

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 AMICUS CURIAE BRIEF OF
ALLIANCE DEFENDING FREEDOM IN SUPPORT OF DEFENDANTS-
APPELLANTS AND REVERSAL**

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IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

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

1. Alliance Defending Freedom is a nonprofit legal organization committed to preserving marriage as an institution inherently linked to procreation and childrearing—an institution that connects children to both of their biological parents, for the good of children and society as a whole. Because redefining marriage to include same-sex couples severs marriage from its intrinsic link to childbearing and childrearing and undermines the long-established ideal that each child deserves to be raised by her biological mother and biological father in a stable family unit, Alliance Defending Freedom has consistently defended against legal challenges claiming that sovereign States or nations must redefine marriage. This includes, for example, serving as counsel for party-defendants in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014). Given this organizational commitment, Alliance Defending Freedom has a significant interest in defending against the constitutional claims that Plaintiffs assert in this case. And

Alliance Defending Freedom’s significant experience litigating these cases will aid the Court’s evaluation of the relevant constitutional and social-policy considerations.

2. 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.

3. Alliance Defending Freedom’s brief, in particular, discusses society’s compelling interest in connecting children to both their biological mother and their

biological father. The brief explains not only why that interest is important, but also how the challenged man-woman-marriage laws directly further it. The Court will thus benefit from an in-depth discussion of this important issue, which is directly relevant to whether the challenged marriage laws are rationally related to a legitimate government interest.

4. All Defendants-Appellants have consented to the filing of Alliance Defending Freedom's amicus brief. But counsel for Plaintiffs-Appellees in the *Brenner* case refused to consent, which has necessitated the filing of this motion.

5. Under Federal Rule of Appellate Procedure 29(b), Alliance Defending Freedom has filed the proposed amicus brief along with this motion.

6. Alliance Defending Freedom respectfully requests that the Court grant this motion.

Dated: November 21, 2014.

Respectfully submitted,

/s/ Byron J. Babione

Byron J. Babione

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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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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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IDENTITY AND INTEREST OF AMICUS CURIAE¹

Amicus Curiae Alliance Defending Freedom is a nonprofit legal organization committed to preserving marriage as an institution inherently linked to procreation and childrearing—an institution that connects children to both of their biological parents, for the good of children and society as a whole. Because redefining marriage to include same-sex couples severs marriage from its intrinsic link to childbearing and childrearing and undermines the long-established ideal that each child deserves to be raised by her biological mother and biological father in a stable family unit, Amicus has consistently defended against legal challenges claiming that sovereign States or nations must redefine marriage. This includes, for example, serving as counsel for party-defendants in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014). Given this organizational commitment, Amicus has a significant interest in defending against the constitutional claims that Plaintiffs assert here.

¹ This brief is accompanied by a motion for leave to file. *See* Fed. R. App. P. 29(a)-(b). No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than Amicus, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUE

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

SUMMARY OF ARGUMENT²

A universal and indispensable facet of the human experience is the search for an identity—making sense of life and one’s place in the world. This critical task, which intensifies (though does not entirely occur) during adolescence and young adulthood, is challenging for everyone, no matter their race, creed, or socioeconomic status. But it becomes all the more difficult when children are reared apart from one or both of their biological parents or, worse yet, when children are deprived of any relationship with, or information about, the two people who are responsible for their very existence. A biological mother and a biological father are the only people who innately show children deeply ingrained aspects of themselves, like their genetically predisposed temperament, manner, and peculiarities. Thus, trying to develop an identity and sense of self without these crucial pieces is like attempting to discern one’s physical appearance without looking in a mirror.

² This brief discusses in detail the importance of the social norm that the Brief of Amici Curiae Scholars of the Institution of Marriage describes as the right of every child to be reared by, and to bond with, her biological mother and biological father.

Because of these roadblocks to identity development, many individuals separated from either their mother or their father suffer significant harm. For instance, their inherent, unrelenting desire to search for their biological parents creates angst within these individuals and tension within their families. In addition, they often suffer from a psychological condition known as genealogical bewilderment—confusion and uncertainty about their origins—that fundamentally undermines their security and negatively affects their sense of self, belonging, and identity. They also regularly experience deeply rooted frustration, depression, anxiety, and sadness that result from the inability to know or establish a relationship with their biological parents. And their physical health is often compromised because they typically do not know, and lack access to, their biological parents' medical history.

In light of this, the State best serves children when it adopts laws and policies that promote the biological home. Man-woman-marriage laws do just that. The preeminent social purpose of marriage—and the overriding reason why the government recognizes marriage—is to connect children to both of their biological parents. By joining a man and a woman in a committed relationship, society forges a link between sex, procreation, and childrearing. And by socially connecting these three closely related activities, marriage encourages a man and a woman in a

sexual relationship to remain together and jointly care for the children they produce.

