UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JONATHAN P. ROBICHEAUX, et al., Plaintiffs v. JAMES D. CALDWELL, et al., Defendants	CIVIL ACTION NO. 13-5090 SECTION F(5) JUDGE MARTIN L.C. FELDMAN MAGISTRATE MICHAEL NORTH REF: ALL CASES

BRIEF OF *AMICI CURIAE*
J. RANDALL TRAHAN AND KATHERINE SHAW SPAHT
ON BEHALF OF DEFENDANTS

Gregory Scott LaCour (Bar No. 23823)
Amanda M. Pendleton (Bar No. 34022)
DAVID J. LUKINOVICH, APLC
4415 Shores Drive, Suite 200
Metairie, Louisiana 70006
Telephone: (504) 818-0401
Telecopy: (504) 818-0408

TABLE OF CONTENTS

TABLE OF AUTHORITIES

LOUISIANA

CONSTITUTION

LEGISLATION

CIVIL CODE ARTICLES

INTEREST OF *AMICI CURIAE*

Amici curiae, J. Randall Trahan and Katherine Shaw Spaht, are professors of law at Louisiana State University. Professor Trahan regularly teaches courses in family law, regularly speaks in a number of "continuing legal education" programs on the subject of family law, and has written several articles pertaining to various aspects of family law. Professor Emeritus Spaht, during her lengthy career, regularly taught family law and published extensively on the subject of marriage and related matters in family law. Her publications include the Louisiana Civil Law Treatise on Matrimonial Regimes. Professors Spaht and Trahan file this brief in their individual capacities,

neither of them representing Louisiana State University or its law school. *Amici curiae* have no personal interest in the outcome of the pending litigation other than as teachers of and commentators on the Louisiana law of marriage and as concerned Louisiana citizens.

ARGUMENT

I. The Louisiana Legislature's decision to enact Louisiana Civil Code art. 3520.B, far from being a bizarre departure from traditional "conflict of laws" principles, was an effort to codify those very principles, an effort that represented a reasoned and proportioned response to a credible threat to those principles posed by then contemporaneous social, political, and judicial developments outside Louisiana.

A central plank of the plaintiffs' case is the contention that the enactment of Louisiana Civil Code Article 3520.B[1] cannot be explained except on the theory that its backers were motivated by some sort of anti-homosexual *animus*. Evidence in support of this theory, the plaintiffs maintain, includes what they regard as the seeming singularity of Article 3520.B. Before Article 3520.B was enacted in 1999, Article 3520, the plaintiffs correctly note, consisted of only one paragraph, that which is now labeled "A", the relevant part of which then read (and still reads) as follows: "A marriage that is valid in the state where contracted . . . shall be treated as a valid marriage unless to do so would violate a strong public policy of the state whose law is applicable [under other general conflicts-of-law principles]." By adding Paragraph B to the article, which explicitly prohibits recognition of foreign same-sex marriages, the Legislature[2] – so say the plaintiffs – did something unprecedented, namely, singled out one specific "strong public policy" of Louisiana from among the

[1] Throughout our brief, we will have occasion to cite a number of Louisiana Civil Code articles. For the sake of convenience, we will hereafter use the abbreviation "LCC art." or simply "Article" in referring to those articles.

[2] Because we will be speaking of the Louisiana Legislature quite a lot in this brief, we will, here and hereafter, use simply the short form expression "Legislature" to refer to it.

others – that against same-sex marriage – for special treatment.

Though the plaintiffs are correct about the "singularity" of LCC art. 3520.B, they are not correct about the considerations that motivated its enactment. As we will explain below, through the enactment of Article 3520.B, the Legislature, far from breaking with traditional conflicts of laws principles, took pains to "codify" them , doing so in the face of a credible threat to those principles posed by then contemporaneous social, political, and judicial developments outside Louisiana.

Before presenting the arguments in support of this proposition, we would do well, first of all, to address several "background" matters. Without a clear understanding of this background, neither the plaintiffs' arguments, nor those we will make to rebut them, can be properly assessed.

First, it is beyond all disputing that the "strong public policy" exception to Louisiana's general choice-of-law rule of *favor matrimonii* – the exception now instantiated in LCC art. 3520 – is of ancient vintage. The exception can be traced at least as far back as 1907[3], when the state supreme court first recognized it *in haec verbae*, and perhaps even as far back as 1855[4], when the state supreme court undoubtedly applied the principle, though without identifying it.

