Case No. 14-5291

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GREGORY BOURKE, et al.,
Plaintiffs-Appellees; and

v.

Steve Breshear, in his official capacity as Governor of Kentucky; and
Jack Conway, in his official capacity as Attorney General of Kentucky,
Defendants-Appellants

On appeal from the United States District Court for the
Western District of Kentucky
Case No. 3:13-cv-00750
Honorable John G. Heyburn II, Presiding

Brief of *Amici Curiae* North Carolina Values Coalition and Liberty, Life, and Law Foundation in Support of Defendant-Appellants and Reversal

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6 Cir. R. 26.1, *Amici Curiae* North Carolina Values Coalition and Liberty, Life, and Law Foundation each make the following identical disclosures:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? If the answer is YES, list the identity of such corporation and the nature of the financial interest:

No.

/s/ Deborah J. Dewart
(Signature of counsel)

May 12, 2014
Date

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INTEREST OF *AMICI CURIAE*

Amici Curiae, North Carolina Values Coalition and Liberty, Life, and Law Foundation, respectfully urge this Court to reverse the District Court decision.

The North Carolina Values Coalition ("NCVC") is a North Carolina nonprofit corporation established to preserve faith, family, and freedom in North Carolina by working in the arenas of public policy and politics to protect marriage and religious liberty. NCVC spearheaded the ballot initiative to amend North Carolina's Constitution to protect the time-honored definition of marriage.

Liberty, Life, and Law Foundation ("LLLF") is a North Carolina nonprofit corporation established to promote the legal defense of religious liberty, sanctity of human life, liberty of conscience, family values, and other moral principles. LLLF's founder, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in the U.S. Supreme Court and federal circuits.

Both *amici* are concerned about legal developments across the nation concerning the definition of marriage. This issue will most likely reach the U.S. Supreme Court, and the result will impact every state.

SOURCE OF AUTHORITY TO FILE *AMICI CURIAE* BRIEF

Amici have concurrently filed their "Motion to File Brief as *Amici Curiae* in Support of Appellants and Reversal" with this proposed brief.

AUTHORSHIP AND FUNDING OF *AMICI CURIAE* BRIEF

Counsel for *amicus* authored this brief in whole. No party or party's counsel authored this brief in any respect, and no person or entity, other than amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is not about "same-sex marriage" or the "right to marry" a person of the same sex. It is not about equal protection for an existing fundamental right deeply rooted in America's history and tradition. It is about *marriage redefinition*: mandating a radically new definition for the oldest institution in human history—an institution that predates human law and defines the basic building block for society.

When courts mandate marriage redefinition in conflict with the will of a majority of the people, they disenfranchise millions of voters, shatter the foundations of American government, and threaten liberties of speech, religion, and even thought.

ARGUMENT

I. ADVOCATES OF MARRIAGE REDEFINITION PRESUPPOSE THE DEFINITION THEY SEEK TO ESTABLISH.

Words matter. In discussing whether his war powers included authority to emancipate by executive order, Abraham Lincoln "used to liken the case to that of

the boy who, when asked how many legs his calf would have if he called its tail a leg, replied, 'Five,' to which the prompt response was made that *calling* the tail a leg would not *make* it a leg." *Reminiscences of Abraham Lincoln By Distinguished Men of His Time* (Allen Thorndike Rice ed., New York: Harper & Brothers Publishers, 1909) (Classic Reprint 2012) (1853-1889), 62. Similarly, calling a triangle a "circle" or saying that "two plus two equal five" does not make it so.

Calling a same-sex relationship "marriage" does not make it so. Plaintiffs in this case—and similar cases across the nation—seek to fundamentally redefine the terms "marriage" and "marry," words whose meanings have been established for millennia. In the state case striking down Connecticut's marriage laws, one of the three dissenting judges observed that:

> The latter conclusion [that the state has failed to provide sufficient justification for limiting marriage to one man and one woman] is based primarily on the majority's unsupported *assumptions* that the essence of marriage is a loving, committed relationship between two adults and that the sole reason that marriage has been limited to one man and one woman is society's moral disapproval of or irrational animus toward gay persons.

Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 515-516 (Conn. 2008) (Zarella, J., dissenting). This simple observation has been buried under a heap of eloquent sounding arguments about fundamental rights and equal protection—arguments that rely on the same "unsupported assumption" about what marriage already *is*.

Rather than acknowledge their goal of marriage redefinition, advocates put forth arguments that must presuppose their novel definition. These verbal gymnastics must be exposed.

A. Fundamental Rights Arguments Presuppose That The Word Marriage Already Encompasses Same-Sex Couples.

In recent months, courts have made statements that lack coherence without assuming that "marriage" already encompasses same-sex relationships. The *Bostic* court concluded that "Virginia's Marriage Laws unconstitutionally deny Virginia's gay and lesbian citizens the fundamental freedom to choose to marry," specifically, the "right to choose to celebrate, *in marriage*, a loving, rewarding, monogamous relationship with a partner to whom they are committed for life." *Bostic v. Rainey*, 2014 U.S. Dist. LEXIS 19110, *67-68, 66 (E.D. Va., Feb. 14, 2014). Federal courts in Texas and Utah have admitted that states have the right to define marriage. *DeLeon v. Perry* , 2014 U.S. Dist. LEXIS 26236, *52 (W.D. Texas Feb. 26, 2014) ("Texas has the 'unquestioned authority' to regulate and *define marriage*") (emphasis added); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1196 (D. Utah 2013) ("Utah exercises the 'unquestioned authority' to regulate and *define marriage*...the court's role is not to *define marriage*") (emphasis added). But these courts assume the very role they have declined. In order to determine "what individual rights are protected by the Constitution" (*id.*) and "whether the State's definition and regulation of marriage impermissibly infringes those rights" (*id.*),

the court must use *some* definition. The Utah court crafted one to fit the conclusion it wished to reach—"the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Id*., at *46. The *Kitchen* court, taking its cue from passages in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), asserted that the "[a] person's choices about marriage implicate the heart of the right to liberty that is protected by the Fourteenth Amendment." *Id.* at 1200. Indeed, those choices implicate liberty—but nothing anywhere *Casey* suggests that such liberty is a license to redefine the very essence of marriage. The *DeLeon* court casually dismissed the contention that an injunction for the plaintiffs "would effectively change the legal definition of marriage in Texas, rewriting over 150 years of Texas law." *DeLeon*, at *75. But that is exactly what it would do.

The New Mexico Supreme Court, framing the issue before it, rejected arguments that Plaintiffs sought "the right to marry a person of the same gender." *Griego v. Oliver*, 316 P.3d 865, 885 (N.M. 2013). Instead, that court said the "correct question" was "whether the right to marry is a fundamental right requiring strict scrutiny." *Id*. at 54-55. But as in other cases, the court must presuppose some definition of "marriage" as a starting point. Federal courts are evading the crucial issue of whether marriage *already encompasses* same-sex relationships, and if not, whether plaintiffs have the legal right to demand that it be redefined.

B. Equal Protection Arguments Presuppose That The Word Marriage Already Encompasses Same-Sex Couples.

In *Bostic*, the court criticized Virginia's marriage laws because they "limit the fundamental right to marry to only those Virginia citizens willing to choose a member of the opposite gender for a spouse." *Bostic*, at *36. In *DeBoer*, the court found that Mich. Const. Art. I, § 25, the Michigan Marriage Amendment ("MMA"), "discriminates against same-sex couples." *DeBoer v. Snyder*, 2014 Dist. LEXIS 37274, *30 (E.D. Mich. March 14, 2014). These pronouncements beg the question. To reach such conclusions, courts must assume the term "marry" already encompasses same-sex relationships.