The man-woman-marriage laws challenged here satisfy constitutional review because they substantially further the State's compelling interest in connecting children to both of their biological parents. They advance that interest in a number of ways. *First*, redefining marriage to include same-sex couples communicates that the State no longer prefers children to be raised by both of their biological parents; expressing that message over time will likely lead to fewer man-woman couples jointly committing to the task of raising their biological children in a stable family unit; and that will result in more children being raised without one or both of their biological parents. *See, e.g.*, Amicus Br. of Ryan Anderson at 20-27, *Brenner v. Armstrong*, No. 14-14061 (11th Cir. Nov. 21, 2014); Amicus Br. of Scholars of the Institution of Marriage at 4-25, *Brenner v. Armstrong*, No. 14-14061 (11th Cir. Nov. 21, 2014). *Second*, redefining marriage will result in more same-sex couples raising children, and those children will be separated from one or both of their biological parents. *Third*, the redefinition of marriage will likely result in more bisexuals choosing to raise children with a same-sex partner (and thus apart from one or both biological parents) rather than creating and raising their own biological children together with the children's other biological parent. Because, for these (and other) reasons, man-woman-marriage laws directly further the State's

compelling interest in providing for the next generation's inherent need to know and be raised by their own mother and father, this Court should not condemn those laws as constitutionally infirm.

ARGUMENT

I. Children Benefit from Knowing and Being Cared for by Both of Their Biological Parents.

A. Connecting Children to Their Biological Parents Is Vital to Their Development and Identity Formation.

All individuals, the Supreme Court has observed, have a profound interest in “defin[ing] [their] own concept of existence, of meaning, . . . and of the mystery of human life.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). But encouraging family arrangements where children are raised apart from one or both of their biological parents frustrates their ability to know themselves and form their identities.

“In Western culture, it is presumed that children will have a better sense of their identity and higher self-esteem if they know their genetic roots.” *Pratten v. British Columbia*, 2011 BCSC 656, para. 95 (Can.) (testimony of Dr. Diane Ehrensaft); *see also* Michael Hanby, *The Brave New World of Same-Sex Marriage*, *The Federalist*, Feb. 19, 2014, <http://thefederalist.com/2014/02/19/the-brave-new-world-of-same-sex-marriage/> (noting that “having a lineage is deeply constitutive of [a person’s] humanity [and] his personal identity”). And “[i]t is now generally

accepted” in the social-science literature “that knowledge about their origins helps . . . children to develop a secure sense of identity.” Susan Golombok, *Parenting: What really counts?* 25 (2000).

“An individual’s identity is never formed in isolation. It is in part dependent on a mirroring back from one’s [own parents].” *Pratten*, 2011 BCSC 656, at para. 96 (testimony of Dr. Diane Ehrensaft). “In coming to know and define themselves, most people rely on their acquaintance with . . . their biological relatives.” J. David Velleman, *Family History*, 34 *Philosophical Papers* 357, 365 (Nov. 2005). Biological parents “are the closest thing to a mirror that [children] can find,” *id.* at 368; they show children aspects of themselves “that are deeply ingrained and resistant to change,” *id.* at 366, such as their “personal manner,” “styles of thinking and feeling,” and “temperament,” *id.* at 365. Acquiring this sort of intricate self-knowledge from one’s parents requires more than merely learning information; a child must develop an ongoing relationship with the two people who together brought about her very existence.

“[T]o develop a secure identity, young people need to build a coherent story of their lives.” Golombok, *supra*, at 28. But children separated from either their mother or their father face great obstacles when constructing their “life-story.” Velleman, *supra*, at 375; *see, e.g.*, Adele Jones, *Issues Relevant to Therapy with Adoptees*, 34 *Psychotherapy: Theory, Research, Practice, Training* 64, 66 (1997)

(stating that “an adoptee’s struggle to achieve a coherent story is often a daunting task” that is crucial to the “development of an identity” and “self-esteem”). They, after all, must cobble together a narrative that lacks core components about themselves. As one person separated from her biological father tellingly revealed: “I think of myself as a puzzle; [but] the only picture I have ever known is half-complete.” Elizabeth Marquardt et al., *My Daddy’s Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* 21 (Institute for American Values 2010) (quotation marks omitted). In contrast, children reared in intact biological homes benefit from access to all these pieces when building their life story.

