Case No. 14-31037

In the United States Court of Appeals for the Fifth Circuit

JONATHAN P. ROBICHEAUX, DEREK PENTON; NADINE BLANCHARD; COURTNEY BLANCHARD, Plaintiffs-Appellants

v.

JAMES D. CALDWELL, in his official capacity as the Louisiana Attorney General, also known as Buddy Caldwell, Defendant-Appellee

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JONATHAN P. ROBICHEAUX, DEREK PENTON; NADINE BLANCHARD; COURTNEY BLANCHARD; ROBERT WELLES; and GARTH BEAUREGARD, Plaintiffs-Appellants

v.

DEVIN GEORGE, in his official capacity as the State Registrar and Center Director at Louisiana Department of Health and Hospitals; TIM BARFIELD, in his official capacity as the Louisiana Secretary of Revenue; KATHY KLIEBERT, in her official capacity as the Louisiana Secretary of Health and Hospitals, Defendants-Appellees

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FORUM FOR EQUALITY LOUISIANA, INCORPORATED; JACQUELINE M. BRETTNER; M. LAUREN BRETTNER, NICHOLAS J. VAN SICKELS, ANDREW S. BOND; HENRY LAMBERT; R. CAREY BOND; L. HAVARD SCOTT, III; and SERGIO MARCH PRIETO Plaintiffs-Appellants

v.

TIM BARFIELD, in his official capacity as Secretary of the Louisiana Department of Revenue; DEVIN GEORGE, in his official capacity as Louisiana State Registrar, Defendants-Appellees

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Appeals from the United States District Court
for the Eastern District of Louisiana
Civil Case Nos. 2:13-cv-5090, 2:14-cv-97 & 2:14-cv-327
Honorable Martin C. Feldman, District Judge

BRIEF OF *AMICUS CURIAE*, THE FAMILY RESEARCH COUNCIL, IN SUPPORT OF THE DEFENDANTS-APPELLEES AND AFFIRMANCE

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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.

s/Paul Benjamin Linton
Counsel for the *Amicus*

November 3, 2014

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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 reviews data and analyzes 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 Louisiana Marriage Amendment (codified as art. XII, § 15, of the Louisiana Constitution), as well as similar amendments in other States. FRC thus 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.

SUMMARY OF ARGUMENT

On September 18, 2004, the People of the State of Louisiana overwhelming approved the Louisiana Marriage Amendment, which provides as follows:

> Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of any union other than the union of one man and one woman. A legal status identical to or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

La. Const. art. XII, § 15.[1]

Plaintiffs, seven same-sex couples who either sought to marry in Louisiana or sought recognition of their out-of-State marriages, along with an advocacy group, challenged art. XII, § 15, claiming that the measure interferes with the fundamental right to marry protected by the Due Process Clause of the Fourteenth Amendment and discriminates on the basis of gender and sexual orientation in violation of the Equal Protection Clause. The district court rejected plaintiffs'

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[1] *Amicus* shall refer to art. XII, § 15, as shorthand for both the Louisiana constitutional amendment the voters approved on September 18, 2004, and the statutes the Louisiana General Assembly has enacted defining marriage as a relationship that may exist only between a man and a woman, prohibiting same-marriages and denying recognition of same-sex marriages contracted in another State, *see* La. Civil Code arts. 86, 90, 3520(B), which plaintiffs also challenged.

claims. Plaintiffs have appealed, renewing their due process and equal protection challenge to § 15. This Court should affirm the district court's judgment.

Due Process – Fundamental Right to Marry

The fundamental right to marry that has been recognized by the Supreme Court has always been understood to be limited, by the nature of marriage itself, to opposite-sex couples who, *as a class*, are capable of procreating children. *See*, *e.g.*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental to the very existence and survival of the race"). Although marriage serves a variety of purposes, it is a privileged legal and social institution primarily to channel the potential procreative sexual activity of opposite-sex couples into stable relationships in which the children so procreated (intentionally or unintentionally) may be raised by their biological mothers and fathers.[2] Unlike the sexual activity of opposite-sex couples, the sexual activity of same-sex couples can never result in the procreation of children. Given the nature of marriage as it has been understood since colonial days, no right to same-sex marriage can be derived from "the Nation's history, legal

[2] "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, reflects society's judgment as how optimally to manage procreation and the resultant child rearing." *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 1002 n. 34 (Mass. 2003) (Cordy, J., dissenting).

traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

In support of their due process argument, plaintiffs rely principally on the Supreme Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S.Ct. 2675 (2013). *See*, *e.g.*, Plaintiffs' Br. at 32-33.[3] Neither case supports their argument.

