

Case No. 12-17668
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BEVERLY SEVCIK, et al.,
Plaintiffs-Appellants,

v.

BRIAN SANDOVAL, et al.,
Defendants-Appellees,

And

COALITION FOR THE PROTECTION OF MARRIAGE, et al.,
Defendant-Intervenor-Appellee.

Appeal from the United States District Court for the District of Nevada
Civil Case No. 2:12-CV-00578-RCJ-PAL (The Honorable Robert C. Jones)

**AMICUS BRIEF OF LIBERTY COUNSEL IN SUPPORT OF
DEFENDANTS- APPELLES AND-INTERVENORS-APPELLEES**

STEPHEN M. CRAMPTON
MARY E. McALISTER
MANDI D. CAMPBELL
Liberty Counsel
P.O. Box 11108
Lynchburg, VA 24506
(434) 592-7000 Telephone
(434) 592-7700 Facsimile
email court@lc.org
Attorneys for Amicus Liberty Counsel

MATHEW D. STAVER
ANITA L. STAVER
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
(800) 671-1776 Telephone
(407) 875-0770 Facsimile
email court@lc.org
Attorneys for Amicus Liberty Counsel.

CORPORATE DISCLOSURE STATEMENT

Amicus Liberty Counsel states, pursuant to Fed. R. App. P. 26.1 that there is no parent corporation or publicly held corporation that owns 10 percent or more of its stock.

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INTEREST OF THE AMICUS CURIAE

Amicus Liberty Counsel has been substantially involved in drafting constitutional amendments and Defense of Marriage Acts (DOMAs) and defending them in courts throughout the country. Liberty Counsel has developed a substantial body of information regarding the issues presented by the ultimate constitutional question in this case. Amicus believes that the information provided in this Brief regarding the ontological nature of marriage as the union of one man and one woman and the significant state interests served by the definition are critical to this Court's consideration of the important constitutional question at issue.

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

No party's counsel authored this 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 Amicus Curiae Liberty Counsel its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF ARGUMENT

At issue in this case is whether the nation is going to continue to honor and respect the transcendent nature of marriage, which John Locke described as “the First Society.”¹ Locke defined marriage as:

[A] voluntary Compact between Man and Woman; and tho’ [sic] it consist chiefly in such a Communion and Right in one another’s Bodies, as is necessary to its chief end, Procreation; yet it draws with it mutual Support, and Assistance, and a Community of Interest too, as necessary to unite not only their Care and Affection, but also necessary to their common Offspring, who have a right to be nourished and maintained by them, till they are able to provide for themselves.²

That definition has carried across time and cultures, as all human groups have “fashioned kinship symbols and marriage rules aimed at guaranteeing that each child is emotionally, morally, practically, and legally affiliated with both parents.”³ All human societies recognize marriage as a social institution based upon the biological and social facts of human sexuality and reproduction, which are what enable society to continue.⁴

¹ David Blankenhorn, *THE FUTURE OF MARRIAGE* 26 (Encounter Boodks 2007) (citing John Locke, *TWO TREATISES OF GOVERNMENT* (1698; Cambridge, U.K.: Cambridge University Press, 1965) 179).

² *Id.*

³ *Id.* at 100.

⁴ *Id.* at 101-102.

In other words, marriage, *i.e.*, the union of one man and one woman as defined in Nevada's Constitution, is the institution upon which the structure of society is built. This Court should not permit the foundation, and the orderly conduct of society, to crumble by overturning the definition of marriage.

ARGUMENT

I. MARRIAGE IS THE FUNDAMENTAL SOCIAL CONSTRUCT DEFINED BY ITS NATURE, NOT BY STATUTE OR JUDICIAL DECREE.

Statutes and constitutional amendments which define marriage as the union of one man and one woman are not, as those seeking to redefine the institution argue, laws that "ban same-sex marriage" or "discriminate against same-sex couples." Instead, constitutional provisions statutes such as those under consideration in this case simply memorialize the nature of a fundamental social institution. Neither Nevada nor any other governmental entity creates a "definition of marriage" by which certain subgroups are somehow discriminated against or through which those groups are denied "rights." Long before modern governments were formed marriage was, and still is, a union of one man and one woman that is uniquely structured toward procreation and therefore ensures the continuation of humankind and society. Only the union of a man and a woman can provide the biological,

psychological and sociological connections upon which a stable social structure can be built. By memorializing that unique relationship in the law and providing for certain obligations, responsibilities and benefits, governments acknowledge that marriage, the comprehensive union of one man and one woman, is indispensable to the very future of society.

A. The Supreme Court Has Recognized And Protected The Union Of One Man And One Woman As The Foundational Social Institution Since The Nation's Founding.

As the Supreme Court has recognized since the early days of the Republic, marriage is the foundational social institution. Marriage, *i.e.*, the union of one man and one woman, is “fundamental to the very existence and survival of the race.” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The union of one man and one woman in marriage “is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.” *Maynard v. Hill*, 125 U. S. 190 (1888). Governments “regulate the mode of entering into the contract, but they do not confer the right.” *Meister v. Moore*, 96 U.S. 76, 78-79 (1877).

For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the

union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (emphasis added).

