APPEAL NO. 14-14061

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER, et al.,

Plaintiffs-Appellees,

v.

JOHN H. ARMSTRONG, et al.,

Defendants-Appellants.

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

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici, pursuant to Eleventh Circuit Rule 26.1-1, certifies that the following persons and entities have an interest in the outcome of this case and/or appeal:

Albu, Joyce

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Andrade, Carlos

Armstrong, Dr. John H.

Ausley McMullen

Bazzell, Harold

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

Pursuant to Federal Rule of Appellate Procedure 29, Amici move for leave to file an amicus brief in support of Defendants-Appellants in the above-captioned case. In support of this Motion, Proposed Amici states as follows:

1. Amicus Professor Robert P. George (B.A., Swarthmore College; J.D., M.T.S., Harvard University; D.Phil., University of Oxford) is a Visiting Professor at Harvard Law School and McCormick Professor of Jurisprudence at Princeton University. Amicus Sherif Girgis (A.B., Princeton University; B.Phil., University of Oxford-Rhodes Scholar) is pursuing a Ph.D. in philosophy at Princeton University and a J.D. at Yale Law School.

2. Amici have studied and published on the moral, political, and jurisprudential implications of redefining marriage to eliminate the norm of sexual complementarity and have expertise that would benefit this Court. Their article, "What Is Marriage?" appeared in the *Harvard Journal of Law and Public Policy*. Their book, *What Is Marriage? Man and Woman: A Defense*, further develops their philosophic defense of marriage as a conjugal union, and was cited twice by Justices Alito and Thomas in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Given their academic expertise in the field, amici have a significant interest in defending against the constitutional claims that Plaintiffs assert in this case, and

that expertise will aid the Court's evaluation of the relevant constitutional and social-policy considerations.

3. The fundamental issue raised in this case—whether the Fourteenth Amendment forbids States from defining marriage as the union of a man and a woman—is of profound importance. Accordingly, dozens of amicus briefs have been filed in each of the similar cases that have recently been (or are currently being) litigated before the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits. *See, e.g.*, *Kitchen v. Herbert*, 755 F.3d 1193, 1240-53 (10th Cir. 2014) (cataloguing all amici that filed briefs); *Baskin v. Bogan*, 766 F.3d 648, 651-653 (7th Cir. 2014) (listing the attorneys for all amici). Notably, many of the judges who have written opinions in those cases have referenced the many helpful amicus briefs that have been filed. *See, e.g.*, *Bostic*, 760 F.3d at 382 (referencing the "amicus brief filed by Dr. Gary J. Gates"); *Kitchen*, 755 F.3d at 1240 (Kelly, J., concurring and dissenting) (referencing "the scores of amicus briefs on either side"). Indeed, amicus briefs are so commonplace and useful in these cases that every party that litigated a marriage case before the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits consented to the filing of any and all amicus briefs.

4. Amici's brief, in particular, debunks the idea advanced by Plaintiffs that traditional marriage laws impinge upon same-sex partners' moral claim to equal dignity. Indeed, as their brief explains, accepting this misunderstanding of

the link between marriage law and dignity would admit of no limiting principle, would undermine important social interests, and would ultimately prove self-defeating. Put simply, redefining marriage to include every relationship of deep personal importance would promote a flexible vision of marriage that destabilizes family life and would thereby contribute to myriad social harms. Ultimately, the brief establishes that Florida can define and has defined marriage as a conjugal union without undermining the equal dignity of Floridians in same-sex relationships or the children they rear, and without impairing the liberty of same-sex partners to pursue and structure their romantic relationships as they desire. The Court will benefit from a discussion of this important issue.

5. Counsel for the Amici Curiae has attempted to contact counsel for all parties by email, seeking consent for the filing of the proposed amicus brief. At the time the instant Motion is being filed, the only response received was a reply from counsel for plaintiff Sloan Grimsley, consenting to the filing of the amicus brief. No other responses have been received.

6. Under Federal Rule of Appellate Procedure 29(b), the proposed brief is being filed along with this Motion.

7. Amici respectfully request that the Court grant this Motion.

Dated: November 21, 2014.

Respectfully submitted,

/s David C. Gibbs

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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Dated: November 21, 2014.