First, the *holdings* in *Lawrence* and *Windsor* are not controlling on the precise issue presented in this case, specifically, whether same-sex couples have a fundamental right to marry. In *Lawrence*, which struck down, on rational basis grounds, a Texas statute criminalizing private, non-commercial sexual activity between consenting adults, the Court expressly stated that its decision "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," 539 U.S. at 578, a qualification which seems to have escaped the attention of the plaintiffs. *See* Plaintiffs' Br. at 33. In *Windsor*, which struck down, also on rational basis grounds, § 3 of the federal Defense of Marriage Act, 1 U.S.C. § 7 (2008), the Court emphasized, in the

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[3] As did the Fourth Circuit and the Tenth Circuit in their decisions striking down the state marriage amendments and statutes at issue in those cases. *See Bostic v. Schaefer*, 760 F.3d 352, 374 (4th Cir. 2014) ("[o]n the Due Process front, *Lawrence v. Texas* . . . and *Windsor* are particularly relevant"), 377 ("*Lawrence* and *Windsor* indicate that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships"); *Kitchen v. Herbert*, 755 F.3d 1193, 1229 (10th Cir. 2014) ("[o]ur holding . . . turns in large measure on this jurisprudential foundation") (referring to *Lawrence* and *Windsor*).

penultimate sentence of its opinion, that "This opinion and its holding are confined to those lawful marriages," 133 S.Ct. at 2696, referring to same-sex marriages that a State has chosen to recognize. In other words, neither the holding nor the opinion on which the holding was based has any application outside the issue presented therein, *i.e.*, whether § 3 of DOMA is constitutional.[4]

Second, the *reasoning* in *Lawrence* and *Windsor* does not support plaintiffs' argument, either. In overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court in *Lawrence* observed that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter[;]" that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private[;]" that "American laws targeting same-sex couples did not develop until the last third of the 20th century[;]" that "our laws and traditions in the past half century are of most relevance here[;]"[5] and that, almost five years before *Bowers* was decided, the European Court of Human Rights had struck down a Northern Ireland law prohibiting "consensual homosexual conduct." *Lawrence*, 539 U.S. at 568, 569, 570, 571-72, 573 (citing *Dudgeon v. United*

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[4] Thus, plaintiffs clearly distort *Windsor* in stating that "the Supreme Court . . . . recognized [that] the fundamental right to marry is *not* limited to different-sex couples." Plaintiffs' Br. at 32 (emphasis in original). *See also*, *id*. at 22 (Louisiana's marriage laws "infringe the 'constitutional guarantees' recognized in *Windsor*").

[5] Focusing on the dwindling number of States that prohibited sodomy and the even fewer States that enforced their sodomy laws against private consensual conduct.

Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981)). These observations were critical to its holding striking down the Texas sodomy statute.

By way of contrast, there *has* been a "longstanding history in this country of laws" reserving marriage to opposite-sex couples (expressly or by necessary implication); the laws forbidding same-sex marriages *have* been consistently enforced (by the denial of marriage licenses to same-sex couples who have applied for them); the prohibition of same-sex marriage *is* an unbroken continuum from the common law, to state statutes and, in the majority of States, to state constitutional amendments; before the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Dep't of Health*, 798 N.E.2d 941 (Mass. 2003), eleven years ago, *no* State had allowed same-sex marriage, and since the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), three times as many States have codified their traditional prohibition of same-sex marriage in their statutes or constitutions as have allowed such marriages (in the absence of a court order); and, finally, the European Court of Human Rights has recently reaffirmed its earlier judgment holding that the European Charter does *not* require Contracting States "to grant same-sex couples access to marriage." *Hamalainen v. Finland*, No. 37359/09, ¶ 71, ECHR 2014 (Grand Chamber) (July 16, 2014), reaffirming *Schalk and Kopf v. Austria*, No. 30141/ 04, ¶ 101, ECHR 2010 (First Section) (June 24, 2010). The analysis in *Lawrence* is not controlling here.