The innate desire of children to search for their biological parents illustrates the significance of those relationships to their identity development. “When a parent of an adolescent cannot provide a ‘genetic’ mirror because that parent has no biological link to the child, the son or daughter will have to look elsewhere for the reflections.” *Pratten*, 2011 BCSC 656, at para. 96 (testimony of Dr. Diane Ehrensaft). “[T]his searching” for the child’s biological parent “is provoked by a void in the process of identity formation, which is a key part of psychological development and the establishment of psychological integrity.” *Id.* at para. 95 (testimony of Dr. Diane Ehrensaft); *see also* Jones, *supra*, at 66 (“The need to piece together information is compelling . . . , and the search upon which many

adoptees embark[is] a quest to fulfill this psychological void in the search for an identity.”).

“[A]bout 50% of all adopted persons will, at some point in their life, search for their birth parents.” Ulrich Müller & Barbara Perry, *Adopted Persons’ Search for and Contact with Their Birth Parents I: Who Searches and Why?*, 4 *Adoption Quarterly* 5, 12 (2001).³ “Many adoptees . . . go to heroic lengths to find their biological families, impelled by what they describe as a deep and unrelenting need.” Velleman, *supra*, at 359. “Adopted adolescents,” in particular, “often become extremely interested in their origins, seeking out information about, and . . . contact with, their biological parents.” Golombok, *supra*, at 28.

Like adopted children, children conceived through sperm donation “typically express a desire to search for some actual information about their [biological father] . . . to establish their unfolding adult identities.” *Pratten*, 2011 BCSC 656, at para. 95 (testimony of Dr. Diane Ehrensaft); *see also* Marquardt, *supra*, at 7 (revealing that seventy percent of the donor-conceived children surveyed “wonder[ed] what [their biological father’s] family is like”). Their “search for an identity” often “generate[s] a strong desire to seek out [their biological fathers],”

³ In acknowledging some of the challenges facing adopted children, Amicus does not cast aspersions on the role of adoption in our society. Adoption is an indispensable pro-child social good through which the State provides a home for children when the ideal—being raised by their biological mother and biological father—is unavailable because of unfortunate circumstances such as death, incapacity, abuse, or neglect.

“lay claim to [their] own heritage and future,” and “gather information about themselves and their roots.” *Pratten*, 2011 BCSC 656, at para. 95 (testimony of Dr. Diane Ehrensaft). When interviewed by the media, one donor-conceived person somewhat begrudgingly admitted that his absent biological father “is a part of [him],” and that without knowing his father, he “will never feel completely whole.” Natasha Pearlman, *I Feel So Betrayed Because I Don’t Know Who My Father Is*, Daily Mail, Feb. 8, 2007. Similarly, Lindsay Greenawalt spent years wondering about her father, asking herself: “Who is he? Do I look like him? Does he like the same stuff I do?” Judith Graham, *Sperm Donors’ Offspring Reach Out Into Past*, Chicago Tribune, June 19, 2005, available at http://articles.chicagotribune.com/2005-06-19/news/0506190276_1_sperm-donor-sperm-bank-dna-sample. These questions, and many more like them, abound among donor-conceived children.

Contrary to the assumptions of some, a great relationship with custodial parents generally does not remove a person’s need to seek out her origins. See Marian K. Affleck & Lyndall G. Steed, *Expectations and Experiences of Participants in Ongoing Adoption Reunion Relationships: A Qualitative Study*, 71 *Am. J. of Orthopsychiatry* 38, 38 (Jan. 2001) (noting that “the vast majority of adoptees who search have positive relationships with adoptive parents,” and that “the quality of adoptive relationships (either positive or negative) is not associated with a decision to search”). For example, even though Eve Andrews has a close

relationship with her stepfather, she acknowledges so many “unanswered questions in [her] life” and wants “to know the other half of [her]”—“the person who is responsible for [her] being here.” Graham, *supra*.

Consider also the story of Amy, one of the many children placed into a loving family by the American Adoptions agency. Although Amy was adopted when only three months old, she has always wondered about and desired to find her biological parents. In her words: “I have a very loving family, but always longed to have the questions answered as to who my biological parents were and who I looked like. Was there medical history that I need to know? Did they think of me as often as I thought of them?” American Adoptions, *Amy’s Adoption & Reunion Story*, http://www.americanadoptions.com/adopted/article_view/article_id/4112?cId=139 (last visited Nov. 21, 2014). Finding her biological parents after a four-year-long search was therapeutic for Amy. As she explains: “It has been a very healing thing just to be able to ask them things that I wonder about from time to time.” *Id.*