Second, there can be no doubt that Louisiana has, in fact, long had a "strong public policy" against same-sex marriage. Can we point to some "old" piece of legislation, judicial decision, even piece of scholarship that says as much explicitly? No, we cannot. But that is hardly determinative of the question. One cannot very well expect legislators, judges, or scholars to speak to what is unthinkable, and up until recently, the very idea of same-sex marriage most assuredly fit that

---

[3] *Succession of Gabisso*, 119 La. 704, 712, 44 So. 438, 441 (1907).

[4] *Dupre v. Executor of Boulard*, 10 La. Ann. 415, 415 (1855).

description, not just in Louisiana, but around the world.[5] As Professor Spaht has noted in a recent publication,

> [w]hat did not appear at the turn of the century as an incapacity to contract marriage was a person who is of the same sex. It never would have occurred to the lawmaker to prohibit the marriage of persons of the same sex since marriage, a natural institution by definition and by natural law, could only be contracted by persons of the opposite sex. That marriage could be contracted between persons of the same sex would constitute an oxymoron; therefore, there was simply no need to include any prohibition of such "marriage." No other civilization which had recognized the institution of marriage had ever permitted the marriage of persons of the same sex.[6]

One might add to this observation the fact that, from the very beginning of its existence, Louisiana has criminalized the kind of sexual intercourse that same-sex marriage, as a matter of law, would necessarily presuppose, that is, sodomy.[7,8] It is hardly a stretch to suggest that Louisiana has always

---

[5] That this is so was acknowledged by the majority in *U.S. v. Windsor*, 133 S. Ct. 2675, 2689 (2013) ("It seems fair to conclude that, 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. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight.")

[6] Katherine S. Spaht, *The Last One Hundred Years: the Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 253-54 (2003). *See also* J.-R. Trahan, *Impediments to Marriage in Scotland and Louisiana: An Historical-Comparative Investigation*, forming Chapter 7 of MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND 173, at 195 (2009) ("During most of the American period [of Louisiana legal history], it was evidently assumed, as a matter of custom, that persons of the same sex could not contract marriage with each other.")

[7] *See* La. R.S. 14:89.

[8] The notion that same-sex marriage would necessarily entail any form of sexual intercourse, much less a form proscribed by law, requires special comment. Though it seems not to be widely known, the civil law in general and that of Louisiana in particular have long imposed upon spouses what is known as the "positive" duty of "fidelity". As comment (a) to LCC art. 98 explains, "the term 'fidelity'", as used in Article 98, " refers not only to the spouses' duty to refrain from adultery, but also to their mutual obligation to submit to each other's reasonable and normal sexual desires. The

had a "strong public policy" against a form of marriage that, by definition, would entail behavior that Louisiana has always defined as criminal.

Third, it is equally clear that opposition to same-sex marriage is not the only "strong public policy" of Louisiana that might trigger the exception. Alongside that policy there are at least two others. One is the policy against "polygamy", reflected in LCC art. 88.[9] In the previously referenced supreme court opinion of 1907, polygamy was specifically mentioned as one of the those forms of marriage that, even if permitted by the law of some another state, could not be recognized in Louisiana. This conclusion is buttressed by the fact the polygamy was then (and still today) remains a criminal offense in Louisiana.[10] Another is the policy against "incestuous" marriages, reflected in LCC art. 90.A[11], at least insofar as it concerns unions between truly "close" relations, such as parent and child, brother and sister, and even aunt (or uncle) and nephew (or niece).[12] The 1907 opinion

---

jurisprudence has held that the latter obligation is a necessary concomitant of marriage." This duty would fall on any same-sex married couple in Louisiana, just as it falls on any opposite-sex married couple in Louisiana. And, in the case of a same-sex married couple, the only kind of "sex" that each might possibly give the other would be sodomy.

[9] "A married person may not contract another marriage."

[10] "Bigamy is the marriage to another person by a person already married and having a husband or wife living; or the habitual cohabitation, in this state, with such second husband or wife, regardless of the place where the marriage was celebrated." La. R.S. 14:76.