Other courts have made similar errors of logic. *After* announcing that "[d]enying same-gender couples the right to marry...violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution," in the *remedies* section, the state supreme court decreed marriage redefinition: "'[C]ivil marriage' shall be construed to mean the voluntary union of two persons to the exclusion of all others." *Griego*, at *889. The court had to redefine marriage in order to sustain plaintiff's legal arguments. Similarly, in order to find that Oklahoma's constitutional amendment violated the Equal Protection Clause through "an arbitrary exclusion based upon the majority's disapproval of the defined class," a district court had to bypass the state's argument that it was "rational for Oklahoma voters to believe that *fundamentally redefining marriage* could have a severe and

negative impact on the institution as a whole." *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1294 (N.D. Okla. 2014) (emphasis added). The court implicitly redefined marriage as a "loving, committed, enduring relationship" between any two persons. *Id*. at 1295. That newly minted definition has no roots in this nation's history or jurisprudence (Section IIA) and cannot be presupposed in a crucial ruling about marriage redefinition.

II. FUNDAMENTAL RIGHT ARGUMENTS MUST FAIL.

The right to marry is indeed fundamental. *Bourke v. Beshear*, 2014 U.S. Dist. LEXIS 17457, *19 (W.D. Kentucky Feb. 12, 2014). But frequently cited cases clearly assume the time-honored definition of marriage as the union of one man and one woman:

- *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965) (striking down a law forbidding married couples' use of contraceptives)
- *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.")
- *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.")

- *Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]ost inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated.")

Same-sex couples have no use for the contraceptives at issue in *Griswold*. Same-sex unions are in no way fundamental to the survival of the human race (*Zablocki, Loving, Skinner*), and the expectation in *Turner*—that most inmate marriages would eventually be consummated—confirms that the Supreme Court presupposed the marital union of male and female.

Nations around the world join in affirming the definition of marriage:

> We declare that the family, a universal community based on the *marital union of a man and a woman*, is the bedrock of society, the strength of our nations, and the hope of humanity. As the ultimate foundation of every civilization known to history, the family is the proven bulwark of liberty and the key to development, prosperity, and peace.

World Family Declaration, endorsed by 120 countries (emphasis added).[1] Even a commentator who favors extending *legal* benefits to same-sex couples (but not necessarily the term "marriage") acknowledges that:

> *The social institution of marriage predates our legal system by millennia*. Although legal rights conferred and obligations imposed by civil marriage have changed over the centuries, *sexuality remains the vital core*, and many of the central messages and expectations of the institution have remained largely constant.

[1] http://worldfamilydeclaration.org/WFD (last visited 05/08/14).

Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 Alb. Govt. L. Rev. 552, 578 (2012) (emphasis added).

Moreover, *Lawrence v. Texas*, often quoted by homosexual advocates seeking expanded rights, did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). On the contrary, the Court noted that "Texas cannot assert any legitimate state interest here, such as national security or *preserving the traditional institution of marriage.* Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—*other reasons exist to promote the institution of marriage* beyond mere moral disapproval of an excluded group." *Id*. at 585 (emphasis added).

The Supreme Court has repeatedly signaled caution about announcing new fundamental rights, thus placing matters beyond the reach of public debate and legislative action. Courts must "exercise the utmost care...lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of [the] Court." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), citing *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977). It is imperative that courts heed this warning in the context of pleas to redefine marriage—society's basic building block.

A. Plaintiffs' Proposed Redefinition Of Marriage Is Not Deeply Rooted In American History Or Tradition.

Fundamental rights are those "objectively, deeply rooted in this Nation's history and tradition...implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. at 720-21 (internal citations and quotations omitted). But the Court must ignore decades of precedent in order to conclude that the right plaintiffs seek falls under that umbrella. Plaintiffs allegedly seek to exercise the "fundamental right to marry"—but must *first* redefine the institution to make their arguments.

Plaintiff's novel redefinition of marriage cannot qualify as a fundamental right. Case after case confirms that marriage—*as redefined by plaintiffs*—is not "deeply rooted" in American history or tradition. Even one of the early marriage redefinition cases conceded that:

> The everyday meaning of "marriage" is "the legal union of a man and woman as husband and wife," Black's Law Dictionary 986 (7th ed. 1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law. See, e.g., *Milford v. Worcester*, 7 Mass. 48, 52 (1810) (marriage "is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife"). This definition of marriage, as both the department and the Superior Court judge point out, derives from the common law. See *Commonwealth v. Knowlton*, 2 Mass. 530, 535 (1807) (Massachusetts common law derives from English common law except as otherwise altered by Massachusetts statutes and Constitution).

