Nos. 14-5297

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VALERIA TANCO and SOPHY JESTY, et al.,

Plaintiffs-Appellees,

v.

WILLIAM HASLAM, Governor of the State of Tennessee, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
For the Middle District of Tennessee
Case No. 3:13-cv-01159

BRIEF OF AMICI CURIAE REPUBLICANS IN SUPPORT OF APPELLEES AND AFFIRMANCE

Sean R. Gallagher, sgallagher@polsinelli.com
Stacy A. Carpenter, scarpenter@polsinelli.com
Bennett L. Cohen, bcohen@polsinelli.com
Jon R. Dedon, jdedon@polsinelli.com

POLSINELLI PC
1515 Wynkoop St., Ste. 600
Denver, CO 80202
303-572-9300

Attorneys for Amici Curiae

Date: June 16, 2014

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INTEREST OF AMICI CURIAE

Amici are members of the Republican Party who embrace the individual freedoms protected by our Constitution. They embrace Ronald Reagan's belief that the Republican Party must be a "big tent." Though they hail from diverse backgrounds, they share a common belief in the importance of limited government, individual freedom and stable families. Many have served as elected or appointed officeholders in states within the Sixth Circuit. They share Barry Goldwater's belief that "[w]e don't seek to lead anyone's life for him. We only seek . . . to secure his rights, . . . [and] guarantee him opportunity to strive, with government performing only those needed and constitutionally sanctioned tasks which cannot be otherwise performed." Because Amici believe that these values are advanced by recognizing civil marriage rights for same-sex couples, Amici submit that, for the reasons set forth herein, this Court should affirm the judgments of the district courts.

A full list of Amici is provided as an Appendix to this brief.

AUTHORSHIP STATEMENT

Pursuant to F.R.A.P. 29(c), Amici state that the parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no party has made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici hold a diverse set of social and political views, but generally believe that while government should play a limited role in the lives of Americans, it must act when individual liberties are at stake. Amici are united in their belief that, to the extent that the government acts in ways that affect individual freedom in matters of family and child-rearing, it should promote family-supportive values like responsibility, fidelity, commitment, and stability, but that such considerations cannot be determined based solely on history and tradition.

As various states have legalized civil marriage for same-sex couples, undersigned Amici, like many Americans, have examined the emerging evidence and have concluded that there is no legitimate, fact-based reason for denying same-sex couples the same recognition in law that is available to opposite-sex couples. To the contrary, Amici have concluded that marriage is strengthened and its benefits, importance to society, and the social stability of the family unit are promoted by providing access to civil marriage for same-sex couples. In the absence of a legitimate, fact-based reason, Amici believe that the Constitution prohibits denying same-sex couples access to the legal rights and responsibilities that flow from the institution of civil marriage. This view is buttressed by the United States Supreme Court's recent ruling that no rational basis exists to treat

same-sex marriage differently at the federal level. *See United States v. Windsor*, 133 S.Ct. 2675 (2013).

Amici acknowledge that deeply-held social, cultural, and religious tenets lead sincere and fair-minded people to take the opposite view. However, no matter how strongly or sincerely they are held, the law is clear that such views cannot serve as the basis for denying a certain class of people the benefits of marriage in the absence of a legitimate fact-based governmental goal. Amici take this position with the understanding that providing access to *civil* marriage for same-sex couples poses no credible threat to religious freedom or to the institution of religious marriage. Amici believe firmly that religious individuals and organizations should, and will, make their own decisions about whether and how to participate in marriages between people of the same sex, and that the government must not intervene in those decisions

Amici believe strongly in the principle of judicial restraint and that courts generally ought to defer to legislatures and the electorate on matters of social policy. Amici also believe that courts should be particularly wary of invoking the Constitution to remove issues from the normal democratic process. But Amici equally believe that actions by legislatures and popular majorities can on occasion pose significant threats to individual freedom, and that, when they do, courts should intervene. It is precisely at moments like this—when discriminatory laws

appear to reflect unexamined, unfounded, or unwarranted assumptions rather than facts and evidence, and the rights of one group of citizens hang in the balance—that the courts' intervention is most needed. Amici accordingly urge this Court to affirm the judgment below.

ARGUMENT

I. THERE IS NO LEGITIMATE, FACT-BASED JUSTIFICATION FOR DIFFERENT LEGAL TREATMENT OF COMMITTED RELATIONSHIPS BETWEEN SAME-SEX COUPLES.

