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

# In The Supreme Court of the United States

JAMES OBERGEFELL, et al.,

*Petitioners,*

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, et al.,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF THE LIGHTED CANDLE SOCIETY AMICUS CURIAE, IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

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VALERIA TANCO, et al.,

*Petitioners,*

v.

WILLIAM EDWARD "BILL" HASLAM,
GOVERNOR OF TENNESSEE, et al.,

*Respondents.*

———♦———

APRIL DEBOER, et al.,

*Petitioners,*

v.

RICK SNYDER,
GOVERNOR OF MICHIGAN, et. al.,

*Respondents.*

———♦———

GREGORY BOURKE, et al.,

*Petitioners,*

v.

STEVE BESHEAR,
GOVERNOR OF KENTUCKY, et al.,

*Respondents.*

## QUESTIONS PRESENTED

1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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## INTERESTS OF AMICUS CURIAE[1]

The Lighted Candle Society is a not-for-profit corporation based in Washington, D.C. and qualified as tax-exempt under the Internal Revenue Code.

It was founded in 1998 by the Honorable John L. Harmer, former Lieutenant Governor and State Senator of California, and the Honorable Edwin Meese III, former Attorney General of the United States. Harmer is chairman and Harmer and Meese serve as trustees.

The purposes of the Lighted Candle Society are to encourage the enforcement of obscenity laws and support traditional values, including male-female marriage and family. The Lighted Candle Society regards these values as foundational to the survival and health of American society.

## SUMMARY OF ARGUMENT

Opposite-sex marriage is an essential foundation of our civilization. The recent movement to redefine

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for a party authored the brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus and its members made such a monetary contribution. In this brief, citations and internal quotation marks are omitted unless otherwise indicated.

marriage to eliminate its opposite-sex nature threatens this foundation.

In this appeal from a Sixth Circuit decision, reported at 772 F.3d 388, Petitioners contend that the opposite-sex definition of marriage contained in the state constitutional provisions adopted by substantial majorities of voters in Kentucky (74%), Michigan (59%), Ohio (62%), and Tennessee (80%), *id.* at 397-98, violate the Fourteenth Amendment to the U.S. Constitution, even though neither that Amendment nor any other part of the Constitution mentions marriage or prescribes any definition of that institution. Petitioners contend that all state constitutional provisions and other laws defining marriage as opposite-sex, and the views of voters, should be simply swept away by judicial edict.

This Court has repeatedly emphasized that no right can be considered fundamental unless it is "deeply rooted in this Nation's history and tradition" and basic to our civil and political institutions. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

Same-sex marriage cannot be considered a fundamental right because, unlike opposite-sex marriage, it is not deeply rooted in this nation's history and is not basic to our civil and political institutions. Thus, a compelling state interest is not required for the state definitions of marriage at issue to be upheld.

The opposite-sex definition of marriage satisfies the rational basis test of equal protection or due process review. The Lighted Candle Society emphasizes

three rational bases. These and those presented in other briefs supporting affirmance are sufficient, however, to satisfy even strict scrutiny.

These rational bases apply not only to state laws such as those at issue here but also to the prerogative of states to decline to recognize same-sex marriages licensed in other states. Neither the Full Faith and Credit Clause nor the Equal Protection Clause requires a state to license or permit activities that violate its own legitimate public policies. 772 F.3d at 418-19.

*First*, the educational effect of law furnishes a strong rational basis for respecting and counting as constitutional state marriage definition laws. Law has an inevitable educational effect and changing the law to erase the opposite-sex nature of marriage will necessarily require that even small children be taught that same-sex marriage is a "good thing," which voters and legislatures in most states have declined to do. Any change in these laws should be made through the political branches.

*Second*, a related rational basis for marriage definition laws flows from the states' substantial interest in protecting the rights of parents to supervise the development of their children. *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968). Parents who do not want their children to be taught that same-sex marriage is a good thing and a status to which they should aspire have a right to ask the states to respect their desires regarding their children's upbringing.

A *third* rational basis is that imposing same-sex or genderless marriage at the constitutional level will unavoidably create strong pressure to redefine marriage further. This will include removal of the traditional understanding of marriage as involving two persons. Redefinition will also bring challenges against laws forbidding incestuous marriage.

Some courts have erroneously concluded, borrowing language from *Romer v. Evans*, 517 U.S. 620 (1996), that laws defining marriage as opposite-sex in nature are invalid because they are based on "animus." But the simple restatement of the traditional opposite-sex nature of marriage can hardly, after 6,000 years of recorded history, be found unconstitutional merely by reciting this pejorative label.

Moreover, judicial redefinition of marriage usurps power from the political branches. This practice threatens democratic principles.



## ARGUMENT

### I. IMPORTANCE OF OPPOSITE-SEX MARRIAGE.

The Court has often recognized the paramount importance of male-female or opposite-sex marriage to the survival of our society. At the time of these cases, same-sex marriage had not even been seriously proposed. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court said: "Marriage is a coming together

for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id*. at 486. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court recognized, in an obvious reference to opposite-sex marriage: "Marriage and procreation are fundamental to the very existence and survival of the [human] race." *Id*. at 541. *See also Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (marriage is the "relationship that is the foundation of the family in our society" and the "decision to marry and raise the child in a traditional family setting" is entitled to constitutional protection); *Maynard v. Hill*, 125 U.S. 190, 211 (1888); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) ("no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman . . . the sure foundation of all that is stable and noble in our civilization").