Like Amy, Alexander Dorf was adopted as an infant, but always wanted to find the woman who brought him into the world. So as a teenager, he “searched the Internet for [his birth mother] . . . with no luck.” Lisa Belkin, *I Found My Mom Through Facebook*, N.Y. Times, June 24, 2011, available at <http://www.nytimes.com/2011/06/26/fashion/i-found-my-birth-mother-through->

facebook.html?pagewanted=all. Although his search proved unsuccessful, one day he unexpectedly received a Facebook message that changed his life forever. He immediately recognized the name of the sender. “It belonged to the woman who had given birth to him.” *Id.* Alexander now communicates regularly with her and has developed relationships with the brothers he never knew he had. *Id.*

These stories, and the countless others like them, tangibly illustrate “the power of a biological connection These kids [are] going to find their [biological parents] [I]t’s going to happen because there’s a fundamental drive to do it.” Graham, *supra*.⁴

B. Depriving Children of Their Biological Parents Harms Their Development, Identity Formation, and Well-Being.

Many children and adults experience far-reaching “psychosocial consequences . . . from not knowing . . . one of [their] genetic parents.” Pratten, 2011 BCSC 656, at para. 109 (testimony of Professor Ken Daniels); *see also*

⁴ Even same-sex couples and single parents demonstrate the importance of biological ties between parents and children when they choose sperm donation and surrogacy instead of adopting an unrelated child in need. *See* Meredith Rodriguez, *Lawsuit: Wrong Sperm Delivered to Lesbian Couple*, Chicago Tribune, Oct. 1, 2014, available at <http://www.chicagotribune.com/news/local/breaking/ct-sperm-donor-lawsuit-met-20140930-story.html> (discussing a lawsuit filed by a Caucasian same-sex couple against a sperm bank that erroneously provided them with the sperm of an African-American man). For those prospective parents, “creating a new child designed to suffer . . . alienation” from one biological parent “is often preferred to adoption precisely because of the parents’ interest in biological ties—a[n] interest that they choose to further slightly in their own case by creating a person for whom the same interest will be profoundly frustrated.” Velleman, *supra*, at 374.

Marquardt, *supra*, at 7 (finding that children conceived through sperm donation, and thus raised without their biological father, often “experience profound struggles with their origins and identities”). These enduring consequences, as explained below, range from psychological harm to compromised physical health.

Of initial note, the unyielding need to search for one’s biological heritage causes angst within the person and tension within their family. One study found that over half of the donor-conceived children surveyed have “worried that if [they] try to get more information about or have a relationship with [their biological father], [their] mother and/or the father who raised [them] would feel angry or hurt.” Marquardt, *supra*, at 7. As one “17-year-old daughter of a lesbian couple” explained:

I don’t know my father, his name, heritage, or anything. I can only remember one time the topic of my father really came up in conversation. I was eight years old and I denied any interest in knowing about him. I was worried that my parents would think that I am ungrateful for all that they have done for me

Id. at 25 (quoting a story posted on <http://familieslikemine.com/>). Adoptee Tony Gambino relates a similar story:

I felt I couldn’t ask my [adopted] father [about my biological parents], so, timidly, one afternoon, I approached my [adopted] mother in the kitchen. Her startled, anguished look told me I had veered into a completely forbidden area. I slunk away, feeling that I had done something very wrong. I never asked her about it again.

Tony Gambino, *My Philomena*, Slate, Feb. 24, 2014, available at http://www.slate.com/articles/double_x/doublex/2014/02/a_philomena_story_of_a_man_who_searches_for_his_adoptive_mother_and_learns.html. These kids thus find themselves in a difficult dilemma, yearning to know their biological parents but torn by the prospect of upsetting the parents who raised them. This tension injects anguish and trepidation in the lives of many children who are separated from their biological mother or biological father.

Moreover, children left in the dark about their genetic origins “may suffer from the psychological phenomenon referred to as genealogical bewilderment, confusion about from whence they come, along with accompanying psychological dysphoria as a result of grappling with the ‘missing piece’ of themselves.” Pratten, 2011 BCSC 656, at para. 95 (testimony of Dr. Diane Ehrensaft); *see also* Rachel Levy-Shiff, *Psychological Adjustment of Adoptees in Adulthood: Family Environment and Adoption-Related Correlates*, 25 Int’l J. of Behavioral Dev. 97, 98 (Mar. 2001) (“Those who lack this information [about their genetic origins] may continue to experience ‘genealogical bewilderment’ and a sense of incompleteness”); H. J. Sants, *Genealogical bewilderment in children with substitute parents*, 37 Brit. J. Med. Psychol. 133, 133 (1964) (“Genealogically bewildered children may be found in any family where one or both of the natural parents is missing.”). “A genealogically bewildered child is one who either has no