The Supreme Court has removed legislative and judicial barriers placed upon the union of one man and one woman, but has not, because it cannot, change the nature of the union. Indeed, the union of one man and one woman in marriage is not a creation of any one civilization or its statutes, but is an institution older than the Constitution and indeed of any laws of any nation. *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. In recognition of the primacy of the union, the Supreme Court invalidated a prohibition on contraception as impermissibly restricting the union of one man and one woman. *Id.*

Similarly, in *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978), the Supreme Court invalidated a law that prohibited non-custodial parents with child support obligations from marrying without a court order. Again, the

Supreme Court preserved and respected the nature of marriage as the union of one man and one woman by removing an impermissible barrier into entering into *that* union, *i.e.*, the union of one man and one woman. *Id.*

In *Turner v. Safley*, 482 U.S. 78, 97 (1987), the Court invalidated a restriction that provided that prisoners could not marry unless the warden determined that there was a compelling interest. As was true with the restriction against non-custodial parents in *Zablocki* and contraception in *Griswold*, the restriction against inmate marriage in *Turner* was an impermissible barrier to entering into the foundational institution of the union of one man and one woman. *Id.*

When the Supreme Court invalidated Virginia's and all remaining anti-miscegenation laws it, again, removed an improper restriction, *i.e.*, race, imposed upon entering into the union of one man and one woman. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967). As was true with the other artificial barriers placed upon entering into the foundational union of one man and one woman, the anti-miscegenation statutes invalidated in *Loving* did not involve a change in the nature of marriage and so cannot be compared to the present efforts to eliminate the union of one man and one woman and replace it with the union of any two "people." As marriage scholar David Blankenhorn observed, "two men (or two women) seeking to marry one

another is not remotely similar to a black person of one sex seeking to marry a white person of the other sex.”⁵

If a white person of one sex aims to marry a black person of the other sex, we have not the slightest reason to believe that marriage’s fundamental forms are being weakened or violated, or that the institution’s fundamental purposes are being challenged or denied. On the contrary, we have every reason to assume that such a marriage would be fully consistent with the core forms, meanings, and purposes of marriage as a human and social institution. But whenever someone seeks to *prevent* an interracial couple from marrying—say, by passing anti-miscegenation laws – that person is weakening the institution of marriage, because *promoting racism by enforcing racial separatism is not one of marriage’s public purposes*. Accordingly, people who use marriage laws to promote racism are corrupting marriage by grafting onto it a public value that is alien and even hostile to the institution’s core forms, meanings and reasons for being. They are manipulating marriage for their own purposes, turning an institution designed to bring women and men together into one that often keeps them apart.⁶

Consequently, *Loving*, like the other cases addressing restrictions upon the right to marry, was aimed at preserving the right to enter into the union of one man and one woman by removing agenda-driven obstacles that had been improperly engrafted onto the union. Those seeking to overturn laws such as Nevada’s that memorialize marriage as the union of one man and one woman are now trying to engraft another agenda-driven obstacle

⁵ Blankenhorn, *The Future of Marriage* at 174.

⁶ *Id.* at 175-176 (emphasis added).

onto the institution. Actually, they are seeking more than that. They are seeking to replace the institution with their own agenda driven proposal.

B. Marriage As The Union Of One Man And One Woman Reflects Centuries Of Philosophical And Legal Tradition Based On The Inherent Attributes Of Human Beings.

Marriage as the union of one man and one woman is not a recent invention aimed at marginalizing those who seeking alternative lifestyles. Nor is it merely the creation of modern social theory and religious traditions. There is a “2,400 year *philosophical* tradition that has [] distinguished those uniquely comprehensive unions consummated by coitus from all others.”⁷ In fact, “legal and philosophical traditions have, significantly, long termed [coitus] the *generative* act,” as without coitus, organic conception is impossible.⁸

Important philosophical and legal traditions have long distinguished friendships of all kinds from those special relationships that extend two people's union along the bodily dimension of their being and that are uniquely apt for, and enriched by, reproduction and childrearing. The three great philosophers of antiquity—Socrates, Plato, and Aristotle—as well as Xenophanes and Stoics such as Musonius Rufus defended this view—in some cases, amid highly homoerotic cultures.⁹

⁷ Sherif Girgis et al., WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 50 (2012) (emphasis in original).

⁸ *Id.* at 26 (emphasis in original).

⁹ *Id.* at 49.

In other words, even in ancient times, including times in which same-sex relationships were acknowledged or condoned, the union of the male and female bodies in marriage was recognized as a unique institution, more than merely a union of the wills or emotions. For, while same-sex couples can enter into a union of the wills, it is not possible for them to join in body in the way true marriage has always required. Joining in body requires more than a sexual act. It is a natural, organic union that is “coordinated toward a common biological end of the whole that they form together.”¹⁰ By nature,

[In] coitus, and there alone, a man and a woman's bodies participate by virtue of their sexual complementarity in a coordination that has the biological purpose of reproduction—a function that neither can perform alone. Their coordinate action is, biologically, the first step (the behavioral part) of the reproductive process. By engaging in it, they are united, and do not merely touch, much as one's heart, lungs, and other organs are united: by coordinating toward a biological good of the whole that they form together. Here the whole is the couple; the single biological good, their reproduction.¹¹

In fact, it is because of this natural aspect of a female-male union that, historically, consummation of marriage required sexual intercourse, and not simply any sexual act between the couple—the idea was to join the parts that, together, have the potential to embody a whole.¹²

¹⁰ *Id.* at 25.

¹¹ *Id.* at 26.

¹² *Id.* at 25.