The current debate over the nature of marriage has been fueled by strategic lawsuits before lower court judges friendly to the redefinition of marriage, President Obama's reversal in May 2012 of his previously-stated opposition to same-sex marriage, and U.S. Attorney General Holder's refusal to defend the federal Defense of Marriage Act (DOMA) and coordinated attacks on state marriage definition laws. Only since 2009 has any state legislature or popular

referendum supported the redefinition of marriage to eliminate its opposite-sex nature.[2]

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[2] Public opinion has apparently grown more accepting of same-sex marriage, as evidenced by popular votes in November 2012 in Maryland, Maine, Minnesota, and Washington. In more than 30 states, previous ballot measures preserved the traditional opposite-sex nature of marriage. Geoffrey A. Fowler, *Gay Marriage Gets First Ballot Wins*, Wall St. J. (Nov. 7, 2012), p. A17 (available at: http://online.wsj.com/article/SB10001424052970204755404578102953841743658.html) (visited March 9, 2015).

Because the pronouncements of judges heavily influence public opinion, it is impossible to know where public opinion would be today if some judges had not improperly injected themselves into the debate – attempting to delegitimize the definition of marriage as opposite-sex. For example, U.S. District Judge John E. Jones in *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014), struck down Pennsylvania marriage definition laws and expressed contempt for laws defining marriage as opposite-sex in nature, saying "it is time to discard them into the ash heap of history." *Id*. at 431.

The results of public opinion polls probing support for redefining marriage are also influenced by the wording of the questions. *See* Michael J. New, "How Surveys Overstate Support for Same Sex Marriage," *Catholic Vote* (available at http://www.catholicvote.org/how-surveys-overstate-support-for-same-sex-marriage/) (visited March 13, 2015). Support for same-sex marriage also drops when respondents are asked how marriage should be "defined." *See* http://www.pollingreport.com/civil.htm (visited March 13, 2015).

The dissenting judge in the present case says that court decisions redefining marriage in a majority of states show that a "tipping point" has been reached in public opinion. 772 F.3d at 435. This is nonsense on stilts. It's as if someone appropriated all the cars in a neighborhood, forcing everyone to ride bikes, and then announced that the increase in bike riding had created a tipping point against cars.

The first modern court decision supporting the redefinition of marriage was *Baehr v. Levin*, 852 P.2d 44 (Haw. 1993). The Hawaii Supreme Court ruled that, in order to limit marriage to opposite-sex couples, the state was required to show "compelling state interests" and that "the statute is narrowly drawn." *Id*. at 67. Since then a number of courts have ruled that, as a constitutional matter (state or federal, depending on the case), states must license same-sex marriages. The first was the Supreme Judicial Court of Massachusetts. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

This Court held in *United States v. Windsor*, 133 S.Ct. 2675 (2013) that Section 3 of federal DOMA, which defined "marriage" as "only a legal union between one man and one woman and husband and wife," 1 U.S.C. §7, "violate[d] basic due process and equal protection principles" when applied to override the New York state redefinition of marriage. *Id*. at 2693. Although the Court included blunt dictum characterizing the federal DOMA as an expression of "animus," the Court emphasized that "[t]his opinion and its holding are confined to those lawful marriages" sanctioned in states where same-sex marriage is legal. *Id*. at 2696.

*Windsor* has unleashed an avalanche of attacks on state marriage definition laws and many lower federal courts have used its dictum as justification to strike down laws defining marriage as opposite-sex. This includes the Fourth, Seventh, Ninth, and Tenth Circuits, together with a number of district courts.

These courts have convinced themselves that, although *Windsor* held that New York was entitled to respect from the federal government for its redefinition of marriage, now post-*Windsor* the states *must* redefine marriage. In other words, many lower courts have reached the absurd conclusion that the holding of *Windsor* was not that New York could redefine marriage but that in fact it would have acted unconstitutionally had it failed to do so.

## II. THE ISSUE BEFORE THIS COURT IS WHETHER THERE IS A RATIONAL BASIS FOR LAWS DEFINING MARRIAGE AS OPPOSITE-SEX IN NATURE.

This Court has repeatedly emphasized that no liberty or right can be considered fundamental unless it is, "objectively" speaking, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (1997). *See also Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969); *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934); *Rochin v. People of California*, 342 U.S. 165, 169 (1952). Identification of fundamental rights requires "careful description of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 720-21.

Same-sex marriage cannot credibly be considered a fundamental right inasmuch as it is not deeply rooted in this nation's history and not basic to our civil and political institutions. Some lower courts have simply glided over the obvious difference in the opposite-sex definition of marriage, which certainly represents a fundamental right, and redefinition of marriage as genderless. In none of the precedents cited by these courts, *Loving v. Virginia*, 388 U.S. 1 (1967) (right to inter-racial marriage); *Zablocki*, 434 U.S. 374 (right of persons with unpaid child-support to marry); and *Turner v. Safley*, 482 U.S. 78 (1987) (right of prisoners to marry), was marriage redefined to be genderless or anything other than opposite-sex in nature. There was no suggestion in any of these cases that marriage should be redefined as proposed in the present cases. These lower courts' fallacy is akin to inferring from the fact that copper conducts electricity (opposite-sex marriage is fundamental) to the conclusion that all matter conducts electricity (every relationship is fundamental).

As a result of erroneously concluding that the Constitution delivers a fundamental right to same-sex marriage, several courts have applied "strict scrutiny" and concluded that state laws defining marriage as opposite-sex are unconstitutional because they are not "narrowly tailored to serve a compelling state interest." *See, e.g.*, *Kitchen v. Herbert*, 755 F.3d 1193, 1218-19 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014).

If a state law does not burden a fundamental right or employ a suspect criterion, it satisfies the Fourteenth Amendment so long as it "bear[s] a rational relationship to a legitimate governmental purpose." *Romer*, 517 U.S. at 635. It is not required that the law actually has been enacted on the basis of the legitimate interest. In fact, it is usually impossible to establish the "motive" for a law when numerous legislators are involved or, millions of people have cast ballots in voter initiatives.

