Nos. 14-556, 14-562, 14-571, 14-574 & 14-596

IN THE

Supreme Court of the United States

APRIL DEBOER, *et al.*,
Petitioners

v.

RICHARD SNYDER, *et al.*,
Respondents

Additional Case Captions Listed On Inside Front Cover

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Fifth And Sixth Circuits

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BRIEF OF *AMICI CURIAE* 76 SCHOLARS OF MARRIAGE SUPPORTING REVIEW AND AFFIRMANCE

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v.

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Respondents

BRITTANI HENRY, *et al.,*
Petitioners

v.

RICHARD HODGES,
Respondent

JAMES OBERGEFELL*, et al.,*
Petitioners

v.

RICHARD HODGES
Respondent

TIMOTHY LOVE, *et al.* AND GREGORY BOURKE, *et al.,*
Petitioners

v.

STEVE BESHEAR
Respondent

JONATHAN P. ROBICHEAUX, *et al.*,
Petitioners

v.

DEVIN GEORGE, *et al.*,
Respondents

QUESTION PRESENTED

Whether the Fourteenth Amendment to the United States Constitution requires that a state define or legally recognize marriages as between people of the same gender.

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INTRODUCTION AND INTERESTS OF *AMICI* [1]

During argument in the California Proposition 8 case, Justice Kennedy noted that redefining marriage in genderless terms could be akin to jumping off a cliff: It is impossible to see all the dangers lurking at the bottom. Oral Argument at 47:19-24, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Justice Alito echoed that concern in *United States v. Windsor,* where he also noted that any analysis of the effects of a redefinition calls for "[judicial] caution and humility." 133 S.Ct. 2675, 2715-16 (2013) (Alito, J. dissenting). That is because same-sex marriage in the United States is still too new—and the institution of marriage too complex—for a redefinition's impact to have fully registered. *Id*. And the risks associated with a redefinition are a powerful reason *not* to second-guess the people's considered judgment—expressed at the ballot box or through elected representatives—that the man-woman definition should be retained. *Id*. at 2716.

Despite those concerns, and although the Sixth Circuit went the other way here, four federal appeals courts have held that state marriage laws violate the Fourteenth Amendment when they limit marriage to man-woman unions. In so doing these courts have rejected concerns about the social impact of such a change, essentially adopting the motto of same-sex

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[1] Undersigned counsel for the Sutherland Institute has authored this *amicus* brief in whole, and no other person or entity has funded its preparation or submission. Parties were given 10 days' advance notice of amici's intention to file, and all have consented in correspondence on file with the clerk.

marriage advocates that "my marriage won't affect your marriage."

But the concerns expressed by Justices Kennedy and Alito remain well founded. Unless reversed, the rulings compelling states to recognize same-sex marriage will adversely alter the whole *institution* of marriage in the affected states—not because same-sex marriages will themselves "set a bad example" for man-woman marriages, but by undermining important social norms that are tied to the man-woman understanding of marriage and that typically guide the procreative and parenting behavior of *heterosexual* individuals and couples. Accordingly, those decisions will likely inflict—or pose a substantial risk of inflicting—significant long-term harm on the affected states and their citizens, especially children of man-woman unions.

Taken together, these points constitute what we call the "institutional defense" of man-woman marriage laws. That defense does not depend on any particular views about sexual morality, theology, or natural law. *Amici*, who are scholars of marriage from various disciplines—including sociology, psychology, economics, history, literature, philosophy and family law—have a variety of views on those matters. But we are united in our conviction that redefining marriage—the country's most fundamental and valuable institution—will not well serve a state's children or its future. We therefore urge the Court to grant review, affirm the Sixth Circuit's decision, and thereby overrule the contrary decisions of the Fourth, Seventh, Ninth and Tenth Circuits.

ARGUMENT

I. Social benefits of the man-woman understanding and associated norms

Marriage is a complex social institution that preexists the law, but is supported by it in virtually all human societies. Levi-Strauss(a):40-41[2]; Quale:2; Reid:455; Bracton:27; Blackstone:410; Blankenhorn(a):100. Like other social institutions, marriage is "a complex set of personal values, social norms, … customs, and legal constraints that regulate a particular intimate human relation over a life span." Allen(a):949-50.

