Nos. 10-2204, 10-2207, 10-2214 (Consolidated)

United States Court of Appeals for the First Circuit

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

vs.

U.S. DEP'T OF HEALTH & HUMAN SERVICES, *et al.,*
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,

NANCY GILL, *et al.,*
Plaintiffs-Appellees,

vs.

OFFICE OF PERSONNEL MANAGEMENT, *et al.,*
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
CIVIL CASE NOS. 1:09-10309-JLT, 1:09-11156-JLT
HON. JOSEPH L. TAURO

***AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Form") makes the following corporate disclosure statement: No publicly held company owns 10% or more of Eagle Forum's stock, and Eagle Forum has no parent company.

Dated: January 26, 2011

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS AND RULES

OTHER AUTHORITIES

ADDENDUM

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum") is a nonprofit Illinois corporation founded in 1981. Eagle Forum has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. Accordingly, Eagle Forum has a direct and vital interest in the issues before this Court. Eagle Forum files this *amicus* brief with the consent of all parties.[1]

STATEMENT OF THE CASE AND FACTS

In 1996, Congress enacted the Defense of Marriage Act ("DOMA") *inter alia* to adopt a uniform federal definition of marriage and to foster husband-wife marriage to encourage responsible procreation and childrearing. H.R. REP. NO. 104-664 at 5, 12-13, 18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2910, 2916, 2922. Various private individuals and Massachusetts (collectively, "Plaintiffs") prevailed in an as-applied

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

constitutional challenge to 1 U.S.C. §7 against various federal officers and agencies (collectively, "Federal Appellants"). *Commonwealth v. HHS,* 698 F.Supp.2d 234, 235-36 (D. Mass. 2010); *Gill v. OPM,* 699 F.Supp.2d 374, 386 n.82 (D. Mass. 2010). The only relevant facts are legislative facts that support the plausibility of the link between husband-wife marriage and responsible procreation and childrearing.

SUMMARY OF ARGUMENT

Plaintiffs lack standing over Massachusetts' voluntary decisions to fund same-sex beneficiaries, DOMA's application to statutes that do not affect Plaintiffs, and speculative, non-imminent future enforcement (Section I.A). Because Plaintiffs' damage claims fall outside any waivers of sovereign immunity, the District Court lacked jurisdiction to award damages and to hear Plaintiffs' non-exhausted claims for taxes, Social Security, and Medicare (Sections I.B-I.E). On the merits, marriage's rationales of responsible procreation and childrearing easily satisfy the rational-basis test (Section II.B), and same-sex marriage is not a fundamental right (Section II.A). Because it fits within the Spending, Commerce, and Taxing Powers, without offending Equal Protection, DOMA does not violate the Tenth Amendment (Section III).

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION OVER MOST, IF NOT ALL, OF PLAINTIFFS' CLAIMS

To adjudicate claims in federal court, the parties must present a case or controversy under Article III's constitutional requirement for subject-matter jurisdiction. U.S. CONST. art. III, §2. In addition, the lower federal courts have defined statutory subject-matter jurisdiction, *see, e.g.,* 28 U.S.C. §1331, which they lack authority to exceed. Eagle Forum respectfully submits that the District Court and this Court lack jurisdiction for most, if not all, of Plaintiffs' claims.

A. Plaintiffs Lack Standing

Standing involves a tripartite test of a cognizable injury to the plaintiff, caused by the defendant, and redressable by the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). The plaintiff's injury must involve "a legally protected interest" and its "invasion [must be] concrete and particularized" and "affect the plaintiff in a personal and individual way." *Lujan,* 504 U.S. at 560-61 & n.1.

Standing is a "bedrock requirement," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471 (1982), "founded in concern about the proper – and

properly limited – role of the courts in a democratic society." *Bennett v. Spear,* 520 U.S. 154, 162 (1997) (interior quotations and citations omitted). Standing is "fundamental to the judiciary's proper role in our system of government," *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 37 (1976), and "[n]o principle is more fundamental" to that role "than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id.*

Standing is "*crucial* in maintaining the tripartite allocation of power set forth in the Constitution." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 341 (2006) (interior quotations omitted, emphasis added). If their jurisdiction extended beyond cases and controversies, judges could impose personal policy choices by fiat, without public recourse.[2]

Federal Appellants purport to have declined to appeal the District Court's jurisdictional rulings, Fed'l Opening Br. at 21 n.13, but parties cannot confer jurisdiction by consent or waiver. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982).

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[2] The Supreme Court recently emphasized that judges exceed their constitutional role when they substitute their policy views and bend constitutional texts to do what those texts were not designed to do. *District of Columbia v. Heller,* 554 U.S. 570, 578 n.3 (2008).

Quite the contrary, appellate courts must assure themselves of jurisdiction, even if the parties concede it:

> [E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, *but also that of the lower courts in a cause under review,* even though the parties are prepared to concede it.

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (interior quotations omitted, emphasis added). "In a long and venerable line of cases, [the U.S. Supreme] Court has held that, without proper jurisdiction, a court cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 84 (1998). With that background, *amicus* Eagle Forum now applies the standing analysis to various aspects of the cases before this Court.

1. A Plaintiff Can Challenge DOMA's Application Only to Statutes that Impact that Plaintiff

Although the Government Accountability Office ("GAO") has identified over 1,000 federal laws to which DOMA applies, GAO, *Defense of Marriage Act,* at 1 (GAO-04-353R 2004), Plaintiffs here challenge DOMA's application to only a handful of those laws. Specifically, Massachusetts challenges DOMA's application to the State

Cemetery Grants Program, Medicaid and its implementation in Massachusetts as "MassHealth," and the Medicare tax, *Commonwealth,* 698 F.Supp.2d at 239-44, and the private plaintiffs challenge DOMA's application to federal-employee health-benefit programs, Social Security retirement and survivor benefits, and tax filing-status issues. *Gill,* 699 F.Supp.2d at 379-83. In sum, Plaintiffs challenge several Spending-Clause issues and two Taxing-Power issues.

Indeed, most of DOMA's applications fall under the Spending Clause as conditions that Congress attached to the receipt of federal funds, although Massachusetts noted below that DOMA "impacts, among other things, copyright protections, provisions relating to leave to care for a spouse under the Family and Medical Leave Act ["FMLA"], and testimonial privileges." *Commonwealth,* 698 F.Supp.2d at 247 & n.133; *see also Gill,* 699 F.Supp.2d at 396 (discussing DOMA's impact on immigration issues). Of the issues outside the Spending Clause, however, only the foregoing tax issues are contested.

To prevail, plaintiffs must establish standing on the merits, *Summers v. Earth Island Inst.,* 129 S.Ct. 1142, 1150 (2009), which requires that each challenged DOMA application injure a plaintiff

concretely: "standing is not dispensed in gross," *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996). Accordingly, the District Court's mention of immigration, testimonial privileges, and copyright protections is *dicta.*[3]

Although it represents a separate sovereign in our federal system, Massachusetts cannot represent its citizens as *parens patriae* when suing the federal government: "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 610 n.16 (1982); *accord Massachusetts v. EPA,* 549 U.S. 497, 520 n.17 (2007) (Supreme Court's precedent "prohibits" "allowing a State to protect her citizens from the operation of federal statutes") (internal quotations omitted). Accordingly, Massachusetts must assert her own injuries.

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[3] Should they prevail here, Plaintiffs could assert collateral estoppel against the government in future litigation between the same parties over DOMA's other impacts, *Montana v. U.S.,* 440 U.S. 147, 153 (1979), but new plaintiffs could not. *U.S. v. Mendoza,* 464 U.S. 154, 162-63 (1984) ("nonmutual offensive collateral estoppel simply does not apply against the government"). Given the weak defense put on by the federal government, subsequent litigation presumably will attack the application of *stare decisis* and estoppel. *Cf. Horne v. Flores,* 129 S.Ct. 2579, 2596 (2009) (suggesting lack of "true challenge" where plaintiffs and defendants appear to have sought same result).

2. Massachusetts' Self-Inflicted Injuries from *Its Own* Laws Cannot Support Standing

Because its Supreme Judicial Court has decreed that same-sex couples may marry under state law, *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003), and Massachusetts decided to cover same-sex marriages in its implementation of Medicare, MASS. GEN. LAWS Ch. 118E, §61 ("MassHealth Equity Act"), Massachusetts now pays higher benefits to same-sex couples excluded from the federal definition of marriage. *Commonwealth,* 698 F.Supp.2d at 241-43. Incredibly, Massachusetts claims injury from these higher payments, notwithstanding that it remains entirely free to void its Supreme Judicial Court's decision and the MassHealth Equity Act.

Consistent with founding principles, both the Massachusetts and federal constitutions recognize the separation-of-powers doctrine. MASS. CONST. Pt. 1, art. XXX; *Loving v. U.S.,* 517 U.S. 748, 756 (1996). "Even before the birth of this country, separation of powers was known to be a defense against tyranny." *Loving v. U.S.,* 517 U.S. at 756. Although both the Massachusetts and federal constitutions recognize the doctrine, Massachusetts' state-law version does not aid Massachusetts in federal court. To the contrary, if plaintiffs' self-inflicted injuries could

manufacture standing, Article III's limits would have no meaning.

Accordingly, Massachusetts' decision to allow same-sex marriage cannot support Massachusetts' standing. *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976) (no standing to redress "self-inflicted" injuries); *Petro-Chem Processing, Inc. v. EPA,* 866 F.2d 433, 438 (D.C. Cir. 1989) (self-inflicted injury does not support standing if it is "so completely due to the [complainant's] own fault as to break the causal chain") (*quoting* 13 WRIGHT, MILLER & COOPER, FED. PRAC. & PROC.: Jurisdiction 2d §3531.5 (2d ed. 1984)). The Constitution shields Massachusetts' decision to allow same-sex marriage *within its borders,* but Massachusetts cannot turn that shield into a sword to attack federal law.

Significantly, the "doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen v. U.S.,* 445 U.S. 684, 689 (1980); *Tarrant v. Ponte,* 751 F.2d 459, 464 (1st Cir. 1985). Because "States are free to allocate the lawmaking function to whatever branch of state government they may choose," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.6 (1981), Massachusetts may override the Supreme Judicial Court by constitutional amendment or even abolish the Supreme Judicial Court. Massachusetts' voluntary

acquiescence to that court's decision cannot manufacture a controversy with the United States. Under the circumstances, this Court must dismiss Plaintiffs' challenges to DOMA as applied to Medicare.

3. Massachusetts' Cemetery-Related Injuries Are Purely Speculative and Non-Imminent

From 2004 to 2008 (*i.e.,* in the prior Administration), the executive branch advised Massachusetts that burying veterans' same-sex spouses in veterans' cemeteries *could* require reimbursing funds the federal government provided under the State Cemetery Grants Program, 38 U.S.C. §2408 ("SCGP"). *Commonwealth,* 698 F.Supp.2d at 240-41. The current Administration favors repealing DOMA, Fed'l Opening Br. at 23 n.14, and repealed the "Don't Ask, Don't Tell" law ("DADT"). PUB. L. NO. 111-321, 124 Stat. 3515 (2010). It is inconceivable that the current Administration would exercise *discretion* to demand reimbursement for military cemeteries. 38 U.S.C. §2408(b)(3) (entitling – without requiring – recovery of SCGP grants); 38 C.F.R. §39.10(c) (same). To have standing to avoid *future* enforcement, Plaintiffs must face a "credible threat" of enforcement. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). That threat is entirely lacking under the current Administration and thus insufficiently imminent for

standing. Under the circumstances, this Court must dismiss Plaintiffs' challenges to DOMA as applied to SCGP.

B. Anti-Injunction Act Denies Jurisdiction for All Tax-Related Relief

To the extent that Plaintiffs seek relief from DOMA's impact on tax legislation, the District Court and this Court lack jurisdiction for injunctive or declaratory relief. Under the Anti-Injunction Act ("AIA"), with exceptions inapplicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. §7421(a). Similarly, the Declaratory Judgment Act provides jurisdiction to the district courts for declaratory relief "except with respect to Federal taxes." 28 U.S.C. §2201(a). With equitable relief thus denied, Plaintiffs cannot bring tax-related claim.

Applying the AIA preserves the government's ability to collect tax assessments expeditiously, with "a minimum of preenforcement judicial interference," "require[ing] that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon,* 416 U.S. 725, 736 (1974) (internal quotation omitted). The parallel provision in the Declaratory Judgment Act further demonstrates the "congressional

antipathy for premature interference with the assessment or collection of any federal tax." *Bob Jones Univ.,* 416 U.S. at 732 n.7.