A law satisfies rational basis review if it is supported by a "reasonably conceivable state of facts." *Heller v. Doe*, 509 U.S. 312, 320 (1993). *See also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (a law "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"). Rational basis review is not limited to "explanations of the statute's rationality that may be offered by the litigants or other courts." *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 463 (1988).

## III. THE RATIONAL BASES FOR LAWS DEFINING MARRIAGE AS OPPOSITE-SEX IN NATURE ALSO SUPPORT STATE POLICIES AGAINST RECOGNITION OF OUT-OF-STATE SAME-SEX MARRIAGES.

The rational bases supporting the opposite-sex definition of marriage apply not only to state laws

such as those at issue here but also to the prerogative of states to decline recognition of same-sex marriages licensed in other states or jurisdictions.

As the Sixth Circuit held in the present cases, neither the Full Faith and Credit nor the Equal Protection Clause requires a state to license or permit activities that violate its own legitimate public policies. 772 F.3d at 418-19. With respect to the Full Faith and Credit Clause, the Sixth Circuit quoted *Nevada v. Hall*, 440 U.S. 410 (1979), in which this Court ruled: "The Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Id*. at 422.

Federalism does not require all states to license the same activities. A moment's reflection is sufficient to establish the point. Some states permit assisted suicide, a few allow recreational use of marijuana, and several allow casino gambling. Only Nevada (in some counties) licenses prostitution. It cannot be seriously argued that the inability to operate a brothel in Arizona under a Nevada business license violates either the Full Faith and Credit or the Equal Protection Clause.

The Sixth Circuit cited the Restatements for the proposition: "States often have refused to enforce all sorts of out-of-state rules on the grounds that they contradict important local policies." 772 F.3d at 419 (citing *Restatement (First) of Conflict of Laws* §612; *Restatement (Second) of Conflict of Laws* §90).

As the Sixth Circuit recognized, what is even "more telling" is the Restatements' summary of law regarding recognition of marriages performed in one state that violate the strong public policy of a another state. The court summarized the Restatement rule: "States in many instances have refused to recognize marriages performed in other States on the grounds that these marriages depart from cardinal principles of the State's domestic-relations laws." 772 F.3d at 419 (citing *Restatement (First) of Conflict of Laws* §134; *Restatement (Second) of Conflict of Laws* §283).

Thus, if laws defining marriage as opposite-sex in nature express the legitimate public policy of a state, it is not required by either the Full Faith and Credit or the Equal Protection Clause to recognize a same-sex marriage legally performed or created in another state or jurisdiction.

## IV. THE EDUCATIONAL EFFECT OF MARRIAGE LAWS FURNISHES A STRONG RATIONAL BASIS FOR LAWS DEFINING MARRIAGE AS OPPOSITE-SEX IN NATURE.

### A. The Law Has an Inevitable Educational Effect.

When laws are enacted and promulgated that say "x is permitted" and "y is not permitted," those subject to the laws are thus instructed or taught that x is

proper conduct and y is not. The law teaches that there is no reason to avoid x, but y should be avoided.

The educational effect addressed here is the educational impact that a law (particularly a new one) has as a result of its very enactment. It is not that a new law will be used as an occasion by teachers and other authority figures to teach persons to act in accordance with it. Rather, the effect in question is that the law itself, apart from any instruction based on the law, will have an educational effect.

Because almost every law has an educational effect, countless instances exist. Taking only one, the Sarbanes-Oxley Act was enacted by Congress in 2002, making it illegal for an employer or supervisor to retaliate against an employee for providing information or assisting in an investigation regarding alleged securities fraud. 18 U.S.C. §1514A. One effect of the enactment and promulgation of this law has been to instruct employers and supervisors not to engage in retaliation.

The educational effect is especially strong where the law is seen as carrying a moral imperative. Laws of this type have traditionally been described as regulating "mala in se," whereas other laws have been described as regulating "mala prohibita."[3]

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[3] Joycelyn M. Pollock, *Criminal Law* §1.8 (Anderson Publishing, 2013).

Legal theorists have long recognized that law has an educational effect and even encouraged lawmakers to use this effect to teach proper conduct to their citizens. In the *Nichomachean Ethics*, Aristotle urged that "the legislator makes the citizens good by habituating them" and "habituation is what makes the difference between a good political system and a bad one."[4] In the same work, he added that "legislators should urge people towards virtue and exhort them to aim at what is fine . . . , but should impose corrective treatments and penalties on anyone who disobeys or lacks the right nature."[5]

The educational effect is implicit in promulgation, which is a necessary element of law. In order for a command to be considered law, it must be promulgated or disseminated to those who are governed by it. Promulgation gives citizens the opportunity to learn what the law provides and conform to it. Therefore, practices such as the Roman emperor Caligula's posting of severe tax statutes in minute letters in high places "so that [they] should be read by as few as possible"[6] have been condemned.

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[4] Aristotle, *Nicomachean Ethics*, bk. ii, ch. 2, ¶2.1 (1985 ed.) (trans. T. Irwin).

[5] *Id*. at bk. x, ch. 9, ¶14.22.

[6] *Dio's Roman History* 357 (59.28.11) (E. Cary trans. 1924).