Thus, laws defining marriage as the union of one man and one woman are not based upon animus toward same-sex couples, as some have mistakenly assumed, or merely religious or societal norms, but upon advocating for a positive social good that arises only from the union of opposite sexes. but upon advocating for a social good that arises only from the union of opposite sexes. “[I]f the law were just targeting homosexual relationships for exclusion, it would have counted *any* sexual act between a man and a woman as adequate to consummate marriage.”¹³ However, the “law reflected the rational judgment that unions consummated by coitus were valuable in themselves, and different in kind from other bonds.”¹⁴ Accordingly, “two men, two women, and larger groups cannot achieve organic bodily union: there is no bodily good or function toward which their bodies can coordinate,” like procreation.¹⁵ While the bodily union of a male and female who have consented to a marital union has an inherent good, there are inherent harms associated with attempts at bodily union between those of the same sex.¹⁶

¹³ *Id.* at 50 (emphasis in original).

¹⁴ *Id.*

¹⁵ *Id.* at 27.

¹⁶ John R. Diggs, Jr., *The Health Risks of Gay Sex*, Catholic Education Resource Center (2002), <http://www.catholiceducation.org/articles/homosexuality/ho0075.html> (internal citations omitted); *see also HIV and Young Men Who Have Sex*

It is “marriage—the demands of a natural institution—[that has] helped to shape our religious and philosophical traditions,”¹⁷ not religion that has shaped marriage. Marriage, as a comprehensive union of one man and one woman, predates civil government, and is “not peculiar to religion, or to any religious tradition.”¹⁸ In fact, “marriage is a *natural* bond that society or religion can only ‘solemnize.’”¹⁹ Even then, solemnization only binds the individuals participating in the ritual, not third parties who will necessarily be affected by the union. Therefore, a “major function of marriage laws is to bind *all third parties* (schools, adoption agencies, summer camps, hospitals, friends, relatives, and strangers) presumptively to treat a man as father of his wife’s children, husbands and wives as entitled to certain privileges and sexually off-limits, and so on. This only the state can do with any

with Men, Centers for Disease Control and Prevention 1 (June 2012), http://www.cdc.gov/HealthyYouth/sexualbehaviors/pdf/hiv_factsheet_ymism.pdf; *Sexually Transmitted Diseases (STDs): HPV and Men - Fact Sheet*, Centers for Disease Control and Prevention (Feb. 23, 2012), <http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm>; Richard J. Naftalln, *Correspondence: Anal Sex and AIDS*, 360.6399 *Nature* 10 (Nov. 5, 1992); *Gay and Bisexual Men's Health: For Your Health: Recommendations for A Healthier You*, Centers for Disease Control and Prevention (Jan. 21, 2011), <http://www.cdc.gov/msmhealth/for-your-health.html>; *Lesbian and Bisexual Health Fact Sheet*, Womenshealth.gov (Feb. 17, 2011), <http://womenshealth.gov/publications/our-publications/fact-sheet/lesbian-bisexual-health.cfm#d>.

¹⁷ Girgis, *What is Marriage?* at 11 (emphasis in original).

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 2 (emphasis in original).

consistency.”²⁰ Thus, marriage laws protect the common good of health and safety and promote the common good of efficiency. “Private efforts cannot adequately secure [these goods], and yet failure to secure them has very public consequences.”²¹ Since “the state *can* secure it without undue cost, then the state may step in—and should.”²²

However, in so doing, the state is merely protecting those people and institutions affected by the union of one man and one woman. It is not creating and cannot create, or as Appellants seek here, re-create the union. The union was created when human beings were created as males and females who in coming together naturally create new human beings, and thereby perpetuate the race.

II. MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN IS INHERENTLY GOOD FOR STRUCTURING FAMILIES AND SOCIETY.

A. A Framework For Families And Society Must Be Based Upon More Than An Emotional Union.

Marriage is not merely an emotional union of “two people who love each other,” or “are committed to each other,” as those seeking to redefine marriage argue. Instead, marriage provides a framework for mutual benefits—financial, sexual and otherwise—and for affection. An “emotional

²⁰ *Id.* at 41.

²¹ *Id.*

²² *Id.* (emphasis in original).

union cannot stand on its own. People really unite by *sharing a good*, but feelings are inherently private realities, which can be simultaneous but not really shared ... feelings cannot be central to a vow, for we have no direct control over them.”²³

Marriage, unlike purely emotional unions, is inherently good for structuring families. Families are the building blocks for a healthy society and for encouraging permanency and exclusivity in relationships. These benefits, or purposes, of marriage are inherently good.

[A] good must be truly common and for the couple as a whole, but mental states are private and benefit partners, if at all, only individually. The good must be bodily, but pleasures as such are aspects of experience. The good must be inherently valuable, but pleasures are good in themselves only when they are taken in some other, independent good. So while pleasure and delight deepen and enrich a marital union where one exists, they cannot be its foundation.²⁴

Some governments have enacted new “laws” attempting to recast marriage from a shared common good to a purely emotional union with detrimental consequences.

As more people absorb the new law’s lesson that marriage is fundamentally about emotions, marriages will increasingly take on emotion’s tyrannical inconsistency. Because there is no reason that emotional unions—any more than the emotions that define them, or friendships generally—should be permanent or

²³ *Id.* at 55 (emphasis in original).

