsel of record will be served through the CM/ECF system if they are registered CM/ECF users:

WILLIAM J. SHEPPARD
ELIZABETH L. WHITE
BRYAN E. DEMAGGIO
SHEPPARD, WHITE & KACHERGUS, P.A.
215 Washington Street
Jacksonville, Florida 32202
sheplaw@att.net
Counsel for Plaintiffs-Appellees in Case No. 14-14061

SAMUEL S. JACOBSON
BLEDSOE, JACOBSON, SCHMIDT, WRIGHT et al.
1301 Riverplace Boulevard, Suite 1818
Jacksonville, Florida 32207
sam@jacobsonwright.com
Counsel for Plaintiffs-Appellees in Case No. 14-14061

MARIA KAYANAN
DANIEL B. TILLEY
ACLU FOUNDATION OF FLORIDA, INC.
4500 Biscayne Blvd Ste 340
Miami, Florida 33137-3227
mkayanan@aclufl.org
dtilley@aclufl.org
Counsel for Plaintiffs-Appellees in Case No. 14-14066

STEPHEN F. ROSENTHAL

PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
srosenthal@podhurst.com
Counsel for Plaintiffs-Appellees in Case No. 14-14066

Allen C. Winsor
Adam Scott Tanenbaum
OFFICE OF THE ATTORNEY GENERAL
The Capitol PL-01
Tallahassee, FL 32399-1050
allen.winsor@myfloridalegal.com
adam.tanenbaum@myfloridalegal.com
Counsel for Defendants-Appellants in Cases Nos. 14-14061 and 14-14066

James J. Goodman, Jr.
JEFF GOODMAN, PA
946 Main St.
Chipley, FL 32428
office@jeffgoodmanlaw.com
Counsel for Defendant-Appellant in Case No. 14-14061

November 21, 2014 Respectfully submitted,

s/David Boyle
P.O. Box 15143
Long Beach, CA 90815
(734) 904-6132
dbo@boyleslaw.org
Counsel for Amicus Curiae Robert Oscar Lopez

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

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2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

X this brief has been prepared in a proportionally spaced typeface using 2010 Microsoft Word in 14-point Times New Roman font, or

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s/David Boyle
Attorney for Amicus Curiae Robert Oscar Lopez

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

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES BRENNER, 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, 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.

MOTION OF AMICUS CURIAE DAVID BOYLE FOR LEAVE TO FILE AMICUS CURIAE BRIEF FOR ROBERT OSCAR LOPEZ, SUPPORTING APPELLANTS AND REVERSAL

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (names start on next page)

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Robert Oscar Lopez, 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

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

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.

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

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

Jacobson, Samuel

Jeff Goodman, PA

Jones, Charles Dean

Kachergus, Matthew R.

Kayanan, Maria

Liberty Counsel, Inc.

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.

Schlairet, Stephen

Scholars of the Institution of Marriage

Scott, Rick

Sevier, Chris

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

Sheppard, William J.

Smith, Michael F.

Smith, Hannah

Snider, Kevin T.

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

Tanenbaum, Adam S.

Tilley, Daniel B.

Trent, Edward

Ulvert, Christian

United States Conference of Catholic Bishops

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, *Grimsley v. Sec'y Dep't of Health*

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.

INTRODUCTION/STATEMENT OF INTEREST

The present amicus curiae, David Boyle (hereinafter, "Amicus"), respectfully submits this Motion for Leave to File Amicus Curiae Brief for Robert Oscar Lopez, 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)): the case information just mentioned, providing a "brief recitation of prior actions of this or any other court", if needed. (If the Court would like more information, please let Amicus know.) Amicus contacted the parties' counsel; neither Appellants nor Appellees oppose this Motion.

Amicus is a California lawyer who is filing his own *pro se* amicus brief in *Brenner* and *Grimsley*, *supra*, but is also sending in another, separate amicus brief for a client, Robert Oscar Lopez. The Court's staff (here unnamed for privacy's sake), when Amicus contacted them by telephone to ask about various brief-filing issues, told Amicus that he could file only one amicus brief, not two, following the "one attorney, one brief" Internal Operating Procedure of the Court, #2, following Federal Rule of Appellate Procedure 28, "Briefs", in the Court's Rules and Internal Operating Procedures as of August 1, 2014. However, Robert Oscar Lopez's brief would be highly informative to the Court in regard to the issue of children raised

by homosexuals, as he was, so Amicus files this Motion to allow Lopez's brief to be filed in this Court.

