No. 14-1341

In the United States Court of Appeals
for the Sixth Circuit

APRIL DEBOER, *et al.*,
Plaintiffs-Appellees,

vs.

RICHARD SNYDER, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Michigan, Southern Divison
Civil Action No. 12-CV-10285
(Honorable Bernard A. Friedman)

BRIEF OF *AMICUS CURIAE*, THE FAMILY RESEARCH COUNCIL, IN SUPPORT OF THE DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

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United States Court of Appeals
for the Sixth Circuit

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Sixth Circuit
Case Number: 14-1341 Case Name: *DeBoer, et al., vs. Snyder, et al.*

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s/Paul Benjamin Linton
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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 the Michigan Marriage Amendment (art. I, § 25, of the Michigan 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

I.

THE MICHIGAN MARRIAGE AMENDMENT DOES NOT INTERFERE WITH THE FUNDAMENTAL RIGHT TO MARRY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Michigan Marriage Amendment provides: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. I, § 25. In their amended complaint, plaintiffs alleged that art. I, § 25, impermissibly interferes with the fundamental right to marry protected by the Due Process Clause of the Fourteenth Amendment and, therefore, is unconstitutional. Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief (Doc. # 38), Count II, pp. 9-10, ¶ 34.[1] Given its holding that art. I, § 25, violates the Equal Protection Clause, the court found it "unnecessary to address whether the [the Michigan Marriage Amendment] burdens the exercise of a fundamental right under the Due

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[1] In this brief, *amicus* shall refer to the Michigan Marriage Amendment as shorthand for both the Michigan state constitutional amendment prohibiting the recognition of same-sex marriages the voters approved on November 2, 2004 (art. I, § 25), and the statues the Michigan General Assembly has enacted prohibiting such marriages, declaring them invalid and denying them recognition (Mich. Comp. Laws Ann. §§ 551.1–551.4, 551.272). Although plaintiffs did not identify the statutes in their complaint, they did challenge them in their brief in support of their motion for summary judgment (Doc. # 67) 1-2 (hereafter Plaintiffs' S.J. Br.).

Process Clause." Findings of Fact and Conclusions of Law (Doc. # 151) 18. As appellees, however, plaintiffs may defend the district court's judgment on any grounds properly raised below, including their due process challenge to § 25. Accordingly, *amicus curiae* shall address this alternative argument in its brief.

In determining whether an asserted liberty interest (or right) should be regarded as fundamental for purposes of substantive due process analysis under the Due Process Clause of the Fourteenth Amendments (infringement of which would call for strict scrutiny review), the Supreme Court applies a two-prong test. First, there must be a "careful description" of the asserted fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation and internal quotation marks omitted).[2] Second, the interest, so described, must be

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[2] *Glucksberg* was not an anomaly in demanding precision in defining the nature of the interest (or right) being asserted. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993) (describing alleged right as "the . . . right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than that of a government-operated or government-selected child-care institution," not whether there is a right to 'freedom from physical restraint," "a right to come and go at will" or "the right of a child to be released from all other custody into the custody of its parents, legal guardians, or even close relatives"); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125-26 (1992) (describing asserted interest as a government employer's duty "to provide its employees with a safe working environment"). *See also District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 72-75 (2009) (convicted felon has no freestanding "substantive due process right" to obtain the State's DNA evidence in order to apply new DNA-testing technology that was not available at the time of his trial) (relying upon *Glucksberg*, *Reno* and *Collins*).

firmly rooted in "the Nation's history, legal traditions, and practices." *Id.* at 710. In *Glucksberg*, the Court characterized the asserted liberty interest as "a right to commit suicide which itself includes a right to assistance in doing so," not whether there is "a liberty interest in determining the time and manner of one's death," "a right to die," "a liberty to choose how to die," "[a] right to choose a humane, dignified death" or "[a] liberty to shape death." *Id*. at 722-23 (citations and internal quotation marks omitted).