Equal protection analysis typically invokes one of three levels of scrutiny: strict scrutiny, intermediate scrutiny, or rational basis review. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Strict scrutiny applies to suspect classifications based on race, alienage, or national origin. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Under strict scrutiny review, a state must show that the challenged classification is narrowly tailored to further a compelling governmental interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Intermediate scrutiny has been applied to quasi-suspect, discriminatory classifications based on illegitimacy and gender. *Cleburne*, 473 U.S. at 441. To survive intermediate scrutiny review, a classification must be substantially related to a sufficiently important governmental interest. *Id.* All other classifications are subject to a rational basis review. *Id.* at 440-41. Under rational basis review, a classification can only be upheld if there is

a rational relationship between the disparity of treatment and some legitimate governmental purpose. *Heller v. Doe*, 509 U.S. 312, 319 (1993).

In order to survive under a rational basis test, a law that makes distinctions between classes of people must have "reasonable support in fact," *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 17 (1988), and must "operate so as rationally to further" a legitimate government goal. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 537 (1973). That law "must find some footing in the realities of the subject addressed by the legislation," *Heller*, 509 U.S. at 321, and a court reviewing it must insist on knowing the relation between the classification adopted and the object to be attained. *Romer v. Evans*, 517 U.S. 620, 632 (1996). A law will not survive rational basis analysis unless it is "narrow enough in scope and grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]." *Id.* at 632–33.

Recent rulings in marriage cases for same-sex couples have observed that discrimination on the basis of sexual orientation fits well into the Supreme Court's analysis of factors meriting application of strict or heightened scrutiny. *See De Leon v. Perry*, 975 F. Supp. 2d 632, 649-652 (W.D. Tex. 2014) (reviewing cases supporting application of strict scrutiny to laws that discriminate on the basis of sexual orientation); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999 at *16-18 (D. Idaho May 13, 2014) (applying heightened scrutiny to Idaho's

marriage laws); *Whitewood v. Wolf*, No. 1:13-CV-1861, 2014 WL 2058105 at *14 (M.D.Pa. May 20, 2014) (finding that classifications based on sexual orientation are quasi-suspect and therefore subject to heightened scrutiny); *Wolf v. Walker*, 2014 WL 2558444 at *31 (finding that "Wisconsin's marriage amendment… [is] subject to heightened scrutiny under both the due process clause and the equal protection clause."); *Wright v. Arkansas*, No. 60CV-13-2662, 2014 WL 1908815 (Ark. Cir. Ct., Pulaski Cnty, May 09, 2014) (order granting summary judgment) (coming to the "undeniable conclusion that same-sex couples [are] to be considered a suspect or quasi-suspect classification.").

The Supreme Court consistently applies heightened scrutiny to laws that discriminate against groups that have experienced a "history of purposeful unequal treatment or have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). In applying heightened scrutiny, the Supreme Court also considers whether the distinguishing characteristic is "immutable" or beyond the group member's control, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); and whether the group is "a minority or politically powerless," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). *See also United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

Various district courts addressing these marriage cases have also chosen to avoid a strict scrutiny analysis because, as the lower courts here recognized, discrimination on the basis of sexual orientation in the context of marriage cannot survive even the lowest level of review – rational basis scrutiny. *E.g. De Leon*, 975 F. Supp. 2d at 653; *Geiger v. Kitzhaber*, No. 6:13-CV-01834-MC, 2014 WL 2054264, at *9; *Wright v. Arkansas*, 2014 WL 1908815 at *2. After all, even rational basis review is not toothless. It requires that the law in question serve a "legitimate" governmental interest. *Moreno*, *supra*; *see also SECSYS, LLC v. Vigil*, 666 F.3d 678, 685–86 (10th Cir. 2012) (equal protection inquires into whether a discriminatory law "can be justified by reference to some upright government purpose."); *Cleburne*, 473 U.S. at 442-50 (rejecting lower courts' decision to analyze law discriminating against mentally disabled persons under intermediate scrutiny, but nonetheless holding that the law failed rational basis review); *Romer v. Evans*, 517 U.S. 620, 632-35 (1996) (striking down, under rational basis review, Colorado constitutional amendment that prohibited state and local laws that would afford protected status based on sexual orientation).