[11] "The following persons may not contract marriage with each other: (1) Ascendants and descendants. (2) Collaterals with the fourth degree, whether of the whole or of the half blood."

[12] The qualification we have added here (reflected in the "at least insofar" clause of the sentence) is made necessary by the fairly recent case of *Ghassemi v. Ghassemi*, 998 So.2d 731 (La. App. 1st Cir. 2008). The court of appeal, applying LCC art. 3520.A, concluded that though LCC art. 90 prohibits marriages between first cousins, the public policy underlying that prohibition is not so "strong" as to preclude the recognition of out-of-state marriages between first cousins contracted in jurisdictions in which such unions are permitted. The court took repeated pains, however, to distinguish first-cousin unions from unions between closer relatives. First, the court wrote this: "In

mentioned incestuous unions together with polygamous unions. And incest between such "close" relations, just like polygamy, was then (and still is) a criminal offence.[13]

With this background now clearly exposed, we can begin to take up the plaintiffs' question – why, in 1999, did the Legislature chose to make only one of its "strong public policies" regarding marriage – that against same-sex marriage – "explicit" by writing it into the text of LCC art. 3520. To us the reason could not be more obvious. Of the three kinds of marriage against which Louisiana has a strong public policy – same-sex marriage, polygamous marriage, and closely-incestuous marriage –, only the first was an "issue" in 1999. At that time, the "homosexual rights" movement was really starting to take off, manifested in a number of ways on a number of fronts: television sitcoms featuring homosexuals in a positive light, sympathetic media reports, celebrities and public intellectuals lining up to speak out against the "last acceptable prejudice", and – this is what's most important – state court decisions here and there recognizing a "state constitutional" right for same-

---

finding no violation, we make a clear distinction between the marriage of first cousins and marriages contracted by more closely-related collaterals, i.e., uncle and niece, aunt and nephew, and siblings." *Id.* at 743-44. Still later, the court added this: "[W]e emphasize that the instant case involves the marriage of first cousins. Although the previously noted laws, both past and present, applied generally to all collaterals within the fourth degree, we reiterate that in finding no violation of a strong public policy, we make a clear distinction between the marriage of first cousins and marriages contracted between more closely-related collaterals. While the former is commonly accepted, the latter is greatly condemned." *Id.* at 747-48. At the very least, then, these statements of the court left the door open to the possibility that out-of-state unions between closer relatives might not be recognized in Louisiana. But one might even go so far as to say (and we would) that these statements should be read as *obiter dictum* to the effect that such unions cannot be recognized.

[13] *See* La. R.S. 14:78 ("Incest is the marriage to, or sexual intercourse with, any ascendant or descendant, brother or sister, uncle or niece, aunt or nephew, with knowledge of their relationship.")

sex couples to enter into marriage-like civil unions[14], if not into marriage itself[15]. By contrast, there was, at that time, no "movement" afoot in the entertainment industry, the media, or academia to legitimize multi-party marriages or marriages between close relatives and, more important still, no judicial decisions had been rendered anywhere even hinting, much less holding, that there might be some constitutional right, state or federal, to enter into such unions. For these reasons, then, back in 1999, whereas the Legislature faced a reasonable prospect that Louisiana judges might be called upon to apply unamended Article 3520 to cases involving out-of-state same-sex marriages, the Legislature faced no prospect whatsoever, reasonable or otherwise, that Louisiana judges might be called upon to apply unamended Article 3520 to polygamous or closely-incestuous marriages. As was only natural and reasonable, the Legislature, while choosing to provide the courts with additional guidance and clarification to help them face the prospect that was on the horizon, did not provide any such additional guidance and clarification to help them face other prospects that were not. In short, there was at that time no need, no exigency, to take action on any subject other than same-sex marriage.[16]

---

[14] *Baker v. State*, 744 A.2d 864 (Vt. 1999).

[15] *Baehr v. Miike*, Civ. No. 91-1394,1996 WL 694235 (Haw. Dist. 1996), *aff'd per curiam*, 87 Haw.34, 950 P.2d 1234 (Haw. 1997). See also *Brause v. Bureau of Vital Statistics,* No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998).