knowledge of his natural parents or only uncertain knowledge about them.” Sants, *supra*, at 133. “The resulting . . . confusion and uncertainty . . . fundamentally undermines [the child’s] security,” *id.*, and “negatively affect[s] [her] sense of self, belonging and identity,” *Pratten*, 2011 BCSC 656, at para. 94 (testimony of Dr. Diane Ehrensaft); *see also* Levy-Shiff, *supra*, at 98 (noting that this “sense of incompleteness . . . fundamentally undermines [a child’s] sense of security”); *id.* at 102 (noting that “the lack of information about one’s biological background is likely to create a ‘hereditary ghost’ which may contribute to a confused, unstable, and distorted sense of self”).⁵

Deep-seated frustration often accompanies the inability to know or establish a relationship with one’s biological parents. Indeed, it is profoundly “frustrating” for individuals “to know that [they] will never meet” parents “who could instantly show [them] a living rendition of deeply ingrained aspects of [themselves].” Velleman, *supra*, at 369. In addition, “sadness, frustration, depression and anxiety” often result when individuals “are unable to obtain information” about their biological origins. *Pratten*, 2011 BCSC 656, at para. 111 (adopting this as a finding of fact). For example, Shelley Deacon (a woman conceived through sperm

⁵ Perhaps more troublingly, the “identity dysphoria” associated with genealogical bewilderment “can also be accompanied by a depressive fantasy . . . that ‘somebody gave me up.’ . . . [T]hese fantasies of rejection . . . stand to remain frozen and immutable in the offspring’s psyche.” *Pratten*, 2011 BCSC 656, at para. 96 (testimony of Dr. Diane Ehrensaft).

donation) has experienced “great frustration, anger, depression, anxiety and sadness” as a result of not knowing about her “biological origins.” *Id.* at para. 50; *see also id.* at para. 45. Similarly, Lindsay Greenawalt (who also was conceived through sperm donation) explains how she endures a constant sense of frustration: “I feel my right to know who I am and where I come from has been taken away.” Graham, *supra*. And for many of these individuals deprived of one or both of their biological parents, it is too often the case that this “wound remains open” because “there is no possibility of closure.” Pratten, 2011 BCSC 656, at para. 109 (testimony of Professor Ken Daniels).

People are also exposed to potentially life-threatening harm when they do not know their biological parents’ medical history. “The importance of knowing [one’s] medical family history is well recognized. . . . [F]amily history is a key component of every medical genetics clinical assessment and is performed in every patient encounter.” Pratten, 2011 BCSC 656, at para. 84 (testimony of Dr. Julie Lauzon) (emphasis omitted); *see also* American Medical Association, *Family Medical History in Disease Prevention* 1 (2004), available at https://download.ama-assn.org/resources/doc/genetics/x-pub/family_history02.pdf (“An accurate family history is a well-established method to recognize genetic disorders and susceptibilities that may pose risks for future health problems.”). “[A]n individual’s genetic make-up plays a significant role in their health by

influencing everything from their risk of congenital anomalies to their chance of developing a common disorder such as cardiovascular disease, asthma, and obesity.” *Pratten*, 2011 BCSC 656, at para. 83 (testimony of Dr. Julie Lauzon). But “no genetic test developed to date can determine and accurately quantify risk for all diseases. Therefore, a ‘good old-fashioned’ family history remains the best way to screen for genetically linked health problems.” *Id.*

Yet children who do not know one or both of their biological parents lack access to this vital information and thus are exposed to increased health risks. *See American Medical Association, supra*, at 1 (explaining that knowing the medical history of one’s biological family is important, and that “[e]arly identification of families with increased risk for chronic diseases such as heart disease, diabetes, and certain cancers can often improve, delay, or even prevent adverse health outcomes to individual members”). Consider, for example, the story of Alison Davenport. Because she was conceived through sperm donation and did not know her biological father, she endured great difficulty finding a close match for a bone-marrow transplant to treat her lymphoma. *Pratten*, 2011 BCSC 656, at para. 51. Thankfully, she was finally able to obtain the treatment she needed, but the experience would not have been as traumatic had she known about her father and his medical background.