St. Thomas Aquinas, who believed that promulgation is essential to law, wrote:

> [L]aw is laid on subjects to serve as a rule and measure. This means that it has to be brought to bear on them. Hence to have binding force, which is an essential property of a law, it has to be applied to the people it is meant to direct. This application comes about when their attention is drawn to it by the fact of promulgation. Hence this is required in order for a measure to possess the force of law.[7]

Ancient lawgiver Hammurabi says in his famous Code: "[L]et the oppressed, who have a lawsuit, come before my image as king of righteousness. Let him read the inscription on my monument, and understand my precious words." Hammurabi then adds that, when the oppressed is informed of the law he will "discover his rights, and . . . his heart be made glad."[8]

More recent thinkers have argued similarly. Hegel insisted in his *Philosophy of Right* that law must be made universally known: "If laws are to have a binding force, it follows that, in view of the right of self-consciousness . . . they must be made universally

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[7] T. Aquinas, 28 *Summa Theologiae* 15-16 (Q 90, Art. 4) (Blackfriars ed. 1966).

[8] William Walter Davies, ed., *The Codes of Hammurabi and Moses* 108 (Jennings and Graham: 1905).

known."[9] According to Thomas Hobbes, a law must "declar[e] publicly and plainly."[10] Hobbes also said that statute books should be circulated as widely as the Bible so that all who could read could have a copy.[11] And, according to Jeremy Bentham, persons should not be punished for the violation of a law "not sufficiently promulgated."[12]

The educational effect of the law is also implicit in stare decisis. Under this doctrine, courts follow precedent in order that people may order their affairs based on what they understand the law to be. Obviously, stare decisis assumes that citizens will endeavor to obey or follow the law as they understand it. In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), the Court stated the rationale for stare decisis: "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Id*. at 403.

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[9] G. Hegel, *Philosophy of Right* ¶215 (T. Knox trans. 1942 & photo reprint 1949). *See also id*. ¶211.

[10] 6 *The English Works of Thomas Hobbes* 26-28 (W. Molesworth ed. 1966).

[11] *Id*.

[12] J. Bentham, *An Introduction to the Principles of Morals and Legislation* 173 (C.XIII §3, VIII.2) (1948). *See also* L. Fuller, *The Morality of Law* 19-51 (1964); Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 712 Harv. L. Rev. 630, 651-52 (1958).

In other contexts the Court has also recognized the educational influence of the law. In *Glucksberg*, the Court refused to read into the Constitution a "right to die." The Court held: "If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs." 521 U.S. at 732. In other words, the Court acknowledged that creating a right to physician-assisted suicide might have the educational effect of causing an increase in such suicides.

In *Ginsberg*, 390 U.S. 629, the Court upheld laws against the distribution to minors of materials obscene for them. The Court quoted with approval Dr. William Gaylin of the Columbia University Psychoanalytic Clinic: "To openly permit [pornography] implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval – another potent influence on the developing ego." *Id*. at 642-43 n.10 (*quoting* William M. Gaylin, *The Prickly Problems of Pornography*, Book Review, 77 Yale L.J. 579, 592-93 (1968)).

Modern legal scholars have also discussed the educational effect of the law. John Ragsdale recognizes: "Novel or innovative law, in place long enough without displacement or wholesale evasion, may have an educational effect and inculcate new values or

interpretations."[13] Another commentator acknowledges that tort law educates as to proper conduct: "Tort law . . . establishes the appropriate standard for behaviour, serves as a reason for action for the subjects of a legal norm, and has symbolic and educational effects. . . ."[14]

In one incisive article, scholars discuss the "educational effect" of the law, using as examples smoking bans, helmet laws, and regulations against fireworks. They recognize that this educational effect can lead "individuals to change their own primary behavior."[15] Many other scholarly articles also acknowledge the educational effect of the law.[16]

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[13] John W. Ragsdale, Jr., *Possession: An Essay on Values Necessary for the Preservation of Wild Lands and Traditional Tribal Cultures*, 40 Urban Lawyer 903, 908 (2008).

[14] Tsachi Keren-Paz, *Private Law Redistribution, Predictability, and Liberty*, 50 McGill L.J. 327, 348 (2005).

[15] Dhammika Dharmapala and Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 Am. L. & Econ. Rev. 1, 5-6 (2003).

[16] *E.g.*, Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage As A Social Institution: A Reply to Andrew Koppelman*, 2 U. St. Thomas L.J. 33, 51 (2004) ("Laws do more than incentivize or punish. . . . They educate directly and indirectly."); Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 Review of Law and Economics 716, 725, 740 (2008) ("a law-abiding society may indeed need the law to support a social norm through its expressive function"); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 397-98 (1997); John A. Bozza, *Judges, Crime Reduction, and the Role of Sentencing*, 45 No. 1 Judges' J. 22, 28 (2006); Robert Cooter, *Three Effects of Social Norms on Law:*

(Continued on following page)

### B. States Could Rationally Decide that Changing the Definition of Marriage Would Deliver an Unwanted Educational Message to All Citizens, Including Young Children, that Opposite-Sex Marriage is No Longer the Preferred Context for Family Formation.

What will kindergarteners be taught? This is a critical issue in the same-sex marriage debate. But it is seldom mentioned.

In kindergarten, five-year-old children discuss what marriage is and what a family is. The teacher guides their discussion and helps them understand these concepts.

Through the educational effect of their decisions, courts play a substantial role in writing the school curriculum. This educational impact is especially strong when the law is suddenly changed to protect behavior or create a status not previously recognized, as has occurred in some jurisdictions with same-sex marriage.

If marriage is legally redefined to eliminate the opposite-sex element and perhaps eventually to mean

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*Expression, Deterrence, and Internalization*, 79 Or. L. Rev. 1, 4, 11 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2024-25 (1996); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4 (1996); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. Rev. 961, 962 (1992).

any relationship among consenting adults regardless of gender or number, the content of these kindergarten discussions will necessarily change. The law will teach the redefinition of marriage not only in schools, but also on every street corner and level of society.