In *Windsor*, the Court, stressing the unusual nature of the federal government's intrusion into a matter of traditional state concern, held that § 3 of DOMA violated the Fifth Amendment because it "singles out a class of persons deemed *by a State* entitled to recognition and protection to enhance their own liberty" and "imposes a disability on the class by refusing to acknowledge a status *the State* finds to be dignified and proper." 133 S.Ct. at 2695-96 (emphasis added). The focus of the Court's analysis was the federal government's devaluation of same-sex marriages that a *State* had chosen to recognize. Nothing in *Windsor* dictates or even suggests the appropriate resolution of the present case. Reserving marriage to opposite-sex couples does not violate the fundamental right to marry protected by the Due Process Clause.

Equal Protection – Gender Discrimination

Plaintiffs' gender discrimination argument lacks merit. The classification in art. XII, § 15, is not between men and women, but between opposite-sex couples and same-sex couples of either sex. Section 15 treats men and women equally: both may marry someone of the opposite sex; neither may marry someone of the same sex. The Supreme Court has never struck down, on the basis of equal protection principles, a statute that confers benefits or imposes burdens upon the sexes equally. Because art. XII, § 15 does not discriminate on the basis of gender, it is not subject to heightened scrutiny under the Equal Protection Clause.

ARGUMENT

I.

ARTICLE XII, § 15, OF THE LOUISIANA CONSTITUTION DOES NOT INTERFERE WITH THE FUNDAMENTAL RIGHT TO MARRY PROTECTED BY THE DUE PROCESS CLAUSE.

(Response to Plaintiffs' Arguments I, II, IV(C))

Plaintiffs' argue that art. XII, § 15, of the Louisiana Constitution interferes with the fundamental right to marry protected by the Due Process Clause of the Fourteenth Amendment. Plaintiffs' Br. at 21-44, 59. The district court rejected plaintiffs' argument (*see* Order and Reasons at 18-24) and so should this Court.

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 (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).[6] Second, the interest, so described, must be "deeply rooted" in "the

[6] *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

Nation's history, legal traditions, and practices." *Id.* at 710, 721.

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). *Glucksberg* emphasized that, unless "a challenged state action implicate[s] a fundamental right," there is no need for "complex balancing of competing interests in every case." *Id.* at 722. All that is necessary is that the state action bear a "reasonable relation to a legitimate state interest . . . ." *Id*. Thus, unless there is a fundamental right to enter into a same-sex marriage, the reservation of marriage to opposite-sex couples is subject to rational basis review.

For purposes of substantive due process analysis, the issue is not *who* may marry, but "*what* marriage is." *Windsor*, 133 S.Ct. at 2716 (Alito, J., dissenting) (emphasis added). The principal defining characteristic of marriage as it has been

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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, 72-73 (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*).

understood throughout Western Civilization is the union of a man and a woman.[7] As the New York Court of Appeals observed, "The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who every lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). *See also Windsor*, 133 S.Ct. at 2689 ("until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage"), *id*. ("[t]he limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental"). Properly framed, therefore, the issue is not whether there is a fundamental right to enter into a marriage with the person of one's choice, but whether there is a right to enter into a same-sex marriage.

The Supreme Court has recognized a substantive due process right to marry. *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

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[7] "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." *Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d 136, 141 (App. Div. 2006) (citation and internal quotation marks omitted), *aff'd*, 855 N.E.2d 1 (N.Y. 2006).

decisions all concerned *opposite*-sex, not *same*-sex, couples. *Loving*, 388 U.S. at 12, *Zablocki*, 434 U.S. at 384, *Turner*, 482 U.S. at 94-97. That the right to marry is limited to opposite-sex couples is clearly implied in a series of cases relating marriage to procreation and childrearing. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("[m]arriage 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 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) (referring to marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress").[8]

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[8] Contrary to plaintiffs' understanding, Plaintiffs' Br. at 48 n. 11, 69, the Court's decision in *Turner* does not undermine the argument that the right to marriage is fundamental because of its procreative potential. At issue in *Turner* was a state prison regulation that prohibited inmates from marrying, absent a compelling reason for allowing their marriage (generally understood to be limited to "a pregnancy or the birth of an illegitimate child," *Turner*, 482 U.S. at 82). In holding that the right to marry applies to prison inmates, *id*. at 95, the Court acknowledged that "[t]he right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration," but determined that "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life." *Id*. The Court noted that "most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated." *Id*. at 96. The Court also observed that marriage often serves as a precondition to certain tangible and intangible benefits, including the "legitimation of children born out of wedlock." *Id*. Admittedly, the reasons given in support of recognizing the right of inmates to marry were not linked in express terms to procreation. And some of the reasons given, "expressions of emotional support and public commitment," "an exercise

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, barely ten years ago, no State allowed or recognized same-sex marriages. And, in the absence of a court order, *no* State allowed same-sex marriage until 2009, only five years ago, while thirty States have approved state constitutional amendments reserving the institution of marriage to opposite-sex couples. 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 "deeply 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).

