

EXHIBIT 53

E X C L U S I V E

There's more to Hawaii than luaus and leis. Michelangelo Signorile reports on the people and politics that make our last state the first place to look for legalized gay and lesbian marriage.

Bridal Wave

SHORTLY before dusk on a Sunday night in Honolulu a flamboyant crowd is gathering at the Tropical Paradise Lounge on Kalakaua Avenue. This is the edge of Waikiki, a desolate, quiet part of town halfway between the tourist-jammed beaches and Honolulu's downtown business district. By mainland standards the city is tranquil. Unbelievably it is ground zero of a future war—the capital of a state that appears about to legalize marriage between members of the same sex, a move that will no doubt send a tidal wave clear across the Pacific, surging over the entire U.S. mainland.

The evening is balmy and breezy, yet again. The ocean's scent is in the air. But inside the Tropical Paradise Lounge there is a deeply penetrating musty odor from decades of humidity and cigarette smoke. Garish tinted mirrors reflect the night's arrivals, each framed by a background of thick red-velvet drapes: Stunning young gay men of Samoan, Japanese, Burmese, and Thai descent, as well as men of mixed pedigrees of these and more; glittering Hawaiian transsexuals—post-op, pre-op, and, as one tells me, "between-op"; wizened old Chinese men who couldn't be a day under 80, sporting big bellies; cute Filipino boys no older than 18; and attractive young lesbians, most of whom are blond haoles—white people.

Everywhere, dark purple spotlights bounce off of '70s-era crystal chandeliers and onto the faces of the revelers, each of whom carries one or more spectacular leis. Thankfully the leis, made of orchids, roses,

lilacs, and ginger, overpower the room's stench, as each arrival tosses one over the head of tonight's guest of honor, offers air kisses, and delivers a husky, "Aloha—darling!"

The girl-of-the-minute is soon weighed down by dozens of leis, which

cover her skimpy, turquoise-sequined tube dress. This is Charmaine Lee Anderson, well known among Honolulu's fast crowd and beyond. Her ancestry is Hawaiian and Chinese, and with her long bleached blond hair piled high on her head, she is a striking figure, the RuPaul of the Pacific.

She is celebrating her 48th birthday, approximately 30 years since she shed her old self, a local Honolulu boy named Jesse Lee. It was in 1963, at 18, when Charmaine says she simply began dressing in women's ensembles and doing up her face because "it felt right."

No one cared. "Everyone—my aunts, my uncles, my cousins, all of their friends—everyone accepted it," she says with an indistinct accent. "They all said, 'Oh, we always knew you were a *māhū*'—the Hawaiian word for a feminine gay boy or a transvestite—and *māhūs* have always been accepted. No one ever said anything mean to me."

Charmaine is describing the attitude of many Hawaiians—people at the end of the earth where most are yellow, brown, black, or some variation in between. A place that has readily accepted waves of migrants from as far off as Puerto Rico and Alaska, waves of immigrants from all over Asia and the Pacific, and waves of tourists from across the First World. In Hawaii the aloha spirit is bestowed no matter where you fall on the diversity spectrum—even if you're a peroxide-driven Polynesian drag queen.

Michelangelo Signorile, author of Queer in America (Random House), is contributing writer to OUT.

"Those are my friends from the hospital," Charmaine enthuses, beaming and waving to a group of seemingly heterosexual middle-aged haole women who are clustered around a table. Most, she says, are nurses at Kaiser-Mauna Loa Hospital, where she works in housekeeping, changing beds—as Charmaine Lee Anderson, of course.

"Oh, I'm the queen bee there," she boasts. "I'm very popular. When I walk in every day, well, let's just say there's never a dull moment. And there has never been any prejudice. I have been at the hospital for 13 years and there has never even been anything bad ever said. The people who work at the hospital who live in Hawaii are very accepting. But the traveling nurses, well, *they* sometimes get very confused."

TRAVELING NURSES aren't the only people in a dither because of Hawaii these days.

On May 5, 1993, turbulent news rose out of the island state, crashed over the Associated Press wire, and landed in hundreds of newspapers across America. HAWAII COURT OPENS WAY TO GAY MARRIAGES, roared the front-page headline of *The Washington Post*, the first swell of the approaching tsunami.

The story told of three couples (two lesbian and one gay male) who had jointly brought suit against the state. And the Hawaii Supreme Court had ruled in their favor—that barring same-sex marriages was a form of gender discrimination in violation of the state's constitution. Its decision stipulated that the state must find "compelling state interests"—a condition that many legal scholars on both sides of the issue agree does not exist in Hawaii—to ban marriages between people of the same gender, sending the case back to a trial court. Though the case has so far proceeded quickly, legal professionals don't expect it to be fully resolved for about two years, at which point it's quite possible we'll see the first legally sanctioned same-sex couples in America blissfully walking down the aisle.

Alarmed that other states might be forced to honor such marriages, news of the case sent America's right wing into a tizzy. Historically, except in cases in which it has been clearly proved that the public holds strong contrary views, U.S. courts have ordered individual states to recognize out-of-state marriages even when they don't adhere to local marriage laws, reiterating that the U.S. Constitution mandates states to do so.

Gay activists and their allies were equally stunned. Gay marriage, after all, has

always seemed beyond the horizon, the last privilege we might gain, if ever. And many activists weren't—and still aren't—sure that they will ever even want it; gay activists have in fact been split on the issue for over a decade. Some argue that marriage is an inalienable right that must be extended to gays, that queers should be able to do anything straights can do, including playing house and having it recognized by society. Others argue that the gay movement shouldn't be holding up the heterosexual family as a model, unrealistically attempting to ape the TV fantasy world of June and Ward Cleaver. Rather, they say, as a movement based on sexual liberation we must lead the charge to smash a traditionally inequitable institution in which Dad more often than not is the boss whom Mom must love, honor, and obey and where children should be seen but definitely not heard.

Whatever side of the fence mainland folk were on, the first question pondered after the initial astonishment was, Why Hawaii? The question itself pisses off Hawaiians. They are well aware that most Americans don't think of their island cluster as a real state with real impact. The image is more one of a national Club Med with a full, picturesque staff and grass-skirted hula girls dancing in the breeze—certainly not an involved citizenry, as civic-minded as that of, say, Des Moines.

In fact Hawaii has played a pivotal role in progressive national American politics over the past 25 years. Hawaii was the first state to legalize abortion, in 1970. It was the first to ratify the Equal Rights Amendment, in 1972, and the fifth to offer employment protection for lesbians and gay men, in 1991. Some of the nation's most successful union organizing dates back to the years of Hawaii's vast sugar-cane and pineapple plantations. And Hawaii has been a model for universal health care, which is by law provided by all employers. It is a state with a strong Democratic Party (some of



TANIA JO INGRAHM

Joe Melillo and Pat Lagon

The Hawaii Supreme Court ruled that barring them from marriage violated the state's constitution.



Charmaine Lee Anderson
Well known among Honolulu's fast crowd and beyond, she is a striking figure—the RuPaul of the Pacific.

whose members, like U.S. Representative Neil Abercrombie, are among the most left-leaning members of Congress); a state with virtually no Republican Party, let alone a religious Right; a state with a rapidly growing sovereignty movement rebelling against the U.S. government; and a state where even Catholic clergymen are renegades, with the local bishop defying recent Vatican pronouncements and publicly supporting gay rights legislation and recognizing "people with a homosexual orientation."

Perhaps most significantly Hawaii has no majority, just a dozen or so minorities—whites included. The balance appears to provide each group with a sense of security, a sense that no one group will dominate—at least not in numbers. Thus people more freely take on each other's customs, collapsing cultures to form one rather than tensely coexisting. Beyond the most superficial and commercial examples—the fresh-cut pineapple served with your Egg McMuffin at McDonald's or Jack in the Box's popular teriyaki chicken "Teri Bowls"—is the simple and yet astonishing fact that unlike everywhere else in America and the West-

ern world, in Hawaii people of different races, colors, ethnicities, and religions readily intermarry with little or no social stigma.

On any given day the walkways of the Ala Moana Center, a large mall on Ala Moana Boulevard in downtown Honolulu, are teeming with heterosexual couples of every possible mix: black and Chinese, Filipino and white, Japanese and Portuguese, Thai and Hawaiian, Samoan and Indian. Many have small children with them, children whose magnificent faces of mixed ancestries defy description. Packs of teenagers, dressed like their mainland counterparts, crowd the stores wearing baggy raver clothes, resembling the utopian, multicultural world of a Benetton ad. Locals say half jokingly that when they see a couple that is haole and haole, they are clearly a U.S. military family venturing off base or tourists on their dream vacation. More often than not they are right.

This defiance of the Polly Purebred way of life is one of the reasons Hawaii is the only state that literally sent the fanatical Reverend Jerry Falwell and his now defunct religious Right group, the Moral Majority, home packing in May 1981.

Falwell journeyed to the islands on a mission to "save the 50th state." Locals—alerted by news reports in the *Honolulu Star-Bulletin* with a quote from Falwell saying that anyone who opposed him must be "a Nazi, a communist, or a homosexual"—did not take the crusade lightly. An organization immediately formed to take on Falwell. Realizing there was not yet an official Moral Majority chapter in Hawaii (Falwell was going to found one when he got there), organizers took the name themselves, making sure first to seek legal counsel and have the name registered. The group took full page ads in local newspapers, urging people to join the fight against Falwell, proclaiming that "The Moral Majority of Hawaii" stood for "family planning, civil rights for all people, pro-choice in abortion, child care programs, freedom of speech and religion, and the separation of church and state." Within two weeks the group had thousands of members, each sending in checks and money orders. Falwell, at an outdoor rally soon after he arrived, was met by mobs of protesters; of the estimated 3,500 who showed up for the rally, activists say approximately 3,000 were anti-Falwell. That night onstage, amid jeers and catcalls, Falwell was handed a summons by a local sheriff: The just-formed Moral Majority of Hawaii was suing him for using their name in the state of Hawaii. Falwell's facilities, such as the auditoriums he'd booked for the next few days, canceled his gigs for fear of being embroiled in the lawsuit. Utterly defeated, Falwell collected his entourage and left the islands.

HONOLULU RESIDENT Bill Woods was the leader of the group that opposed Jerry Falwell, and Woods' name was the only one the once powerful religious zealot used—besides Jesus—in an angry speech before leaving Hawaii. Not so surprisingly, Woods, 44, is the father of Hawaii's gay rights movement and is perhaps the person most responsible for



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TANIA JO INGRAHM

putting gay marriage on the local—and now national—gay agenda.

Woods, a white man from Arthur, Illinois, went to Hawaii on vacation in 1969. "I immediately fell in love with the place," he says, "and I decided right then to move here and live freely, out of the closet." He worked at hospitals in Kaneohe and Honolulu—first as a psychiatric aide and then as a research statistician—and stayed in health services for quite some time. But within a few years he became Hawaii's pre-eminent openly gay activist, taking on the *Honolulu Star-Bulletin* and the *Honolulu Advertiser* for their refusal to list weekly meetings of local gay groups, helping the Kalihi-Palama Comprehensive Mental Health Center to create a gay hot line for troubled lesbian and gay youth. Over the next 20 years Woods founded several gay organizations, including the Honolulu Gay and Lesbian Community Center and the Hawaii AIDS Task Group, created a local gay newspaper, *Gay Community News*, and appeared on television and in mainstream newspapers regularly as a spokesperson for the gay community of Hawaii—one of the few people willing to be identified as a homosexual on the islands during the '70s and early '80s. Beyond his gay activism, Woods was active with the environmental movement, abortion rights, and other causes, in the process making his share of enemies and friends inside and outside the government.

It was in 1978 that Woods says he realized that same-sex marriage, if fought through the judicial system, could be a possibility for Hawaii. A recent constitutional convention in the state had addressed discrimination based on sexual orientation and a privacy measure was passed protecting gay people. Woods spent the next decade trying to convince his own lover to join him in bringing a suit against the state regarding their right to wed.

"I wanted us to be the first couple married in Hawaii," he says. Eventually, in 1989, the two broke up and Woods, still believing that same-sex marriage could be won but sadly realizing that his chance to get married had passed him by, began scouting for other couples to proceed with a suit. Through friends and the community center he found three test couples.

On December 17, 1990, Woods, with the three couples and a battery of television and newspaper reporters in tow, went to the Hawaii Department of Health, where the couples applied for marriage licenses. They filled out their applications and were told to wait while stunned employees asked their superiors what on earth they should do. After an hour word came down from the health director and the state attorney general: The licenses were to be denied; Hawaii law did not extend marriage to members of the same sex. The couples informed the health department that they would not let the issue rest; their applications were put into a "pending" file.

The group went from the health department, with their entourage of reporters, to the local chapter of the American Civil Liberties Union. Bill Woods had previously tried to get the local ACLU as well as the national ACLU involved but, he says, to no avail. He charges



Bill Woods

Woods is perhaps the person most responsible for putting marriage on the local gay and lesbian agenda.

that the ACLU did not view gay marriage as winnable in the court of public opinion (and thus not winnable politically, beyond the judiciary) and didn't want to waste their time on the case, a position that he says made him "livid."

"Nan Hunter [former director of the national ACLU's Lesbian and Gay Rights Project] and Bill Rubenstein [Hunter's successor on the Project] totally rejected it," he claims. "They said that ACLU Hawaii should do an opinion poll first, to see if there was support. The ACLU has *never* done an opinion poll when it came to the Constitution of the United States. They didn't ask the people of Skokie if they should have the Nazis march down their streets. Their response was outrageous." Several other people involved in the case, including legal advisers and the couples themselves, agree with Woods that the ACLU seemed more concerned with whether or not local gay leaders favored pursuing gay marriage as an issue than with the couples' individual rights.

(Hunter, now deputy general counsel for the Department of Health and Human Services in Washing-

ton, says Woods' charges are "totally false and a cheap shot. There was never any suggestion of an opinion poll. The concern at that time was that one individual was trying to get support for his own position, and I advised that the ACLU work in close cooperation with the entire lesbian and gay community." Rubenstein says, "We were involved on a consulting basis and we filed an amicus brief in the case [at the supreme court level] before it was won." He strongly disagrees with Woods' assertion that the ACLU wasn't interested. "The [national] ACLU fully supports the right of gay people to marry. One of our affiliates in Minnesota filed the first-ever suit challenging marriage laws on behalf of gays, in 1971. Each of our affiliates decides on their own whether to proceed with a case. We can neither tell them to take a case or reject it.")

When Woods and company arrived at the local ACLU that day, ACLU officials, perhaps putting on a conciliatory face for the press, said they would take the case. Two weeks later, when the publicity had died down, each couple was sent a letter on ACLU letterhead saying that the agency would not be involved in the case. The local ACLU had in fact polled community leaders a few months earlier, with staff attorney Carl Varady sending local leaders a letter dated June 20, 1990, in which he stated that Nan Hunter "suggested I thoroughly poll [gay advocates] locally to determine whether there is broadly based support for such litigation." Referring to opposition to gay marriage in some activist circles Varady wrote that the ACLU "would not want to act in a manner inconsistent with the opinion of a substantial number of gays and gay rights activists." (The local ACLU has never made public the results of this poll.)

The couples, clearly not concerned with following the party line of established gay rights activists, retained their own lawyer.

Attorney Dan Foley, a partner in the Honolulu law firm of Partington and Foley, had been known for taking—and winning—some offbeat cases. In 1985, a hula *halau* (a group who dance hula together) on the island of Molokai, trying to raise money for a trip to Disneyland, decided to sponsor a carnival that would include the first ever Miss Gay Molokai pageant. Religious fundamentalists charged that the pageant would endanger the island by spreading AIDS and somehow got the island's mayor to revoke the *halau's* permit to hold the pageant. Foley took the *halau's* case to court and won. The Miss Gay Molokai pageant went on.

A heterosexual white man from San Francisco, Foley had gone to the South Pacific in 1975, spending eight years in Micronesia, assisting many of the tiny island nations there in writing their first constitutions as part of their fight for sovereignty from a United Nations trusteeship (administered by the United States). He married a Japanese-Chinese-Hawaiian woman and settled in Hawaii in 1983. Foley says he has always been committed to equal rights and the same-sex marriage case provided him with a challenge; he knew the couples could not afford to pay for his services, a fee that now exceeds \$30,000 and for which the couples continue to raise funds through donations. But he also didn't think the case would go on as long as it has.

"My clients had a lot more faith in this case than I did," he chuckles. Foley felt it was at least worth a shot, in the hopes that perhaps a pared-down domestic partnership victory would result.

He filed the couples' lawsuit against the state on May 1, 1991, and the state circuit court promptly dismissed it that September. The couples took an appeal to the state supreme court. In a surprising 3-1 opinion, the court ruled that the ban on same-sex marriage discriminates on the basis of gender and threw out a motion by the state to reconsider the case, remanding it to a lower court where the state will have to prove a "compelling interest" against gay marriage.

Since the decision was based not on sexual orientation but gender, the ruling was seen as a victory for women as well. Hawaii Women's Lawyers issued a statement urging the state to give up its fight, as did a suddenly supportive ACLU (which took some credit for the victory, its national officials turning up in press stories about the issue and saying that they'd always been behind it). State attorney general Robert Marks, however—(continued on page 146)



KRISTI K. GABAWAY

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Baehr's base reasons for pursuing same-sex marriage were far more emotional than political.

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HAWAII (continued from page 73)
echoing Hawaii's Democratic governor, John Waihee, and others in the government who, even for this superliberal state, seem afraid of the political fallout—says he is compelled to fight same-sex marriage (though some close to him say he personally believes the couples should be allowed to marry). Hailing the decision as a “civil rights victory,” the *Honolulu Star-Bulletin* backed the couples: “The court wisely left the nature of homosexuality to medical research and avoided an ugly, lengthy and hurtful debate. In a display of clear thinking, it focused on the narrow issue of gender discrimination and ruled that the legality of state-sanctioned marriage is independent of whether the couples involved are male-female or of the same sex.”

Foley, the couples' attorney, who was skeptical when the case was in the lower courts, now seems certain that same-sex marriage will be a reality in Hawaii—unless stopped by a legislative measure. In his view and that of several other legal professionals, since the state supreme court has ruled in favor of same-sex marriage, the state has no ground to stand on, since there is no “compelling interest” its lawyers can possibly come up with: There are no sodomy statutes on the books in Hawaii, and the state's marriage laws do not specify that marriage is for the sake of procreation, as had been the case in other states in the past. Furthermore the state already bans discrimination on the basis of sexual orientation in employment, and anyway, this case is based on gender, not sexual orientation, making it clearly unconstitutional.

“Given the standard that [the Hawaii Supreme Court] has applied, it's almost impossible to imagine losing this,” observes the ACLU's Rubenstein, “unless the composition of the court changes.”

“Our state supreme court is generally liberal on individual rights,” Foley explains. “Our case will not get to the U.S. Supreme Court and it was purposefully pled that way. I purposely chose to only file our complaint under the state constitution, and I pled no federal claim so there would be no federal review.”

The state legislature could step in and put a halt to same-sex marriage in Hawaii, but even this appears to be an exceedingly difficult and highly unlikely move. In general, and especially in Hawaii, state legislatures have been uncomfortable with altering state supreme court decisions. And a change

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in Hawaii's marriage laws to make them specifically exclude lesbians and gay men would require a constitutional amendment enacted either through a constitutional convention, an unusual and time-consuming process, or by a two-thirds vote of the legislature, with ratification by popular vote. Unlike states such as Colorado, California, and Oregon, Hawaii has no mechanism for bringing this or any issue to a general vote without a vote of the legislature.

"We have too many friends—and too many closet cases—in the legislature, too many people who understand that this is a civil rights issue, for any of that to happen," says Bill Woods, referring to the mostly Democratic, mostly gay-friendly legislators, many of whom are people of color. "They'll be afraid of

"Given the standard that [the Hawaii Supreme Court] has applied, it's almost impossible to imagine losing this," observes the ACLU's Bill Rubenstein.

how they'll look." This seems to be true of most politicians in Hawaii; even the governor and the attorney general have gone out of their way not to appear antigay in coming out against gay marriage, both reiterating their support of gay rights and calling for domestic partnership laws in the hopes that such laws will make same-sex marriage a moot point.

Political analysts for the most part agree with Woods' assessment about the legislators, adding that the issue could become a political hot potato. "With a little help from a Legislature worrying about its own standing, gay marriages could be one of the most controversial topics of [1994's] race for governor," wrote *Star-Bulletin* columnist Richard Borreca.

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EVERY SILVER LINING

The legislature, at least to show its concern, has begun hearings on the issue, the first of which took place September 16 on the island of Kauai, where gay activists and antigay bigots engaged in nasty yelling matches. Two Oahu-based radical fundamentalist groups—Common Sense Now and Stop Promoting Homosexuality Now—along with a chapter of the Virginia-based right-wing Rutherford Institute are lobbying the legislature to not only outlaw gay marriage but to institute sodomy laws and repeal antidiscrimination statutes as well. The two Oahu groups are small and relatively powerless; both in fact are thought to be run by the same people, most of whom do not divulge their names. In Hawaii it is the homophobes who are in the closet.

Still, the gay community, well aware that when it comes to queers Hawaii's aloha spirit can often be only on the surface, is not taking the case for granted. The community center—an organization whose staff and board of directors is painstakingly crafted to represent all of Hawaii's ethnic groups—is vigorously organizing around the issue, having put Samoan-Filipino lesbian activist Val Tavai in charge of outreach to local communities specifically on the issue of same-sex marriage. In July the *Star-Bulletin* reported the results of a poll the paper took in which it claimed that 61 percent of Hawaiians were opposed to same-sex marriage (however, many activists have charged for years that the papers' polls are biased and that a great many people in Hawaii who live in rural areas—those who tend to be non-white—are not polled because they don't have telephones).

Bill Woods feels that if the legislature quickly pushes through even a skimpy domestic partnership bill, the supreme court will consider the issue of gay marriage a dead one and will



Dan Foley

The couples' attorney was skeptical of the case in lower courts but now seems certain same-sex marriage will be a reality in Hawaii.

rule in favor of the state. But legal professionals disagree.

"A court does not stick its neck out like that only to pull it back in," observes Foley. Though the case could go on well into 1995, Foley is hoping for a favorable decision as early as January 1994, amazed at how well—and how quickly—the case has proceeded thus far.

EVERY SILVER LINING, however, has its clouds. As things were going their way in the courts, the cast of players in this picture-perfect lawsuit were unraveling in other ways.

Vastly different from each other, it was perhaps inevitable that the couples would quibble and split hairs in the same excruciating and petty manner that, say, ACT UPers have torn each other apart in meeting after meeting on the other side of the Pacific. And like

their brothers and sisters in ACT UP, where stockbrokers and hairdressers became heroes and revolutionaries, these folks seemed the most unlikely bunch to be leading Pacific Stonewall.

While the supreme court was considering their case, the couples formed Hawaii Equal Rights Marriage Project (HERMP), a group that they all headed, in support of their cause and to raise funds for the rapidly increasing legal bills. As usual there were unforeseen problems.

One of the lesbian couples, Tammy Rodrigues and Antoinette Pregil, had lived on the remote and rugged Waianae coast of Oahu, over an hour's drive from Honolulu, in a modest house they'd owned together. Over a period of many years they have fostered at least 10 children, and they have a daughter of their own. Women of color with little money and children to care for, the economic reasons for seeking marriage were compelling enough for them to go public in a big way. But shortly after the case received its first burst of notoriety, their children began to be teased and harassed at school. In August 1992 the house they'd spent years saving for was leveled by Hurricane Iniki. They decided that though

Soon after the couples went public, Baehr was demonized by the press, labeled a radical Marxist feminist who was in cahoots with the most dangerous leftists on earth.

they would not pull out of the case it was time to concentrate on their family and to pull back from interviews and their formal involvement with HERMP.

The marriage project was left to the other two couples, who soon began quarreling—with each other as well as with Bill Woods—about tactics, fund-raising strategies, and the basic image that the marriage project would put out to the media. The group also came under pressure from people within the local lesbian and gay community who began questioning the couples' motives and priorities.

Joe Melillo and Pat Lagon, the gay male couple, had been recruited by Woods, who had known them for years. Melillo, quick-talking and sometimes pushy, is a 46-year-old Italian-American who moved to Hawaii from Summit, New Jersey, when he was in his late teens. His lover, Pat Lagon, is his diametric opposite, a quiet, reserved man who grew up in Aiea, Hawaii, in a Filipino Catholic family. Lagon's parents knew he was gay early on; there were others in his extended family who were queer too. As in many Hawaiian families of mixed races, religions, and ethnic groups, he says homosexuality was accepted in the family as long as it did not have to be reconciled with religious and other beliefs. "There's a tolerance and an acceptance," he says, "but there's also a bit of shame connected with it, a sense that it



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should not be talked about." But unlike some of his relatives, Lagon did not allow that attitude to keep him quiet. He brought his lover home and integrated him into the family. The two settled down when Lagon was at the fairly young age of 21 and have been together 15 years, having started a silk-screen printing business together in Honolulu.

Concern for their business in fact was one reason these two big, bearish men say they decided to fight for gay marriage: Among the more than 100 civil rights that activists have identified as denied homosexual couples who cannot marry are the tax breaks, reduced health insurance rates, and established rights of inheritance that are granted married couples—rights that affect the profitability of a small business.

But some local activists—eventually including Bill Woods—claimed that Melillo and Lagon had further ambitions in pushing their case, even though no one has fully explained exactly what those ambitions are. "Melillo is using the project for financial gain," Woods somewhat irresponsibly claims, without elaborating. Others have said that Melillo has hogged much of the press, injecting himself into stories and trying to downplay the other couples. Melillo has—over and over again—talked about wanting to write a book about his battle to be married. From his careful cultivation of journalists who are working on the gay marriage story to the sound bites he rolls off in response to even the most benign questions, he certainly exhibits typical activist "media whoring," as executed brilliantly by groups like Queer Nation. In an especially petty moment he even complained that one of the lesbian couples, rather than he and Lagon, snagged the cover of the local queer monthly, *Island Lifestyle*, for a story about the gay marriage case "because lesbians own the magazine." But none of that is proof that he is anything more than a zealous advocate with an overactive ego—certainly not a negative trait for today's gay activists. His appetite for press notwithstanding, Melillo's intentions seem genuine. Still, his position at the helm of the marriage project, and thus a very public voice for the local gay community, bothers many and continually causes division.

