14-31037

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

JAMES D. CALDWELL, in his official capacity as the Louisiana Attorney General, also known as Buddy Caldwell, *Defendants-Appellees*.

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

v.

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

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

v.

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

On Appeal from the United States District Court for the Eastern District of Louisiana, No. 2:13-cv-5090, 2:14-cv-97, 2:14-cv-327
The Honorable Martin Leach-Cross Feldman, District Judge

BRIEF OF THE NATIONAL COALITION OF BLACK PASTORS AND CHRISTIAN LEADERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

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Pursuant to Fifth Circuit Local Rule 28.2.1(b), undersigned counsel for *Amici Curiae* certify that the following persons and entities have an interest in the

outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Devin George, in his official capacity as Louisiana State Registrar

Kathy Kliebert, in her official capacity as the Louisiana Secretary of Health and Hospitals

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Respectfully submitted,

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/s/Erin Mersino
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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Per Fifth Circuit Rule 29.2, *Amici* state that they are unaware of any additional parties with an interest in the amicus brief.

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/Erin Mersino
Erin Mersino

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INTEREST OF *AMICI CURIAE*[1]

Amici represent the interests of over 25,000 Ministries/Churches that include over 3 million laity in the United States. *Amici* devote their lives to America's time-honored family values, morality, and the Christian faith. *Amici* head their pastoral communities, preach, and spread the good news of God's love. As pastors, *Amici* are considered to be shepherds who guide their church communities and their local bodies of believers in accordance with the Bible, which defines both the role and responsibilities of the pastor and of the members of their church community. *Amici* believe that the Bible defines what constitutes sound doctrine, not the culture, gender, or personality. *Amici* bear the responsibility to oppose unsound doctrines and to oppose practices that are harmful to the following of God's teachings as outlined in the Bible. Therefore, *Amici* have a vested interest in a State being able to define marriage to secure the sanctity of the traditional family, as it is defined by God in the Bible.

Over the past year, the issue of marriage redefinition has aggressively reached the national stage with cases involving the marriage laws of Alabama,

[1] The Parties granted blanket consent for the filing of amicus curiae briefs in this matter. Joint Consent, No. 14-31301 (Oct. 7, 2014). Pursuant to Fed. R. App. P. 29(c)(5), *Amici* state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming, and Puerto Rico. *Amici* have submitted several amicus briefs across the country, including in *DeBoer v. Synder*, No. 14-1341, slip op. (6th Cir. Nov. 6, 2014)—an opinion released yesterday by the Sixth Circuit in favor of traditional marriage.

The undersigned *Amici* hold a strong interest in the protection of marriage nationally and therefore hold a strong interest in seeing traditional marriage upheld in the Fifth Circuit. *Amici* oppose any idea, law, rule or suggestion that is contrary to the teachings of the Bible. Hence, when a federal court properly upholds a duly enacted State law that protects the sanctity of marriage and the family, *Amici* have the responsibility of standing up for such a decision and leading the community to do so as well. *Amici Curiae* the National Coalition of Black Pastors and Christian Leaders respectfully submit this brief requesting that the Court maintain the State of Louisiana's definition of marriage as constitutional.

SUMMARY OF THE ARGUMENT

The State of Louisiana's Constitution and marriage laws affirm the State's definition of marriage that marriage belongs to one man and one woman. La. Civ. Code art. 86 (1988); La. Civ. Code art. 3520 (1999); La. Civ. Code art. 89 (1999); La.

Const. art. XII, § 15 (2004) (collectively, the "Marriage Amendment").[2] The State of Louisiana's Constitution and marriage laws do not serve a discriminatory purpose. The District Court properly recognized "the plain reality that Louisiana's laws

[2] Louisiana's marriage laws were approved by both the Louisiana legislature and by the vast majority of its voters, in a seventy-eight percent to twenty-two percent margin—in favor of traditional marriage.

> During the 2004 Regular Session, the Louisiana Legislature, by joint resolution with a two-thirds majority of both houses, passed 2004 La. Acts 926. Through the passage of Act 926, the Legislature resolved "that there shall be submitted to the electors of the state of Louisiana, for their approval or rejection in the manner provided by law, a proposal to add Article XII, Section 15 of the Constitution of Louisiana." The amendment was to read as follows:
>
> § 15. Defense of Marriage
>
> Section 15. Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.
>
> The amendment was considered by the voters at the September 18, 2004 election, and the measure was approved by 77.78% of the electorate. The Louisiana Supreme Court subsequently held that La. Const. Art. XII, § 15 is constitutional. *Forum for Equality PAC v. McKeithen*, 893 So.2d 715 (La. 2005).