Sadly, these harms—particularly the health-related concerns that result from the absence of information about family medical history—are not confined to the children separated from their biological parents. Breaking the genetic link perpetuates these harms by inflicting them on future generations. That is why Shelley Deacon, one of the donor-conceived individuals discussed above, “would like her son to be able to know his heritage.” *Id.* at para. 47. She worries about the risks that not having this information will inflict on his health. *Id.* at para. 50. Not unique to Shelley, this concern is widespread—indeed, it is shared by many others who will never know their genetic origins. *Id.*

C. Children Benefit from the Childrearing Advantages Available to Biological Parents.

Natural parents have access to childrearing advantages that non-biological parents lack. Most notably, biological parents possess experiential knowledge about their children’s innate characteristics, tendencies, and temperaments—features that originated with and are reflected in the parents. *See* James E. Deal et al., *Temperament Factors as Longitudinal Predictors of Young Adult Personality*, 51 *Merrill-Palmer Quarterly* 315, 315 (2005) (“[T]here is a general consensus that temperament forms the enduring, biologically based foundation of personality”). That knowledge aids parents in the complex task of childrearing, for each child “has an inborn nature that joins together the natures of two adults,” and that child’s

biological parents are best positioned to show the child “how to recognize and reconcile . . . the qualities within [her]self.” Velleman, *supra*, at 370-71.

In contrast, non-biological custodial parents are left “in the dark” about these matters, “in ways that adversely affect their parenting.” *Id.* at 370. As one scholar analyzing these issues observed: “[R]aising my children without knowing their mother—that would have been like raising them with one eye closed. It’s . . . my understanding of her and me in relation to one another” that “has helped me to understand them” “since each child is a blend of qualities that were first blended in our relationship.” *Id.*

Amy from American Adoptions, an adoptee whose story was recounted above, explains some of these challenges faced by non-biological parents. “Some things I did as a child,” she recalls, “bugged my parents because they didn’t understand.” American Adoptions, *supra*. After eventually meeting her biological parents and finding out “where some of [her] personality quirks came from,” she and her adopted parents began to understand her idiosyncrasies. *Id.* Yet this later-acquired knowledge, while immensely beneficial to Amy and her family going forward, does not undo the hardships endured during her upbringing because her adopted parents did not have an innate understanding of Amy’s temperament and quirks. Biological parents and their children thus benefit from those parents’ unique knowledge about their children’s intrinsic characteristics.

D. Children Generally Thrive When Raised by Both of Their Biological Parents in an Intact Married Family.

In light of the substantial challenges faced by children raised apart from one or both biological parents and the childrearing advantages available to biological parents, it is not surprising that of all the various childrearing environments, children generally develop best in a home headed by their married biological mother and biological father. *See, e.g.*, W. Bradford Wilcox et al., eds., *Why Marriage Matters* 11 (3d ed. 2011) (hereafter “Wilcox, *Marriage Matters III*”) (“The intact, biological, married family remains the gold standard for family life in the United States, insofar as children are most likely to thrive—economically, socially, and psychologically—in this family form.”); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 *The Future of Children* 75, 75 (2005) (showing that “children in households with both biological parents . . . are less likely to experience a wide range of cognitive, emotional, and social problems, not only during childhood but also in adulthood,” than are “children in households with only one biological parent”); Kristin Anderson Moore et al., *Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We do About It?*, *Child Trends Research Brief* 6 (June 2002) (“[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-

conflict marriage.”); *id.* at 1-2 (“[I]t is not simply the presence of two parents . . . , but the presence of *two biological parents* that seems to support children’s development.”).

Indeed, the most rigorous and reliable studies substantiate the conclusion that children are most likely to achieve favorable outcomes on a number of indicators when they are reared by both of their biological parents in stable family units. *See, e.g.,* Mathew D. Bramlett et al., *Adverse Family Experiences Among Children in Nonparental Care, 2011-2012*, National Health Statistics Report No. 74, Center for Disease Control and Prevention, May 7, 2014, at 3, *available at* <http://www.cdc.gov/nchs/data/nhsr/nhsr074.pdf> (“Children living with one biological parent were between 3 and 8 times as likely as children living with two biological parents to have experienced . . . caregiver violence[] or caregiver incarceration or to have lived with a caregiver with mental illness or an alcohol or drug problem.”); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 *J. Marriage & Fam.* 876, 890 (2003) (“Adolescents in married, two-biological-parent families generally fare better than children in any of the family types examined here, including single-mother, cohabiting stepfather, and married stepfather families. The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents. Our findings are consistent with previous work”); Sara

McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 1 (1994) (“Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parents’ race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries.”).