The public persona of Ninia Lellani Baehr, one half of the remaining lesbian couple in HERMP, had also made many people uncomfortable, at one point creating a contentious media scandal. It was in August 1990 when she first found out about the project. She'd

called the community center for some advice since she was buying life insurance and wanted to make her lover her beneficiary. "I happened to get Bill Woods on the phone," she remembers. "I asked him if there was any domestic partnership legislation that I should know about. He said no, but that he believed gay couples could win the right to marry in the state of Hawaii and that they were looking for test couples." For 30-year-old Baehr it was a provocative proposition. A feminist with a masters degree in women's history, someone who had worked for many women's groups and certainly considered herself an activist, Baehr understood the intricate and perhaps conflicting political ramifications that such a suit could have. But her base reasons for taking to the idea, she says, were far more emotional than political.

"I was living in New York, on the Lower East Side [in the late 1980s]," she explains, "and I had broken up with a lover and was miserable. I was working at [the women's erotica shop] Eve's Garden and during the summers I would go to the women's music festivals, selling CDs. I'd see like 8,000 naked lesbians in a weekend and talk to them about their vagina size, and I would think to myself, Wow, I've met thousands and thousands and thousands of lesbians and there isn't one for me. I was just so lonely, thinking I was going to be alone for the rest of my life. I eventually decided to go to school in Hawaii, and when I met [my lover] Genora, I looked at her and thought, She's the one. She's the one I've been waiting for. I wanted to spend the rest of my life with her."

An attractive, slender woman with amber eyes and a fair, clear complexion, Baehr, who was actually born in Hawaii, is the daughter of liberal white educators who moved their family often and to distant places. She grew up in such disparate states as Colorado, Pennsylvania, and Tennessee and in such far-off locales as American Samoa and Norway. Her mother, who has now settled in Hawaii (her parents were divorced several years ago, her father going back to Norway), accepted Baehr's lesbianism very well when Baehr told her about herself at 18; her mother in fact matched Baehr up with her lover and partner in the lawsuit, Genora Dancel, a Filipino-American woman who until recently was an engineer at Hawaii's PBS station, KHET, where Baehr's mother is also now employed.

Anticipating the barrage of publicity that the case would bring, Baehr was prepared at the outset for a rocky ride.

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But no one could foresee what was to come: Soon after the couples went public, Baehr was demonized by the press, labeled a radical Marxist feminist who was in cahoots with the most dangerous leftists on earth, all because of her involvement in another cause.

While working at the University of Hawaii Women's Center, Baehr had met some campus activists who told her about something that was for her perhaps as provocative and exciting as same-sex marriage. Several European activists were scouting for an observer to come with them to Peru, where they were to hold a press conference protesting the death sentence of Abimael Guzman, leader of the Maoist terrorist group known as the Shining Path, a guerrilla organization responsible for many murders in Peru. The European activists were not at all supporters of the Shining Path, but they felt that Guzman had been unfairly sentenced.

"Even though the death penalty was illegal in Peru, it looked as if he was going to be executed," Baehr says. "It would have been a bad precedent because there had already been 5,000 disappearances in Peru and some extrajudicial executions. So sanctioning this would only have made it worse." Baehr decided to go to Peru with the activists, not as a protester but as a witness. But shortly after the group arrived in Peru and held a press conference, they were rounded up and held on suspicion of "being apologists for terrorists." Baehr landed in Peruvian detention—as well as on the front pages of the *Star-Bulletin* and *Advertiser*—and all hell broke loose back home. She soon came under a torrent of attacks from many lesbians and gay men who felt she was giving the marriage project a bad name as well as from the usual antigay bigots who branded her a stereotypical lesbian she-devil.

As outrageous as this all seemed, however, none of it caused as much



Val Tavai

"I think a lot of local people aren't involved in gay politics because every time somebody gay is on TV, it's a haole male face."

scandal as what soon engulfed Bill Woods. Queer and straight circles alike were staggered when, at the height of the couples' fight through the courts, in December 1991, Woods, a pillar of the gay community and the main orchestrator of the marriage project, was arrested on felony charges of conspiracy and theft of \$3,559 from the Hawaii AIDS Task Group and soon thereafter was indicted by an Oahu grand jury. The press coverage, by default linking their "righteous suit" with swindling and embezzlement, was a public relations nightmare for the couples. Woods, who had dreamed for 20 years of basking in the glory of winning this fight, was immediately forced out of the marriage project.

NO ONE WILL TALK all that much about Bill Woods these days. Until I brought up his name, in fact, Joe Melillo refused to even use it, referring to Woods as "an



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activist" who had "started things" but who left because of a "problem." No one wants to hear what Bill Woods has to say these days either: Ninia Baehr stopped me several times when I tried to tell her Woods' comments about her.

Woods has maintained and still maintains that he is innocent, that the entire affair was the result of a book-keeping error. He settled out of court with the Task Group by paying back \$8,417 (more than twice what he was alleged to have stolen), and as of this writing two charges of conspiracy and one charge of second-degree theft are still pending against him in state criminal court.

He claims that he has been framed by a conspiracy of his enemies, a conspiracy so wide it includes Governor Waihee—with whom he has butted heads in the past—and Cheryl Embry, the bisexual publisher of *Island Lifestyle*, a rival publication to his creation, *Gay Community News*. Ever since Embry arrived in the islands in 1988 and founded *Island Lifestyle*, she and Woods have been at odds, often jousting in print. *Island Lifestyle* uncovered the story of Woods' alleged embezzling from the group he'd founded in 1985 and where he had remained treasurer. Embry, a willowly California blonde with a laid-back disposition to match, says that Woods' charges of a conspiracy are preposterous.

"I didn't even print the story at urst," she says, referring to when she first received documents that alleged Woods' embezzlement. "I thought, Oh God, no one's going to give money to these organizations again if I print this. It was a dilemma for me. I went to the lawyer that represents the group and let him know all about it, letting the people in the AIDS group get all their ducks in a row, but still I didn't report it." It wasn't until she found out that the mainstream press—and soon enough local law enforcement—was on the case, Embry says, that she decided to run with the story.

Whether people believed Woods was guilty or innocent, many in the local gay community were quietly hailing his arrest—and his subsequent dropping out of the marriage project—as a blessing in disguise. Almost all involved in the marriage project as well as some who have just observed from afar say there was little support—and even less money—for the cause from Hawaii's larger gay community until Woods was out of the picture. And this perhaps explains why, when the ACLU polled local gay and lesbian activists, it may have decid-

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ed there wasn't enough support: It wasn't gay marriage that people apparently were against—it was Bill Woods.

Over the years, despite his good deeds, resentment toward Woods had built; many charged that he thrust himself into every issue, every story, often being the only person in the media speaking for Hawaii's gay community. These charges increasingly were coming from white lesbians as well as lesbians and gay men of Asian and Pacific Islander descent; for all its melting-pot character there's always been a bit of trouble in paradise—the same trouble, more or less, that is everywhere else.

"I think a lot of the local people aren't involved in gay politics because every time somebody gay is on TV, it's a haole male face," observes Val Tavai, the Samoan-Filipino lesbian who is in charge of outreach—specifically on the issue of same-sex marriage—for the gay community center. "The attitude is like, I don't want to bother getting involved, because this person they see on television is supposed to be representing the whole community and they're not. It makes [gay people of color]—and heterosexuals—think that these issues are only haole issues, when they're not."

For almost two decades, until very recently, white gay men—a minority in the Hawaiian gay community—have almost exclusively been the out queer activists in Hawaii. Most of these men had moved from the mainland during the '70s and '80s to start new lives and build businesses. Having left their families far behind and having found financial security, they perhaps had less to lose in being outspoken. These men have always commanded much respect from the local gay community and for the most part still do. Jack Law is the owner of Hula's Bar and Lei Stand in Waikiki, where the "shirtless tea dance" attracts mostly mainland American and Australian white gay male tourists—as



Reinette Cooper

In high school she joined a butch lesbian gang. "We were too rough. Boys never bugged us."

well as U.S. military boys—who spend their days baking on the gay beach called Queens Surf and endlessly pumping up at the 24-hour Gold's Gym by the ocean at the Pacific Beach Hotel. But once a year Law closes Hula's to tourists for a grand party for the locals, who eagerly come and celebrate. An owner of much of the real estate in the Kuhio district—a small block of Kuhio Avenue in Waikiki Beach that constitutes Honolulu's gay ghetto—Law is outspoken on gay issues and is admired by gays and straights alike. This is equally true of Dr. David McEwan, a tireless health care professional and activist who founded Hawaii's largest AIDS service organization, the Life Foundation, and also of Richard Minnick, owner of the Hotel Honolulu, a quaint gay inn in the Kuhio district where local gay support groups often hold meetings (and where I stayed).

But in the case of Bill Woods, there is a general feeling that he doesn't make

room for new and different people, as evidenced by his constant bickering with Cheryl Embry, an emblem of the new activists.

"Bill Woods is an important part of gay and lesbian history here," Val Tavai is quick to point out. But she sees the realistic outcome of the community's refusal to get behind him. "Without the full support of the local community, I'm not sure the marriage project will go anywhere," she notes. "We can't depend on our haole activists. Yeah, they may make things move and they may know people. But legislators are in the end going to listen to the local [gay] populations and their families, the people who vote."

Since Woods' departure, Tavai says, the marriage project has become a galvanizing force for gay and lesbian people of color on the islands, compelling many to bring up the Q word at the dinner table—big stuff in a place where homosexuality is accepted as long as you don't talk about it—and to start pushing their relatives to support gay marriage. "This really is like 'another Stonewall,'" she observes. "Stonewall was about bringing people out of the closet by revolting in the streets. We're taking this out of the streets and into the courtrooms and into people's homes—the way things are done in Hawaii—as a sort of next phase."

HAWAII is in one of those uncertain periods, one where radical transformation of all kinds—beyond gay marriage—seems inevitable.

"Mostly a state of mind, Hawaii is the image of escape from the rawness and violence of daily American life," observed author Haunani-Kay Trask. "Hawaii—the word, the image, the sound in the mind—is the fragrance and feel of soft kindness. Above all, Hawaii is 'she,' the Western image of the native 'female' in her magical allure. . . . And Hawaiian women are marketed on posters from Paris to Tokyo promising an unfettered 'primitive' sexuality. . . . As the pimp for the cultural prostitution business, the state of Hawaii pours millions into the tourist industry, even to the extent of funding a private booster club—the Hawaii Visitors Bureau—to the tune of \$30 million a year. . . . Today, we Hawaiians exist in an occupied country forced to witness and participate in our own collective humiliation as tourist artifacts for the First World."

The quote is from Trask's new book, the current must-read on the islands, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i*. The director of the Hawaiian studies de-

partment at the University of Hawaii-Manoa, she is a chief organizer in Ka Lahui Hawai'i, a leading group in the fight for native Hawaiian sovereignty. While some Hawaiian sovereignty groups demand complete independence from the United States, Trask's group, perhaps more realistically, calls for nation-within-a-nation status for native Hawaiians, as has been given native Americans on the mainland.

Many—but certainly not all—in this rapidly growing movement, including some of its leaders, have endorsed the same-sex marriage project. They point to new evidence that suggests that same-sex relationships existed and flourished in precolonial Hawaii—before Christian missionaries arrived in the 1800s to warn Hawaiians that sex, unless between a man and his wife for the purpose of procreation, was going to send them to hell.

It was in 1990 when Honolulu real estate lawyer Robert Morris sent a jolt through intellectual circles on the islands and beyond when he published a scholarly article in the *Journal of Homosexuality* titled, "Aikāne: Accounts of Hawaiian Same-Sex Relationships in the Journal of Captain Cook's Third Voyage (1776–80)." *Aikāne*, according to Morris, were men who had sex with men and were common in Hawaii, with several of the kings having their own coteries of them. "As a noun," he writes, "aikāne may be most directly translated as 'man-fucking'; as a verb, 'fucking a man.'" (Later, in an op-ed piece in the *Honolulu Advertiser*, Morris embarrassed Governor Walhee, who is of Hawaiian ancestry, by pointing out that the state constitution mandates legislators take into consideration the "historical, cultural, and traditional values" of the Hawaiian people and respect Hawaiian history when passing laws.)

Aikāne were different from *māhū*s—men who dressed and lived as women. Curiously, it was the latter that survived Christianity, more so in terms of acceptance. Today in many areas of Hawaii, *māhū*s are a part of life, as are women who dress as men, or as Honolulu attorney Reinette Cooper calls them, "boogie-butch bulldykes."

The daughter of a Filipino mother and a haole father (who died when she was 10), Cooper was herself a tomboy growing up in a rough area on the Waianae coast of Oahu, on a pig farm. In high school, she joined a butch lesbian gang, taping down her breasts and wearing men's clothes. "No one ever messed with us," she says. "We were

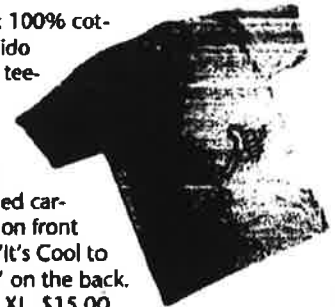
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too rough. Boys never bugged us. If anyone was bothered out there it was the *māhūs*, but not really much. There were *māhūs* all over school, dressing in drag, and no one really beat them up or anything." On that part of Oahu being white is probably more dangerous than being gay—"We used to have 'beat up a haole day,'" Cooper remembers—and families seem to integrate their gay neighbors into their lives, even when they're not *māhūs* or tomboys. Mark Kadota, a well-known artist in Hawaii, shares land in Waianae with his two heterosexual brothers, who like him are of Japanese descent. Their houses are in a neighborhood that is predominantly Hawaiian families. "Everyone knows I'm gay," he says, referring to his neighbors, who he says have become like his family. "All of the kids know and the parents know and it's totally accepted. It's not even like the parents have to explain it to the kids. It's just understood."

While this traditional if sometimes reluctant acceptance is one reason some sovereignty activists are supporting same-sex marriage, they—as well as many gay activists—also see the strategic benefits of banding together with other movements. But this union could at any time have its fissures. While the sovereignty movement is quite obviously down on tourism entirely, many gay activists have been touting the boost in tourism that they say same-sex marriage will bring, conjuring up visions of queer honeymooners checking into the Sheraton Waikiki and the Hilton Hawaiian Village en masse. They point to travel agencies and other businesses that are already gearing up for the possibility.

"While Hawaii has been a favorite honeymoon destination for the last 40 years, this business has recently been pursued by other Pacific destinations, in particular, Australia and Guam," wrote Sumner La Croix, a professor of economics at the University of Hawaii, in a pamphlet titled, "What Effects Will Same-Sex Marriage Have on Hawaii's Economy?" "Same-sex marriage ceremonies and honeymoons could help to offset this lost business and could contribute significantly to Hawaii tourism in the 1990s."

But homophobes charge that a surge in gay tourists is precisely what will be Hawaii's downfall. Mayor Frank Fasi of Honolulu, an Italian-American originally from New Jersey (who changed his party affiliation from Republican to Democrat because, some cynics say, he realized that a GOP

Aikāne were men who had sex with men and were common in Hawaii. Several kings had their own coterie of them.

politician couldn't go very far in Hawaii) and a man who local political analysts believe could become Hawaii's next governor, has issued a warning to Hawaii residents: If the state offers same-sex marriage and gays flock to the islands, heterosexual tourists will be driven away by the sight of homosexual couples walking arm-in-arm out of same-sex wedding chapels and onto Waikiki's Kalakaua Avenue, causing economic disaster.

His charges are not to be taken lightly, not because there might be validity to them but merely because of the perception of that validity. If politicians like Fasi decide the issue will play well, same-sex marriage could become a hot issue in 1994's gubernatorial race as well as in local state legislature and congressional races. Tourism, in this state that has one of the highest costs of living in the country, is the industry that employs most of its people, including most poor people. Despite the sovereignty movement's pleas and good intentions, many Hawaiians simply could not at this time afford to turn their backs on tourism or allow the industry to suffer. And it is an industry already in danger.

In the summer of 1993, tourism—Hawaii's No. 1 industry, accounting for almost 40 percent of the gross state product—after more than 20 years of steady growth, endured its worst economic slump in five years. A delayed recession in California and the peaking of a recession in Japan have kept the bulk of Hawaii's regular visitors away, some analysts say. But others say the slump is indicative of something far more dire than just a recession. They predict that the changes are permanent, that Hawaii's heyday as a preeminent tourist mecca is long gone, largely due to its becoming wildly expensive.

Trends in the industry indeed show that tourists from Asia, the Pacific Rim, and Australia are steadily shifting their travel habits. Hong Kong this year, for the first time, is ahead of Hawaii in visitor count, and Singapore has become a new hot spot for people from the region and is expected to surpass Hawaii as well. And mainland Americans looking for a tropical respite are increasingly heading to the much closer, much cheaper Caribbean.

Without tourism Hawaii's economic picture is exceedingly bleak. Cuts in the Pentagon's budget will greatly affect the state, where the military is the second largest industry. And Hawaii's once prosperous sugar-cane industry, like its pineapple industry, is collapsing. Last August, the 96-year-old Oahu Sugar Co. in Waipahu stunned workers when it announced it would be closing down, leaving only one sugar plantation on Oahu. The cost of producing any product in Hawaii—where almost all materials must be brought in from outside and where labor is not nearly as cheap as it is in nearby Southeast Asia and China—has kept Hawaii from highly developing any exportable industries.

It appears that tourism—and how the industry and thus the entire state of Hawaii will be transformed—will be a focal point of Hawaii's debate over same-sex marriage for the next two years. Antigay forces will claim gay marriage is going to kill an already bludgeoned industry. Many gays and lesbians will say that same-sex marriage is in fact the shot in the arm that the tourist business needs. And many activists fighting for native Hawaiian sovereignty will perhaps be angry, wondering why the discussion is focusing on tourism at all.

OF COURSE, the belief that tourism will be affected one way or the other, that mainland gay people will be going to Hawaii in droves to tie the knot if the state codifies same-sex marriage, depends on how other states, Congress, and the U.S. Supreme Court ultimately feel about the issue.

Political analysts and legal professionals inside and outside of Hawaii offer a wide variety of scenarios as to what will happen on the mainland, all of which point to a simple fact: Nobody knows.

What most agree on is that unless Congress attempts to reel in Hawaii by writing antigay statutes into U.S. marriage laws—a lengthy process that would require a constitutional amendment—or unless the state legislature of

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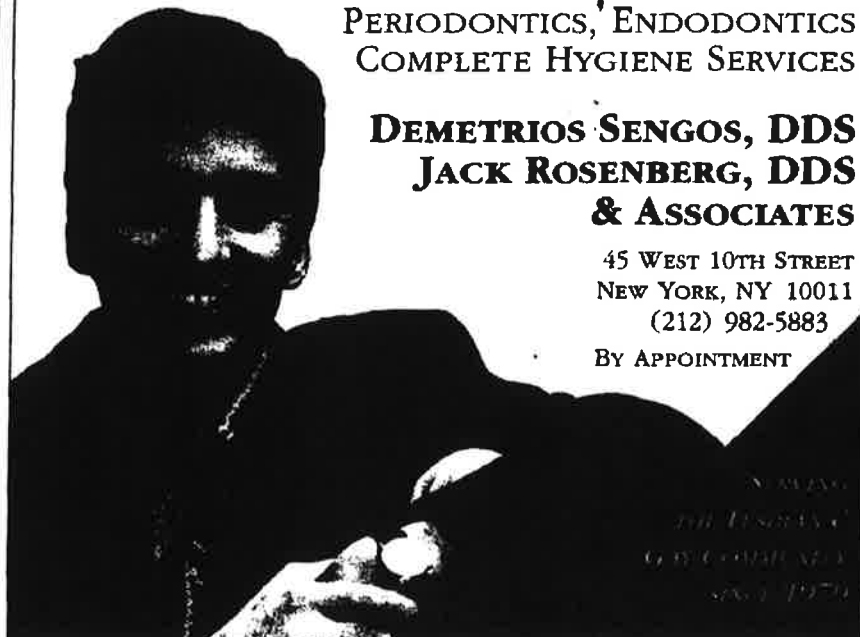
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Hawaii delves into this uncomfortable territory, no one can stop the Hawaii Supreme Court from instituting same-sex marriage for residents of that state: the state cannot take the case to the U.S. Supreme Court because Hawaii's supreme court has the ultimate jurisdiction.

The only way that same-sex marriage will get to the U.S. Supreme Court is via another state's challenge to recognizing a Hawaiian marriage in that state (a decision whose outcome still could not affect same-sex marriage within Hawaii, however). General legal principles and constitutional laws require states to honor each other's marriage laws, which is why the average heterosexual couple can get hitched overnight in Las Vegas and have their marriage recognized back in Kansas City. Or why a teenage girl who is considered underage and can't get married in New York without her parents' consent can go to Maryland to marry and come back to give her parents a nightmare.

However, another legal tenet says that courts can make exceptions in cases where the public is greatly opposed. Linda Elrod, a law professor at Washington University in Topeka, Kansas, and the editor of the American Bar Association's *Family Law Quarterly*, says that "as a general rule [courts] will validate the parties' expectations if [the marriage] was valid where the relationship was entered into—unless it violates public policy."

Legal scholars say that the 23 states that still have sodomy laws on the books might have a case for claiming that same-sex marriage violates public policy, as would those states that define marriage as existing for procreation. But most agree the entire area is uncharted.

Dan Foley is hopeful about the outcome of this case on the mainland. It would be helpful, he says, if the first mainland couples to marry in Hawaii and then challenge their state for recognition were from states such as Wisconsin or Massachusetts, where lesbians and gay men are already protected by law from discrimination in housing and employment. He also feels that by the time this case gets to the U.S. Supreme Court, Bill Clinton will quite possibly have appointed two or more liberal justices and Hawaii's same-sex marriage laws will have been in effect long enough to prove that there are no adverse problems caused by such marriages.

The right wing, meanwhile, is already seeing a new issue to rally around.

"In my mind, to perpetuate this gross institution of marriage is to limit us and the kinds of relationships we have," says Paula Ettelbrick of the National Center for Lesbian Rights.

Gary Bauer, a former Reagan official who now heads the conservative Family Research Council, has said that if states start recognizing same-sex marriages "you would see some kind of grass-roots response." Bauer claims that his organization has already received many letters from people wanting to stop gay marriage from happening.

The issue could clearly become yet another—like gays in the military—in which the right wing easily puts into motion an avalanche of opposition on something that the organized gay movement is divided on and doesn't see as a main priority. The debate over the issue in the gay community will in fact probably become even more heated. Many gay conservatives, an increasingly vocal group, strongly favor gay marriage, while many of those from the left of the queer spectrum, including some gay advocates in the Washington, D.C., establishment, have tended to be opposed.

"Marriage is not simply a private contract; it is a social and public recognition of a private commitment," wrote conservative, openly gay *New Republic* editor Andrew Sullivan in a cover story for the magazine's May 10, 1993, issue, which was on newsstands the week of the March on Washington. "Gay people always know this essential affirmation will be denied them. Thus their relationships are given no anchor, no endpoint, no way of integrating them fully into the network of family and friends that make someone a full member of

civil society." Gay marriage, Sullivan has said, would civilize gay men, encouraging them to be less promiscuous and more monogamous, which in his view is more socially acceptable.

Paula Ettelbrick, former legal director of the Lambda Legal Defense and Education Fund, the gay legal advocacy group, and now the public policy director of the National Center for Lesbian Rights, is very much against gay marriage "as a primary strategy for our community," she says. "I think the problem we face is not that we can't marry but that a full range of relationships we have are not recognized in our society. In my mind, to perpetuate this gross institution of marriage is to limit us and the kinds of relationships we have. I'm much more of a broad social reformist. I don't think that people should be entitled to health care, for instance, just because they're married to someone who has such benefits. Same-sex marriage is buying into the notion that only people who are married should be entitled to health benefits. And marriage is at its base a religious institution. Saying that gays and lesbians should be able to do anything that heterosexuals can do is sort of a classic liberal approach, and I guess I'm not a classic liberal."

A middle ground might be to fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, to demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution that as it now stands keeps us down. The most subversive action lesbians and gay men can undertake—and one that would perhaps benefit all of society—is to transform the notion of "family" entirely.

BACK AT THE TROPICAL PARADISE Lounge, Charmaine Lee Anderson's 48th birthday party is long under way. People are complimenting each other's sparkling—sometimes blinding—outfits, as the posing and pageantry reaches a crescendo.

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homage bestowed upon her is outdone only by that granted her mother, who has also arrived. Elsie Kimura, owner of the nearby Elsie's Club Polynesian, another night spot popular with this crowd, is a large woman with red hair and a gargantuan smile. She is a matriarch here, a woman for whom everyone present would give the dress off his/her back if need be. She raised Pamela among the queens, many of whom are Pamela's dearest friends. As Pamela embarked on her beauty pageant career and ultimately a shot at the Miss America title, they counseled her, celebrated her victories, and hosted a grand send-off dinner party for her before she left for Atlantic City in 1992. For most of them she lives a life they can only dream about, gliding down interminable runways, wearing glittering crowns and exquisite gowns, posing before an awestruck, television-watching nation.

"She placed in the top 15 in Atlantic City," Charmaine says authoritatively. "You don't see the top 15 on TV; you only see the top 10 finalists. She should have been one of those 10 finalists, but, you know, that pageant, it's all political. The whole thing—who wins, who gets chosen—it's all political!"

As dinner is served—a mix of Hawaiian, Chinese, Filipino, and American dishes, each of which a different guest has cooked at home and brought—well-wishers individually take to a stage in the middle of the room to croon to Charmaine. Some of them lip synch, but most actually sing in the Japanese karaoke style: They belt out the words to a song while a DJ spins the music track.

