No. 14-5003

In the United States Court of Appeals
for the Tenth Circuit

MARY BISHOP, *et al.*, Plaintiffs-Appellees,

vs.

SALLY HOW SMITH, in her official capacity as County Clerk for Tulsa County, State of Oklahoma, Defendant-Appellant,

and

UNITED STATES OF AMERICA, *ex rel*. ERIC H. HOLDER, JR., in his capacity as Attorney General of the United States of America,

Defendant,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, Intervenor-Defendant.

Appeal from the United States District Court for the Northern District of of Oklahoma, No. 04-CV-848-TCK-TLW (Honorable Terence C. Kern)

BRIEF OF *AMICUS CURIAE*, THE FAMILY RESEARCH COUNCIL, IN SUPPORT OF THE DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that *amicus curiae*, the Family Research Council, is not a corporation that issues stock or has a parent corporation that issues stock.

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[insert date xx]

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Interest of the *Amicus*

The Family Research Council (FRC) was founded in 1983 as an organization dedicated to the promotion of marriage and family and the sanctity of human life in national policy. Through books, pamphlets, media appearances, public events, debates and testimony, FRC's team of policy experts review data and analyze Congressional and executive branch proposals that affect the family. FRC also strives to assure that the unique attributes of the family are recognized and respected through the decisions of courts and regulatory bodies.

FRC champions marriage and family as the foundation of civilization, the seedbed of virtue and the wellspring of society. Believing that God is the author of life, liberty and the family, FRC promotes the Judeo-Christian worldview as the basis for a just, free and stable society. Consistent with its mission statement, FRC is committed to strengthening traditional families in America.

FRC publicly supported the successful effort to adopt State Question No.711 (codified as art. II, § 35, of the Oklahoma Constitution), as well as similar amendments in other States. FRC, therefore, has a particular interest in the outcome of this case. In FRC's judgment, recognition of same-sex marriages–either by state legislators or by the courts–would be detrimental to the institution of marriage, children and society as a whole. And, for the reasons set forth herein, nothing in the Constitution, properly understood, compels such recognition.

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amicus curiae* or its counsel contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

ARTICLE II, § 35, OF THE OKLAHOMA CONSTITUTION, WHICH RESERVES MARRIAGE TO OPPOSITE-SEX COUPLES, IS REASONABLY RELATED TO MULTIPLE, LEGITIMATE STATE INTERESTS.

On November 2, 2004, the people of Oklahoma overwhelmingly approved State Question No. 711 (what the district court refers to as "SQ 711"), which was codified as art. II, § 35, of the Oklahoma Constitution. Section 35 provides:

> "Marriage" Defined – Construction of Law and Constitution – Recognition of Out-of-State Marriages – Penalty
>
> A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
>
> B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.
>
> C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

In a challenge brought by two of the plaintiffs, a same-sex female couple who were denied a marriage license by the defendant county clerk, the district court held that Part A of art. II, § 35, is unconstitutional because it is not reasonably related to any legitimate state interest. Op. & Order 51-67 (Jan. 14, 2014). That holding does not withstand scrutiny and must be reversed.

Where, as here, a law neither infringes upon the exercise of a fundamental constitutional right, nor classifies upon the basis of a suspect or quasi-suspect characteristic, it is subject to the rational basis standard of review. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319-20 (1993). Under this "paradigm of judicial restraint," courts have no "license . . . to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications*, *Inc*., 508 U.S. 307, 313-14 (1993). Rather, the law must be "accorded a strong presumption of validity," and "cannot run afoul of [the Fourteenth Amendment] if there is a rational relationship between [the] disparity of treatment" of same-sex and opposite-sex couples "and some legitimate governmental purpose." *Heller*, 509 U.S. at 320.

Finally, the law "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis" for it, and plaintiffs bear "the burden . . . to negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320 (citation and internal quotation marks omitted). It follows, therefore, that the State "has no obligation to produce evidence to sustain the rationality of" its laws. *Id*. To the contrary, the State's "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC*, 508 U.S. at 315. Moreover,

"those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonable be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Id.* at 112. Indeed, so long as the "assumptions underlying [a law's] rationales" are at least "arguable," that is "sufficient, on rational basis review, to immunize the [legislative] choice from constitutional challenge," even if those assumptions are, in fact, "erroneous." *Heller*, 509 U.S. at 333 (citation and internal quotation marks omitted). In sum, the question before this Court is not whether the legislative facts underlying the explanation for the adoption of art. II, § 35(A), of the Oklahoma Constitution are true or false; it is whether they are "at least debatable." *Id*. at 326 (citation and internal quotation marks omitted). There is no question that they are.