Apart from their power to consider validly filed refund claims, district courts lack jurisdiction to order the abatement of tax liability. *McMillen v. U.S. Dept. of Treasury,* 960 F.2d 187, 188-89 (1st Cir. 1991). Indeed, courts lack jurisdiction not only for employers' pre-enforcement challenges to employment taxes, *Foodservice & Lodging Inst. v. Regan,* 809 F.2d 842, 844-45 (D.C. Cir. 1987), but even for pre-enforcement *constitutional* challenges. *U.S. v. Clintwood Elkhorn Mining Co.,* 553 U.S. 1, 10 (2008) ("unmistakably clear that the constitutional nature of a taxpayer's claim ... is of no consequence") (alteration in original, interior quotations omitted).[4] Under the circumstances, this Court must dismiss Plaintiffs' challenges to DOMA as applied to taxes.

C. Sovereign Immunity Bars Claims for Money Damages

Plaintiffs lack jurisdiction to sue the federal government without a

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[4] District courts' jurisdiction for tax claims, 28 U.S.C. §1346(a)(1), carries jurisdictional predicates not met here: pre-enforcement claims for refunds, 26 U.S.C. §7422(a); *McMillen,* 960 F.2d at 188-89, and strict timelines to file claims. 26 U.S.C. §6511(a) (later of 3 years from return or 2 years from paying). Like failure to present claims administratively, untimeliness is jurisdictional. *U.S. v. Dalm,* 494 U.S. 596, 602 (1990).

waiver of sovereign immunity. *F.D.I.C. v. Meyer,* 510 U.S. 471, 475 (1994). Officer suits for *prospective* injunctive relief against ongoing violations of federal law are an exception to sovereign immunity, *Ex parte Young,* 209 U.S. 123 (1908), but that exception does not allow money damages or even "retroactive payment of benefits … wrongfully withheld." *Edelman v. Jordan,* 415 U.S. 651, 678 (1974). Similarly, 5 U.S.C. §702 "eliminates the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer," *Sea-Land Serv., Inc. v. Alaska R.R.,* 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. REP. NO. 94-996, 8 (1976)), but its express terms omit "money damages." 5 U.S.C. §702. To recover money damages, Plaintiffs must proceed under a waiver of sovereign immunity for such damages.[5]

For damage claims *not sounding in tort,* the "Little Tucker Act" provides district-court jurisdiction for nontax claims up to $10,000, and

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[5] A "*Bivens*" action covers *some* equal-protection violations, *Davis v. Passman,* 442 U.S. 228, 247-49 (1979), but only for individual-capacity defendants, *Chiang v. Skeirik,* 582 F.3d 238, 243 (1st Cir. 2009) ("*Bivens* doctrine does not override bedrock principles of sovereign immunity … to permit suits against the United States, its agencies, or federal officers sued in their official capacities") (interior quotation omitted), and probably would fail, in any event, where Plaintiffs have adequate alternate remedies. *Bush v. Lucas,* 462 U.S. 367, 388 (1983).

the Tucker Act provides jurisdiction for all amounts. 28 U.S.C. §§1346(a)(2), 1491(a)(1).[6] If Plaintiffs had non-tort claims under the Little Tucker Act, Federal Appellants would have appealed to the wrong court: the Federal Circuit has exclusive appellate jurisdiction "over *every appeal* from a Tucker Act or nontax Little Tucker Act claim," *U.S. v. Hohri,* 482 U.S. 64, 73 (1987) (emphasis in original), including "mixed cases" with nontax Little Tucker Act claims coupled with claims typically resolved in regional courts of appeals. *Hohri,* 482 U.S. at 78; 28 U.S.C. §1295(a)(2). But discrimination claims sound in tort, *Wilson v. Garcia,* 471 U.S. 261, 277 (1985), *abrogated on other grounds by* 28 U.S.C. §1658, for which the Tucker and Little Tucker Acts provide no jurisdiction. *Tempel v. U.S.,* 248 U.S. 121, 129 (1918); *Roman v. Velarde,* 428 F.2d 129, 131-32 (1st Cir. 1970).

Similarly, the Federal Tort Claims Act ("FTCA") waives sovereign immunity for tort-related damages, but that waiver excludes "claim[s] based upon an act or omission of an employee of the Government,

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[6] Unless withdrawn or duplicated by another statute, §1491(a)(1)'s jurisdiction is exclusive. *Eastern Enterprises v. Apfel,* 524 U.S. 498, 519-20 (1998); *cf. Bowen v. Massachusetts,* 487 U.S. 879, 910 n.48 (1988).

exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. §2680(a). Falling outside FTCA's waiver of sovereign immunity, Plaintiffs cannot recover tort damages. *Molzof v. U.S.,* 502 U.S. 301, 304-05 (1992) (before FTCA, "sovereign immunity … prevented those injured by the negligent acts of federal employees from obtaining redress through lawsuits").

To the extent that *any* of Plaintiffs' claims *do not sound in tort,* this Court lacks jurisdiction and should transfer the entire appeal to the Court of Appeals for the Federal Circuit. 28 U.S.C. §1631. Because Plaintiffs' claims sound in tort, albeit outside FTCA's waiver of immunity, this Court must dismiss Plaintiffs' damage claims.

D. Sovereign Immunity Bars Claims where Plaintiffs Have Adequate Alternate Remedies in Court

As indicated in the prior section, the doctrine of sovereign immunity allows suits for equitable and declaratory relief, which may proceed under either the officer-suit fiction of *Ex parte Young,* 209 U.S. 123 (1908), or 5 U.S.C. §702's waiver of sovereign immunity. Although both *Ex parte Young* and §702 provide resort to equitable relief, they also both are conditioned upon exhausting alternate legal remedies. Like equitable relief's requiring inadequate legal remedies, *Beacon*

Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959), §702's waiver of sovereign immunity is conditioned upon 5 U.S.C. §704's limitation, in pertinent part, to actions "for which there is no other adequate remedy in a court." Several of Plaintiffs' claims have or even *require* alternate remedies, so sovereign immunity bars suit. Under the circumstances, this Court must dismiss Plaintiffs' challenges to DOMA as applied to Medicare, Social Security, and tax claims with alternate remedies.

E. Medicare and Social Security Statutes Require Exhausting those Statutes' Administrative Process

Where they seek relief from Social Security or Medicare, Plaintiffs first must present their claims administratively under those statutes' administrative-channeling mechanisms. 42 U.S.C. §§405(g)-(h), 1395ii. Under the circumstances presented here, "Section 405(g) contains the nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court," *Shalala v. Ill. Council on Long Term Care,* 529 U.S. 1, 15 (2000), which withdraws district courts' jurisdiction under 28 U.S.C. §§1331, 1346 for claims outside that channeling process. 42 U.S.C. §§405(g)-(h), 1395ii. Under the circumstances, this Court must dismiss Plaintiffs' challenges to DOMA as applied to Medicare and Social Security.

II. DOMA SATISFIES DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AMENDMENT

The District Court found DOMA to deny Equal Protection,[7] based on one-sided legislative facts. To negate federal interests in marriage, Plaintiffs' historian airbrushed federal opposition to bigamy out of existence, *compare Commonwealth,* 698 F.Supp.2d at 236-39 *with Reynolds v. U.S.,* 98 U.S. 145 (1879), and Federal Appellants threw marriage's traditional justifications of responsible procreation and childrearing under the polemical bus of left-leaning policy statements. *Gill,* 699 F.Supp.2d at 388 n.106. Because review of legislative facts and legal conclusions is *de novo, U.S. v. Volungus,* 595 F.3d 1, 4 (1st Cir. 2010), the District Court's facts are neither relevant nor controlling, and DOMA easily satisfies the Fifth Amendment.

A. Same-Sex Marriage Is Not a Fundamental Right under the Due Process Clause

Under substantive Due Process, the Supreme Court recognizes "heightened protection against government interference with certain

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[7] The Due Process Clause includes an equal-protection component that parallels the Equal Protection Clause. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Buckley v. Valeo,* 424 U.S. 1, 93 (1976).

fundamental rights and liberty interests," which courts are "reluctant to expand … because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," reflecting only the "policy preferences" of the presiding judge. *Washington v. Glucksberg,* 521 U.S. 702, 719 (1997). To cabin any possible impulse to impose policy preferences by judicial fiat, the Supreme Court limits fundamental rights to "those fundamental rights and liberties which are, *objectively,* deeply rooted in this Nation's history and tradition." *Glucksberg,* 521 U.S. at 720-21 (emphasis added, interior quotations omitted).

Although *husband-wife marriage* unquestionably is a fundamental right under the federal Constitution, *Turner v. Safley,* 482 U.S. 78, 95 (1987) ("the decision to marry is a fundamental right"); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental"), the federal Constitution has never recognized the unrestricted right to marry *anyone.* Instead, the fundamental right recognized by the Supreme Court applies only to marriages between one man and one woman: "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia,* 388 U.S. 1, 12 (1967). Unlike opposite-sex

marriage, same-sex marriage is not fundamental to the existence and survival of the human race. Indeed, the Supreme Court held that same-sex couples have no right to marry, much less a fundamental right do so. *Baker v. Nelson,* 409 U.S. 810 (1972). *Baker* ends this matter.[8]

It is also significant that ten of the thirteen states that originally ratified the Fifth Amendment[9] – and all but two of the thirty-seven

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[8] Because the Supreme Court resolved *Baker* summarily and dismissed for want of a substantial federal question, this Court must review the "jurisdictional statement filed in the Supreme Court … and any other relevant aid to construction in order to ascertain what issues were 'presented and necessarily decided' by the Court's summary dismissal." *Auburn Police Union v. Carpenter,* 8 F.3d 886, 894 (1st Cir. 1993) (*quoting Mandel v. Bradley,* 432 U.S. 173, 176 (1977)); *cf. Piper v. Supreme Court of New Hampshire,* 723 F.2d 110, 122 n.5 (1st Cir. 1983) ("summary affirmance … can be taken only to affirm the precise issues decided by the court below"), *aff'd,* 470 U.S. 274 (1985). The *Baker* jurisdictional statement plainly presented (and *Baker* thus plainly decided) the question whether denying same-sex marriage violates Equal Protection. Add. 23a-34a. Taking the Supreme Court at its word, nothing has undermined *Baker* with respect to same-sex marriage. *Lawrence v. Texas,* 539 U.S. 558, 578 (2003) (*Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

[9] GA. CONST. art. I, §IV, ¶I; S.C. CONST. art. XVII, §15; VA. CONST. art. I, §15-A; DEL. CODE ANN. tit. 13, §101; MD. CODE ANN., FAM. LAW §2-201; N.C. GEN. STAT. §51-1.2; PA. CONS. STAT. §1704; R.I. GEN. LAWS §§15-1-1 to -5; *Chambers v. Ormiston,* 935 A.2d 956, 962 (R.I. 2007); *Hernandez,* 7 N.Y.3d at 366, 855 N.E.2d at 12; *cf. Quarto v. Adams,* 395 N.J. Super. 502, 511, 929 A.2d 1111, 1116 (N.J. Super.A.D. 2007).

states that subsequently joined the Union[10] – have, in much more homosexual-friendly times, defined marriage as a union between husband and wife. While "not conclusive in a decision as to whether that practice accords with due process," the "fact that a practice is followed by a large number of states is … plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McKeiver v. Pennsylvania,* 403 U.S. 528, 548 (1971). In ratifying twenty-nine constitutional marriage amendments, States acted with the same solemnity with which they ratified the Fifth and Fourteenth Amendments. Whatever the founding colonies had in mind

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[10] *See* ALA. CONST. art. I, §36.03; ALASKA CONST. art. 1, §25; ARIZ. CONST. art. XXX, §1; ARK. CONST. amend. 83, §§1-3; CAL. CONST. art. I, §7.5; COLO. CONST. art. II, §31; FLA. CONST. art. I §27; IDAHO CONST. art. III, §28; KAN. CONST. art. XV, §16; KY. CONST. §233a; LA. CONST. art. XII, §15; MICH. CONST. art. I, §25; MISS. CONST. art. XIV, §263a; MO. CONST. art. I, §33; MONT. CONST. art. XIII, §7; NEB. CONST. art. I, §29; NEV. CONST. art. I, §21; N.D. CONST. art. XI, §28; OHIO CONST. art. XV, §11; OKLA. CONST. art. II, §35; OR. CONST. art. XV, §5a; S.D. CONST. art. XXI, §9; TENN. CONST. art. XI, §18; TEX. CONST. art. I, §32; UTAH CONST. art. I, §29; WIS. CONST. art. XIII, §13; HAW. REV. STAT. §572-1, -3; 750 ILL. COMP. STAT. 5/212; IND. CODE §31-11-1-1; 19-A ME. REV. STAT. §701.5; MINN. STAT. §517.01; WASH. REV. CODE §26.04.010-20; W. VA. CODE §48-2-603; WYO. STAT. ANN. §20-1-101; N.M. Stat. §§40-1-1 to -7.

in 1787, the idea of same-sex marriage is not "deeply rooted" *today*.