Moreover, in virtually all societies, although sex and procreation may occur in other settings, marriage marks the boundaries of socially *commended* procreation. Girgis,*etal*.:38; Corvino&Gallagher:96. Thus the most basic message conveyed by the traditional institution of marriage is that, where procreation occurs, *this* is the arrangement in which society prefers it to occur. And that message helps to achieve a principal purpose of marriage: to ensure, or at least increase the likelihood, that any children born as a result of sex between men and women will have a known mother and father with responsibility for caring for them. Minor:375-76; Blackstone:435; Wilson:41; Witte:17; Webster.

Thus, although marriage benefits its adult participants in countless ways, it is "*designed* around pro-

[2] Because of the number of scholarly studies cited, in-text citations are in shortened form, and authors with more than one article have letters following their last names to distinguish publications. All sources appear in the Table of Authorities.

creation." Allen(a):954. As famed psychologist Bronislaw Malinowski emphasized, "the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents." Malinowski:11. And, as Bertrand Russell—no friend of Judeo-Christian theology or traditional sexual mores—once remarked, "[b]ut for children, there would be no need of any institution concerned with sex." Russell:77,156; *accord* Llewellyn:1284.

The man-woman understanding and definition are thus integral not only to the social institution of marriage that state marriage laws are intended to support, but also to the states' purposes in providing that support—which they do at considerable cost. Story:168; Kent:76; Bouvier:113-14; Bishop:§225. Until recently, all the states had rejected what Justice Alito has aptly called the relatively adult-centric, "consent-based" view of marriage—focused principally on adult relationships—and had embraced instead the "conjugal" view, based principally on the procreative potential of most man-woman unions. *Windsor*, 133 S.Ct. at 2718; IAV(a):7-8; Stewart(a):337; Yenor:253-73. Even today, not counting judicially-imposed definitions, most states have implemented the conjugal view of marriage by explicitly retaining the man-woman definition—despite decisions by some states to redefine marriage as the union of any two otherwise qualified "persons."[3]

By itself, the man-woman definition conveys and

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[3] *E.g., Marriage Equality Act* (NY), AB A08354 (June 24, 2011); *Civil Marriage Protection Act* (MD), House Bill 438 (March 1, 2012).

reinforces that marriage is centered on procreation and children, which man-woman couples are uniquely capable of producing naturally. Davis:7-8; Wilson:23; Blackstone:422; Locke:§§78-79; Anthropological Institute:71; Wilcox,*etal*.:18-19; Girgis,*etal*.:38. That definition also conveys that one purpose of marriage is to provide a structure by which to care for children that may be created unintentionally—an issue also unique to man-woman couples. IAV(b):6. Most obviously, by requiring a man and a woman, that definition conveys that this structure can be expected to have both a "masculine" and a "feminine" aspect, one in which men and women complement each other. Nock:*passim*; Levi-Strauss(b):5.

By implicitly referencing children, unintentional procreation, masculinity and femininity, the man-woman definition not only reinforces the simple idea that society prefers that procreation occur within marriage. It also "teaches" or reinforces certain procreation and child-related "norms." *Windsor*, 133 S.Ct. at 2718. Because only man-woman couples are capable of naturally producing children together, deliberately or accidentally, these norms are directed principally at heterosexual individuals and couples, and include the following:

1. Where possible, every child has a right to be supported financially by the man and woman who brought it into the world (the "maintenance" norm). Brinig:110-11; Minor:375-78; Young:9.

2. Where possible, every child has a right to be reared by and to bond with its own biological father and mother (the "biological bonding"

norm). *Convention on the Rights of the Child*, 1577 U.N.T.S. 3, 47; Somerville(a):179-201; Aristotle:§12; Locke:§78; Velleman:370-71; Young&Nathanson(b):154-55.

3. Where possible, a child should ideally be raised by *a* mother and father who are committed to each other and to the child, even where it cannot be raised by both biological parents (the "gender-diversity" norm). Erickson:2-21; Esolen:29-40; Palkovitz:234-37; Witherspoon:18; Pruett:17-57; Raeburn:121-158; Rhoads:8-45; Byrd:227-29; Byrd&Byrd:382-87; Young:9. As a corollary, men and women who conceive children together should treat marriage, and fatherhood and motherhood within marriage, as an important expression of their masculinity or femininity. Hawkins&Carroll:16-20; Nock:58-59; Erickson:15-18.

4. Men and women should postpone procreation until they are in a stable, committed, long-term relationship (the "postponement" norm). Dwyer:44-76; Grossman&Friedman:10; McClain:2133-84; Friedman:9-10; Schneider:495-532; Young:9.