The State has legitimate interests in encouraging responsible procreation, in furthering an environment in which the children so procreated will be raised in a family with both a mother and a father to whom they are biologically related and in preserving the traditional institution of marriage. The district court conceded (or assumed) the legitimacy of the first two interests – Op. & Order 56 ("the Court

accepts that Oklahoma has a legitimate interest in encouraging 'responsible procreation,' (*i.e.*, procreation in marriage), and in steering 'naturally procreative' relationships into marriage, in order to reduce the number of children born out of wedlock and reduce economic burdens on the State"), *id* at 61 ("[t]he Court assumes, for purposes of this motion for summary judgment only, that (1) the 'ideal' environment for children must include opposite-sex, married, biological parents, and that (2) that 'promoting' this ideal is a legitimate state interest") – but denied the legitimacy of the third interest, *id*. at 65 (characterizing that interest as "impermissibly tied to moral disapproval of same-sex couples as a class of Oklahoma citizens"), and determined that reserving marriage to opposite-sex couples was not reasonably related to *any* legitimate state interest. *Id*. at 57-66.[1]

Encouraging Responsible Procreation

The district court, as noted, conceded that the State has a legitimate interest in encouraging procreation to take place within a stable social and familial environment, but determined that the classification set forth in art. II, § 35(A), is both *over*inclusive, because opposite-sex couples who are unable or unwilling to have children *may* marry, and, at the same time, it is *unde*rinclusive, because

[1] The court also held that "promoting morality," an interest not advanced by the defendant-appellant, was not a legitimate state interest. *Id*. at 53-55.

same-sex couples, who may have children through assisted reproduction or adoption, may *not*. Op. & Order 58-61. This critique of the "fit" between "means" and "ends" of art. II, § 35(A), is deeply flawed.

For purposes of rational basis review under the Equal Protection Clause, "[t]he Supreme Court repeatedly has instructed that neither the fact that a classification may be overinclusive or underinclusive nor the fact that a generalization underlying a classification is subject to exceptions renders the classification irrational." *Lofton v. Secretary of Dep't of Children & Family Services*, 358 F.3d 804, 822-23 & n. 20 (11th Cir. 2004), citing *FCC v. Beach Communications*, 508 U.S. at 315-16 (noting that defining legislative classes "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration") (citation omitted), *Vance v. Bradley*, 440 U.S. at 108 ("[e]ven if the classification involved . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required") (citation and internal quotation marks omitted), and *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) ("every line drawn by a legislature leaves some out

that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function"). Accordingly, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. There are entirely plausible reasons for the disparate treatment of opposite-sex and same-sex couples under art. II, § 35(A), of the Oklahoma Constitution. To the extent that the classification in § 35(A) may be imperfect, "that imperfection does not rise to the level of a constitutional infraction." *Lofton*, 358 F.3d at 823.

As an initial matter, the district court simply ignored the incontestable fact that, *as a class*, opposite-sex couples *are* capable of procreation while same-sex couples are *not*. On rational basis review, that in itself provides a plausible basis for upholding the classification set forth in art. II, § 35(A). *See Morrison v. Sadler*, 821 N.E.2d 15, 27 (Ind. Ct. App. 2005) ("[t]here was a rational basis for the legislature to draw the line between opposite-sex couples, who as a generic group are biologically capable of reproducing, and same-sex couples, who are not"). *See also Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (same); *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1112-14 & n. 36 (D. Haw. 2012) (same), *appeals pending*, Nos. 12-16995, 12-16998 (Ninth Circuit); *Conaway v. Deane*, 932 A.2d 571, 630-31 (Md. 2010) (same); *Baker v.*

Nelson, 191 N.W.2d 185, 187 (Minn. 1971) (same), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality) (same); *Andersen v. King County*, 138 P.3d 963, 982-83 (Wash. 2006) (plurality) (same); *Standhardt v. Superior Court*, 77 P.3d 451, 462-63 (Ariz. Ct. App. 2003) (same); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 677 (Tex. App. 2010) (same); *Dean v. District of Columbia*, 653 A.2d 307, 363-64 n. 5 (D.C. App. 1995) (Op. of Steadman, J.) (following *Baker*).