[16] Though there was at that time no pressing reason for the Legislature to take action on subjects such as polygamous marriage or closely-incestuous marriage, it is perhaps worthwhile to consider what might have happened had there been, that is, had then been some sort of push underway elsewhere in the United States in support of one or the other of these alternative forms of marriage, plus a spattering of judicial decisions in other states finding a constitutional right to one or the other. Though we admit we cannot be entirely sure, we are convinced, based on what we know about the Legislature of 1999 in general and about the sponsors of the bill that became 3520.B in particular, that it would have taken the same action against the threat to traditional opposite-sex marriage posed by rising support outside Louisiana for polygamous marriage or closely–incestuous

"But", one might well ask, "if it was in fact 'so clear' circa 1999 that Louisiana had a 'strong public policy' against same-sex marriage, then why did the Legislature think that any such 'additional guidance and clarification' was necessary?" That is a good question, one that demands an answer, for without that answer one cannot fully understand the reason the Legislature enacted Article 3520.B. But answering the question is awkward, for it requires getting into a matter of some delicacy, namely, the Legislature's attitude toward what might be called the "Louisiana judiciary", by which we mean not only the Louisiana state courts but also the federal courts exercising jurisdiction in Louisiana. It is safe to say that as of 1999, many legislators, including those who backed Article 3520.B, were less than confident that every imaginable Louisiana judge before whom an "out-of-state same-sex marriage case" might have been brought would have interpreted the unamended article objectively and faithfully. To be more precise still, the fear was this: that such a case might end up before a judge who, lacking a proper understanding of the limited role of the judiciary within our constitutional system and blinded by a strong ideological commitment to some form of political "progressivism", would have conjured up some "creative" interpretation of the unamended provision – perhaps some sort of "evolutive" argument[17] – the upshot of which would

---

marriage as it did in response to the threat posed thereto by rising support outside Louisiana for same-sex marriage. That is to say, we believe the Legislature would have amended Article 3520 to make explicit the state's strong public policies against these forms of marriage as well. And, had that happened, surely no one would have accused the Legislature of acting out of some invidious *animus* toward those who had entered or hoped to enter into such marriages.

[17] This is the expression used by students of civil law interpretative methodology to refer to a method of interpreting Civil Code provisions that parallels in many ways the so-called "living constitution" approach to interpreting the US Constitution. *See generally* Kenneth Murchison & J. Randall Trahan, WESTERN LEGAL TRADITIONS & SYSTEMS: LOUISIANA IMPACT 175-76, 178, &186 (2003). Though scholarship on interpretative methodology in other civil law systems and in Louisiana consistently mentions this method of interpretation, seemingly with approval, its propriety nevertheless remains controversial. Some scholars, among whom we would include ourselves, fear

have been that, whatever may have been true in the past, Louisiana no longer has a strong public policy against same-sex marriage.

This was not, in our view, an unreasonable fear. It is not demeaning to the judiciary in general nor to this court in particular to point out that there have been (and still are) such judges and that there have been (and continue to be) such cases.[18] No one can deny it. And for that reason alone the Legislature's fear must, we think, be counted as reasonable.

Let us, then, sum up. The Legislature's decision to enact LCC art. 3520.B, far from being a bizarre departure from traditional "conflict of laws" principles, was an effort to codify those very principles, an effort that represented a reasoned and proportioned response to the only "threat" to those principles that was then on the horizon, namely, a potential push to get same-sex marriages that had been validly celebrated in other states recognized in Louisiana. There's nothing at all "irrational" about that.

II. The "strong public policy" against same-sex marriage on which Louisiana Civil Code article 3520.B is premised has its roots in Louisiana's traditional "civil law" understanding of marriage, according to which the procreation and rearing of children are viewed as its natural concomitants; same sex-marriage cannot be reconciled with this venerable understanding of marriage.

Though others may think otherwise, we believe that it is impossible for this court to pass on

---

that this method of interpretation, which can easily be abused, carries with it the very great danger of undermining the balance of powers struck in the state constitution between the legislative and the judicial branches of government and perhaps even the very principle of democratic government itself.