5. Undertaken in that setting, creation and rearing of children is a socially valuable activity (the "procreation/child-rearing norm"). Wardle(a): 784-86; Girgis,*etal*.:44; Young&Nathanson(b):161-63.

6. Men and women should limit themselves to a

single procreative partner (the "procreative exclusivity norm"). Wilson:32-38; Blankenhorn(a):148-50; Plato:1086.

7. In all their decisions, parents and prospective parents should put the interests of their children—present and future—ahead of their own (the "child-centricity" norm). IAV(b):6.

States and their citizens receive enormous benefits when man-woman couples heed these norms, which are central to the conjugal vision of marriage. Indeed, common sense and a wealth of social-science data teach that children do best emotionally, socially, intellectually and economically when reared in an intact home by both *biological* parents. Wilcox,*etal*.:11; Moore,*etal*.; McLanahan&Sandefur:1; Lansford,*etal*.:842; O'Brien:31. Such arrangements benefit children of man-woman couples by (a) harnessing the biological or "kinship" connections that parents and children naturally feel for each other, and (b) providing what experts have called "gender complementarity" or diversity in parenting. Erickson; Popenoe:146; Witherspoon:18; Glenn:27; Lamb:246; Byrd; Byrd&Byrd:382-87; *U.S. v. Virginia*, 518 U.S. 515, 533 (1996). Compared with children of man-woman couples raised in any other environment, children raised by their two biological parents in a married family are *less* likely to commit crimes, engage in substance abuse, and suffer from mental illness, or do poorly in school, and *more* likely to support themselves and their own children successfully in the future.[4] Accordingly, such children pose a

[4] Jeynes:85-97; Marquardt; Amato&Keith:26-46; Amato(a):543-56; Wallerstein(a):444-58; Wallerstein(b):545-53; Waller-

lower risk of needing state assistance, and a higher likelihood of contributing to the state's economic and tax base. Amato(b).

Similarly, parents who embrace the norms of child-centricity and maintenance are less likely to engage in behaviors—such as child abuse, neglect or divorce—that typically require state assistance or intervention. Popenoe; Blankenhorn(b); Manning&Lamb; Flouri&Buchanan:63. People who embrace the procreative exclusivity norm are likewise less likely to have multiple children with multiple partners—a phenomenon that also leads to social, emotional and financial difficulties for children. Cherlin(a):137; Wilson:32-38; Blankenhorn(a):148-50; Plato:1086. And people who embrace the postponement norm are less likely to have children without a second, committed parent—another well-established predictor of psychological, emotional and financial trouble. Oman,*etal*.:757; Bonell,*etal*.:502; Kantojarvi,*etal*.:205; Bachman,*etal*.:153.

For all these reasons, Judge Perez-Gimenez was correct in concluding recently that "[t]raditional marriage"—that is, man-woman marriage—"is the fundamental unit of the political order. And ultimately the very survival of the political order depends upon the procreative potential embodied in traditional marriage." *Conde-Vidal v. Garcia-Padilla*, No. 14-1254 (PG) (Oct. 21, 2014), slip op. at 20.

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stein(c):65-77; Waller-stein(d):199-211; Wallerstein&Blakeslee; Wallerstein&Corbin:593-604; Marquardt,*etal*.:5.

II. Social costs and risks of removing the man-woman definition

It is thus not surprising that so many informed commentators on both sides have predicted that redefining marriage to accommodate same-sex couples—which necessarily requires removing the man-woman understanding and the associated definition—will change the institution of marriage profoundly.[5] As Oxford's prominent liberal legal philosopher Joseph Raz observed, "the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from … arranged to unarranged marriage." Raz(b):23.

Erosion of Marital Norms. For man-woman couples, the major effect of removing the procreation-focused, man-woman definition will be to erode the simple message that society prefers that procreation occur within marriage, as well each of the specific norms that depend upon or are reinforced by that definition. IAV(b):18; Allen(b):1043. For example, as Professors Hawkins and Carroll have explained, the redefinition of marriage directly undermines the gender-diversity norm by putting in place a legal structure in which two women (or two men) can easily raise children together as a married couple, and placing the law's authoritative stamp of approval on such arrangements. Hawkins&Carroll:13-16; Car-

[5] Bix:112-13; Dalrymple:1,24; Blankenhorn(a):157; Stoddard:19; Cere:11-13; Farrow(a):1-5; McWhorter:125; Stacey:126-28; Young&Nathanson(a):48-56; Bolt:114; Carbado:95-96; Gallagher(b):53; Graff:12; Hunter:12-19; Sullivan:1-16; Widiss:778,781; Raz(a):161; Stewart(b):10-11; Searle:89-122; Reece:185; Stewart(c); Clayton:22; Stewart(d):503; Stewart(e):239-40; Bradley:193-96; Young&Nathanson(b):156-65.

roll&Dollahite:59-63. Such approval also obviously erodes the bonding or biological connection norm inherent in the man-woman definition of marriage.