Eventually Pamela Kimura goes onstage, as the crowd cheers. She sings the classic "What a Difference a Day Makes," first dedicating the song to Elsie, "to my mother—our mother."

Charmaine's "husband" of 14 years, Freddie, then takes to the stage, kneels on one knee, and sings two love songs to Charmaine while she sits before him. She's crazy about him, evidenced by the sweet, childlike expression on her face, even if theirs is not a conventional relationship even by queer standards. "He has never touched my front," she tells me, referring to her penis. "He has never even seen it, not even during sex."

Freddie, a chunky man originally from Maui, has never sung to his sweetheart in public before either, and everyone present seems to realize the spe-

cialness of the moment. Charmaine momentarily becomes teary eyed.

However, as soon as Freddie is finished serenading her, Charmaine is up and about again, all smiles. She changes from her turquoise tube dress into a floor-length white-sequined gown, and now that everyone else has performed she belts out a number herself. She then brings the night to a close, reciting to the audience a litany of thank-yous. "I want to thank Miele for the ham and noodles. I want to thank Tony for the stuffed mushrooms. I want to thank Mama Elsie for the potato and macaroni salads. I want to thank Uncle Sonny for the lumpia." And so on.

When she is finished a *halau* of half a dozen grass-shirted children—boys and girls none of whom are above the age of nine—parades into the room to dance hula for Charmaine and her guests while Charmaine bids farewell to everyone individually.

"They are all just a wonderful family," Charmaine says of her guests as they flit about the Tropical Paradise Lounge critiquing the evening's festivities, making plans for their next glamorous affair, and air-kissing each other goodnight. "They are really one big family."♥

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DEREK KITCHEN, individually, et al.,

Plaintiffs-Appellees,

v.

GARY R. HERBERT, in his official
capacity as Governor of Utah, et al.,

Defendants-Appellants,

Appeal from the U.S. District Court
for the District of Utah,
Civil Case No. 2:13-CV-00217-RJS

MARY BISHOP, et al.,

Plaintiffs-Appellees,

and

SUSAN G. BARTON, et al.,

Plaintiffs-Appellees/
Cross-Appellants,

v.

SALLY HOWE SMITH, in her official
capacity as Court Clerk for Tulsa
County, State of Oklahoma,

Defendant-Appellant/
Cross-Appellee.

Appeal from the U.S. District Court
for the Northern District of Oklahoma,
Civil Case No. 04-CV-848-TCK-TLW

**BRIEF OF AMICI CURIAE ROBERT P. GEORGE, SHERIF GIRGIS, AND RYAN T.
ANDERSON IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

**BRIEF OF AMICI CURIAE ROBERT P. GEORGE, SHERIF GIRGIS, AND RYAN T.
ANDERSON IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

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smith@smithpllc.com

**Counsel for *Amici Curiae* Robert P. George,
Sherif Girgis, and Ryan T. Anderson**

Dated: February 10, 2014

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INTEREST OF AMICUS CURIAE^{1 2}

Sherif Girgis (A.B., Princeton University; B.Phil., University of Oxford-Rhodes Scholar) is a Ph.D. candidate in philosophy at Princeton University and a law student at Yale. Ryan T. Anderson (A.B., Princeton University, M.A., University of Notre Dame) is the Editor of *Public Discourse: Ethics, Law, and the Common Good*, the on-line journal of the Witherspoon Institute of Princeton, N.J., and a Ph.D. candidate in political science at the University of Notre Dame. Robert P. George (B.A., Swarthmore College; J.D., M.T.S., Harvard University; D.Phil., University of Oxford) is a Visiting Professor at Harvard Law School and McCormick Professor of Jurisprudence at Princeton University. Affiliations are for identification purposes.

Amici have studied and published on the moral, political, and jurisprudential implications of redefining marriage to eliminate the norm of sexual complementarity and have expertise that would benefit this Court. Their article, “What Is Marriage?” appeared in the *Harvard Journal of Law and Public Policy*. Their book, *What Is Marriage? Man and Woman: A Defense*, further develops their philosophic defense of marriage as a conjugal union.

¹ No party’s counsel authored the brief in whole or in part, and no one other than the *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

² This brief is filed with consent of all parties; thus no motion for leave to file is required. *See* 1/24/14 Joint Notice of Consent; *see also* Fed. R. App. P. 29(a).

SUMMARY OF ARGUMENT

This case is about what marriage is. Today's debates offer rival answers to that question, two competing substantive visions of marriage. This Court's task is not to judge the desirability of the State of Utah's definition, but only to decide whether citizens and legislators may embody in law the belief in marriage as a conjugal union, as they have historically done.

There are excellent reasons to think that marriage is a conjugal relationship—the type of union that only a man and woman can form—rather than just the sort of emotional union that any two (or more) adults can form. And recognizing marriage as such serves crucial public interests at low social costs.

A society's marriage culture serves many public goods. But to thrive, it requires a supporting framework of social norms. A main purpose of marriage law in any society is to promote such norms. Sound marriage policy therefore serves the common good.

Redefining civil marriage can cause corresponding social harms because it changes the public understanding of what marriage is. It weakens the rational foundation (and social practice) of the stabilizing marital norms that serve social order: permanence, exclusivity, monogamy. And undermining marital norms will damage the many critical goods that draw the law into regulating marriage:

Real marital fulfillment. To form a true marriage, one must freely choose it, which requires at least a rough idea of what it is. Redefining marriage will harm people (especially future generations) by distorting their idea of what marriage is. It will teach that marriage is essentially about emotional fulfillment, without any inherent connections to bodily union or procreation and family life. As people internalize this view, their ability to realize genuine marital union will diminish.

Child and spousal well-being. Marriage tends to make husbands and wives healthier, happier and wealthier. And it does this especially by promoting norms of permanence, exclusivity and orientation to family life. As the redefinition of marriage makes these norms harder to justify and live by, spouses will benefit less from the advantages of stability.

Moreover, if marriage is redefined, no civil institution will reinforce the notion that both mothers and fathers matter for child-rearing. In all these ways, redefinition will weaken the motivation for spouses to stay together for their children, or for couples to marry before conceiving. But children do best when reared by their married biological mother and father, so the welfare and correctional state will have to expand to fill the developmental vacuum.

Leading LGBT activists increasingly agree that redefining marriage would undermine its norms.

Religious liberty. If the conjugal view of marriage is deemed irrational (“bigotry”), freedom to promote it will be eroded. Individuals and institutions who espouse it have been denied government licenses, or educational and professional opportunities, for promoting (even publicizing) their views. The consequences for observant Christians, Jews, Muslims and others are clear.

Moreover, none of these harms is caused by recognizing infertile (opposite-sex) marriages, which cohere with the conjugal view. And finally, enshrining this view of marriage in law is fully consistent with the U.S. Supreme Court’s ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

Because there are good reasons for citizens and lawmakers to understand marriage as a male-female union—even bracketing the harms of redefining it—this Court should uphold Utah’s marriage laws as constitutional exercises of policy-making power.

ARGUMENT

I. At stake in Utah’s marriage laws is the definition of marriage.

What is misleadingly called “the gay marriage debate” is not about homosexuality, but marriage. It is not about whom to treat as eligible to marry, but about which understanding of the nature of marriage to enshrine legally. It marks a pivotal stage in a decades-long struggle between two views of marriage.

The *conjugal* view of marriage has long informed our legal traditions. Marriage so understood is a *comprehensive* union: Joining spouses in body as well as in mind, it is begun by consent and sealed by sexual intercourse. So completed in the acts by which new life is made, it is especially apt for and deepened by procreation, and calls for that broad domestic sharing uniquely fit for family life. Uniting spouses in these all-encompassing ways, it calls for all-encompassing commitment: permanent and exclusive. Comprehensive union is valuable in itself, but its link to children's welfare is what justifies recognizing and regulating it.

A *revisionist* view has informed certain marriage policy changes of the last several decades. It sees marriage as essentially an *emotional* union, accompanied, if the partners wish, by consensual sexual activity and valuable while the emotion lasts.

The revisionist view informs some opposite-sex as well as same-sex bonds, and brooks no real difference between them: both involve intense emotional bonding, so both can make a "marriage." But comprehensive union is something only a man and woman can form.

For this reason, enacting same-sex marriage, whether by legislative action or judicial fiat, would not expand the institution of marriage, but redefine it. Finishing what policies like "no-fault" divorce began, and thus entrenching them, it would

finally replace the conjugal view with the revisionist. This would multiply the marriage revolution's cultural spoils, making them harder to recover.

There is therefore no direct line from the principle of equality, to redefining marriage to abolish the norm of sexual complementarity. Equality requires treating like cases alike. To know what counts as "like cases," we have to know what marriage is and how recognizing it serves the public interest.

And because any marriage policy enshrines *some* view of what marriage is—the conjugal, revisionist, or another—none is morally or politically neutral. Each relies on controversial judgments. Rejecting either as unconstitutional would require this Court to answer reasonably disputed moral and policy questions on which the Constitution is silent.

Yet the Court is charged with judging not the *soundness* of either view of marriage, but only whether the conjugal view is reasonable, and crucial for important public interests. What we show is that citizens have excellent reasons to affirm that view, and to expect redefining civil marriage to undermine public interests. The first point alone is sufficient to show a crucial basis in the common good for Utah's marriage laws; the second reinforces it.

II. States have compelling reasons for affirming that marriage is a union of man and woman.

Any community is created by common action—by cooperative activity, defined by common goods, in the context of commitment. The activities and goods build up the bond and determine the commitment it requires.

For example, a scholarly community exists whenever people commit to cooperate in activities ordered toward gaining knowledge. These activities and the truths they uncover build up their bond and determine the sort of commitment (to academic integrity) that scholars owe each other.

The kind of union created by *marriage* is *comprehensive* in just these ways: in (a) how it unites persons, (b) what it unites them with respect to, and (c) how extensive a commitment it demands.

It unites two people (a) in their most basic dimensions, in mind *and* body; (b) with respect to procreation, family life, and its broad domestic sharing; and (c) permanently and exclusively.³

As to (a): The bodily union of two people is much like the union of organs in an individual. Just as one's organs form a unity by coordinating for the biological good of the whole (one's bodily life), so the bodies of a man and woman form a unity by coordination (coitus) for a biological good (reproduction) of the couple as

³ *Amici* expand on this argument about marriage in Chapter 2, entitled “Comprehensive Union,” of Sherif Girgis et al., *What Is Marriage? Man and Woman: A Defense* (2012).

a whole. In choosing such biological coordination, spouses unite bodily, and do not merely touch. Non-marital bonds are, by contrast, simply unions of heart and mind.

Second, marriage is oriented to procreation, family life, and thus a comprehensive range of goods. Why? The kind of act that makes marital love is also the one that makes new life: new participants in *every* type of good. So marriage itself, the bond so embodied, would be fulfilled by family life, and by the all-around domestic sharing uniquely apt for it. Ordinary friendships—unions of heart and mind through conversations and other activities—can have more limited and variable scope.

Third, in view of its comprehensiveness in these other senses, marriage inherently calls for comprehensive commitment: permanence and exclusivity. (Indeed, comprehensive union can be achieved *only* by two people, because no act can organically unite three or more people bodily.)

Moreover, marriage is uniquely apt for having and rearing children, an inherently open-ended task calling for unconditional commitment. So its norms fittingly create the stability and harmony suitable for rearing children. That stability is undermined by divorce and infidelity, which create fragmented and often fatherless families.

Indeed, only the conjugal view explains why spouses should pledge *sexual* exclusivity at all. If instead marriage is essentially an emotional union, this is

impossible to explain. After all, sex is just one of many pleasing activities that foster tenderness, and some partners regard sexual openness as better for lasting companionship. But the conjugal view is not arbitrary in picking out sexual activity as central to exclusivity, since it distinguishes marriage by the type of cooperation, defined by the common ends, that it involves: bodily union and its natural fulfillment in family life.

While people in other bonds may pledge and live out permanent sexual exclusivity as a matter of preference, only conjugal union objectively requires such a commitment if it is to be realized fully. Only in conjugal marriage is there a principled basis for these norms apart from what spouses happen to prefer. As we show below (Part IV.E-F), this is borne out by reasoned reflection, revisionists' own arguments, recent policy proposals, and preliminary social science.

Because the conjugal view best explains the other norms of marriage, citizens and lawmakers have excellent reasons to affirm it.

III. The conjugal view explains the state's interest in marriage.

Why does the state recognize marriage but not other close bonds? It has an interest in supporting the stabilizing norms of marriage because marriage is uniquely apt for family life. Only male-female sexual relationships produce new human beings—who have the best chance of reaching maturity and contributing socially when reared by their own committed mother and father. But family

stability requires strong social norms guiding people's choices toward their (and others') long-term interests.

As the eminent social scientist James Q. Wilson wrote, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."⁴ The law addresses this problem by shaping how people understand marriage—and thus how they act *toward and within* it. It thus vindicates children's right to know their own mother and father's committed love. It also curbs negative externalities on innocent parties, as family fragmentation imposes costs across society.

Studies that control for other factors, including poverty, show that children reared in intact homes do best on the following indices:⁵

- *Educational achievement*: literacy and graduation rates
- *Emotional health*: rates of anxiety, depression, substance abuse, and suicide

⁴ James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* 41 (New York: Harper Collins 2002).

⁵ For the relevant studies, see *Marriage and the Public Good: Ten Principles* 9-19 (Princeton, N.J.: The Witherspoon Institute 2008), winst.org/wp-content/uploads/WI_Marriage_and_the_Public_Good.pdf.

- *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
- *Child and adult behavior:* rates of aggression, attention deficit disorder, delinquency, and incarceration

Consider the conclusions of the left-leaning research institution Child Trends:

[T]he family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents. . . . [I]t is not simply the presence of two parents, . . . [but] of *two biological parents* that seems to support children's development.⁶

Several other literature reviews corroborate the importance of intact households for children.⁷

⁶ Kristin Anderson Moore, Susan M. Jekielek, & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It?*, Child Trends Research Brief 1-2 (June 2002), www.childtrends.org/wp-content/uploads/2013/03/MarriageRB602.pdf.

⁷ See Sara McLanahan, Elisabeth Donahue, & Ron Haskins, *Introducing the Issue, Future of Children*, Fall 2005, at 3-12, available at http://futureofchildren.org/futureofchildren/publications/docs/15_02_01.pdf; Mary Parke, *Are Married Parents Really Better for Children?: What Research Says about the Effects of Family Structure on Child Well-Being*, CLASP Policy Brief no. 3 (May 2003), available at http://www.clasp.org/publications/Marriage_Brief3.pdf; W. Bradford Wilcox et al., *Why Marriage Matters: Twenty-*

A second public benefit of marriage is its tendency to help spouses financially, emotionally, physically, and socially. After marrying, for example, men tend to spend more time at work, less time at bars, more time at religious gatherings, less time in jail, and more time with family.⁸ Yet as discussed below (Part V), it is the conjugal view of marriage that makes sense of and reinforces these stabilizing norms; attempting to spread them by replacing that understanding of marriage with a competing vision is likely to have just the opposite effect.

Third, given the economic benefits of marriage, its decline most hurts the least fortunate, as Kay Hymowitz argues in *Marriage and Caste in America*.⁹ In fact, a leading indicator of whether someone will know poverty or prosperity is whether she knew growing up the love and security of her married mother and father.

Finally, since a strong marriage culture is good for children, spouses, our whole economy, and especially the poor, it also helps keep government limited. Where marriages never form or easily end, the state expands to fill the domestic

Six Conclusions from the Social Sciences (New York: Institute for American Values, 2d ed. 2005).

⁸ Steven Nock, *Marriage in Men's Lives* (New York: Oxford University Press 1998). Nock is discussing marriages in the traditional sense: the union of husband and wife.

⁹ Kay S. Hymowitz, *Marriage and Caste in America: Separate and Unequal Families in a Post-Marital Age* (Chicago: Ivan R. Dee 2006). See also W. Bradford Wilcox, *The Evolution of Divorce*, National Affairs, Fall 2009, at 81, 88-93, available at http://www.nationalaffairs.com/doclib/20091229_Wilcox_Fall09.pdf.

vacuum by lawsuits to determine paternity, visitation rights, child support, and alimony; and by increased policing and social services. Sociologists David Popenoe and Alan Wolfe's research on Scandinavian countries shows that as marriage culture declines, the size and scope of state power and spending tend to grow.¹⁰

In fact, a study by the left-leaning Brookings Institution finds that \$229 billion in welfare expenditures over a quarter century can be attributed to the exacerbation of social ills by family breakdown: teen pregnancy, poverty, crime, drug abuse, and health problems.¹¹ A 2008 study found that divorce and unwed childbearing cost taxpayers “at least \$112 billion” each year.¹²

In short, several aspects of the common good depend on a strong marriage culture.

¹⁰ David Popenoe, *Disturbing the Nest: Family Change and Decline in Modern Societies* xiv-xv (New York: A. de Gruyter 1988); Alan Wolfe, *Whose Keeper? Social Science and Moral Obligation* 132-42 (Berkeley: University of California Press 1989).

¹¹ Isabel V. Sawhill, *Families at Risk, in Setting National Priorities: The 2000 Election and Beyond* 97, 108 (Henry J. Aaron & Robert D. Reischauer eds., Washington, D.C.: Brookings Institution Press 1999); *see also Marriage and the Public Good, supra*, at 15.

¹² Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and for All Fifty States* 5 (New York: Institute for American Values 2008), <http://www.americanvalues.org/search/item.php?id=52> (emphasis in original).

IV. Redefining marriage would not extend its stabilizing norms, but undermine them across society.

Redefining civil marriage will obscure the true nature of marriage and undermine the principled basis of its norms, and, over time, people's adherence to them. This will harm spouses, children, and the larger community. The arguments of *amici* here depend on three simple ideas:

1. Law tends to shape beliefs.
2. Beliefs shape behavior.
3. Beliefs and behavior affect human interests and human well-being.

In discussing harms, *amici* do not propose changing the controlling constitutional standard, under which marriage laws are valid if they rationally advance legitimate ends. That standard does not require evidence that different laws would cause more harm. The *amici* discuss harms here only because they *reinforce* the sufficient reasons given above for enshrining the conjugal view.

A. If sexual complementarity is merely incidental, then so are marital norms like permanence, monogamy, exclusivity, and even sexual union.

Some argue that redefined marriage would only spread stability. But there is nothing magical about the word "marriage" that promotes marital norms, however applied. The law encourages these norms by promoting an understanding of marriage that makes sense of them.

Yet marital norms make no sense as requirements of *principle* (as opposed to preference), if marriage is just whatever same- and opposite-sex couples can have in common, namely, intense emotional regard. There is no reason of *principle* why emotional union should be permanent. Or limited to two persons, rather than including larger ensembles. Or sexually exclusive, rather than “open.” Or sexual at all, rather than integrated around other activities (say, where sex would remain illegal—as between relatives). Or inherently oriented to family life and shaped by its demands. Couples may live out these norms where temperament or taste motivates them, but there is no reason of principle for them to do so, and no basis for using the law to encourage them to do so.

In other words, if sexual complementarity is optional for marriage, present only where preferred, then so is almost every other norm that sets marriage apart. If laws defining marriage as a male-female union unjustly discriminate against same-sex relationships because the latter can have loving emotional bonds, then excluding people in polyamorous (multiple-partner) emotional bonds is equally unjust. Sexual complementarity and other historic norms of marriage logically stand or fall together.

B. Promoting the revisionist view makes conjugal union harder to live out.

No one acts in a void. We all take cues from cultural norms, shaped by the law. Prominent Oxford philosopher Joseph Raz, who does not share the conjugal

view, explains the inevitable and sweeping consequences of changing marriage laws:

[O]ne thing can be said with certainty [about recent changes in marriage law]. They will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear. They will not disappear suddenly. Rather they will be transformed into a somewhat different social form, which responds to the fact that it is one of several forms of bonding, and that bonding itself is much more easily and commonly dissoluble. All these factors are already working their way into the constitutive conventions which determine what is appropriate and expected within a conventional marriage and transforming its significance.¹³

Redefining civil marriage would change its meaning *for everyone*. It would not merely expand access to the institution of marriage as it has historically existed. Legally recognized opposite-sex unions would increasingly be defined by what they had in common with same-sex relationships.

In fact, such a change makes marriage itself (considered as a valuable form of human association, not just as a legal status) harder to form. For one can realize marriage only by choosing it, which requires having some idea of what it really is. By altering the basic understanding of marriage, the revisionist proposal would

¹³ Joseph Raz, *Autonomy and Pluralism*, in *The Morality of Freedom* 393 (Oxford: Clarendon Press 1988).

make people less capable of realizing this basic way of thriving.¹⁴ People entering into what the state calls “marriage” would increasingly be forming bonds that merely resembled the real thing in certain ways, as a contractual relationship might resemble a friendship. The revisionist view would distort their priorities, actions, even motivations, in ways detrimental to true marriage.

C. By obscuring the principled basis of the stabilizing norms of marriage, redefining marriage would increase marital instability, harming spouses and children.

Permanence and exclusivity—the principled basis, and internal and social motivations to live them out—depend on the conjugal view (Part III). By the same token, these norms are undermined by the revisionist view (Part IV.A). Yet law affects behavior. So as more people absorb the new law’s message, we can expect marriages to take on still more of emotion’s inconstancy.¹⁵

Because there is no *reason* that emotional unions—any more than the emotions that define them, or general friendship—should be permanent or limited to two, these norms of marriage would make less sense. People would thus feel less bound to live by them whenever preference dictated otherwise. And being less able to understand the value of marriage itself as a certain sort of union, even apart

¹⁴ Patrick Lee, Robert P. George, & Gerard V. Bradley, *Marriage and Procreation: Avoiding Bad Arguments, Public Discourse*, Witherspoon Institute, March 30, 2011, <http://www.thepublicdiscourse.com/2011/03/2637>.

¹⁵ See also Andrew J. Cherlin, *The Marriage-Go-Round: The State of Marriage and Family in America Today* (New York: Knopf 2009), for a discussion of the link between the rise of expressive individualism and the divorce revolution.

from its emotional satisfactions, they would overlook reasons for marrying or staying with a spouse as feelings waned, or waxed for others.¹⁶

But children and spouses benefit in many concrete ways from marital stability (Part IV). These interests, which justify recognizing marriage, also count against redefining it.

D. Redefining marriage would obscure the special importance of biological parents, and of mothers and fathers generally, to children's detriment.

Conjugal marriage laws communicate the message that a conjugal union is, on the whole, the most appropriate environment for rearing children, as the best available social science suggests.

Recognizing same-sex relationships as marriages would legally abolish that ideal. No civil institution would reinforce the notion that men and women typically have different strengths as parents. Indeed, our law, public schools, and media would teach that mothers and fathers are fully interchangeable, and that only bigots think otherwise (Part VI.C).

And here is the central problem with that: it would diminish the motivations for husbands to remain with their wives and *biological* children, or for men and

¹⁶ See, e.g., W. Bradford Wilcox & Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate versus Institutional Models of Marriage*, 39 Soc. Sci. Res. 687, 687-699 (2010). For research showing that same-sex unions tend far more often to eschew sexual exclusivity, see Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. Times, Jan. 28, 2010, available at <http://www.nytimes.com/2010/01/29/us/29sfmetro.html?ref=us>.

women having children to marry first. Yet the resulting arrangements—parenting by divorced or single parents, or cohabiting couples; and disruptions of any kind—are *demonstrably* worse for children. So *even if studies showed no differences between same- and opposite-sex adoptive parenting*, redefining marriage would destabilize marriage in ways that we know hurt children.

That said, there is evidence that mothers and fathers have different parenting strengths. Girls growing up without fathers are likelier to suffer sexual abuse and to have children as teenagers and out of wedlock.¹⁷ Boys reared without their father have higher rates of aggression, delinquency, and incarceration.¹⁸

As Rutgers University sociologist David Popenoe concludes, social science evidence suggests “that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is [...]

¹⁷ Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Cambridge, Mass.: Harvard University Press 1994); Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 *Child Dev.* 801, 801-21 (2003); Wilcox et al., *Why Marriage Matters*, *supra*, at 17-18, 31-32; Lorraine Blackman et al., *The Consequences of Marriage for African Americans: A Comprehensive Literature Review* (New York: Institute for American Values 2005).

¹⁸ Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, *Future of Children*, Fall 2005, at 75, 75-96, available at http://futureofchildren.org/futureofchildren/publications/docs/15_02_05.pdf; Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 *J. Res. on Adolescence* 369-97 (2004).

irreplaceable.”¹⁹ He continues: “The two sexes are different to the core, and each is necessary—culturally and biologically—for the optimal development of a human being.”²⁰

In a summary of the “best psychological, sociological, and biological research to date,” University of Virginia sociologist W. Bradford Wilcox finds that “men and women bring different gifts to the parenting enterprise, that children benefit from having parents with distinct parenting styles, and that family breakdown poses a serious threat to children and to the societies in which they live.”²¹

In short: redefining civil marriage might well make it more socially acceptable for fathers to leave their families, for unmarried parents to put off firmer commitment, or for children to be created for a household without a mother or father. But whatever the cause, there will be a cost as more children lack the care of their own married mother and father.²²

¹⁹ David Popenoe, *Life without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensable for the Good of Children and Society* 146 (New York: Free Press 1996).

²⁰ *Id.* at 197.

²¹ W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show about the Complementarity of the Sexes and Parenting*, Touchstone, November 2005, at 32, 36.

²² Of course, the question of which arrangements our policies should privilege is normative; it cannot be settled by the cause-and-effect descriptions of social science alone. But that point scarcely matters here, because it is impossible to

E. Many LGBT activists agree—even embrace the result—that eliminating the norm of sexual complementarity will weaken other norms of marriage.

The point that the revisionist view erodes the basis for permanence and exclusivity in *any* relationship is increasingly confirmed by revisionists’ own rhetoric and arguments, by the policies that they are increasingly led to embrace, and even by preliminary social science.