Amici do not believe the constitutional and statutory at issue here rest on a legitimate, fact-based justification for excluding same-sex couples from civil marriage. Over the past two decades, the arguments presented by proponents of such initiatives have been discredited by social science, rejected by courts, and

contradicted by Amici's personal experience with same-sex couples. Amici thus do not believe that any "reasonable support in fact" exists for arguments that allowing same-sex couples to join in civil marriage will damage the institution of marriage, jeopardize children, or cause any other social ills. Rather, experience shows that permitting civil marriage for same-sex couples will do quite the opposite and will actually enhance the institution, protect children, and benefit society generally.

A. Although the Constitutional and Statutory Provisions at Issue May Rest on Sincerely Held Beliefs and Tradition, That Does Not Sustain Their Constitutionality.

While the proponents of the subject constitutional and statutory provisions prohibiting civil marriages of same-sex couples may hold strong beliefs that are founded on the history of the man-woman definition of marriage, tradition and sincere beliefs cannot insulate those provisions from rational basis scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Heller*, 509 U.S. at 326 ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("Neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.").

The Supreme Court has repeatedly recognized that private beliefs, no matter how strongly held, do not, without more, establish a constitutional basis for a law.

Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (private beliefs "may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); *Reitman v. Mulkey*, 387 U.S. 369, 374-76 (1967) (striking down constitutional referendum repealing state anti-discrimination laws, and holding that that enshrining such "private discriminations" in state law violated the Fourteenth Amendment).

Gender discrimination cases provide a particularly clear illustration of how formerly widespread traditional views alone cannot justify a discriminatory law. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) ("old notions" and "role-typing" did not supply a rational basis for classification); *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) ("If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed."); *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (rejecting "increasingly outdated misconceptions" as "loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy"); *Trammel v. United States*, 445 U.S. 40, 52 (1980) (rejecting basis for law discriminating based on sex because its "ancient foundations ... have long since disappeared" as "over the years those archaic notions [of women's roles] have been cast aside").

Moreover, courts in other such cases have consistently and explicitly rejected traditional views as supplying a sufficient rational basis to support bans on same-sex couples marrying. *See Geiger v. Katzhaber*, 2014 WL 2054264 at *11 (finding that "[l]imiting civil marriage to opposite-gender couples based only on a traditional definition of marriage is simply not a legitimate purpose."); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 475 (E.D. Va. 2014) (noting that "tradition alone cannot justify denying same-sex couples the right to marry any more than it could justify Virginia's ban on interracial marriage."); *Bourke v. Beshear*, No. 3:13–CV–750–H, 2014 WL 556729 at *7 (W.D. Ky. Feb 12, 2014) (holding that tradition cannot alone justify the infringement on individual liberties); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 998 (N.D. Cal. 2010) ("[T]he state must have an interest apart from the fact of the tradition itself."); *Golinski v. U.S. Office of Personnel Management*, 824 F.Supp.2d 968, 998 (N.D. Cal. 2012) ("[T]he argument that the definition of marriage should remain the same for the definition's sake is a circular argument, not a rational justification."); *De Leon*, 2014 WL 715741 at *16.[1]

[1] Justice Scalia's dissent in *Lawrence v. Texas* acknowledged as much, when he wrote that "[p]reserving the traditional institution of marriage ... is just a kinder way of describing the State's moral disapproval of same-sex couples." 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). This interest of expressing moral disapproval, however, can be no more legitimate when applied to discrimination on the basis of sexual orientation than it was when applied to the defense of laws

B. Marriage Promotes the Conservative Values of Stability, Mutual Support, and Mutual Obligation.

The marriage bans at issue here fare no better in their equal protection analysis when the court considers the governmental goal of preserving and protecting the institution of marriage.

Marriage is a venerable institution that confers countless benefits, both to those who marry and to society at large. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("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." (internal quotation marks omitted)). Marriage makes it immeasurably easier for family members to make plans with, and decisions for, each other, without relying on outside assistance from lawyers. Married individuals can make medical decisions together (or for each other if one spouse is not able to make a decision) and can make joint decisions for the upbringing of children; they can plan jointly for their financial future and their retirement; they can hold property together; they can share a spouse's medical insurance policy and have the health coverage continue for a

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enshrining traditional gender roles. *Id.* at 571; *Stanton*, *supra*; *Craig*, *supra*. *Accord Windsor*, 133 S.Ct. at 2694.

period after a spouse's death; and they have increased protections against creditors upon the death of a spouse. Some—not all—of these rights and responsibilities can be approximated outside marriage, but only marriage provides family members with the security that these benefits will be *automatically* available when they are most needed.