Plaintiffs tacitly concede that a right to same-sex marriage is not "deeply rooted" in our "Nation's history, legal traditions and practices." But, in their view,

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of religious faith as well as an expression of personal dedication," *id*. at 95-96, were wholly independent of procreation. That said, "it is clear that the Court was contemplating marriage between a man and woman when it declared unconstitutional the [prison] regulation." *Conaway v. Deane*, 932 A.2d 571, 621 (Md. 2007). "The case involved challenges by opposite sex couples, and a number, although not all, of the reasons given in support of the right to marry applied only to opposite-sex couples, i.e., consummation of the marriage and legitimization of children born outside the marital relationship." *Id*.

that is the wrong question. Rather, the only question is whether there is a fundamental right to marry the person of one's choice and, if so, then same-sex couples are entitled to exercise that right in the same manner as opposite-sex couples. Plaintiffs' Br. at 38-40. Plaintiffs note that the Supreme Court did not frame the issue in *Loving* as a right to enter into an "interracial marriage," or, in *Turner*, as a right to "prisoner marriage," or, in *Zablocki*, as a right of a person owing child support to "impoverished parent marriage." *Id*. at 39. In each case, plaintiffs submit, the Court discussed the right to marry at a broader level of generality than would be consistent with the district court's analysis. *Id*.

Plaintiffs, however, confuse a *restriction* on the exercise of a fundamental right with the *nature* of the right itself. Interracial marriages were legal at common law, in seven of the original thirteen colonies and in a number of other States that never banned them.[9] In short, there was no uniform tradition of prohibiting such marriages. Moreover, to the extent that there was a (non-uniform) "tradition" banning interracial marriages, any such "tradition" "was contradicted by a *text*–an Equal Protection Clause that explicitly establishes racial

[9] *See* Irving G. Tragen, *Statutory Prohibitions against Interracial Marriage*, 32 Cal. L. Rev. 269, 269-70 & n. 2 (1944) (common law); David H. Fowler, Northern Attitudes Towards Interracial Marriage 62-63 (1987) (colonies) Lynn Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 How. L.J. 117, 180-81 (2007) (other States).

equality as a constitutional value." *Planned Parenthood v. Casey*, 505 U.S. 833, 980 n. 1 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis in original). There is no comparable text that establishes sexual orientation equality as a constitutional value from which one could derive a subsidiary right to enter into a same-sex marriage. With respect to *Turner* and *Zablocki*, there had never been a uniform and longstanding prohibition of the right to marry by prison inmates[10] or by persons who had (or who could be expected to have) outstanding child support obligations.

Unlike the facts in *Loving*, *Zablocki* and *Turner*, until very recently (and then only in a minority of countries and American jurisdictions) marriage has always and everywhere been understood as a relationship that may exist only between a man and woman. Regardless of the changes to marriage laws over the years, the fundamental right to marry has *never* been understood historically to include the right to marry someone of the same sex, to marry someone who was already married and whose marriage had not been dissolved by a decree of divorce or annulment (bigamy or polygamy), to marry someone who was incompetent or

[10] In *Turner*, the Court noted that, before adoption of the prison regulation challenged therein, no regulation specifically authorized correctional officers to prohibit inmates from getting married and, in fact, prison authorities had routinely allowed male inmates to marry and female inmates to marry civilians who were not ex-felons. 482 U.S. at 82, 98-99.

lacked the mental ability to enter into a marriage (contractual capacity), to marry an underage minor without parental consent and/or judicial authorization (nonage) or to marry a close relative (incest). *See Conaway v. Deane*, 932 A.2d at 622-23 (summarizing historically recognized limitations on marriage).[11]