Professor Lynn D. Wardle makes the point: "As a matter of elementary legal analysis, if the meaning of marriage changes, education laws and policies that require or allow teaching about marriage, family life, and marital sexuality compel that the curriculum change also."[17]

In states where same-sex marriage or its equivalent is legal (or supported by education policymakers), this very message is now being delivered to five-year-olds. Johnny is being taught that before he marries a girl, he may want to consider marrying another boy. Susie is being taught that before she marries a boy, she may want to marry another girl. The lesson is that marrying someone of the same gender is a "good thing." In states where same-sex marriage has been legalized, schools now teach children this lesson in elementary grades using books like "King and King," in which a boy marries another boy, and "Heather has Two Mommies," in which a girl has lesbian parents. Because the redefinition process does not logically stop at same-sex marriage

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[17] Lynn D. Wardle, *The Impacts on Education of Legalizing Same-Sex Marriage and Lessons from Abortion Jurisprudence*, 2 BYU Educ. & L.J. 593, 595 (2011).

between two persons, the message will naturally evolve into questions about polygamy and polyamory.

In jurisdictions where the law has changed, usually by judicial decree, courts have ruled that parents cannot opt their children out of these "same-sex marriage is a good thing" lessons. These decisions against opting out are unsurprising. After all, the educational effect of the law cannot be avoided.

In *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), the First Circuit overruled objections to the use, without prior notice to parents, of "King and King" in public elementary schools in Massachusetts. Reflecting the inevitable educational effect from laws redefining marriage, the court ruled: "Given that Massachusetts has recognized gay marriage under its state constitution, it is entirely rational for its schools to educate their students regarding that recognition." *Id*. at 95.

A Ninth Circuit emphasized that the parental right to control children's upbringing "does not extend beyond the threshold of the school door." Thus, "The constitution does not vest parents with the authority to interfere with a public school's decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise." *Fields v. Palmdale School District*, 427 F.3d 1197, 1206-07 (9th Cir. 2005). *See also Morse v. Frederick*, 551 U.S. 393, 419-20 (2007) (Thomas, J., concurring).

But the American people have the right to decide not to deliver to kindergarteners this message redefining marriage. It is astounding that courts are asked to rule that the citizens of the United States must deliver to their kindergarteners the message that same-sex marriage is a "good thing" and equally desirable with opposite-sex marriage. But that is precisely what a change in the law will mandate. The Ninth Circuit cements this point. Having ruled that same-sex marriage is somehow incorporated into the Constitution, it then logically holds that society cannot express an "official message of support . . . in favor of opposite-sex marriage." *Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014). That is indeed a drastic and totalitarian result but the inevitable effect of decisions creating a constitutional right to same-sex marriage.

Of course, there are some messages that the Constitution does not allow even a majority of citizens to deliver through the educational effect of the law. For instance, the Reconstruction Amendments do not allow the political branches to enact laws teaching that one race is superior to another. This explains why the Court's decision was eminently correct in *Loving*, 388 U.S. 1, holding laws prohibiting interracial marriage unconstitutional. These laws had nothing to do with the definition of marriage. They did not define marriage as only between people of the same race, so that allowing interracial marriage redefined the institution. Rather, anti-miscegenation laws were

instances of blatant racial discrimination and rightly struck down.

It is impossible to know the precise effects of teaching every five-year-old child that same-sex marriage is a good thing and they should aspire to it. But society is warranted in being concerned about the effects on our crumbling society when Johnny has four fathers and no mother at all – after surrogate motherhood, followed by divorce and remarriage of his male same-sex parents. As one scholar has said, the redefinition of marriage "will radically transform . . . the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative."[18]

If the people of this country want to embark into uncharted territory by recognizing same-sex marriage (and even plural marriage), they certainly may do so. But this change should come through the political branches, operating under democratic principles, and not be mandated by courts under the pretense of constitutional construction.

Supporters of the redefinition of marriage assume that the meaning of marriage can simply be shifted to include same-sex relationships. But there is no evidence this can be done without destroying the institution.

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[18] Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 84 (2004).

Many lower courts and commentators have asked how imposing same-sex marriage will harm opposite-sex marriage. This is a fair question.

In *Kitchen*, the Tenth Circuit "emphatically" assured 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." 755 F.3d at 1223. The court added: "We cannot imagine a scenario under which recognizing same-sex marriages would 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." *Id*. at 1224.

It seems unlikely that many adults presently in opposite-sex marriages will suddenly abandon them, in favor of same-sex marriages. The harm the Lighted Candle Society is primarily concerned about is not to individual, presently-constituted opposite-sex marriages but rather to the *institution* of marriage and its future. This is where the educational effect of the law comes into play.

If children are taught starting in kindergarten that marriage is not opposite-sex in nature and that same-sex relationships (and, by extension in the future, polygamous/polyamorous ones) are fully equivalent and desirable to opposite-sex marriage, the states may reasonably be concerned that the institution of marriage will be irreparably damaged and perhaps destroyed. The assurances of courts such as

the Fourth, Ninth, and Tenth Circuits that there will be no harm to opposite-sex marriage are naïve and hollow. *See Bostic*, 760 F.3d at 381; *Latta*, 771 F.3d 475-76; *Kitchen*, 755 F.3d at 1223.