[18] Though there are some cases that everyone (or nearly everyone) would put into this category, such as *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which others should likewise be so classified is, of course, to a large extent a matter of perspective. We know of progressives who would categorize the supreme court's recent decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), or *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), in this way. And for many conservatives, of course, there is no better example than *Roe v. Wade*, 410 U.S. 113 (1973).

the constitutionality of LCC art. 3250.B without considering the "rationality" of the "strong public policy" against same-sex marriage that lies behind it. For that reason, we offer the following observations about the theoretical foundations of that policy. As we will show, those foundations are rooted in a time-honored understanding of marriage that binds it inextricably to the procreation and rearing of children. And, as will become obvious, same-sex marriage is fundamentally incompatible with this understanding.

Louisiana's "strong public policy" against same-sex marriage, a policy reflected not only in the Civil Code[19] but also in the state constitution[20], is intimately tied to – indeed, springs from – Louisiana's traditional "civil law"[21] understanding of marriage. According to that understanding, marriage necessarily concerns children, specifically, the procreation of children and, once they have been born, their care, nurture, development, and protection. In this conception, the production and rearing of children – and not just any children, but children whom the parents produce together through sexual intercourse with one another – is thought to be one of the most fundamental "ends" (purposes) of marriage. And the ideal setting for the rearing of children is understood to be the stable and enduring union of the very parents from whose sexual congress those children spring.

---

[19] *See* LCC art. 86 ("Marriage is a legal relationship *between a man and a woman* that is created by civil contract.") (emphasis added); *id.* art. 89 ("Persons of the same sex may not contract marriage with each other.")

[20] *See* La. Const. Art. 12, § 15 ("Marriage in the state of Louisiana shall consist only of the union of one man and one woman.")

[21] The reference here, of course, is to Louisiana's distinctive legal heritage, a heritage that derives most immediately from the law of Spain and the law of France and, beyond them, from the law of Rome. *See* Murchison & Trahan, *supra* note 17, at 51; J.-R. Trahan, *The Continuing Influence of Le Droit Civil and El Derecho Civil in the Private Law of Louisiana*, 63 La. L. Rev. 1019, 1019 (2003).

This traditional civil law understanding of the purpose and function of marriage is clearly reflected in several of the earliest and most revered sources of Louisiana civil law. Consider, for example, these passages from *Las Siete Partidas*, a 13th century compilation of Spanish civil law that was in force in Louisiana until the late 1820s:

> . . . while their bodies were different according to nature, they should be one, so far as love was concerned, so that they could not be divided, preserving faithfulness to one another; and, besides, that from this affection offspring might be born, by which the world might be peopled . . . [N]one of these things can be lawfully accomplished except by means of offspring, resulting from marriage brought about by the union of man and woman. . . .
>
> . . .
>
> . . . . The third [reason marriage was established is] in order that a man may have greater love for his children, he being certain that they belong to him. . ..
>
> . . .
>
> Very great benefit and many advantages arise from marriage . . . . The second advantage, that of offspring, is having children lawfully to increase the human race, and all should marry with this intention, not only those who cannot have children, but also those who do have them. . . . Moreover, love should increase between husband and wife, since they know that they cannot separate, and are more sure of their children, and love them the more on this account. . . .
>
> . . .
>
> The principal reasons for the institution of marriage are two in number; first, to have children and increase the race of men. . . . [22]

Then there are these passages from Jean Domat's seminal work on French civil law, *Les Lois Civiles dans Leur Ordre Natural*, the reading of which was a prerequisite for admission to the Louisiana bar up until at least the 1840s:

> The engagement that marriage makes between the husband and the wife, and that which birth makes between them and their children, form a particular society in each family . . . .
>
> . . . [T]he union between man and woman, . . . to institute marriage, . . . was to be the source of multiplication and, at the same time, of the liaison of human kind, and in order to give to this union

---

[22] 4 *LAS SIETE PARTIDAS* pt. 4, intro. & tit. 2, intro. & laws 3 & 4, at 877, 886, & 887 (Robert I. Burns, S.J., Burns ed. & Samuel Parsons Scott tr., 2001).