Under current constitutional doctrine, the prohibition of bigamous (or polygamous) marriages, the prohibition of incestuous marriages, the prohibition of the marriage of minors and the prohibition of the marriage of persons lacking contractual capacity would all be reviewed (or have been reviewed) under the rational basis standard.[12] Rational basis review applies precisely because neither

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[11] Although States have sometimes differed in determining the outer limits of consanguinity that would bar two persons from marrying (*e.g.*, first cousins), they have always and everywhere prohibited and denied recognition to marriages between siblings and between ancestors and descendants. Almost two hundred years ago, Chancellor Kent noted that, "independent of any church canon, or of any statut[ory] prohibition," marriages in the "direct lineal line of consanguinity," as well as marriages between brothers and sisters, are unlawful and void "by the law of nature." *Wightman v. Wightman*, 4 Johns. Ch. 343, 348-49 (1820).

[12] *See*, *e.g.*, *Bronson v. Swensen*, 395 F. Supp.2d 1329, 1332-34 (D. Utah. 2005) (rejecting challenge to state laws prohibiting bigamy and polygamy and holding that nothing in *Lawrence v. Texas* requires the State of Utah "to sanction . . . polygamous marriage"), *aff'd in part and vacated in part and remanded with directions*, 500 F.3d 1099 (10th Cir. 2007); *State v. Holm*, 2006 UT 31, 137 P.3d 726, 742-45 (defendant had no fundamental due process liberty interest to engage in polygamy by marrying his wife's sixteen-year-old sister) (also holding *Lawrence* inapplicable); *Potter v. Murray City*, 760 F.2d 1065, 1070-71 (10th Cir. 1985) (termination of officer from police force for engaging in "plural marriage" did not violate his right to privacy, finding "no authority for extending the right of privacy so far that it would protect polygamous marriages"); *State v. Allen M.*, 571 N.W.2d 872, 877 (Wis. Ct. App. 1997) (State may "legitimately bar [siblings] from marriage") (dictum in case terminating parental rights over incestuously conceived children); *Muth v. Frank*, 412 F. 3d 808, 817 (7th Cir. 2005) (affirming denial

the fundamental due process liberty interest in marriage nor any protected privacy interest is implicated. Indeed, in *Zablocki*, several Justices noted the States' authority to prohibit polygamous marriages, incestuous marriages and/or underage marriages. *See Zablocki*, 434 U.S. at 392 (Stewart, J., concurring in the judgment) ("[s]urely . . . a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, . . . or that no one can marry who has a living husband or wife"); *id*. at 399 (Powell, J., concurring in the judgment) ("[s]tate regulation [of marriage] has included bans on incest, bigamy, and homosexuality"); *id*. at 404 (Stevens, J., concurring in the judgment) ("laws prohibiting marriage to a child [or] a close relative . . . are unchallenged here even though they 'interfere directly and substantially with the right to marry'") (quoting majority opinion, *id*. at 387).

In divorcing the right to marry from its historical roots, plaintiffs formulate an abstract right to marry the person of one's choice, *see*, *e.g*, Plaintiffs' Br. at 30,

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of habeas corpus relief to criminal defendant who was convicted of incest for marrying his sister) (rejecting application of *Lawrence*); *Moe v. Dinkins*, 533 F. Supp. 623, 627-31 (S.D.N.Y. 1981) (rejecting a class action challenging the constitutionality of a state statute prohibiting the marriage of minors between the ages of 14 and 18 absent parental consent and holding that none of the Supreme Court's marriage or privacy cases – including *Skinner*, *Loving*, *Zablocki*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) – required a heightened standard of review), *aff'd*, 669 F.2d 67 (2d Cir. 1982) (*per curiam*).

33, that, as the district court noted, *see* Order and Reasons at 28, would subject *any* traditional limitation on the right to marry to the strict scrutiny standard of review. Presumably, statutes regulating the age at which a person may be married could be justified by the State's compelling interest in protecting children against abuse and coercion,[13] and statutes not allowing a person who lacks contractual capacity to marry could be justified by similar considerations.[14] But could prohibitions of polygamous, bigamous and incestuous marriages (between related adults) withstand strict scrutiny review, which plaintiffs themselves acknowledge would be the applicable standard (Plaintiffs' Br. at 44-45 fn. 10, last sentence)? Having abandoned the historical meaning of marriage and the limitations that have always and everywhere been placed on the right to marry, plaintiffs are unable to offer any principled rationale for limiting marriage to one spouse or to non-

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[13] But, under the strict scrutiny standard of review, would not the requirement that such statutes be "narrowly tailored" to promote such an interest necessarily have to allow for "as-applied" challenges to be brought by mature minors questioning the generalizations regarding age and maturity underlying the statutes? *See Moe v. Dinkins*, 533 F. Supp. at 630 (rejecting, on rational basis review, plaintiffs' contention that the minimum age statute "denied them the opportunity to make an individualized showing of maturity").