SUMMARY OF ARGUMENT

While the IOP in question says "one attorney, one brief", it is in the "Briefs" section of the rules, not the "Brief of an Amicus Curiae" section, which covers a different situation. Also, there are issues here of clients' free choice of counsel, free speech, and freedom of association. Various other Circuits have allowed multiple associated groups to file separate briefs instead of one combined brief, or allowed one counsel to file multiple amicus briefs in one case; in fact, some Circuits have allowed Amicus and Lopez to file separate amicus briefs in the same case, with Amicus as lawyer. The State of Florida will be disadvantaged if the hard work of Lopez is not honored and his brief is not filed, a brief which is informative on relevant issues, as per Lopez's statement herein. Amicus does not object to Appellees filing several amicus briefs through one lawyer. If the Court opposes one lawyer filing several amicus briefs, it could clarify the Circuit's written rules and procedures to say so explicitly, though permission to permit filing several amicus briefs through one lawyer may be a better idea, since it would promote free speech and greater knowledge about relevant issues.

I. THERE IS APPARENTLY NOT *PER SE* A PUBLISHED INTERNAL OPERATING PROCEDURE OR RULE IN THIS CIRCUIT, PREVENTING

ONE COUNSEL FROM FILING SEVERAL SEPARATE AMICUS BRIEFS FOR SEPARATE CLIENTS IN ONE CASE

While the Court staff were helpful, Amicus respectfully notes that the written policy in this Circuit re "one attorney, one brief" seems to cover the issue of having *full* parties, e.g., appellants and appellees, not file multiple briefs. This is a sensible rule, since, say, a class-action suit with 10,000 plaintiffs could have 10,000 separate appellant's (or appellants') briefs filed, which would be a ridiculous situation. However, Amicus is trying to file one additional amicus brief, not 9,999 appellant's briefs.

IOP #2 following FRAP 28 in the Court rulebook says, in pertinent part, "Unless otherwise directed by the court, an attorney representing more than one party in an appeal may only file one principal brief (and one reply brief, if authorized), which will include argument as to all of the parties represented by that attorney in that appeal, and one (combined) appendix." *Id.* So, *prima facie* at least, IOP #2 seems to be talking only about the appellant's or appellee's briefs, since an amicus curiae is normally not going to be filing a reply brief, or an appendix. Thus, IOP #2 arguably does not prevent one lawyer from filing multiple *amicus* briefs, even if that lawyer could not submit more than one appellant or appellee brief.

With amicus briefs, there is just not the same problem as with allowing every plaintiff or defendant, every appellant or appellee, to file a separate brief. There are only going to be so many amici. But some of them, like Mr. Lopez, are not

lawyers, and may be hard put to file a brief if they cannot use their lawyer of choice to file a brief. —A hypothetical example: the "Save the Fish Foundation" files an amicus brief in an environmental case, about legal issues re the exotic and endangered Zooba fish; but then Old Salty the sailor, who has a lifetime of personal experience with the characteristics and environment of the Zooba fish, comes to the SFF Foundation and wonders if he can write a brief to the Court about his unique personal experience, in order to help out in the controversial environmental case. Old Salty is not a lawyer, so he needs the Foundation's lawyer to have his, Old Salty's, say—and his say may be long enough that he cannot consolidate all of his wisdom with that of the SFF's own amicus brief. (I.e., SFF have their own 7000 words to say, and Old Salty has at least 6999 words to say, so that they cannot just cram all their ideas and testimony together into one combined 7000-word brief.) If the old salt has something to say which can help the Court decide the issue in an informed way, perhaps it would be wise to let him say it.

By the way, the Court could have given public warning if it wanted amici, in particular, to combine their efforts into one single amicus brief; *see, e.g.*, D.C. Cir. R. 29(d), "Single Brief.": "Amici curiae on the same side must join in a single brief to the extent practicable. . . . Any separate brief . . . must contain a certificate of counsel plainly stating why the separate brief is necessary." *Id.* (Note that the D.C. Circuit rule, *see id.*, still *allows* separate briefs, even if it discourages them.) But

the Eleventh Circuit apparently has no such circuit rule, *see* the Eleventh Cir. Rules/ IOP. Given the lack of previous written notice against multiple amicus briefs being submitted by one lawyer, Amicus respectfully asserts that it would be fair to allow Lopez to file his brief. (The Court can always amend its rules/ procedures in the future to add written notice, as noted *infra*.)