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ATTORNEY GENERAL, STATE OF FLORIDA,

Defendant,

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

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AMICI CURIAE BRIEF OF ROBERT P. GEORGE AND SHERIF GIRGIS IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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Other Authorities:

IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amicus Professor Robert P. George (B.A., Swarthmore College; J.D., M.T.S., Harvard University; D.Phil., University of Oxford) is a Visiting Professor at Harvard Law School and McCormick Professor of Jurisprudence at Princeton University. Amici Sherif Girgis (A.B., Princeton University; B.Phil., University of Oxford-Rhodes Scholar) is pursuing a Ph.D. in philosophy at Princeton University and a J.D. at Yale Law School. Affiliations are for identification purposes.

Amici have studied and published on the moral, political, and jurisprudential implications of redefining marriage to eliminate the norm of sexual complementarity and have expertise that would benefit this Court. Their article, "What Is Marriage?" appeared in the *Harvard Journal of Law and Public Policy*. Their book, *What Is Marriage? Man and Woman: A Defense*, further develops their philosophic defense of marriage as a conjugal union, and was cited twice by Justices Alito and Thomas in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a) with an accompanying motion for leave to file.

[1] This brief is submitted with an accompanying motion for leave to file. No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than the amicus curiae, it members, or its counsel contributed money intended to fund preparing or submitting this brief.

STATEMENT OF THE ISSUE

Does the Fourteenth Amendment of the United States Constitution prohibit Florida from defining marriage as the union of a man and a woman?

SUMMARY OF THE ARGUMENT

Moral claims of equal dignity, a child's entitlement to a mother and father, and democratic self-determination can be appropriately assessed and settled in the normal political process and have been here by the people of Florida.

Plaintiffs believe that Florida's marriage laws harm the personal dignity of same-sex couples and of the children they rear. But no one disputes their equal dignity. Plaintiffs' argument misunderstands the social purpose of marriage law, which never has functioned—and *could never* function—as a mechanism for expressing individual dignity or social inclusion. Accepting this view would have absurd logical implications and harmful effects.

First, it would deprive the State of any limiting principle for its marriage law.

Second, by dissolving the links between marriage and any historic marital norm besides consent, it would harm the state's material interest in providing children with stable ties to their own parents. It would undermine their right to be reared by their own parents wherever possible--a right affirmed by the United Nations Convention on the Rights of Children.

Third, it could also thereby spread the stigmatic harms that children and partners of broken homes often suffer. And fourth, by reducing marriage to a primary mark of social inclusion and equality, it would—ironically—spread the very social message it was intended to oppose: that those outside the institution of marriage matter less.

In these ways, finally, it would deprive the People and the State of Florida of their own right to settle the purposes and contours of family policy for themselves--a right they can exercise, and have exercised, while respecting the social equality, and personal and romantic freedoms, of same-sex couples in full.

ARGUMENT

The Legislature and voters of Florida approved an amendment to their State Constitution preserving the understanding of marriage that has prevailed since statehood and that reflects universal practice until recently—namely, as the conjugal union of a husband and wife. In this case, Plaintiffs have impugned that decision as a violation of the Fourteenth Amendment. Their arguments should be rejected.

This brief discusses three moral claims implicated by the question of whether States remain free to define as marriage as a conjugal relationship, viz., the union of husband and wife. The first is the claim for the equal dignity of men and women in same-sex partnerships. The second is the claim that each child is

entitled to be reared, where possible, by her married mother and father. The third is the legal and moral claim of the People and of the States to deliberate and decide for themselves the important social and moral questions at stake in family law.

Although the decisions below imply that these claims are in competition, the people of Florida, and of most States, would disagree, as expressed by their enactments of constitutional amendments and statutes preserving the legal definition of marriage as a conjugal (male-female) union.

I. Plaintiffs' belief that traditional marriage laws impinge upon same-sex partners' moral claim to equal dignity is a mistake. Accepting this misunderstanding of the link between marriage law and dignity would admit of no limiting principle, undermine important social interests, and ultimately prove self-defeating.

Plaintiffs contend that Florida's marriage laws deprive same-sex couples and their children of their moral claim to dignity. This assumes that marriage law is a means of conferring social dignity on individuals in romantic bonds and any children they may rear.

But that cannot be right.