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 952 (Mass. 2003). As the district court confirmed, "neither the Supreme Court nor the Sixth Circuit has

stated that the fundamental right to marry includes a fundamental right to marry someone of the same sex." *Bourke*, at *19. Other courts agree:

- *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (Hawaii's marriage statute held to be a presumptively unconstitutional sex-based classification under Hawaii's Equal Protection Clause) ("[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.")
- *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) ("[A]ppellants [two women] are prevented from marrying, not by the statutes of Kentucky . . . but rather by their own incapability of entering into a marriage as that term is defined.")
- *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003) ("The history of the law's treatment of marriage as an institution involving one man and one woman . . . lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.")

- *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005) (Indiana Constitution does not require recognition of same-sex "marriage" although *legislature* may extend rights to same-sex couples)
- *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005) (suit by lesbian couple "married" in Massachusetts) ("Although the Supreme Court has held that marriage is a fundamental right . . . . no federal court has recognized that this right includes the right to marry a person of the same sex.")
- *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006) ("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.")
- *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) (" The right to marry is unquestionably a fundamental right.... The right to marry someone of the same sex, however, is not 'deeply rooted'; it has not even been asserted until relatively recent times. The issue then becomes whether the right to marry must be defined to include a right to same-sex marriage.")
- *Andersen v. King Cnty.*, 138 P.3d 963, 990 (Wash. 2006) (marriage laws do not infringe fundamental right to marry or equal protection)

- *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (same—but *legislature* may choose to extend rights to same-sex couples)
- *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 977 (S.D. Ohio 2013) ("[M]ost courts have not found that a right to same-sex marriage is implicated in the fundamental right to marry. *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1094-98 (D. Haw. 2012) ('Other courts considering claims that same-sex couples have a fundamental right to marry, have concluded that the right at issue is not the existing fundamental right to marry.') (collecting cases).")

Most of these state cases predate *Windsor*, but *Windsor* actually contradicts the assertion that plaintiffs' definition of marriage is deeply rooted in our history and tradition. As one federal court recently admitted, "language in *Windsor* indicates that same-sex marriage may be a 'new' right, rather than one subsumed within the Court's prior 'right to marry' cases." *Bishop*, at 1286 n. 33, quoting *Windsor*:

> For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. . . . The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

Words and definitions matter. As *Bishop* concedes, "whether or not the right in question is deemed fundamental turns in large part upon how the right is

defined." *Bishop*, at *1286 n. 33. *Bishop* declined to reach the question as to whether Okla. Const. art. 2, § 35 burdened the same-sex couple's "fundamental right to marry a person of their choice," recognizing that other requirements (age, number, and other restrictions) might be impacted. *Id*. The right plaintiffs purport to assert is not the right to marriage that is "deeply rooted" in our nation's history.

B. There Is No Fundamental Right To Redefine The Word Marriage.

Judicially imposed marriage redefinition has cataclysmic implications, as even some advocates admit:

> A court's insistence that the legal recognition of same-sex couples be designated "marriage" imposes an intellectual and social view that may not be held by a majority of citizens within its jurisdiction, and does so through the creation of not simply "a brand-new 'constitutional right'" but a disquieting new breed—a "right" to a *word*, an unprecedented notion having inauspicious potential for regulating speech and thought. As Cass R. Sunstein has understatedly noted, "[c]ertainly efforts at norm management are more legitimate if they have a democratic pedigree."

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 599-600, quoting Cass R. Sunstein, *The Right to Marry*, 26 Cardozo L. Rev. 2081, 2113-14 (2005). Dunson, who distinguishes between legal recognition (legal benefits) and official designation (use of the word "marriage"), explains that "[t]his "right" to a *word* (in this case, one which has traditionally reflected social approval) is not only new; its character and scope are unprecedented." *Id*. at 604 n. 226. The First Amendment implications are ominous indeed, "impact[ing] countervailing liberty interests,

which have been virtually ignored by proponents of court-ordered gender-blind marriage." *Id*. at 555.