Such legal changes are especially likely to undermine those norms among heterosexual men, who generally need more encouragement to marry than women. That is because such changes suggest that society no longer needs men to bond to women to form well-functioning families or to raise happy, well-adjusted children. Hawkins&Carroll:14-16; Nock:58-59; Young&Nathanson(a):50-51;(b):158-59.

For similar reasons, the redefinition weakens the expectation that biological parents will take financial responsibility for any children they participate in creating. It also weakens the expectation that parents will put their children's interests ahead of their own—a problem exacerbated by the reality that the redefinition movement is driven largely by a desire to accommodate adult interests. Hawkins&Carroll:20.

Equally important, and for similar reasons, removing the gendered definition teaches that society now considers the natural family (a woman, a man, and their biological children), and the capacity of a woman and a man to create human life, to be of no special value. Knapp&Williams:626-28. That in turn will inevitably undermine the procreativity/child-rearing norm, the procreative exclusivity norm, and the postponement norm.

Our prediction that redefining marriage will undermine all of these norms—and the overall preference that procreation occur within marriage—is consistent with the view often expressed by judges

and scholars that the law can play a powerful "teaching" function. Hawkins&Carroll:20; Sunstein(a):2027-28; Posner,E.; Cooter; Lessig:2186-87; Sunstein(b); *University of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). That teaching principle applies fully to laws defining and regulating marriage, which likewise serve to either reinforce or undermine the legitimate norms and societal preferences long associated with that institution.

Resulting Harms to Children and Society. Just as these norms benefit the state and society, their removal or weakening can be expected to harm the interests of the state and its citizens. For example, as fewer man-woman couples choose to limit procreation to marriage relationships, and as fewer embrace the norms of biological connection, gender diversity, maintenance and postponement, more children will be raised without both a mother and a father—usually a father. Hawkins&Carroll:18-20. That in turn will mean more children being raised in poverty; more children who experience psychological or emotional problems; more children who do poorly in school; and more children and young adults committing crimes—all at significant cost to the state.[6] Similarly, as fewer parents embrace the norm of child-centricity, more will make choices driven by personal interests rather than the interests of their children. Many such choices will likewise impose substantial

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[6] Popenoe:passim; Blankenhorn(b):passim; Manning&Lamb: passim; Flouri&Buchanan:63; Ellis,*etal*.:passim; Bowling& Werner-Wilson:13; Marquardt,*etal*.:5; Wu&Martinson:passim; Wardle(b):passim; Harper&McLanahan:384-86; Young&Nathanson(a):49,52-56.

costs on the state. Wildsmith,*etal.*:5; Scafidi:9; Kohm&Toberty:88. Moreover, by breaking the link between procreation and parenting, a redefinition will require additional changes to the legal and social institution of parenting—thereby creating another major source of societal risk. Morse(a); Morse(b); Farrow(b).

That is not to suggest that a redefinition will affect all social groups similarly. People who are more religious, for example, generally have religious reasons—beyond the "teaching" power of the law—for embracing both the man-woman understanding of marriage and the associated social norms. Similarly, regardless of religion, people who are relatively well-educated and wealthy tend to embrace in their personal lives the expectations and norms associated with traditional marriage to a greater extent than the relatively poor or uneducated. Wilcox:53; Cahn&Carbone:3,188-19,166; Murray:149,151-57,163-67; Cherlin(b). Accordingly, we would expect to see the social costs of redefining marriage concentrated among the relatively non-religious and less well-to-do.

In short, if the institution of marriage were a valuable hanging tapestry, the man-woman definition would be like a critical thread running through it: Remove that thread and, over time, the rest of the tapestry will likely unravel. Schneider:498; Allen(a):963-65; Stewart(a):327-28. That will be a tragedy for society and, especially, its children.