²⁴ *Id.* at 27.

limited to two, these norms of marriage would make less sense.²⁵

Studies of same-sex “marriage” in Norway and Sweden affirm redefining “marriage” to include same-sex unions leads to diminished commitment and permanence:

In Norway and Sweden, the divorce risk for female partnerships is practically double that for male partnerships. Because our data include legal unions of short durations only, we cannot say much about the fraction of unions that eventually will end in disruption. An application of life-table techniques to our data gives an estimation of the fractions of partnerships that would end in divorce within the partnership durations we can cover, assuming that the duration-specific divorce risks we observe prevail. In Norway, 13% of partnerships of men and 21% of female partnerships are likely to end in divorce within six years from partnership registration. In Sweden, 20% of male partnerships and 30% of female marriages are likely to end in divorce within five years of partnership formation. These levels are higher than the corresponding 13% of heterosexual marriages that end in divorce within five years in Sweden, but not high when compared with divorce levels in the United States. A higher propensity for divorce in same-sex couples is perhaps not very surprising given this group's lower exposure to normative pressure to maintain lifelong unions. In addition, if expectations about relationship duration are based on past relationship experience and on the experiences of one's peers, then lesbians and gay men will probably have lower expectations of relationship duration than will heterosexual people, given the less-institutionalized nature of same-sex relationship dynamics.²⁶

²⁵ *Id.* at 56.

²⁶ Gunnar Andersson, Turid Noack, Ane Seierstad, Harald Weedon-Fekjaer, *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 DEMOGRAPHY 79, 95 (2006).

These studies show that “if sexual complementarity is optional, so are permanence and exclusivity.”²⁷ Permanence and exclusivity are essential to a stable family structure. As the European experiments in same-sex “marriage” vividly illustrate society does not benefit when it seeks to purchase the illusion of marital “equality” at the cost of stable families.

B. Marriage As The Union Of One Man And One Woman Promotes Societal Interests, Not Personal Lifestyles.

Rather than focusing on the inherent good that marriage provides to society, “today’s proponents of same-sex marriage in the United States are seeking to restructure marriage and use it for a special purpose. That purpose is to gain social recognition of the dignity of homosexual love.”²⁸ However, “[a]sserting that legalizing same-sex marriage will enhance the lives or lifestyles of homosexuals misses the target. The proper question is whether, and if so, how, legalizing same-sex marriage will contribute to promoting the public interests in marriage, and to achieving the social policy purposes for which laws establishing marriage have been enacted.”²⁹

Marriage exists for public purposes that can be specified.

²⁷ Sherif Girgis et al., *What is Marriage? Man and Woman: A Defense* 57 (2012).

²⁸ Blankenhorn, *The Future of Marriage*, at 177-178.

²⁹ Lynn D. Wardle, “Multiply and Replenish:” *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL’Y 771, 779 (2001).

Diminishing homophobia is not one of marriage's public purposes. Marriage is institutionally alive to the fact of sexual embodiment and, flowing from it, sexual reproduction. Regarding the subjective and often complex issue of sexual orientation, marriage is institutionally blind, deaf and dumb. It doesn't ask, tell, require, record, stipulate, accept, judge, or reject on the basis of individual sexual desire. Asking marriage to do so now – asking marriage to reconstitute itself according to the criterion of sexual orientation, and in doing so to help change public attitudes about orientation – is asking marriage to do something entirely unprecedented, and something for which the institution is radically ill equipped.³⁰

“Marriage law is not enacted to promote private, personal interests, but to protect and promote those individual interests that are shared in common with society as a whole, i.e., social interests.”³¹ Those interests far exceed recognition of particular emotional bonds or lifestyle choices, to the foundational issues that define society and determine its future.

C. Defining Marriage As The Union Of One Man and One Woman Provides An Objective Structure For The Family And Society.

Preserving the definition of marriage is about preserving a good, the relationship upon which the future of society rests. An objective structure for marriage assists all people in a society, and understanding marriage to be a comprehensive union “respects same-sex attracted people's equal dignity

³⁰ Blankenhorn at 179 (emphasis in original).

³¹ Wardle, “*Multiply and Replenish*” at 778.

and basic needs,”³² while also recognizing that the union of one man and one woman serves public purposes that reinforce key norms necessary to protect children and the reproduction of the family system and society.³³

Consequently, “marriage does not merely reflect individual desire, it shapes and channels it.”³⁴

Marriage law is at its heart not simply a cluster of benefits given to people whose taste in sex or lifestyle we happen to personally approve; it is a set of obligations and rewards that serve important social, not merely personal, goals. Marriage serves a pointing function, elevating a certain type of relationship—permanent, exclusive, normally procreative—above all others. Marriage law demarcates certain public boundaries which social norms can then use to impose informal rewards or sanctions.³⁵

Marriage has innate value.³⁶ It is more than the name that society gives to the relationship that matters most between two adults.

Marriage is, **of its essence**, a comprehensive union: a union of will (by consent) and body (by sexual union); **inherently** ordered to procreation and thus the broad sharing of family life; and calling for permanent and exclusive commitment, ... it is also **a moral reality**: a human good **with an objective structure**, which is **inherently** good for us to live out.³⁷

Marriage as a “comprehensive union is valuable in itself,” in that it

³² Girgis et al., *What is Marriage?* at 53.

³³ See Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 778 (2002).

³⁴ *Id.* at 790.

³⁵ *Id.* at 788-789.

³⁶ Girgis et al., *What is Marriage?* at 50.

³⁷ *Id.* at 6 (emphasis added).

embodies the commitment to reproduction and they go together—“family life specially *enriches* marriage [and] marriage is especially *apt* for family life, which shapes its norms.”³⁸ “For hundreds of years at common law, moreover, while infertility was no ground for declaring a marriage void, only coitus was recognized as consummating (completing) a marriage. No other sexual act between a man and woman could.”³⁹

The complementary nature of marriage as the union of one man and one woman provides an objective structure: two parts that, uniting, create a whole that has the organic, biological capability to reproduce. “[W]hat sets biological processes apart: they don’t depend on our goals or beliefs. Likewise, the behavioral part of the reproductive process (coitus) remains ordered to reproduction even when nonbehavioral factors—like low sperm count—prevent conception.”⁴⁰

Rather than being based on individual interests or benefits, marriage is based on the complementary nature of the union of one man and one woman, which can result in embodiment. This inherent ordering of marriage toward procreation transcends any private desires of the parties. Thus, regardless of whether the parties intend to start a family immediately, or at

³⁸ *Id.* at 29-31.