Merritt v. AG, 2013 U.S. Dist. LEXIS 163235, 2-3 (M.D. La. Oct. 2, 2013).

apply evenhandedly to both genders—whether between two men or two women." *Robicheaux v. Caldwell*, 2 F.Supp. 3d 910, 919 (2014).

The State's constitution simply codifies the long-standing definition of marriage as being between a man and a woman. It is the right of each State's voters to do so. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (stating that "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States") (*quoting Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).[3]

As Christian pastors, *Amici* know that all human beings have inherent value because God created every person in His image. Thus, it is *Amici*'s position that the government should never classify or discriminate against another human being, based upon who they are. *Amici* do not condone discriminatory actions toward any person and hold no animus toward anyone.

A person's sexuality and sexual preferences, however, are *not* their state of being, or even an immutable aspect of who they are, as race is. The truth of the

[3] Recently, even the European Court on Human Rights has ruled that no right to so-called homosexual marriage exists under the European Convention on Human Rights. *See Europe stands strong for traditional definition of marriage: U.S. Supreme Court should also allow states to choose*, Washington Times Editorial, Sept. 1, 2014, http://www.washingtontimes.com/news/2014/sep/1/europe-stands-strong-for-traditional-definition-of/. The Court noted that, similar to the United States, no consensus exists that marriage should be redefined across the European States. Further, the Court ruled that the European Convention on Human Rights did not require individual States to recognize so-called homosexual marriage, and each European State had the freedom to define marriage for itself.

matter is that it is merely activity in which they engage. And for *Amici*, truth matters.

A State has no responsibility to promote any person's sexual proclivities, whether heterosexual, homosexual, or otherwise—and certainly is not required to accept that one's sexual conduct preference is the same as an immutable characteristic like race. Government may not regulate people based on who they are, but it may regulate their conduct, including sexual conduct.

This brief addresses two reasons why this Court should uphold the District Court's correct and persuasive ruling. First, the Appellants ask this Court to misapply the reasoning behind the landmark case of *Loving v. Virginia* in order to reject the District Court's holding that the State can define marriage. Here the Appellants re-characterize the reasoning of *Loving v. Virginia* and its progeny to judicially redefine the fundamental right to marry. (Appellants Br. at 29-40). Second, the Appellants ask this Court to err by summarily dismissing any argument that law should be based upon our Nation's history and traditions. *Id*. at 40-44. The Appellant's wrongfully argue that Louisiana's Constitution violates the Due Process and Equal Protection Clauses. *See, e.g., id*. at 60-64. It does not. The District Court's opinion is well-reasoned. The Appellants ask this Court to reject the District Courts' findings informed by morality. In doing so, Appellants ask this Court to substitute the convictions of Louisiana's voters, the convictions of

Louisiana's legislature, and the morality upon which our nation was built with the moral relativism of the Appellants. Appellants also seek for this Court to commit an act of judicial overreach, aggrandize the power of a limited federal jurisdiction, and diminish the constitutionally granted power of the States. This Court should decline Appellants' invitation and uphold the correct and informed decision of the District Court.

ARGUMENT

I. *LOVING v. VIRGINIA* DOES NOT PROHIBIT STATES FROM ENACTING LAWS THAT PREVENT MARRIAGE REDEFINITION

The Equal Protection Clause holds special significance for Black Americans. The text of the Fourteenth Amendment guarantees that "no state shall ... deny to any person within its jurisdiction equal protection of the laws," and this text must be viewed in the context of its history. U.S. Const., amend. XIV, § 1. When the Equal Protection Clause became law in 1868, many Black Americans were recently emancipated slaves. Four years later in 1872, the Supreme Court suggested that white supremacist discrimination was "the evil [the Civil War Amendments] were designed to remedy," *Slaughter-House Cases*, 83 U.S. 36, 72 (1873) ("We do not say that no one else but the negro can share in [their] protection, but ... in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to

remedy."); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) ("the colored race for whose protection the [Fourteenth] Amendment was primarily designed"). It then took nearly a century after the end of the Civil War for the Supreme Court to enforce a modicum of what we now know as substantive equality. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