II. CLIENTS HAVE SOME MORAL RIGHT TO COUNSEL OF THEIR CHOICE, PURSUANT TO THE SIXTH AMENDMENT, FIRST AMENDMENT, FREE SPEECH, AND FREEDOM OF ASSOCIATION

After all, for Americans to have counsel of their choice just reflects fairness and common sense. While the legal profession is regulable, e.g., disallowing felons admission to the bar, or preventing price-gouging of lawyers' clients, counsel should still have a substantial right to take on clients of their choice (either for profit or the public interest), and clients conversely should have a right to be represented by counsel and to choose counsel. If this Court somehow forces every separate amicus brief to have a separate lawyer, that right is effectively infringed. (While the Sixth Amendment right to counsel may only technically be for criminal defendants, *see id.*: a court interested in justice would presumably be interested in letting parties or amici in civil proceedings also have freedom to choose.)

Lopez, like Amicus, lives in California, so it may not be easy for Lopez to hunt around in order to find a lawyer who is part of the Eleventh Circuit bar like Amicus is. (Not all Californian lawyers are even members of the *Ninth* Circuit bar,

much less the Eleventh.) Also, if Lopez tried to find some other lawyer besides Amicus, that other lawyer would likely being one whom Lopez has never met before and may know little about, and who may not work for Lopez *pro bono*, either, and may simply not be amenable to Lopez's style or thoughts. Again, freedom of choice in lawyers can be very crucial.

Obviously, the First Amendment is strongly implicated as well. If Amicus' client is not allowed to file his brief just because his lawyer is also filing a *pro se* amicus brief, Lopez's free speech in *Brenner*/*Grimsley* will be reduced to zero.

Freedom of association is also at issue. Clients should have a right to associate with a lawyer of their choice. (*See* Lopez's statement, *infra* at 11, on the difficulty of finding inexpensive counsel who will help defend, re gay marriage, a child's right to a mother and father, as Amicus is doing.)

(If the Court were worried about "profiteering", e.g., one lawyer taking away paying business from other lawyers if he files more than one amicus brief: Amicus is representing Lopez in this case *pro bono*. Amicus is essentially losing money by doing so, since he could have used the time he spent on the *pro bono* work to find other, paying work; so he is not "profiteering" here.)

III. SOME PRECEDENT FROM THE *HOBBY LOBBY* CASE ON ALLOWING ASSOCIATED PEOPLE TO FILE SEPARATE AMICUS BRIEFS

After all, there is a substantial history of allowing people to file separate amicus briefs even if a court could argue that they are all associated and should stuff their separate ideas into just one brief. For example, in the recent U.S. Supreme Court *Burwell v. Hobby Lobby* case (573 U.S. ___, 134 S. Ct. 2751 (2014)), one may see at the Becket Fund link *Amicus History: Hobby Lobby Supreme Court Amicus Briefs Among Record Levels* (undated), http://www.becketfund.org/hobbylobbyamicus/ (last visited November 20, 2014, as with the other Internet link herein), that: the Catholic Medical Association; the Knights of Columbus; the U.S. Catholic Bishops; 67 Catholic theologians and ethicists; and the Ryan Institute for Catholic Social Thought, all filed separate amicus briefs, five in total, on the side of the Hobby Lobby company. The Supreme Court could, say, have forced those five groups *supra*, who are all presumably part of the association which is the Roman Catholic Church, to combine their efforts and write one "Catholic" brief together. But the five groups decided to write separate briefs, which the High Court allowed.

IV. AMICUS AND ROBERT OSCAR LOPEZ FILED SEPARATE AMICUS BRIEFS IN THE SAME CASE, WITH AMICUS AS COUNSEL, IN TWO OTHER CIRCUITS; AND OTHER COUNSEL HAVE ALSO FILED SEPARATE AMICUS BRIEFS IN THE SAME CASE

Moreover, some other Circuits have not made any arbitrary restriction, or any restriction, on Amicus' filing separate amicus briefs.

In the in the Fourth Circuit *Bostic v. Schaefer* case (760 F.3d 352 (4th Cir. 2014)), Amicus filed, supporting that case's Appellants, a *pro se* amicus brief and also another amicus brief as counsel for Robert Oscar Lopez: both were filed, April 4, 2014. There was no problem. (Needless to say, the Fourth Circuit did not require that Lopez and Amicus cram our two separate briefs into one single brief, which would have been basically impossible.) Similarly, in the Sixth Circuit *DeBoer v. Snyder* case (-- F.3d --, 2014 U.S. App. LEXIS 21191 (6th Cir. Nov. 6 2014)), Amicus filed, supporting that case's Appellants, a *pro se* amicus brief and also another amicus brief as counsel for Robert Oscar Lopez: both were filed, May 14, 2014. Again, there was no problem.