With respect to art II, § 35(A)'s purported *over*inclusiveness, the reasonableness of the relationship between opposite-sex marriage and procreation is not affected by the fact that the State does not inquire into the ability or willingness of opposite-sex couples to procreate or by the fact that persons who are unable or unwilling to have children are allowed to marry.

> First, if the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns. [Citations omitted]. Second, in light of medical advances affecting sterility, the ability to adopt, and the fact that intentionally childless couples may eventually choose to have a child or have an unplanned pregnancy, the State would have a difficult, if not impossible, task in identifying couples who will never bear and/or raise children. Third, because opposite-sex couples have a fundamental right to marry [citation omitted], excluding such couples from marriage could only be justified by a compelling state interest, narrowly tailored to achieve that interest [citation omitted], which is not readily apparent.

Standhardt, 77 P.3d at 462.[2]

Reserving marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children," even though "married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married." *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974). "The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human

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[2] *See also Conaway v. Deane*, 932 A.2d at 633 ("any inquiry into the ability or willingness of a couple actually to bear a child during marriage would violate the fundamental right to marital privacy recognized in *Griswold* [*v. Connecticut*], 381 U.S. [479,] 484-86 [1965]"); *Hernandez v. Robles*, 855 N.E.2d at 11-12 (plurality) ("limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable line-drawing"); *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980) (recognizing that government inquiry about couples' procreation plans or requiring sterility tests before issuing marriage licenses would "raise serious constitutional questions"), *aff'd*, 673 F.2d 1036 (9th Cir. 1981); *Jackson v. Abercrombie*, 884 F.Supp.2d at 1113 ("there would be pragmatic and constitutional problems with the state inquiring whether each couple that applies for a [marriage] license has the ability or desire to have children"); *In re Kandu*, 315 B.R. 123, 147 (Bankr. W.D. Wash. 2004) ("if the government attempted to limit marriage solely to those able or desiring to produce children, the government would be required to make such inquiries of couples prior to marriage" which "would implicate constitutionally-rooted privacy concerns" and "would interfere with the fundamental right o oppose-sex couples to marry") (citations omitted).

race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union." *Id*. "Although . . . married persons are not required to have children or even to engage in sexual relations, marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the union of one man and one woman." *Id*. at 1197.

With respect to § 35(A)'s allged *under*inclusiveness, the reasonableness of the relationship between opposite-sex marriage and procreation is not undermined by the observation that some same-sex couples may have children by means of assisted reproduction or adoption.[3] This observation fails to give due weight to "the key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption and assisted reproduction." *Morrison*, 821 N.E.2d at 24.

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[3] "Human beings are created through the conjugation of one man and one woman. The percentage of human beings conceived through non-traditional methods is minuscule, and adoption, the form of child-rearing in which same-sex couples may typically participate together, is not an alternative means of creating children, but rather a social backstop for when traditional biological families fail. The perpetuation of the human race depends upon traditional procreation between men and women." *Sevcik v. Sandoval*, 2012 WL 5989662 (D. Nev. Nov. 26, 2012), Order 30-31, *appeal pending*, No. 12-17668 (Ninth Circuit).

> Becoming a parent using "artificial" reproduction methods is frequently costly and time-consuming. Adopting children is much the same. Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. "Natural" procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.

Id. (footnote omitted). What is the constitutional significance between "natural" reproduction on the one hand and assisted reproduction and adoption on the other?

> It means that it impacts the State['s] . . . clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the "protections" of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.
>
> By contrast, procreation by "natural" reproduction may occur without any thought for the future. The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from "causal" intercourse. Second, even where an opposite-sex couple enters into a marriage with no intention of having children, "accidents" do happen, or persons often change their minds about wanting to have children. The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the "natural" procreation of children in the first place, but it also encourages them to say together and raise a child or children together if there is a "change in plans."

Id. at 24-25 (footnotes omitted).