Marriage also benefits children. "We know, for instance, that children who grow up in intact, married families are significantly more likely to graduate from high school, finish college, become gainfully employed, and enjoy a stable family life themselves[.]" Institute for American Values, *When Marriage Disappears: The New Middle America* 52 (2010); *see also id*. at 95 ("Children who grow up with cohabiting couples tend to have more negative life outcomes compared to those growing up with married couples. Prominent reasons are that cohabiting couples have a much higher breakup rate than do married couples, a lower level of household income, and a higher level of child abuse and domestic violence." (footnote omitted)). These benefits have become even more critical in recent decades, as marital rates have declined and child-rearing has become increasingly untethered to marriage. *See, e.g.*, Cherlin, *American Marriage in the Early Twenty-First Century*, 15 The Future of Children 33, 35-36 (2005).

As numerous courts have recognized, these findings do not depend on the gender of the individuals forming the married couple. *See Perry v.*

Schwarzenegger, 704 F.Supp.2d at 980 ("Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted"); *Varnum v. Brien*, 763 N.W.2d 862, 899 (Iowa 2009) ("Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents."). In fact, all courts to recently examine the issue have concluded that prohibitions on same-sex marriage actually harm familial stability rather than help it. *See De Leon*, 2014 WL 715741 at *14 ("[T]his Court finds that far from encouraging a stable environment for childrearing, [Texas' same-sex marriage ban] denies children of same-sex parents the protections and stability they would enjoy if their parents could marry."); *Geiger*, 2014 WL 2054264 at *11 ("Although protecting children and promoting stable families is certainly a legitimate governmental interest, the state's marriage laws do not advance this interest – they harm it."); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 994-995 (S.D. Ohio 2013) (noting the only effect the marriage recognition bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married); *Golinski v. U.S. Office of Personnel Management*, 824 F.Supp.2d 968, 992 (N.D. Cal. 2012) ("The denial of recognition and withholding of marital benefits to same-sex couples does nothing

to support opposite-sex parents, but rather merely serves to endanger children of same-sex parents."); *Pedersen v. Office of Personnel Management*, 881 F.Supp.2d 294, 336-37 (D. Conn. 2012) (finding that the denial of marriage to same-sex parents "in fact leads to a significant unintended and untoward consequence by limiting the resources, protections, and benefits available to children of same-sex parents.").

As Professors Jesse Choper and John Yoo—who support civil marriage for same-sex couples as a policy choice—have explained:

> With regard to gay marriage, the cost of a prohibition is the restriction of the liberty of two individuals of the same sex who seek the same legal status for an intimate relationship that is available to individuals of different sexes. This harm may not be restricted just to the individuals involved but may also involve broader social costs. If the government believes that marriage has positive benefits for society, some or all of those benefits may attach to same-sex marriages as well. Stable relationships may produce more personal income and less demands on welfare and unemployment programs; it may create the best conditions for the rearing of children; and it may encourage individuals to invest and save for the future.

Choper & Yoo, *Can the Government Prohibit Gay Marriage?*, 50 S. Tex. L. Rev. 15, 33-34 (2008).

Moreover, hundreds of thousands of children being raised by same-sex couples[2]—some married, some precluded from marrying—would benefit from the

[2] *See* Sears, *et al.*, *Same-Sex Couples and Same-Sex Couples Raising Children in the United States: Data from Census 2000*, at 1 (Sept. 2005) (reporting that same-sex couples are "raising more than 250,000 children under age 18").

security and stability that civil marriage confers. The denial of civil marriage to same-sex couples does not mean that their children will be raised by married opposite-sex couples. Rather, the choice here is between allowing same-sex couples to marry, thereby conferring on their children the benefits of marriage, and depriving those children of married parents altogether.

C. Social Science Does Not Support Any of the Putative Rationales for the State Constitutional and Statutory Provisions at Issue.

Proponents of laws like the constitutional and statutory provisions at issue here have advanced certain social-science arguments that they contend support the exclusion of same-sex couples from civil marriage. The proponents' main arguments are (1) *deinstitutionalization*: that allowing same-sex couples to marry will harm the institution of marriage by severing it from child-rearing; (2) *biology*: that marriage is necessary only for opposite-sex couples because only they can procreate; and (3) *child welfare*: that children are better off when raised by two parents of the opposite sex. Each of these arguments reflects a speculative assumption rather than fact, is unsupported in the records in these cases, and has in fact been refuted by evidence.