And in the Fifth Circuit, in *De Leon v. Perry*, No. 14-50196 (No. 5:13-cv-982, 975 F. Supp. 2d 632 (W.D. Tex. Feb. 12, 2014)) Amicus had to file a motion like this present one, but to allow *four* more amicus briefs, from four separate clients, to be submitted, in addition to his own *pro se* amicus brief. It was successful; all five briefs were filed. By contrast, in the instant case, Amicus is only asking to file one more brief, Lopez's brief.

Actually, not just Amicus, but other lawyers, such as the Christian public-interest law group Liberty Counsel, have also served as amicus counsel not only for themselves but also simultaneously for others. *See, e.g.*, *Liberty Counsel Defends Virginia Marriage Amendment*, Liberty Counsel, Apr. 4, 2014, http://

www.lc.org/index.cfm?PID=14102&AlertID=1758, showing, *see id.*, that Liberty Counsel represented a group called WallBuilders, LLC in one amicus brief of April 4, 2014, and also submitted another brief the same day, combining themselves (Liberty Counsel) and the American College of Pediatricians, all in *Bostic*, the Fourth Circuit same-sex-marriage case *supra*. So Liberty Counsel represented multiple, separate parties as amici in separate briefs in one case, which should be perfectly legal.

The Fourth and the Sixth Circuits' common-sense acceptance, *supra*, of the notion that an amicus should be able to choose his own lawyer; or at least the Fifth Circuit's granting of Amicus' motion to file additional amicus briefs (four in that case): should be followed by this Circuit and Court as well, at least in this compelling instance where Lopez has so much insight to offer.

V. UNFAIRNESS TO THE STATE OF FLORIDA IF THE LOPEZ BRIEF IS KEPT OUT OF *BRENNER*/*GRIMSLEY*

Additionally, not only will Lopez himself be penalized by the Court keeping his brief out of the instant cases; the State of Florida and its People, who voted to ban same-sex marriage, will also be penalized by the forced absence of the Lopez brief. The issue of mandatory legalized same-sex marriage in every State is one of the most momentous legal issues ever, one may fairly say. And Florida has a right to what aid and counsel it can get in presenting its case re the issue. For the State of Florida to be forced to present a weaker, more inferior and under-informed case

than it could have, because one of its amici is completely silenced, is not something that the Court should not permit to occur.

VI. CORRESPONDING COURTESY TO THE SIDE OF APPELLEES

Of course, in the interest of consistency and equity, Amicus shall not object if the other side, the Appellees, use one lawyer to submit multiple briefs from multiple amici.

VII. A STATEMENT BY ROBERT OSCAR LOPEZ, IN SUPPORT OF THE FILING OF HIS BRIEF

Robert Oscar Lopez made a brief statement, sent to Amicus in an e-mail, *see id.*, concerning the unique point of view he can offer, and the importance of allowing his brief to be filed. (It is the same statement he made in the motion to the Fifth Circuit, *see id.* at 15, to submit a brief, but Amicus has contacted him and he reiterates the statement.) His perspective has a great deal to offer to this case, especially since he has considerable experience researching and writing about same-sex-marriage related issues, as his brief notes. Thus, even if exclusion of multiple amicus briefs from one lawyer were regular Court policy, that policy should be waived in this case.

Without over-repeating Lopez' brief itself: he is a tenured professor, Yale graduate, military veteran, and children's-rights activist who was raised by lesbians and suffered immensely thereby, including separation from a male parent, with all

the anguish that caused. In an era when the popular thing to say is that "It's great for kids to have same-sex parents", Lopez' personal experience and eyewitness testimony will help balance versus that "popular" point of view, by indicating that there can be a serious downside for children who live under same-gender, instead of gender-diverse, parenting.

Here is his statement, which helps show why the Court should grant requested relief:

> I request that the Court permit my attorney to submit multiple briefs for this case, for a few reasons. Currently the climate for children of gay parents is very dangerous when such children speak out in favor of a child's right to a mother and father. It is difficult to find legal representatives willing to take on our cause, and we are generally not wealthy enough to have independent funds. Our voices are nonetheless crucial to this debate and have not been given sufficient attention.