III. Empirical evidence

What does the available empirical evidence tell us about these issues? Several pro-redefinition commentators have cited the experience of Massachusetts—which adopted same-sex marriage a decade ago—in claiming that such a change has no adverse effects. But putting aside more recent evidence showing an overall *increase* in divorce in the wake of Massachusetts' decision, and an overall *decrease* in marriage rates, see Centers for Disease Control and Prevention(a); Centers(b), such small-sample, short-term results cannot reliably predict a redefinition's longer-term consequences. And studies relying upon longer experience and larger sample sizes strongly suggest that a redefinition is likely to have substantial adverse effects—or at least that it presents a serious risk of such effects.

Requirements for Statistical Validity. Obviously, one cannot fairly infer that a state's decision to redefine marriage *caused* (or did not cause) an increase in divorce or a reduction in marriage without controlling for other, potentially confounding factors. And only one study based on U.S. data of which we are aware has even attempted to do that—a very recent study by Marcus Dillender. While that study purports to find "no evidence" that allowing same-sex marriage has any effect on U.S. heterosexual marriage rates, Dillender:582, it has a number of fatal methodological flaws.

The most important is its assumption that the impact of redefining marriage would show up in measurable and statistically meaningful ways a very short time after the redefinition. As Justice Alito's re-

marks in *Windsor* suggest, that assumption is unrealistic in the context of an ancient and complex social institution like marriage. *Windsor*, 133 S.Ct. at 2715-16. Experts on marriage have frequently and correctly noted that such major social changes operate with a "cultural lag" that often requires a generation or two to be fully realized. Cherlin(a):142-43.

Another flaw is the study's failure to examine the impacts on social groups that might be affected *differentially* by the redefinition—for example, those who are relatively less religious, educated or prosperous. The relatively more religious or wealthy segments of the population could well embrace the norms associated with man-woman marriage with even greater fervor during and just after a state's decision to redefine marriage. And that effect could mask a negative impact of that redefinition on less religious or prosperous segments of the heterosexual population. Yet Dillender confesses that he cannot test these possibilities in his data. Dillender:568.

The Netherlands Study. The only credible study of which we are aware that has recognized and adjusted for this problem is a recent study of the Netherlands, which formally adopted same-sex marriage in 2001 but had already adopted all of its main elements by 1998. That study, by Mircea Trandafir, has much more statistical credibility than Dillender's study because it examined the effect of a marriage redefinition over a much longer period—13 years. That study also shows a clear post-redefinition *decline* in marriage rates among man-woman couples in urban areas—which in the Netherlands tend to be less religious than rural areas. Trandafir:28-29. Indeed, the Netherlands study also suggests that the

debate surrounding same-sex marriage caused a (likely) temporary increase in marriage rates among the more religious segments of society—which embraced traditional marriage with greater fervor—and that this increase tended to offset temporarily the decrease in man-woman marriages among the more urban, less religious segments. Trandafir:28-29.

It was only by examining these populations separately that Trandafir was able to discover this differential effect. His study thus shows that, although the more religious segment of Dutch society may not have seen a reduction in man-woman marriages in the near term, other segments—those that lack a strong alternative source for the norms associated with man-woman marriage—have seen and likely will continue to see a reduction in marriage among man-woman couples. And for those populations, that will mean a substantial reduction in the many social benefits—beginning with lower rates of fatherlessness—that man-woman marriage has long been known to produce.

Studies of the Value of Dual-Biological Parenting. The Dillender study also ignores the reality that a redefinition would likely result in fewer children being raised by their biological parents for reasons other than reduced marriage rates. For example, by weakening the biological bonding and gender-diversity norms associated with traditional marriage, over time a redefinition would likely lead more married parents to separate from their spouses and raise their children in new arrangements without going through the formality of a divorce. Similarly, by weakening the procreative exclusivity norm, a redefinition would likely lead more people to engage in

what some have called "serial polygamy"—having children with multiple partners. Both of these effects would lead to more children of man-woman couples being raised outside the immediate presence of one or both biological parents.

The available empirical evidence shows that, in the aggregate, such an outcome would be very bad for the affected children. *All* of the large-sample studies show that children raised by their two biological parents in intact marriages do better, in the aggregate, than children raised in any other parenting arrangement, including single parenting, mother-grandmother parenting, step-parenting, and even adoption—as valuable and important as those arrangements are. Significant differences appear across a wide range of outcomes, including freedom from serious emotional and psychological problems, Sullins:11, McLanahan,*etal*., Culpin,*etal*., Kantojarvi,*etal*.; avoidance of substance abuse, Brown&Rinelli; avoidance of behavioral problems generally, Osborne&McLanahan, Cavanagh&Huson; and success in school, McLanahan,*etal*., Bulanda&Manning; Gillette&Gudmunson; Allen,*etal*.