B. Denying Benefits to Same-Sex Marriage Does Not Violate Equal Protection under the Fifth Amendment

DOMA does not trigger heightened equal-protection scrutiny because same-sex couples are not a suspect class. The United States has an unquestionable interest in supporting responsible and stable procreation and childrearing through husband-wife marriage, which easily satisfies the rational-basis test.

1. Plaintiffs' Claimed Discrimination Does Not Trigger Heightened Scrutiny

For constitutional equal-protection claims without a suspect class, courts evaluate differential treatment under the rational-basis test. *Cf. Romer v. Evans,* 517 U.S. 620, 631-32 (1996) (evaluating sexual-orientation discrimination under rational-basis test).[11] Significantly, intermediate scrutiny cannot apply because DOMA's differential

[11] Homosexuals cannot trigger strict scrutiny as a class "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973). Indeed, the homosexual lobby recently succeeded in legislatively repealing DADT. PUB. L. NO. 111-321, 124 Stat. 3515 (2010).

treatment of same-sex and opposite-sex couples is not *because of sex.*[12]

For intermediate scrutiny even potentially to apply, the defendant must have acted *because of* the plaintiff's sex, not merely in spite of it. *Feeney,* 442 U.S. at 279; *cf. Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 81 (1998) ("[t]he critical issue … is whether members of one sex are exposed to disadvantageous terms or conditions … to which members of the other sex are not exposed"). DOMA is facially neutral with respect to sex, applying equally to same-sex female couples and same-sex male couples, as the individual Plaintiffs demonstrate. Because something other than sex drives any differential treatment, DOMA does not constitute differential treatment *because of sex.*[13]

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[12] Strictly speaking, treating same-sex couples differently is not the same as treating homosexuals differently, notwithstanding a disparate impact on homosexuals. Disparate impacts alone cannot support an equal-protection claim. *Personnel Administrator v. Feeney,* 442 U.S. 256, 272 (1979); *Washington v. Davis,* 426 U.S. 229, 239 (1976).

[13] *Loving* properly rejected Virginia's claim that its miscegenation statute neutrally treated whites and blacks equally. *Loving,* 388 U.S. at 8-9. There, the statute *did not* apply equally to whites and non-whites, had a race-based purpose, and was "designed to maintain White Supremacy." *Loving,* 388 U.S. at 11-12. Accordingly, the Court correctly applied heightened scrutiny. *Lawrence,* 539 U.S. at 600 (Scalia, J., dissenting). Here, DOMA has no *sex-based* purpose whatsoever. Even

(Footnote cont'd on next page)

2. DOMA Satisfies the Rational-Basis Test

Under rational-basis review, Equal Protection does not require that the decisionmaker's reasoning is objectively correct. Instead, it suffices if "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker" and "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn,* 505 U.S. 1, 11-12 (1992) (citations omitted, emphasis added). Moreover, courts give economic and social legislation a presumption of rationality, and "Equal Protection … is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462-63 (1988) (interior quotations omitted). DOMA easily meets this test.

Under the rational-basis test, equal-protection plaintiffs "must convince the court that the *legislative* facts on which the classification is

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(Footnote cont'd from previous page.)

the District Court tied DOMA to *anti-homosexual* animus, not anti-female or anti-male animus. *Gill,* 699 F.Supp.2d at 396.

apparently based *could not reasonably be conceived to be true* by the governmental decisionmaker," a burden that "the plaintiff can carry … by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact." *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 17 (1988) (interior quotations omitted, emphasis added). As explained below, the standard is not what *is true,* but what the decisionmaker *could reasonably believe to be true.* "[T]his burden is … a considerable one," *id.; Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (those attacking the rationality of legislative classifications have the burden "to negative every conceivable basis which might support it") (internal quotations omitted), but it is the only way that Plaintiffs can prevail.

"[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993); *Heller v. Doe,* 509 U.S. 312, 320 (1993) (same). Because a merely arguable basis will support government action, even the one-sided evidentiary presentation here cannot bear the weight that the District Court placed on it.

For example, in *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981), the plaintiff marshaled "impressive supporting evidence at trial to prove that the probable consequences of the ban on plastic nonreturnable milk containers" would be counterproductive. That evidence served no purpose because it attacked the "*empirical* connection between" the ban and the legislative purpose, without "challeng[ing] the *theoretical* connection" between the two. *Id.* (emphasis in original). As explained below, the data that Plaintiffs need to negative the procreation and childrearing rationale for traditional husband-wife marriage simply do not exist, and yet those data are Plaintiffs' burden to produce.

The most widely recognized social purpose of marriage is to provide for responsible procreation and childrearing. *Maynard v. Hill,* 125 U.S. 190, 211 (1888) (marriage is "an institution regulated and controlled … for the benefit of the community," in which "the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress"); *Skinner,* 316 U.S. at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race"); *Citizens for Equal Prot. v.*

Bruning, 455 F.3d 859, 867 (8th Cir. 2006) (*quoted infra*); *Loving,* 388 U.S. at 12 (*quoted supra*); note 14, *infra* (collecting cases). Children born within husband-wife marriages have the uniquely valuable opportunity to know their own biological mother and father. Common understanding easily establishes DOMA's goals as worthy and well-served by husband-wife marriage. By contrast, same-sex marriage obviously neither produces biological offspring nor serves these goals.

As indicated above, the rational-basis test does not *require* that research support husband-wife marriage's benefits for childrearing. It is enough that Congress *plausibly* could find that link, based on merely *arguable* legislative facts. *Vance v. Bradley,* 440 U.S. 93, 110-12 (1979). And it is *Plaintiffs' burden* to negative that link's plausibility. "Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model." *Lofton v. Sec'y of Dept. of Children & Family Services,* 358 F.3d 804, 820 (11th Cir. 2004). Without that definitive proof that "millennia of human experience" are objectively wrong and that Congress could not *plausibly* link biological

parenting to childrearing, Plaintiffs cannot use the courts to coerce the United States into their brave new world.

The two decisions below represent one district judge's conclusions, but other judges have reached opposite conclusions:

> [T]he many laws defining marriage as the union of one man and one woman … are rationally related to the government interest in steering procreation into marriage.

Bruning, 455 F.3d at 867 (interior quotations omitted).[14] That alone establishes that DOMA satisfies the equal-protection inquiry. *Lockhart v. McCree,* 476 U.S. 162, 170 n.3 (1986) ("[t]he difficulty with applying [the clearly-erroneous] standard to 'legislative' facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies … has reached a [contrary] conclusion"). Marriage remains plausibly linked to procreation and childrearing.

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[14] *See, e.g., Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 388-89, 798 N.E.2d 941, 999-1000 (Mass. 2003) (Cordy, J., dissenting); *Standhardt v. Superior Court of Ariz.,* 206 Ariz. 276, 288-89, 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003); *Dean v. District of Columbia,* 653 A.2d 307, 336-37 (D.C. 1995); *Hernandez v. Robles,* 7 N.Y.3d 338, 359-61, 855 N.E.2d 1, 7-8 (N.Y. 2006); *Conaway v. Deane,* 401 Md. 219, 317-23, 932 A.2d 571, 630-34 (Md. Ct. App. 2007); *Andersen v. King County,* 158 Wash. 2d 1, 35-42, 138 P.3d 963, 982-85 (Wash. 2006) (plurality); *Morrison v. Sadler,* 821 N.E.2d 15, 23-31 (Ind. Ct. App. 2005).

Although the typical rational-basis plaintiff has a difficult evidentiary burden to negative every possible basis on which the legislature may have acted, Plaintiffs here face an *impossible* burden. While Eagle Forum submits that Plaintiffs *never* will negative the value of traditional husband-wife families for childrearing, Plaintiffs clearly cannot prevail when the data *required by their theory of the case* do not – indeed cannot – yet exist. Plaintiffs therefore lack the very data that could negate DOMA's linkage to a legitimate legislative end. Unlike legislators, Plaintiffs cannot ask that we take their word for it.

3. The Federal Litigants' Concessions Cannot Undermine DOMA's Congressional Bases

Relying on left-leaning professional-academic associations, Federal Appellants choose not to rely on childrearing. *Gill,* 699 F.Supp.2d at 388 n.106; Fed'l Opening Br. at 30 n.16. The cited authorities (Add. 1a-17a) are mere policy statements, reflecting faculty-lounge groupthink:

> Given the widespread support for same-sex marriage among social and behavioral scientists, it is becoming politically incorrect in academic circles even to suggest that arguments being used in support of same-sex marriage might be wrong. There already seems to be some reluctance on the part of researchers and scholars to address issues

> concerning fatherlessness and the relative merits of same-sex and opposite-sex parenting.

Norval D. Glenn, *The Struggle for Same-Sex Marriage,* 41 SOC'Y 25, 27 (2004) (Add. 21a). Even if these purported authorities were "studies" instead of political statements, they could not displace the basis on which Congress – a coequal branch of government – enacted DOMA.

As explained in Section II.B.2, *supra,* the underlying data are too thin to support the definitive findings that Plaintiffs would need to prevail (namely, that Congress could not plausibly believe that husband-wife marriage contributes to responsible procreation and childrearing). Moreover, the existing studies are simply inapposite, focusing on "children raised by gay and lesbian parents," most of whom also have a parent of the sex opposite the now-homosexual parent. *At most,* that could show that children of broken homes with one now-homosexual parent fare as badly as other children of broken homes. Nothing in the rational-basis test compels Congress to aim that low.

Because the District Court reached it, Congress relied on it, and *amici* brief it, this Court can reach DOMA's responsible-childrearing rationale. *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976); *Cleland v. Nat'l Coll. of Business,* 435 U.S. 213, 220 (1978); *Aroostook Band of*

Micmacs v. Ryan, 484 F.3d 41, 73 n.11 (1st Cir. 2007). Alternatively, if this Court disqualifies the statutory rationale, any decision should be unpublished. 1ST CIR. RULE 36.0(b)(1) (unpublished "opinion[s] do[] not … serve … as a significant guide to future litigants").

4. The District Court's Fact-Finding Is Neither Relevant Nor Controlling

The District Court attempted to determine the facts, but "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Clover Leaf Creamery,* 449 U.S. at 470, Accordingly, the District Court's purported facts – even if they were true – could not negative a rational basis for DOMA. *National Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1127 (7th Cir. 1995) ("district court … should not have conducted a trial, and we disregard its conclusions"). The rational-basis test does not allow courts to substitute their own views for the permissible views of Congress.

Although the *Lawrence* majority held that that case had nothing to do with same-sex marriage, *Lawrence,* 539 U.S. at 578, the District Court cites Justice Scalia's *dissent* to argue that DOMA cannot concern procreation and childrearing because it allows opposite-sex couples to marry even if infertile or not wanting children. *Gill,* 699 F.Supp.2d at

389 (*citing Lawrence,* 539 U.S. at 605 (Scalia, J., dissenting)). At the outset, it turns *stare decisis* on its head to attempt to silence a majority with a dissent. Even with that aside, the argument is a *non sequitur*.

Unlike strict scrutiny, the rational-basis test does not require narrow tailoring. *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 315-317 (1976). Moreover, some couples marry with the intent not to have children or with the mistaken belief they are infertile, yet later do have children. Finally, by reinforcing the family unit, husband-wife marriage at least reinforces marriage's procreation and childrearing function even when particular marriages are childless.

III. DOMA SATISFIES THE TENTH AMENDMENT

Under the Tenth Amendment, "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. "Every law enacted by Congress must be based on one or more of" its "enumerated powers," *U.S. v. Morrison,* 529 U.S. 598, 607 (2000). This Section shows that DOMA falls within those enumerated

powers, making the Tenth Amendment inapposite by its terms.[15]

Action under an enumerated power cannot lawfully coerce States "to engage in activities that would themselves be unconstitutional." *U.S. v. Am. Library Ass'n,* 539 U.S. 194, 194 (2003). As *amicus* Eagle Forum reads it, *Commonwealth* found DOMA to violate the Tenth Amendment because DOMA discriminates (and compels Massachusetts to discriminate) against same-sex couples. *Compare Commonwealth,* 698 F.Supp.2d at 248-49 *with Gill,* 699 F.Supp.2d at 386-97. As Section II, *supra,* explains, however, DOMA does not violate equal-protection principles, thereby negating the perceived Tenth-Amendment violation.