VIII. ANY CIRCUIT PROCEDURE THAT NO COUNSEL CAN SUBMIT MORE THAN ONE AMICUS BRIEF, IF NOT ABROGATED, SHOULD BE INSERTED INTO PUBLISHED INTERNAL OPERATING PROCEDURES

By the way, in the event that the Court does not abrogate any policy it may have which prevents amici from choosing a lawyer who is submitting another amicus brief, the Court should at least consider amending the published Eleventh Circuit Internal Operating Procedures, not to mention the Circuit Rules, to include clear and transparent language such as, "No attorney may serve as counsel of record to more than one amicus brief." That statement, *see id.*, is only 14 words, yet would

give unmistakably overt notice and warning that a lawyer can't submit more than one amicus brief as counsel of record.

Again, there is usually little good reason to impair citizens' free speech/ freedom-of-association by forbidding them the counsel of their choice, in this Court or other courts. Amicus would politely suggest that instead of adding language to the rules that explicitly prohibits more than one amicus brief from a lawyer, it could be helpful to free speech and an increased flow of valuable information to the Court, to put language into the rules that actually supports the ability of amici to have whatever lawyer they want, even one who is submitting another (or even several) amicus briefs.

* * *

"[T]he right to counsel of choice . . . . is the right to a particular lawyer[.]" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S. Ct. 2557, 2563 (2006) (Scalia, J.). While that quote refers to criminal cases, *see id.*, the spirit of free choice, *see id.*, should obtain in civil cases as well when it can. This Court would act fairly by allowing Robert Oscar Lopez his choice of counsel and the filing of his brief. And his voice, drawing on personal experience instead of mere legalisms and theory, has a great deal to add to the controversial and difficult debate before this Court.

CONCLUSION

Amicus respectfully asks the Court to allow the filing of Robert Oscar Lopez's amicus brief; and humbly thanks the Court for its time and consideration.

November 21, 2014 Respectfully submitted,

s/David Boyle
P.O. Box 15143
Long Beach, CA 90815
(734) 904-6132
dbo@boyleslaw.org
Pro se Counsel for Amicus Curiae David Boyle,
Counsel for Amicus Curiae Robert Oscar Lopez

CERTIFICATE OF SERVICE

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.

He also certifies that all parties or their counsel of record will be served through the CM/ECF system if they are registered CM/ECF users:

WILLIAM J. SHEPPARD
ELIZABETH L. WHITE
BRYAN E. DEMAGGIO
SHEPPARD, WHITE & KACHERGUS, P.A.
215 Washington Street
Jacksonville, Florida 32202
sheplaw@att.net
Counsel for Plaintiffs-Appellees in Case No. 14-14061

SAMUEL S. JACOBSON
BLEDSOE, JACOBSON, SCHMIDT, WRIGHT et al.
1301 Riverplace Boulevard, Suite 1818
Jacksonville, Florida 32207
sam@jacobsonwright.com
Counsel for Plaintiffs-Appellees in Case No. 14-14061

MARIA KAYANAN
DANIEL B. TILLEY
ACLU FOUNDATION OF FLORIDA, INC.
4500 Biscayne Blvd Ste 340
Miami, Florida 33137-3227
mkayanan@aclufl.org
dtilley@aclufl.org
Counsel for Plaintiffs-Appellees in Case No. 14-14066

STEPHEN F. ROSENTHAL

PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
srosenthal@podhurst.com
Counsel for Plaintiffs-Appellees in Case No. 14-14066

Allen C. Winsor
Adam Scott Tanenbaum
OFFICE OF THE ATTORNEY GENERAL
The Capitol PL-01
Tallahassee, FL 32399-1050
allen.winsor@myfloridalegal.com
adam.tanenbaum@myfloridalegal.com
Counsel for Defendants-Appellants in Cases Nos. 14-14061 and 14-14066

James J. Goodman, Jr.
JEFF GOODMAN, PA
946 Main St.
Chipley, FL 32428
office@jeffgoodmanlaw.com
Counsel for Defendant-Appellant in Case No. 14-14061

November 21, 2014 Respectfully submitted,

s/David Boyle
P.O. Box 15143
Long Beach, CA 90815
(734) 904-6132
dbo@boyleslaw.org
Pro se Counsel for Amicus Curiae David Boyle,
Counsel for Amicus Curiae Robert Oscar Lopez