III. EQUAL PROTECTION ARGUMENTS MUST FAIL.

Equal Protection arguments rely on the presumption—contrary to case law and simple logic—that "marriage" already subsumes same-sex relationships. There is no constitutional right to redefine marriage in order to squeeze same-sex relationships within its confines. Nor is there a constitutional right to compel social approval under the rubric of equal protection:

> [E]qual protection of the laws concerns equal rights and protections that allow people to be who they are and live as they choose**,** *not* equal social stature, which requires other members of the community to think of them in certain ways.

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 599.

A. Earlier Equal Protection Cases Involving Marriage Did Not Redefine The Institution.

Certain key Supreme Court cases are frequently cited to support Equal Protection arguments for marriage redefinition. These cases dealt with issues—race, incarceration, failure to pay child support—that are not central to the essence of marriage. None of them challenged the nature of the institution or did violence to its existing definition. Rather, these cases all presupposed that marriage is, *by definition*, the union of one man and one woman.

Loving v. Virginia struck down Virginia's restrictions on interracial marriage. Marriage is not—and never has been—a *racial* institution. But marriage has everything to do with sex.

> With regard to sexual institutions, distinguishing between couples on the basis of hair color would be arbitrary. But, distinguishing on the basis of gender composition is hardly arbitrary, inasmuch as such composition determines the nature of sexual relations constituting the vital core of each institution, and the gender composition-dependent differences in the nature of sexual relations are neither trivial nor superficial.

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 597. *Loving* was entirely consistent with the Fourteenth Amendment: "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U.S. at 10. "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id*. at 12.

Turner recognized that prisoners retain the right to marry—as marriage has historically been defined—while incarcerated. The restriction on inmate marriages did not serve legitimate penological interests in rehabilitation and security. *Turner v. Safley*, 482 U.S. at 97-98.

Zablocki struck down a statute that prevented Wisconsin residents from marrying if they were behind in their child support payments. The Court described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Zablocki v. Redhail*, 434 U.S. at 384,

quoting *Maynard* v. *Hill*, 125 U.S. 190, 211 (1888). *Zablocki* did nothing to disturb the existing definition of marriage. Civilization and progress have occurred for millennia without official recognition of same-sex relationships.

B. The State Does Not Discriminate By Limiting Marriage To One Man And One Woman.

An Oklahoma district court recently observed that the plaintiffs (same-sex couples) co-owned property and wanted to retire together, make medical decisions for one another, and assume other rights and responsibilities normally assigned to married couples. *Bishop*, at 1296.

Plaintiffs' proposed marriage definition would empty the term "marriage" of all meaning. It would disintegrate into the "loving, committed" relationship of any two people—with no principled basis on which to find that *any* two people are not "similarly situated" with respect to marriage. This nebulous definition leaves no foundation for restrictions based on age, number, or other factors.

Our society recognizes and values many personal, loving relationships between two persons of the same sex: mother-daughter, father-son, sister-sister, brother-brother, aunt-niece, uncle-nephew, grandmother-granddaughter, grandfather-grandson, friend-friend, and others. There are comparable non-marital relationships between opposite-sex persons: father-daughter, mother-son, brother-sister, and others. These persons engage in many of the same activities as married couples. They may live together, co-own property, bequeath property to each other

in wills or trusts, name one another as agents another under powers of attorney for financial matters or health care. Two men, two women, or other combinations of unmarried persons may share a residence to minimize expenses in troubled economic times, and might appoint one another to act in emergencies if there is no local family member to assume that responsibility. They might even share some responsibility for children—for example, a grandmother may offer financial assistance or babysitting to help her daughter who is a single mom.

None of this renders these relationships the equivalent of marriage—but under Plaintiff's construction of the term "marriage," every one of these "couples" would be eligible to marry, and there is no principled reason to deny them that "right."