As in other cases asserting fundamental liberty interests, it is necessary to provide a "careful description" of the fundamental liberty interest at stake. For purposes of substantive due process analysis, therefore, the issue here is not *who* may marry, but *what* marriage is. The principal defining characteristic of marriage, as it has been understood in our "history, legal traditions, and practices," is the union of a man and a woman.[3] Properly framed, therefore, the issue before this Court is not, as plaintiffs' have framed it, whether "two consenting adults" have a "fundamental personal right" "to marry," Plaintiffs' S.J. Br. 7, an abstract and vague formulation divorced from our history and traditions, but whether there

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[3] *See Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d 136, 141 (App. Div. 2006), *aff'd*, 855 N.E.2d 1 (N.Y. 2006): "To remove from 'marriage' a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and state . . . would, to a certain extent, extract some of the deep roots that support its elevation to a fundamental right." Citation and internal quotation marks omitted.

is a right to enter into a same-sex marriage. With the exceptions of the district court decisions in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded with instructions to dismiss the appeal for lack of standing sub nom. Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), *Kitchen v. Herbert*, Case No. 2:13-cv-217 (D. Utah. Dec. 20, 2013) (alternative holding), *appeal pending*, No. 13-4178 (Tenth Circuit), and *Bostic v. Schaefer*, Civil No. 2:13-cv395 (E.D. Va. Feb. 13, 2014), *appeals pending*, Nos. 14-1167, 14-1169, 14-1173 (Fourth Circuit), no court has held that the Due Process Clause requires the States to allow same-sex marriages.[4] That is not surprising. "In the nearly one hundred and fifty years

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[4] *See Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing, for want of a substantial federal question, due process challenge to state law reserving marriage to opposite-sex couples); *Smelt v. County of Orange*, 374 F. Supp.2d 861, 877-79 (C.D. Cal. 2005), *aff'd in part, vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305-07 (M.D. Fla. 2005); *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1093-98 (D. Haw. 2012), *appeals pending*, Nos. 12-16995, 12-16998 (Ninth Circuit); *In re Kandu*, 315 B.R. 123, 138-41 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court*, 77 P.3d 451, 455-60 (Ariz. Ct. App. 2003); *Baehr v. Lewin*, 852 P.2d 44, 56 (Haw. 1993) ("the federal construct of the fundamental right to marry . . . presently contemplates unions between men and women); *Conaway v. Deane*, 932 A.2d 571, 624 (Md. 2010) (rejecting argument that "the right to same-sex marriage is so deeply embedded in the history, tradition, and culture of this State and Nation, that it should be deemed fundamental"); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) ("[t]he right to marry someone of the same sex . . . is not 'deeply rooted'" "in this

since the Fourteenth Amendment was adopted, . . . no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause *or any other provision of the United States Constitution.*" *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006) (emphasis added).

With the exception of the California Supreme Court's decision in *In re Marriage Cases*, 183 P.3d 384, 421 (Cal. 2008), *every* reviewing court to have considered the issue has understood that same-sex couples challenging restrictions on same-sex marriage *are*, in fact, seeking recognition of a *new* right.[5] And with

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Nation's history and tradition") (citation and internal quotation marks omitted); *In re Marriage of J.B. & H.B.* 326 S.W.3d 654, 674-76 (Tex. App. 2010); *Singer v. Hara*, 522 P.2d 1187, 1195-97 & n. 11 (Wash. Ct. App. 1974); *Dean v. District of Columbia*, 653 A.2d 307, 331-33 (D.C. Ct. App. 1995), *id*. at 361-62 (Terry, J., concurring), *id*. at 363-63 (Steadman, J., concurring). *See also Andersen v. King County*, 138 P.3d 963, 979 (Wash. 2006) (rejecting dissent's view that there is a "fundamental right to marry a person of the same sex" as "an astonishing conclusion, given the lack of any authority to support it; *no* appellate court applying a federal constitutional analysis has reached this result").

[5] *See Lewis v. Harris*, 908 A.2d 196, 206 (N.J. 2006) (defining issue as "whether the right of a person to marry someone of the same sex is so deeply rooted in the traditions and collective conscience of our people that it must be deemed fundamental"). In rejecting a state privacy challenge to the state law reserving marriage to opposite-sex couples, the Hawaii Supreme Court stated that "the precise question facing this court is whether we will extend the *present* boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, *we are being asked to recognize a new fundamental right*." *Baehr v. Lewin*, 852 P.2d

the exceptions of the opinions in *Perry v. Schwarzenegger*,[6] *Kitchen v. Herbert*, Mem. Op. & Order 27-29, and *Bostic v. Schaefer*, Op. & Order 21-23, the last two of which are on appeal, federal district courts are in agreement that plaintiffs seek recognition of a *new* right.[7] Nothing in our "history, legal traditions, and