Under the Full-Faith-and-Credit Clause, "Congress may by general laws prescribe the manner in which [State acts] shall be proved, and the effect thereof." U.S. CONST. art. IV, §1. Under Article I, "Congress shall have power to lay and collect taxes … [to] provide for

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[15] Federal Appellants address Massachusetts' perceived alternate argument that the Tenth Amendment prohibits DOMA, *even if DOMA falls within an enumerated power*. Fed'l Opening Br. at 59-61. If Massachusetts indeed makes that alternate argument here, Federal Appellants adequately address that argument. *Id.* Although federal action under an enumerated power can violate the Tenth Amendment by "commandeering" the States, DOMA does not do commandeer Massachusetts. *Commonwealth,* 698 F.Supp.2d at 252 n.156.

the … general welfare of the United States," *id.* art. I, §8, cl. 1, and "[t]o regulate commerce … among the several states." *Id.* art. I, §8, cl. 3. The Sixteenth Amendment exempts income taxes from the Constitution's other limitations on direct taxes. *Id.* amend XVI. Finally, under the Necessary-and-Proper Clause, Congress may "make all laws which shall be necessary and proper for carrying into execution the [Article I, §8] powers, and all other powers vested by this Constitution in the [federal] government." *Id.* art. I, §8, cl. 18. These broad powers provide sufficient authority for all DOMA applications challenged here.

At the outset, it would be anomalous for the Constitution to provide Congress authority to legislate the effect of State acts in sister States without providing authority to legislate their effects in federal matters. Indeed, courts have "consistently held that federal law governs questions involving the rights of the [U.S.] arising under nationwide federal programs." *U.S. v. Kimbell Foods, Inc.,* 440 U.S. 715, 726 (1979). Of course, absent controlling federal statutes or a "need for a nationally uniform body of law," courts often adopt "state law … as the federal rule of decision." *Id.* 728; *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 691-92 (2006) ("prudent course … is often to adopt the ready-

made body of state law as the federal rule of decision until Congress strikes a different accommodation") (internal quotation omitted). But now that Congress has enacted a federal rule, that rule must control.

With respect to the Taxing Power and Spending Clause, Congress may use its broad power for purposes that would exceed its other enumerated powers. *U.S. v. Sanchez,* 340 U.S. 42, 44 (1950), and determining how to "provide for the … general Welfare" is for the representative branches, not for the courts. *Helvering v. Davis,* 301 U.S. 619, 640, 645 & n.10 (1937); *South Dakota v. Dole,* 483 U.S. 203, 207 (1987). Similarly, courts "will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution" where (as here) taxes are "productive of some revenue." *Sonzinsky v. U.S.,* 300 U.S. 506, 514 (1937). Finally, with respect to non-tax, non-spending statutes like FMLA, Congress plainly has Commerce-Clause authority to regulate employment. *See, e.g., U.S. v. Darby,* 312 U.S. 100, 118 (1941) (Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 (1937) (National Labor Relations Act). Plaintiffs cannot seriously contend otherwise.

CONCLUSION

This Court should reverse the District Court's judgment.

Dated: January 26, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, I certify that the foregoing "*Amicus Curiae* Brief of Eagle Forum Education & Legal Defense Fund in Support of Appellants in Support of Reversal" complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation, FED. R. APP. P. 32(a)(5)'s typeface requirements, and FED. R. APP. P. 32(a)(6)'s type-style requirements because the brief contains 6,927 words, excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts, and is proportionately spaced in 14-point Century Schoolbook typeface. I have relied on Microsoft Word 2007's word-count feature for the calculation.

Dated: January 26, 2011

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Nos. 10-2204, 10-2207, 10-2214 (Consolidated)

United States Court of Appeals for the First Circuit

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

vs.

U.S. DEP'T OF HEALTH & HUMAN SERVICES, *et al.,*
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,

NANCY GILL, *et al.,*
Plaintiffs-Appellees,

vs.

OFFICE OF PERSONNEL MANAGEMENT, *et al.,*
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
CIVIL CASE NOS. 1:09-10309-JLT, 1:09-11156-JLT
HON. JOSEPH L. TAURO

ADDENDUM TO *AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

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ADDENDUM

AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY

Policy Statements

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Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement

Revised by Council October 2008
To be reviewed

All decisions relating to custody and parental rights should rest on the interest of the child. There is no evidence to suggest or support that parents who are lesbian, gay, bisexual, or transgender are per se different from or deficient in parenting skills, child-centered concerns, and parent-child attachments when compared with heterosexual parents. There is no basis on which to assume that a parent's sexual orientation or gender identity will adversely affect the development of the child.

Lesbian, gay, bisexual, or transgender individuals historically have faced more rigorous scrutiny than heterosexual people regarding their rights to be or become parents. The American Academy of Child & Adolescent Psychiatry opposes any discrimination based on sexual orientation or gender identity against individuals in regard to their rights as custodial, foster, or adoptive parents.

This is a Policy Statement of the American Academy of Child and Adolescent Psychiatry

AMERICAN ACADEMY OF PEDIATRICS

Committee on Psychosocial Aspects of Child and Family Health

Coparent or Second-Parent Adoption by Same-Sex Parents

ABSTRACT. Children who are born to or adopted by 1 member of a same-sex couple deserve the security of 2 legally recognized parents. Therefore, the American Academy of Pediatrics supports legislative and legal efforts to provide the possibility of adoption of the child by the second parent or coparent in these families.

Children deserve to know that their relationships with both of their parents are stable and legally recognized. This applies to all children, whether their parents are of the same or opposite sex. The American Academy of Pediatrics recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual.[1–9] When 2 adults participate in parenting a child, they and the child deserve the serenity that comes with legal recognition.

Children born or adopted into families headed by partners who are of the same sex usually have only 1 biologic or adoptive legal parent. The other partner in a parental role is called the "coparent" or "second parent." Because these families and children need the permanence and security that are provided by having 2 fully sanctioned and legally defined parents, the Academy supports the legal adoption of children by coparents or second parents. Denying legal parent status through adoption to coparents or second parents prevents these children from enjoying the psychologic and legal security that comes from having 2 willing, capable, and loving parents.

Several states have considered or enacted legislation sanctioning second-parent adoption by partners of the same sex. In addition, legislative initiatives assuring legal status equivalent to marriage for gay and lesbian partners, such as the law approving civil unions in Vermont, can also attend to providing security and permanence for the children of those partnerships.

Many states have not yet considered legislative actions to ensure the security of children whose parents are gay or lesbian. Rather, adoption has been decided by probate or family courts on a case-by-case basis. Case precedent is limited. It is important that a broad ethical mandate exist nationally that will guide the courts in providing necessary protection for children through coparent adoption.

Coparent or second-parent adoption protects the child's right to maintain continuing relationships with both parents. The legal sanction provided by coparent adoption accomplishes the following:

1. Guarantees that the second parent's custody rights and responsibilities will be protected if the first parent were to die or become incapacitated. Moreover, second-parent adoption protects the child's legal right of relationships with both parents. In the absence of coparent adoption, members of the family of the legal parent, should he or she become incapacitated, might successfully challenge the surviving coparent's rights to continue to parent the child, thus causing the child to lose both parents.
2. Protects the second parent's rights to custody and visitation if the couple separates. Likewise, the child's right to maintain relationships with both parents after separation, viewed as important to a positive outcome in separation or divorce of heterosexual parents, would be protected for families with gay or lesbian parents.
3. Establishes the requirement for child support from both parents in the event of the parents' separation.
4. Ensures the child's eligibility for health benefits from both parents.
5. Provides legal grounds for either parent to provide consent for medical care and to make education, health care, and other important decisions on behalf of the child.
6. Creates the basis for financial security for children in the event of the death of either parent by ensuring eligibility to all appropriate entitlements, such as Social Security survivors benefits.

On the basis of the acknowledged desirability that children have and maintain a continuing relationship with 2 loving and supportive parents, the Academy recommends that pediatricians do the following:

- Be familiar with professional literature regarding gay and lesbian parents and their children.
- Support the right of every child and family to the financial, psychologic, and legal security that results from having legally recognized parents who are committed to each other and to the welfare of their children.
- Advocate for initiatives that establish permanency through coparent or second-parent adoption for

The recommendations in this statement do not indicate an exclusive course of treatment or serve as a standard of medical care. Variations, taking into account individual circumstances, may be appropriate.

children of same-sex partners through the judicial system, legislation, and community education.

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GLBT Advisory Committee

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AMA Policy Regarding Sexual Orientation

General Policies:

H-65.992 Continued Support of Human Rights and Freedom. Our AMA continues (1) to support the dignity of the individual, human rights and the sanctity of human life, and (2) to oppose any discrimination based on an individual's sex, sexual orientation, gender identity, race, religion, disability, ethnic origin, national origin or age and any other such reprehensible policies. (Sub. Res. 107, A-85; Modified by CLRPD Rep. 2, I-95; Reaffirmation A-00; Reaffirmation A-05; Modified: BOT Rep. 11, A-07)

H-65.983 Nondiscrimination Policy. The AMA affirms that it has not been its policy now or in the past to discriminate with regard to sexual orientation or gender identity. (Res. 1, A-93; Reaffirmed: CCB Rep. 6, A-03; Modified: BOT Rep. 11, A-07)

H-65.990 Civil Rights Restoration. The AMA reaffirms its long-standing policy that there is no basis for the denial to any human being of equal rights, privileges, and responsibilities commensurate with his or her individual capabilities and ethical character because of an individual's sex, sexual orientation, gender, gender identity, or transgender status, race, religion, disability, ethnic origin, national origin, or age. (BOT Rep. LL, I-86; Amended by Sunset Report, I-96; Modified: Res. 410, A-03)

Physician-centered policies:

B-1.50 Discrimination. Membership in any category of the AMA or in any of its constituent associations shall not be denied or abridged because of sex, color, creed, race, religion, disability, ethnic origin, national origin, sexual orientation, gender identity, age, or for any other reason unrelated to character, competence, ethics, professional status or professional activities.

B-6.524 Council on Ethical and Judicial Affairs. To receive appeals filed by applicants who allege that they, because of sex, color, creed, race, religion, disability, ethnic origin, national origin, sexual orientation, gender identity, or age, or for any other reason unrelated to character or competence have been unfairly denied membership in a component and/or constituent association, to determine the facts in the case, and to report the findings to the House of Delegates. If the Council determines that the allegations are indeed true, it shall admonish, censure, or in the event of repeated violations, recommend to the House of Delegates that the constituent and/or component association involved be declared to be no longer a constituent and/or component member of the AMA;

E-9.03 Civil Rights and Professional Responsibility. Opportunities in medical society activities or membership, medical education and training, employment, and all other aspects of professional endeavors should not be denied to any duly licensed physician because of race, color, religion, creed, ethnic affiliation, national origin, sex, sexual orientation, gender identity, age, or handicap. (IV) Issued prior to April 1977; Updated June 1994; Updated 2007

E-9.12 Patient-Physician Relationship: Respect for Law and Human Rights. The creation of the patient-physician relationship is

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contractual in nature. Generally, both the physician and the patient are free to enter into or decline the relationship. A physician may decline to undertake the care of a patient whose medical condition is not within the physician's current competence. However, physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity or any other basis that would constitute invidious discrimination. Furthermore, physicians who are obligated under pre-existing contractual arrangements may not decline to accept patients as provided by those arrangements. (I, III, V, VI) Issued July 1986; Updated June 1994.

H-200.951 Strategies for Enhancing Diversity in the Physician Workforce. Our AMA supports increased diversity across all specialties in the physician workforce in the categories of race, ethnicity, gender, sexual orientation/gender identity, socioeconomic origin and persons with disabilities. (CME Rep. 1, I-06; Reaffirmed: CME Rep. 7, A-08)

G-630.130 Discrimination. It is the policy of our AMA not to hold meetings or pay member, officer or employee dues in any club, restaurant, or other institution that has exclusionary policies based on gender, race, color, religion, national origin, gender identity, or sexual orientation. (Res. 101, I-90; Reaffirmed: Sunset Report, I-00; Consolidated: CLRPD Rep. 3, I-01; Modified: BOT Rep. 11, A-07)

H-295.969 Nondiscrimination Toward Medical School and Residency Applicants. Our AMA urges (1) the Liaison Committee on Medical Education to amend the Standards for Accreditation of Medical Education Programs Leading to the MD Degree, Part 2, Medical Students, Admissions to read: "In addition, there must be no discrimination on the basis of sex, age, race, creed, national origin, gender identity, or sexual orientation"; and (2) the Accreditation Council for Graduate Medical Education to amend the "General Essentials of Accredited Residencies, Eligibility and Selection of Residents" to read: "There must be no discrimination on the basis of sex, age, race, creed, national origin, gender identity or sexual orientation." (Res. 12, A-89; Reaffirmed: Sunset Report, A-00; Modified: BOT Rep. 11, A-07).