Men and women in same-sex partnerships and the children they rear have the same inestimable dignity and worth as every human being. But accepting Plaintiffs' assumption—that the personal dignity of individuals in loving bonds is what marriage law confers—would logically entail a constitutional right to recognition of any loving consensual bond at all. It would harm important policy

goals currently served by Florida's marriage laws, particularly the moral claim of children to be reared whenever possible by a married mother and father. *See* United Nations Convention on the Rights of the Child 1577 U.N.T.S. 3, 47 (1990). In fact, acting on Plaintiffs' assumption would undermine the very dignitary concerns that motivate it in the first place.

A. If the purpose of marriage law were to enhance the social dignity of loving bonds as such, and of the children reared within them, no basis of principle would remain for limiting marriage to two-person or presumptively permanent bonds.

To find for Respondents is to redefine the public understanding of marriage into whatever same- and opposite-sex couples can have in common but ordinary co-habitants lack: namely, committed romantic emotional union. But there is no reason of principle that a deep emotional union should be permanent, rather than temporary by design; or limited to two-person bonds, rather than multiple-partner (polyamorous) bonds of three of more as a unit.

In other words, people form many kinds of companionate (and romantic) relationships, and children are reared in households of every size and shape. Thus, for example, *Newsweek* reports that there are more than 500,000 polyamorous households in the United States *alone*. Jessica Bennett, *Only You. And You. And You: Polyamory—Relationships with Multiple, Mutually Consenting Partners—Has a Coming-Out Party*, NEWSWEEK, July 28, 2009, http://www.newsweek.com/2009/07/28/only-you-and-you-and-you.html.

And these are the critical points: The partners in these multiple-partner relationships are no less deserving of equality before the law. Their children are no more immune to social stigma. Thus, if marriage law is re-engineered to be an instrument for expressing social approval and inclusion, why shouldn't it be redefined to include these and all other loving, consensual bonds? There is no answer to this challenge—which explains why neither the District Court nor Plaintiffs have proposed one.

Indeed, many same-sex civil marriage advocates have now publicly embraced these implications of their view that civil marriage is simply about conferring social dignity: More than 300 prominent mainstream LGBT and allied scholars and advocates have argued for recognizing sexual relationships involving more than two partners, as well as deliberately temporary sexual (and even non-sexual) relationships. *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, BEYONDMARRIAGE.ORG, (July 26, 2006), http://beyondmarriage.org/full_statement.html. Their logic is irresistible *if* equal citizenship and social standing, or the needs of children in non-traditional homes, require recognition of one's most preferred loving relationship, regardless of shape.

B. Redefining marriage to include every relationship of deep personal importance would promote a flexible vision of marriage that destabilizes family life (further), thereby contributing to social harms—including the dignitary harms of family breakdown suffered by ex-spouses and their children.

If the State redefines marriage to equate it with the broader category of companionship, stabilizing marital norms like permanence and exclusivity will come to seem arbitrary. In practice, then, marriages are likely to take on the variety and flexibility of companionship, to which it will have been assimilated.

The more people think of marriage as a form of deep emotional regard (which may be inconstant), or a means of individualist expression (which sexual fidelity might hamper), the less they will see the point of permanence or exclusivity. Because *these norms have no basis of principle if marriage is defined by emotional union, they are likely to come to seem just as arbitrary to expect of all marriages as sexual complementarity now seems to same-sex marriage advocates*.

In other words, re-defining civil marriage to eliminate the principle of sexual-reproductive complementarity might entrench what Johns Hopkins sociologist (and same-sex marriage supporter) Andrew Cherlin, among others, calls the "expressive individualist" model of marriage. ANDREW CHERLIN, MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 29 (2009). On this model, Cherlin writes, a relationship that no longer

fulfills you personally is "inauthentic and hollow," and you "will, *and must*, move on." *Id.* at 30; emphasis added.

But as social scientific evidence shows, spouses who internalize this model of marriage as primarily about emotional fulfillment are more prone to conflict and divorce. W. Bradford Wilcox, *Is Love a Flimsy Foundation? Soulmate Versus Institutional Models of Marriage* 39 SOCIAL SCIENCE RESEARCH 687 (2010).