Thus, in their statement “Beyond Same-Sex Marriage,” more than 300 “LGBT and allied” scholars and advocates—including prominent Ivy League professors—call for recognizing sexual relationships involving more than two partners.²³

And they do exist: *Newsweek* reports that there are more than five hundred thousand multiple-partner households in the United States alone.²⁴ In Brazil, a public notary has recognized a trio as a civil union.²⁵ Mexico City has considered

generalize from available studies purporting to find no differences between same-sex and married biological parenting.

²³ *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, BeyondMarriage.org, July 26, 2006, http://beyondmarriage.org/full_statement.html.

²⁴ Jessica Bennett, *Only You. And You. And You: Polyamory—Relationships with Multiple, Mutually Consenting Partners—Has a Coming-Out Party*, *Newsweek*, July 28, 2009, <http://www.newsweek.com/2009/07/28/only-you-and-you-and-you.html>.

²⁵ *Three-Person Civil Union Sparks Controversy in Brazil*, BBC News, Aug. 28, 2012, <http://www.bbc.co.uk/news/world-latin-america-19402508>.

expressly temporary marriage licenses.²⁶ The Toronto District School Board has taken to promoting polyamorous relationships among its students.²⁷

And exclusivity? Consider this candid piece in *The Advocate*, a gay-interest newsmagazine:

[W]hat if—for once—the sanctimonious crazies are right? Could the gay male tradition of open relationships actually alter marriage as we know it? And would that be such a bad thing?²⁸

Other revisionists have embraced the goal of weakening marriage *in these very terms*. It is “correct,” says revisionist advocate Victoria Brownworth, to think “. . . that allowing same-sex couples to marry will weaken the institution of marriage. . . . It most certainly will do so, and that will make marriage a far better concept than it previously has been.”²⁹ Michelangelo Signorile, a prominent revisionist advocate, urges same-sex couples to seek legal recognition “not as a way of adhering to society’s moral codes but rather to debunk a myth and radically

²⁶ *Mexico City Proposes Temporary Marriage Licenses*, Telegraph, Sept. 30, 2011, <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/mexico/8798982/Mexico-City-proposes-temporary-marriage-licences.html>.

²⁷ *Toronto School District Board Promotes Polygamy, Group Sex to Children*, BlazingCatFur, <http://blazingcatfur.blogspot.com/2012/09/tdsb-promotes-polygamy-group-sex-to.html>.

²⁸ Ari Karpel, *Monogamish*, Advocate, July 7, 2011, http://www.advocate.com/Print_Issue/Features/Monogamish/.

²⁹ Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?*, in *I Do/I Don't: Queers on Marriage* 53, 58-59 (Greg Wharton & Ian Philips eds., San Francisco: Suspect Thoughts Press 2004).

alter an archaic institution”³⁰ and thereby “transform the notion of ‘family’ entirely.”³¹

Leading revisionist advocates increasingly agree that redefining marriage would undermine its stabilizing norms.

F. Preliminary social science also suggests that opposite- and same-sex bonds tend to follow different norms.

Preliminary social science also suggests that different norms tend to make sense for opposite- and same-sex bonds. In the 1980s, David McWhirter and Andrew Mattison set out to disprove popular beliefs about same-sex male partners’ lack of adherence to sexual exclusivity. Of those they surveyed, whose relationships had lasted from one to thirty-seven years, more than 60 percent had originally expected sexual exclusivity, but not one couple stayed exclusive longer than five years.³²

More recently, the *New York Times* reported on a San Francisco State University study: “[G]ay nuptials are portrayed by opponents as an effort to rewrite the traditional rules of matrimony. Quietly, outside of the news media and courtroom spotlight, many gay couples are doing just that.”³³

³⁰ Michelangelo Signorile, *Bridal Wave*, OUT, December/January 1994, at 68, 161.

³¹ *Id.*

³² David P. McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* 252-53 (Englewood Cliffs, N.J.: Prentice-Hall Trade 1984).

³³ James, *Many Successful Gay Marriages Share an Open Secret*, *supra*.

One study even suggests that exclusivity affects men's satisfaction in opposite-sex relationships more than in same-sex ones.³⁴ According to another, sexually open gay relationships last longer.³⁵ By contrast, 99 percent of opposite-sex spouses demand of each other and anticipate sexual exclusivity,³⁶ and violations of it are "the leading cause of divorce across 160 cultures and are one of the most frequent reasons that couples seek marital therapy."³⁷

Relationship longevity, too, tends to vary. A study of same-sex civil marriages in Norway and Sweden found that "divorce risks are higher in same-sex partnerships than opposite-sex marriages and . . . unions of lesbians are considerably less stable, or more dynamic, than unions of gay men."³⁸

Early evidence thus suggests that different norms prevail among same- and opposite-sex bonds.

³⁴ Trevor A. Hart & Danielle R. Schwartz, *Cognitive-Behavioral Erectile Dysfunction Treatment for Gay Men*, 17 *Cognitive & Behav. Prac.* 66, 66-76 (2010).

³⁵ James, *Many Successful Gay Marriages Share an Open Secret*, *supra*.

³⁶ Alfred DeMaris, *Distal and Proximal Influences on the Risk of Extramarital Sex: A Prospective Study of Longer Duration Marriages*, 46 *J. Sex Res.* 597, 597-607 (2009).

³⁷ Julie H. Hall & Frank D. Fincham, *Psychological Distress: Precursor or Consequence of Dating Infidelity*, 35 *Personality & Soc. Psychol. Bull.* 143-59 (2009).

³⁸ Gunnar Andersson, Turid Noack, Ane Seierstad & Harald Weedon-Fekjaer, *The Demographics of Same-Sex Marriages in Norway & Sweden*, 43 *Demography* 79, 95 (2006).

V. Beyond weakening marriage and its stability, enshrining the revisionist view would burden rights of conscience.

Americans are impatient with those we regard as enemies of equality. Often barred from respectable jobs, they enjoy little social tolerance. The First Amendment does not keep us from revoking certain of their civil privileges or suing them for acting on their views.³⁹

Yet the revisionist view depends on the idea that it is irrational to see important differences between same- and opposite-sex relationships. By accepting this idea, the state would deem conjugal marriage supporters champions of invidious discrimination. This would undermine moral and religious freedom, and parents' rights to direct their children's education.

From the wedding on through the honeymoon and into common life, couples transact *as a couple* with countless people. Photographers, caterers, innkeepers, adoption agency officials, private school administrators, counselors, foster-care and adoption providers, and others will be forced to comply with the revisionist view or lose their jobs, or licenses and government contracts.⁴⁰

³⁹ For example, the Internal Revenue Service revoked the tax-exempt status of Bob Jones University because of its racially discriminatory practices, and the Supreme Court upheld this action as compatible with the university's First Amendment rights. *Bob Jones University v. United States*, 461 U.S. 574 (1983).

⁴⁰ Marc D. Stern, *Same-Sex Marriage and the Churches*, in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 1-57, 1, 11-14 (Douglas Laycock, Anthony Picarello, & Robin Fretwell Wilson eds., Lanham, Md.: Rowman & Littlefield 2008). This collection of essays includes the views of scholars on both

Thus, in Canada, Damian Goddard was fired from his job as a sportscaster for expressing on Twitter support for conjugal marriage.⁴¹ In Massachusetts, Catholic Charities was forced to give up its adoption services rather than violate its principles by placing children with same-sex cohabitants; Catholic Charities of the Washington, D.C. archdiocese in 2010 for the same reason shut down its public adoption and foster-care programs.⁴² When public schools began teaching students about same-sex marriage, precisely on the ground that it was now the law, a federal Court of Appeals ruled that parents had no right to exempt their children.⁴³ The Becket Fund for Religious Liberty reports that over “350 separate state anti-discrimination provisions would likely be triggered by recognition of same-sex marriage.”⁴⁴

sides of the same-sex marriage question, who conclude that conflicts with religious liberty are inevitable when marriage is extended to same-sex couples.

⁴¹ *TV Host Fired over Sean Avery Debate*, ESPN.com, May 13, 2011, <http://sports.espn.go.com/new-york/nhl/news/story?id=6532954>.

⁴² Maggie Gallagher, *Banned in Boston: The Coming Conflict between Same-Sex Marriage and Religious Liberty*, Weekly Standard, May 15, 2006, <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>; *Same-sex "marriage" law forces D.C. Catholic Charities to close its adoption program*, Catholic News Service, Feb. 17, 2010, http://www.catholicnewsagency.com/news/same-sex_marriage_law_forces_d.c._catholic_charities_to_close_adoption_program/.

⁴³ See, e.g., *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

⁴⁴ Becket Fund for Religious Liberty, *Same-Sex Marriage and State Anti-Discrimination Laws 2* (Washington, D.C. Jan. 2009), available at <http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendices.pdf>.

If the people judge that the conjugal view of marriage is reasonable or even compelling, they may also judge that state efforts to suppress it curb freedoms of speech, religion, and conscience without justification.

VI. Recognizing the marriages of infertile opposite-sex couples does not undermine the State's rationale for upholding the conjugal view of marriage.

It is a mistake to think that the conjugal view leaves no principled basis for recognizing infertile couples' unions but not same-sex couples.

After all, (1) an infertile man and woman can still form together a comprehensive (bodily as well as emotional) union, which differs only in degree, not type, from fertile ones before or after their first child. So recognizing such unions has (2) none of the costs of recognizing same-sex bonds; (3) most of the benefits of recognizing fertile ones; and (4) one *additional* benefit.

A. Infertile conjugal unions are still true marriages

To form a true marriage, a couple needs to establish and live out the (i) comprehensive (i.e., mind-and-body) union that (ii) would be completed by, and be apt for, procreation and domestic life and so (iii) inherently calls for permanent and exclusive commitment.

Every male-female couple capable of consummating their commitment can have all three features. With or without children, on the wedding night or years

later, these bonds are all comprehensive in the three senses specific to marriage, with its distinctive value. No same-sex or multiple-partner union is.

B. Recognizing infertile conjugal unions has none of the costs of redefining marriage.

Since infertile couples can form a true marriage, recognizing them has none of the *costs* of recognizing same-sex, polyamorous, or other nonmarital unions. It does not make it harder for people to realize the basic human good of marriage, for it does not undermine the public's grasp of the nature of true marriage. Nor does it undermine marital *norms*, which are grounded in that nature, or make fathers or mothers seem superfluous. It prejudices no one's religious or moral freedom.

C. Recognizing such unions has many of the benefits of recognizing fertile unions.

Many couples believed to be infertile end up having children, who are served by their parents' marriage; and trying to determine fertility would require unjust invasions of privacy.

Furthermore, even an obviously infertile couple can for reasons of principle, and not merely subjective preference, live out the features of true marriage, and so contribute to a strong marriage culture. Their example makes couples who might conceive likelier to form a marriage and abide by its norms. And that, in turn, ensures that more children are reared by their married biological parents.

D. Recognizing such unions has at least one additional benefit.

Finally, recognizing only fertile marriages would suggest that marriage is valuable only as a means to children—and not good in itself, as it is. So recognizing infertile marriages serves one purpose *better* than recognizing fertile unions does: to teach the truth, itself crucial for marriage stability, that marriage (conjugal union) is valuable in itself.

Thus, the more fully spouses (including infertile ones) live out the truth about what marriage is, the more that truth will saturate our culture, so that more families *with* children stay intact.

VII. Upholding Utah’s marriage laws is consistent with *Windsor*.

State laws defining marriage as the union of a man and a woman suffer none of the infirmities found in the federal Defense of Marriage Act (“DOMA”) in *United States v. Windsor*, 133 S. Ct. 2675 (2013). In fact, that decision’s logic and holding affirm the States’ prerogative to define civil marriage.

As *Windsor* noted, “[t]he definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’” *Id.* at 2691 (citations omitted). Indeed, it was “DOMA’s unusual deviation from the usual tradition of . . . accepting state definitions of marriage”

that provided “strong evidence” of unconstitutionality and “especially require[d] careful consideration.” *Id.* at 2693.

Under that careful scrutiny, the Court struck down Section 2 of DOMA (defining marriage for federal purposes as a male-female union) *on State-protective grounds*—which are, of course, logically inapplicable against the States.

In particular, the Court observed that “the State [of New York had] acted” to acknowledge “a relationship deemed by the State worthy of dignity.” *Id.* at 2692. For the Court, the problem with DOMA was its attempt “to injure the very class New York [sought] to protect.” *Id.* at 2693. It was “[b]y *doing so*”—by targeting a *State-recognized* domestic relation—that DOMA violated “basic due process and equal protection principles applicable to the *Federal* Government.” *Id.* (emphasis added). *See also id.* (DOMA “impose[s] a disadvantage . . . upon all who enter into same-sex marriages *made lawful by the unquestioned authority of the States.*”) (emphasis added); *id.* at 2694 (faulting DOMA for “diminishing the stability and predictability of basic personal relations *the State has found it proper to acknowledge and protect*”) (emphasis added); *id.* at 2695 (DOMA “demean[s] those persons *who are in a lawful same-sex marriage.*”) (emphasis added). The problem, in short, was DOMA’s attempt to “interfere with state sovereign choices about who may be married.” *Id.* at 2693.

Thus, the *Windsor* majority’s “*opinion and* its holding are confined to” unions recognized as marriages under State law. *Id.* at 2696 (emphasis added); *see also id.* (“The Court does not have before it, *and the logic of its opinion does not decide*, the distinct question whether the States” may limit marital status to male-female bonds.) (Roberts, C.J., dissenting) (emphasis added); *id.* at 2709 (“[S]tate courts can distinguish today’s case when the issue before them is state denial of marital status to same-sex couples.”) (Scalia, J., dissenting).

But Utah’s laws do not undermine the States’ prerogative to define marriage or, therefore, trigger the same “careful consideration” as DOMA. Nor do they disadvantage relationships recognized by a State in its authority over domestic relations. On the contrary, they are *exercises* of that authority. Nothing in *Windsor* requires striking down Utah’s marriage laws or scrutinizing them more closely. Indeed, far from condemning Utah’s right so to determine its marriage policy, the logic of *Windsor* reinforces it.

CONCLUSION

For the foregoing reasons, this Court should uphold Utah's marriage laws as constitutionally valid exercises of policy-making power.

Respectfully submitted,

THE SMITH APPELLATE LAW FIRM

/s/ Michael F. Smith

By: Michael F. Smith

1717 Pennsylvania Avenue N.W.

Suite 1025

Washington, D.C. 20006

(202) 454-2860 (tel)

(202) 747-5630 (fax)

smith@smithpllc.com

**Counsel for *Amici Curiae* Robert P. George,
Sherif Girgis, and Ryan T. Anderson**

Dated: February 10, 2014

CERTIFICATE OF COMPLIANCE

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Dated: February 10, 2014

s/ Michael F. Smith

*Attorney for Robert P. George,
Sherif Girgis, and Ryan T. Anderson*

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to the following parties:

Case No. 13-4178:

David C. Codell
dcodell@nclrights.org

Kathryn Kendell
kkendell@nclrights.org

Shannon Price Minter
SMinter@nclrights.org

James E. Magleby
magleby@mgpclaw.com

Jennifer Fraser Parrish
parrish@mgpclaw.com

Peggy Ann Tomsic
tomsic@mgpclaw.com

Attorneys for Plaintiffs-Appellees

John J. Bursch
jbursch@wnj.com

Philip S. Lott
phillott@utah.gov

Stanford E. Purser
spurser@utah.gov

Gene C. Schaerr
gschaerr@gmail.com

Monte Neil Stewart
stewart@stm-law.com

Attorneys for Defendants-Appellants

Ralph E. Chamness
rhamness@slco.org

Darcy Marie Goddard
dgoddard@slco.org

Attorneys for Defendant Swensen

Case Nos. 14-5003, 14-5006:

Don Gardner Holladay
dholladay@holladaychilton.com

James Edward Warner, III
jwarner@holladaychilton.com

Joseph Thai
thai@post.harvard.edu

*Attorneys for Plaintiffs-Appellees/
Cross-Appellant*

W. Scott Simpson
scott.simpson@usdoj.gov

Attorney for Defendant

Byron Jeffords Babione
bbabione@alliancedefendingfreedom.org

James Andrew Campbell
jcampbell@alliancedefendingfreedom.org

David Austin Robert Nimocks
animocks@alliancedefendingfreedom.org

John David Luton
jluton@tulsacounty.org

*Attorneys for Defendant-Appellant /
Cross-Appellee*

Kerry W. Kircher
kerry.kircher@mail.house.gov

Attorney for Defendant-Intervenor

/s/ Michael F. Smith
Michael F. Smith

February 10, 2014

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
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s/ Michael F. Smith

Michael F. Smith

*Attorney for Robert P. George,
Sherif Girgis, and Ryan T. Anderson*

Dated: February 10, 2014

EXHIBIT 55

Case Nos. 13-4178, 14-5003, 14-5006

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

a

DEREK KITCHEN, individually, et al.,
Plaintiffs-Appellees,

v.

GARY R. HERBERT, in his official
capacity as Governor of Utah, et al.,
Defendants-Appellants.

Appeal from the United States District
Court for the District of Utah,
Civil Case No. 2:13-CV-00217-RJS

MARY BISHOP, et al.,
Plaintiffs-Appellees,

and

SUSAN G. BARTON, et al.,
Plaintiffs-Appellees/Cross-Appellants,

v.

SALLY HOWE SMITH, in her official
capacity as Court Clerk for Tulsa County,
State of Oklahoma,
Defendant-Appellant/Cross-Appellee.

Appeal from the United States District
Court for the Northern District of
Oklahoma,
Civil Case No. 04-CV-848-TCK-TLW

**BRIEF OF AMICI CURIAE PROFESSORS ALAN J. HAWKINS AND JASON S.
CARROLL IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

Lynn D. Wardle, Esq.
Brigham Young University Law School
Room 518
Provo, UT 84602
Telephone: (801) 422-2617
wardlel@law.byu.edu

Attorney for Professors Hawkins and Carroll

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INTEREST OF *AMICI CURIAE*¹

Alan J. Hawkins and Jason S. Carroll are professors of Family Life at Brigham Young University. Professor Hawkins earned his Ph.D. in Human Development and Family Studies from Penn State University. Professor Carroll earned his Ph.D. in Family Social Science from the University of Minnesota. They have studied extensively and published widely on fatherhood, marital formation and dissolution, interventions to strengthen marriages, and how marriage as a social institution affects human behavior. Their expertise in these fields will assist the Court's consideration of the issues presented by this case.

SUMMARY OF THE ARGUMENT

There is no dispute among social scientists that social institutions profoundly affect human behavior. They provide human relationships with meaning, norms, and patterns, and in so doing encourage and guide conduct. Nobel Laureate Douglass North has described institutions as the “humanly devised constraints that shape human interaction.” DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990). That is their function. And

¹ No party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief, and no one other than *amicus* or his counsel contributed money that was intended to fund preparing or submitting this brief. See Fed. R. App. P. 29(c)(5). All parties have consented to the filing of this brief. The views expressed herein are those of the *amici* and not necessarily those of Brigham Young University.

when the definitions and norms that constitute a social institution change, the behaviors and interactions that the institution shapes also change.

Marriage is society's most enduring and essential institution. From ancient times to the present, it has shaped and guided sexual, domestic, and familial relations between men, women, and their children. As with any institution, changing the basic definition and social understanding of marriage—such as by abandoning its gendered definition—will change the behavior of men and women in marriage and even affect whether they enter marriage in the first place. Whether deemed good or bad, redefining marriage away from its historically gendered purposes will have significant consequences.

We know this, as discussed below, not only as a matter of sound theory, logic, and common sense but from experience with other changes to marriage and marriage-related expectations. Specifically, the advent of no-fault divorce changed the legal and social presumption of permanence in marriage. That change had profound consequences. While affording adults greater autonomy and facilitating an easier end to dangerous or unhealthy relationships, it also resulted in increased numbers of divorces from low-conflict marriages, created a tangible sense of fragility for all marriages, and left more children to be raised without one of their parents, typically the father, with attendant adverse consequences.

Although it is far too early to know exactly how redefining marriage to include same-sex couples will change marriage, Professor Hawkins and Professor Carroll demonstrate that such a significant change will likely further weaken heterosexual men's connection to marriage and their children. This, in turn, will likely increase the risk that more children will be raised without the manifest benefits of having their fathers married to their mothers and involved day to day in their lives. These risks justify States in cautiously hesitating before redefining marriage in non-gendered terms.

ARGUMENT

I. Marriage Is a Social Institution With Practical Benefits that Depend on Its Social, Linguistic, and Legal Meaning; Altering that Meaning Will Necessarily Alter Those Benefits.

A. Marriage is a social institution that exists to encourage important human behaviors for vital public ends.

Social institutions exist primarily to guide and channel human behavior in ways that benefit society. As Utah notes in its opening brief (at 53 n.15), preeminent social anthropologist A. R. Radcliffe-Brown described social institutions as a means for society to order “the interactions of persons in social relationships.” A.R. RADCLIFFE-BROWN, STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY 10-11 (1952). In social institutions, “the conduct of persons in their interactions with others is controlled by norms, rules, or patterns.” *Id.* As a consequence, “a person [in a social institution] knows that he [or she] is expected

to behave according to these norms and that the other person should do the same.”

Id.

Through such rules, norms, and expectations—some legal, others cultural—social institutions become constituted by a web of public meaning. *See* Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19 (Mary C. Brinton & Victor Nee eds., 1998) (“An institution is a web of interrelated norms—formal and informal—governing social relationships.”). Social institutions, and the language we use to describe them, in large measure define relationships and how we understand them and act within them.

“[L]anguage—or more precisely, normative vocabulary—is one of the key cultural resources supporting and regulating any [social] institution. Nothing is more essential to the integrity and strength of an institution than a common set of understandings, a shared body of opinions, about the meaning and purpose of the institution. And, conversely, nothing is more damaging to the integrity of an institution than an attack on this common set of understandings with the consequent fracturing of meaning.”

Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage As a Social Institution: A Reply to Andrew Koppelman*, 2 *U. ST. THOMAS L. J.* 33, 52-53 (2004) (quoting Barbara Dafoe Whitehead, *The Experts’ Story of Marriage* 7 (Council on Families in Am. Working Paper No. WP14, 1992)).

Marriage is a vital institution—few dispute that. *See, e.g.*, WILLIAM J. DOHERTY ET AL., INSTITUTE FOR AM. VALUES, *WHY MARRIAGE MATTERS:*

TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 8-9 (2002) [hereinafter DOHERTY, WHY MARRIAGE] (“At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution.”). Courts have long recognized the institutional nature of marriage. *See, e.g., Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (“[T]he marriage relation [is] an institution more basic in our civilization than any other.”).

Thus, although serving many private ends, marriage’s institutional nature means that it is not merely a private arrangement. It exists to shape and guide human behavior to serve public and social purposes. And those *public* purposes have always centered on uniting a man and a woman to order their sexual behavior and maximize the welfare of their children:

Marriage exists in virtually every known human society. . . . As a virtually universal human idea, marriage is about the reproduction of children, families, and society. . . . [M]arriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.

DOHERTY, WHY MARRIAGE, *supra*, at 8-9. That has been the social, linguistic, and legal meaning of marriage from ancient times and continues in contemporary society. *See, e.g., JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED OUR FAMILIES* 24 (2002) (“[A] lasting, socially enforced obligation between man and woman that authorizes sexual congress and the

supervision of children” exists and has existed “[i]n every community and for as far back in time as we can probe”); G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988) (“Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies.”); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (marriage is the “act of uniting a man and woman for life”); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (same).

Indeed, until very recently, “it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.” *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). And until a few years ago, the law universally reflected and reinforced that historical, cultural, and linguistic understanding.

B. Because marriage is a social institution with a public purpose and not only a vehicle for accommodating private arrangements, altering its basic definition will necessarily alter the social benefits it produces.

Abandoning marriage’s gendered definition and redefining it in non-gendered terms would fundamentally alter its meaning and many of its the public purposes. That necessarily follows from the very nature of marriage as a social institution. As Professor Daniel Cere of McGill University has explained: “Definitions matter. They constitute and define authoritative public knowledge. . . Changing the public meaning of an institution changes the institution. [The

change] inevitably shapes the social understandings, the practices, the goods, and the social selves sustained and supported by that institution.” Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 76-77 (2004) (footnotes omitted) (quoting Daniel Cere, *The Conjugal Tradition in Postmodernity: The Closure of Public Discourse?*, Paper Presented at Re-visioning Marriage in Postmodern Culture Conference, 4-5 (Dec. 2003)).

The current debate over marriage is frequently portrayed as a decision about whether to “expand” or “extend” the boundaries of marriage to include same-sex couples. This argument rests on the assumption that the basic nature of marriage will remain largely unchanged by granting marriage status to same-sex partnerships and that all this policy change would do is absorb same-sex partnerships within the boundaries of marriage and extend the benefits of marriage to a wider segment of society. Indeed, the very term “same-sex marriage” implies that same-sex couples in long-term committed relationships are *already* a type of marriage that should be appropriately recognized and labeled as such. But this understanding is flawed in that it fails to recognize how recognizing same-sex partnerships as marriages would signify a fundamental change in how marriage is collectively understood and the primary social purposes for which it exists.

If marriage is redefined to mean the union of two people without regard to gender, it will lose its *inherent* focus on children. Such a change, to be sure, would

afford a few more children in same-sex unions the opportunity to grow up in what the law would deem a married household. But the law would then teach that marriage is “essentially an emotional union” that has no inherent connection “to procreation and family life.” ROBERT GEORGE ET AL., *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* 7 (2012); see *United States v. Windsor*, 133 S. Ct. 2675, 2715, 2718 (2013) (Alito, J., dissenting) (citing GEORGE ET AL., *supra*). In a formal statement, seventy prominent academics from all relevant disciplines expressed “deep[] concerns about the institutional consequences of same-sex marriage for marriage itself,” concluding that “[s]ame-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage” and “undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget.” WITHERSPOON INSTITUTE, *MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES* 18-19 (2006). Defining marriage as merely the union of two persons, in short, would “distill[] marriage down to its pure close relationship essence.” Cere, *supra*, at 2.

Courts and jurists have likewise acknowledged the profound change in social meaning that would follow a change in marriage’s basic definition:

We cannot escape the reality that the shared societal meaning of marriage—passed down through the common law into our statutory law—has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin.