H-310.919 Eliminating Questions Regarding Marital Status, Dependents, Plans for Marriage or Children, Sexual Orientation, Gender Identity, Age, Race, National Origin and Religion During the Residency and Fellowship Application Process. Our AMA: 1. opposes questioning residency or fellowship applicants regarding marital status, dependents, plans for marriage or children, sexual orientation, gender identity, age, race, national origin, and religion. 2. will work with the Accreditation Council for Graduate Medical Education, the National Residency Matching Program, and other interested parties to eliminate questioning about or discrimination based on marital and dependent status, future plans for marriage or children, sexual orientation, age, race, national origin, and religion during the residency and fellowship application process. 3. will continue to support efforts to enhance racial and ethnic diversity in medicine. Information regarding race and ethnicity may be voluntarily provided by residency and fellowship applicants. (Res. 307, A-09)

H-295.878 Eliminating Health Disparities - Promoting Awareness and Education of Lesbian, Gay, Bisexual, and Transgender (LGBT) Health Issues in Medical Education. Our AMA: (1) supports the right of medical students and residents to form groups and meet on-site to further their medical education or enhance patient care-without regard to their gender, gender identity, sexual orientation, race, religion, disability, ethnic origin, national origin or age; (2) supports students and residents who wish to conduct on-site educational seminars and workshops on health issues in Lesbian, Gay, Bisexual, and Transgender communities; and (3) encourages the Liaison Committee on Medical Education and the Accreditation Council for Graduate Medical Education to include Lesbian, Gay, Bisexual, and Transgender health issues in the cultural competency curriculum for medical education. (Res. 323, A-05)

D-295.995 Adoption of Sexual Orientation Nondiscrimination and Gender Identity in LCME Accreditation. Our AMA will urge the Liaison Committee on Medical Education to expand its current accreditation standard to include a nondiscriminatory statement related to all

aspects of medical education, and to specify that the statement must address sexual orientation and gender identity. (Res. 305, A-99; Modified: BOT Rep. 11, A-07)

H-295.955 Teacher-Learner Relationship in Medical Education. The AMA recommends that each medical education institution have a widely disseminated policy that: (1) sets forth the expected standards of behavior of the teacher and the learner; (2) delineates procedures for dealing with breaches of that standard, including: (a) avenues for complaints, (b) procedures for investigation, (c) protection and confidentiality, (d) sanctions; and (3) outlines a mechanism for prevention and education. The AMA urges all medical education programs to regard the following Code of Behavior as a guide in developing standards of behavior for both teachers and learners in their own institutions, with appropriate provisions for grievance procedures, investigative methods, and maintenance of confidentiality. CODE OF BEHAVIOR The teacher-learner relationship should be based on mutual trust, respect, and responsibility. This relationship should be carried out in a professional manner, in a learning environment that places strong focus on education, high quality patient care, and ethical conduct. A number of factors place demand on medical school faculty to devote a greater proportion of their time to revenue-generating activity. Greater severity of illness among inpatients also places heavy demands on residents and fellows. In the face of sometimes conflicting demands on their time, educators must work to preserve the priority of education and place appropriate emphasis on the critical role of teacher. In the teacher-learner relationship, each party has certain legitimate expectations of the other. For example, the learner can expect that the teacher will provide instruction, guidance, inspiration, and leadership in learning. The teacher expects the learner to make an appropriate professional investment of energy and intellect to acquire the knowledge and skills necessary to become an effective physician. Both parties can expect the other to prepare appropriately for the educational interaction and to discharge their responsibilities in the educational relationship with unfailing honesty. Certain behaviors are inherently destructive to the teacher-learner relationship. Behaviors such as violence, sexual harassment, inappropriate discrimination based on personal characteristics must never be tolerated. Other behavior can also be inappropriate if the effect interferes with professional development. Behavior patterns such as making habitual demeaning or derogatory remarks, belittling comments or destructive criticism fall into this category. On the behavioral level, abuse may be operationally defined as behavior by medical school faculty, residents, or students which is consensually disapproved by society and by the academic community as either exploitive or punishing. Examples of inappropriate behavior are: physical punishment or physical threats; sexual harassment; discrimination based on race, religion, ethnicity, sex, age, sexual orientation, gender identity, and physical disabilities; repeated episodes of psychological punishment of a student by a particular superior (e.g., public humiliation, threats and intimidation, removal of privileges); grading used to punish a student rather than to evaluate objective performance; assigning tasks for punishment rather than educational purposes; requiring the performance of personal services; taking credit for another individual's work; intentional neglect or intentional lack of communication. On the institutional level, abuse may be defined as policies, regulations, or procedures that are socially disapproved as a violation of individuals' rights. Examples of institutional abuse are: policies, regulations, or procedures that are discriminatory based on race, religion, ethnicity, sex, age, sexual orientation, gender identity, and physical disabilities; and requiring individuals to perform unpleasant tasks that are entirely irrelevant to their education as physicians. While criticism is part of the learning process, in order to be effective and constructive, it should be handled in a way to promote learning. Negative feedback is generally more useful when delivered in a private setting that fosters discussion and behavior modification. Feedback should focus on behavior rather than personal characteristics and should avoid pejorative labeling. Because people's opinions will differ on whether specific behavior is acceptable, teaching programs should encourage discussion and exchange among teacher and learner to promote effective educational strategies. People in the teaching role (including faculty, residents,

and students) need guidance to carry out their educational responsibilities effectively. Medical schools are urged to develop innovative ways of preparing students for their roles as educators of other students as well as patients. (BOT Rep. ZZ, I-90; Reaffirmed by CME Rep. 9, A-98; Reaffirmed: CME Rep. 2, I-99; Modified: BOT Rep. 11, A-07)

H-225.961 Medical Staff Development Plans. 1. All hospitals/health systems incorporate the following principles for the development of medical staff development plans: (a) The medical staff and hospital/health system leaders have a mutual responsibility to: cooperate and work together to meet the overall health and medical needs of the community and preserve quality patient care; acknowledge the constraints imposed on the two by limited financial resources; recognize the need to preserve the hospital/health system's economic viability; and respect the autonomy, practice prerogatives, and professional responsibilities of physicians. (b) The medical staff and its elected leaders must be involved in the hospital/health system's leadership function, including: the process to develop a mission that is reflected in the long-range, strategic, and operational plans; service design; resource allocation; and organizational policies. (c) Medical staffs must ensure that quality patient care is not harmed by economic motivations. (d) The medical staff should review and approve and make recommendations to the governing body prior to any decision being made to close the medical staff and/or a clinical department. (e) The best interests of patients should be the predominant consideration in granting staff membership and clinical privileges. (f) The medical staff must be responsible for professional/quality criteria related to appointment/reappointment to the medical staff and granting/renewing clinical privileges. The professional/quality criteria should be based on objective standards and the standards should be disclosed. (g) The medical staff should be consulted in establishing and implementing institutional/community criteria. Institutional/community criteria should not be used inappropriately to prevent a particular practitioner or group of practitioners from gaining access to staff membership. (h) Staff privileges for physicians should be based on training, experience, demonstrated competence, and adherence to medical staff bylaws. No aspect of medical staff membership or particular clinical privileges shall be denied on the basis of sex, race, age, creed, color, national origin, religion, disability, ethnic origin sexual orientation, or physical or mental impairment that does not pose a threat to the quality of patient care. (i) Physician profiling must be adjusted to recognize case mix, severity of illness, age of .patients and other aspects of the physician's practice that may account for higher or lower than expected costs. Profiles of physicians must be made available to the physicians at regular intervals. 2. The AMA communicates the medical staff development plan principles to the President and Chair of the Board of the American Hospital Association and recommend that state and local medical associations establish a dialogue regarding medical staff development plans with their state hospital association. BOT Rep. 14, A-98) E-10.05 Potential Patients. (1) Physicians must keep their professional obligations to provide care to patients in accord with their prerogative to choose whether to enter into a patient-physician relationship. (2) The following instances identify the limits on physicians' prerogative: (a) Physicians should respond to the best of their ability in cases of medical emergency (Opinion 8.11, "Neglect of Patient"). (b) Physicians cannot refuse to care for patients based on race, gender, sexual orientation, gender identity or any other criteria that would constitute invidious discrimination (Opinion 9.12, "Patient-Physician Relationship: Respect for Law and Human Rights"), nor can they discriminate against patients with infectious diseases (Opinion 2.23, "HIV Testing"). (c) Physicians may not refuse to care for patients when operating under a contractual arrangement that requires them to treat (Opinion 10.015, "The Patient-Physician Relationship"). Exceptions to this requirement may exist when patient care is ultimately compromised by the contractual arrangement. (3) In situations not covered above, it may be ethically permissible for physicians to decline a potential patient when: (a) The treatment request is beyond the physician's current competence. (b) The treatment request is known to be scientifically invalid, has no medical indication, and offers no possible benefit to the patient (Opinion 8.20,

"Invalid Medical Treatment"). (c) A specific treatment sought by an individual is incompatible with the physician's personal, religious, or moral beliefs. (4) Physicians, as professionals and members of society, should work to assure access to adequate health care (Opinion 10.01, "Fundamental Elements of the Patient-Physician Relationship").* Accordingly, physicians have an obligation to share in providing charity care (Opinion 9.065, "Caring for the Poor") but not to the degree that would seriously compromise the care provided to existing patients. When deciding whether to take on a new patient, physicians should consider the individual's need for medical service along with the needs of their current patients. Greater medical necessity of a service engenders a stronger obligation to treat. (I, VI, VIII, IX) Issued December 2000 based on the report "Potential Patients, Ethical Considerations," adopted June 2000. Updated December 2003. * Considerations in determining an adequate level of health care are outlined in Opinion 2.095, “The Provision of Adequate Health Care.”

Patient-centered policies:

H-160.991 Health Care Needs of the Homosexual Population. 1. Our AMA: (a) believes that the physician's nonjudgmental recognition of sexual orientation and behavior enhances the ability to render optimal patient care in health as well as in illness. In the case of the homosexual patient this is especially true, since unrecognized homosexuality by the physician or the patient's reluctance to report his or her sexual orientation and behavior can lead to failure to screen, diagnose, or treat important medical problems. With the help of the gay and lesbian community and through a cooperative effort between physician and the homosexual patient effective progress can be made in treating the medical needs of this particular segment of the population; (b) is committed to taking a leadership role in: (i) educating physicians on the current state of research in and knowledge of homosexuality and the need to take an adequate sexual history; these efforts should start in medical school, but must also be a part of continuing medical education; (ii) educating physicians to recognize the physical and psychological needs of their homosexual patients; (iii) encouraging the development of educational programs for homosexuals to acquaint them with the diseases for which they are at risk; (iv) encouraging physicians to seek out local or national experts in the health care needs of gay men and lesbians so that all physicians will achieve a better understanding of the medical needs of this population; and (v) working with the gay and lesbian community to offer physicians the opportunity to better understand the medical needs of homosexual and bisexual patients; and (c) opposes, the use of "reparative" or "conversion" therapy that is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that the patient should change his/her homosexual orientation. 2. Our AMA will (a) educate physicians regarding: (i) the need for women who have sex exclusively with women to undergo regular cancer and sexually transmitted infection screenings due to their comparable or elevated risk for these conditions; and (ii) the need for comprehensive screening for sexually transmitted diseases in men who have sex with men; and (b) support our partner medical organizations in educating women who have sex exclusively with women on the need for regular cancer screening exams, the risk for sexually transmitted infections, and the appropriate safe sex techniques to avoid that risk. 3. Our AMA will use the results of the survey being conducted in collaboration with the Gay and Lesbian Medical Association to serve as a needs assessment in developing such tools and online continuing medical education (CME) programs with the goal of increasing physician competency on gay, lesbian, bisexual, and transgender health issues. 4. Our AMA will continue to explore opportunities to collaborate with other organizations, focusing on issues of mutual concern in order to provide the most comprehensive and up-to-date education and information to physicians to enable the provision of high quality and culturally competent care to gay men and lesbians. (CSA Rep. C, I-81; Reaffirmed: CLRPD Rep. F, I-91; CSA Rep. 8 - I-94; Appended: Res. 506, A-00; Modified and Reaffirmed: Res. 501, A-07; Modified: CSAPH Rep. 9, A-08)

H-65.976 Nondiscriminatory Policy for the Health Care Needs of the Homosexual Population. Our AMA encourages physician practices,

medical schools, hospitals, and clinics to broaden any nondiscriminatory statement made to patients, health care workers, or employees to include "sexual orientation, sex, or gender identity" in any nondiscrimination statement. (Res. 414, A-04; Modified: BOT Rep. 11, A-07)