³⁹ *Id.* at 49.

⁴⁰ Girgis et al., *What is Marriage?* at 75.

any time, the natural structure of marriage is such that it is directed toward the common good of procreation. “Legal recognition makes sense only where regulation does: these are inseparable. The law, which deals in generalities, can regulate only relationships with a definite structure. Such regulation is justified only where more than private interests are at stake, and where it would not obscure distinctions between bonds that the common good relies on.”⁴¹

Certainly, the bond that creates future generations is one upon which the common good relies, and therefore serves as an appropriate objective standard upon which to differentiate between the union of one man and one woman and other relationships.

D. Defining Marriage As The Union Of One Man And One Woman Provides The Optimal Environment For Raising Children.

Marriage is central to the welfare of the community in part because “societies rely on families built on strong marriages to produce what they need but cannot secure: healthy, upright children who become conscientious citizens.”⁴² “Marriages have always been the main and most effective means of rearing healthy, happy, and well-integrated children. The health and order of society depend on the rearing of healthy, happy, and well-integrated

⁴¹ *Id.* at 92.

⁴² *Id.* at 16.

children. That is why law, though it may take not notice of ordinary friendships, should recognize and support [natural] marriage.”⁴³

Experience and social science research have demonstrated that “children fare best overall when reared by their wedded biological parents.”⁴⁴ They “benefit from the love and care of both mother and father, and from their parents' committed and exclusive love for each other.”⁴⁵ Studies show children raised by their wedded biological parents fair best in “*educational achievement*: literacy and graduation rates, *emotional health*: rates of anxiety, depression, substance abuse, and suicide, *familial and sexual development*: strong sense of identity, timing of onset of puberty, rates of teen and out-of-wedlock pregnancy, and rates of sexual abuse, and *child and adult behavior*: rates of aggression, attention deficit disorder, delinquency, and incarceration.”⁴⁶ In addition, “youth living in a family without two biological parents were more likely to runaway than those living with two biological parents.”⁴⁷

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 32.

⁴⁵ *Id.* at 16, 32.

⁴⁶ *Id.* at 42 (emphasis in original).

⁴⁷ Martha W. Waller & Rebecca P. Sanchez, *The Association Between Same-Sex Romantic Attractions and Relationships and Running Away Among a Nationally Representative Sample of Adolescents*, 28 CHILD ADOLESCENT SOCIAL WORK JOURNAL 475, 484 (Aug. 6, 2011) (emphasis in original).

The importance of biological intact families is corroborated by a number of “[r]ecent literature reviews conducted by the Brookings Institution, the Woodrow Wilson School of Public and International Affairs at Princeton University, the Center for Law and Social Policy, and the Institute for American Values. ...”⁴⁸ The “*public* functions of marriage—both to require and to empower parents (especially fathers) to care for their children and each other—require society-wide coordination.”⁴⁹ “Redefining civil marriage will further erode marital norms thrusting the state even more deeply into leading roles for which it is poorly suited: parent and discipliner of the orphaned, provider to the neglected, and arbiter of disputes over custody, paternity, [child support, alimony,] and visitations. As the family weakens, our welfare and correctional bureaucracies grow.”⁵⁰ “In fact, a study by the Left-leaning Brookings Institution f[ound] that **\$229 billion** in welfare expenditures between 1970 and 1996 can be attributed to the breakdown of the marriage culture and the resulting exacerbation of social ills: teen pregnancy, poverty, crime, drug abuse, and health problems.”⁵¹

At stake are *rights*, and costs and benefits (externalities) for all society. Rights, because wherever reasonably possible, parents are entitled to bring up their own children -- and children have a

⁴⁸ Girgis et al., *What is Marriage?* at 43.

⁴⁹ *Id.* at 40 (emphasis in original).

⁵⁰ *Id.* at 9.

⁵¹ *Id.* at 46 (emphasis in original).

right to their own two parents' care. ... [E]xternalities are in play because **failed marriages burden innocent bystanders, including children and ultimately all society**. As we have seen, not only is it impossible for private groups to secure well the interests at stake, but it is also many times more effective, less intrusive, and less costly for the state to do so by reinforcing marital norms than by picking up the pieces from a shattered marriage culture.⁵²

Various sociologists have also corroborated the importance of biologically intact families. A Rutgers University sociologist, David Popenoe, concluded, “gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable. ... **The two sexes are different to the core, each is necessary -- culturally and biologically -- for the optimal development of a human being.**”⁵³ University of Virginia sociologist, W. Bradford Wilcox, similarly concluded “family breakdown poses a serious threat to children and to the societies in which they live.”⁵⁴

The proposition that children fare best when raised by their biological mothers and fathers in an intact family was affirmed in a recent study on the issue of child development. The “Regnerus study” was published in the

⁵² *Id.* at 42 (italics in original; bold added).

⁵³ David Popenoe, *Life without Father: Compelling New Evidence that Fatherhood and Marriage are Indispensable for the Good for Children and Society* 146, 197 (1996).

⁵⁴ W. Bradford Wilcox, *Reconcilable Differences: What Social Science Shows About the Complementarity of the Sexes and Parenting*, 18.9 Touchstone 36 (2005).