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44, 56-57 (Haw. 1993) (second emphasis added). *See also Hernandez v. Robles*, 805 N.Y.S.2d 354, 359 (App. Div. 2005) (observing that plaintiffs seek "an alteration in the definition of marriage"), *aff'd*, 855 N.E.2d 1 (N.Y. 2006); *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003) ("recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage'"); *Samuels*, 811 N.Y.S.2d at 141 ("this case is not simply about the right to marry the person of one's choice, but represents a significant expansion into new territory which is, in reality, *a redefinition of marriage*") (emphasis added); *Conaway v. Deane*, 932 A.2d 571, 617-24 (Md. 2007); *Andersen*, 138 P.3d at 976-80 (plurality). *See also Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 965 (Mass. 2003) (acknowledging that "our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries").

[6] In *Perry*, cited by plaintiffs (Plaintiffs' S.J. Br. 10-11), the district court made the remarkable, indeed, stunning, statement that the restriction of marriage to opposite-sex couples was "*never* part of the historical core of the institution of marriage." 704 F.Supp.2d at 187 (emphasis added).

[7] *See Jackson*, 884 F.Supp.2d at 1095 ("missing from [p]laintiffs' asserted 'right to marry the person of one's choice' is its centerpiece: the right to marry someone of the same gender"), *id*. at 1096 ("[t]he Court agrees that the right at issue here is an asserted new right to same-sex marriage"); *Smelt*, 374 F.Supp.2d at 878-79 (rejecting same-sex couple's argument that they were "not asking the Court to find a new fundamental right, but only to find [that] the existing fundamental right to marry includes their right to marry each other"); *Kandu*, 315 B.R. at 140 ("[e]ven if this Court believes that there should be a fundamental right to marry someone of the same sex, it would be incorrect to suggest that the Supreme Court, in its long line of cases on the subject, conferred the fundamental right to marry on anything other than a traditional, opposite-sex relationship").

practices" supports recognition of such a right.

The Supreme Court has recognized a substantive due process right to marry. *See Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987). But the right recognized in these decisions all concerned *opposite*-sex, not *same*-sex, couples. *See Loving*, 388 U.S. at 12, *Zablocki*, 434 U.S. at 384, *Turner*, 482 U.S. at 94-97.[8] That the right to marry is limited to opposite-sex couples is clearly implied in a series of Supreme Court cases relating marriage to procreation and childrearing. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty language in Due Process

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[8] Plaintiffs' reliance on *Loving*, which struck down anti-miscegenation statutes, in support of its due process argument, *see* Plaintiffs' S.J. Br. 10-11, is misplaced. Plaintiffs confuse a *restriction* on the exercise of a fundamental right with the *nature* of the right itself, which has always been understood to refer to the marriage of a man and a woman. Although a few courts have held otherwise, *see Perry*, 704 F.Supp.2d at 992, *Kitchen*, Mem. Op. & Order 27-29, and *Bostic*, Op. & Order 21-23, the overwhelming majority of state and federal courts have rejected the argument that *Loving's* due process holding requires invalidation of laws reserving marriage to opposite-sex couples. *See Standhardt*, 77 P.3d at 458; *Conaway*, 932 A.2d at 619-20; *Lewis*, 908 A.2d at 210; *Hernandez*, 855 N.E.2d at 8 (plurality), *id*. at 15-17 (Graffeo, J., concurring); *Samuels*, 811 N.Y.S.2d at 144; *In re Marriage of J.B. & H.B.,* 326 S.W.3d at 674-75; *Andersen*, 138 P.3d at 977-79 (plurality), *id*. at 1001 (Johnson, J.M., J., concurring in judgment only); *Dean*, 932 A.2d at 332-33; *Jackson*, 884 F.Supp.2d at 1097. *See also In re Kandu*, 315 B.R. at 138-41 (same).

Clause includes "the right of the individual . . . to marry, establish a home and bring up children"); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (characterizing the institution of marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress"). As the Maryland Court of Appeals noted, "virtually every Supreme Court case recognizing as fundamental the right to marry indicates as the basis for the conclusion the institution's inextricable link to procreation, which necessarily and biologically involves participation (in ways either intimate or remote) by a man and a woman." *Conaway v. Deane*, 932 A.2d at 621. "All of the cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species." *Id*. at 619 (citing *Loving*, *Zablocki*, *Turner* and *Skinner*).[9] *See also Donaldson v. State of Montana*,

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[9] Plaintiffs' observation that "opposite-sex couples can marry regardless of [their] desire or capacity to have children" and that "many same-sex couples . . . choose to have and/or raise children" "by means of artificial insemination [in the case of a female same-sex couple], surrogate parenting and adoption," Plaintiffs' S.J. Br. 15-16, does not change the biological reality that only opposite-sex couples are capable of procreating through their sexual activity. Marriage is the social and legal institution designed to channel that activity into stable relationships that protect the children so procreated. It is simply obtuse not to recognize this, as Justice Cordy noted in his dissent in *Goodridge*: "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." 798 N.E.2d at 1002 n. 34 (Cordy, J., dissenting).