> foundations proportionate to the characteristics of the love that must be the bond within it . . . .
>
> . . .
>
> Thus, marriage, being instituted for the multiplication of human kind, by the union of man and woman . . . .[23]

Remarking on the interplay between marriage and procreation, Robert Pothier, the scholar whose writings on the civil law of the French *ancien régime* formed the basis for much of the *Code Napoléon* and, therefore, of the various Louisiana civil codes, wrote as follows:

> Although carnal commerce is not of the essence of marriage, and the man and the woman may by common consent abstain from it, nevertheless marriage gives to each of the parties a right on the body of the other, which obligates each of them reciprocally to grant this carnal commerce to the other, when it is demanded of him or her. The reason for this obligation is drawn from the ends of marriage. The principal end is the procreation of children, which clearly cannot be achieved without this commerce.[24]

Finally, there is the famous "definition of marriage" offered by J.-E.-M. Portalis, head of the legal commission that wrote the *Projet du Gouvernement*, which, with certain modifications, became the *Code Napoléon*: "[M]arriage . . . is the society of a man and a woman, who unite themselves in order to perpetuate their species, in order to help each other by mutual assistance bear the weight of living, and in order to share their common destiny."[25]

Reading through these early Louisiana civil law sources, one cannot help but be struck by the authors' insistence on the intimate interdependence between marriage, on the one hand, and the

---

[23] 2 Jean Domat, *LES LOIS CIVILES DANS LEUR ORDER NATUREL* ch. III, secs. I-IV, pp. xiii-xvi (2d ed. 1697) (J.R. Trahan tr., 2014).

[24] Robert Pothier, TRAITÉ DU CONTRAT DE MARIAGE n° 5, p. 4, *in* 5 OEUVRES DE POTHIER (Dupin ed., nouv. ed. 1825) (J.R. Trahan tr., 2014).

[25] J.-E.-M. Portalis, *Présentation au Corps Législatif*, in 9 *RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL* 138, at 140 (P.A. Fenet ed., 1827) (J.R. Trahan tr., 2014)

procreation and rearing of children, on the other. For them, the optimal outcome for a child was that he be born to and then reared by parents who were knit together for the long term by marriage and to both of whom the child would be biologically related, that is, both of whom would recognize him as "their own flesh and blood".

Lest there be any misunderstanding, caused perhaps by our having cited these "ancient" Louisiana civil law sources, let us point out that this understanding of marriage is not merely a thing of the distant past. Still in the past, but not so remotely, the state supreme court, interpreting then LCC art. 1556 (which provided for the revocation of donations *inter vivos* upon the birth of a child), confirmed this understanding of marriage:

> The object of marriage, it cannot be disputed, is the perpetuation of families; and the procreation of children is, of necessity, in the contemplation of the parties, to that contract. The interpretation which would make the Legislature declare a donation made in favor of marriage, to be revoked by the happening of that event (the birth of children) which, as all the authorities agree, is a principal object of marriage, is inadmissible.[26]

Much more recently, Professor Spaht, a noted authority on Louisiana family law, spoke out in favor of the traditional understanding in these words:

> A status that is marriage in all but name confirms the idea that marriage is about an essentially private, intimate personal relationship publicly recognized and not about the need to provide a biological father and mother committed to each other, hopefully for life, for the purpose of rearing healthy children. Marriage alone has been the unique publicly privileged intimate relationship. The law privileges marriage so that men and women will be channeled into this vital social institution to continue to perform the very public function of acculturating the next generation of citizens. That acculturation is a long-term enterprise, expensive in both time and economic

[26] *Ledoux v. Her Husband*, 10 La. Ann. 663 (1855).

> resources. There must be no other faux competitor if marriage, properly understood, is to be protected.[27]

But perhaps the best evidence that the traditional civil law understanding of marriage remains alive in Louisiana is the content of Louisiana's contemporary family law itself. This understanding of marriage, which, to repeat, sees marriage and the procreation and rearing of children as necessarily interdependent, undoubtedly underpins much of that law as it is expressed in the current Civil Code. Let us consider, first, the relationship between marriage and procreation. It cannot be gainsaid that the bulk of the law of "paternal filiation", that is, the law that tells us "who is the father" of a given child, is predicated on the law of marriage. Undoubtedly the most fundamental rule of paternal filiation is that which is embodied in current LCC art. 185, which provides that "[t]he husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of the termination of the marriage."[28] Along the same lines is LCC art. 195, which creates a presumption of paternity in favor of "[a] man who marries the mother of a child . . . and who, with the concurrence of the mother, acknowledges the child by authentic act." Next, let us consider the relationship between marriage and child rearing. Among the legal effects of marriage