Comparing the dilemmas of same-sex couples to the centuries of discrimination faced by Black Americans is a distortion of our country's cultural and legal history. The disgraces and unspeakable privations in our nation's history pertaining to the civil rights of Black Americans are unmatched. No other class of individuals, including individuals who are same-sex attracted, have ever been enslaved, or lawfully viewed not as human, but as property. *See*, *e.g.*, Stacy Swimp, *LGBT Comparison of Marriage Redefinition to Historical Black Civil Rights Struggles is Dishonest and Manufactured*, (March 7, 2014), (http://stacyswimp.net/2014/03/07/lgbt-comparison-of-marriage-redefinition-to-historical-Black-civil-rights-struggles-is-dishonest-and-manufactured). Same-sex attracted individuals have never lawfully been forced to attend different schools, walk on separate public sidewalks, sit at the back of the bus, drink out of separate drinking fountains, denied their right to assemble, or denied their voting rights. *Id*. The legal history of these disparate classifications, *i.e.*, immutable racial discrimination and same-sex attraction, is incongruent. Yet, courts continue to

mistakenly draw upon this incongruence as the basis for what they now deem "marriage equality."

The Hawaii Supreme Court first ruled that a State's failure to agree with so-called "same-sex marriage" violated the State's Equal Rights Amendment. *Baehr v. Lewin*, 74 Haw. 530 (Haw. 1993). This marked the first time a court used the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), to blur the line of a suspect class (race) and a non-suspect class (sexual preference) in Equal Protection Clause analysis.

To understand why this analysis is incorrect, it is essential to understand the holding in *Loving v. Virginia*—that a State's statutory scheme to prevent marriage between a man and a woman on the basis of racial classifications violated the Equal Protection Clause. *Id*. at 11. The plaintiffs in *Loving* were two Virginia residents, a black woman and a white man. *Id*. at 3. The plaintiffs legally married in Washington, D.C. and returned to Virginia. *Id*. The State of Virginia, however, considered interracial marriage a criminal offense. *Id*. The plaintiffs were charged and pleaded guilty to violating the State's ban on interracial marriage and were sentenced to a year in jail, a sentence suspended for a period of twenty-five (25) years if the plaintiffs left the State. *Id*. In a landmark decision, the Supreme Court struck down Virginia's ban on interracial marriage on both equal protection and due process grounds. In doing so, the Supreme Court held:

> At the very least, the Equal Protection Clause demands that *racial classifications . . . be subjected to the "most rigid scrutiny,"* . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. . . . There is patently no legitimate overriding purpose independent of invidious discrimination which justifies this classification. . . . We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.

Id. at 10-12 (emphasis added).

Loving was clearly a case about *racial discrimination*. The *Baehr* Court improperly expanded *Loving* by plucking from its dicta that: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]." *Baehr*, 74 Haw. at 562-63 (quoting *Loving*, 388 U.S. at 12). This statement is followed in *Loving*, however, by the critical qualification that this fundamental freedom is not to be denied "on so unsupportable a basis as [] racial classifications," which the *Baehr* court failed to acknowledge. *Loving*, 388 U.S. at 12.

The Supreme Court in *Loving* never contemplated, much less addressed, "same-sex marriage." However, in *Baehr*, the court assumed, without reasoned explanation, that because *racial* discrimination is morally wrong and unconstitutional, that it necessarily follows that a State cannot recognize the historical, moral, and Biblical value that marriage should be between a man and a woman. *Baehr*, 74 Haw. at 572. *Loving* actually affirmed that the foundational

institution of marriage is the union of a man and woman, and it is so regardless of their race. It did not hold, as *Baehr* erroneously surmised, that marriage is the union of two (or more) people regardless of their gender, co-sanguinity, or any other factor. As the *Baehr* dissent correctly pointed out, "*Loving* is simply not authority for the plurality's proposition that the civil right to marriage must be accorded to same sex couples." *Id.* at 588 (Heen, J., dissenting).

There are critical differences between race and sexual preference classifications. Race is a suspect class, and racial discrimination triggers strict scrutiny review. In order for a law to survive strict scrutiny under the Equal Protection Clause, the State interest involved must be more than important—it must be *compelling*. *Loving*, 388 U.S. at 11. And the law itself must be *necessary* in order to achieve the objective. *Id*. If any less discriminatory means of achieving the goal exists, the law will fall. *Id*. As a practical matter, it is rare for a law to survive strict scrutiny review.