States could rationally decide to withhold the term "marriage" from same-sex relationships because they wish to convey the message to their citizens, particularly children, that opposite-sex marriage remains the preferred context for family formation. Legal scholars have recognized that the law may properly be used to protect institutions considered critical to the survival of society. According to Basil Mitchell, "The function of the law is not only to protect individuals from harm, but to protect the essential institutions of society. These functions overlap, since the sorts of harm an individual may suffer are to some extent determined by the institutions he lives under."[19]

Monte Neil Stewart demonstrates that a social institution comprises a complex network of "shared

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[19] Basil Mitchell, Law, *Morality and Religion* 134 (Oxford, 1967). *See also* Patrick Devlin, *The Enforcement of Morals* 22 (Oxford, 1965) ("But the true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together."); Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, 556 (Harvard, 1983) ("Law is also an expression of moral standards as understood by human reason.").

meanings."[20] And to transform marriage into a genderless creature would effectively deinstitutionalize it. As Stewart says, "A social institution defined at its core as the union of any two persons is unmistakably different from the historic marriage institution between a man and a woman."[21] Indeed, persons of the same gender, due to lack of biological complementarity, cannot form a union akin to that of a man and woman (which may, of course, result in a child).

Deinstitutionalization of traditional marriage is precisely what many proponents of same-sex marriage want. Professor Ellen Willis says,

> Marriage . . . should not have legal status. . . . Feminism and gay liberation have already seriously weakened marriage as a transmission belt of patriarchal, religious values; conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart, further promoting the democratization and secularization of personal and sexual life. . . . Legalizing same-sex marriage would be an improvement over the status quo. But let's see it for what it is – a step toward the

[20] Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke J. of Const. L. & Pub. Pol'y 1, 8 (2006).

[21] *Id*. at 20.

> more radical solution of civil unions, not vice versa.[22]

The apparent goal is to fashion a substitute along the lines of polyamory.[23]

The radical nature of petitioners' demands that genderless marriage be imposed nationwide as constitutional law cannot be overstated. Experience certainly shows, and state law reflects, real differences between men and women and between mothers and fathers. For this Court to decree that there are no differences and that a mother-mother or father-father home is the same as a mother-father home would enshrine Queer Critical Theory (which says there are no real differences) into the Constitution. This would be a species of injustice to which American law has not descended since *Roe v. Wade*, 410 U.S. 113 (1973) and *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

Courts should not sacrifice their credibility in order to serve the agenda of those who seek to deinstitutionalize marriage. If deinstitutionalization of marriage is what society wants, it should accomplish it through the political branches. It should not be imposed by judicial fiat.

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[22] Ellen Willis, contribution to *Can Marriage be Saved? A forum*, Nation 16-17 (July 5, 2004).

[23] *See* Martha L. Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. Colo. L. Rev. 269, 278 (1991) ("I favor functional definitions of families that expand beyond reference to biological or formal marriage or adoptive relationship because the people involved have chosen family-like roles.").

## V. STATES COULD RATIONALLY DECIDE THAT PRESERVING THE DEFINITION OF MARRIAGE AS OPPOSITE-SEX PROTECTS THE RIGHTS OF PARENTS TO SUPERVISE THE DEVELOPMENT OF THEIR CHILDREN.

States have a substantial interest in protecting the rights of parents to supervise development of their children. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court recognized that the right of parents to "direct the rearing of their children is basic in the structure of our society." *Id*. at 639. The Court added: "The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id*. Moreover, in *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983), the Court described the governmental interest in "aiding parents' efforts to discuss birth control with children" as "substantial." *Id*. at 73. *See also Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

As shown, due to the educational effect of the law, changing the legal definition of marriage as proposed by petitioners will inevitably teach all children that same-sex marriage is fully equivalent to, and equally desirable with, opposite-sex marriage. We know from ballot initiatives that most voters in the United States do not want their children to be taught this lesson.

Court decisions like those of the Fourth, Seventh, Ninth, and Tenth Circuits force the message of the equivalence and desirability of same-sex marriage into every home in this country. The result is that parents lose the ability to raise their children as they see fit, not as the government or judges want. Again, this message is not merely what is taught in school. It is essentially the lesson the law delivers – both inside and outside of school. This loss of parental influence over the upbringing of their children is of profound concern to this amicus.

## VI. STATES COULD RATIONALLY DECIDE THAT THE OPPOSITE-SEX DEFINITION OF MARRIAGE SHOULD BE PRESERVED IN ORDER TO PREVENT FURTHER RE-DEFINITION.

The corollaries of redefining marriage to eliminate its opposite-sex nature will certainly include plural and incestuous marriage. Challenges are already being presented by supporters of plural marriage.[24] The drive for plural marriage will necessarily include opposite-sex, same-sex, and bisexual varieties. In other words, polygamy will morph into polyamory.

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[24] Drucilla Cornell, *Fatherhood and Its Discontents: Men, Patriarchy, and Freedom*, *Lost Fathers: The Politics of Fatherlessness in America*, ed. Cynthia Daniels 199 (St. Martin's Press, 1998) (arguing that adults should be allowed to "choose consensual polygamy" including same-sex polygamy).

Challenges to laws forbidding incestuous marriage have also been advanced.[25] If the gender element of marriage is eliminated, logic will dictate a constitutional right for adult relatives also to marry.

Inevitable pressure to expand a right is one good reason not to recognize the right. For example, the Court in 1997 cited as one reason not to recognize a constitutional right to physician-assisted suicide "avoiding a possible slide towards euthanasia." The Court labeled this as one of several "valid and important public interests [that] easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end." *Vacco v. Quill*, 521 U.S. 793, 808-09 (1997). Amicus submits that this is particularly important where the right has little connection to the text of the Constitution and thus no ascertainable boundaries.

States could rationally decide that preserving the opposite-sex definition of marriage is necessary in order to avoid further redefinition of marriage and erosion of the institution.