Deinstitutionalization. No credible evidence supports the deinstitutionalization theory, and courts that have considered this argument have not found it persuasive. *See Pedersen*, 881 F.Supp.2d at 335-39. Extending civil marriage to same-sex couples is a clear endorsement of the multiple benefits of

marriage—including stability, lifetime commitment, and financial support during crisis and old age—and a reaffirmation of the social value of this institution for all committed couples and their families. Although marriage has undoubtedly faced serious challenges over the last few decades, as demonstrated by high rates of divorce and greater incidence of child-bearing and child-rearing outside marriage, nothing suggests that allowing committed same-sex couples to marry has exacerbated or will in any way accelerate those trends, which have their origins in complex social forces. *See* Choper & Yoo, 50 S. Tex. L. Rev. at 34 ("We are not aware of any evidence that the marriage of two individuals of the same sex produces any tangible, direct harm to anyone either in the marriage or outside of it.").

Opposite-sex couples confront many challenges in raising families, and Amici strongly believe that society should make marriage a stronger and more valuable institution for those couples and families. But those challenges will remain whether or not same-sex couples can marry.

In addition, the evidence (albeit limited) from States that allow civil marriage for same-sex couples undermines the deinstitutionalization hypothesis. Same-sex marriage has had no measurable negative effect on rates of marriage, divorce, or birth in States where it has been recognized. *See De Leon*, 2014 WL 715741 at *14 ("Defendants have failed to establish how recognizing a same-sex

marriage can influence, if at all, whether heterosexual couples will marry, or how other individuals will raise their families."). As the District Court in *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1211 (D. Utah 2013) correctly noted:

> [I]t defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts. Both opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support.

Biology. There is also no biological justification for denying civil marriage to same-sex couples. Allowing same-sex couples to marry in no way undermines the importance of marriage for opposite-sex couples who enter into committed relationships to provide a stable family structure for their children. Indeed, there is no evidence that marriage between individuals of the same sex affects opposite-sex couples' decisions about procreation, marriage, divorce, or parenting whatsoever. *Cf. Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012), *aff'd* 133 S.Ct. 2675 (2013) (laws burdening same-sex couples' right to civil marriage "do[] not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation,'" as the "[i]ncentives for opposite-sex couples to marry and procreate (or not) [are] the same after [such laws are] enacted as they were before" (footnote omitted); *Massachusetts v. HHS*, 682 F.3d 1, 14-15 (1st Cir. 2012) (laws burdening same-sex couples' right to civil marriage "do[] not increase benefits to opposite-sex couples ... or explain how denying benefits to same-sex couples will reinforce

heterosexual marriage. Certainly, the denial will not affect the gender choices of those seeking marriage").

Our society has long recognized that civil marriage provides numerous benefits to couples who are unable to, or who choose not to, bear children. Some married couples adopt children and thus benefit from the child-protective institution of marriage; others marry after child-bearing age but still benefit from the web of rights and obligations conferred by marriage. Whatever the merits of speculation that marriage was originally fashioned only to channel the procreative impulse, it has been centuries since marriage was so limited (if it ever was). Our Nation's first President and his wife had no children together, but their marriage provided a protective family structure for raising Martha Washington's children by her first marriage as well as her grandchildren. *See* Chernow, *Washington: A Life* 78-83, 421-22 (2010).

Moreover, hundreds of thousands of children are *in fact* being raised in loving families with same-sex parents. The last few decades have demonstrated that many same-sex couples strongly wish to raise children and are doing so. This is a social development that will not be reversed, but will likely only accelerate. Because Amici believe that having married parents is optimal for children, Amici conclude that granting the rights and responsibilities of civil marriage to same-sex

couples will benefit, not harm, these hundreds of thousands of children, as well as the many children who will be raised by same-sex couples in the future.