Moreover, recognizing same-sex bonds as marriages would send the message—which other public institutions would reinforce—that it matters not, even as a rule, whether children are reared by their biological kin, or by a parent of each sex at all; indeed, that it is *bigoted* to think otherwise. As this message is internalized—as mothers and fathers each come to seem optional—it will be harder to send the message that fathers, say, are essential. Men are likely to feel less urgently any responsibility to stick with their wives and children, and men and women are almost certainly likely to feel less motivation or social pressure to commit to each other in marriage before having children in the first place.

But while the merits of same- and opposite-sex adoptive parenting are in dispute, virtually everyone accepts the distinct benefits of marital stability for children—and for partners, especially the economically dependent. And because coming from a broken relationship or home itself can involve social stigma, these effects would include dignitary harms.

Thus, whether by relativizing the importance of male-female and/or biological parenting, or by obscuring the point of norms like permanence and exclusivity, redefining marriage threatens to reduce stability in households across the board, including ones with children.

So even if some dignitary interests favored redefining marriage law, they would have to be balanced against the significant potential social harms—including the dignitary harms for some partners and children—of doing so. Yet to balance the costs and benefits of rival policy schemes—including the moral claims of abandoned partners and children whom changing social mores might leave without both their biological parents or a parent of each sex—is the role of the People and their elected representatives, not the courts.

C. Using marriage law as a mechanism of expressing social inclusion is self-defeating: it further marginalizes those who remain unmarried, as well as any children they might rear.

Finally, if marriage law *does* come to be seen as a means of bestowing social approval on individuals, rather than promoting certain expectations of certain relationships for specific social purposes, the effect *really will* be to marginalize those who aren't, or can't be, or don't wish to be in marriages—along with the children they rear. And there will always be such people, under any marriage policy: after same-sex civil marriage, for example, anyone who finds most personal

satisfaction in multiple-partner bonds, or cannot find a mate, or chooses to have children alone (perhaps later in life) by adoption or artificial reproduction.

By contrast, the more the State links marriage to *specific* social purposes, the less marriage law will seem like a statement about individuals' personal dignity, inside marriage or out, or about that of their children.

That is, as law and culture make clear that the public purpose of marriage is to link children to their own mother and father and to vindicate their moral claim to be reared by the same, people will be less likely to read into the law (mistakenly) an endorsement of animus toward those who do not marry.

II. Civil marriage recognition cannot be equated with a general conferral of dignity: the social meaning of marriage is inseparable from its social purpose. Plaintiffs' dignity-based arguments would therefore impose without constitutional warrant a new set of policy goals on the State of Florida's marriage laws.

Plaintiffs' argument from dignity fails in this case because it seriously misunderstands the social functions and implications of marriage law. It is impossible to make sense of the institution of marriage as a conferral of personal dignity, or in any way apart from its historic social purposes.

A. Civil marriage is not the State's way of expressing general approval; it serves specific interests that shape and limit its social meaning.

Marriage recognition is not—and never has been—the vehicle for affirming the equal worth of adult citizens or the children they rear. Indeed, it cannot be:

everyone should be equal under law, yet some will never marry, and some children will always be reared in households led by partnerships of types that are ineligible for legal recognition.

Nor does civil marriage simply distinguish favored from disfavored types of *relationships*. Again, countless loving bonds—romantic or not, familial or friendly, of various sizes and levels of formality and commitment and closeness—go legally unrecognized, without any denigration of their worth.

If marriage law simply expressed generic approval of people or relationships or their children, it would be easy to build an Equal Protection-based argument for recognizing all loving, consensual bonds upon request. But because marriage law has always served more specific social purposes, and, indeed, developed precisely to do so, there is no direct line from the principle of equality to a right to redefine marriage to abolish the norm of sexual complementarity.

That is, both sides of our national marriage debate want the law to treat marriages equally. Both, in that sense, favor marriage equality. What they disagree on is which social purposes marriage should serve and how best to serve them—i.e., the social meaning of marriage.

But one must first assume a position on the meaning and social purposes of marriage, to know whether Florida's marriage policy treats similarly situated relationships alike. And while the Constitution requires equality before the law, it

doesn't require any particular set of social purposes to be embodied in marriage law. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) ("The Constitution does not codify either of [the more traditional or purely consent-based] views of marriage.") So concerns about the dignity of adults in loving bonds, or about the social standing of those they rear, cannot operate without more specific assumptions about what marriage policy is for.