Journal of Social Science Research, and found that children raised by lesbian mothers (“LM”) and gay fathers (“GF”) fared far worse than children raised by their biological intact families (“IBF”) in numerous ways.⁵⁵ The Regnerus study is a population-based cross-sectional study of 3,000 young adults between the ages of eighteen and thirty-nine.⁵⁶ The study revealed that

Sixty-nine (69) percent of LMs and 57% of GFs reported that their family received public assistance at some point while growing up, compared with 17% of IBFs; 38% of LMs said they are currently receiving some form of public assistance compared with 10% of IBFs. Just under half of all IBFs reported being employed full-time at present, compared with 26% of LMs. While only 8% of IBF respondents said they were currently unemployed, 28% of LM respondents said the same. LMs were statistically less likely than IBFs to have voted in the 2008 presidential election (41% vs. 57%), and more than twice as likely—19% vs. 8%—to report being currently (or within the past year) in counseling or therapy ‘for a problem connected with anxiety, depression, relationships, etc.,’ an outcome that was significantly different after including control variables.⁵⁷

These statistics convey a strong government interest in encouraging biological intact families through marriage policy. Children raised by biological intact families are much more likely to become productive citizens who vote, are mentally stable, have more stable relationships, and who are less likely to become dependents of the state. In addition, the

⁵⁵ Mark Regnerus, *How Different are the Adult Children of Parents Who have Same-sex Relationships? Findings from the New Family Structures Study*, 41 JOURNAL OF SOCIAL SCIENCE RESEARCH 752, 761 (2012).

⁵⁶ *Id.* at 755, 757.

⁵⁷ *Id.* at 761-62.

children in biological intact families are more likely to enter relationships in which they can organically produce children of their own: in the Regnerus study, 90% of respondents from IBFs identified as entirely heterosexual, whereas only 61% of those raised by LMs and 71% of those raised by GFs reported identifying entirely as heterosexual.⁵⁸ Similarly, “a greater share of daughters of lesbian mothers reported being ‘not sexually attracted to **either** males **or** females’ ... 4.1% of female LMs compared to 0.5% of female IBFs.”⁵⁹ Similarly, those raised by lesbians “fare worse on educational attainment, family-of-origin safety/security, negative impact of family-of-origin, the CES-D (depression) index, one of two attachment scales, report worse physical health, smaller household incomes than do respondents from still-intact biological families, and think that their current romantic relationship is in trouble more frequently.”⁶⁰

Children raised by homosexual fathers also fared worse than children raised in intact biological families. When contrasted with those raised by intact biological families, those raised by gay fathers “reported more modest educational attainment, worse scores on the family-of-origin safety/security and negative impact indexes, less closeness to their biological mother,

⁵⁸ *Regnerus*, at 762.

⁵⁹ *Regnerus*, at 762 (emphasis added).

⁶⁰ *Regnerus*, at 763.

greater depression, a lower score on the current (romantic) relationship quality index, and think their current relationship is in trouble more frequently.”⁶¹ In addition, those raised by both lesbian mothers and gay fathers were more likely than those raised in biological intact families to smoke, have been arrested, and to have pled guilty to non-minor offenses.⁶²

In addition, children are apparently safer in IBF homes. “23% of LMs said yes when asked whether ‘a parent or other adult caregiver ever touched you [sic] in a sexual way, forced you to touch him or her in a sexual way, or forced you to have sexual relations,’ while only 2% of IBFs responded affirmatively. ... Among female respondents, 3% of IBFs reported parental (or adult caregiver) sexual contact/victimization, dramatically below the 31% of LMs who reported the same. Just under 10% of female GFs responded affirmatively to the question.”⁶³ “[C]hildren appear most apt to succeed well as adults -- on multiple counts and across a variety of domains -- when they spend their entire childhood with their married mother and father, and especially when the parents remain married to the present day.”⁶⁴ It appears that children even grow up to mimic the sexual practices of their parents, “while [only] 13% of IBFs reported having had a sexual relationship

⁶¹ *Regnerus*, at 763.

⁶² *Regnerus* at 764.

⁶³ *Regnerus*, at 763.

⁶⁴ *Regnerus*, at 766.

with someone else while they were either married or cohabitating, 40% of LMs said the same.”⁶⁵ Thus, according to the Regnerus study, the comprehensive marriage model encourages responsible procreation by adults, and by encouraging those who have children to first make a permanent, exclusive commitment to the individual with whom he/she plans to procreate, and by encouraging responsible sexual behaviors in their children.

The Regnerus study is one of the most methodologically sound studies on the influence of family structures on children for its size of the sample and its representative nature, but it does not purport to prove causality and it is not longitudinal.⁶⁶ Even so, in critiquing the Regnerus study and analyzing its “limitations, Pennsylvania State University Professor Paul Amato maintained that the study's methodological advantages still make it ‘probably the best that we can hope for, at least in the near future.’”⁶⁷ In addition, understanding the deficiencies of parenting by single parents, divorced parents, step-parents, and adoptive⁶⁸ parents makes it is clear that

⁶⁵ *Regnerus*, at 763.

⁶⁶ *Regnerus*, at 766.

⁶⁷ Girgis et al., *What is Marriage?* at 61.