Contrary to the recent conclusions that traditional marriage laws "fail to display a rational relationship to a legitimate purpose" (*Bostic*, at *64; *see also DeBoer*, at *30), it is hardly irrational for a state to reserve a unique word and legal status for the complementary union of male and female that is necessary for the survival of the human race—even if some married couples are childless. One court asserts that "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Bostic*, at *58 n. 14, quoting *Lawrence v. Texas*, 539 U.S. at 567. Marriage is not *simply* about the right to have intercourse, but the *ability* of a male and female to have intercourse is a rational

distinction. Humanity is a gendered species. The union of male and female differs from other loving, committed two-person relationships. Not every marriage produces children, just as not every for-profit corporation actually earn a profit. That does not mean we need to redefine what constitutes a corporation—or a marriage.

IV. COURT-ORDERED MARRIAGE REDEFINITION THREATENS CORE AMERICAN LIBERTIES.

The District Court correctly admits that:

> This court's role is not to impose its own political or policy judgments on the Commonwealth or its people. Nor is it to question the importance and dignity of the institution of marriage as many see it.

Bourke, at *2. True—but that is exactly what this and other courts are doing. These judicial pronouncements jeopardize the people's right of self-governance, along with core freedoms of thought, speech, and religion. This is a novel and ominous development in American jurisprudence.

A. Court-Ordered Marriage Redefinition Threatens The Right Of "The People" To Govern Themselves And Set Public Policy.

As one district court observes, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities" so that certain rights "may not be submitted to vote." *Bostic*, at *50, quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *see also DeLeon*, at *53; *DeBoer*, at *49.

The right to *redefine* marriage and impose it on the people against their will is not among the subjects the Bill of Rights withdrew from the reach of majorities. Marriage never has and does not already encompass same-sex relationships, as plaintiffs presuppose. That means that federal courts—in this and other similar cases—are disenfranchising millions of voters and destroying the initiative process "the people" have used to amend their state constitutions. This is a serious threat to American self-governance. It is one thing when marriage is defined and regulated in accordance with the will of the community—but quite another when judges craft public policy by judicial fiat. "A court is not competent to speak for the people as to how they value biologically distinct relationships." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 592.

Federalism is a key to resolving the current crisis concerning marriage and to understanding how *Windsor* impacts these cases. The architects of the Constitution created a federal government "powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of Independence." *Shelby v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012). Formerly independent states "bound themselves together under one national government," delegating some of their powers—but not all—to the newly formed federal administration. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964). The States were to "remain independent and autonomous within their proper sphere of authority."

Printz v. United States, 521 U.S. 898, 928 (1997); *see Texas v. White*, 74 U.S. 700, 725 (1869). Federalism permeates the Constitution, with residual state sovereignty implicit in Art. I, § 8 (delegating enumerated powers to the federal government) and explicit in the Tenth Amendment (reserving all other powers to the States and people). Power is divided not only vertically, between the federal and state governments, but also horizontally, among the three co-equal branches at each level. The Supreme Court has long recognized the critical need to preserve this structure: "The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.... Without the States in union, there could be no such political body as the United States." *Id.*, quoting *County of Lane v. Oregon*, 74 U.S. 71, 76 (1869).

Federalism also safeguards individual liberty, allowing states to "respond to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, 131 S. Ct. 2355 (2011). As the Supreme Court recently affirmed, "'federalism secures to citizens the liberties that derive from the diffusion of sovereign power. *New York v. United States*, 505 U.S. 144, 181 (1992)." *Nat'l Fed'n. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

The "double security" of American federalism is deeply rooted in the nation's history. "The 'constitutionally mandated balance of power' between the

States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). The "federalist structure of joint sovereigns...increases opportunity for citizen involvement in democratic processes." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Federally mandated marriage redefinition decreases and may even destroy those opportunities—it intrudes on the prerogatives of state governments and abridges the rights of all citizens to vote and participate in shaping public policy.

After the Civil War, the Reconstruction Amendments carved out an exception to America's balance of federal and state powers because "states too could threaten individual liberty." *Shelby v. Holder*, 679 F.3d at 853. These Amendments were designed to protect individual liberties, including equal protection and the right to vote. ***Ironically, the Fourteenth Amendment is the very provision judges now use to annul millions of votes on a matter of intense public concern and debate***.