The State's interest in supporting opposite-sex marriage is not necessarily "to encourage and promote 'natural' procreation across the board and at the expense of other forms of becoming parents, such as by adoption and assisted reproduction; rather, it encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e., a child, to procreate responsibly." *Morrison*, 821 N.E.2d at 25.[4] In *Morrison*, the State "identified the protection of *unintended* children resulting from heterosexual intercourse as one of the key interests in opposite-sex marriage." *Id*. The court of appeals agreed:

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[4] "When plaintiffs, in defense of genderless marriage, argue that the State imposes no obligation on married couples to procreate, they sorely miss the point. Marriage's vital purpose is not to mandate procreation, but to control or ameliorate its consequences – the so-called 'private welfare' purpose. To maintain otherwise is to ignore procreation's centrality to marriage." *Lewis v. Harris*, 875 A.2d 259, 276 (N.J. App. Div. 2005) (Parrillo, J., concurring), *aff'd as modified*, 908 A.2d 196 (N.J. 2006). *See also Goodridge v. Dep't of Health*, 798 N.E.2d 941, 1002 n. 34 (Mass. 2003) (Cordy, J., dissenting): "Civil marriage is the product of society's critical need to manage procreation as the inevitable consequence of intercourse between members of the opposite sex. Procreation has always been at the root of marriage and the reasons for its existence as a social institution. Its structure, one man and one woman committed for life, reflect's society's judgment as how optimally to manage procreation and the resultant child rearing. The court, in attempting to divorce procreation from marriage, transforms the form of the structure into its purpose. In doing so, it stands history on its head."

> The institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly. The recognition of same-sex marriage would not further this interest in heterosexual "responsible procreation." Therefore, the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable inherent characteristic that distinguishes the two classes: the ability or inability to procreate by "natural" means.

Id. (footnote omitted).[5] In rejecting state and/or federal constitutional challenges to their statutes (or, in the case of Texas, its constitutional provision) reserving marriage to opposite-sex couples, the Maryland Court of Appeals, the New York Court of Appeals, the Washington Supreme Court, the Arizona Court of Appeals, the Texas Court of Appeals and the Washington Court of Appeals have all agreed that "the ability or inability to procreate by 'natural' means" provides a reasonable basis for distinguishing between opposite-sex and same-sex couples, allowing the former to marry, but not the latter.[6] Similarly, both the Eighth Circuit and several

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[5] *See id*. at 26: "Members of a same-sex couple who wish to have a child . . . have . . . demonstrated their commitment to child-rearing by virtue of the difficulty of obtaining a child through adoption or assisted reproduction, without the State necessarily having to encourage that commitment through the institution of marriage. Conversely, the 'casual' intimate acts of a same-sex couple will never result in a child, but those of an opposite couple can and frequently do."

[6] *Conaway v. Deane*, 932 A.2d at 633-34; *Hernandez v. Robles*, 855 N.E.2d at 7 (plurality); *Andersen v. King County*, 138 P.3d at 982-83 (plurality), *id*. at 1002 (Johnson, J.M., J., concurring in judgment only) ("[t]he complementary

federal district courts have relied upon the same distinction in rejecting federal constitutional challenges to state constitutional amendments and/or statutes reserving marriage to opposite-sex couples, finding the classification in the law to be reasonably related to the State's interest in encouraging responsible procreation.[7] The district court's holding that art. II, § 35(A), is not reasonably related to the State's legitimate interest in responsible procreation is erroneous.

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nature of the sexes and the unique procreative capacity of one man and one woman as a reproductive unit provide one obvious and nonarbitrary basis for recognizing such [opposite-sex] marriage"); *Standhardt v. Superior Court*, 77 P.3d at 461-64 ("limiting marriage to opposite-sex couples is rationally related to" the State's "legitimate interest in encouraging procreation and child-rearing within the marital relationship"); *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 677 ("[b]ecause only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage"); *Singer v. Hara*, 522 P.2d at 1195-97 ("marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman"). *See also Goodridge*, 798 N.E.2d at 994-96 (Cordy, J., dissenting).

[7] *See Citizens for Equal Protection v. Bruning*, 455 F.3d at 867-69; *Adams v. Howerton*, 486 F. Supp. at 1124-25 ("it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised"); *Jackson v. Abercrombie*, 884 F.Supp.2d at 1114 ("opposite-sex couples, who can naturally procreate, advance the interest in encouraging natural procreation to take place in stable relationships and same-sex couples do not to the same extent"). *See also Dean v. District of Columbia*, 653 A.2d at 332-33, 363-64 & n. 5 (Op. of Steadman, J.) (rejecting federal constitutional challenge to former District of Columbia statute reserving marriage to opposite-sex couples).