Appellants urge this Court that Louisiana's constitutional provision protecting marriage fails strict scrutiny. (Appellants' Br. at 30). One's sexual preference, however, triggers mere rational basis review, not strict scrutiny. *Romer v. Evans*, 517 U.S. 620 (1996); *Equality Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997). A court undertaking rational basis review can ask no more than whether "there is some rational relationship between disparity of treatment and

some legitimate governmental purpose." *Central State Univ. v. American Assoc. of University Professors*, 526 U.S. 124, 128 (1999), *citing Heller v. Doe*, 509 U.S. 312, 319-321 (1993); *see also* Brief of *Amici Curiae* Coalition of Black Pastors from Detroit, Outstate Michigan, and Ohio at 11-26, *DeBoer*, No. 14-1341 (6th Cir. May 14, 2014) (Doc. No. 74).

The Appellants argue that because a fundamental right is supposedly implicated, Louisiana's constitution does not pass any level of scrutiny. (Appellants' Br. at 65). The Appellants drastically misapprehend *Loving's* holding regarding the fundamental right to marriage. (Appellants' Br. at 26, 29-31, 34-39). The Appellants reiterate a correct statement of the law in the sense that *Loving* affirmed the fundamental constitutional right of a *man and woman to marry* because "[m]arriage [between a man and a woman] is . . . fundamental to our very existence and survival." *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942) (pertaining to the importance of procreation); *Maynard v. Hill*, 125 U.S. 190, 212 (1888) (signifying "the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable."). But then the Appellants irrationally and unconstitutionally extend *Loving* and its progeny to create a new federal right of the freedom of choice to marry without any qualification whatsoever, and to thus destroy the very meaning of marriage.

(Appellants' Br. at 26, 29-31, 34-39). Appellants build the entire foundation of their appellate arguments upon this flawed analysis of *Loving*. *Id.*

Loving emphasized the importance of marriage to all Americans, in the true sense of the word. It did not pave the way for the destruction of that vital institution. So-called "marriage equality" rests on the false premise that all individuals should be allowed to "marry" (actually, to redefine "marriage" to fit their desires) because the right to marry is the fundamental right of all. But *Loving* and its progeny do not hold that if prohibited conduct is defined by reference to a proclivity, then that prohibition violates the Equal Protection Clause. *See* S. Girgis, R.P. George, & R.T. Anderson, What is Marriage? 34 Harv. J. L & Pub. Pol'y, 245, 249 (2011) (hereafter, "What is Marriage") ("antimiscegenation was about whom to allow to marry, not what marriage was essentially about; and sex, unlike race, is rationally related to the latter question"). Thus, when viewed in the light of truth, it is clear that the lawsuit in the instant case is not about civil rights. It is, rather, about political activists seeking to use judicial power to bypass the will of the people -- in order to judicially force civil acceptance of homosexual behavior.

The "marriage equality" slogan is self-defeating, because it is a standard-less standard that renders "marriage" equally meaningless for all. *See id.* at 269-75 (discussing that the logic of Plaintiffs' position demands "equal marriage rights" for bigamists, polygamists, same-sex siblings, and virtually any other arrangement

individuals might want to create). Although the lower court cited *Loving* for the proposition that States cannot discriminate in violation of the Equal Protection Clause, all States *routinely* require certain qualifications to obtain a marriage license and disallow certain individuals who do not meet those qualifications. States discriminate against first cousins, for example, by not allowing them to marry. States discriminate against bigamists, polygamists, pedophiles, sibling couples, parent-child couples, and polyamorists in the licensing of marriage, and it is within the States' right to do so. *See, e.g.*, Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, National Public Radio: *All Things Considered*, May 27, 2008 (discussing the illegality of polygamy in all fifty States); *Lesbian 'throuple' proves Scalia right on slippery slopes*, Washington Times Editorial, Apr. 25, 2014, http://www.washingtontimes.com/news/2014/apr/25/editorial-throuple-in-paradise/ (lesbian threesome claim to have married).

Under the Appellants' reasoning, however, such restrictions would no longer be valid. The Appellants urge this Court to discard the limits on marriage that have always existed under Louisiana law and, acting as a super-legislature, replaced the traditional and rational definition of marriage with one that has no discernible limits. Marriage will no longer be elevated to "the only term in our society that, without further explanation, conveys that a relationship is deep and abiding, and

commands instant respect for the relationship." (Appellants' Br. at 14). If "marriage" means fulfilling one's personal choices regarding intimacy, as the Appellants insist, it is difficult to see how States could regulate marriage on any basis. If personal autonomy is the essence of marriage, then not only gender, but also number, familial relationship, and even species are insupportable limits on that principle and they all will fall. This is not just a slippery slope on which the Appellants wish to set us, it is a bottomless pit into which they desire to throw us.