Child Welfare. Amici are not aware of any persuasive evidence that same-sex marriage is detrimental to children. Social scientists have resoundingly rejected the claim that children fare better when raised by opposite-sex parents than they would with same-sex parents. Empirical research "gathered during several decades" showed "no systemic difference" between the child-rearing capabilities of same-sex and heterosexual parents, but rather that the sexual orientation of a child's parent had no measureable effect on the child's well-being. Perrin, *et al.*, Technical Report: *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341, 343 (2002) (finding no differences regarding "emotional health, parenting skills, and attitude towards parenting" between same-sex and opposite-sex parents, and finding that "[n]o data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents"); *see also* Farr, *et al., Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 Applied Developmental Sci. 164, 175 (2010) (finding children adopted by same-sex parents to be "as well adjusted as those adopted by heterosexual parents" and that there were "no significant

differences" between same-sex and heterosexual parents "in terms of child adjustment, parenting behaviors, or couples' adjustment").[3]

Courts are necessarily guided by evolving notions of what types of discrimination can no longer be maintained as legitimate. Although Amici firmly believe that society should proceed cautiously before adopting significant changes to beneficial institutions and should carefully weigh the costs and benefits of such changes, Amici do not believe that society must remain indifferent to facts. *Cf.* 2 Burke, *The Works of the Right Honourable Edmund Burke* 295 (Bell ed. 1886) ("A state without the means of some change is without the means of its conservation."). Our Nation has undergone too many changes for the better already—especially in its repudiation of discrimination against minorities—to allow social policy to be dictated by unexamined assumptions undermined by evidence.

[3] Courts that have examined the evidence have unanimously agreed with these studies. *See Gill v. Office of Personnel Management*, 699 F.Supp.2d 374, 388 (D. Mass. 2010) ("[A] consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents."); *Golinski*, 824 F.Supp.2d at 991-92 (examining studies on each side and concluding that there is no "genuine issue of disputed fact regarding whether same-sex married couples function as responsible parents").

In addition, no evidence suggests that the sexual orientation of a child's parents has an impact on a child's sexual orientation. Tr. 1029-32, *Perry* (N.D. Cal. Jan. 15, 2010) (testimony of Michael Lamb, expert in developmental psychology); *see also* Farr, 14 Applied Developmental Sci. at 175 (finding that children of same-sex parents exhibit "typical gender development").

The constitutional and statutory provisions at issue here rest on similar beliefs—sincere and strongly held, but ultimately illegitimate in the eyes of the law and devoid of any true grounding in facts—and thus cannot stand even under rational basis scrutiny.

II. THIS COURT SHOULD PROTECT THE FUNDAMENTAL RIGHT OF CIVIL MARRIAGE BY ENSURING THAT IT IS AVAILABLE TO SAME-SEX COUPLES.

It is well established that the right to marry a spouse of one's own choosing is a fundamental right, guaranteed under the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); *United States v. Kras*, 409 U.S. 434, 446 (1973) (concluding the Court has come to regard marriage as fundamental); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Skinner v. Okla. ex. rel. Williamson*, 316 U.S. 535, 541 (1942) (noting marriage is one of the basic civil rights of man fundamental to our existence and survival); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (characterizing marriage as "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress."). *Accord Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (holding that our federal

Constitution "undoubtedly imposes constraints on the state's power to control the selection of one's spouse"); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977) ("[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.").

Amici value marriage and families, which play a central role in our society and reinforce essential values such as commitment, faithfulness, responsibility, and sacrifice. Marriage is the foundation of the secure families that form the building blocks of our communities and our Nation. It both provides a protective shelter and reduces the need for reliance on the State.

Choosing to marry is also a paradigmatic exercise of human liberty. Indeed, "[i]t is only those who cannot marry the partner of their choice ... who are aware of the extent to which ... the ability to marry is an expression of one's freedom." Tr. 206, *Perry* (N.D. Cal. Jan. 11, 2010). As an expert on the history of marriage testified, "When slaves were emancipated, they flocked to get married. And this was not trivial to them, by any means. [One] ex-slave who had also been a Union soldier ... declared, 'The marriage covenant is the foundation of all our rights.'" *Id.* at 202-03. Marriage is thus central to the liberty of individuals and a free society. Indeed, the mutual dependence and obligation fostered by marriage affirmatively advance the appropriately narrow and modest role of government. *See* Goldwater,

The Conscience of a Conservative 14 (1960) ("[F]or the American Conservative, there is no difficulty in identifying the day's overriding political challenge: it is to preserve and extend freedom. As he surveys the various attitudes and institutions and laws that currently prevail in America, many questions will occur to him, but the Conservative's first concern will always be: *Are we maximizing freedom?*").