Furthering Dual-Gender Parenting

For purposes of deciding the motion for summary judgment, the district court "assumed" that "the 'ideal' environment for children must include opposite-sex, married, biological parents," and "that 'promoting' this ideal is a legitimate state interest." Op. & Order 61. What the district court merely "assumed" in its decision many state and federal courts have accepted as true. *See*, *e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d at 867-68 (acknowledging "traditional notion that two committed heterosexuals are the optimal partnership for raising children"); *Lofton v. Secretary of the Dep't of Children and Family Services*, 358 F.3d at 819 (in considering State's argument that the presence of both male and female authority figures in the home is critical to optimal childhood development, the court held that "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society"); *Adams v. Howerton*, 486 F.Supp.2d at 1124 (it is "beyond dispute" that the State has a "compelling interest" in "providing stability to the environment in which children are raised"); *Jackson v. Abercrombie*, 884 F.Supp.2d at 1114-16 (it is not irrational for the State to assume that "children do best when raised by their two biological parents"); *Conaway v. Deane*, 932 A.2d at 635 (referring to

the State's legitimate interest in "encouraging the traditional family structure in which children are born"); *Hernandez v. Robles*, 855 N.E.2d at 7 (plurality) ("[t]he Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like"); *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 678 ("[t]he state also could have rationally concluded that children are benefited [*sic*] by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman, individually and collectively, contribute to the relationship"); *Andersen v. King County*, 138 P.3d at 985 (plurality) (recognizing State's legitimate interest in "encouraging families with a mother and a father and children biologically related to both").

The district court determined that the classification set forth in art. II, § 35(A), is both *over*inclusive, because "many opposite-sex couples never actually do provide this optimal child-rearing environment, due to drug use, abuse, or, more commonly, divorce," Op. & Order 63, and, at the same time, it is *unde*rinclusive, because "thousands of children [are] now being raised by same-sex couples." *Id*. at 62 (citation and internal quotation marks omitted). As with its analysis of the State's interest in encouraging responsible procreation, this critique

of the "fit" between "means" and "ends" of art. II, § 35(A), is deeply flawed.

With respect to the classification's purported *over*inclusiveness, the failure of *some* opposite-sex couples to provide the "optimal child-rearing environment" (dual-gender parenting) because of "drug use" or "abuse" affects only a small number of all children raised by such couples and, in any event, may not be known or predictable at the time of their procreation, but the inability of *any* same-sex couples to provide that environment is known with certainty *ab initio*. Moreover, while the incidence of divorce in Oklahoma (on which the court places such emphasis, *see* Op. & Order 63) is regrettably high, it is surely misleading to imply, as the district court does, that a non-custodial parent has little or no role in the upbringing of his or her child, thereby denying him or her the benefits of dual-gender parenting. The incidence of divorce among opposite-sex couples does not affect the reasonableness of the "fit" between "means" and "ends" in reserving marriage to such couples. *See Conway v. Deane*, 932 A.2d at 631-34.

With respect to the classification's alleged *under*inclusiveness, the district court overlooks the obvious fact that, apart from assisted reproduction, which accounts for only a minute fraction of all births (and is available only to *female* same-sex couples), a child does not become "available" for adoption by anyone (including a same-sex couple) unless the child has been abandoned, one or both

parents have died or their parental rights have been involuntarily terminated in formal court proceedings or have been voluntarily surrendered. Adoption is society's provision for caring for children who, for whatever reason, will *not* be raised in the "optimal" environment. It is implausible to conclude, as the district court apparently does, that, by recognizing and providing for the practical reality that the ideal will not be achieved in all cases, a State somehow abandons its interest in promoting and increasing the likelihood of that ideal. As Justice Cordy explained in his dissent in *Goodridge v. Dep't of Public Health*:

> That the State does not preclude different types of families from raising children does not mean that it must view them all as equally optimal and equally deserving of [s]tate endorsement and support. For example, single persons are allowed to adopt children, but the fact that the Legislature permits single-parent adoption does not mean that it has endorsed single parenthood as an optimal setting in which to raise children or views it as the equivalent of being raised by both of one's biological parents. The same holds true with respect to same-sex couples–the fact that they may adopt children means only that the Legislature has concluded that they may provide an acceptable setting in which to raise children who cannot be raised by both of their biological parents. The Legislature may rationally permit adoption by same-sex couples yet harbor reservations as to whether parenthood by same-sex couples should be affirmatively encouraged to the same extent as parenthood by the heterosexual couple whose union produced the child.