2012 MT 288, ¶ 28, 292 P.3d 364, 370 ("marriage is not merely a private act. It is also a public act which serves a public function critical to society, that of bringing together female and male to create and raise the future generation") (Rice, J., concurring).

The Supreme Court has never stated or even implied that the federal right to marry extends to same-sex couples. Until the Massachusetts Supreme Judicial Court's decision in *Goodridge* in 2003, slightly more than ten years ago, no State allowed or recognized same-sex marriages. And of the seventeen States that now allow and recognize same-sex marriages, six (California, Connecticut, Iowa, Massachusetts, New Jersey and New Mexico) have done so only as the result of state (or in the case of California, federal) litigation. With respect to the eleven States that have not acted under compulsion of a court order, two (New Hampshire, Vermont) enacted same-sex marriage laws in 2009, one (New York) in 2011 and the other eight (Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, Rhode Island and Washington) only at various times since November 2012. At the same time, three times as many States have approved state constitutional amendments reserving the institution of marriage to opposite-sex couples (twenty-nine States, excluding California) or statutory equivalents (four States). Given that same-sex marriage has been allowed only since 2003 (and then only in one State), it cannot be said that same-sex marriage is firmly rooted in "the

Nation's history, legal traditions, and practices." To paraphrase *Osborne*, there is no "long history" of a right to enter into a same-sex marriage and "[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it." 557 U.S. at 72 (citation and internal quotation marks omitted). "[S]ame-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty." *Standhardt*, 77 P.3d at 459. It is precisely because the opposite-sex nature of marriage is the *essence* of marriage as it has been understood in our history and traditions that plaintiffs' substantive due process claim should be rejected.

Plaintiffs propose to *redefine* marriage to give it a meaning that it has never had. In place of the historical and traditional understanding of the nature of marriage and the limitations that have always and everywhere been placed on the exercise of the right to marry in Western Civilization, plaintiffs would substitute an abstract and unfettered "fundamental personal right" "of two consenting adults to marry . . . ." Plaintiffs' S.J. Br. 7. Under that formulation, no law restricting the fundamental right to marry could be upheld unless it was narrowly tailored to serve a compelling state interest. Thus, prohibitions of marriages between closely related adults and even of persons who lack contractual capacity would be constitutionally suspect. Presumably, the latter could be justified by the need to

prevent abuse or coercion of persons who are incapable of forming the requisite consent.[10] But could the prohibition of incestuous marriages (between adult relatives) survive strict scrutiny review? And, for that matter, once the institution of marriage has been unmoored from its historical context, on what basis could marriage be limited to only two persons? After all, "polygamists undoubtedly would insist that the essential nature of marriage is the coupling of people of the opposite sex while defending multiple marriages on religious principles." *Lewis v. Harris*, 908 A.2d at 206 n. 8.[11] Having abandoned the historical understanding of marriage, plaintiffs cannot offer any principled rationale for limiting marriage to

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[10] Even the seemingly unassailable requirement that a person must have contractual capacity to enter into a marriage has been challenged. *See* Luke Davis, "Can a person in a vegetative state get married," http://blog.practicalethics.ox.ac.uk/ 2013/10/can-a-person-in-a-vegetative-state get-married (last checked October 14, 2013) (reporting case asking court to order county clerk to issue marriage license for a woman whose fiancé had lapsed into a persistent vegetative state during brain surgery).

[11] Plaintiffs spill much ink purporting to show how certain peripheral and inessential attributes of marriage have changed over the years, *see* Plaintiffs' S.J. Br. 8-9, Plaintiffs' Brief in Opposition to State Defendants' Motion for Summary Judgment (Doc. # 76), 2-3, Plaintiffs' Proposed Findings of Fact and Conclusions of Law (Doc. # 139), pp. 4-5, ¶¶ 8, 9 (citing plaintiffs' experts' reports and trial testimony). Insofar as the federal constitutional right to marry is concerned, however, the core understanding of marriage as a relationship that may exist only between one man and one woman has *not* changed. Moreover, plaintiffs utterly fail to explain why the "binary" nature of marriage – involving only two persons – which they do not challenge in this litigation, is any more central to a proper understanding of the fundamental right to marry than is the opposite-sex nature of marriage.

non-relatives or one spouse.