B. Throughout history and in the United States, a central social purpose of marriage law has been to promote the formation of stable bonds between men and women for the sake of children born of their union.

In virtually every culture, marriage as a social institution has served the purpose of maximizing the chances that children will be reared by their biological mother and father in a committed bond. This purpose has been recognized as a moral right by, for example, the United Nations Convention on the Rights of the Child. Moreover, as a group of respected family scholars has noted, "as a virtually universal human idea, marriage is about regulating the reproduction of children, families and society." W. BRADFORD WILCOX, ET AL., WHY MARRIAGE MATTERS 15 (2d ed. 2005). Another historian has noted that "[m]arriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies." G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988).

This understanding has been consistently reflected in U.S. law. Justice Joseph Story explained: "[m]arriage is not treated as a mere contract between the parties . . . . But it is treated as a civil institution, the most interesting and important in its nature of any in society. Upon it the sound morals, the domestic affections, and the delicate relations and duties of parents and children essentially depend." JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 168 (1834). Perhaps the most prominent treatise writer in mid-nineteenth century America, Joel Prentiss Bishop, wrote that "[m]arriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby." JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE §225 (1st ed. 1852).

The same understanding persisted throughout the 20th Century. Frank Keezer's 1923 family law treatise stated: "Marriage is universal; it is founded on the law of nature" in which "[n]ot only are the parties themselves interested but likewise the state and the community" since it is "the source of the family." FRANK H. KEEZER, A TREATISE ON THE LAW OF MARRIAGE AND DIVORCE §55 (1923). He specifically defined "legal marriage" as "a union of a man and a woman in the lawful relation of husband and wife, whereby they can cohabit and rear legitimate children." *Id.* at §56.

Indeed, the same view was widely accepted by state and federal courts. Early in its history, the Supreme Court stated that "no legislation can be supposed more wholesome and necessary . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." *Murphy v. Ramsey*, 114 U.S. 15, 45, 5 S.Ct. 747, 764 (1885). A few years later, the Court defined marriage as "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211, 8 S.Ct. 723, 729 (1888).

Judged by its historic social purposes of marriage, restricting civil marriage based on race or nationality is arbitrary while Florida's marriage law is principled and just.

Respondents cite the Supreme Court's cases on the right to marry, but those support rather than condemn Florida's marriage laws. When the Court first applied the fundamental right to marry to invalidate a state regulation dealing with marriage, it cited two cases as precedent, both centered upon procreation and the family. *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824 (1967). The first was *Skinner v. Oklahoma*, which had explicitly linked marriage and procreation: "We are dealing here with legislation which involves one of the basic civil rights

of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113 (1942). The second was *Maynard v. Hill*, which, as noted above, called marriage "the foundation of the family." *Maynard v. Hill*, 125 U.S. 190, 211, 8 S.Ct. 723, 729 (1888).

State courts addressing arguments for redefining marriage have noted the links between marriage and procreation in the right-to-marry cases. The Washington Supreme Court recognized that "[n]early all United States Supreme Court decisions declaring marriage to be a fundamental right expressly link marriage to fundamental rights of procreation, childbirth, abortion, and childrearing." *Andersen v. King County*, 138 P.3d 963, 978 (Wash. 2006). And Maryland's highest court concurred in this recognition:

> All of the cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species. . . . Thus, virtually every Supreme Court case recognizing as fundamental the right to marry indicates as the basis for the conclusion the institution's inextricable link to procreation, which necessarily and biologically involves participation (in ways either intimate or remote) by a man and a woman. *Conaway v. Deane*, 932 A.2d 571, 621 (Md. 2007).

This social purpose of marriage law only highlights the arbitrariness of the interracial marriage ban struck down in *Loving*: race simply has nothing to do with conjugal union or family life; indeed, interracial marriage was recognized at the common law inherited from England. Irving G. Tragen, *Statutory Prohibitions*

against Interracial Marriage, 32 *California L. R.* 269, 269 n.2 (1944). Colonial and later State bans could only have been introduced to promote "White Supremacy," as the *Loving* Court held.

By contrast, the historic social purpose of marriage explains the nearly universal norm of sexual complementarity. And it is historically impossible to attribute that norm to hostility to men and women in same-sex relationships across cultures of radically different degrees of awareness of, and attitudes toward, same-sex sexual activity and partnerships.