798 N.E.2d at 1000-01 (Cordy, J., dissenting). Several courts (and individual judges thereof) have cited Justice Cordy's dissent in upholding, on rational basis

review, their laws restricting marriage to opposite-sex couples. *See*, *e.g.*, *Jackson v. Abercrombie*, 884 F.Supp.2d at 1116; *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 678; *Hernandez. v. Robles*, 805 N.Y.S.2d 354, 376 (App. Div. 2005) (Catterson, J., concurring), *aff'd*, 855 N.E.2d 1 (N.Y. 2006). More generally, both state and federal courts have held that the reservation of marriage to opposite-sex couples is reasonably related to the State's legitimate interest in furthering an "optimal child-rearing environment" even though same-sex couples may have (and subsequently raise) children through adoption or assisted reproduction.[8]

Apart from its flawed "overinclusiveness/underinclusiveness" analysis, the district court determined that the reservation of marriage to opposite-sex couples in art. II, § 35(A), of the Oklahoma Constitution is not reasonably related to the State's legitimate interest in encouraging responsible procreation because "[p]ermitting same-sex couples to receive a marriage license [would] not harm, erode, or somehow water-down the 'procreative' origins of the marriage institution." Op. & Order 58. The court also determined that art. II, § 35(A), is not reasonably related to the State's legitimate interest in furthering an environment in

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[8] *See Citizens for Equal Protection v. Bruning*, 455 F.2d at 867; *Jackson v. Abercrombie*, 884 F.Supp.2d at 1114-16; *Conaway v. Deane*, 932 A.2d at 631-35; *Hernandez v. Robles*, 855 N.E.2d at 7-8 (plurality); *Andersen v. King County*, 138 P.3d at 983 (plurality); *Standhardt v. Superior Court*, 77 P.3d at 462-64; and *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 677-78.

which the children so procreated will be raised in a family with both a mother and a father to whom they are biologically related because "[e]xlusion from marriage does not make it more likely that a same-sex couple desiring children, or already raising children together, will change course and marry an opposite-sex partner (thereby providing the 'ideal' child-rearing environment)," *id*. at 62, and because "exclusion of same-sex couples from marriage" would not "make[] it more likely that opposite-sex marriages will stay in tact (thereby remaining 'optimal' child-rearing environments)." *Id*. at 63.

The district court's critique of the reasonableness of the relationship between the legitimate ends art. II, § 35(A), is intended to promote – responsible procreation and dual-gender parenting – and the means chosen to do so – reserving marriage to opposite-sex couples – is fundamentally flawed. On rational basis review, the issue is *not* whether recognition of same-sex marriage would *injure* the State's legitimate interests, but whether it would *promote* those interests. Recognition of same-sex marriage would not promote the State's interest in encouraging responsible procreation, particularly *unintended* procreation from opposite-sex intercourse, nor would it promote the State's interest in furthering an environment in which the children so procreated are raised in a family with both a mother and a father to whom they are biologically related. That is sufficient to

sustain the constitutionality of art. II, § 35(A) under rational basis review, *see Johnson v. Robison*, 415 U.S. 361, 383 (1974) (when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification . . . is invidiously discriminatory"), as multiple courts have recognized in rejecting challenges to state marriage statutes and amendments.