In the oral argument in *Hollingsworth v. Perry*, 133 S.Ct.2652 (2013), which was ultimately decided on standing grounds, Justice Sotomayor asked respondents' counsel, under his formulation of the right to marry (essentially the same as the one advanced by plaintiffs here), "what State restrictions could ever exist? Meaning, what State restrictions with respect to the number of people, with respect to . . . the incest laws, the mother and child, assuming that they are [of] age . . . , but what's left?" Tr. 46-47 (March 26, 2013). Counsel could not provide plausible answers to these questions. And neither have plaintiffs.

Several courts and judges have recognized that "[t]he same form of constitutional attack that plaintiffs mount against statutes limiting the institution of marriage to members of the opposite sex also could be made against statutes prohibiting polygamy." *Lewis v. Harris*, 875 A.2d 259, 270 (N.J. Super. Ct. App. Div. 2005). *See also Morrison v. Sadler*, Cause No. 49D13-0211-PL-00196, Order on Motion to Dismiss at 13, May 7, 2003 (noting that "[p]laintiffs have not posited a principled theory of marriage that would include members of the same sex but still limit marriage to couples," and observing that "[t]here is no inherent reason why their theories, including the encouragement of long-term, stable relationships, the sharing of economic lives, the enhancement of the emotional

well-being of the participants, and encouraging participants to be concerned about others, could not equally be applied to groups of three or more"), *aff'd*, 821 N.E.2d 15 (Ind. Ct. App. 2005). *See also Goodridge v. Dep't of Public Health*, 798 N.E.2d at 984 n. 2 (Cordy, J., dissenting) (same).

Similarly, given plaintiffs' reformulation of the right to marry, on what basis could the State prohibit marriages of closely related adults? *See*, *e.g*., *Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005) (rejecting challenge to constitutionality of state criminal incest statute where brother had married his sister); *Cook v. Cook*, 104 P.3d 857, 860 (Ariz. Ct. App. 2005) (upholding but not applying Arizona's prohibition on marriages between first cousins). Plaintiffs have provided no principled reason to prohibit such marriages.

The Michigan Marriage Amendment does not interfere with the fundamental constitutional right to marry protected by the Due Process Clause of the Fourteenth Amendment. For that reason, plaintiffs' due process argument provides no alternative basis on which to affirm the district court's judgment.

II.

THE MICHIGAN MARRIAGE AMENDMENT IS REASONABLY RELATED TO MULTIPLE, LEGITIMATE STATE INTERESTS, INCLUDING PROMOTING RESPONSIBLE PROCREATION.

Defendants argued below that the reservation of marriage in the Michigan Marriage Amendment (art. I, § 25) to opposite-sex couples is reasonably related to multiple, legitimate state interests. Those interests, as summarized by the district court, include " (1) providing children with 'biologically connected' role models of both genders that are necessary to foster healthy psychological development; (2) avoiding the unintended consequences that might result from redefining marriage; (3) upholding tradition and morality; and (4) promoting the transition of 'naturally procreative relationships into stable unions.'" Findings of Fact and Conclusions of Law (Doc. # 151) 3.

In Part II of its opinion, *id* at 4-18 ("Trial Proceedings, Summary of Testimony, and Findings of Fact"), the district court summarized the evidence offered at trial on all four asserted state interests and made its "Findings of Fact" with respect to those interests. In Part III of its opinion, *id*. at 18-30 ("Conclusions of Law"), however, the court did not even mention, much less consider, either the legitimacy of the fourth interest cited above – the State's interest in "promoting the transition of 'naturally procreative relationships into stable unions'" – or

whether the Michigan Marriage Amendment is rationally related to that interest. Entirely apart from the district court's analysis of the other state interests (which was flawed for the reasons set for in the defendants' brief), the reservation of marriage to opposite-sex couples is rationally related to the State's legitimate interest in "responsible procreation." Accordingly, the district court's judgment that art. I, § 25, is unconstitutional must be reversed.