Further confirming the primacy of the biological home for children’s well-being is the body of social science demonstrating that, on average, children raised in stepfamilies do not fare as well as children raised in married biological families. *See, e.g.*, Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 10-11 (2008) (noting that boys raised in stepfamilies are much more likely to display antisocial behavior than boys raised in intact biological families); W. Bradford Wilcox et al., eds., *Why Marriage Matters* 7, 14 (2d ed. 2005) (hereafter “Wilcox, *Marriage Matters II*”) (noting that girls raised in stepfamilies are much more likely to experience premature sexual development often leading to teenage pregnancy than girls raised in intact biological families); Amato, *supra*, at 80 (“[T]he marriage of a single parent (to someone other than the child’s biological parent) does not appear to improve the functioning of most children.”); Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 *Journal of Research on Adolescence* 369, 390 (2004) (“We expected that in a

father-absent household, remarriage of the custodial parent might help a child by providing household income and adult supervision or a role model of the opposite sex, but youths in stepparent households faced incarceration odds almost 3 times as high as those in [biological] mother-father families, and significantly higher than those in single-parent households, even though stepfamilies were relatively well off on average.”); James Q. Wilson, *The Marriage Problem* 169-70 (2002) (discussing studies showing the disparities between children raised by stepfathers and children raised by their biological fathers); David Popenoe, *Life Without Father* 150 (1996) (noting that it surely “make[s] a difference” in childrearing whether “the father is biologically related to the child”).

Even some of the studies touted by proponents of same-sex marriage acknowledge that, in general, intact biological homes produce better outcomes for children. *See, e.g.*, Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 *Demography* 755, 755 (Aug. 2010) (“Studies of family structure and children’s outcomes nearly universally find at least a modest advantage for children raised by their married biological parents.”); Daniel Potter, *Same-Sex Parent Families and Children’s Academic Achievement*, 74 *Journal of Marriage and Family* 556, 557-58 (June 2012) (“Children from traditional families, typically described as households with two married biological parents, tend to do better than their peers from nontraditional families (e.g., children living with

divorced parents, a single parent, or stepparents) on several indicators of academic achievement”). This widespread support for childrearing in the biological home reinforces the law’s longstanding recognition of the need to unite children to both their mother and their father. This legal preference for biological parents is discussed in the next section.

II. The Law Recognizes the Importance of Connecting Children to Both of Their Biological Parents.

Biological “parents” are those “whom our society and [the Supreme] Court’s jurisprudence have always presumed to be the preferred and primary custodians of their minor children.” *Reno v. Flores*, 507 U.S. 292, 310 (1993). This preference for promoting intact biological homes is based, in part, on the Supreme Court’s repeated acknowledgement that the “natural bonds of affection” between parents and their biological children “lead parents to act in the best interests of their children.” *Parham v. J.R.*, 442 U.S. 584, 602 (1979); accord *Troxel v. Granville*, 530 U.S. 57, 68 (2000); see also *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2582 (2013) (Sotomayor, J., dissenting) (stating that “the biological bond between a parent and a child is a strong foundation” for “a stable and caring relationship”).⁶ And the law’s preference for stable biological families is further supported by the

⁶ With enduring roots, this legal presumption in favor of biological parents grew out of the common law. See 1 William Blackstone, Commentaries *435 (recognizing the “insuperable degree of affection” for one’s natural children “implant[ed] in the breast of every parent”).

constitutionally protected “liberty interest” in “the natural family” rooted “in intrinsic human rights.” *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977).

Children, in particular, have a legal “interest in knowing their biological parents.” *Adoptive Couple*, 133 S. Ct. at 2582 (Sotomayor, J., dissenting). The United Nations Convention on the Rights of the Child affirms that “[t]he child . . . shall have . . . , as far as possible, the right to know and be cared for by his or her parents.” United Nations Convention on the Rights of the Child, G.A. Res. 44/25, art. 7, § 1 (Nov. 20, 1989), *available at* http://www.ohchr.org/en/professional_interest/pages/crc.aspx. As the Implementation Handbook for the Convention on the Rights of the Child explains, the child’s right to “be cared for” by her parents is independent from, and in addition to, the right to merely “know” her parents. *See* Implementation Handbook for the Convention on the Rights of the Child 108 (3d ed. 2007), *available at* http://www.unicef.org/publications/index_43110.html. And the Convention’s “as far as possible” language provides a “strict[]” standard for any governmental action that threatens to deprive children of their right to know and be cared for by their parents. *See id.* at 107.

The institution of marriage and the laws recognizing it have always played a vital role in protecting this domestically and internationally recognized right to

know and be raised by one's biological parents. This enduring purpose of marriage is discussed below.

III. The State's Preeminent Purpose for Regulating the Social Institution of Marriage Is to Connect Children to Both of Their Biological Parents.

“[T]hroughout human history and across many cultures, marriage has been . . . inextricably linked to procreation and biological kinship.” *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). Indeed, it is widely recognized that “marriage . . . is a publicly acknowledged and supported sexual union that creates kinship obligations . . . between men, women, and the children that their sexual union may produce.” Wilcox, *Marriage Matters III*, at 19-20.