It is clearly within a State's right to define marriage between a man and a woman when that licensing restriction passes rational basis review. The Court should review the issue of so-called homosexual marriage not under an implicit or even explicit heightened review, but as any other law that does not involve a suspect class. *Loving* does not require a higher standard. That case only employed a higher standard because race is a suspect class. *Loving* actually counsels the opposite outcome in the instant case: the protection of Louisiana citizens' fundamental right of marriage as truthfully defined. The fact that American media or other factions erroneously characterize the traditional meaning of "marriage" as being on par with the civil rights deprivations of Black Americans does not make it so. The law treats racial classifications as wholly distinct from sexual preference classifications. And here, such different classifications necessarily yield different outcomes. The Appellants' fundamental-rights analysis misapplies existing law

and heightened sexual preference to the same level of immutable classes, such as race. That conclusion is wrong, and void of factual, historical, and legal support. The District Court properly indentified the fatal flaws in Appellants' arguments. *Robicheaux*, 2 F. Supp. 3d at 919 ("[Appellants'] argument betrays itself."). The District Court correctly found that Louisiana's law passed rational basis review. *Id*. at 919, 923.

II. COURTS SHOULD NOT SUPPLANT THIS NATION'S TRADITIONAL MORALITY WITH THEIR OWN MORAL RELATIVISM

The Appellants wish for this Court to eschew consideration of morality when assessing the constitutionality of Louisiana's definition of marriage. (Appellants' Br. at 84-86). The Appellants wish to replace the morality of the Judeo-Christian tradition on which our country was founded with the trendy, relativist morality of political correctness.[4] Appellants claim that this case is a

[4] Like any lawgiver, the court cannot avoid the application of morality. *See, e.g*., Senator Barack Obama, Keynote Address to Sojourners at the 'Call to Renewal' Conference (June 28, 2006) ("Our law is by definition a codification of morality, much of it grounded in Judeo-Christian tradition."). And the Sixth Circuit stated when analyzing so-called "same-sex marriage" cases, our "[t]radition reinforces the point." *DeBoer*, No. 14-1341, slip op. at 18. The Sixth Circuit reasoned,

> Only months ago, the Supreme Court confirmed the significance of long-accepted usage in constitutional interpretation. In one case, the Court held that the customary practice of opening legislative meetings with prayer alone proves the constitutional permissibility of legislative prayer, quite apart from how that practice might fare under the most up-to-date Establishment Clause test. *Town of Greece v. Galloway*,

matter of "integrity, autonomy, and self-definition." (Appellants' Br. at 45, 46). The Appellants reject our Founders' judgment—which we have inherited and which we share—and just replace it with their own.[5]

> 134 S. Ct. 1811, 1818–20 (2014). In another case, the Court interpreted the Recess Appointments Clause based in part on long-accepted usage. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014). Applied here, this approach permits today's marriage laws to stand until the democratic processes [*Appellants*] say should stand no more. From the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning that the Fourteenth Amendment permits, though it does not require, States to define marriage in that way.

DeBoer, No. 14-1341, slip op. at 18.

[5] *See, e.g.*, What is Marriage, *supra*, at 286 ("there is no truly neutral marriage policy"); Dent, G.W., Jr., Straight is Better: Why Law and Society May Justly Prefer Heterosexuality, 15 Tex. Rev. L. & Pol. 359 (2011) ("Sensible scholars acknowledge that moral neutrality is not only undesirable but impossible."). Robert Reilly more fully explains this disingenuous displacement of morality and tradition:

> The legal protection of heterosexual relations between a husband and wife involves a public judgment on the nature and purpose of sex. That judgment teaches that the proper exercise of sex is within the marital bond because both the procreative and unitive purposes of sex are best fulfilled within it. The family alone is capable of providing the necessary stability for the profound relationship that sexual union both symbolizes and cements and for the welfare of the children who issue from it.
>
> The legitimization of homosexual relations changes that judgment and the teaching that emanates from it. What is disguised under the rubric of legal neutrality toward an individual's choice of sexual behavior—"equality and freedom for everyone"—is, in fact, a demotion of marriage from something seen as good in itself and for society to just