⁶⁸ While adopted children don’t fare as well as children raised by their wedded biological mothers and fathers, state laws have also historically “reinforce[d] the ideal” of providing children with both, a mother and a father. Girgis et al., *What is Marriage?* at 58 (2012).

same-sex parents cannot provide the optimal environment for rearing children, and treating same-sex unions as marriages “would undermine marital stability in ways that we know do hurt children.”⁶⁹

[The] mind-body union is ordered to the comprehensive good of rearing new members of the human family -- their children -- an open-ended task calling for the coordination of their whole lives, which in turn required undivided commitment. Thus, the norms of marriage, a union specially enriched by family life, fittingly create the stability and harmony suitable for rearing children. ... The intrinsic connection between marriage and children therefore reinforces the reasons spouses have to stay together and faithful for life.⁷⁰

So, “not only does childrearing deepen and extend a marriage; children also benefit from marriage.”⁷¹ The “state of economic and social development we call ‘**civilization**’ depends on healthy, upright, productive citizens; ... [thus,] **civilization depends on strong marriages.**”⁷² The connection between marriage and children provide both a strong reason to support a comprehensive view of marriage and a strong purpose for regulating marriage.⁷³

⁶⁹ *Id.* at 59.

⁷⁰ *Id.* at 34.

⁷¹ *Id.* at 32.

⁷² *Id.* at 38 (emphasis added).

⁷³ *Id.* at 44.

E. Defining Marriage As The Union Of One Man And One Woman Recognizes Their Complementary Roles In Society And Fosters True Equality And Relative Value Of The Sexes.

Encouraging parenting in an intact biological family unit does not just benefit the child, who needs both a mother and a father, but also fosters equality and optimal health and well-being between the sexes, an important societal goal. As marriage scholar William Duncan explained, “marriage is necessary to bridge the differences between the sexes on a footing of equality for both.”⁷⁴ Professor Duncan observed that “marriage provides two significant additional benefits to society which justify its preservation.”

First, **marriage provides an institution where men and women are valued equally.** As currently understood, there can be no marriage without both sexes. Neither sex can be excluded without impairing the institution. This equality is not compelled by lawsuits, as has been the case with the integration of sex-segregated private clubs, but is intrinsic to the nature of the institution. Because the very nature of marriage requires equal participation by men and women, it sends a powerful message about the importance of each sex to society's fundamental unit. Related to this reality of sex equality in marriage is the message that the law of marriage conveys about the relative worth of men and woman, particularly in their roles as fathers and mothers. Redefining marriage to include same-sex couples is a legal endorsement of the fungibility of men and women, mothers and fathers. In other words, when the state says that “any two persons” are equivalent to a mother and father, it is also saying that a mother or a father makes no unique contribution to child well-being. In the United States

⁷⁴ William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 171 (2004) (emphasis added).

there are 16,473,000 children living in mother-only homes and 3,297,000 children in father-only homes. In the face of these numbers, it is eminently reasonable for the state to shrink from sending a legal message that men (fathers) are not essential to marriage or that women (mothers) can be dispensed with without consequences. Marriage advances these state interests by acknowledging that a marriage cannot exist without both a man and a woman.⁷⁵

Professor Wardle agrees that “the assumption that same-sex unions are fungible with marriages in terms of social policy is wrong.”⁷⁶ “In reality, not all relationships are the same, and not all relationships are of equal value to children, to families, and to society.”⁷⁷ “Marriage has an ethical or moral dimension lacking in other relationships that transfigures it into a truly unique institution and that can transform the individual men and women into caring and ‘other-committed’ husbands and wives, at the same time.”⁷⁸

Professor Wardle observed that:

The astounding thing about the argument for functional equivalence between marriage and other partnerships is that it has developed at a time in history when there is overwhelming evidence of the unique value and superior benefits of marriage compared to other adult intimate relationships. **Married couples live longer, are healthier, report that they are happier, have lower rates of mental illness, have lower rates of substance abuse, earn more, save more, have more enjoyable sexual intercourse, [and] experience less physical**

⁷⁵ *Id.* at 171-172 (emphasis added).

⁷⁶ Lynn D. Wardle, *The “End” of Marriage*, 44 FAM. CT. REV. 45, 53 (2006).

⁷⁷ *Id.* at 52.

⁷⁸ *Id.*

and emotional abuse.⁷⁹

Rather than fostering inequality, marriage establishes equality between men and women in a way that other relationships cannot. Both men and women, as well as their children, extended family, community, and society benefit from the equalizing effects of defining marriage objectively as the union of one man and one woman.

III. DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN PROMOTES EQUALITY AMONG THE RELIGIOUS AND NON-RELIGIOUS.

As well as promoting equality between men and women, defining marriage as the union of one man and one woman promotes equality between religious adherents and non-adherents. Memorializing the objective standard of one man and one woman permits religious believers to organize their lives and conduct their businesses in keeping with their sincerely held religious beliefs that marriage is the union of one man and one woman. When the objective standard is removed, so is the protection for those whose beliefs prohibit them from solemnizing or facilitating “marriages” between same-sex couples. In addition, removing the standard creates a domino effect as other standards, such as the limitation to two people or to adults.

If marriage is redefined, then those with sincerely held religious

⁷⁹ *Id.* (emphasis added).

beliefs against same-sex unions being recognized as marriages will find their free exercise rights threatened. A Becket Fund for Religious Liberty survey found “350 separate state anti-discrimination provisions would likely be triggered by recognition of same-sex marriage. The survey found that ... sexual orientation laws are [] far more likely to feature religious or conscience exemptions than laws governing gender or marital status discrimination.”⁸⁰ Thus, while many anti-discrimination statutes currently protect the consciences of religious people who wish to withhold professional endorsement of a particular sexual orientation,⁸¹ such exemptions are not available based on marital status discrimination.