III. Florida can define and has defined marriage as a conjugal union without undermining the equal dignity of Floridians in same-sex relationships or of the children they rear and without impairing the liberty of same-sex partners to pursue and structure their romantic relationships as they desire.

All human beings, regardless of their romantic desires or relationship choices, have equal dignity and title to all the same civil rights. States can respect this principle in full while continuing to promote the distinct benefits of a male-female marriage scheme in law and culture. In doing so, they can vindicate the moral claim of children to be raised by their own mothers and fathers whenever possible.

A. Lawmakers can meet the practical needs of all types of households without re-engineering marriage. Indeed, doing so directly can be more effective.

Many cite the practical needs of same-sex partners living together—needs regarding property, tax, and hospital visitation, among other things—as a reason to recognize same-sex civil marriage. One might similarly cite the needs of children reared in such homes—for education-based tax credits, and so on.

But suppose the law grants such legal benefits to two men in a sexual partnership. Should it not also grant them to bachelor brothers committed to sharing a home? The brothers' bond would differ in many ways of deeply personal significance, of course. But tax breaks and inheritance rights would make just as much sense for them if they, too, would share household burdens, and that common stock of memories and sympathies that makes each the other's best proxy in emergencies and beneficiary in death.

Indeed, if the State's goal is to provide same-sex romantic unions with ready access to these benefits, an expansive (i.e., marriage-neutral) scheme would be more effective. It would be available even to same-sex partners who did not want to liken their unions to heterosexual bonds in marriage—an assimilation that makes some same-sex partners see gay civil marriage as a "mixed blessing," if a blessing at all. Katherine M. Franke, *Marriage is a Mixed Blessing*, N.Y. TIMES, June 23, 2011, http://www.nytimes.com/2011/06/24/opinion/24franke.html?_r=0.

A policy that offered legal benefits to any adults—romantic partners, widowed sisters, cohabiting celibate monks—would involve no rival definition of marriage, or the possible harms of such redefinition. So it would square the needs of diverse households with the social purposes served by Florida's marriage laws.

B. Floridians can define and have defined marriage as a conjugal union without denigrating people in same-sex relationships.

Not only can the State meet same-sex partners' and others' material needs without redefining marriage; it has done so without denigrating them or harming their social status or that of their children.

We are each related to people in countless ways that have no legal status, and no one thinks this an offense to social dignity.

Non-recognition as a marriage is only a stigma if it is assumed that marriage is about ratifying loving adult bonds just as such. If, by contrast, there are different social purposes that traditional marriage laws serve better than a redefined marriage policy would, then it is no more unjust not to recognize same-sex bonds than to exclude, say, romantic triads (or, to use the word now in vogue, "throuples").

There is no denying the long and tragic history of cruelty toward men and women who experience same-sex romantic attraction or identify as LGBT. Such persons have known ridicule, discrimination, even violence. But there is no clear evidence that people motivated by hatred would be moved by changes in marriage

policy. In fact, for *this* purpose, the law makes a blunt instrument: revamping it has the unintended harms reviewed above; and doing so precisely to mark out who is normal might, again, further marginalize those who, for whatever reason, remain unmarried—or who grow up in households led by unmarried parents.

C. This case is not about people's liberty to conduct their romantic lives free of interference—a liberty that Florida's definition of marriage respects entirely. People remain free to seek the joys of companionship, romantic and otherwise.

Many people find deep fulfillment in the companionship of marriage, but Florida's marriage laws *deny its companionate ideals to no one*. They do not discourage them. They leave more, not less, social space for pursuing many of these ideals outside the context of marriage. And even if companionate bonds would be impaired without some public status, it does not follow that they require *legal* status, much less the legal status of marriage.

First, under rights found in *Lawrence*, however the marriage debate is resolved, two men or two women will be free to live together, with or without a sexual relationship or a wedding ceremony. Meanwhile, prison will still await bigamists. The same-sex civil marriage debate is not about anyone's private behavior, but about legal recognition. The decision to honor conjugal marriage *bans nothing*.

But neither does it *discourage* companionship, by any means whatsoever. Indeed, insofar as traditional marriage laws give marriage a definite shape, as

inherently oriented to conjugal union and its fulfillment in rearing a family, it leaves more social permission for finding emotional union in other bonds than a law and culture simply equating companionship with marriage would.