Amici understand better than many that "tradition" alone cannot justify a law, no matter how hoary its pedigree. But *Amici* do not argue Louisiana's Constitution should remain unmolested by the federal judiciary merely because it upholds long-standing tradition. Contrary to the Appellants' facile analysis, mere "tradition" is not the reason Louisiana's marriage definition is constitutional. (Appellants' Br. at 84-86). The *reasons* for the tradition are the reasons that Louisiana's law is constitutional. The reasons for the tradition are entirely rational. *See, e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (promotion of traditional family structure as sound social foundation is rational); What is Marriage, *supra*, at 248-259 (discussing fundamental nature of marriage as a public good and revisionists' failure to justify replacing it with their relativist surrogate); M. Gallagher, Why Marriage Matters: The Case for Normal Marriage, available at http://marriagedebate.com/pdf/SenateSept42003.pdf (discussing research demonstrating benefits of traditional family structure); Straight is Better, *supra* at 359, 371-75 (the biological family is universally recognized as a unique social unit worthy of special encouragement and protection).

> one of the available sexual alternatives. In other words, this neutrality is not at all neutral; it teaches and promotes indifference, where once there was an endorsement.

Reilly, Robert R., Making Gay Okay: How Rationalizing Homosexual Behavior is Changing Everything, 13 (Ignatius Press, 2014).

As our tradition recognizes, some truths are self-evident. Among them are that men and women are different. In fact, it is clear from our very existence that men are made for women, and women for men. None of us would be here but for that truth. Another self-evident truth is that it is best for children to be raised by their parents whenever possible. There have been many theories to the contrary throughout history, but they have all proven vacuous at best. Public policy that recognizes and acts on these truths is not unfairly discriminatory. In fact, the only way to have sound public policy is to build on such truths.

In inviting the Court to radically redefine "marriage," the Appellants reject these truths. Louisiana's legislature and voters, with an overwhelming majority, affirmed a truth upon which our nation was founded and has flourished for over two hundred years: that the natural family is the optimal environment in which children should be raised. Human history, scientific observations of human biology, and our own experience, common sense and reason tell us that children come exclusively from opposite sex unions, and children benefit from being raised by their biological parents whenever possible. *See, e.g.* Straight Is Better, *supra* at 376, 378, 380-81; What is Marriage, *supra* at 258; M. Gallagher, (How) Does Marriage Protect Child Well-Being, in The Meaning of Marriage (R.P. George & J.B. Elshtain, eds.) (Scepter Publishers, Inc., 2010) at 197-212 (*see especially* 208-12 regarding gender roles).

To *Amici* and to most Americans, this federalization and redefinition of marriage directly harms and threatens this sacred and foundational institution. There is no surer way to destroy an institution like marriage than to destroy its meaning.[6] If "marriage" means whatever a political activist, a cherry-picked plaintiff, or an appointed judge wants it to mean, it means nothing. If it has no fixed meaning, it is merely a vessel for a judge's will. It is used as a subterfuge for judicial legislation. And as Montesquieu observed: "There is no greater tyranny than that which is perpetrated under the shield of law and in the name of justice." Charles de Montesquieu, Montesquieu's Considerations on the Causes of the Grandeur and Decadence of the Romans, 279 (Jehu Baker trans., Tiberius 1882).

Here, the Appellants urge this Court to overstep its authority and impose *Appellants'* morality on the people of Louisiana, usurping the State's right to retain the traditional, truthful meaning of marriage. Article V of the Constitution exists for a reason, and that reason is to prevent such radical redefinition of our social contract by non-democratic means. There is a critical difference between

[6] Destroying marriage by destroying its meaning is the admitted goal of many "same-sex marriage" advocates. *See, e.g.,* What is Marriage, *supra*, at 277-78 (citing numerous gay activists and supporters who openly advocate the destruction of traditional concepts of marriage and family); Why Marriage Matters, *supra*; Gay Marriage is a Lie: Destruction of Marriage, Masha Gessen (http://www.youtube.com/watch?v=n9M0xcs2Vw4, last visited Sept. 3, 2014) (In the words of gay activist Masha Gessen …, "Gay marriage is a lie . . . Fighting for gay marriage generally involves lying about what we're going to do with marriage when we get there. It's a no-brainer that the institution of marriage should not exist.").

interpreting and re-writing the Constitution, and the Appellants want that line crossed. As the Eight Circuit correctly held in *Citizens for Equal Protection v. Bruning*:

> In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution.

455 F.3d at 870. Marriage should be reinforced, not redefined. This Court should uphold the District Court's just ruling and reject the Appellants' unconstitutional arguments, which undermine the family as the fundamental building block of our society by destroying the meaning of marriage.

CONCLUSION

For the reasons stated above, *Amici* respectfully request that this Court affirm the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 7,000 words or less, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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