[14] Even the seemingly unassailable requirement that a person must have contractual capacity to enter into a marriage has been challenged. *See* Luke Davies, "Can a person in a vegetative state get married?," http://blog.practicalethics.ox.ac. uk/2013/can-a-person-in-a-vegetative-state-get-married (last visited August 17, 2014) (reporting case asking court to order county clerk to issue marriage license for a woman whose fiancé had lapsed into a persistent vegetative state).

relatives. Nor is there such a rationale. *See*, *e.g.*, *Lewis v. Harris*, 875 A.2d at 270 ("[t]he same form of constitutional attack that plaintiffs mount against statutes limiting the institution of marriage to members of the opposite sex could also be made against statutes prohibiting polygamy"); *Conaway v. Deane*, 932 A.2d at 623 ("[w]e are not aware of any case . . . in which the issue has been framed in terms of whether the fundamental right to marry encompasses . . . 'the fundamental right to marry a person of one's choosing without government interference, even if that other person is lineally and directly related to the citizen asserting [his or her] fundamental right to marry,' such that strict scrutiny was deemed the appropriate standard of constitutional review to analyze the relevant statute").

Unless "a challenged state action implicate[s] a fundamental right," there is no need for "complex balancing of competing interests in every case." *Glucksberg*, 521 U.S. at 722. All that is necessary is that the state action bear a "reasonable relationship to a legitimate state interest . . . ." *Id*. Article XII, § 15, does not implicate the fundamental right to marry. Accordingly, it is subject to rational basis review. For the reasons set forth in defendants' brief, § 15 is reasonably related to legitimate state interests, including promoting responsible procreation and channeling such procreation into stable family relationships where the children so procreated will be raised by their biological mothers and fathers.

II.

ARTICLE XII, § 15, DOES NOT DISCRIMINATE ON ACCOUNT OF GENDER AND, THEREFORE, IS NOT SUBJECT TO HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

(Response to Plaintiffs' Argument IV(B)

Plaintiffs contend that art. XII, § 15, is subject to heightened scrutiny under the Equal Protection Clause because "it discriminates on account of gender . . . ." Plaintiffs' Br. at 54.[15] The district court rejected this contention, Order and Reasons at 14, and properly so. The classification in the law is not between men and women, but between opposite-sex couples and same-sex couples of either sex.

The fundamental flaw with plaintiffs' argument is that "the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Baker v. State*, 744 A.2d 864, 880 n. 13 (Vt. 1999). "[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct." *Id*. Other state courts have also rejected the claim that "defining marriage as the union of one man and

[15] Louisiana's marriage laws are intended to channel potentially procreative opposite-sex sexual activity into a stable legal and social institution – *marriage* – in which the children so procreated may be raised by their biological mother and father. The sexual activity of same-sex couples can *never* result in procreation. Accordingly, the distinction in the law is based on biological reality, not, as plaintiffs argue, "gender-based stereotypes about the proper roles of men and women." Plaintiffs' Br. at 54.

one woman discriminates on the basis of sex."[16]

In the last eight years, the California Supreme Court, the Maryland Court of Appeals, the New Mexico Supreme Court, the New York Court of Appeals and the Washington Supreme Court have held that laws reserving marriage to opposite-sex couples do not discriminate on account of sex.[17] And, with the exceptions of the alternative holdings in *Perry v. Schwarzenegger*, 704 F. Supp.2d 921, 996 (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 appeal for lack of standing sub nom. Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), and *Kitchen v. Herbert*, No. 2:13-cv-217 (D. Utah), Mem. Dec. & Order at 34-35, Dec. 20, 2013, *aff'd on other grounds*, 755 F.3d 1193 (10th Cir. 2014), federal district courts have consistently rejected sex discrimination challenges to state constitutional amendments reserving marriage to opposite-sex couples. *See Jackson v. Abercrombie*, 884 F. Supp.2d 1065, 1098-99 (D. Haw. 2012), *vacated and remanded with directions to*

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[16] *Id.* (citing *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 910 (1972), and *Singer v Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974)). *See also Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (same); *Dean v. District of Columbia*, 653 A.2d 307, 363 n. 2 (D.C. App. 1995) (Op. of Steadman, J.) (same).