D-65.996 Nondiscriminatory Policy for the Health Care Needs of the Homosexual Population. Our AMA will encourage and work with state medical societies to provide a sample printed nondiscrimination policy suitable for framing, and encourage individual physicians to display for patient and staff awareness-as one example: "This office appreciates the diversity of human beings and does not discriminate based on race, age, religion, ability, marital status, sexual orientation, sex, or gender identity." (Res. 414, A-04; Modified: BOT Rep. 11, A-07)

H-65.972 Repeal of "Don't Ask, Don't Tell" Our American Medical Association will advocate for repeal of "Don't Ask, Don't Tell," the common term for the policy regarding gay and lesbian individuals serving openly in the U.S. military as mandated by federal law Pub.L. 103-160 and codified at 10 U.S.C. § 654, the title of which is "Policy concerning homosexuality in the armed forces." (Res. 917, I-09)

H-270.997 Legal Restrictions on Sexual Behavior Between Consenting Adults. Our AMA supports in principle repeal of laws which classify as criminal any form of noncommercial sexual conduct between consenting adults in private, saving only those portions of the law which protect minors, public decorum, or the mentally incompetent. (BOT Rep. I, A-75; Reaffirmed: CLRPD Rep. C, A-89; Reaffirmed: Sunset Report, A-00)

D-65.995 Health Disparities Among Gay, Lesbian, Bisexual and Transgender Families. Our AMA will work to reduce the health disparities suffered because of unequal treatment of minor children and same sex parents in same sex households by supporting equality in laws affecting health care of members in same sex partner households and their dependent children. (Res. 445, A-05)

D-160.979 Health Care Disparities in Same-Sex Partner Households Our AMA will evaluate existing data concerning same-sex couples and their dependent children and report back to the House of Delegates to determine whether there is evidence of health care disparities for these couples and children because of their exclusion from civil marriage. (Res. 522, A-08)

H-60.940 Partner Co-Adoption. Our AMA will support legislative and other efforts to allow the adoption of a child by the same-sex partner, or opposite sex non-married partner, who functions as a second parent or co-parent to that child. (Res. 204, A-04) D-515.997 School Violence Our AMA will collaborate with the US Surgeon General on the development of a comprehensive report on youth violence prevention, which should include such issues as bullying, racial prejudice, discrimination based on sexual orientation or gender identity, and similar behaviors and attitudes. (CSA Rep. 11, I-99; Modified: BOT Rep. 11, A-07)

H-65.979 Sexual Orientation as an Exclusionary Criterion for Youth Organization. Our AMA asks youth oriented organizations to reconsider exclusionary policies that are based on sexual orientation or gender identity. (Res. 414, A-01; Modified: BOT Rep. 11, A-07) H-180.980 Sexual Orientation and/or Gender Identity as Health Insurance Criteria The AMA opposes the denial of health insurance on the basis of sexual orientation or gender identity. (Res. 178, A-88; Reaffirmed: Sub. Res. 101, I-97; Reaffirmed: CMS Rep. 9, A-07; Modified: BOT Rep. 11, A-07)

H-185.950 Removing Financial Barriers to Care for Transgender Patients. Our AMA supports public and private health insurance coverage for treatment of gender identity disorder as recommended by the patient's physician. (Res. 122; A-08) H-185.958 Equity in Health Care for Domestic Partnerships Our AMA: (1) encourages the development of domestic partner health care benefits in the public and private sector; and (2) supports equity of pre-tax health care benefits for domestic partnerships. (Res. 101, I-01)

H-215.965 Hospital Visitation Privileges for GLBT Patients. Our AMA encourages all hospitals to add to their rules and regulations, and to their Patient's Bill of Rights, language permitting same sex couples

and their dependent children the same hospital visitation privileges offered to married couples. (Res. 733, A-06)

H-295.879 Improving Sexual History Curriculum in the Medical School. Our AMA (1) encourages all medical schools to train medical students to be able to take a thorough and nonjudgmental sexual history in a manner that is sensitive to the personal attitudes and behaviors of patients in order to decrease anxiety and personal difficulty with sexual aspects of health care; and (2) supports the creation of a national public service announcement that encourages patients to discuss concerns related to sexual health with their physician and reinforces its commitment to helping patients maintain sexual health and well-being. (Res. 314, A-05)

H-440.885 National Health Survey. Our AMA supports a national health survey that incorporates a representative sample of the U.S. population of all ages (including adolescents) and includes questions on sexual orientation, gender identity, and sexual behavior. (CSA Rep. 4, A-03; Modified: BOT Rep. 11, A-07)

AMERICAN PSYCHOLOGICAL ASSOCIATION

Sexual Orientation, Parents, & Children

Adopted by the APA Council of Representatives July 28 & 30, 2004.

RESEARCH SUMMARY

Lesbian and Gay Parents

Many lesbians and gay men are parents. In the 2000 U. S. Census, 33% of female same-sex couple households and 22% of male same-sex couple households reported at least one child under the age of 18 living in the home. Despite the significant presence of at least 163,879 households headed by lesbian or gay parents in U.S. society, three major concerns about lesbian and gay parents are commonly voiced (Falk, 1994; Patterson, Fulcher & Wainright, 2002). These include concerns that lesbians and gay men are mentally ill, that lesbians are less maternal than heterosexual women, and that lesbians' and gay men's relationships with their sexual partners leave little time for their relationships with their children. In general, research has failed to provide a basis for any of these concerns (Patterson, 2000, 2004a; Perrin, 2002; Tasker, 1999; Tasker & Golombok, 1997). First, homosexuality is not a psychological disorder (Conger, 1975). Although exposure to prejudice and discrimination based on sexual orientation may cause acute distress (Mays & Cochran, 2001; Meyer, 2003), there is no reliable evidence that homosexual orientation per se impairs psychological functioning. Second, beliefs that lesbian and gay adults are not fit parents have no empirical foundation (Patterson, 2000, 2004a; Perrin, 2002). Lesbian and heterosexual women have not been found to differ markedly in their approaches to child rearing (Patterson, 2000; Tasker, 1999). Members of gay and lesbian couples with children have been found to divide the work involved in childcare evenly, and to be satisfied with their relationships with their partners (Patterson, 2000, 2004a). The results of some studies suggest that lesbian mothers' and gay fathers' parenting skills may be superior to those of matched heterosexual parents. There is no scientific basis for concluding that lesbian mothers or gay fathers are unfit parents on the basis of their sexual orientation (Armesto, 2002; Patterson, 2000; Tasker & Golombok, 1997). On the contrary, results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.

Children of Lesbian and Gay Parents

As the social visibility and legal status of lesbian and gay parents has increased, three major concerns about the influence of lesbian and gay parents on children have been often voiced (Falk, 1994; Patterson, Fulcher & Wainright, 2002). One is that the children of lesbian and gay parents will experience more difficulties in the area of sexual identity than children of heterosexual parents. For instance, one such concern is that children brought up by lesbian mothers or gay fathers will show disturbances in gender identity and/or in gender role behavior. A second category of concerns involves aspects of children's personal development other than sexual identity. For example, some observers have expressed fears that children in the custody of gay or lesbian parents would be more vulnerable to mental breakdown, would exhibit more adjustment difficulties and behavior problems, or would be less psychologically healthy than other children. A third category of concerns is that children of lesbian and gay parents will experience difficulty in social relationships. For example, some observers have expressed concern that children living with lesbian mothers or gay fathers will be stigmatized, teased, or otherwise victimized by peers. Another common fear is that children living with gay or lesbian parents will be more likely to be sexually abused by the parent or by the parent's friends or acquaintances.

Results of social science research have failed to confirm any of these concerns about children of lesbian and gay parents (Patterson, 2000, 2004a; Perrin, 2002; Tasker, 1999). Research suggests that sexual identities (including gender identity, gender-role behavior, and sexual orientation) develop in much the same ways among children of lesbian mothers as they do among children of heterosexual parents (Patterson, 2004a). Studies of other aspects of personal development (including personality, self-concept, and conduct) similarly reveal few differences between children of lesbian mothers and children of heterosexual parents (Perrin, 2002; Stacey & Biblarz, 2001; Tasker, 1999). However, few data regarding these concerns are available for children of gay fathers (Patterson, 2004b). Evidence also suggests that children of lesbian and gay parents have normal social relationships with peers and adults (Patterson, 2000, 2004a; Perrin, 2002; Stacey & Biblarz, 2001; Tasker, 1999; Tasker & Golombok, 1997). The picture that emerges

from research is one of general engagement in social life with peers, parents, family members, and friends. Fears about children of lesbian or gay parents being sexually abused by adults, ostracized by peers, or isolated in single-sex lesbian or gay communities have received no scientific support. Overall, results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents.

Resolution

WHEREAS APA supports policy and legislation that promote safe, secure, and nurturing environments for all children (DeLeon, 1993, 1995; Fox, 1991; Levant, 2000);

WHEREAS APA has a long-established policy to deplore "all public and private discrimination against gay men and lesbians" and urges "the repeal of all discriminatory legislation against lesbians and gay men" (Conger, 1975);

WHEREAS the APA adopted the Resolution on Child Custody and Placement in 1976 (Conger, 1977, p. 432)

WHEREAS Discrimination against lesbian and gay parents deprives their children of benefits, rights, and privileges enjoyed by children of heterosexual married couples;

WHEREAS some jurisdictions prohibit gay and lesbian individuals and same-sex couples from adopting children, notwithstanding the great need for adoptive parents (Lofton v. Secretary, 2004);

WHEREAS there is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children (Patterson, 2000, 2004; Perrin, 2002; Tasker, 1999);

WHEREAS research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish (Patterson, 2004; Perrin, 2002; Stacey & Biblarz, 2001);

THEREFORE BE IT RESOLVED that the APA opposes any discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services;

THEREFORE BE IT FURTHER RESOLVED that the APA believes that children reared by a same-sex couple benefit from legal ties to each parent;

THEREFORE BE IT FURTHER RESOLVED that the APA supports the protection of parent-child relationships through the legalization of joint adoptions and second parent adoptions of children being reared by same-sex couples;

THEREFORE BE IT FURTHER RESOLVED that APA shall take a leadership role in opposing all discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services;

THEREFORE BE IT FURTHER RESOLVED that APA encourages psychologists to act to eliminate all discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services in their practice, research, education and training (American Psychological Association, 2002);

THEREFORE BE IT FURTHER RESOLVED that the APA shall provide scientific and educational resources that inform public discussion and public policy development regarding discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services and that assist its members, divisions, and affiliated state, provincial, and territorial psychological associations.

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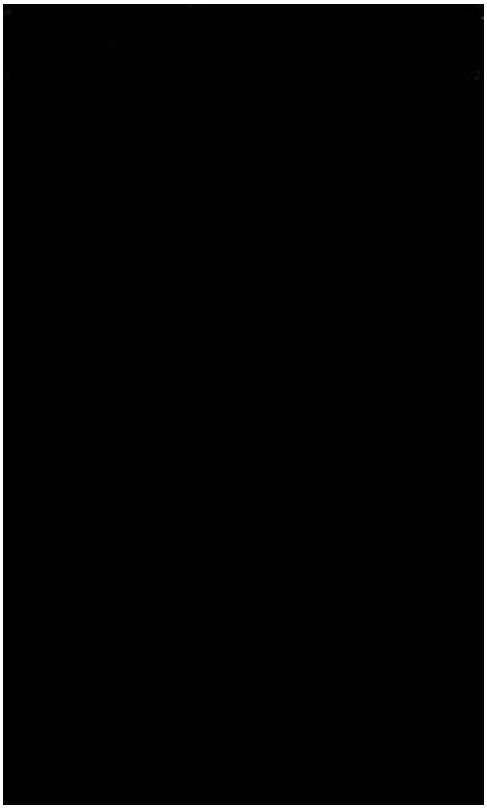

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Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults

CWLA's Position on Same-Sex Parenting

The Child Welfare League of America (CWLA) affirms that lesbian, gay, and bisexual parents are as well suited to raise children as their heterosexual counterparts.

Issue

Since 1920, CWLA and its member agencies have worked to ensure that abused, neglected, and other vulnerable children are protected from harm. CWLA strives to advance research-based best practices and sound public policy on behalf of the nine million vulnerable children served by our approximately 900 member agencies. We believe every child and youth has a value to society and we envision a future in which families, neighborhoods, communities, organizations, and governments ensure that all children and youth are provided with the resources and supports they need to grow into healthy, contributing members of society.

Among its member agencies, CWLA also values and encourages approaches to child welfare that are culturally competent and responsive to the specific needs of our society's broad and diverse population. Included in CWLA's definition of cultural competence is the ability to support children, youth, and families who are gay, lesbian, bisexual, or transgender (GLBT), as well as those individuals who may be questioning (Q) their sexual orientation or gender identity.