Lewis v. Harris, 908 A.2d 196, 222 (N.J. 2006); *see also Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 981 (Mass. 2003) (Sosman, J., dissenting) (“[I]t is surely pertinent to the inquiry to recognize that this proffered change affects not just a load-bearing wall of our social structure but the very cornerstone of that structure.”).

II. Recent Legal Changes to the Institution of Marriage and to Marriage-Related Expectations Confirm that Altering the Meaning of Marriage Would Likely Have Unintended and Negative Consequences for Children.

The conclusion that redefining marriage will materially alter the mix of social benefits marriage provides is supported not only by sound socio-institutional theory, logic, and common sense but by experience with other changes to marriage and marriage-related expectations. Of course, no one can know the precise, long-term consequences of redefining marriage to include same-sex couples. It is simply too soon and the ways it may affect marriage too complex to be understood without considerably more time and extensive conceptual and empirical inquiry.

Justice Alito recently made this point:

Past changes in the understanding of marriage . . . have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time. We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.

Windsor, 133 S. Ct. at 2715 (Alito, J., dissenting); *see also id.* at 2715 n.5 (“As

sociologists have documented, it sometimes takes decades to document the effects of social changes—like the sharp rise in divorce rates following the advent of no-fault divorce—on children and society.” (citing JUDITH S. WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: THE 25 YEAR LANDMARK STUDY* (2000)).

But cautionary lessons can be drawn from recent changes to marriage law and marriage-related expectations. Perhaps the most relevant lesson comes from an analysis of the impact of no-fault divorce. No-fault divorce had unintended consequences that weakened marriage and fatherhood, and thus harmed children, *id.* at 297; ALLEN M. PARKMAN, *GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY* 91-150 (2000), and is a likely template for the effects of same-sex marriage.

There are many important reasons for no-fault divorce laws. The fault-based systems of the past undoubtedly created many problems and at times serious injustices. Among its benefits, no-fault divorce affords adults greater autonomy, WALLERSTEIN ET AL., *supra*, at 297, and facilitates the end of dangerous, Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Law and Family Distress*, 121 Q.J. ECON. 267, 267 (2006), unhealthy, or necrotic unions.

Reformers were optimistic that no-fault divorce would have no detrimental effects on children. In fact, as Barbara Dafoe Whitehead has chronicled, many

early “experts” provided extensive and intricate rationales for how divorce would benefit children—divorce “for the sake of the children.” BARARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY* 81 (1996); *see also id.* at 84-90 (discussing predictions of how divorce would benefit children). Empirically, however, this early optimism has proven short-sighted. *See* Donald Moir, *A New Class of Disadvantaged Children*, in *IT TAKES TWO: THE FAMILY IN LAW AND FINANCE* 63, 67-68 (Douglas W. Allen & John Richards eds., 1999). Reformers may have reasoned that children’s exposure to harmful parental conflict would decrease and that their parents would readily find greater happiness that would improve parenting. But divorce often does not end parental conflict, E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* 138 (2002), and the evidence suggests that parenting quality declines with divorce, *id.* at 126-140. Also, most divorces come from low-conflict marriages. PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* 220 (1997); Paul R. Amato & Bryndl Hohmann-Marriott, *A Comparison of High- and Low-Distress Marriages That End in Divorce*, 69 *J. MARRIAGE & FAM.* 261 (2007). And divorce does not lead reliably to greater personal happiness. LINDA J. WAITE ET AL., *INSTITUTE FOR AM. VALUES, DOES DIVORCE MAKE PEOPLE HAPPY? FINDINGS FROM A STUDY OF UNHAPPY MARRIAGES* 4 (2002).

So as scholars acquired sufficient data to adequately assess the empirical realities of divorce, the evidence revealed decidedly less favorable outcomes, Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE OF CHILDREN, Fall 2005, at 75, 75. It is true that the children of chronic, high-conflict marriages actually do better when that relationship ends, AMATO & BOOTH, *supra*, at 220, furthering societal interests in children's well-being. But this is not the typical divorce scenario; as mentioned above, most divorces come from low-conflict marriages, and these children do worse when their parents divorce compared to children whose parents are able to sustain the marriage. *Id.* And most unhappy marriages become happy again if given time, Linda J. Waite et al., *Marital Happiness and Marital Stability: Consequences for Psychological Well-Being*, 38 SOC. SCI. RES. 201, 201 (2009) [hereinafter Waite, *Marital Happiness*], redounding to the further benefit of their children.

Accordingly, the potential salutary benefits of no-fault divorce for one subset of children and parents have been greatly diminished by the harms it imposes on another and likely much larger subset of children and parents. A prolonged period of greater instability is a primary contributor to these harms. For most children (and adults), marital dissolution begins a prolonged process of residential and relational instability, as families move and new romantic interests

move in and out of the household and many children lose contact with their fathers. ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 16-24 (2009) [hereinafter CHERLIN, *MARRIAGE-GO-ROUND*]. While there is a long list of caveats, and while most children are resilient, the fact remains that, on average, children whose parents divorce are at significantly greater risk for a host of economic, behavioral, educational, social, and psychological problems. Amato, *supra*, at 75.

Moreover, the impact of no-fault divorce must also be assessed at the institutional level, not just the personal level. Scholars have debated the specific effects of no-fault divorce on subsequent divorce and marriage rates. It certainly contributed to a short-term increase in divorce in the 1970s, but evidence suggests it has also contributed modestly to increased divorce rates above its long-term historical trends. PARKMAN, *supra*, at 91 (summarizing research). Psychologically, high rates of divorce have contributed greatly to a climate of marital fragility, which may be influencing current declines in our overall marriage rate as well as further increases in divorce rates. Judith Wallerstein concluded from her 25-year study of the effects of divorce that changes to family life, including the high incidence of divorce, have “created new kinds of families in which relationships are fragile and often unreliable.” WALLERSTEIN ET AL., *supra*, at 297. Nearly half of all marriages now end in divorce, Matthew D. Bramlett &

William D. Mosher, CDC, *First Marriage Dissolution, Divorce and Remarriage: United States*, ADVANCE DATA NO. 323, at 5 (2001), making marriage seem like a risky proposition for all. This discourages some from entering into marriage at all, WALLERSTEIN ET AL., *supra*, at xvi, and keeps the specter of divorce ever-present during times of marital discontent. Research also has found a contagion effect for divorce, such that a divorce in one's social circle increases one's own risk of divorce. Rose McDermott et al., *Breaking Up Is Hard to Do, Unless Everyone Else Is Doing It Too: Social Network Effects on Divorce in a Longitudinal Sample*, 92 SOC. FORCES 491, 491 (2013).

The advent of no-fault divorce (with accompanying shorter waiting periods) did not just make it procedurally easier to exit an unsatisfying relationship. It changed the legal and social presumption of permanence in marriage. Intentionally or not, no-fault divorce diminished the institutional and social expectation of marital permanence. It changed the public meaning of marriage from a legally binding life-long union that was expected to weather the inevitable disappointments and challenges of romantic unions (“for better or for worse”), to a union whose duration depended on the subjective choice of one spouse—“from as long as we both shall *live*” has been replaced by “as long as we both shall *love*.” Before no-fault divorce, our laws reinforced the ideal that divorce should not be a ready option, although it may be a necessity. After no-fault divorce, our laws teach

that divorce is always a ready option, even if not a necessity.

The legal change of no-fault divorce has to some extent tipped the scales of marriage in favor of adult emotional interests and personal choice over its institutional, child-centered elements. It weakened permanence as a fundamental public meaning of marriage and contributed to a generational shift in attitudes and behaviors within individual marriages in ways that harmed overall child interests. Permanence was not just an element of the legal definition of marriage; it was a primary mechanism by which marriage produced its benefits for children (and adults). The expectation of permanence provides a strong incentive for parents to work through their problems to achieve a satisfying relationship; it encourages parents to prioritize their children's long-term needs above their own short-term desires; it helps to harness two adults in the rearing of their children. Weakening the expectation of permanence in the legal and cultural understanding of marriage unexpectedly weakened each of these child-centered factors, on average harming the wellbeing of children.

The no-fault divorce experience serves as a warning, especially with respect to child welfare. The definition of the institution of marriage—its legal rules and norms and the social and personal meanings and expectations that flow from them—affects the behavior of all couples within marriage. And that in turn can have profound effects on the overall wellbeing of children, even if the immediate

rationale of the change is to benefit a specific subset of children and adults.

III. Redefining Marriage in Non-Gendered Terms Will Likely Harm the Interests of Children by Diminishing the Relevance and Value of Marriage and Fatherhood to Heterosexual Men.

As with early advocates for no-fault divorce, proponents of eliminating the gendered definition and understanding of marriage confidently predict that such a change will have no adverse consequences for heterosexual marriages or their children. What could be the harm to marriage-related interests of allowing same-sex couples to marry? Indeed, for the vast majority of people, the argument goes, nothing would change: “If you like your marriage, you can keep your marriage.”

This recalls the optimistic early thinking about no-fault divorce. Yet some humility is in order. It is unlikely that contemporary thinkers attempting to divine the consequences of another major change to the legal definition of marriage—the removal of gender as a defining pillar—are more gifted at secular prophecy than were thinkers in the early years of the no-fault divorce revolution. Indeed, in our view, the no-fault divorce revolution provides the clearest precedent for rational predictions about the effects of redefining marriage in genderless terms.

Just as the innovation of no-fault divorce benefited men and women in irretrievably broken marriages, same-sex couples may benefit from being able to marry and from the non-gendered understanding of marriage that such a redefinition would create. And it is reasonable to assume—although it is hardly a

certainty—that some existing children in same-sex couple households would also benefit from marriage if it brings greater stability to their family. But as the history of no-fault divorce suggests, there are strong reasons not to fully credit such predictions. And importantly, one has to look beyond the effects within same-sex families alone to accurately gauge the full impacts of a de-gendered understanding of marriage.

Benign predictions about the effects of such a redefinition, moreover, are based on the assumption that legalizing same-sex marriage would not be a significant change in the core definition of marriage, or that, even if it is, such a change will have little or no adverse consequences on marriage as an institution and on those who depend on its current definition. But in fact, the legalization of same-sex marriage would eliminate gender as a definitional pillar of the social institution of marriage. That would not just expand or extend marriage to another class of relationships leaving unchanged the basic institution for its traditional members; it would effect a fundamental change in its meaning. And changing its meaning most likely will change behavior. To deny this likelihood is intellectually untenable—it is to deny that meaning matters to social institutions, and that marriage matters as a social institution.

How the new, de-gendered meaning of marriage will change attitudes toward and behaviors within marriage cannot be known with precision. But based

on what is known about marriage as an institution and the roles it has long played in society, we can make some highly reasonable projections. We focus here on one in particular: that stripping marriage of its gendered meaning will likely diminish the relevance and meaning of marriage and fatherhood to heterosexual men, weakening their connection to marriage and to the children they father.

A. Traditional, gendered marriage is the most important way heterosexual men create their masculine identities. Marriage forms and channels that masculinity into the service of their children and society. Redefining marriage to include same-sex couples would eliminate gender as a crucial element of marriage and thus undermine marriage's power to shape and guide masculinity for those beneficial ends.

Far from being a relic of history or a quaint custom that has outgrown its usefulness in modern society, gender is a crucial component of not only the definition of marriage but of how marriage produces its benefits for children and society. In fact, it may be more crucial now than it has ever been because of changes that have occurred in the meaning of marriage over the past five decades that have dramatically weakened men's ties to their children and their children's mother. Sara McLanahan, *Diverging Destinies: How Children Are Faring Under The Second Demographic Transition*, 41 *DEMOGRAPHY* 607, 607 (2004).

According to eminent family sociologist Steven L. Nock, marriage is a primary means of shaping men's identities and behaviors (*e.g.*, sexual, economic, etc.) from self-centered in nature to child- and family-centered in orientation:

Historically, masculinity has implied three things about a man: he should be the father of his wife's children, he should be the provider for his wife and children, and he should protect his family. Accordingly, the male who refused to provide for or protect his family was not only a bad husband, he was somehow less of a man. In marriage, men do those things that are culturally accepted as basic elements of adult masculinity. . . . [M]arriage changes men because it is the venue in which adult masculinity is developed and sustained.

STEVEN L. NOCK, *MARRIAGE IN MEN'S LIVES* 4 (1998). Moreover, Nock argues that, "by calling for behaviors of a certain type [socially valuable behaviors], the expectations of normative marriage also reinforce and maintain [generative] masculine identities. In this sense, normative marriage is a masculinity template. . . . In their marriages, and by their marriages, men define and display themselves as masculine." *Id.* at 58-59. "When we ask why marriage appears to be beneficial to men [and women and children], one possible answer is that the institution of marriage, at least in its traditional form, is a socially approved mechanism for the expression of [mature] masculinity." *Id.* at 59.

Marriage is the most important social mechanism we have to channel young men's adult identity into other-oriented behaviors of sacrifice, generosity, and protection for their own children and even for all children. Marriage is a transformative act, but especially so for men, because of how it directs men's adult identity into service to their families and to society

But fatherhood is more socially constructed and more contextually sensitive than motherhood, according to a landmark report to the U.S. Department of Health

and Human Services, which was later published in a leading peer-reviewed journal. William J. Doherty et al., *Responsible Fathering: An Overview and Conceptual Framework*, 60 J. MARRIAGE & FAM. 277 (1998) [hereinafter Doherty, *Responsible Fathering*]. Fatherhood is more problematic than motherhood because men's commitment to and investment in parenting is far more difficult to achieve. Many of the historical supports that have traditionally preserved men's involvement in their children's lives have been eroding for contemporary families. Historically high rates of non-marital cohabitation, out-of-wedlock childbirth, and marital divorce, McLanahan, *supra*, have dramatically altered the landscape of fathering, leaving unprecedented numbers of children growing up with uncertain or non-existent relationships with their fathers.

While these demographic trends have changed family life in general, they have been particularly grim for father-child relationships, which are more sensitive than mother-child relationships to contextual forces and supports. Doherty, *Responsible Fathering, supra*, at 277. Accordingly, any signal that men's contributions are not central to children's well-being threatens to further decrease the likelihood that they will channel their masculine identities into responsible fathering. We believe the official de-gendering of marriage sends just such a signal. A gender-free definition of marriage risks eliminating the achievement of mature, other-centered masculinity (as opposed to immature, self-centered

masculinity) as a primary motivation for generative fathering.

Thus, the legal recognition of same-sex marriage is not just an extension or expansion of marriage's borders to accommodate a new kind of family form; it is a fundamental change to the meaning of marriage and fatherhood. In our opinion, to legally proclaim that gender is not an essential component of marriage undermines in a profound, far-reaching, and official way the very mechanism that creates many of the benefits that marriage produces. If marriage is redefined as two committed partners regardless of their gender, then marriage's connection to men's role as fathers is necessarily ambiguous. A genderless meaning of marriage puts at risk the cultural sense that marriage and fatherhood are central to defining men's identities. It invites, even demands, new ways of understanding families that make men's unique contributions to family life and their children entirely optional. It deepens the destructive, decades-long cultural trend of questioning the necessity and importance of fathers as nurturers, providers, and protectors within families, which has weakened father-child bonds and familial ties.

In sum, if men are legally defined as optional to marriage and childrearing, then marriage will likely struggle to maintain its primacy as a means for men to establish their masculine identity in ways that serve children best. A gender-free definition of marriage—where gender is officially irrelevant to its structure and meaning—will likely have less social power to draw heterosexual men into

marriage and thus less power to serve marriage's vital child-welfare purposes. And no doubt these potential effects, like many others, would be felt most keenly and quickly by the children and families of the most disadvantaged men in our society—men who already are struggling with a sense that they are of secondary importance within their families and whose masculinity is already challenged by their tenuous participation in our economic system. KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 216-28 (2013).

To be sure, these risks associated with same-sex marriage may be difficult to disentangle from negative effects from other strong social changes. After all, we believe a de-gendered understanding of marriage is an additional force in a larger trend that is uncoupling sexuality, marriage, and parenthood and making men's connections to children weaker. Thus, it may be difficult to separate statistically the potential effects of de-gendering marriage from the effects stemming from powerful forces to which it is related, such as the sexual revolution, the divorce revolution, and the single-parenting revolution. That these effects are intertwined with the effects of other powerful forces, however, does not diminish their importance or the harms they can impose on marriage.

Removing gender from the legal meaning of marriage will deepen the grand social experiment of the past 50 years of deinstitutionalizing marriage and fatherhood. Andrew Cherlin, *The Deinstitutionalization of American Marriage*, 66

J. MARRIAGE FAM. 848, 848 (2004). And we fear its consequences will only add to the problems this change in family life is producing.

B. Abandoning the gendered definition of marriage, thereby weakening the connection of heterosexual men to marriage and fatherhood, will harm the State's interests in maximizing the welfare of children.

We have demonstrated how abandoning the gendered definition of marriage will tend to further alienate heterosexual men from marriage and fatherhood. Although precise effects cannot be known with certainty at this early stage, that alienation is likely to harm the State's interests in securing the welfare of children—and specifically in maximizing the likelihood that children will be reared by a father as well as a mother—in at least four concrete and predictable ways.

1. Fewer and shorter marriages. Redefining marriage in genderless terms will undermine the State's interest in encouraging heterosexual fathers to marry the mothers of their children. If men no longer view marriage as central to defining their adult identities—if they see themselves as unnecessary to the intrinsic meaning and purpose of marriage and thus view marriage as unrelated to their sense of maleness—they will be less likely to marry, even when they become fathers. Marriage, in other words, will simply be less relevant to men and thus less attractive to them. In an already highly individualistic culture such as ours, men will be more likely to seek to establish their adult identities through other means,

such as career and financial success, personal pursuits, and leisure activities and non-marital sexual relationships. The children of such men will be far less likely to be raised by their fathers as well as their mothers, and as a result will suffer. *See* KRISTIN ANDERSON MOORE ET AL., CHILD TRENDS, MARRIAGE FROM A CHILD’S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN AND WHAT CAN WE DO ABOUT IT? 6 (June 2002), <http://www.childtrends.org/files/MarriageRB602.pdf> (children born and raised without a married father and mother suffer increased risks of poor outcomes).

Redefinition will also undermine the State’s interest in encouraging married heterosexual fathers to remain married for the benefit of their children despite marital difficulties. “Until the current generation, the widely held (and now empirically supported) belief that children needed their fathers was a central tenet in social norms encouraging men to work through marital troubles with their wives” Jason S. Carroll & David C. Dollahite, “*Who’s My Daddy?*” *How the Legalization of Same-Sex Partnerships Would Further the Rise of Ambiguous Fatherhood in America*, in WHAT’S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY 62 (Lynn D. Wardle ed., 2008). “This retreat from the ideal may be particularly devastating for [the family involvement and parenting of] men who, according to research, are more reliant on such social and relationship supports to foster their healthy involvement

in family life and parenting.” *Id.* As we noted previously, research studies have found that most divorces come from low-conflict marriages and that the children in these families do worse when their parents’ divorce compared to children whose parents are able to sustain the marriage. AMATO & BOOTH, *supra*, at 220. Also, most unhappy marriages become happy again if given time, Waite, *Marital Happiness*, *supra*, at 201, rebounding to the further benefit of their children. A gendered definition of marriage and parenting emphasizes that fathers are important and unique in the lives of their children. This perspective helps men see that their children are stakeholders in their marriages and discourages divorce. Same-sex marriage denies that men are essential to marriage and thus that fathers are essential in the lives of their children, which will increase the likelihood that fewer heterosexual fathers stay married for the sake of their children.

2. Less parenting by fathers. Abandoning the gendered definition of marriage will also diminish the likelihood of men, even married men, being responsible fathers, or being fathers at all. Indeed, it is likely that redefining marriage

would support a retreat from fatherhood altogether among some American men. One aspect of a self-defined parenting ideology in society is the option of not being a parent at all. If fathering is not a cultural ideal, the potential exists for an increase in men who live outside marriage and parenthood altogether. Given the data on the negative social consequences of a large number of unmarried men (e.g., higher rates of crime and other anti-social behavior), we should resist movement toward a parenting culture that would suggest that

men can be viewed as “sperm donors” whose only essential “parenting role” is conception and then women can do it alone, either as single parents or as a lesbian couple. The loss of a cultural ideal for men to become responsible fathers could lead to increased numbers of men and children who live in non-generative contexts.

Carroll & Dollahite, *supra*, at 62-63. This would harm the State’s interest in encouraging the optimal mother-father, biological parenting model, resulting in more children being raised without the benefits of a biological father—or any father at all.

3. More conception outside marriage rather than inside marriage. For similar reasons, abandoning the gendered definition of marriage would make it more likely that men will engage in sex outside marriage, and will thus produce comparatively more children who will likely be raised by their mothers alone. For many men, the current cultural expectation that they will be active fathers to any children they help conceive serves as a natural deterrent to engaging in extra-marital sex and thus risking the incursion of such an obligation. By weakening or removing that cultural expectation—*i.e.*, by making the father’s role optional—redefining marriage in genderless terms will reduce that deterrent and, therefore, likely increase the relative number of children conceived and born outside of marriage, with no expectation that the father will be actively involved in rearing them. In short, redefinition will likely increase the *proportion* of fatherless

children in two ways: by reducing the number of children born within marital unions, and by increasing the number born outside of such unions.

Of course, current increases in non-marital childbirth rates reflect large increases in the number of cohabiting couples having children, which is increasingly being seen by many as another culturally viable form of family formation. And, if young mothers and fathers were actually marrying each other a year or two after the arrival of their first child and remaining together, non-marital childbirth rates might not be much to worry about. But that is not what's happening. Nearly 40 percent of cohabiting twenty-something parents who had a baby between 2000 and 2005 split up by the time their child was five—three times the rate for twenty-something parents who were married when they had a child. Cohabiting parents were also more than three times more likely than married parents to move on to another cohabiting or marital relationship with a new partner if their relationship did break up. KAY HYMOWITZ, ET AL., *KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA* (2013), *available at* <http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf>. Research paints a sobering picture of the effect these disruptions have. Children suffer emotionally, academically, and financially when they experience this type of relationship carousel. *See* CHERLIN, *MARRIAGE-GO-ROUND*, *supra*; Amato, *supra*.

4. Less self-sacrificing by fathers. Finally, further alienating men from marriage and fatherhood by redefining it to make their presence unnecessary would likely diminish self-sacrificing behavior by men for their wives and children. If, as we show above, a genderless definition of marriage undermines marriage and fatherhood as a primary vehicle for adult identity-creation, then men will be less likely to sacrifice their self-interests for the child-centric interests inherent in traditional male-female marriage and fatherhood. When faced with choices regarding career, housing and neighborhood decisions, long-term saving, child educational needs, personal recreational activities, activities with friends, sexual fidelity to spouse, alcohol and drug use, and a host of other decisions affecting the welfare of their children, fathers will be more likely to choose their own selfish interests over those of their wives and children. As child interests take a back seat, the welfare of children is likely to suffer in a host of ways.

CONCLUSION

This Court should not make the mistake of believing that redefining marriage to include same-sex couples is merely a matter of extending to such couples the benefits of marriage. Social institutions are constituted by legal and social meanings that shape and guide human behavior. Marriage, foremost among our social institutions, has profound connections with child welfare and adult male

identity. Indeed, both are integrally related. We believe marriage cannot simply be redefined in non-gendered terms without significant consequences for children.

Naturally, the risks associated with legalizing same-sex marriage may prove difficult to statistically disentangle from the negative effects of other strong social changes. In our view, a de-gendered understanding of marriage is an additional force in a larger trend that is uncoupling sexuality, marriage, and parenthood and making men's connections to children weaker. Thus, it may be difficult to statistically separate the potential effects of de-gendering marriage from effects stemming from powerful forces to which it is related: the sexual revolution, the divorce revolution, and the single-parenting revolution. But the fact that de-gendering effects are intertwined with the effects of other powerful forces does not diminish their importance.

Much as no-fault divorce changed the presumed permanence of marriage, creating unexpectedly adverse consequences for children, abandoning the gendered definition of marriage threatens to further destabilize marriage as a key definer and shaper of mature male identity. This, in turn, is likely to further alienate men from marriage, resulting in harm to marriage's vital role in advancing child welfare—and particularly in maximizing the likelihood that children, as much as possible, will be reared by a father as well as a mother. While the precise effects of

redefining marriage cannot be known with statistical certainty, these risks are real and cannot be ignored.

For these reasons, we urge the Court to reject arguments advocating the judicial redefinition of marriage and reverse the district courts below.