Nor must traditional marriage laws impair certain forms of companionship by robbing them of public status: At stake in this debate is not an effort to discourage or keep same-sex relationships hidden, but to uphold specific norms for linking men and women to each other and their children. Publicity, which may well matter for many forms of adult affection and commitment, does not require *legal* status; even among bonds that all agree are morally worthy, the state must keep clear distinctions where blurring them would harm the common good. And the common good is served when the State reinforces the norms of permanence and exclusivity that society is uniquely entitled to demand of partnerships that might produce children and can give them the knowledge of their own mother and father, as the moral claim described above compels.

Nor, finally, can there be a constitutional requirement for the State to *encourage* by its policies the companionship some would seek in same-sex partnerships, for the simple reason that there would then be, again, no limiting principle. Among all the forms companionship can take, which should Florida law single out, and why? Legal recognition makes sense only where *regulation* does: these are inseparable. The law, which deals in generalities, can regulate only

relationships with a definite structure. Such regulation is justified only where more than private interests are at stake, and where it would not obscure distinctions between bonds that the common good relies on. The only romantic bond that meets these criteria—and the only bond that implicates the child's moral claim to be raised by her own mother and father wherever possible—is the conjugal relationship that alone can link children to the man and woman whose union gave them life, the relationship historically known as marriage.

IV. Florida has the authority and a moral claim to be able to determine (a) which social purposes to serve by its marriage law, (b) how best to meet the needs of unrecognized relationships and the children reared within them, whatever its marriage policy, and (c) how to balance diverse dignitary claims.

As explained above, Florida can reasonably be concerned that legally redefining marriage as plaintiffs propose would erode the social expectations promoted by the legal recognition of marriage as the union of a husband and wife, particularly the expectation that each child will be reared wherever possible by his or her own mother and father.

There is, of course, good faith disagreement about the validity of this concern. Some who question it will assume a different set of proper purposes of marriage law, and argue on that assumption that Florida's marriage laws serve only to stigmatize the close emotional bonds it fails to recognize.

There are also disputes about whether the public goods served by the historic definition of marriage (including dignitary goods for parents and children spared the stigma of divorce by the stabilizing norms of the historic conception of marriage) are worth what some will see (despite the arguments above) as tradeoffs for the practical or social interests of people in same-sex, and perhaps also multiple-partner and other non-traditional consensual bonds. Controversial, too, will be whether it is more efficient, expansive, and effective to meet concrete needs wherever they arise, apart from marriage law.

But such questions require balancing the pro's and con's of various policy proposals. So they are quintessential policy judgments, not matters of constitutional law.

Just last term, the Supreme Court wrote forcefully of the importance of allowing citizens of the States to set policy even when the questions addressed involve matters of great controversy. The Court upheld a Michigan constitutional amendment enacted, like Florida's marriage amendment, "[a]fter a statewide debate." *Schuette v. BAMN*, 572 U.S. __ (2014), slip op at 2. Writing for the plurality, Justice Kennedy made clear that federal courts "may not disempower the voters from choosing which path to follow" when "enacting policies as an exercise of democratic self-government." *Id.* at 13. The plurality characterized the voters' action as "exercis[ing] their privilege to enact laws as a basic exercise of

their democratic power." *Id.* at 15. Justice Kennedy's words fit well Florida's marriage laws: "freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id.* at 15-16. This is true even though the issue "raises difficult and delicate issues" and embraces "a difficult subject." *Id.*

Justice Kennedy rejected the idea "that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate." *Id.* at 16. To accept this idea would have been "an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common . . . the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* He concluded: "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 17.

In his concurrence, Justice Breyer explains "the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits" of race-conscious programs. *Id.* at 3 (Breyer, J, concurring). This passage too is instructive in this case, where the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of preserving marriage as the union of a

husband and wife or redefining it to include same-sex couples. Citizens of a republic have a moral claim to be allowed to make their own decisions on such matters through the political process.

Clearly, state decisions reflecting the views of citizens about a matter as fundamental as the definition of marriage—the foundation of the family and all society—are entitled to deference and respect. The people of the States must be left free to reconcile moral claims and interests rather than be made to accept the federal courts' settlement of such delicate considerations.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court reverse the District Court's decision.

Dated: November 21, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(C)

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 5,513 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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