CWLA has operationalized its support of LGBTQ children, youth, and families by working in partnership with Lambda Legal, the nation's oldest and largest civil rights organization dedicated to supporting GLBT people, as well as people with HIV or AIDS. Together, CWLA and Lambda Legal have created an initiative entitled Fostering Transitions: CWLA/Lambda Joint Initiative to Support LGBTQ youth and Adults Involved with the Child Welfare System. The goal of the initiative is to increase the child welfare system's capacity to meet the needs of lesbian, gay, bisexual, transgender and questioning (LGBTQ) children, youth, adults, and families. CWLA is pursuing this goal by providing education, technical assistance, resource development and dissemination, programmatic coordination, and advocacy to CWLA member agencies and the greater child welfare field.

The number of children in America currently being raised by gay, lesbian, or bisexual parents is unknown. Resistance to lesbian and gay rights continues to force many lesbian and gay people to remain silent about their sexual orientation and relationships. But several studies indicate the numbers of children with same-sex parents in America are significant. According to the 2000 U.S. Census, there are approximately 600,000 same-sex couples in the United States (Simmons & O'Connell, 2003). More than 30% of these couples have at least one child, and over half of that 30% have two or more children. Therefore, parents of the same sex are raising at least 200,000 children--possibly more than 400,000--in America (these numbers do not include single lesbian or single gay parents). The 2000 U.S. Census also reported that lesbian and gay families live in 99.3% of all U.S. counties (Smith & Gates, 2001). A 1995 National Health and Social Life Survey by E.O. Lauman found that up to nine million children in America have gay or lesbian parents (Committee on Psychosocial Aspects of Child and Family Health, 2002).

Based on more than three decades of social science research and our 85 years of service to millions of families, CWLA believes that families with LGBTQ members deserve the same levels of support afforded other families. Any attempt to preclude or prevent gay, lesbian, and bisexual individuals or couples from parenting, based solely on their sexual orientation, is not in the best interest of children.

CWLA, therefore, affirms that gay, lesbian, and bisexual parents are as well suited to raise children as their heterosexual counterparts.

Existing Social Science Research Supporting Same-Sex Parenting

Existing research comparing lesbian and gay parents to heterosexual parents, and children of lesbian and gay parents to children of heterosexual parents, shows that common negative stereotypes are not supported (Patterson, 1995). Likewise, beliefs that lesbian and gay adults are unfit parents have no empirical foundation (American Psychological Association, 1995).

A growing body of scientific evidence demonstrates that children who grow up with one or two parents who are gay or lesbian fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual. Evidence shows that children's optimal development is influenced more by the nature of the relationships and interactions within the family unit than by its particular structural form (Perrin, 2002).

Studies using diverse samples and methodologies in the last decade have persuasively demonstrated that there are no systematic differences between gay or lesbian and non-gay or lesbian parents in emotional health, parenting skills, and attitudes toward parenting (Stacey & Biblarz, 2001). No studies have found risks to or disadvantages for children growing up in families with one or more gay parents, compared to children growing up with heterosexual parents (Perrin, 2002). Indeed, evidence to date suggests home environments provided by lesbian and gay parents support and enable children's psychosocial growth, just as do those provided by heterosexual parents (Patterson, 1995).

Prevalent heterosexism, sexual prejudice, homophobia, and resulting stigmatization might lead to teasing, bullying, and embarrassment for children about their parent's sexual orientation or their family constellation, restricting their ability to form and maintain friendships. Nevertheless, children seem to cope well with the challenges of understanding and describing their families to peers and teachers (Perrin, 2002). CWLA concludes that problems associated with such family formations do not emanate from within the family unit, but from prejudicial forces on the outside. Children of gay, lesbian, and bisexual parents are better served when society works to eliminate harmful, prejudicial attitudes directed toward them and their families.

CWLA Standards Support Same-Sex Parenting

CWLA's policies and standards are consistent with existing research on outcomes of children raised by gay, lesbian, or bisexual parents. CWLA develops and disseminates the Standards of Excellence for Child Welfare Services as benchmarks for high-quality services that protect children and youth and strengthen families and neighborhoods.

CWLA develops and revises its Standards through a rigorous, inclusive process that challenges child welfare agency representatives and national experts to address both persistent and emerging issues, debate current controversies and concerns, review research findings, and develop a shared vision reflecting the best current theory and practice. The Standards provide goals for the continuing improvement of services for children and families, and compare existing practice with what is considered most desirable for children and their families. The Standards are widely accepted as the foundation for sound U.S. child welfare practice, providing goals for the continuing improvement of services to children and their families.

As they pertain to LGBTQ children, youth, and families, CWLA's Standards of Excellence for Family Foster Care Services do not include requirements for adults present in the home to be legally related by blood, adoption, or legal marriage. Specifically, section 3.18 of the foster care standards establishes a policy of nondiscrimination in the selection of foster parents, stating: "The family foster care agency should not reject foster parent applicants solely due to their age, income, marital status, race, religious preference, sexual orientation, physical or disabling condition, or location of the foster home" (CWLA, 1995).

CWLA also articulates a strong position on the issue of nondiscrimination of adoptive applicants. Section 4.7 of the Standards of Excellence for Adoption Services states:

All applicants should be assessed on the basis of their abilities to successfully parent a child needing family membership and not on their race, ethnicity or culture, income, age, marital status, religion, appearance, differing lifestyle, or sexual orientation. Applicants should be accepted on the basis of an individual assessment of their capacity to understand and meet the needs of a particular available child at the point of the adoption and in the future (CWLA, 2000).

Thus, based on a preponderance of existing research substantiating the ability of gay, lesbian, and bisexual adults to serve as competent, caring, supportive and loving parents, and consistent with the Standards of Excellence for Child Welfare Services, CWLA commits its experience, its resources, and its influence to supporting LGBTQ children, youth, adults, and families involved in America's child welfare system.

Additional Resources

CWLA Online

- More information about CWLA
- More information about the CWLA/Lambda Legal joint LGBTQ initiative

Empirical Studies on Lesbian and Gay Parenting

- American Psychological Association, Lesbian and Gay Parenting
- American Psychological Association, Resources on Lesbian and Gay Parenting
- American Academy of Pediatrics, *Technical Report: Co-parent or Second Parent Adoption by Same-Sex Parents*
- American Civil Liberties Union, *Too High A Price: The Case Against Restricting Gay Parenting*

Books, Articles, and Chapters on Lesbian and Gay Parenting

- http://www.apa.org/pi/l&bbks.html
- http://www.apa.org/pi/l&gart.html

Legal and Advocacy Organizations:

- Lambda Legal
- American Civil Liberties Union Lesbian and Gay Rights Project
- Family Pride Coalition
- Parents, Families, and Friends of Lesbians and Gays
- Children of Lesbians and Gays Everywhere

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THE STRUGGLE FOR SAME-SEX MARRIAGE

Norval D. Glenn

The heated debates about same-sex marriage are focused largely on the probable social effects of same-sex marriage, civil unions, and similar legal recognitions of homosexual pairings. My concern here is with a related but distinctly different topic, namely, what will be (and already have been) the social consequences of the political struggle for same-sex marriage. The ultimate effects depend in large measure on the outcome of the struggle, of course, but they also depend on such properties of the battle as its duration and the specific forms it takes. There may be unintended casualties and/or benefits, and some participants in the struggle admit to goals other than attainment or prevention of same-sex marriage. Together, these possible consequences are what I call side effects. I lack certain knowledge about what these generally undiscussed and unrecognized possible effects may be, but I fear they are largely negative. More optimistically, I think they may be largely avoidable.

The main stated concern of opponents to same-sex marriage and other legal recognitions of same-sex pairings is likely harm to the institution of marriage. Although it may be possible to open marriage to same-sex couples without harming the institution, there are clear dangers to marriage in the political and ideological conflict about same-sex marriage. These lie in a blurring of the distinction between high and low commitment relationships, in a blurring of the distinction between marriage as an institution and mere "close relationships," and in a politically motivated denial of the value of fathers for the socialization, development, and well being of children. It also seems likely that the debate about same-sex relationships will lead to a re-evaluation of some aspects of the privileging of marriage over other care-giving relationships–a development that, while arguably overdue, poses risks for marriage.

Considerable blurring of the distinction between high and low commitment relationships has already occurred in the United States, and it has occurred to a greater extent in several other countries. In the U. S., a good many private companies and municipalities have given insurance and similar benefits to the "domestic partners" of their employees. Although inauguration of these benefits was in response to the gay rights movement, they are often extended to cohabiting heterosexual partners as well as to partners of homosexual employees. There have apparently been two major reasons for the inclusion of heterosexuals, first, to broaden the base of support for the benefits, and second, to avoid legal challenge on the grounds of sex discrimination. Whatever the reasons, an effect of the inclusion of heterosexuals has been to extend some of the rights previously reserved for married persons to those who are not willing to marry and assume the responsibilities of marriage. Whereas traditionally major social statuses have carried both rights and responsibilities, which have been inextricably linked, heterosexual domestic partnerships give rights and perquisites without attendant responsibilities. For instance, they often provide or partially pay for medical insurance for partners even though the employees have no legal obligation to pay the partners' medical bills. The same is true of homosexual domestic partnerships although gay and lesbian couples who would marry if they could—and thus take on the risks, financial and otherwise, that marriage entails—can hardly be blamed for taking advantage of a one-sided arrangement. However, domestic partnerships allow many homosexual couples who are not highly committed to one another, and who would not take on the responsibilities and risks of marriage if they could, to gain benefits previously reserved for married couples. The destructive consequences for marriage, and for society as a whole, seem rather obvious, though they have rarely been discussed.

Consider that the family codes in all 50 states impose on spouses some kind of obligation to provide financial support to one another, often including specific obligations to support a spouse who cannot support himself or herself. These obligations are somewhat less binding in the present era of unilateral no-fault divorce than they once were, but there are still strong social pressures against abandoning a sick or disabled spouse. Although not usually codified in family law, there are also strong social obligations to provide physical care to spouses

who need it. Thus, husbands and wives do a great deal for one another to prevent either from becoming a burden on society. Even deceased spouses usually leave property and/or pension benefits that help keep the surviving spouse from being dependent on the public coffers. In return for the obligations spouses discharge vis a vis one another, they are granted, among other things, spousal benefits from employers. Even when the cost is paid by private employers, it is ultimately borne by the public via the cost of goods and services. Thus spousal employee benefits and spousal property rights are an important part of an intricate web of costs and rewards that are expressions of the social contract. They may exist largely for the benefit of children, but they also provide for the care of adults.

Except in six states and the District of Columbia, domestic partnerships in the United States are private arrangements between employers and employees. In several other modern societies, domestic partnerships and similar arrangements are legally recognized statuses, usually open to both homosexual and heterosexual couples. However, their effects on marriage may be less than in the United States. In many of those societies, the benefits attached to employment in the United States are provided by the state and depend on neither employment nor marital status. Furthermore, in some of those countries so many other influences have tended to blur the distinction between marriage and relationships of low commitment that the effects on marriage of domestic partnerships and similar state recognized pairings may be largely superfluous.

The blurring of the distinction between marriage as an institution and mere "close relationships" is also well underway, largely for reasons unrelated to the political struggle for same-sex marriage. This change has been ratified (and according to some critics has been aided and abetted) by the emergence of the academic specialty of "close personal relationships," which includes marital relationships but gives little attention to the institutional aspects of marriage. This development in modern societies has been associated with the emergence (especially in the United States) of an extreme form of the conjugal family system, in which marriage is the central relationship in the family system, and the socially approved purposes of marriage have become personal and "hedonistic", as opposed to communalistic and for the benefit of the extended family. This development is reflected in the operational definition of marital success in terms of the happiness and satisfaction of the married persons.

The roots of this change go back for at least a couple of centuries, well before the possibility of same-sex marriage was contemplated by most observers of the family. However, acceptance of the arguments made by some advocates of same-sex marriage would bring this trend to its logical conclusion, namely, the definition of marriage as being for the benefit of those who enter into it rather than as an institution for the benefit of society, the community, or any social entity larger than the couple. A common recent argument has been that same-sex couples should be allowed to marry in recognition of the fact that they have "loving relationships", the operational definition of loving relationships being long-term sexual relationships. Historically, however, heterosexual marriage has very rarely been considered a reward for entering into mutually gratifying relationships. Rather, it has been a condition for the social recognition of such relationships, one imposed for the purpose of regulation of sexual activity and provision for offspring that may result from it. To be sure, persons have been given esteem and social approval for entering into a socially recognized status, and these rewards have provided motivation for marrying, but the social purpose of marriage has usually not been in doubt.