In *Jackson v. Abercrombie*, the district court held that "the state is not required to show that denying marriage to same-sex couples is necessary to promote the state's interest or that same-sex couples will suffer no harm by an opposite-sex definition of marriage." 884 F.Supp.2d at 1106. "Rather, the relevant question is whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry." *Id*. at 1107, citing *Morrison v. Sadler*, 821 N.E.2d at 23 (the issue is not whether "recognizing same-sex marriage . . . [would] *harm* the institution of opposite-sex marriage," but whether "the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation. If it would not, then limiting the institution of marriage to opposite-sex couples is rational and acceptable under [the] [state] [c]onstitution") (emphasis in original), and

Standhardt v. Superior Court, 77 P.3d at 463 (even if "allowing same-sex couples to marry would not inhibit opposite-sex couples from procreating," the classification in the marriage law is reasonable because "the State does not have the same interest in sanctioning marriages between couples who are incapable of procreating it as it does with opposite-sex couples"). *See also Hernandez v. Robles*, 805 N.Y.S.2d at 361 ("there is no requirement in rational basis equal protection analysis that the government interest be furthered by both those included in the statutory classification and by those excluded from it"); *Andersen v. King County*, 138 P.3d at 984 (plurality) (on rational basis review, "the correct inquiry . . . is whether allowing opposite-sex couples to marry furthers legitimate governmental interests" "in procreation and raising children in a health environment," not "whether those interests are furthered by denying same-sex couples the right to marry"); *Conaway v. Deane*, 932 A.2d at 629-35 (same, by implication); *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 678 ("[t]he state has decided that the general welfare does not require extending the same option to the members of other social units").

Other than the district court's judgment in *Kitchen v. Herbert*, Case No. 2:13-cv-217, Mem. Dec. & Order 41-50 (N. D. Okla. Dec. 20, 2013) (alternative holding), *appeal pending*, No. 13-4178 (Tenth Circuit), and the Massachusetts

Supreme Judicial Court's decision in *Goodridge v. Dep't of Public Health*,[9] no other state or federal court has struck down a state statute reserving marriage to opposite-sex couples on rational basis grounds.[10]

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[9] Although the majority opinion in *Goodridge* "purports to apply a rational basis test to Massachusetts' limitation of marriage to opposite-sex couples only, it frequently uses language suggesting that some stricter standard of review was being applied that was less deferential to legislative discretion." *Morrison v. Sadler*, 821 N.E.2d at 29, citing Justice Sosman's dissenting opinion in *Goodridge*, 798 N.E.2d at 980-81 (Sosman, J., dissenting).

[10] It is remarkable that in its *sixty-eight page* opinion, the district court never cites, much less attempts to distinguish, the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, the Eleventh Circuit's decision in *Lofton v. Secretary of Dep't of Children & Family Services*, the district court's decision in *Adams v. Howerton*, the Arizona Court of Appeals decision in *Standhardt v. Superior Court*, the Indiana Court of Appeals decision in *Morrison v. Sadler*, the Maryland Court of Appeals decision in *Conaway v. Deane*, the New Jersey Superior Court, Appellate Division, decision in *Lewis v. Harris*, the New York Court of Appeals decision in *Hernandez v. Robles*, the New York Supreme Court, Appellate Division, decision in *Hernandez*, the Texas Court of Appeals decision in *In re Marriage of J.B. and H.B.*, the Washington Supreme Court's decision in *Andersen v. King County*, the Washington Court of Appeals decision in *Singer v. Hara* or the District of Columbia Court of Appeals decision in *Dean v. District of Columbia*. The court cites, but does not attempt to distinguish the Minnesota Supreme Court's decision in *Baker v. Nelson* (Op. & Order 32-32 & n. 21), and cites *In re Kandu* only in support of its holding that the Supreme Court's summary disposition in *Baker v. Nelson* 409 U.S. 810 (1972), is not binding precedent with respect to plaintiffs' claims. Op. & Order 32. The district court takes issue with *Jackson v. Abercrombie* on only two points – the precedential force of *Baker v. Nelson*, Op. & Order 32, 34-35 n. 23, and whether recognition of same-sex marriage might have a "negative impact" on opposite-sex marriage, *id*. at 65, which is discussed in the next section of this brief, along with the court's critique of *Sevcik v. Sandoval*. The district court's failure to engage a wealth of contrary authorities directly on point is mute evidence of the poverty of its analysis.