If the state recognizes same-sex unions as marriages, the state would imply that viewing marriage as a comprehensive union “makes *arbitrary* distinctions,” and “marriage supporters would become, in the state’s eyes,

⁸⁰ *Becket Fund for Religious Liberty Issues Brief: Same-Sex Marriage and State Anti-Discrimination Laws*, The Becket Fund for Religious Liberty (January 2009), <http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendices.pdf>.

⁸¹ In the past year states have injected themselves into the relationship between minors and their professional counselors by prohibiting counselors, despite the religious convictions and consciences of the professionals, their minor patients, and the minors’ parents, from counseling minor patients about how to choose a heterosexual sexual orientation. Cal. Bus. and Prof. Code §§ 865, 865.1, 865.2; N.J. Rev. Stat. §§ 45:1-54, 55 (2013). Thus, while many anti-discrimination statutes do protect religious liberty, the fight for the religious liberty of professional counselors, their minor patients, and the parents of those minors is currently raging in the courts.

champions of ‘invidious discrimination.’ This idea would lead to violations of the rights of conscience and religious freedom, and of parents’ rights to direct their children's education.”⁸²

These effects are already being realized. For example, a Christian couple in Oregon which operated Sweet Cakes by Melissa, was forced to close its doors after a lesbian couple filed a complaint with the state alleging discrimination when the couple cited religious reasons for refusing to bake a cake for the lesbian wedding.⁸³ Similarly, in December, a Colorado judge determined a Christian cake-baker in Colorado who owns Masterpiece Cakes would be required to bake cakes for same-sex weddings or else face fines.⁸⁴ In New Mexico, a photography studio was sued for refusing its services to a same-sex couple for their commitment ceremony and the Supreme Court of New Mexico determined the rights of the same-sex couple trump the religious and artistic liberties of the Christian photographers.⁸⁵ In

⁸² Girgis et al., *What is Marriage?* at 63.

⁸³ Cheryl K. Chumley, *Christian Bakers Who Refused Cake Order for Gay Wedding Forced to Close*, The Washington Times (September 2, 2013), <http://www.washingtontimes.com/news/2013/sep/2/christian-bakers-who-refused-cake-order-gay-wedding/>.

⁸⁴ Anugrah Kumar, *Colo. Bakery Can't Refuse Wedding Cake to Same-Sex Couple, Court Rules*, The Christian Post (Dec. 7, 2013, 8:30 AM), <http://www.christianpost.com/news/colo-bakery-cant-refuse-wedding-cake-to-same-sex-couple-court-rules-110280/>.

⁸⁵ Todd Starnes, *NM Court Says Christian Photographers Must Compromise Beliefs*, FOX News and Commentary (August 22, 2013),

New Jersey, even a church was forced to allow a same-sex couple to use its property for its commitment ceremony.⁸⁶

These cases are increasing in frequency and are costing Christian business owners their livelihoods. This is occurring despite the fact that 85 percent of Americans agree that, if a Christian wedding photographer has deeply held religious beliefs opposing same-sex marriage, the wedding photographer should have the right to say no if asked to work a same-sex wedding ceremony.⁸⁷ Further erosion of the objective standard of marriage as the union of one man and one woman will only exacerbate the unequal treatment between religious adherents and non-adherents.

CONCLUSION

Marriage is a comprehensive union that involves the union of both the will and the body. It is naturally ordered toward procreation and family life. It is exclusive and permanent, and therefore, inherently good both for individuals and for society. Same-sex unions are not and cannot be

<http://radio.foxnews.com/toddstarnes/top-stories/nm-court-says-christian-photographers-must-compromise-beliefs.html>.

⁸⁶ Ben Johnson, *Judge Rules Christian Facility Cannot Ban Same-Sex Civil Union Ceremony on its Own Premises*, LifeSiteNews.com (January 13, 2012, 8:48 PM), <http://www.lifesitenews.com/news/judge-rules-christian-facility-cannot-ban-same-sex-civil-union-ceremony-on/>.

⁸⁷ Tyler O'Neil, *Most Americans Say Christian Photographer Has Right to Deny Gay Wedding Request*, The Christian Post (July 17, 2013, 6:29 PM), <http://www.christianpost.com/news/most-americans-say-christian-photographer-has-right-to-deny-gay-wedding-request-100334/>.

comprehensive, and calling same-sex unions marriages would undermine the current objective structure of marriage. Civil government has profound interests in preserving marriage for the benefit of the individuals engaged in the relationship, furthering responsible procreation, and maintaining the family, which is the foundation of society. Should the civil government divert to a subjective structure of marriage, all of society will suffer.

For these reasons, Amicus respectfully requests that the Court affirm the lower court ruling and uphold the definition of marriage as the union of one man and one woman.

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/s/ Mary E. McAlister
STEPHEN M. CRAMPTON
MARY E. McALISTER
MANDI D. CAMPBELL
Liberty Counsel
P.O. Box 11108
Lynchburg, VA 24506
(434) 592-7000 Telephone
(434) 592-7700 Facsimile
email court@lc.org
Attorneys for Amicus Liberty
Counsel

MATHEW D. STAYER
ANITA L. STAYER
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
(800) 671-1776 Telephone
(407) 875-0770 Facsimile
email court@lc.org
Attorneys for Amicus Liberty
Counsel.

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/s/Mary E. McAlister
Mary E. McAlister
Liberty Counsel
P.O. Box 11108
Lynchburg, VA 24506
(434) 592-7000 Telephone
(434) 592-7700 Facsimile
court@lc.org email