Neither the district court nor the plaintiffs have questioned the legitimacy of the State's interest in promoting responsible procreation. Instead, plaintiffs argued below that the classification set forth in the Michigan Marriage Amendment 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 same-sex couples, who may have children through assisted reproduction, adoption or surrogacy arrangements, may *not*. *See* Plaintiffs' S.J. Br. (Doc. # 67) 14-17; Plaintiffs' Reply Brief in Support of Motion for Summary Judgment (Doc. # 78) 2-3 (hereafter Plaintiffs' S.J. Reply Br.). *See also* Findings of Fact and Conclusions of Law 10-11 (summarizing evidence). This critique of the "fit" between "means" and "ends" of art. I, § 25, 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, Inc.* 508 U.S. 307, 315-16 (1993) (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. 93, 108 (1979) ("[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 v. Doe ex rel. Doe*, 509 U.S. 312, 321 (1993). There are

entirely plausible reasons for the disparate treatment of opposite-sex and same-sex couples under the Michigan Marriage Amendment. And, to the extent that the classification in art. I, § 25, 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, it is incontestable 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. I, § 25. *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").[12]

With respect to art I, § 25'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

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[12] *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); *Conaway v. Deane*, 932 A.2d 571, 630-31 (Md. 2010) (same); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (same); *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*).

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.[13]

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.

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[13] *See also Conaway v. Deane*, 932 A.2d at 633 (same); *Hernandez v. Robles*, 855 N.E.2d at 11-12 (plurality); *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1981); *Jackson v. Abercrombie*, 884 F.Supp.2d at 1113); *In re Kandu*, 315 B.R. 123, 147 (Bankr. W.D. Wash. 2004).

1974). "The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human 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 § 25's alleged *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, adoption or surrogacy arrangements.[14] 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

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[14] "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).

must become parents, through adoption and assisted reproduction." *Morrison*, 821 N.E.2d at 24.

> 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.[15] "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

[15] The same is true, of course, with respect to surrogacy arrangements.

> resulting from "casual" 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.[16] 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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[16] "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).

> 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).[17] In rejecting state and/or federal constitutional challenges to laws 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.[18] Similarly,

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[17] *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."

[18] *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); *Standhardt v. Superior Court*, 77 P.3d at 461-64; *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 677; *Singer v. Hara*, 522 P.2d at 1195-97. *See also Goodridge*, 798 N.E.2d at 994-96 (Cordy, J., dissenting) (same).

both the Eighth Circuit and several 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.[19]

Plaintiffs argued below that "same-sex marriage does not and will not in any way undermine or interfere with the rights or desires of heterosexuals to marry or to procreate" and that to suggest otherwise "is nothing short of absurd." Plaintiffs' S.J. Reply Br. 3. Plaintiffs, like the principal authority on which they relied, *Perry v. Schwarznegger*, 704 F.Supp.2d at 972, have improperly phrased the issue. On rational basis review, the issue is *not* whether recognition of same-sex marriage would *injure* the State's legitimate interests (although there is certainly room for rational speculation that deconstructing marriage as it has always been understood *would* have that effect), but whether it would *promote* those interests. Recognition

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[19] *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.) (same).

of same-sex marriage would not promote the State's interest in encouraging responsible procreation, particularly *unintended* procreation from opposite-sex intercourse. That is sufficient to sustain the constitutionality of art. I, § 25, 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 many courts have recognized in rejecting challenges to state marriage statutes and amendments. *See Jackson v. Abercrombie*, 884 F.Supp.2d at 1106-07; *Morrison v. Sadler*, 821 N.E.2d at 23; *Standhardt v. Superior Court*, 77 P.3d at 463; *Hernandez v. Robles*, 805 N.Y.S.2d at 361; *Andersen v. King County*, 138 P.3d at 984 (plurality); *Conaway v. Deane*, 932 A.2d at 629-35; *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 678.

The Michigan Marriage Amendment is rationally related to multiple, legitimate state interests, including promoting responsible procreation. Accordingly, the district court's judgment striking down art. I, § 25, must be reversed.

CONCLUSION

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

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The undersigned certifies that 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).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word Perfect X5 word processing software in 14-point Times New Roman font.

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May 9, 2014

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The undersigned certifies that on May 9, 2014, a true, correct and complete copy of the foregoing Brief *Amicus Curiae* of the Family Research Council in Support of Defendants-Appellants and in Support of Reversal was filed with the Court and served on the following via the Court's ECF system:

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