---

[27] Katherine S. Spaht, *State Constitutional Amendments Prohibiting Same-sex Unions: Winning the "Dual Object" Argument*, 7 FL. C. L. REV. 339, 361-62 (2005). *See also* Katherine S. Spaht, *Revolution and Counter-Revolution: the Future of Marriage in the Law*, LOY. L. REV. 1, 47-48 (2003). ("Successful societies isolate and prefer a certain type of sexual union over others because of the need of children for both mothers and fathers. As Maggie Gallagher summarized in her article entitled, What Is Marriage For?, 'the purpose of marriage is inherently normative - to foster a certain kind of sexual union between men and women characterized by caretaking, sharing of resources, procreation, and long-term commitment in order to encourage the protection of children and the reproduction of society.'")

[28] This is Louisiana's current statement of the ancient Roman law rule *pater is est quem nuptiae demonstrant* (the father is he whom marriage indicates). *See generally* J.-R. Trahan, *Glossae on the New Law of Filiation*, 67 LA. L. REV. 387, 400-01 (2007) (gloss # 15).

is the conferral on the married parents of "family authority", described in LCC art. 99 as follows: "Spouses mutually assume the moral and material direction of the family, exercise parental authority, and assume the moral and material obligations resulting therefrom." Regarding this "parental authority", it bears noting that it is the prerogative (and responsibility) only of married couples, as the juxtaposition of LCC arts. 215-237 against LCC arts. 238-245 reveals.[29] One element of parental authority (it might also be thought of as an element of the "material obligations" referred to in Article 99) that is of particular interest here is the responsibility of parents to support their children, a matter addressed in LCC art. 227. It is telling that in this article the Legislature grounds the obligation of support not in the mere fact of maternity or paternity itself, but rather in the "very act of contracting marriage".[30] Thus, we see that, again and again, the concept of marriage is linked up in the minds of Louisiana's legislators with the concepts of procreation and child rearing. And back of that linkage, we believe, is the traditional civil law understanding that whatever else marriage may be "for", it is certainly for procreation and child rearing.

So much, then, for Louisiana's traditional "civil law" understanding of marriage. What remains for us to consider is what room there is, if any, for same-sex marriage within that understanding. The indisputable answer is "no room". It should be obvious that between the traditional civil law notion of marriage and same-sex marriage there is an unbridgeable chasm. Same-sex marriage, by its very nature, is not "procreative". The sexual intercourse in which same-

---

[29] This does not mean that "single parents" or unmarried parents have no "power" over their children. They do. But it is the power of "tutorship", *see* LCC art. 246, which suffers more restrictions and enjoys fewer "perks" than parental authority.

[30] This is not to say that unmarried parents have no obligation to support their children. They do. *See* LCC art. 240. Nevertheless, the fact still remains that, for married parents, the obligation of support springs at least in part from the marriage itself.

sex spouses engage is, by nature, incapable of producing offspring. To produce offspring, such a couple must reach outside themselves, beyond their union, to some third person, be it a friend or a stranger. But in that case, the resulting offspring would be the biological progeny of just one of the spouses, with the consequence that these offspring would end up being reared by parents to one of whom they were not related biologically. For reasons that we have made clear, this represents a significant departure from the traditional civil law ideal of marriage.

CONCLUSION

For these reasons, *Amici curiae* Professors Trahan and Spaht urge this court to uphold the constitutionality of LCC art. 3520.B.

Respectfully submitted,

/s/ Gregory Scott LaCour
Gregory Scott LaCour (Bar No. 23823)
Amanda M. Pendleton (Bar No. 34022)
DAVID J. LUKINOVICH, APLC
4415 Shores Drive, Suite 200
Metairie, Louisiana 70006
Telephone: (504) 818-0401
Telecopy: (504) 818-0408

Counsel for Amici Curiae
Professor J. Randall Trahan &
Professor Katherine Shaw Spaht

CERTIFICATE OF SERVICE

I hereby certify that, on May 12, 2014, the foregoing brief was filed with the Clerk of the Court using the Court's CM/ECF system. I further certify that counsel for all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Gregory Scott LaCour
Gregory Scott LaCour
May 12, 2014