Preserving Tradition Marriage

Finally, the State has a legitimate interest in "preserving the traditional institution of marriage," *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, concurring in the judgment), *see also Sevcik v. Sandoval*, Order 29 (recognizing legitimacy of interest), *Jackson v. Abercrombie*, 884 F.Supp.2d at 1116-19 (same), which interest could be undermined by the recognition of same-sex marriage. "Although traditional moral disapproval is not alone a valid state interest for prohibiting private, consensual activity, . . . civil marriage is at least partially a public activity, and preventing 'abuse of an institution the law protects' is a valid state interest." *Sevcik*, Order 29, quoting *Lawrence v Texas*, 539 U.S. at 567. *See also Jackson*, 884 F.Supp.2d at 1109 ("[a]lthough legal marriage also secures individual interest, it is a public institution enacted for the benefit of society"). What kind of abuse? The district court in *Sevcik* explained:

> Should that institution [marriage] be expanded to include same-sex couples with the state's imprimatur, it is conceivable that a meaningful percentage of heterosexual persons would cease to value the civil institution as highly as they previously had and hence enter into it less frequently, opting for purely private ceremonies, if any, whether religious or secular, but in any case without civil sanction, because they no longer wish to be associated with the civil institution as redefined, leading to an increased percentage of out-of-wedlock children, single-parent families, difficulties in property disputes after the dissolution of what amount to common law marriages in a state where such marriages are not recognized, or other unforseen

> consequences. Because the family is the basic societal unit, the State could have validly reasoned that the consequence of altering the traditional definition of marriage could be severe.

Id. at 31-32, citing *Jackson*, 884 F.Supp.2d at 1117 ("it is not beyond rational speculation to conclude that altering the definition of marriage to include same-sex unions might result in undermining the societal understanding of the link between marriage, procreation, and family structure").

Such speculation is not unreasonable. The experience in Scandinavia and the Netherlands indicates that formal governmental recognition of same-sex relationships, whether through domestic partnerships, civil unions or marriage, has been associated with an accelerated decline in marriage and a marked increase in the number of out-of-wedlock births. *See* Stanley Kurtz, "The End of Marriage in Scandinavia," *Weekly Standard* (Feb. 2, 2004); William C. Duncan, "The Tenth Anniversary of Dutch Same-Sex Marriage: How is Marriage Doing in the Netherlands?, *Institute for Marriage and Public Policy Research Brief* (Vol. 4, No. 3, May 2011). This is not to suggest (and the foregoing authors do not assert) a *causal* relationship, but it certainly is sufficient, along with other evidence, to support "rational speculation" that recognition of same-sex marriage may interfere with the State's legitimate interests in encouraging responsible procreation and furthering dual-gender parenting. That, in turn, is sufficient to sustain the

rationality of the relationship between the prohibition of same-sex marriage in art. II, § 35(A), and the State's legitimate interest in preserving the traditional institution of marriage.

The district denied the legitimacy of the State's interest in preserving traditional marriage on the ground that such interest is "impermissibly tied to moral disapproval of same-sex couples as a class of Oklahoma citizens." Op. & Order 65. As the foregoing analysis demonstrates, however, the State's interest in preserving the traditional institution of marriage is *not* "tied to moral disapproval of same-sex couples" but it based upon rational speculation that recognition of same-sex marriage *could* be injurious to the very interests the district court conceded (or assumed) to be legitimate. As the district court in *Jackson* explained, "[u]nder rational basis review, the state is not required to show that allowing same-sex couples to marry will discourage, through changing societal norms, opposite-sex couples from marrying. Rather, the standard is whether the legislature could rationally speculate that it might." 884 F.Supp.2d at 1117. "It is at least debatable," the court continued, "that altering 'that meaning would render a profound change in the public consciousness of a social institution of ancient origin.'" *Id*., quoting *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006). In any event, under *Johnson v. Robison*, 415 U.S. 361, 383 (1974), the State is "not

required to show that changing the institution of marriage might harm the state's interest." *Id*. at 1118. It is sufficient, on rational basis review, to show, as this brief has, that it would not promote any of the State's legitimate interests.

For all of the foregoing reasons, the district court's holding that art. II, § 35(A), of the Oklahoma Constitution is not reasonably related to any legitimate state interests is erroneous and must be reversed.[11]

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[11] With respect to issues not discussed herein, *amicus* generally adopts the brief of the defendant-appellant.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the Family Research Council, respectfully requests that this Honorable Court reverse the judgment of the district court.

Respectfully submitted,

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This brief comports with type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

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[xx insert date]

United States Court of Appeals
for the Tenth Circuit
Case No. 14-5003

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