In short, given that the vast majority of parents are heterosexuals, Miller&Price:16, any policy that leads to a larger percentage of *their* children being raised outside an intact marriage of two biological parents is likely to be catastrophic for children generally, and for society. That is why removing the man-woman definition is so dangerous.

No-Fault Divorce. The reality of these risks is buttressed by the history of no-fault divorce. Allen(a):965-66;Hawkins&Carroll:6-12; Alvare:137-53.

Before the no-fault divorce movement, the institution of marriage strongly conveyed an additional norm beyond the seven discussed above—a norm of permanence: Marriage was considered, not just a temporary union of a man and a woman, but a permanent union. Parkman:91-150.

When no-fault divorce was first proposed, its advocates argued that it could be adopted without undermining that norm: Only those whose marriages were irretrievably broken would use the new, streamlined (and less contentious) divorce procedures. Wallerstein,*etal*. Those in happy marriages—and hence the institution of marriage itself—would not be adversely affected. Hawkins&Carroll:7-11; Allen(a):966-67.

To put it mildly, such predictions proved overly optimistic. By permitting unilateral divorce for any or no reason, no-fault divorce soon undermined the norm of permanence, and thus led directly to an explosion in divorce. Parkman:93-99; Allen(a):967-69. That, in turn, led to a host of problems for the affected children—financial, academic, emotional and psychological. Allen(a):969.

All the states, moreover, eventually adopted no-fault divorce without waiting to observe its actual effects in one or two jurisdictions for a sustained period. Wardle(c). Moreover, although divorce has recently declined somewhat from its peak, at least among 20-35-year olds, it has never returned to the much lower levels that prevailed before the no-fault revolution. Kennedy&Ruggles. And that reality signals an apparently permanent, adverse change in the marriage institution itself. Parkman:91. Especially

in light of that recent experience, many states are understandably reluctant to adopt yet another change—genderless marriage—that seems likely to undermine, not just one marital norm, but several.

In short, the available evidence reinforces Justice Kennedy's fear that the redefinition of marriage may be akin to jumping off a cliff. Indeed, although it is impossible to see with *complete* accuracy all the dangers one might encounter at the bottom, we already know enough to predict with confidence that the landing will not be a soft one.

IV. Flawed judicial responses

Some of these points have been addressed to some extent by the federal appellate judges who have invalidated state marriage laws. But all of them ignore the principal point that, like no-fault divorce, redefining marriage in genderless terms will change the *social institution* of marriage in a way that will adversely affect the behavior of *heterosexual individuals and couples*—whether or not they choose to get (and stay) married under the new regime. Giddens:98. It is only by ignoring the impact of redefining marriage on the marriage institution that courts can claim—as some of them have—that the man-woman definition does not advance any of the state interests described above. *E.g., Bostic v. Schaefer*, 760 F.3d 352, 382-83 (4th Cir. 2014).

Diversions. Rather than address the institutional defense head-on, most judges have offered diversions. For example, Judge Lucero argues that "it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter

the most intimate and personal decisions of opposite-sex couples." *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014). This observation ignores that legally recognizing same-sex marriage requires more than a mere "*recognition* of the love and commitment between same-sex couples." Same-sex marriage requires instead a *redefinition* of the marital relationship that eliminates its man-woman character—replacing "man" and "woman" with "persons," *see supra* note 3—and thus establishes (among other things) that children have *no* right to be reared by both a mother and a father, much less their own biological parents. Somerville(b). For the reasons discussed above, a belief that removing the gendered aspect of marriage will harm the institution is more than merely "logical." Indeed, it would be "wholly *illogical"* to believe that a major social institution can be redefined without any collateral damage to the institution and to those who benefit from it—especially children.

In a similar diversion, Judge Reinhardt claims the institutional defense of man-woman marriage is based on the idea that "allowing same-sex *marriages* will adversely affect opposite-sex marriage …." *Latta v. Otter*, No. 14-35420 (9th Cir. Oct. 7, 2014), Slip Op. at 15-16. But it's not the existence or even "recognition" of same-sex marriages that is of principal concern. Again, it's the *redefinition* that such marriages require—replacing the man-woman definition with an "any qualified persons" definition—and the resulting impact of that redefinition on the *institution* of marriage, as perceived and understood, over a long period, in our social norms and values. As explained, a large body of social-science literature affirms that,

contrary to Judge Lucero's speculation, such a radical institutional change can and in many cases *will* "affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen,* 755 F.3d at 1223.