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[25] Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 Kan. J.L. & Pub. Pol'y 262, 271 (2000) ("Individuals denied marriage under the incest statutes may therefore find themselves disenfranchised in the same manner as homosexual partners who are denied the right to marry and cohabitants who choose not to marry.").

## VII. STATE MARRIAGE DEFINITION LAWS ARE NOT UNCONSTITUTIONAL AS PRODUCTS OF "ANIMUS."

Laws that express and preserve the values and standards of society cannot be dismissed simply by reciting the pejorative term "animus." One can always label others' standards as expressing animus. Laws against prostitution, sale of heroin, and discharge of pollution cannot be found unconstitutional as based on animus towards those who perform these activities simply because one has a libertarian view and dislikes such laws.

Some courts have denigrated state laws defining marriage as opposite-sex in nature as based on animus. *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014); *Perry v. Brown*, 671 F.3d 1052, 1082, 1085 (2012), *rev'd on other grounds*, 133 S.Ct. 2652 (2013). These courts borrow the term from *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court struck Colorado Amendment 2.

Other courts have expressly rejected *Romer*-based challenges to the traditional definition of marriage. *See, e.g.*, *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 680 (Tex. Ct. App. 2010); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003).

In *Romer*, the Court held Colorado Amendment 2 unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Court summarized

Amendment 2 as not only rescinding local ordinances banning certain discrimination based on sexual orientation, but also "prohibit[ing] all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexuals or gays and lesbians." 517 U.S. at 624.

Thus, Amendment 2 inserted into the Colorado Constitution a prohibition on measures that in the future entitled any "homosexual, lesbian, or bisexual" to "any moral status, quota preferences, protected status or claim of discrimination." *Id*. at 624. This Court agreed with the Colorado Supreme Court that Amendment 2 "prohibit[ed] any government entity from adopting . . . protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." *Id*. at 627; *see also id*. at 630. The Court repeatedly described the Colorado Amendment in apocalyptic terms: "unprecedented," "[s]weeping and comprehensive," "far reaching," "severe," and "broad." *Id*. at 627, 629-30, 632-33. Obviously, the preservation by state law of the traditional opposite-sex nature of marriage bears no resemblance to the uncharted impact of Colorado Amendment 2.

The equal protection sin of Amendment 2 identified in *Romer* was that it closed off homosexuals and bisexuals from normal access to the law-making apparatus in Colorado that all other citizens enjoyed. Only homosexuals and bisexuals were required to resort to the super-majoritarian mechanism of constitutional

amendment to pursue their interests. According to the Court, "The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." *Id*. at 633.

In the California Proposition 8 case, the Ninth Circuit erroneously dismissed Proposition 8 as motivated by denigration of "the worth and dignity of gays and lesbians as a class" or "disapproval of a class of people." *Perry*, 671 F.3d at 1094. This mischaracterized state laws defining marriage as opposite-sex in nature. They do not express disapproval of homosexuals as persons but express disapproval only of considering same-sex relationships to be marriage. The First Circuit has recognized that "preserv[ing] the heritage of marriage as traditionally defined over centuries of Western civilization . . . is not the same as 'mere moral disapproval of an excluded group.'" *Massachusetts v. United States Dep't of HHS*, 682 F.3d 1, 16 (1st Cir. 2012) (*quoting Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in judgment)).

Moreover, as the dissent by Judge Smith in the Proposition 8 case recognized, even if some voters or other persons involved in the adoption of a law are motivated by "animus," the law may still be valid if it also is supported by a rational basis. The dissent cited a decision in which the Court said that while "negative attitudes and fear often accompany irrational biases, their presence alone does not a constitutional violation make." *Perry*, 671 F.3d at 1104

(quoting *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 357 (2001)). *See also Graham v. Connor*, 490 U.S. 386, 397-98 (1989) ("[T]he subjective motivations of the individual officers . . . has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment.").

## VIII. JUDICIAL REDEFINITION OF MARRIAGE TO ELIMINATE ITS OPPOSITE-SEX NATURE HAS A DESTABILIZING EFFECT ON THE LAW.

Court decisions redefining marriage to eliminate its opposite-sex nature have a destabilizing effect on the law. When public policy is made by the political branches, all views are considered and a compromised result is reached reflecting all input. Moreover, unlike judge-made policy, politically-made policy creates no doctrinal imperative for the creation of new or expanded rights.

Inappropriate judicial usurpation of political power undermines our democratic processes by reducing respect for the law. It has wisely been said that "the voice of the judiciary on constitutional questions must ultimately draw its authority from the public's acceptance of its institutional role."[26] If this is so, judicial redefinition of marriage and decisions like *Roe v. Wade* threaten the authority of the courts.

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[26] Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder, *Keeping Faith with the Constitution* 24 (Oxford, 2010).

Since *Roe* was handed down, there has been a growing backlash against it. There are annual massive protests in multiple cities and there have been repeated efforts to overturn *Roe*.

When *Roe* was decided, the political branches were in the process of modifying abortion laws. As Justice Ginsburg has said, "The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[27]

Creating a constitutional right to same-sex marriage again subverts the process of democratic change and could create another backlash. Impatience with the slow pace of legislative change does not warrant the creation of a new previously-unknown constitutional right and judicial deconstruction of a bedrock institution of our society.

Several lower courts have been strongly influenced by the Supreme Court's thesis in *Windsor* that the federal DOMA, by defining marriage as opposite-sex in nature, "humiliates tens of thousands of children now being raised by same-sex couples" by making "it even more difficult for the children to understand the integrity and closeness of their own family and its

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[27] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 385-86 (1985).

concord with other families in their community and in their daily lives." *Windsor*, 133 S.Ct. at 2694. The Court offered no support for this statement. Nevertheless, the Fourth, Seventh, and Tenth Circuits quoted it in their decisions. *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir. 2014); *Baskin*, 766 F.3d at 659; *Kitchen*, 755 F.3d at 1207, 1215.