[17] *In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571, 585-602 (Md. 2007); *Griego v. Oliver*, 316 P.3d 865, 979-80 (N.M. 2013); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006) (plurality); *id*. at 20 (Graffeo, J., concurring); *Andersen v. King County*, 138 P.3d 963, 988 (Wash. 2006) (plurality); *id*. at 1010 (J.M. Johnson, J., concurring in judgment only).

dismiss on grounds of mootness, (9th Cir. Oct. 10, 2014), *Latta v. Otter*, No. 1:13-cv-00482-CWD (D. Idaho), Mem. Dec. & Order at 30-31, May 12, 2014, *aff'd*, ___F.3d___ (9th Cir. 2014), *Baskin v. Bogan*, No. 1:14-cv-00355-RLY-TAB (S.D. Ind.), Entry on Cross Motions for Summary Judgment at 23, June 24, 2014, *aff'd*, 766 F.3d 648 (7th Cir. 2014), *Sevcik v. Sandoval*, 911 F. Supp.2d 997, 1004-05 (D. Nev. 2012), *rev'd on other grounds,* ___F.3d___ (9th Cir. 2014), *Bishop v. United States ex rel. Holder*, 962 F. Supp.2d 1252, 1286-87 (N.D. Okla. 2014), *aff'd sub nom. Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014).

In sum, fourteen state reviewing courts,[18] six federal district courts (including the case at bar) and the District of Columbia Court of Appeals have all held that statutes reserving marriage to opposite-sex couples "do[] not subject men to different treatment from women; each is equally prohibited from the same conduct." *Goodridge v. Dep't of Public Health*, 798 N.E.2d at 991 (Cordy, J., dissenting) (Justice Cordy was addressing an *alternative* argument raised by the

[18] In addition to the nine state court decisions previously cited are the decisions of the California Court of Appeal in *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 706 (Cal. Ct. App. 2006), *rev'd on other grounds*, 183 P.3d 384 (Cal. 2008), and four decisions of the New York Supreme Court, Appellate Division, later affirmed by the New York Court of Appeals: *Hernandez v. Robles*, 805 N.Y.S.2d 354, 370 (N.Y. App. Div. 2005) (Catterson, J., concurring) ("there is no discrimination on account of sex" because "both men and women may marry persons of the opposite sex; neither may marry anyone of the same sex"); *Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d 136, 143 (N.Y. App. Div. 2006) (state marriage law is "facially neutral"); *In re Kane*, 808 N.Y.S.2d 566 (N.Y. App. Div. 2006) (following *Samuels*), *Seymour v. Holcomb*, 811 N.Y.S.2d 134 (N.Y. App. Div. 2006) (same), *aff'd* 855 N.E.2d 1 (N.Y. 2006).

plaintiffs but not reached by the majority in their opinion invalidating the marriage statute). *But see Baehr v. Lewin*, 852 P.2d 44, 59-63 (Haw. 1993) (plurality) (*contra*); *Latta v. Otter*, ___F.3d___ (9th Cir. 2014) (Berzon, J., concurring) (expressing the view that same-sex marriage prohibitions are unconstitutional gender-based classifications).

Relying upon *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down state anti-miscegenation statutes, plaintiffs argue that the mere fact that art. XII, § 15, has "equal application" to both men and women does not immunize § 15 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex. Plaintiffs' Br. at 56. Plaintiffs' analogy to *Loving* is unconvincing at several levels.