For those who choose to marry, the rights and responsibilities conveyed by civil marriage provide a bulwark against unwarranted government intervention into deeply personal concerns such as medical and child-rearing decisions. *See, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (affirming "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (recognizing "the power of parents to control the education of their own"). Thus, as noted above, the Supreme Court has recognized on numerous occasions that the freedom to marry is one of the fundamental liberties that an ordered society must strive to protect and promote. The Supreme Court has reaffirmed that freedom by securing marriage rights for prisoners, *Turner v. Safley*, 482 U.S. 78, 95 (1987); striking down laws requiring court permission to marry, *Zablocki*, 434 U.S. at 388; and eliminating racially discriminatory restrictions on the right to marry, *Loving*, 388 U.S. at 12.

As other marriage cases involving same-sex couples have noted, *Loving* is particularly apt because it disposes of the familiar "definitional" argument – that

the fundamental right to marriage cannot include the right to marry a person of the same sex because marriage is defined as the union of persons of the opposite sex. This argument seeks to characterize the right sought as a new right to same-sex marriage, as opposed to the existing right to marry without unjustified government constraint. *Loving* is analogous and controlling on this point. Instead of declaring a new right to interracial marriage, the Supreme Court held that individuals could not be restricted from exercising their "existing" right to marry on account of their chosen partner's race. *Loving*, 388 U.S. at 12. The same is true in this instance: individuals cannot be restricted from exercising their "existing" right to marry on account of their chosen partner's gender. The marriage bans at issue here thus violates due process in the same fashion as the anti-miscegenation laws struck down long ago in *Loving*. *Id.* *Accord De Leon*, 2014 WL 715741 at *19-20.

The Supreme Court's most recent foray into this area confirms that this analysis remains sound. In *United States v. Windsor*, the Supreme Court held that the federal government was prohibited from treating same-sex couples differently for the purpose of federal law. 133 S.Ct. 2675 (2013). The constitutional and statutory provisions at issue here attempt to do what was forbidden at the federal level. But the existing federally-recognized fundamental character of the right to marry necessarily forecloses this attempt.

III. ACTING TO STRIKE DOWN THESE LAWS IS NOT "JUDICIAL ACTIVISM."

Amici recognize that judicial restraint is admirable when confronted with a provision duly enacted by the people or their representatives, and it is not the job of a court "to protect the people from the consequences of their political choices." *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012). Nonetheless, a court's "deference in matters of policy cannot ... become abdication in matters of law." *Id*. It is the court's duty to set aside laws that overstep the limits imposed by the Constitution—limits that reflect a different kind of restraint that the people wisely imposed on themselves to ensure that segments of the population are not deprived of liberties that there is no legitimate basis to deny them. As James Madison put it,

> In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

5 *Writings of James Madison* 272 (Hunt ed. 1904). Likewise, while it is the duty of the political arms of the government "in the first and primary instance" "to preserve and protect the Constitution," the judiciary must not "admit inability to intervene when one or the other level of Government has tipped the scales too far." *United States v. Lopez*, 514 U.S. 549, 577-78 (1995) (Kennedy, J., concurring).

It is accordingly not a violation of principles of judicial restraint for courts to strike down laws that infringe on "fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010). It is instead a key protection of limited, constitutionally constrained government. *See The Federalist* No. 78 (Hamilton) ("[A] limited Constitution ... can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."); *see also* Madison, *Speech in Congress on the Removal Power* (June 8, 1789) ("[I]ndependent tribunals ... will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution.").

The right to marry indisputably falls within the narrow band of specially protected liberties that courts ensure are protected from unwarranted curtailment. *See Bostic*, 970 F. Supp. 2d at 472 ("Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority of ... adult citizens.").

The state constitutional and statutory at issue here ran afoul of the Fourteenth Amendment by submitting to popular referendum a fundamental right that there is no legitimate, fact-based reason to deny to same-sex couples. *Cleburne*, 473 U.S. at 448 ("It is plain that the electorate as a whole, whether by

referendum or otherwise, could not order [State] action violative of the Equal Protection Clause, and the [State] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." (citation omitted)); *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."); *Lucas v. Forty-Fourth Gen. Assembly of Colorado*, 377 U.S. 713, 736-37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."). This case accordingly presents one of the rare instances in which judicial intervention is necessary to prevent overreaching by the electorate. When fundamental liberties are at stake, personal "choices and assessments ... are not for the Government to make," *Citizens United v. FEC*, 558 U.S. 310, 372 (2010), and courts must step in to prevent any encroachment upon individual rights.