Windsor is often trumpeted as a call to redefine marriage. That reliance is misplaced, because *Windsor* is heavily grounded in federalism:

- "Regulation of marriage is 'an area that has long been regarded as a virtually exclusive province of the States.'" *Windsor*, 133 S. Ct. at 2691, quoting *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975).
- "The 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.'" *Windsor,* 133 S.Ct. at 2691, quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942).
- "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Windsor,* 133 S.Ct. at 2691, quoting *Haddock* v. *Haddock*, 201 U.S. 562, 575 (1906); see also *In re Burris*, 136 U.S. 586, 593-594 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States").
- "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'"

Windsor, 133 S.Ct. at 2691, quoting *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383-384 (1930).

- "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage." *Windsor,* 133 S.Ct. at 2692.

Windsor's reliance on federalism is undeniable—space does not permit quotation of every example. In spite of the pro-homosexual rhetoric that peppers the opinion, *Windsor* did not mandate marriage redefinition at the state level, and its respect for state rights warrants extreme caution in the lower courts. As one federal court recently stated, "DOMA's federal intrusion into state domestic policy is more 'unusual' than Oklahoma setting its own domestic policy." *Bishop*, at 1278.

Courts have created a massive judicial crisis by overturning millions of votes. "[The right to vote] is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Judicially mandated marriage redefinition endangers key elements of America government—federalism (the sovereignty of states), separation of powers, public policy, and other individual liberties of *the people*.

B. Court-Ordered Marriage Redefinition Threatens Core First Amendment Rights—Free Speech, Thought, And Religion.

"When judges start telling people what words they must use, *beware*." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 588. Courts cannot force

people to grant same-sex couples the social esteem and approval they desire. They have "neither the constitutional power nor the moral authority" to do so. *Id*. at 594.

> [T]he fundamental problem, which the judges do not acknowledge, is that they cannot speak for the community as to what is "unreservedly approved and favored." If judges impose the designation "marriage" against the will of the community, the designation no longer describes "a union unreservedly approved and favored by the community." The court's order misrepresents community views and regulates speech so as to regulate thought in an effort to change those views.

Id. at 591.

Marriage redefinition by judicial fiat, mandating "official recognition" for same-sex couples, "impacts countervailing liberty interests, which have been virtually ignored by proponents of court-ordered gender-blind marriage." *Id*. at 555.[2] Same-sex couples may "call themselves married," but the question is "whether everyone else must do so as well." *Id*. at 556. The American system avoids government regulation of speech and thought. *Id*. at 586.

> If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment.

Schneiderman v. United States, 320 U.S. 118, 144 (1943).

Marriage is an institution infused with deep religious significance for many. Federal courts give barely a passing nod to religious liberty implications. "[N]o

[2] This commentator supports "legal recognition," i.e., legal rights, benefits, and protections, for same-sex couples, but acknowledges that the "official recognition" question poses real threats to the liberties of others and should not be decreed by a court.

court can require churches or other religious institutions to marry same-sex couples or any other couple, for that matter." *Bourke*, at *37. The *Kitchen* court "note[d] that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage." *Kitchen*, at 1214. These comments dismiss deep concerns and barely touch the tip of the proverbial iceberg. Just as courts rebuff concerns about morality, they spurn the religious values held by a multitude of Americans. *Bishop*, at 1289 ("moral disapproval often stems from deeply held religious convictions" but such convictions are "not a permissible justification for a law"); *Bourke*, at *35 ("[The government] cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it."); *Deboer*, at *44 ("many Michigan residents have religious convictions whose principles...inform their own viewpoints about marriage").

It is woefully inadequate for courts to brush aside the convictions of religious organizations and the challenges some have already faced. But courts redefining marriage do not even mention increasing threats to religious liberty for individuals who cannot in good conscience recognize a same-sex couple as being "married." The judicial intrusion on thought and speech encroaches on freedom of religion—a right that, unlike even traditional marriage, is explicitly guaranteed by the Constitution. Anti-discrimination laws and policies have already spawned a

multitude of legal actions,[3] and that threat will escalate exponentially unless the political process is allowed to operate so that exemptions can be carved out to respect fundamental rights of conscience.