Dated: February 10, 2014

s/ Lynn D. Wardle
Lynn D. Wardle, Esq.
Brigham Young University Law School
Room 518
Provo, UT 84602
Telephone: (801) 422-2617
wardlel@law.byu.edu

*Attorney for Professors Hawkins and
Carroll*

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Dated: February 10, 2014

s/ Lynn D. Wardle

Lynn D. Wardle, Esq.
Brigham Young University Law School
Room 518
Provo, UT 84602
Telephone: (801) 422-2617
wardlel@law.byu.edu

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I hereby certify that on February 10, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, which will send notification of such filing to the following:

Case No. 13-4178:

David C. Codell
dcodell@nclrights.org

John J. Bursch
jbursch@wnj.com

Kathryn Kendell
kkendell@nclrights.org

Philip S. Lott
phillott@utah.gov

Shannon Price Minter
SMinter@nclrights.org

Stanford E. Purser
spurser@utah.gov

James E. Magleby
magleby@mgpclaw.com

Gene C. Schaerr
gschaerr@gmail.com

Jennifer Fraser Parrish
parrish@mgpclaw.com

Monte Neil Stewart
stewart@stm-law.com

Peggy Ann Tomsic
tomsic@mgpclaw.com

Attorneys for Defendants-Appellants

Attorneys for Plaintiffs-Appellees

Ralph E. Chamness
rchamness@slco.org

Darcy Marie Goddard
dgoddard@slco.org

Attorneys for Defendant Swensen

Case Nos. 14-5003, 14-5006:

Don Gardner Holladay
dholladay@holladaychilton.com

Byron Jeffords Babione
bbabione@alliancedefendingfreedom.org

James Edward Warner, III
jwarner@holladaychilton.com

James Andrew Campbell
jcampbell@alliancedefendingfreedom.org

Joseph Thai
thai@post.harvard.edu

David Austin Robert Nimocks
animocks@alliancedefendingfreedom.org

*Attorneys for Plaintiffs-Appellees/
Cross-Appellant*

John David Luton
jluton@tulsacounty.org

W. Scott Simpson
scott.simpson@usdoj.gov

*Attorneys for Defendant-Appellant/
Cross-Appellee*

Attorney for Defendant

Kerry W. Kircher
kerry.kircher@mail.house.gov

Attorney for Defendant-Intervenor

Dated: February 10, 2014

s/ Lynn D. Wardle
Lynn D. Wardle, Esq.
Brigham Young University Law School
Room 518
Provo, UT 84602
Telephone: (801) 422-2617
wardlel@law.byu.edu

CERTIFICATE OF DIGITAL SUBMISSION

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Dated: February 10, 2014

s/ Lynn D. Wardle
Lynn D. Wardle, Esq.
Brigham Young University Law School
Room 518
Provo, UT 84602
Telephone: (801) 422-2617
wardlel@law.byu.edu

EXHIBIT 56

Marriage rates by State: 1990, 1995, and 1999-2011

[Rates are based on provisional counts of marriages by state of occurrence. Rates are per 1,000 total population residing in area. Population enumerated as of April 1 for 1990, 2000, and 2010 and estimated as of July 1 for all other years]

State	Marriage rate														
	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1995	1990
Alabama	8.4	8.2	8.3	8.6	8.9	9.2	9.2	9.4	9.6	9.9	9.4	10.1	10.8	9.8	10.6
Alaska	7.8	8.0	7.8	8.4	8.5	8.2	8.2	8.5	8.1	8.3	8.1	8.9	8.6	9.0	10.2
Arizona	5.7	5.9	5.6	6.0	6.4	6.5	6.6	6.7	6.5	6.7	7.6	7.5	8.2	8.8	10.0
Arkansas	10.4	10.8	10.7	10.6	12.0	12.4	12.9	13.4	13.4	14.3	14.3	15.4	14.8	14.4	15.3
California ¹	5.8	5.8	5.8	6.7	6.2	6.3	6.4	6.4	6.1	6.2	6.5	5.8	6.4	6.3	7.9
Colorado	7.0	6.9	6.9	7.4	7.1	7.2	7.6	7.4	7.8	8.0	8.2	8.3	8.2	9.0	9.8
Connecticut	5.5	5.6	5.9	5.4	5.5	5.5	5.8	5.8	5.5	5.7	5.4	5.7	5.8	6.6	7.9
Delaware	5.2	5.2	5.4	5.5	5.7	5.9	5.9	6.1	6.0	6.4	6.5	6.5	6.7	7.3	8.4
District of Columbia	8.7	7.6	4.7	4.1	4.2	4.0	4.1	5.2	5.1	5.1	6.2	4.9	6.6	6.1	8.2
Florida	7.4	7.3	7.5	8.0	8.5	8.6	8.9	9.0	9.0	9.4	9.3	8.9	8.7	9.9	10.9
Georgia	6.6	7.3	6.6	6.0	6.8	7.3	7.0	7.9	7.0	6.5	6.1	6.8	7.8	8.4	10.3
Hawaii	17.6	17.6	17.2	19.1	20.8	21.9	22.6	22.6	22.0	20.8	19.6	20.6	18.9	15.7	16.4
Idaho	8.6	8.8	8.9	9.5	10.0	10.1	10.5	10.8	10.9	11.0	11.2	10.8	12.1	13.1	13.9
Illinois	5.6	5.7	5.7	5.9	6.1	6.2	5.9	6.2	6.5	6.6	7.2	6.9	7.0	6.9	8.8
Indiana	6.8	6.3	7.9	8.0	7.0	7.0	6.9	7.8	7.1	7.9	7.9	7.9	8.1	8.6	9.6
Iowa	6.7	6.9	7.0	6.5	6.6	6.7	6.9	6.9	6.9	7.0	7.1	6.9	7.9	7.7	9.0
Kansas	6.3	6.4	6.4	6.7	6.8	6.8	6.8	7.0	6.9	7.3	7.5	8.3	7.1	8.5	9.2
Kentucky	7.5	7.4	7.6	7.9	7.8	8.4	8.7	8.8	9.1	9.0	9.0	9.8	10.9	12.2	13.5
Louisiana	6.4	6.9	7.1	6.8	7.5	---	8.0	8.0	8.2	8.1	8.4	9.1	9.1	9.3	9.6
Maine	7.2	7.1	7.1	7.4	7.4	7.8	8.2	8.6	8.4	8.4	8.6	8.8	8.6	8.7	9.7
Maryland	5.8	5.7	5.8	5.9	6.5	6.6	6.9	6.9	6.9	7.1	7.0	7.5	7.5	8.4	9.7
Massachusetts	5.5	5.6	5.6	5.7	5.9	5.9	6.2	6.5	5.6	5.9	6.2	5.8	6.2	7.1	7.9
Michigan	5.7	5.5	5.4	5.6	5.7	5.9	6.1	6.2	6.3	6.5	6.7	6.7	6.8	7.3	8.2
Minnesota	5.6	5.3	5.3	5.4	5.8	6.0	6.0	6.0	6.3	6.5	6.6	6.8	6.8	7.0	7.7
Mississippi	4.9	4.9	4.8	5.1	5.4	5.7	5.8	6.1	6.2	6.4	6.5	6.9	7.8	7.9	9.4
Missouri	6.6	6.5	6.5	6.8	6.9	6.9	7.0	7.1	7.2	7.3	7.5	7.8	8.1	8.3	9.6
Montana	7.8	7.4	7.3	7.6	7.5	7.4	7.4	7.5	7.2	7.1	7.1	7.3	7.4	7.6	8.6
Nebraska	6.6	6.6	6.6	6.9	6.8	6.8	7.0	7.1	7.0	7.5	7.9	7.6	7.5	7.3	8.0
Nevada	36.9	38.3	40.3	42.3	48.6	52.1	57.4	62.1	63.9	67.4	69.6	72.2	82.3	85.2	99.0
New Hampshire	7.1	7.3	6.5	6.8	7.1	7.2	7.3	8.0	8.1	8.3	8.5	9.4	7.9	8.3	9.5
New Jersey	4.8	5.1	5.0	5.4	5.4	5.5	5.7	5.9	5.8	6.0	6.4	6.0	5.9	6.5	7.6
New Mexico	8.0	7.7	5.0	4.0	5.6	6.8	6.6	7.4	6.9	7.9	7.6	8.0	8.0	8.8	8.8
New York	6.9	6.5	6.5	6.6	6.8	6.9	6.8	6.8	6.8	7.3	7.6	7.1	7.3	8.0	8.6
North Carolina	6.7	6.6	6.6	6.9	7.0	7.3	7.3	7.3	7.4	7.7	7.4	8.2	8.5	8.4	7.8
North Dakota	6.7	6.5	6.4	6.5	6.6	6.7	6.8	6.9	7.1	6.8	6.5	7.2	6.6	7.1	7.5
Ohio	5.9	5.8	5.8	6.0	6.1	6.3	6.5	6.6	6.7	7.0	7.2	7.8	7.8	8.0	9.0
Oklahoma	6.9	7.2	6.9	7.1	7.3	7.3	7.3	6.5	---	---	---	---	6.8	8.6	10.6
Oregon	6.6	6.5	6.6	6.9	7.2	7.3	7.3	8.1	7.2	7.1	7.5	7.6	7.6	8.1	8.9
Pennsylvania	5.3	5.3	5.3	5.5	5.7	5.7	5.8	5.9	5.9	5.7	5.8	6.0	6.1	6.2	7.1
Rhode Island	6.0	5.8	5.9	6.1	6.4	6.6	7.0	7.7	7.8	7.8	8.1	7.6	7.5	7.3	8.1
South Carolina	7.2	7.4	7.3	7.3	7.9	7.8	8.3	8.2	9.0	9.3	9.9	10.6	10.2	11.9	15.9
South Dakota	7.5	7.3	7.3	7.7	7.8	8.0	8.4	8.4	8.4	8.8	8.9	9.4	9.1	9.9	11.1
Tennessee	9.0	8.8	8.4	9.4	10.1	10.6	10.9	11.4	11.9	13.1	13.5	15.5	14.7	15.5	13.9
Texas	7.1	7.1	7.1	7.3	7.4	7.6	7.8	8.0	8.1	8.4	9.1	9.4	9.1	9.9	10.5
Utah	8.6	8.5	8.4	9.0	9.6	9.2	9.8	9.9	10.2	10.4	10.2	10.8	9.6	10.7	11.2
Vermont	8.3	9.3	8.7	7.9	8.5	8.6	8.9	9.4	9.7	9.8	9.8	10.0	10.0	10.3	10.9
Virginia	6.8	6.8	6.9	7.2	7.5	7.8	8.2	8.3	8.4	8.6	8.8	8.8	9.2	10.2	11.4
Washington	6.1	6.0	6.0	6.3	6.4	6.5	6.5	6.5	6.5	6.5	7.0	6.9	7.2	7.7	9.5
West Virginia	7.2	6.7	6.7	7.1	7.3	7.3	7.4	7.5	7.5	8.1	7.9	8.7	7.5	6.1	7.2
Wisconsin	5.3	5.3	5.3	5.6	5.7	6.0	6.1	6.2	6.2	6.3	6.5	6.7	6.7	7.0	7.9
Wyoming	7.8	7.6	8.0	8.6	9.0	9.3	9.3	9.3	9.3	9.5	10.0	10.0	9.9	10.6	10.7

--- Data not available.

¹ Marriage data includes nonlicensed marriages registered.

Note: Rates for 2001-2009 have been revised and are based on intercensal population estimates from the 2000 and 2010 censuses. Populations for 2010 rates are based on the 2010 census.

Source: CDC/NCHS, National Vital Statistics System.

EXHIBIT 57

Divorce rates by State: 1990, 1995, and 1999-2011

[Rates are based on provisional counts of divorces by state of occurrence. Rates are per 1,000 total population residing in area. Population enumerated as of April 1 for 1990, 2000, and 2010 and estimated as of July 1 for all other years]

State	Divorce rate ¹														
	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1995	1990
Alabama	4.3	4.4	4.4	4.3	4.5	4.9	4.9	4.9	5.2	5.4	5.4	5.5	5.7	6.0	6.1
Alaska	4.8	4.7	4.4	4.4	4.3	4.2	4.3	4.3	3.9	4.6	4.3	3.9	5.0	5.0	5.5
Arizona	3.9	3.5	3.6	3.8	4.0	4.0	4.2	4.3	4.4	4.8	4.0	4.6	4.6	6.2	6.9
Arkansas	5.3	5.7	5.7	5.5	5.9	5.8	6.0	6.1	6.0	6.2	6.2	6.4	6.2	6.3	6.9
California	---	---	---	---	---	---	---	---	---	---	---	---	---	---	4.3
Colorado	4.4	4.3	4.3	4.3	4.4	4.5	4.4	4.4	4.3	4.7	4.7	4.7	4.8	---	5.5
Connecticut	3.1	2.9	3.0	3.4	3.2	3.1	3.0	3.1	3.2	3.3	3.2	3.3	3.0	2.9	3.2
Delaware	3.6	3.5	3.6	3.5	3.7	3.8	3.8	3.7	3.9	3.5	3.9	3.9	4.5	5.0	4.4
District of Columbia	2.9	2.8	2.7	2.7	1.7	2.1	2.0	1.8	2.0	2.4	2.9	3.2	3.6	3.2	4.5
Florida	4.5	4.4	4.2	4.3	4.6	4.7	4.6	4.7	5.0	5.1	5.2	5.1	5.1	5.5	6.3
Georgia	---	---	---	---	---	---	---	---	3.2	2.5	3.1	3.3	4.1	5.1	5.5
Hawaii	---	---	---	---	---	---	---	---	---	3.7	4.0	3.9	3.8	4.6	4.6
Idaho	4.9	5.2	5.0	4.8	4.9	5.0	5.0	5.0	5.2	5.3	5.3	5.5	5.4	5.8	6.5
Illinois	2.6	2.6	2.5	2.5	2.6	2.5	2.6	2.6	2.8	2.9	3.2	3.2	3.3	3.2	3.8
Indiana	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Iowa	2.4	2.4	2.4	2.6	2.5	2.7	2.7	2.8	2.8	3.1	3.3	3.3	3.3	3.7	3.9
Kansas	3.9	3.7	3.6	3.5	3.4	3.1	3.1	3.3	3.3	3.6	3.4	3.6	3.4	4.1	5.0
Kentucky	4.4	4.5	4.6	4.6	4.6	5.0	4.6	4.9	5.0	5.2	5.1	5.1	5.5	5.9	5.8
Louisiana	---	---	---	---	---	---	---	---	3.4	3.3	---	---	---	---	---
Maine	4.2	4.2	4.1	4.2	4.2	4.2	4.1	4.3	4.4	4.6	4.7	5.0	5.1	4.4	4.3
Maryland	2.9	2.8	2.8	2.8	2.9	3.0	3.1	3.2	3.2	3.4	3.0	3.3	3.2	3.0	3.4
Massachusetts	2.7	2.5	2.2	2.0	2.3	2.3	2.2	2.2	2.5	2.5	2.4	2.5	2.5	2.2	2.8
Michigan	3.4	3.5	3.3	3.4	3.4	3.5	3.4	3.5	3.5	3.8	3.9	3.9	3.8	4.1	4.3
Minnesota	---	---	---	---	---	---	---	2.8	3.0	3.1	3.2	3.2	3.2	3.4	3.5
Mississippi	4.0	4.3	4.1	4.3	4.5	4.8	4.4	4.5	4.6	4.9	5.0	5.0	5.0	4.8	5.5
Missouri	3.9	3.9	3.8	3.7	3.8	3.8	3.6	3.8	3.9	4.0	4.2	4.5	4.4	5.0	5.1
Montana	4.0	3.9	4.0	4.1	4.0	4.4	4.5	3.8	3.9	4.0	4.2	4.2	2.8	4.8	5.1
Nebraska	3.5	3.6	3.4	3.3	3.4	3.4	3.3	3.4	3.4	3.6	3.6	3.7	3.7	3.8	4.0
Nevada	5.6	5.9	6.6	6.4	6.4	6.7	7.4	6.3	7.3	7.1	6.3	9.9	7.8	7.8	11.4
New Hampshire	3.8	3.8	3.7	3.9	3.8	4.1	3.9	4.0	4.1	4.3	4.4	4.8	5.1	4.2	4.7
New Jersey	2.9	3.0	2.7	3.0	3.0	3.0	2.9	3.0	3.2	3.4	3.4	3.0	3.0	3.0	3.0
New Mexico	3.3	4.0	3.9	4.1	4.2	4.3	4.6	4.6	5.2	4.4	4.9	5.1	4.6	6.6	4.9
New York	2.9	2.9	2.6	2.8	2.9	3.1	2.9	3.0	3.2	3.4	3.5	3.0	3.3	3.0	3.2
North Carolina	3.7	3.8	3.8	3.8	4.0	4.0	4.1	4.2	4.2	4.4	4.6	4.5	4.6	5.0	5.1
North Dakota	2.7	3.1	2.8	2.9	2.9	3.0	2.9	3.1	2.9	2.9	2.9	3.4	4.4	3.4	3.6
Ohio	3.4	3.4	3.3	3.3	3.4	3.5	3.5	3.6	3.7	4.0	4.0	4.2	3.9	4.3	4.7
Oklahoma	5.2	5.2	4.8	5.3	5.2	5.3	5.6	4.9	---	---	---	---	---	6.6	7.7
Oregon	3.8	4.0	3.9	3.9	3.9	4.0	4.2	4.1	4.3	4.6	4.8	4.8	4.6	4.7	5.5
Pennsylvania	2.8	2.7	2.7	2.7	2.8	2.8	2.3	3.0	3.1	3.1	3.1	3.1	3.1	3.2	3.3
Rhode Island	3.2	3.2	3.0	2.7	2.8	3.0	3.0	3.1	3.1	3.2	3.2	2.9	2.7	3.6	3.7
South Carolina	3.2	3.1	3.0	2.8	3.0	2.9	2.9	3.2	3.3	3.4	3.6	3.8	3.8	3.9	4.5
South Dakota	3.3	3.4	3.3	3.1	3.1	3.2	2.8	3.1	3.0	3.3	3.3	3.5	3.7	3.9	3.7
Tennessee	4.3	4.2	3.9	4.2	4.3	4.6	4.6	4.9	5.0	5.1	5.2	5.9	5.8	6.2	6.5
Texas	3.2	3.3	3.3	3.3	3.3	3.4	3.3	3.6	3.8	3.9	4.0	4.0	3.8	5.2	5.5
Utah	3.7	3.7	3.7	3.8	3.7	3.9	4.1	4.1	4.0	4.1	4.2	4.3	4.0	4.4	5.1
Vermont	3.6	3.8	3.5	3.6	3.6	3.8	3.6	3.9	4.0	4.2	4.3	4.1	4.4	4.7	4.5
Virginia	3.8	3.8	3.7	3.8	3.8	4.0	4.0	3.9	4.0	4.2	4.2	4.3	4.4	4.3	4.4
Washington	4.1	4.2	3.9	3.9	4.0	4.1	4.3	4.3	4.4	4.6	4.5	4.6	5.0	5.4	5.9
West Virginia	5.2	5.1	5.1	4.8	5.1	5.0	5.1	5.0	5.2	5.2	5.2	5.1	4.9	5.2	5.3
Wisconsin	2.9	3.0	2.9	3.0	2.9	3.0	2.9	3.0	3.1	3.2	3.2	3.2	3.2	3.4	3.6
Wyoming	4.8	5.1	5.1	4.9	4.9	5.1	5.2	5.2	5.4	5.4	5.8	5.8	5.7	6.6	6.6

--- Data not available.

¹ Includes annulments. Includes divorce petitions filed or legal separations for some counties or States.

Note: Rates for 2001-2009 have been revised and are based on intercensal population estimates from the 2000 and 2010 censuses. Populations for 2010 rates are based on the 2010 census.

Source: CDC/NCHS, National Vital Statistics System.

EXHIBIT 58



Centers for Disease Control and Prevention
 CDC 24/7: Saving Lives. Protecting People.™

National Marriage and Divorce Rate Trends

Provisional number of marriages and marriage rate: United States, 2000-2011

Year	Marriages	Population	Rate per 1,000 total population
2011	2,118,000	311,591,917	6.8
2010	2,096,000	308,745,538	6.8
2009	2,080,000	306,771,529	6.8
2008	2,157,000	304,093,966	7.1
2007	2,197,000	301,231,207	7.3
2006¹	2,193,000	294,077,247	7.5
2005	2,249,000	295,516,599	7.6
2004	2,279,000	292,805,298	7.8
2003	2,245,000	290,107,933	7.7
2002	2,290,000	287,625,193	8.0
2001	2,326,000	284,968,955	8.2
2000	2,315,000	281,421,906	8.2

¹ Excludes data for Louisiana.

Note: Rates for 2001-2009 have been revised and are based on intercensal population estimates from the 2000 and 2010 censuses. Populations for 2010 rates are based on the 2010 census.

Source: CDC/NCHS National Vital Statistics System.

Provisional number of divorces and annulments and rate: United States, 2000-2011

Year	Divorces & annulments	Population	Rate per 1,000 total population
2011¹	877,000	246,273,366	3.6
2010¹	872,000	244,122,529	3.6
2009¹	840,000	242,610,561	3.5
2008¹	844,000	240,545,163	3.5

Year	Divorces & annulments	Population	Rate per 1,000 total population
2007¹	856,000	238,352,850	3.6
2006¹	872,000	236,094,277	3.7
2005¹	847,000	233,495,163	3.6
2004²	879,000	236,402,656	3.7
2003³	927,000	243,902,090	3.8
2002⁴	955,000	243,108,303	3.9
2001⁵	940,000	236,416,762	4.0
2000⁵	944,000	233,550,143	4.0

¹ Excludes data for California, Georgia, Hawaii, Indiana, Louisiana, and Minnesota.

² Excludes data for California, Georgia, Hawaii, Indiana, and Louisiana.

³ Excludes data for California, Hawaii, Indiana, and Oklahoma.

⁴ Excludes data for California, Indiana, and Oklahoma.

⁵ Excludes data for California, Indiana, Louisiana, and Oklahoma.

Note: Rates for 2001-2009 have been revised and are based on intercensal population estimates from the 2000 and 2010 censuses. Populations for 2010 rates are based on the 2010 census.

Source: CDC/NCHS National Vital Statistics System.

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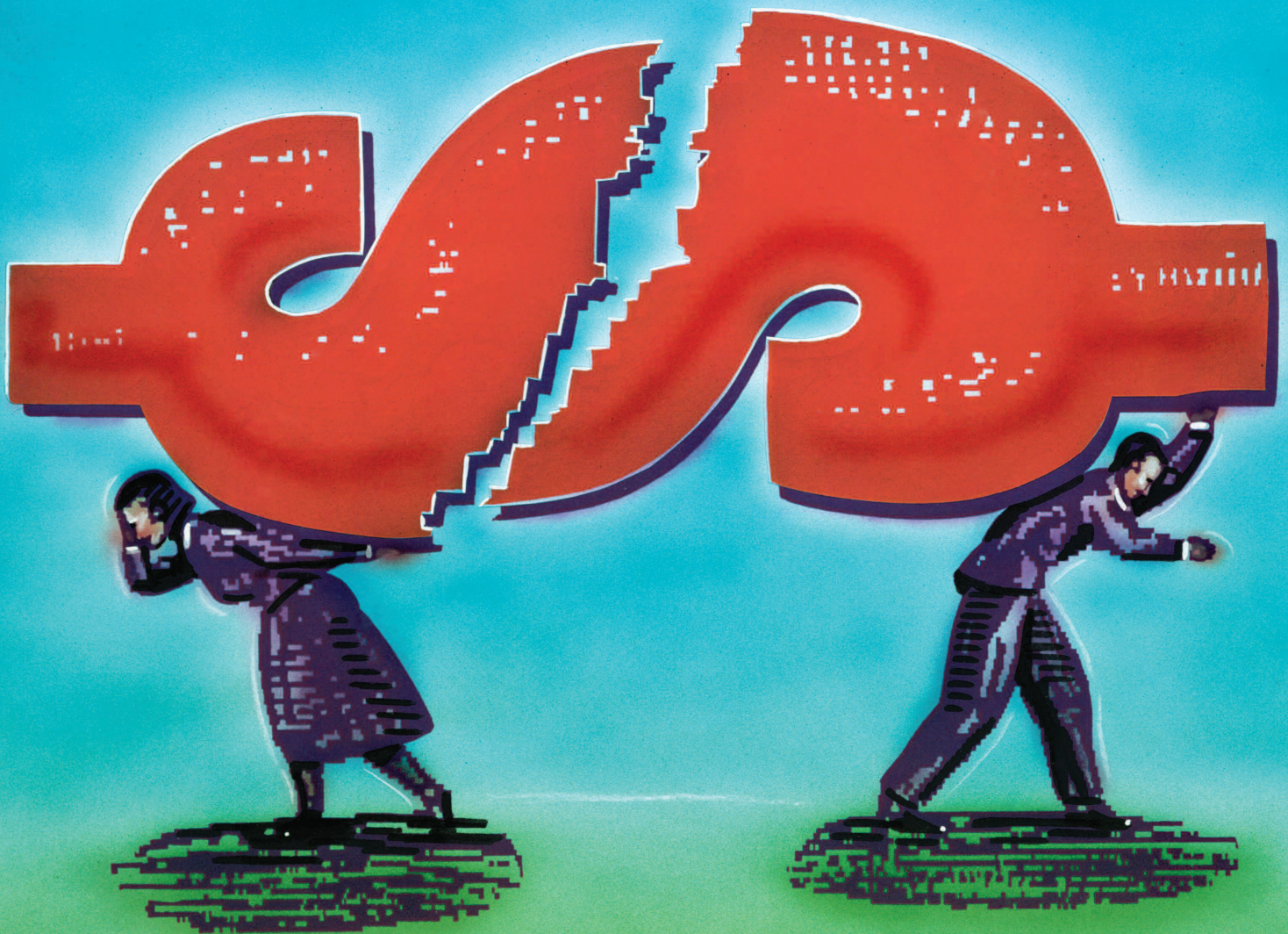


EXHIBIT 59

A Report to the Nation
Benjamin Scafidi, Principal Investigator

The Taxpayer Costs of Divorce and Unwed Childbearing

First-Ever Estimates for the Nation
and All Fifty States



**Institute for American Values
Institute for Marriage and Public Policy**

**Georgia Family Council
Families Northwest**

MOST OF THE PUBLIC DEBATE over marriage focuses on the role of marriage as a social, moral, or religious institution. But marriage is also an economic institution, a powerful creator of human and social capital. Increases in divorce and unwed childbearing have broad economic implications, including larger expenditures for the federal and state governments. This is the first-ever report that attempts to measure the taxpayer costs of family fragmentation for U.S. taxpayers in all fifty states. Among its findings: Even programs that result in very small decreases in divorce and unwed childbearing could yield big savings for taxpayers.

The report's principal investigator is Benjamin Scafidi, an economist in the J. Whitney Bunting School of Business at Georgia College & State University. The co-sponsoring organizations are the Institute for American Values, the Institute for Marriage and Public Policy, Georgia Family Council, and Families Northwest.

The co-sponsoring organizations are grateful to Chuck Stetson and Mr. and Mrs. John Fetz for their generous financial support of the project. The principal investigator is grateful to Deanie Waddell for her expert research assistance.

On the cover: Man and Woman Splitting Dollar by Todd Davidson, Stock Illustration RF, Getty Images.