Similarly, Judge Reinhardt summarily dismisses the idea that "a father will see a child being raised by two women and deduce that because the state has said it is unnecessary for that child … to have a father, it is also unnecessary for *his* child to have a father." *Id.* at 19. But it's not a father's "*see*[ing] a child being raised by two [married] women" that is likely to reduce heterosexual males' enthusiasm for marriage. It's the fact that, even before they become fathers, marriage will have *already* been redefined—legally and institutionally—in a way that signals to them that their involvement is less important and valuable. Hawkins&Carroll:12-20; Young&Nathanson(b):159. And although not all heterosexual fathers or potential fathers will have less interest in marriage because of that change, *some* of them—especially those at the margins of commitment to marriage and fatherhood—will undoubtedly do so. *Id.*

Parenting by Gays and Lesbians. Most of the adverse opinions have also misunderstood the institutional defense as somehow casting aspersions on gays and lesbians—including their fitness or ability as parents. *E.g., Latta*, slip op. at 27. In fact, the institutional defense neither depends upon nor advocates any particular view about the impact of sexual orientation on parenting. To be sure, there is a lively academic debate on the differences in outcomes for

children raised by man-woman versus same-sex couples.[7] But the institutional defense is focused on something different: the impact of removing the man-woman definition on the marriage *institution*—i.e., the public meaning of marriage—and the resulting impact on children of people who consider themselves heterosexuals.

This misunderstanding of the institutional defense is likewise evident in Judge Reinhardt's reaction to the point that "[b]ecause opposite-sex couples can accidentally conceive … marriage is important because it serves to bind such couples together and to their children." *Latta*, slip op. at 21. After acknowledging that this "makes some sense," Reinhardt still rejects the institutional defense because (he says) it "suggests that marriage's stabilizing and unifying force is unnecessary for same-sex couples …" *Latta*, slip op. at 21-22. But again, that's not the point. Even if same-sex couples or the children they are raising would benefit from an "any two persons" redefinition—and the evidence on that is by no means conclusive—no state can responsibly ignore the potential impact on the far larger population composed of children of man-woman couples. Regardless of the definition of marriage, those are the children who will constitute the vast majority of children in the foreseeable future. Allen(c):635-58; Sullins. For that reason, no state can responsibly ignore the impact of removing the man-woman definition on the *institution* of marriage.

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[7] Regnerus(a):752-770; Regnerus(b):1367; Allen(c):30; Schumm(a):79-120; Schumm(b):329-40; Marks:735-51; Allen,*etal*.:955-61; Sarantakos:23-31; Lerner&Nagai.

Empirical Studies. In response to the social risks that would result from removing the man-woman definition (and social understanding) of marriage, Judge Reinhardt cites a single study suggesting that Massachusetts' decision to adopt same-sex marriage in 2004 had no *immediate* impact on marriage or divorce rates in that state. *Latta*, slip op. at 18. But as noted, a decade is not enough time for the effects of a major institutional change like redefining marriage to be fully manifest. Regardless, the study's conclusions have been hotly disputed, and indeed the evidence shows a longer-term increase in divorce and decrease in marriage rates in the wake of Massachusetts' decision. Centers for Disease Control and Prevention(a); Centers(b).

Judge Posner also relies upon the flawed Dillender study, but without acknowledging that study's lack of statistical rigor or its unrealistic assumption about the speed with which the effects of a major institutional change will likely be felt. Moreover, neither he nor Reinhardt addresses the much more relevant and credible Netherlands evidence showing a clear connection between the adoption of same-sex marriage and decreased marriage rates among the less religious.

Most important, with the exception of the Sixth Circuit, all of the appellate opinions thus far disregard Justice Alito's wise call for "[judicial] caution and humility" in assessing the impacts of a redefinition. *Windsor*, 133 S.Ct. at 2715. He is undoubtedly correct that same-sex marriage is still far too new—and the institution of marriage too complex—for a full assessment of those impacts. *Id.* at 2715-16. However, for reasons previously explained, such evi-

dence as now exists indicates that removal of the man-woman definition poses real dangers to children, to governments of all stripes, and to society at large.