Our constitutional guarantees of freedom are no less a part of our legal traditions than is the salutary principle of judicial restraint, and this Court does no violence to those traditions—or to conservative principles—when it acts to secure constitutionally protected liberties against overreaching by the government. *Cf.* Goldwater 13-14 ("The Conservative is the first to understand that that practice of freedom requires the establishment of order: it is impossible for one man to be

free if another is able to deny him the exercise of his freedom. ... He knows that the utmost vigilance and care are required to keep political power within its proper bounds."). Our society is more free when courts vindicate individual rights by enforcing the Constitution. The Court should do likewise in this case.

CONCLUSION

It is precisely because marriage is so important in producing and protecting strong and stable family structures that Amici do not agree that the government can rationally promote the goal of strengthening families by *denying* civil marriage to same-sex couples. As British Prime Minister and Conservative Party Leader David Cameron explained, "Conservatives believe in the ties that bind us; that society is stronger when we make vows to each other and support each other. So I don't support gay marriage despite being a Conservative. I support gay marriage because I'm a Conservative."[4]

Amici agree. They support marriage for same-sex couples because they are conservatives. Amici therefore urge the Court to affirm the well-reasoned decisions below striking down the ban on same-sex marriage as violating the equal protection and due process protections of the Federal Constitution.

Respectfully submitted this 16th day of June, 2014.

[4] Cameron, *Address to the Conservative Party Conference* (Oct. 5, 2011), *available at* http://www.bbc.co.uk/news/uk-politics-15189614.

/s/ *Sean R. Gallagher*
Sean R. Gallagher
Stacy A. Carpenter
Bennett L. Cohen
Jon R. Dedon

POLSINELLI PC
1515 Wynkoop St., Ste. 600
Denver, CO 80202
303-572-9300
sgallagher@polsinelli.com

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6,608 words, excluding the parts of brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ *Sean R. Gallagher*

Sean R. Gallagher
POLSINELLI PC
1515 Wynkoop St., Ste. 600
Denver, CO 80202
303-572-9300
sgallagher@polsinelli.com

Attorney for Amici Curiae

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I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 16th day of June, 2014, to all counsel of record.

/s/ *Bennett L. Cohen*
Attorney for Amici Curiae

APPENDIX

LIST OF AMICI CURIAE

Daniel J. Acciavatti -- Former Republican member, Michigan House of Representatives, 32nd District

Todd Anderson – Former Chief of Staff, to the Republican Speaker of the Michigan House of Representatives.

Lyn Bankes -- Former Republican member, Michigan House of Representatives, District 19

Daniel Scott Bean – Veteran Republican legislative staff member.

Ken Braun – former legislative staffer in Michigan, political columnist for MLive

Tim Brown – Republican member, Ohio House of Representatives

Bill Brownson, former national board chair, Log Cabin Republicans

Jan Dolan - Former Republican member, Michigan House of Representatives

Leon Drolet -- Former Republican member, Michigan House of Representatives

Susan Grimes Gilbert -- Former Republican member, Michigan House of Representatives

Patricia Godchaux – Former Republican member, Michigan House of Representatives

Jennifer Gratz – Founder and CEO, XIV Foundation

Doug Hart -- Former Republican member, Michigan House of Representatives

Dave Honigman – Former Republican member, Michigan Senate, Michigan House of Representatives

Rick Johnson - Former Republican member, Michigan House of Representatives, Former Speaker of the Michigan House of Representatives.

Jim Kolbe -- former Republican member of the United States House of Representatives for Arizona's 5th congressional district, 1985–2003 and 8th congressional district, 2003–2007.

Richard D. McLellan – Chairman, Michigan Law Revision Commission

Greg McNeilly – Republican political strategist, former Executive Director, Michigan Republican Party

Kenneth B. Mehlman – Businessman and 62nd Chairman, Republican National Committee

Deborah D. Pryce – former Republican member, U.S. House of Representatives, 1993-2009

Mike Pumford -- Former Republican member, Michigan House of Representatives, 100th District

John J.H. "Joe" Schwarz, M.D. – former Republican member, U.S. House of Representatives, 2005-2007; former member, Michigan Senate, 1987 – 2002.

Judith L. Scranton -- Former Republican member, Michigan House of Representatives

Jerry Vorva -- Former Republican member, Michigan House of Representatives, 20th District.

Christopher Ward – former Majority Floor Leader and then Minority Floor Leader, Michigan House of Representatives, 2002-2008