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Institute for American Values

1841 Broadway, Suite 211

New York, New York 10023

Tel: (212) 246-3942

Fax: (212) 541-6665

Website: www.americanvalues.org

Email: info@americanvalues.org

The Taxpayer Costs of Divorce and Unwed Childbearing

First-Ever Estimates for the Nation and All Fifty States

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Project Advisors

Project advisors provided expert review but are not authors of the report. Affiliations are listed for identification purposes only. Any errors or omissions in this report are the responsibility of the principal investigator and not of the project advisors.

James Alm
Andrew Young School of Policy Studies at Georgia State University

Obie Clayton
Morehouse College

Ron Haskins
The Brookings Institution

Brett Katzman
Kennesaw State University

Robert Lerman
Urban Institute

Theodora Ooms
Center for Law and Social Policy

Roger Tutterow
Mercer University

Matt Weidinger
U.S. House Ways and Means Committee

W. Bradford Wilcox
University of Virginia

About Benjamin Scafidi

Ben Scafidi is an associate professor in the J. Whitney Bunting School of Business at Georgia College & State University. His research has focused on education and urban policy. Previously he served as the Education Policy Advisor for Georgia Governor Sonny Perdue and served on the staff of both of Georgia Governor Roy Barnes' Education Reform Study Commissions. He received his Ph.D. in Economics from the University of Virginia and his bachelor's degree in Economics from the University of Notre Dame. Ben was born and raised in Richmond, Virginia. Ben and Lori Scafidi and their four children reside in Milledgeville, Georgia.

Executive Summary

THIS STUDY PROVIDES THE FIRST RIGOROUS ESTIMATE of the costs to U.S. taxpayers of high rates of divorce and unmarried childbearing both at the national and state levels.

Why should legislators and policymakers care about marriage? Public debate on marriage in this country has focused on the “social costs” of family fragmentation (that is, divorce and unwed childbearing), and research suggests that these are indeed extensive. But marriage is more than a moral or social institution; it is also an economic one, a generator of social and human capital, especially when it comes to children.

Research on family structure suggests a variety of mechanisms, or processes, through which marriage may reduce the need for costly social programs. In this study, we adopt the simplifying and extremely cautious assumption that all of the taxpayer costs of divorce and unmarried childbearing stem from the effects that family fragmentation has on poverty, a causal mechanism that is well-accepted and has been reasonably well-quantified in the literature.

Based on the methodology, we estimate that family fragmentation costs U.S. taxpayers *at least \$112 billion each and every year*, or more than \$1 trillion each decade. In appendix B, we also offer estimates for the costs of family fragmentation for each state.

These costs arise from increased taxpayer expenditures for antipoverty, criminal justice, and education programs, and through lower levels of taxes paid by individuals who, as adults, earn less because of reduced opportunities as a result of having been more likely to grow up in poverty.

The \$112 billion figure represents a “lower-bound” or minimum estimate. Given the cautious assumptions used throughout this analysis, we can be confident that current high rates of family fragmentation cost taxpayers *at least* \$112 billion per year. The estimate of \$112 billion per year is the total figure incurred at the federal, state, and local levels. Of these taxpayer costs, \$70.1 billion are at the federal level, \$33.3 billion are at the state level, and \$8.5 billion are at the local level. Taxpayers in California incur the highest state and local costs at \$4.8 billion, while taxpayers in Wyoming have the lowest state and local costs at \$61 million.

If, as research suggests is likely, marriage has additional benefits to children, adults, and communities, and if those benefits are in areas other than increased income levels, then the actual taxpayer costs of divorce and unwed childbearing are likely much higher.

How should policymakers, state legislators, and others respond to the large taxpayer costs of family fragmentation? We note that even very small increases in stable marriage rates as a result of government programs or community efforts to strengthen marriage would result in very large savings for taxpayers. If the federal marriage initiative, for example, succeeds in reducing family fragmentation by just 1 percent, U.S. taxpayers will save an estimated \$1.1 billion each and every year.

Because of the modest price tags associated with most federal and state marriage-strengthening programs, and the large taxpayer costs associated with divorce and unwed childbearing, even modest success rates would be cost-effective. Texas, for example, recently appropriated \$15 million over two years for marriage education and other programs to increase stable marriage rates. If this program succeeds in increasing stably married families by just three-tenths of 1 percent, it will be cost-effective in its returns to Texas taxpayers.

This report is organized as follows: Section I explains why policymakers may have an interest in supporting marriage. Sections II and III explain the methods used to estimate the taxpayer cost of family fragmentation by using evidence about the relationship between family breakdown and poverty. Section IV reveals the national estimate of the taxpayer cost. Estimated costs for individual states are found in appendix B.

Finally, a note to social scientists: Few structural estimates exist of the relationships needed to estimate the taxpayer costs of family fragmentation. Therefore, we have used indirect estimates based on the assumption that marriage has no independent effects on adults or children other than the effect of marriage on poverty.

EXHIBIT 60



WHAT IS MARRIAGE?

Man and Woman: A Defense

SHERIF GIRGIS
RYAN T. ANDERSON
ROBERT P. GEORGE

What Is Marriage?

Man and Woman: A Defense



Sherif Girgis, Ryan T. Anderson,
and Robert P. George

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ciations, the media, religious communities, and living rooms across the country. It is hard to think of a more salient cultural conflict.

Same-sex civil marriage finds overwhelming support among intellectuals, journalists, and entertainers, indeed nearly all of our cultural elite. Overall, however, the American people remain unconvinced of its merits. In thirty-two states where the issue has been put to the people in a referendum—including liberal states such as California, Wisconsin, and Maine—the conjugal view of marriage has prevailed. In most of these states, the people have enacted that view constitutionally. Another twelve states have passed statutes doing the same. All told, the people of forty-four states have affirmed the conjugal view of marriage by direct voting or through their representatives.

In six states and the District of Columbia, civil marriage has been redefined to include same-sex relationships. In Massachusetts, Connecticut, and Iowa, this happened by judicial decree; in Vermont, New Hampshire, Washington, D.C., New York, and Maryland by legislation. (As of this writing, Washington State has also passed a same-sex civil marriage bill, to take effect only if upheld in a 2012 referendum.) However this piecemeal battle continues, the record so far explodes the idea that this debate is over, that blind forces of history have somehow fixed a revisionist victory.

While most victories for same-sex civil marriage have come from the bench, courts have upheld conjugal marriage laws more often than not: at least ten state and federal courts have done so in the last decade. But a few pending cases might be the most consequential. One centers on the federal Defense of Marriage Act (DOMA), which defines marriage as a union of man and woman for federal purposes and allows states to choose whether to recognize same-sex marriages contracted elsewhere. Passed overwhelmingly by Congress and signed by President Clinton in 1996, DOMA was declared unconstitutional in 2010 by a federal district court judge in Massachusetts and in 2012 by the First Circuit Court of Appeals. As of this writing, the

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case has been appealed to the Supreme Court. President Obama, having judged parts of DOMA unconstitutional, has instructed his Department of Justice not to defend it.

Perhaps the most prominent judicial battle is *Hollingsworth v. Perry*. In 2008, after the California Supreme Court had declared California's conjugal marriage law unconstitutional, California voters amended their state constitution to declare marriage a male-female union, leaving intact civil-union laws that granted same-sex relationships all the legal benefits of marriage. In August 2010, a federal court declared Proposition 8 a violation of rights to equal protection and due process under the U.S. Constitution; in 2012, a three-judge panel on the Ninth Circuit affirmed. *Perry* has been appealed to the Supreme Court. There, just five justices might well decide marriage policy for the nation, drawing all these battles to an undemocratically abrupt close. By the Court's standards, marriage laws are constitutional if they have a rational basis. Showing that conjugal marriage laws are indeed rationally grounded is a central purpose of this book. But we hope that it serves mainly as grist for democratic deliberation.

WHAT WE WILL SHOW

Our essential claims may be put succinctly. There is a distinct form of personal union and corresponding way of life, historically called marriage, whose basic features do not depend on the preferences of individuals or cultures. 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, whatever the spouses' preferences. It has long been and remains a personal and social reality, sought and prized by individuals, couples, and whole societies. But it is also a moral reality: a human good with an objective structure, which it is inherently good for us to live out.

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 children. That is why law, though it may take no notice of ordinary friendships, should recognize and support marriages.

There can thus be no right for nonmarital relationships to be recognized *as marriages*. There can indeed be much harm, if recognizing them would obscure the shape, and so weaken the special norms, of an institution on which social order depends. So it is not the conferral of benefits on same-sex relationships itself but *redefining marriage in the public mind* that bodes ill for the common good. Indeed, societies mindful of this fact need deprive no same-sex-attracted people of practical goods, social equality, or personal fulfillment.

Here, then, is the heart of our argument against redefinition. If the law defines marriage to include same-sex partners, many will come to misunderstand marriage. They will not see it as essentially comprehensive, or thus (among other things) as ordered to procreation and family life—but as essentially an emotional union. For reasons to be explained, they will therefore tend not to understand or respect the objective norms of permanence or sexual exclusivity that shape it. Nor, in the end, will they see why the terms of marriage should not depend altogether on the will of the parties, be they two or ten in number, as the terms of friendships and contracts do. That is, to the extent that marriage is misunderstood, it will be harder to see the point of its norms, to live by them, and to urge them on others. And this, besides making any remaining restrictions on marriage arbitrary, will damage the many cultural and political goods that get the state involved in marriage in the first place. We list them in summary form here to orient readers. Each will be discussed,

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and its connection to marriage policy defended, in subsequent chapters of this book.

Real marital fulfillment. No one deliberates or acts in a vacuum. We all take cues from cultural norms, which are shaped by the law. To form a true marriage, one must freely choose it. And to choose marriage, one must have at least a rough, intuitive idea of what it is. The revisionist proposal would harm people (especially future generations) by warping their idea of what marriage is. It would teach that marriage is about emotional union and cohabitation, without any inherent connections to bodily union or family life. As people internalized this view, their ability to realize genuine marital union would diminish. This would be bad in itself, since marital union is good in itself. It would be the subtlest but also the primary harm of redefinition; other harms would be the *effects* of misconstruing marriage, and so not living it out and supporting it.

Spousal well-being. Marriage tends to make spouses healthier, happier, and wealthier than they would otherwise be. But what does this is *marriage*, especially through its distinctive norms of permanence, exclusivity, and orientation to family life. As the state's redefinition of marriage makes these norms harder to understand, cherish, justify, and live by, spouses will benefit less from the psychological and material advantages of marital stability.

Child well-being. If same-sex relationships are recognized as marriages, not only will the norms that keep marriage stable be undermined, but the notion that men and women bring different gifts to parenting will not be reinforced by any civil institution. Redefining marriage would thus soften the social pressures and lower the incentives—already diminished these last few decades—for husbands to stay with their wives and children, or for men and women to marry before having children. All this would harm children's development into happy, productive, upright adults.

Friendship. Misunderstandings about marriage will also speed our society's drought of deep friendship, with special harm

to the unmarried. The state will have defined marriage mainly by *degree* or *intensity*—as offering the most of what makes any relationship valuable: shared emotion and experience. It will thus become less acceptable to seek (and harder to find) emotional and spiritual intimacy in nonmarital friendships. These will come to be seen not as different from marriage (and thus distinctively appealing), but simply as *less*. Only the conjugal view gives marriage a definite orientation to bodily union and family life. Only the conjugal view preserves a richly populated horizon with space for many types of communion, each with its own scale of depth and specific forms of presence and care.

Religious liberty. As the conjugal view comes to be seen as irrational, people's freedom to express and live by it will be curbed. Thus, for example, several states have forced Catholic Charities to give up its adoption services or place children with same-sex partners, against Catholic principles. Some conjugal marriage supporters have been fired for publicizing their views. If civil marriage is redefined, believing what virtually every human society once believed about marriage—that it is a male-female union—will be seen increasingly as a malicious prejudice, to be driven to the margins of culture.

Limited government. The state is (or should be) a supporting actor in our lives, not a protagonist. It exists to create the conditions under which we and our freely formed communities can thrive. The most important free community, on which all others depend, is marriage; and the conditions for its thriving include both the accommodations for couples and the pressures on them to stay together that marriage law provides. 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 to the orphaned, provider to the neglected, and arbiter of disputes over custody, paternity, and visitations. As the family weakens, our welfare and correctional bureaucracies grow.

These, in brief, are our main claims, to be elaborated and defended. To opinion leaders, we offer this book as a resource

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to draw on, or a challenge to meet; and to teachers and students of every persuasion, we offer it as material for analysis, defense, and critique. We offer it to religious bodies considering whether to reform or defend their traditions' teachings on marriage. Finally, since marriage is a good that must be chosen to be realized—and must be roughly understood to be chosen—we offer it to current and future spouses, and to all who witness and support their vows.

WHAT OUR ARGUMENT IS NOT

Before we continue, we should clarify what our argument is *not*. First, it is in the end not about homosexuality. We do not address the morality of homosexual acts or their heterosexual counterparts. We will show that one can defend the conjugal view of marriage while bracketing this moral question and that the conjugal view can be wholeheartedly embraced without denigrating same-sex-attracted people, or ignoring their needs, or assuming that their desires could change. After all, the conjugal view is serenely embraced by many thoughtful people who are same-sex-attracted.⁴ Again, this is fundamentally a debate about what marriage is, not about homosexuality.

Second, our argument makes no appeal to divine revelation or religious authority. We think it right and proper to make religious arguments *for or against* a marriage policy (or policies on capital punishment, say, or immigration), but we offer no religious arguments here.

There is simple and decisive evidence that the conjugal view is not peculiar to religion, or to any religious tradition. Ancient thinkers who had no contact with religions such as Judaism or Christianity—including Xenophanes, Socrates, Plato, Aristotle, Musonius Rufus, and Plutarch—reached remarkably similar views of marriage. To be sure, the world's major religions have also historically seen marriage as a conjugal relationship, shaped by its social role in binding men to women and both to the children born of their union. But this suggests only that

these alternatives to married biological parenting.¹² To make marriages more stable is to give more children the best chance to become upright and productive members of society. Note the importance of the link between marriage and children in both stages of our argument: just as it provides a powerful reason to hold the conjugal view of marriage, so it provides the central reason to make marriage a matter of public concern.

But this link is no idiosyncrasy of our view. It is amply confirmed in our law. Long before same-sex civil marriages were envisioned, courts declared that marriage “is the foundation of the family and of society, without which there would be neither civilization nor progress.”¹³ They recalled that “virtually every Supreme court case recognizing as fundamental the right to marry indicates as the basis for the conclusion the institution’s inextricable link to procreation.”¹⁴ In their account, not just ours, “the first purpose of matrimony, by the laws of nature and society, is procreation”;¹⁵ “the procreation of children under the shield and sanction of the law” is one of the “two principal ends of marriage.”¹⁶ In fact, “marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.”¹⁷ Examples can be multiplied *ad nauseam*.¹⁸

A second public benefit of marriage is that it tends to help spouses financially, emotionally, physically, and socially. As the late University of Virginia sociologist Steven Nock showed, it is not that people who are better off are most likely to marry, but that marriage makes people better off. More than signal maturity, marriage can promote it. Thus men, after their wedding, tend to spend more time at work, less time at bars, more time at religious gatherings, less time in jail, and more time with family.¹⁹

The shape of marriage as a permanent and exclusive union ordered to family life helps explain these benefits. Permanently committed to a relationship whose norms are shaped by its aptness for family life, husbands and wives gain emotional insurance against life’s temporary setbacks. Exclusively committed,

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they leave the sexual marketplace and thus escape its heightened risks. Dedicated to their children and each other, they enjoy the benefits of a sharpened sense of purpose. More vigorously sowing in work, they reap more abundantly its fruits. So the state's interest in productivity and social order creates an interest in marriage.²⁰

Third, these two benefits of marriage—child and spousal well-being—support the conclusion of a study led by Professor W. Bradford Wilcox as part of the University of Virginia's National Marriage Project: "The core message . . . is that the wealth of nations depends in no small part on the health of the family."²¹ The same study suggests that marriage and fertility trends "play an underappreciated and important role in fostering long-term economic growth, the viability of the welfare state, the size and quality of the workforce, and the health of large sectors of the modern economy."²² These are legitimate state interests if anything is; so too, then, is marriage.

Fourth, given its economic benefits, it is no surprise that the decline of marriage most hurts the least well-off. As Kay Hy-mowitz argues in *Marriage and Caste in America*, the decline of the marriage culture has hurt lower-income communities and African Americans the most.²³ In fact, a leading indicator of whether someone will know poverty or prosperity is whether she knew growing up the love and security of her married mother and father.

Finally, since a strong marriage culture is good for children, spouses, indeed our whole economy, and especially the poor, it also serves the cause of limited government. Most obviously, where marriages never form or easily break down, the state expands to fill the domestic vacuum by lawsuits to determine paternity, visitation rights, child support, and alimony.

But the less immediate effects are even more extensive. As absentee fathers and out-of-wedlock births become common, a train of social pathologies follows, and with it greater demand for policing and state-provided social services. Sociologists David Popenoe and Alan Wolfe's research on Scandinavian coun-

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tries shows that as marriage culture declines, the size and scope of state power and spending grow.²⁴

In fact, a study by the Left-leaning Brookings Institution finds 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.²⁵ A 2008 study found that divorce and unwed childbearing cost taxpayers \$112 billion each year.²⁶ And Utah State University scholar David Schramm has estimated that divorce alone costs local, state, and federal government \$33 billion each year.²⁷

Thus, although some libertarians would give marriage no more legal status than we give baptisms and bar mitzvahs,²⁸ privatizing marriage would be a catastrophe for limited government. Almost every human interest that might justify state action—health, security, educational development, social order—would also justify legally regulating marriage. A state that will not support marriage is like a doctor who will not encourage a healthy diet and exercise. Each passes over what is basic and paramount in a misplaced zeal for supplements and remedies.

IS MARRIAGE ENDLESSLY MALLEABLE?

We can now address the arguments of those on the Left who think marriage malleable to no end (call them “constructivists”).²⁹ Marriage is for them whatever we decide to make it. There are no criteria that your relationship must meet to be a marriage—to realize the value specific to marriage as a human good. There is only the vast and gradual spectrum of more and less affectionate relations, plus our (and every) society’s peculiar habit of carving out an arbitrary region on the far end of that spectrum for special social and legal treatment.³⁰ Hence there is no “right answer” for the state’s marriage policy, any more than for the national bird: different proposals are just more or less preferable.³¹

Constructivism faces several problems, as we will show. First, it is often motivated by the fallacy, easy to dispel, that because social practices are *partly* constructed, they must be *entirely* constructed. Second, it can make no sense of major philosophical and legal traditions. Third, it also contradicts the spirit of common revisionist arguments, and would imply that many revisionists' views are, by their own lights, as radically unjust as they consider ours to be. Finally, even if constructivism were true, it would provide no good basis for the revisionist view.

Can a Social Practice Have Necessary Features?

For Professor Andrew Koppelman of Northwestern, our claim that a social practice like marriage could have necessary features that we did not choose to give it is "barely comprehensible."³² Could *chess*, for example, have features that cannot be traced to sheer choice or custom? Why marriage, then?

For all its excellences, everything about chess is conventional. But marriage is a basic aspect of human well-being—valuable for people in itself, without our deciding to make it so, and in a way that other goods cannot substitute for.³³

So when we say that, for example, permanent commitment is a necessary feature of marriage, we just mean that there is a distinctive human good that you can fully realize only through a vow of permanence (among other things). This is compatible with the obvious fact that many other features of marriage—like its legal benefits—vary widely across cultures and even couples. Moreover, to agree that goods have some objective features in this sense, one need not believe in God, just in some constants of *human nature*—at least across some time span.

Consider, by analogy, friendship. It clearly takes different forms across history, but no one is fooled by this into thinking that it does not retain an objective core, fixed by our social nature. True friendship requires mutual and mutually acknowledged good will and cooperation. Lacking that, a relationship between two people simply lacks the distinctive value of friend-

ship; they owe each other none of the special consideration that friends do.

Thus also for marriage. The average 1990s American marriage and its 1890s counterpart surely have different emotional profiles, divisions of labor, and economic purposes and implications. Largely rejected in the West today, polygamy and arranged marriage have existed in many cultures. A British royal wedding looks very different from a Navajo wedding (and indeed, from a nonroyal British wedding, though not from certain New York weddings).

But none of this should unsettle proponents of the conjugal view. None of it disproves what reflection reveals: Marriage has an objective core, fixed by our nature as embodied, sexually reproductive (hence complementary) beings; and to deviate from it is to miss a crucial part of this basic human good.

First, some cross-cultural differences in marriage practice do not go to its objective core. Parties to arranged marriages, for example, may still consent to whomever they are assigned, as required for true marriage. The conjugal view neither forbids nor requires any presumption of intense feeling, or a certain economic purpose to marriage.

Second, the conjugal view is not even disproven by cultures that omit what it sees as central. No moral truth of much specificity has enjoyed universal assent—not the wrong of seeking innocent blood, nor the value of freedom from slavery, nor anything else. That makes them no less *true*.

It is natural rather to think that the most *basic* ethical principles would be most widely held; while those *derived* from more basic principles would meet with patchier understanding and assent, since we reach them by applying other principles. From this angle, the historical record is unsurprising, given the truth of the conjugal view. What it considers most basic to marriage—like bodily union and connection to family life—are nearly universal in marriage practice. And what it and our argument treat as *grounded in* these basics—permanent, exclusive

commitment—is less represented. Hence the presence of polygamy in many cultures, contrasted with the nearly perfect human consensus on sexual complementarity in marriage.*

Philosophical and Legal Traditions

It might seem audacious of us to suggest that our view of the essential core of marriage is available to reasoned reflection. If so, we are just the latest in a line of audacious persons, a line that stretches back through millennia. The view that we propose has been developing for as long as there has been sustained reflection on marriage. 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. Especially clear is Plutarch's statement in *Erotikos* of marriage as a special kind of friendship uniquely embodied in coitus (which he, too, calls a “renewal” of marriage). He also expressly affirms in his *Life of Solon* that intercourse with an infertile spouse realizes the good of marriage—something that these other ancient thinkers took for granted, even as they (like Plutarch) denied that other sexual acts could do the same.³⁴

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 man and woman could. What could make sense of these two practices?

*Unlike a union that involves coitus, children, and permanent commitment but not (say) exclusivity, the partnerships of two men or three women lacks even what is most basic to marriage. So such partnerships cannot even be seen as imperfect participations in the good of marriage; they are not true marriages at all.

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What's the Harm?

HAVING COMPARED THE CONJUGAL AND REVISIONIST views of marriage and seen the benefits of recognizing marriage at all, some simply ask, *What's the harm?* Their appeal to practicality runs something like this:

Suppose your view is coherent and even superior to the alternative as an account of the good of marriage. So what? Why not let a few thousand same-sex partners get a certificate and a certain legal status? No one would actually be worse off. *How would gay civil marriage affect your lives, liberties, or opportunities, or your own marriages?*¹

We said in the Introduction that this debate is not about homosexuality, but about marriage. Accordingly, in chapter 6, we will show how the conjugal view respects same-sex-attracted people's equal dignity and basic needs. Here we show how the revisionist proposal would harm the institution of marriage and much else besides.

Our argument depends on three simple ideas:

1. Law tends to shape beliefs.
2. Beliefs shape behavior.
3. Beliefs and behavior affect human interests and human well-being.

Taking these truths for granted,² we argue that an unsound law of marriage will breed mistaken views—not just of marriage, but of parenting, common moral and religious beliefs, even friendship—that will harm the human interests affected by each of these.

WEAKENING MARRIAGE:
MAKING IT HARDER TO REALIZE

No one acts in a void. We all take cues from cultural norms, shaped by the law. For the law affects our ideas of what is reasonable and appropriate. It does so by what it prohibits—you might think less of drinking if it were banned, or more of marijuana use if it were allowed—but also by what it approves. State subsidies for heavy metal promote a different view of musical merit than state sponsorship of chamber music. A school board curriculum of quack science and chauvinistic history will impart a different message about knowledge than one with more rigorous standards.

Of this point, revisionists hardly need convincing. They find civil unions insufficient even when these offer same-sex unions all the legal benefits of marriage. There is only one way to explain this: Revisionists agree that it matters what California or the United States *calls* a marriage, because this affects how Californians or Americans come to *think* of marriage.

Prominent Oxford philosopher Joseph Raz, no friend of the conjugal view, agrees:

[O]ne thing can be said with certainty [about recent changes in marriage law]. They will not be confined to

adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear. They will not disappear suddenly. Rather they will be transformed into a somewhat different social form, which responds to the fact that it is one of several forms of bonding, and that bonding itself is much more easily and commonly dissoluble. All these factors are already working their way into the constitutive conventions which determine what is appropriate and expected within a conventional marriage and transforming its significance.³

Redefining civil marriage would change its meaning for everyone. Legally wedded opposite-sex unions would increasingly be defined by what they had in common with same-sex relationships.

This wouldn't just shift opinion polls and tax burdens. Marriage, the human good, would be harder to achieve. For you can realize marriage only by choosing it, for which you need at least a rough, intuitive idea of what it really is. By warping people's view of marriage, revisionist policy would make them less able to realize this basic way of thriving—much as a man confused about what friendship requires will have trouble being a friend.⁴ People forming what the state called "marriage" would increasingly be forming bonds that merely resembled the real thing in certain ways, as a contractual relationship might resemble a friendship. The revisionist view would distort their priorities, actions, and motivations, to the harm of true marriage.* But it's wrong—and counterproductive—to obscure basic goods as a means to social ends (see chapter 6, dignitary harm).

*The revisionist proposal would teach that marriage is most centrally about emotional union. But emotional 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. People unite by consent, but feelings cannot be central to a vow, for we have no direct control over them.

Obscuring the good of marriage to make it harder to live out is thus the first harm of redefinition: other harms are the *effects* of misunderstanding, and failing to live out, true marriage.