“The genius of the [marital] system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents, . . . the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.” Kingsley Davis, *Introduction: The Meaning and Significance of Marriage in Contemporary Society*, in *Contemporary Marriage: Comparative Perspectives on a Changing Institution* 1, 7-8 (Kingsley Davis ed., 1985); *see also* G. Robina Quale, *A History of Marriage Systems* 2 (1988) (“Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature.”).

It is primarily for this reason—connecting children to both of their biological parents—that the State recognizes and regulates marriage.

IV. Man-Woman-Marriage Laws Substantially Further the State’s Interest in Connecting Children to Both of Their Biological Parents.

The State’s man-woman-marriage laws are directly related to achieving marriage’s enduring purpose of connecting children to both of their biological parents. The challenged laws advance that compelling societal purpose in many ways, three of which are explored herein.⁷

First, as other amici have explained in this case (and as other marriage scholars have explained elsewhere), redefining marriage to include same-sex couples communicates that the State no longer prefers children to be raised by both of their biological parents; expressing that message over time will likely lead to fewer man-woman couples jointly committing to the task of raising their biological

⁷ Under Supreme Court precedent, rational-basis review is satisfied when “the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]” *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Therefore, the challenged man-woman-marriage laws satisfy constitutional review because including man-woman couples in marriage furthers the State’s interest in connecting children to both of their biological parents and the addition of same-sex couples would not. *See, e.g., Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 920 (E.D. La. 2014) (“Louisiana’s [man-woman marriage laws] are directly related to achieving marriage’s historically preeminent purpose of linking children to their biological parents.”); *see also DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990, at *9-11 (6th Cir. Nov. 6, 2014); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006). Nevertheless, if the Court requires an explanation why the redefinition of marriage will undermine society’s compelling interest in connecting children to their biological mother and biological father, Amicus provides that explanation in the paragraphs that follow.

children in a stable family unit; and that will result in more children being raised apart from one or both of their biological parents. *See, e.g.*, Amicus Br. of Ryan Anderson at 20-27; Amicus Br. of Scholars of the Institution of Marriage at 4-25; *see also* Robert P. George et al., *What is Marriage?* 56-62 (2012); Witherspoon Institute, *supra*, at 18-19 (presenting arguments endorsed by more than seventy prominent scholars). In other words, this transformation of the marital institution will contribute to further instability in man-woman relationships, particularly among couples having or raising children, and that will lead to fewer man-woman couples together raising from birth to adulthood the children they create.

Second, redefining marriage will result in more same-sex couples raising children. For myriad reasons (such as the desire for benefits or governmental approval), many same-sex couples have decided that they will not raise children unless the State recognizes their relationships as marriages. As one plaintiff in the federal case challenging California's man-woman-marriage law testified: "[T]he timeline for us has always been marriage first, before family. . . . We need to be married before we have kids." Trial Transcript at 89-90, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW). For this couple and the many others like them, the redefinition of marriage will prompt them to raise children. Yet all children in those households—whether conceived through a parent's prior relationship with a person of the opposite sex, conceived through

sperm donation or surrogacy, or adopted—will necessarily be raised without one or both of their biological parents in their home.

Third, the redefinition of marriage will likely result in more bisexuals (an oft-ignored group in the same-sex-marriage debate) choosing to raise children with a same-sex partner (and thus apart from one or both biological parents) rather than creating and raising their own biological children together with the children's other biological parent. By definition bisexuals—who comprise more than 30% of the LGBT community⁸—are interested in romantic relationships with persons of either sex. The man-woman-marriage institution (and the laws that reinforce it) provides incentives for bisexuals to marry people of the opposite sex and together raise the children that they create with their spouse (i.e., the children's other biological parent). But redefining marriage removes that inducement and thus will likely, over time, result in more bisexuals entering relationships with persons of the same sex and raising children apart from one or both of their biological parents. And that, of course, undermines the State's compelling interest in uniting children to both their mother and their father.

⁸ See Brian W. Ward et al., *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, National Health Statistics Report No. 77, Center for Disease Control and Prevention, July 15, 2014, at 1 (noting that 0.7% of the respondents identified as bisexual and 1.6% identified as gay or lesbian).

For all these reasons, man-woman-marriage laws substantially further the State's interest in connecting children to both of their biological parents. Therefore, those laws easily satisfy the deferential rational-basis standard that applies here.

CONCLUSION

Amicus respectfully requests that this Court reverse the District Court's decision.

Dated: November 21, 2014.

Respectfully submitted,

s/ Byron J. Babione

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 6,730 words.

Dated: November 21, 2014.

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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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