V. Why man-woman marriage laws satisfy any level of judicial scrutiny

Based upon the benefits conferred on the state and its citizens by the man-woman definition and understanding of marriage, and the harms—or at least risks—to the state and its citizens of eliminating that definition, a state's decision to retain it passes muster under any legal standard. And that includes strict scrutiny, which requires that a law be "narrowly tailored" to achieve "compelling governmental interests." *Roe v. Wade*, 410 U.S. 113 (1973).

There can be no doubt that the man-woman definition substantially advances compelling interests—including the interest in the welfare of the vast majority of its children who are born to heterosexual individuals and couples. Miller&Price:16. That is not to say that states that opt to retain the man-woman definition are unconcerned with same-sex couples or the children they raise. But no state can responsibly ignore the long-term welfare of the many when asked to make a major change that might benefit at most a few—no matter how valuable and important they are.

Like many advocates of same-sex marriage, the opinions issued by the Fourth, Seventh, Ninth and Tenth Circuits respond to this point, not by disputing the importance of the state's interests, but by claiming that the man-woman definition pursues those interests in a manner that in Judge Reinhardt's words is "grossly over- and under-inclusive …" *Latta*, slip

op. at 23; *Bostic*, 760 F.3d at 381-82; *Baskin v. Bogan*, 766 F.3d 648, 661, 672 (7th Cir. 2014); *Kitchen*, 755 F.3d at 1219-21. But from a social-science perspective, that argument is irrelevant for two reasons.

First, it once again ignores the real issue, which is the impact of redefining marriage on the *institution* itself and, hence on the norms it reinforces. A state can easily allow infertile couples to marry (and avoid invading their privacy) without having to change the man-woman definition and thus lose the benefits provided by the associated social norms. Indeed, allowing such marriages *reinforces* rather than undermines the norms of marriage for other man-woman couples who can reproduce accidentally. Girgis,*etal*:73-77; Somerville(b):63-78. Allowing infertile couples to marry is thus fully consistent with the institutional norms of marriage, even if those couples are an exception to the biological reality that man-woman couples naturally procreate.

Conversely, taking *other* measures in pursuit of the state interests underlying the man-woman definition—such as Judge Reinhardt's suggestion to "rescind the right of no-fault divorce, or to divorce altogether"—would not materially reduce the adverse impact of removing the man-woman definition. *Latta*, slip op. at 24. Nor would it materially reduce the resulting harms and risks—elaborated above—to the state's children and the state itself. Again, because many of the norms and social benefits associated with marriage flow from the man-woman definition, removing it will have adverse consequences no matter what *else* a state might do to strengthen marriage.

Second, this argument ignores that the choice a state faces here is binary: A state can *either* preserve the benefits of the man-woman definition *or* it can remove that definition—replacing it with an "any two qualified persons" definition—and risk losing those benefits. It cannot do both. Thus, a state's choice to preserve the man-woman definition is narrowly tailored—indeed, perfectly tailored—to its interest in preserving those benefits and in avoiding the enormous soci*etal* risks accompanying a genderless-marriage regime.

In short, the risks outlined above—to the institution of marriage and consequently to a state's children and the state itself—amply justify a decision to retain the traditional man-woman definition. And they do so independent of any particular views on theology, natural law or sexual morality.

* * * * *

What does this analysis imply for the states that have adopted genderless marriage through democratic means? As this Court held in *Windsor*, they have a right to do that, free from any interference or second-guessing by the federal government. But states that make that choice are subjecting their children—and hence themselves and their citizens generally—to enormous long-term risks. Those include serious risks of increased fatherlessness, reduced parental financial support, increased crime, and greater psychological problems—with their attendant costs to the state and its citizens. Fortunately, a state that makes that choice on its own can always change its mind. And if it reintroduces the man-woman definition—even if it "grandfathers" existing same-sex

marriages—it can largely recapture the social norms associated with that definition and, hence, the associated social benefits.

By contrast, a state that is ordered by a court to abandon the man-woman definition cannot simply reenact that definition once the perils of the genderless marriage regime become more apparent. Like a public figure falsely accused of wrongdoing, a state might well ask, "Where do I go to get my marriage institution back?" Unfortunately, a court that is willing to second-guess the people's judgment about the risks of abandoning the man-woman definition won't likely have the humility to recognize its error. And so the state—and its people—will be stuck with the consequences. All the more reason to exercise the "judicial humility" urged by Justice Alito, and thus to refrain from second-guessing the people's considered judgment on the existentially crucial issue of how best to define marriage.

CONCLUSION

Review should be granted, the decisions below affirmed, and the contrary decisions of the Fourth, Seventh, Ninth and Tenth Circuits overturned.

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