First, *Loving* dealt with race, not sex. The two characteristics are not fungible for purposes of constitutional analysis. For example, although it is clear that public high schools and colleges may *not* field sports teams segregated by *race*, s*ee Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968), they *may* field teams segregated by *sex* (at least where equal opportunities are afforded to males and females on separate teams) without violating the Equal Protection Clause. *See Force by Force v. Pierce City R-VI School District*, 570 F. Supp. 1020, 1026 (W.D. Mo. 1983) (noting that "a number of courts have held that the establishment of separate male/female teams in a sport

is a constitutionally permissible way of dealing with the problem of potential male athletic dominance"). Indeed, a school district may go so far as to provide identical sets of single-gender public schools without running afoul of the Equal Protection Clause. *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880, 885-88 (3d Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977). Although, since *Brown v. Board of Education*, 347 U.S. 483 (1954), classifications based on race have been subjected to strict scrutiny review without regard to whether a given classification happens to apply equally to members of different races, *see McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (striking down laws that criminalized interracial cohabitation), "the laws in which the Supreme Court has found sex-based classifications have all treated men and women differently." *Smelt v. County of Orange*, 374 F. Supp.2d 861, 876 (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).[19]

Second, anti-miscegenation statutes were intended to keep persons of

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[19] Citing *United States v. Virginia*, 518 U.S. 515, 519-20 (1996) (law prevented women from attending military college); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 719 (1982) (law excluded men from attending nursing school); *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (law allowed women to buy low-alcohol beer at a younger age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (law imposed a higher burden on female servicewomen than on male servicemen to establish dependency of their spouses); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (law created an automatic preference of men over women in the administration of estates).

different races *separate.* Marriage statutes, on the other hand, are intended to bring persons of the *opposite* sex *together*. Statutes that mandated *segregation* of the *races* with respect to marriage cannot be compared in any relevant sense to statutes that promote *integration* of the *sexes* in marriage. *Hernandez v. Robles*, 805 N.Y.S.2d at 370-71 (Catterson, J., concurring).

Third, unlike the history of the anti-miscegenation statutes struck down in *Loving*, which stigmatized blacks as inferior to whites, "there is *no* evidence that laws reserving marriage to opposite-sex couples were enacted with an intent to discriminate against either men or women. Accordingly, such laws cannot be equated in a facile manner with anti-miscegenation laws." *Hernandez*, 805 N.Y.S.2d at 370 (Catterson, J., concurring) (emphasis in original).[20] As in *Goodridge*, which was decided on other grounds, there is no evidence that art. XII,

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[20] With the exception of the plurality opinion in *Baehr v. Lewin*, 852 P.2d at 59-63 & nn. 23-25, and a passing reference in *Goodridge*, 798 N.E.2d at 958 & n. 16, no reviewing court has found the equal protection analysis set forth in *Loving* to be applicable to laws reserving marriage to opposite-sex couples. *See In re Marriage Cases*, 49 Cal. Rptr. 3d at 707-08; *Conaway v. Deane*, 932 A.2d at 599-604; *Baker v. Nelson*, 191 N.W.2d at 187; *Lewis v. Harris*, 875 A.2d 259, 272 (N.J. Super Ct. App. Div. 2005); *Hernandez*, 855 N.E.2d at 8, *id*. at 19-20 (Graffeo, J., concurring); *Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d at 144; *Baker v. State*, 744 A.2d at 880 n. 13, 887; *Andersen v. King County,* 138 P.3d at 989, *id*. at 1001 (J.M. Johnson, J., concurring in judgment only); *Singer v. Hara*, 522 P.2d at 1195-96. *But see Latta v. Otter*, __F.3d at ___ (slip op. at 7-9) (Berzon, J., concurring) (*contra*). The *Loving* analogy has also been rejected by several federal district courts. *See Smelt*, 374 F. Supp.2d at 876-77; *Baskin v. Bogan*, Entry on Cross-Motions for Summary Judgment at 23; and *Sevcik*, 911 F. Supp.2d at 1004-05.

§15, was "motivated by sexism in general or a desire to disadvantage men or women in particular." 798 N.E.2d at 992 (Cordy, J., dissenting). Nor has either gender been subjected to "any harm, burden, disadvantage, or advantage," *id*., from the adoption of § 15.

Article XII, § 15, of the Louisiana constitution does not discriminate on account of gender. Accordingly, it is not subject to heightened scrutiny under the Equal Protection Clause.[21]

[21] With respect to issues not discussed herein, *amicus* generally adopts the brief of defendants-appellees.

CONCLUSION

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

Respectfully submitted,

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November 3, 2014

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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 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

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November 3, 2014

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The undersigned certifies that on the 3rd of November, 2014, a true, correct and complete copy of the foregoing Brief *Amicus Curiae* of the Family Research Council in Support of Defendants-Appellees and in Support of Affirmance was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. The undersigned further certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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