In striking down the marriage definition laws of Wisconsin and Indiana, the Seventh Circuit pressed the humiliation thesis, offering the following scenario:

> Consider now the emotional comfort that having married parents is likely to provide to children adopted by same-sex couples. Suppose such a child comes home from school one day and reports to his parents that all his classmates have a mom and a dad, while he has two moms (or two dads, as the case may be). Children, being natural conformists, tend to be upset upon discovering that they're not in step with their peers. If a child's same-sex parents are married, however, the parents can tell the child truthfully that an adult is permitted to marry a person of the opposite sex, or if the adult prefers as some do a person of his or her own sex, but that either way the parents are married and therefore the child can feel secure in being the child of a married couple. Conversely, imagine the parents having to tell their child that same-sex couples can't marry, and so the child is not the child of a married couple, unlike his classmates.

*Baskin*, 766 F.3d at 663-64. In effect the Seventh Circuit said that a child's being able to tell his/her peers that the same-sex adults in his/her home are married is consolation for the child not being able to say that he/she has both a mother and a father. Just as the Supreme Court cited no support for its humiliation thesis in *Windsor*, the Seventh Circuit offered none for this hypothetical.

In his dissent in *Kitchen*, Judge Kelly questioned the *Windsor* humiliation thesis. He incisively noted:

> The Court's conclusion that children raised by same-gender couples are somehow stigmatized seems overwrought when one considers that 40.7% of children are now born out of wedlock. Of course, there are numerous alternative family arrangements that exist to care for these children. We should be hesitant to suggest stigma where substantial numbers of children are raised in such environments. Moreover, it is pure speculation that every two-parent household, regardless of gender, desires marriage.

755 F.3d at 1239 n.4.

Out-of-wedlock births and unmarried cohabitation have exploded in this country. "Demographers say the cohabiting trend among new parents is likely to continue. Social stigma regarding out-of-wedlock

births is loosening. . . ."[28] Many modern opposite-sex celebrity couples openly cohabit and have children outside of wedlock, without any apparent stigma or humiliation. Moreover, it could well be that many children of unmarried couples would be more embarrassed and humiliated if their parents were married.

In effect, with this unsupported humiliation thesis, some courts have inserted themselves into the culture as "National Psychologist" – purporting, without evidence, to divine the psychological effect of the traditional opposite-sex definition of marriage on children living in households with same-sex adults. What is even more embarrassing is that this amateur psychology passes for constitutional law.

Speaking of the "humiliation" of children, what about the humiliation of voters? We do not know how many children, if any, are actually humiliated because the adults in their homes are not married. But we do know that millions of voters have been humiliated by the contempt of some federal courts for their views. Of course, behind every statute preserving the opposite-sex definition of marriage that has been adopted by Congress or a state legislature, stand millions of voters. But consider only the states that have adopted constitutional amendments by popular referenda. In those 31 states, some 41,065,837 citizens of

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[28] Hope Yen, *More Couples Who Become Parents are Living Together But Not Marrying, Data Show*, Wash. Post (Jan. 7, 2014).

the United States have voted during 1998-2012 to define marriage as opposite-sex in nature (58% of those voting). This includes Hawaii, which gave the legislature authority to define marriage as opposite-sex.[29]

These millions of voters have been told by a number of federal courts that their vigorous efforts to make democracy work and the countless hours they have invested in expressing their views and organizing are worthless. And the courts have also said that these voters are irrational, believing in the historical opposite-sex definition of marriage without any rational basis. Further, as discussed earlier, some courts have branded voters who support the male-female definition as infected with "animus" or hatred.

Here's a question for the courts. How much public opinion do judges think they can ignore and ridicule without destroying the legitimacy of the judiciary and even destabilizing the democratic basis of this republic?

Our President and other leaders make somber pronouncements and send our young soldiers to fight in distant parts of the globe in order, we say, to secure the rights of other people to "self-determination." But in the United States apparently self-determination does not count for much. When the United States is

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[29] http://en.wikipedia.org/wiki/Same-sex_marriage_legislation_in_the_United_States (visited March 9, 2015).

finally swept into the dust bin of history, one of the primary reasons will likely be judicial usurpation of power from the political branches and disregard for the right of self-determination.

Why are well-meaning judges willing to usurp power from the political branches and disregard the public's right to self-determination? Apparently, they have bought into the false analogy to the civil rights movement, in which courageous judges finally overturned laws and practices infected with racial discrimination. But those judges were applying previously-ignored textual provisions of constitutions and laws (themselves majoritarian products – showing that majorities should not always be distrusted) that forbade race discrimination. There is no analogy to the temptation of judges to substitute their social views, without a clear constitutional command, for the policy choices of the people.

Some say the "arc of history" bends toward same-sex marriage and polyamory. But, after only 10 years of experience in redefining marriage into a genderless phenomenon in some states (against 6,000 years of recorded history under the opposite-sex definition), we do not know that. History documents many now-disfavored practices that were at one time thought inevitable and on the "right side of history." These include National Socialism, Marxism, nuclear power, and racial eugenics. A much better prediction is that the arc of history bends toward the right of citizens to self-determination and freedom in making their own

public policy choices, without interference by an autocratic judiciary or other rulers.

The Lighted Candle Society is frightened for the future of marriage, family, and our democratic system. They are all at risk.

## CONCLUSION

The decision of the Sixth Circuit should be affirmed and state laws defining marriage as opposite-sex in nature upheld as constitutional.

Respectfully submitted,

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