V. ALL LAWS ARE GROUNDED IN MORAL PRINCIPLES.

America's founders spoke passionately about the moral and religious underpinnings of our judicial system. Benjamin Franklin forewarned:

> If a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid? We've been assured in the sacred writing that, "Except the Lord build the house, they labor in vain that build it."

James Madison, *The Papers of James Madison*, (Henry Gilpin ed., Washington: Langtree and O'Sullivan, 1840) (Vol. II, June 28, 1787), 185.

The district court acknowledged a legitimate role for morality in legislation:

> In a democracy, the majority routinely enacts its own moral judgments as laws. Kentucky's citizens have done so here.... It is true that the citizens have wide latitude to codify their traditional and moral values into law. In fact, until after the Civil War, states had almost complete power to do so, unless they encroached on a specific federal power.

Bourke, at *21, 37. The court admits that its "role is not to impose its own political or policy judgments on the Commonwealth or its people." *Id*. at *2. As another court recently proclaimed, "[o]ur courts are duty-bound to define and protect 'the

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[3] See, e.g., *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. petition* denied, 2014 U.S. LEXIS 2453 (04/07/14). A Christian photographer in New Mexico was subjected to draconian financial penalties for refusing to photograph a same-sex commitment ceremony.

liberty of all, not to mandate our own moral code. *Lawrence*, 539 U.S. at 571 (quoting *Casey*, 505 U.S. at 850)." *Bostic*, at *44. But that is exactly what the court did there—and here. Both courts unilaterally nullified the moral judgment of the people and mandated plaintiffs' novel "moral code."

All laws have some moral foundation and many are based on "moral disapproval." The question is *whose* morality will prevail. Ignoring the inescapable fact that moral judgments must be made in the course of legislation, courts have embraced *Lawrence's* "moral code" language to eschew morality as a factor in defining marriage. *Griego*, at *886; *Kitchen*, at 1204. Advocates of marriage redefinition celebrate this as a victory for their cause:

> Preclusion of "moral disapproval" as a permissible basis for laws aimed at homosexual conduct or homosexuals represents a victory for same-sex marriage advocates, and it forces states to demonstrate that their laws rationally further goals other than promotion of one moral view of marriage.

Bishop, at 1290. And yet—these advocates have as their goal the "promotion of one moral view of marriage"—a view that conflicts with a majority of the people in Kentucky and most other states.

Our judicial system seems to have become allergic to religious expression or influence in the public square, banishing moral concerns to the private fringes of life. In *Bostic*, the court gave short shrift to the "faith-enriched heritage" of Virginia's marriage laws—laws admittedly "rooted in principles embodied by men of Christian faith." *Bostic*, at *13-14. The court shoved morality aside, contending

that marriage has "evolved into a civil and secular institution sanctioned by the Commonwealth of Virginia." *Bostic*, at 13-14. But this secularization poses new threats. Over the last few decades, courts have ordered the government to exit the bedroom and respect private choices concerning sexual conduct. Now activists thrust those private choices into the public realm and demand massive government interference with the rights of those who cannot in good conscience affirm their allegedly "private" decisions. The right to privacy in matters of contraception between married people (*Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)) has morphed into a right to compel private employers to provide free access to contraceptive drugs, regardless of religious or moral objections.[4] Plaintiffs' redefinition of marriage improperly mandates social approval, imposing heavy burdens on persons and organizations who cannot in good conscience approve:

> There is no constitutionally protected right to moral or social approbation. Due process and equal protection require according each person a level of passive respect and dignity, but *not* esteem or approbation.

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 592-593.

[4] Ninety-four (94) cases have been filed against this mandate, per "HHS Mandate Information Central." See http://www.becketfund.org/hhsinformationcentral/ (last visited 05/08/14).

CONCLUSION

This Court should reverse the decision of the District Court.

Dated: May 12, 2014

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it brief contains **6,917** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2014, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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