WEAKENING MARRIAGE AND EXPANDING GOVERNMENT: ERODING MARITAL NORMS

Redefining marriage will also harm the material interests of couples and children. As more people absorb the new law's lesson that marriage is fundamentally about emotions, marriages will increasingly take on emotion's tyrannical inconstancy.⁵ Because there is no *reason* that emotional unions—any more than the emotions that define them, or friendships generally—should be permanent or limited to two, these norms of marriage would make less sense. People would thus feel less bound to live by

In other words, what the revisionist proposal would obscure—and make it harder for us to live by—is the fact that marriage is first a matter of will and action: two people's consent to cooperate in ways specific to marital love, especially in bodily union of the sort made possible by sexual-reproductive complementarity, and the domestic sharing of family life to which it tends. Urgent desire and ecstatic delight, while often important motivations, are a valuable *bloom* on marriage: indicative of health and appealing in themselves, but seasonal at best. Spouses are not any less married after fifty years than on day five—or after a long day on the job than on a libidinous Saturday morning.

With the revisionist's inversion of priorities, singles deciding whom to marry might rely more on elusive emotional signals of compatibility than more prosaic indicators of fitness for marriage, such as fitness for parenting. Once married, they might increasingly carry out marital actions—sex, household cooperation, and so on—for the sake of maintaining individual (if reciprocal) satisfactions. But if chosen for the wrong reasons, even such marriage-like actions won't really build up true marriage—any more than giving a “gift” for personal gain builds up genuine friendship.

Finally, such nonmarital *motivations* might eventually change *actions*. Spouses might treat family life—which uniquely extends marriage—as less central: perhaps helpful, but perhaps a hindrance to the emotional union now treated as what marriage is really all about. And they might make their commitment more conditional on romantic attachment, impairing marital union from the utterance of “I do.” These shifts would be harmful not just for their effects on social order. They would be bad in themselves, for they would impede couples from living out and building up something good in itself: true marriage.

them whenever they simply preferred to live otherwise. And, being less able to understand the value of marriage itself as a certain sort of union, even apart from its emotional satisfactions, they would miss the reasons they had for marrying or staying with a spouse as feelings waned, or waxed for others.⁶

It might seem far-fetched to predict that two values as cherished as permanence and exclusivity would wane. But we all value them so strongly in part because our culture has long embraced an ethic that supports them. As this ethic and related sentiments fade, so will support for these norms as objective standards rather than optional preferences.

As we document below, even leading revisionists now argue that if sexual complementarity is optional, so are permanence and exclusivity. This is not because the slope from same-sex unions to expressly temporary⁷ and polyamorous ones is slippery, but because most revisionist arguments level the ground between them: If marriage is primarily about emotional union, why privilege two-person unions, or permanently committed ones? What is it about *emotional union*, valuable as it can be, that requires these limits?

As these norms weaken, so will the emotional and material security that marriage gives spouses. Because children fare best on most indicators of health and well-being when reared by their wedded biological parents, the same erosion of marital norms would adversely affect children's health, education, and general formation. The poorest and most vulnerable among us would likely be hit the hardest. And the state would balloon: to adjudicate breakup and custody issues, to meet the needs of spouses and children affected by divorce, and to contain and feebly correct the challenges these children face (see chapter 3).

Of course, marriage policy could go bad—and already has—in many ways, especially by the introduction of no-fault divorce laws, which make marriage contracts casier to break than contracts of any other sort. Many prominent opponents of the revisionist view—for example, Maggie Gallagher, David Blankenhorn, the U.S. Catholic bishops—also opposed other

legal changes that harmed conjugal marriage.⁸ For that matter, we oppose no-fault divorce laws. We are focusing here on the issue of same-sex civil marriage not because it alone matters, but because it is the focus of a live debate whose results have important consequences. Underlying people's adherence to the marital norms already in decline, after all, are the deep (if implicit) connections in their minds between marriage, bodily union, and children. Redefining marriage as revisionists propose would not just wear down but sever these ties, making it immeasurably harder to reverse other damaging recent trends and restore the social benefits of a healthy marriage culture.

MAKING MOTHER OR FATHER SUPERFLUOUS

Conjugal marriage laws reinforce the idea that the union of husband and wife is, on the whole, the most appropriate environment for rearing children—an ideal supported by the best available social science.* Recognizing same-sex relationships as marriages would legally abolish that ideal. No civil institution would reinforce the notion that men and women typically have different strengths as parents; that boys and girls tend to benefit from fathers and mothers in different ways.

To the extent that some continued to see marriage as apt for family life, they would come to think—indeed, our law, public schools, and media would teach them, and variously penalize them for denying—that it matters not, even as a rule, whether children are reared by both their mother and their father, or by a parent of each sex at all. But as the connection between marriage and parenting is obscured, as we think it would be eventually, *no* arrangement would be proposed as ideal.

And here is the central problem with either result: it would diminish the social pressures and incentives for husbands to

*The need for adoption (and its immense value) where the ideal is practically impossible is no argument for redefining civil marriage, a unified structure of incentives meant precisely to *reinforce* the ideal—to minimize the need for alternative, case-by-case provisions.

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remain with their wives and children, or for men and women having children to marry first. Yet the resulting arrangements—parenting by divorced or single parents, or cohabiting couples—are demonstrably worse for children, as we have seen in chapter 3. So even if it turned out that studies showed no differences between same- and opposite-sex parenting, redefining marriage would undermine marital stability in ways that we know do hurt children.

That said, in addition to the data on child outcomes summarized in chapter 3, there is significant evidence that mothers and fathers have different parenting strengths—that their respective absences impede child development in different ways. Girls, for example, are likelier to suffer sexual abuse and to have children as teenagers and out of wedlock if they do not grow up with their father.⁹ For their part, boys reared without their father tend to have much higher rates of aggression, delinquency, and incarceration.¹⁰ As Rutgers University sociologist David Popenoe concludes, “The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable.”¹¹ He continues: “[W]e should disavow the notion that ‘mommies can make good daddies,’ just as we should disavow the popular notion . . . that ‘daddies can make good mommies.’ . . . The two sexes are different to the core, and each is necessary—culturally and biologically—for the optimal development of a human being.”¹² In a summary of the relevant science, University of Virginia sociologist W. Bradford Wilcox finds much the same:

Let me now conclude our review of the social scientific literature on sex and parenting by spelling out what should be obvious to all. The best psychological, sociological, and biological research to date now suggests that—on average—men and women bring different gifts to the parenting enterprise, that children benefit from having

parents with distinct parenting styles, and that family breakdown poses a serious threat to children and to the societies in which they live.¹³

Of course, the question of which arrangements our policies should privilege is normative; it cannot be settled by the cause-and-effect descriptions of social science alone. But that point scarcely matters here, because it is impossible to generalize from the available studies purporting to find no differences between same-sex and married biological parenting outcomes.

Not one study of same-sex parenting meets the standard of research to which top-quality social science aspires: large, random, and representative samples observed longitudinally. Only one—studying only rates of primary-school progress—is even just large and representative.¹⁴ Several that are most frequently cited in the media actually compare same-sex parenting outcomes with single-, step-, or other parenting arrangements already shown to be suboptimal.¹⁵ Few test for more than one or two indicators of well-being. Most resort to “snowball sampling,” in which subjects recruit their friends and acquaintances for the study.¹⁶ With this technique, “those who have many interrelationships with . . . a large number of other individuals” are strongly over-represented.¹⁷

As a result, psychologist Abbie Goldberg notes, studies of same-sex parent households have focused on “white, middle-class persons who are relatively ‘out’ in the gay community and who are living in urban areas.” They have overlooked “working-class sexual minorities, racial or ethnic sexual minorities, [and] sexual minorities who live in rural or isolated geographical areas.”¹⁸ Yet such favorably biased samples of same-sex parents are often compared to representative (and thus more mixed) opposite-sex parent samples.¹⁹ As Loren Marks observes in a literature review of all fifty-nine studies on which the American Psychological Association relied in declaring no differences between same- and opposite-sex parenting, “The available data, which are drawn primarily from small convenience

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samples, are insufficient to support a strong generalizable claim either way. . . . Such a statement would not be grounded in science. To make a generalizable claim, representative, large-sample studies are needed—many of them.”²⁰

By contrast, consider the findings of a recent study in this area that *was* based on a large, random, and nationally representative sample, regarding outcomes in adulthood of various family structures. Compared to children of parents at least one of whom had had a gay or lesbian relationship, those reared by their married biological parents were found to have fared better on dozens of indicators, and worse on none.²¹ In a critique noting some of the study’s 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.”²²

Furthermore, the scientific literature on child well-being and same-sex parenting includes very little, reliable or otherwise, on children reared by two men. Prominent same-sex parenting scholars Timothy Biblarz and Judith Stacey, in a 2010 literature review, admitted that they “located no studies of planned gay fathers that included child outcome measures and only one that compared gay male with lesbian or heterosexual adoptive parenting.”²³

The upshot is what revisionists William Meezan and Jonathan Rauch concede in a review of the parenting literature: “What the evidence does not provide, because of the methodological difficulties we outlined, is much knowledge about whether those studied are typical or atypical of the general population of children raised by gay and lesbian couples.”²⁴

Ultimately, however, we have two reasons to expect that same-sex parenting is generally less effective. First, every alternative to married biological parenting that *has* been examined in high-quality studies has consistently been shown less effective: this is true of single- and stepparenting as well as parenting by cohabiting couples.²⁵ As Princeton and Wisconsin sociologists Sara McLanahan and Gary Sandefur found, based on four

longitudinal studies of nationally representative samples including 20,000 subjects, "Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents . . . regardless of whether the resident parent remarries."²⁶ This point reinforces the idea that the state's primary interest is in upholding marital norms *to keep biological parents together*, and not simply in promoting two-parent households. Second, again, reliable studies suggest that mothers and fathers foster—and their absences impede—child development in different ways.

In short, then: redefining civil marriage might make it more socially acceptable for fathers to leave their families, for unmarried parents to put off firmer public commitment, or for children to be created for a household without a mother or father. But whatever the cause, there will be a cost to depriving children of the love and knowledge of their married mother and father.

Finally, to state the obvious: None of these points about parenting implies that men and women in same-sex relationships have weaker devotion, or less capacity for affection. After all, it is no insult to heroic single parents to point to data showing that parenting by mother and father together is more effective. What are compared in all cases are the outcomes of various parenting combinations, not individual parents.

THREATENING MORAL AND RELIGIOUS FREEDOM

The harms of redefining civil marriage would extend beyond couples and their children, to anyone who holds the conjugal view.

We Americans are not patient with those we regard as enemies of equality. People whose social attitudes and views remind us of Jim Crow, Chinese exclusion laws, and disenfranchised women experience none of the social tolerance and civility that most of us are happy to extend across vast moral and political gulfs. They are polite society's exiles, barred from the public

square and even respectable jobs. The First Amendment keeps us from jailing them, but not from revoking certain civil privileges or bringing civil claims against them for living by their views.²⁷

The revisionist view depends on the idea that there are no important differences between same- and opposite-sex relationships. By endorsing it, the state would imply that the conjugal view makes *arbitrary* distinctions. Conjugal marriage supporters would become, in the state's eyes, 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.

The First Amendment might well keep clergy from being forced to celebrate same-sex weddings, but their lay coreligionists will not enjoy similar protections, nor will their educational and social-service institutions long escape discrimination in licensing and government contracting. From the wedding on through the honeymoon and into common life, couples transact *as a couple* with countless people. Photographers, caterers, innkeepers, adoption agency officials, parochial school administrators, counselors, foster-care and adoption providers, and others will be forced to comply with the revisionist view or lose their jobs.

We are not scaremongering: we are taking revisionists at their word. If support for conjugal marriage really is like racism, we need only ask how civil society treats racists. We marginalize and stigmatize them. Thus, in a rare departure from professional norms, a prominent law firm in April 2011 reneged on its commitment to defend the Defense of Marriage Act for the House of Representatives. In Canada, Damian Goddard was fired from his job as a sportscaster for expressing on Twitter support for conjugal marriage.²⁸ A Georgia counselor contracted by the Centers for Disease Control was fired after an investigation into her religiously motivated decision to refer someone in a same-sex relationship to another counselor.²⁹ A ministry in New Jersey lost its tax-exempt status for deny-

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ing a lesbian couple use of its facility for a same-sex wedding.³⁰ A photographer was prosecuted by the New Mexico Human Rights Commission for declining to photograph a same-sex commitment ceremony.³¹

The courts are already eroding freedoms in this area, as champions of the rights of conscience have shown.³² In Massachusetts, Catholic Charities was forced to give up its adoption services rather than violate its principles by placing children with same-sex cohabitants.³³ When public schools began teaching students about same-sex civil marriage, precisely on the ground that it was now the law of the commonwealth, a Court of Appeals ruled that parents had no right to exempt their students.³⁴ The Becket Fund for Religious Liberty reports that over “350 separate state anti-discrimination provisions would likely be triggered by recognition of same-sex marriage.”³⁵

Because of the mutual influence of law and culture, moreover, emerging legal trends are mirrored by social ones. The dismissal of the conjugal view as bigotry has become so deeply entrenched among revisionists that a *Washington Post* story drew denunciations and cries of journalistic bias for even implying that one conjugal view advocate was “sane” and “thoughtful.”³⁶ Outraged readers compared the profile to a hypothetical puff piece on a Ku Klux Klan member.³⁷ A *New York Times* columnist has called conjugal marriage proponents (including one of us by name) “bigots.”³⁸ Organizations pushing the legal redefinition of marriage label themselves as champions of “human rights” and opponents of “hate.”³⁹

We agree, of course, that it is within the state’s due powers to restrict invidious discrimination—racist, sexist, or otherwise—and that society may marginalize noxious views by marginalizing their champions. But it had better be right that these views are false and harmful. If they are not noxious but suppressed anyway, then it is society that hurts the common good, by curbing freedoms of speech, religion, and conscience for nothing more than ideological uniformity.

UNDERMINING FRIENDSHIP

We often hear arguments for and against the idea that redefinition would weaken marriage and threaten religious freedom. But it is a point lost on both sides of this debate that the social prevalence of the revisionist view would make things harder on single people: As marriage is defined simply as the most valuable or only kind of deep communion, it becomes harder to find emotional and spiritual intimacy in nonmarital friendships.

Consider in this connection *Atlantic* blogger Ta-Nehisi Coates's admission that he had until recently never considered the possibility of deep nonromantic friendship. Reading about historical examples of it "actually opened up some portion of my own imagination—the possibility of feeling passionate, but not sexual, about someone who I wasn't related to," he confessed. "‘Passion’ isn't a word that often enters into the description [of] friendships these days. And yet [it's] present in the writings of previous generations"—when people recognized marriage as the paradigm of one *type* of intimacy among others, and did not simply *equate* intimacy with marriage.

But the revisionist view tends to do just that. Revisionists cannot define marriage in terms of real bodily union or family life, so they tend to define it instead by its *degree* or *intensity*. Marriage is *simply* your closest relationship, offering *the most* of the one basic currency of intimacy: shared emotion and experience. As a federal judge recently put it in a case striking down California's conjugal marriage law, "‘marriage’ is the name that society gives to the relationship that matters most between two adults."⁴⁰

The more we absorb this assumption, the less we value deep friendship in its own right. Self-disclosure, unembarrassed reliance, self-forgetfulness, extravagant expressions of affection, and other features of companionship come to seem gauche—or even feel like unwelcome impositions—outside romance and marriage.⁴¹ We come to see friendships as mere rest stops on the way back to family life. It becomes harder to share experiences

with our friend that we could just as well have shared with our spouse, without seeming to detract from our marriage.

The conjugal view, by contrast, gives marriage a definite shape, as ordered to true bodily union and thus to family life. If the revisionist view sees single people as just settling for *less*, the conjugal view leaves room for different forms of communion, each with its own distinctive scale and form of companionship and support. It keeps from making marriage totalizing: it clarifies what we owe our spouses in marital love; what we owe it to them not to share with others; and what we could share now with them, now with others, without any compromise of our marriage.

The conjugal view's restoration could thus help us recover the companionate value of friendship: that bond which King David called "more wonderful to me than the love of women," which Augustine described as "two souls in one body";⁴² a bond all the sweeter for being chosen, but no less demanding for those who know its depths.

THE "CONSERVATIVE" OBJECTION

We have seen that redefining civil marriage would affect how we conduct our sexual relationships, how we parent, how we treat conscientious dissent, and how we deal with our friends. Such changes in thought and action would affect people's interests—not just those of children, but of spouses, the unmarried, religious believers of various traditions, and others.

It remains for us to address a common objection to part of this argument. Some say that adopting the revisionist view, far from destabilizing the institution of marriage, would actually strengthen it, by imposing traditional marital norms—conservative values—on more relationships.

This point is usually offered as a stand-alone argument for same-sex civil marriage. But note its limits: It does not show the revisionist view of marriage to be *true* or the conjugal view false (much less inconsistent or bigoted). Untouched are our claims

that fathers matter as well as mothers, and that revisionism threatens this ideal. The point does not allay concerns about moral and religious freedom, or the diminution of friendship. In fact, it does not even rebut our argument that marital norms would come to make less sense in a revisionist world.

In other words, those who make this allegedly conservative claim are suggesting only that it would be good if we used the law to reshape same-sex unions according to the traditional norms of marriage, whatever the point or likelihood of getting them to take and keep the desired shape. But even stripped to its modest core, the objection fails.

It fails because it assumes that the state can effectively encourage adherence to norms in relationships where those norms have no deep rational basis—no reason for partners to stay together and exclusive, even if desire wanders or wanes or attachment erodes. Laws that restrict people's freedom for no deep purpose are not likely to last, much less to influence behavior.⁴³

But redefining civil marriage would not just be idle in this respect; it would be counterproductive. Over time, people tend to abide *less* by any given norms, the less those norms make sense. To say it again, if marriage is understood as an essentially emotional union, then marital norms, especially permanence and exclusivity, will make less sense. But whatever the morality of flouting these norms in other relationships, they *do*, in opposite-sex relationships, serve the interests that hook the state into recognizing and supporting marriages in the first place.

So those who champion the conservative objection are right to think that redefining civil marriage would produce a convergence—but it would be a convergence in exactly the wrong direction. Rather than imposing traditional norms on same-sex relationships, abolishing the conjugal view would tend to erode the basis for those norms in *any* relationship.

This is not an abstract matter. If the conjugal conception of marriage were right, what would you expect the sociology of same-sex romantic unions to be like? In the absence of strong reasons to abide by marital norms, you would expect to see less

regard for those norms in both practice and theory. On both counts, you would be right.

Consider the norm of monogamy. Judith Stacey—a prominent New York University professor who is in no way regarded as a fringe figure, in testifying before Congress against the Defense of Marriage Act—expressed hope that the revisionist view’s triumph would give marriage “varied, creative, and adaptive contours . . . [leading some to] question the dyadic limitations of Western marriage and seek . . . small group marriages.”⁴⁴ In their statement “Beyond Same-Sex Marriage,” more than three hundred “LGBT and allied” scholars and advocates—including prominent Ivy League professors—call for legally recognizing sexual relationships involving more than two partners.⁴⁵ University of Calgary Professor Elizabeth Brake thinks that justice requires us to use legal recognition to “denormalize[] heterosexual monogamy as a way of life” and correct for “past discrimination against homosexuals, bisexuals, polygamists, and care networks.”⁴⁶

What about the connection to family life? Andrew Sullivan, a self-styled proponent of the conservative case for same-sex civil marriage, says that marriage has become “primarily a way in which two adults affirm their emotional commitment to one another.”⁴⁷ E.J. Graff celebrates the fact that recognizing same-sex unions would change the “institution’s message” so that it would “ever after stand for sexual choice, for cutting the link between sex and diapers.”⁴⁸ Enacting same-sex civil marriage “does more than just fit; it announces that marriage has changed shape.”⁴⁹

And exclusivity? Mr. Sullivan, who has extolled the “spirituality” of “anonymous sex,” also thinks that the “openness” of same-sex unions could enhance the bonds of husbands and wives:

Same-sex unions often incorporate the virtues of friendship more effectively than traditional marriages; and at times, among gay male relationships, the openness of the

contract makes it more likely to survive than many heterosexual bonds. . . . [T]here is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman. . . . [S]omething of the gay relationship's necessary honesty, its flexibility, and its equality could undoubtedly help strengthen and inform many heterosexual bonds.⁵⁰

“Openness” and “flexibility” here are Sullivan’s euphemisms for sexual infidelity. Similarly, in a *New York Times Magazine* profile, same-sex civil marriage activist Dan Savage encourages spouses to adopt “a more flexible attitude” about allowing each other to seek sex outside their marriage. A piece in *The Advocate*, a gay-interest newsmagazine, supports our point still more candidly:

Anti-equality right-wingers have long insisted that allowing gays to marry will destroy the sanctity of “traditional marriage,” and, of course, the logical, liberal party-line response has long been “No, it won’t.” But what if—for once—the sanctimonious crazies are right? Could the gay male tradition of open relationships actually alter marriage as we know it? And would that be such a bad thing?⁵¹

As the article’s blurb reads, “We often protest when homophobes insist that same sex marriage will change marriage for straight people too. But in some ways, they’re right.”⁵²

Again, these are not our words, but those of leading supporters of same-sex civil marriage. If you believe in permanence and exclusivity but would redefine civil marriage, take note.

In fact, some revisionists have embraced the goal of weakening the institution of marriage *in these very terms*. “[Former President George W.] Bush is correct,” says revisionist advocate Victoria Brownworth, “. . . when he states that allowing same-sex couples to marry will weaken the institution of marriage.

. . . It most certainly will do so, and that will make marriage a far better concept than it previously has been."⁵³ Professor Ellen Willis, another revisionist, celebrates the fact that "confering the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart."⁵⁴

Michelangelo Signorile, a prominent gay activist, urges people in same-sex relationships to "demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution."⁵⁵ They should "fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, because the most subversive action lesbians and gay men can undertake . . . is to transform the notion of 'family' entirely."⁵⁶

And the Western world's limited experience so far suggests that these ideas play out in policy. Since countries have begun recognizing same-sex unions, officials have proposed bills, made administrative decisions, or allowed lawsuits challenging nearly every other traditional norm: Mexico City has considered expressly temporary marriage licenses.⁵⁷ A federal judge in Utah has allowed a legal challenge to anti-bigamy laws as violations of religious liberty and infringements of equality.⁵⁸ A public notary in Brazil has recognized a triad as a civil union, saying in almost so many words that the redefinition of marriage required it: "[T]he move reflected the fact that the idea of a 'family' had changed. . . . 'For better or worse, it doesn't matter, but what we considered a family before isn't necessarily what we would consider a family today.'"⁵⁹

Some revisionists, like Jonathan Rauch, sincerely hope to preserve traditional marital norms.⁶⁰ But the prediction that they would be weakened is backed up not only by reflection on what these norms are grounded in, along with surveys of revisionist arguments, rhetoric, and the progression of their policy proposals, but also by preliminary social science.

In the 1980s, Professors David McWhirter and Andrew Mattison, themselves in a romantic relationship, set out to dis-

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prove popular beliefs about gay partners' lack of adherence to sexual exclusivity. Of those that they surveyed, whose relationships had lasted from one to thirty-seven years, more than 60 percent had begun the relationship expecting sexual exclusivity, but not one couple stayed sexually exclusive longer than five years.⁶¹ McWhirter and Mattison concluded that, by the end, "[t]he expectation for outside sexual activity was the rule for male couples and the exception for heterosexuals."⁶² Far from disproving popular beliefs, they confirmed them.

The *New York Times* more recently reported on a study finding that exclusivity was not the norm among gay partners: "With straight people, it's called affairs or cheating," said Colleen Hoff, the study's principal investigator, "but with gay people it does not have such negative connotations."⁶³

In fact, the difference touches more than just expectations. Evidence suggests that exclusivity affects men's satisfaction in opposite-sex relationships more than in same-sex ones. According to one study, sexually "open" gay relationships last longer.⁶⁴ According to another, "no differences were found between [gay] couples who were sexually monogamous and nonmonogamous on measures of relationship satisfaction and relationship agreement."⁶⁵ By contrast, 99 percent of opposite-sex couples expect—that is, demand of each other and anticipate—sexual exclusivity in their marriage,⁶⁶ and violations of it are "the leading cause of divorce across 160 cultures and are one of the most frequent reasons that couples seek marital therapy."⁶⁷

Some offer evolutionary explanations for these differences: in opposite-sex couples, where children regularly result, fidelity serves the interests of children by keeping their parents' attention and resources from being diverted. It represents a compromise between women's generally higher interest in sex that expresses affection (and men's interest in not investing in other men's children) on the one hand, and men's generally higher interest in sexual variety on the other.⁶⁸ Whether one embraces these explanations, or the ethical reflection on the goods at stake that we offer above, or both of these accounts as mutually

reinforcing, it is easy to see how the status of exclusivity would differ for same- and opposite-sex relationships.

On the questions of numbers of partners and relationship longevity, we must avoid stereotypes, which exaggerate unfairly, but also consider social data in light of what we argue about the weaker rational *basis* for permanence and monogamy outside opposite-sex relationships. A 1990s U.K. survey of more than five thousand men found that the median numbers of partners over the previous five years for men with exclusively heterosexual inclinations was two, with bisexual inclinations was seven, and with exclusively homosexual inclinations was ten.⁶⁹ A U.S. survey found that the average number of sexual partners since the age of eighteen for men who identified as homosexual or bisexual was over two and a half times as many as the average for heterosexual men.⁷⁰ And a study of same-sex civil marriages in Norway and Sweden found that “divorce risks are higher in same-sex partnerships than opposite-sex marriages and . . . unions of lesbians are considerably less stable, or more dynamic, than unions of gay men.”⁷¹

Finally, as we argued above, preliminary evidence suggests that even same-sex civil marriage cannot impose, by sheer social pressure, norms that make less sense as general requirements for same-sex relationships. The *New York Times* reported on a San Francisco State University study: “[G]ay nuptials are portrayed by opponents as an effort to rewrite the traditional rules of matrimony. Quietly, outside of the news media and courtroom spotlight, many gay couples are doing just that.”⁷²

So there is no reason to believe, and abundant reason to doubt, that redefining civil marriage would make people more likely to abide by its norms. Instead, it would further undermine people’s grasp of the principled basis for those norms. Nothing more than a weak wall of sentiment would remain to hold back the tide of harmful social change.