Current conditions are historically unique, of course, including an unprecedented separation of sexual activity from reproduction. Sexual relations among unmarried persons are now common and are not widely or severely stigmatized. For many if not most adult members of modern societies, marriage is not a condition for the establishment of sexual relationships. Whether the lifting of the stigma once associated with nonmarital sex is good or bad is a matter of values and is the focus of much disagreement, at least in the United States. Whatever position one takes on this issue, however, it does not logically support the argument that attainment of an ongoing sexual relationship should, in itself, be the basis for social rights and privileges. Rather, the very separation of sex from reproduction that is often given as a reason for the restructuring of modern families undermines the argument that almost any ongoing consensual adult sexual relationship deserves to be socially privileged.

Another argument frequently advanced in support of same-sex marriage as well as the joint adoption of children by same-sex couples is that the gender of parents does not matter, that two parents of the same sex can, all else being equal, parent as effectively as two opposite-sex parents. "Dozens of studies of same-sex parenting" allegedly provide evidence for this conclusion.

There *have* been dozens of studies of same-sex parenting, but this body of research leaves open the question about the relative efficacy of same-sex and opposite-sex parenting. The most frequent criticism made of the studies is that they all have used small convenience samples that may not be representative of all same-sex parents and their children, and that *is* an

important limitation. More important for the issue at hand, however, is that the studies have not used large and carefully matched comparison groups of parents and children in intact heterosexual families. The quite valid argument made by the researchers is that since most children living with same-sex parents have experienced a parental divorce, for the purpose of assessing the effects of living in a [almost always] lesbian household, the appropriate comparison group is other children of divorce and their parents. Although that argument is valid, the resulting research fails to cast light on the same-sex-opposite-sex parenting issue.

The research that would provide relevant evidence has not been done, and, because it would be expensive and difficult, is not likely soon to be done. It would require a large and representative sample of same-sex parents in intact relationships and children with whom both parents bonded while the children were infants. The results might be different for male and female same-sex parents, and thus a large number of parents of both genders would be required. Only this kind of research, which would include a large and representative comparison sample of heterosexual parents and their biological or adopted-in-infancy children, could come close to separating the effects of parental gender from the effects of such influences as parental divorce, a deficit of parental resources in single-parent families, and the frequent stresses and strains of step-family relationships.

The absence of this needed evidence also means of course that there is no conclusive evidence about the importance of both a father and a mother for child development and well-being. However, there are strong theoretical reasons for believing that both fathers and mothers are important, and the huge amount of evidence of relatively poor average outcomes among fatherless children makes it seem unlikely that these outcomes are solely the result of the correlates of fatherlessness and not of fatherlessness itself.

It would be unfortunate if the question about the importance of opposite-sex parents were to be closed prematurely in the absence of solid evidence. That may well happen, though, due to the political struggle for same-sex marriage. Given the widespread support for same-sex marriage among social and behavioral scientists, it is becoming politically incorrect in academic circles even to suggest that arguments being used in support of same-sex marriage might be wrong. There already seems to be some reluctance on the part of researchers and scholars to address issues concerning fatherlessness and the relative merits of same-sex and opposite-sex parenting.

The debate about same-sex marriage has raised issues concerning why married and unmarried persons are treated differently by employers and under the law. Some of this questioning has come from conservatives as well as from unmarried adults who feel they are treated unfairly. For instance, Marvin Olasky, a Christian conservative, has asked why caring relationships between persons who have a sexual relationship should be privileged over, say, siblings who care for one another, or over a caring relationship between a son or daughter and an elderly parent. Unmarried adults who take the position that the total compensation package for married and unmarried employees should be the same have been emboldened by the same-sex marriage debate to reassert their position. As Shari Motro put it in a recent Op-Ed piece in the *New York Times*, "Advocates for gay marriage have exposed a huge blind spot: married-only benefits also discriminate against America's 86 million unmarried adults...." According to this line of reasoning, allowing homosexuals to marry would serve only a small proportion of the victims of marital advantage; thus the best way to eliminate discrimination against gays would be to abolish the privileges of marriage. As the battle for same-sex marriage continues, advocates of this view are likely to become more vocal.

For reasons I discuss above, I think the assault on spousal benefits is generally ill-advised; those who take on the risks and responsibilities of marriage serve social ends and deserve support in doing so. If the struggle for gay marriage should lead to any substantial reduction in such benefits, that would be an unfortunate side effect. On the other hand, Olasky's point that there are nonmarital care-giving relationships that deserve social support is well taken. It would be difficult to argue against privileging those relationships if that could be done without substantially reducing the social rewards of marriage. Furthermore, critics of marital privilege are correct in pointing out that pre-nuptial agreements now allow some married persons to avoid some of the major risks and responsibilities that marriage normally entails. Indeed, pre-nuptial agreements have contributed to the blurring of the distinction between high and low commitment relationships and are themselves a threat to the institution of marriage—perhaps as much so as domestic partnerships. However, this threat calls for restrictions on pre-nuptial agreements, or the withholding of spousal benefits from couples with such agreements, rather than a general reduction in spousal benefits.

Given all of the possible detrimental side effects of the conflict about same-sex marriage, a reasonable position for the defenders of marriage might seem to be that the sooner same-sex marriage is instituted and the conflict is ended, the better. A good many centrists and some conservatives have taken that position. They advocate a quick legitimating of same-sex marriage along

with elimination of domestic partnerships and other halfway measures to recognize same-sex relationships. These persons want to open the door to what they assume is a small percentage of homosexuals willing to take on the risks and responsibilities of marriage and to deny social recognition and special rights and privileges to couples, homosexual or heterosexual, with mere "enduring sexual relationships."

The reasoning behind this position might seem unassailable, except for one thing: a quick legitimating of same-sex marriage is not going to happen. The redefinition of marriage as including both heterosexual and homosexual pairings is too radical, flying in the face of thousands of years of tradition, and religious and moral objections to same-sex marriage are too widespread, at least in the United States, for this resolution of the political struggle to be possible. The conflict will not soon end, whatever the ultimate outcome may be. Minimizing negative side effects must be by controlling the nature of the struggle, not by quickly ending it.

In warfare between nations, there is a long tradition of the combatants agreeing to certain rules of engagement in order to avoid unnecessary "collateral damage," such as civilian casualties. Perhaps it is not unrealistic to hope that the participants in the same-sex marriage "war" can be persuaded to wage their battles in such a way as to avoid unnecessary collateral damage to the institution of marriage. Although some advocates of same-sex marriage may wish to weaken marriage by stripping it of its institutional trappings, many want to keep the institution strong and robust, and virtually all opponents of same-sex marriage see themselves as defenders of marriage. Those on each side of the debate who value marriage as an institution could and should take certain steps to help protect marriage. I turn first to what the advocates should do.

The position that any couple in a "loving relationship" deserves the rights, protections, and privileges of marriage should be abandoned, not only because its acceptance would harm marriage but because in the long run it is unlikely to be useful to same-sex marriage advocates. Acceptance of this position is indeed stepping out on the "slippery slope" discussed by such opponents of same-sex marriage as William Bennett. Use of the loving-relationship argument makes same-sex marriage advocates seem more radical than they need to be to make their case.

Those advocates should also make clear that they are willing to dismantle all existing domestic partnership arrangements in exchange for the right of homosexuals to marry or enter civil unions, even though in this exchange the aggregate-level gain in benefits to same-sex couples might be rather small.

The most important step that same-sex marriage advocates could take to avoid harm to marriage would probably be to stop claiming that fathers are not important for the development and welfare of children. Although this claim has some political utility to same-sex marriage advocates, it is not essential to their case. Legitimating of same-sex marriage would have a small effect, at most, on the percentage of fatherless children, and there is no precedent for prohibiting a family arrangement because it creates less than ideal conditions for children. Having two parents of the same gender may not be ideal for children, but it should be better than having only one parent, and children with only one parent are much more numerous than children with same-sex parents are ever likely to be. Most children living with same-sex parents are in step-family situations, and there is no evidence that homosexual step-families are worse for children than heterosexual step-families, which are known to be generally less than ideal and are much more numerous than homosexual step-families. The bottom line is that same-sex marriage advocates gain little from the fathers-are-not-important argument but risk harming marriage, and children, by making it.

In view of the fact that the overriding concern of most opponents of same-sex marriage seems to be the "defense of marriage," it might seem unnecessary to give advice to those persons about how to avoid harm to marriage. However, the view of some opponents that "all is lost" if same-sex marriage is adopted might be harmful to marriage in the long run. If the only thing that matters is preventing same-sex marriage, then little or no attention will be given to minimizing harm to marriage in case same-sex marriage comes about. Universal adoption of same-sex marriage in the United States is not inevitable, but it is likely, given the trends in other modern societies and the fact that young Americans are more receptive to same-sex marriage than older ones. Even the most adamant opponents of legal recognition of homosexual pairings should consider "what if." If same-sex marriage does come about, what is the best way for the change to happen? How can the institutional aspects of marriage be preserved as the redefinition of marriage occurs? These and similar questions should be entertained by persons who oppose same-sex marriage, say for religious reasons, even as they stiffen their opposition.

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71-1027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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INDEX

TABLE OF AUTHORITIES

Cases:

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 10a-17a and 18a-23a.

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file his Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra*, pp. a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case[1]

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18, 1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County[2] (T. 10).

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[1] T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

[2] Appellant McConnell is also petitioner before this Court in *McConnell* v. *Anderson*, petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

The efforts of appellants to get married evidently precipitated the Regents' decision not to employ Mr. McConnell.

Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T. 1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.[3]

[3] In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 16, Mr Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as

How the Federal Questions Were Raised

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra*, pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra*, p. 12a), and to the Supreme Court of Minnesota (App. *infra*, p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But

to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); Finger, *Sex Beliefs and Practices Among Male College Students*, 42 J. ABNORMAL AND SOCIAL PSYCH. 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law.

Only then will the public perceive that homosexuals are not freaks or unfortunate abberations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E. Westermarck, 2 Origin and Development of the Moral Idea 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, Homosexual Behavior Among Males 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.*, at 17; see also W. James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra*, at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.*, at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homo-

sexuality causes earthquakes. H. Hart, Law, Liberty and Morality 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

> "Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, Crime and the Human Mind 117 (1944), it is stated:

> "All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scientific community when he wrote as follows in 1935:

> "Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too." Reprinted in 107 Am. J. of Psychiatry 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, "a great injustice" to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.[4] This Court's decision, therefore, would affect the marriage laws of virtually every State in the Union.

[4] See, e.g., *Jones* v. *Hallhan*, W-152-70 (Ct. Apps. Ky. 1971).

I.

Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Meyer* v. *Nebraska*, 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits

and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie* v. *Connecticut, supra; Loving* v. *Virginia, supra; Griswold* v. *Connecticut, supra; Skinner* v. *Oklahoma, supra; Meyer* v. *Nebraska, supra.* Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer* v. *Nebraska, supra.* In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the

relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination. With regard to the due process component, see *Boddie* v. *Connecticut, supra; Griswold* v. *Connecticut, supra* (all the majority opinions); *Meyer* v. *Nebraska, supra.* With regard to the equal protection component of this argument, see *Loving* v. *Virginia, supra; McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Skinner* v. *Oklahoma, supra;* cf. *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving* v. *Virginia, supra.* Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. The institution of marriage "as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis" (App., *infra,* pp. 20a-21a). On its face, however, Minnesota law neither

states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold* v. *Connecticut*, *supra*.

Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving* v. *Virginia*, *supra*; *Cohen* v. *California*, 403 U.S. 15 (1971); *Street* v. *New York*, 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite

clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving* v. *Virginia*, 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently

> denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving* v. *Virginia*, 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra*, p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race (see, e.g., *Loving* v. *Virginia, supra; McLaughlin* v. *Florida, supra*), has not yet been extended to classifications based upon sex (see *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971),

which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

> In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the

difference is drawn between same sex and different sex marriages.[6]

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranted in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. *Connecticut*, 381 U.S. 479, 491-492 (Goldberg, J., concurring); see also, *Mindel* v. *United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is

[6] The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed* v. *Reed*, *supra*; *Loving* v. *Virginia*, *supra*; *McLaughlin* v. *Florida*, *supra*.

a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold* v. *Connecticut*, *supra*; *Loving* v. *Virginia*, 388 U.S. 1 (1967); cf. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold* v. *Connecticut*, *supra*.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2011, I electronically filed the foregoing "*Amicus Curiae* Brief of Eagle Forum Education & Legal Defense Fund in Support of Appellants in Support of Reversal" and its accompanying Addendum with the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. I certify that counsel of record for all participants in the case are registered CM/ECF users and that service on all participants will be accomplished by the Appellate CM/ECF System.

/s/ Lawrence J. Joseph

Lawrence J. Joseph