No. 14-1341

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL DEBOER; JANE ROWSE, individually and as parents and next of friend of N.D.-R, R.D.-R and J.D.-R, minors,

PLAINTIFFS-APPELLEES

v.

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan; BILL SCHUETTE, in his official capacity as Michigan Attorney General,

DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
No. 2:12-cv-10285-BAF-MJH (Hon. Bernard A. Friedman)

AMICUS CURIAE BRIEF OF THE MICHIGAN CATHOLIC CONFERENCE IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

The Michigan Catholic Conference discloses that it is not a subsidiary or affiliate of a publicly owned corporation and that there is not a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.[1]

[1] No party, counsel for any party, or person other than *amicus curiae* authored this brief in whole or in part, or made a monetary contribution to prepare or submit this brief. This brief is filed with the consent of all parties. *See* Blanket Consent of Appellant for Amicus, Apr. 29, 2014, ECF No. 44, and Blanket Consent of Appellee for Amicus, Apr. 29, 2014, ECF No. 45.

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STATEMENT OF IDENTITY AND INTEREST OF THE MICHIGAN CATHOLIC CONFERENCE

The Michigan Catholic Conference serves as the official voice of the Catholic Church in Michigan on matters of public policy. Its mission is to promote a social order that respects the dignity of human persons and serves the common good in accordance with the teachings of the Catholic Church. Its board of directors includes the active bishops of Michigan's seven Catholic dioceses. The Church teaches that the well-being of an individual and the family is intimately linked to a marriage between one man and one woman. The Michigan Marriage Amendment, rooted in history and secular in nature, is consistent with such teachings. Thus, the Michigan Catholic Conference supports the Michigan Marriage Amendment, which it believes is beneficial to families, children, and society.[2]

[2] The Michigan Catholic Conference's advocacy on this subject is not based on ill-will or animus towards same-sex couples, and by no means is an attempt to force its religious preferences on others. Rather, the Michigan Catholic Conference strongly believes, and the Church's catechism teaches, that marriage is, and has always been, defined as the physical and spiritual union of one man and one woman.

INTRODUCTION

It is the province of the States to define marriage, and to delineate the incidents of marriage that accompany that legally recognized institution. U.S. CONST. amend. X; *United States v. Windsor*, __ U.S. __; 133 S.Ct. 2675, 2689-2690 (2013) ("By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."); *Pennoyer v. Neff*, 95 U.S. 715, 734-735 (1878) ("The State . . . has [an] absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."). By history and tradition, Michigan has defined marriage as the union of one man and one woman. In 2004, the People of Michigan reaffirmed that historical and traditional definition of marriage by constitutional amendment. MICH. CONST. of 1963, art. I, § 25 (2004) ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.").

The district court should have summarily dismissed plaintiffs' attempt to revise Michigan's definition of marriage to encompass any committed relationship regardless of the participants' genders. The decision to set aside Michigan's choices regarding family relationships, outside of the political process, was a

usurpation of power, unauthorized by any article or amendment of the United States Constitution. The district court subjected Michigan's Marriage Amendment to exacting scrutiny that is reserved for only the most heinous types of discrimination. In doing so, the district court substituted its views on the nature of marriage for the understanding of Michigan's citizens who passed the Marriage Amendment. This Court should reaffirm Michigan's sovereign right to govern the domestic relationships of its citizens.

After vigorous debate in 2004, Michigan's citizens confirmed that marriage can only exist between one man and one woman. In doing so, Michigan's citizens did not vote to ban same-sex marriage. They voted to not permit the redefinition of marriage. They voted that marriage will retain its biological requirement of a male-female union rooted not just in tradition but nature. That millennia-old understanding reflects the undeniable fact that only such a union offers the possibility of procreation. Such procreative possibilities fulfill a societal purpose and alone justify elevating marriage over all other intimate relationships. Marriage so defined is the foundation of family and society and essential to the survival of our species. It encourages procreation in a setting that over centuries has proven to be in the best interests of children – a setting that includes both biological parents.

ARGUMENT

I. Marriage Rooted in Nature and Modified by Society Can Only Exist Between One Man and One Woman.

"Have you not read that He who created them from the beginning made them male and female, and said, for this reason a man shall leave his father and mother and be joined to his wife and the two shall become one flesh?" *Matthew* 19:4. The question Jesus posed informs the constitutional inquiry in this case. That is, if nature makes an essential differentiation between the sexes for the purpose of procreation, can a state rationally choose to elevate only that naturally procreative union to the exclusion of all others? Undeniably, the answer is yes. A state may choose to dignify, and burden, as a marriage only that procreative union without running afoul of the equal protection clause. Such regulation invokes no discrimination but only recognition that male and female were made in nature complementary of each other and their union is essential to the propagation of our species and the upbringing of children.

"[Marriage] is something more than a mere contract . . . It is an institution, in the maintenance of which in its purity 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." *Maynard v. Hill*, 125 U.S. 190, 210-211 (1888). The Michigan Catholic Conference and the seven dioceses that it represents believe,

and the Church's catechism teaches,[3] that marriage is only between one man and one woman. Michigan Catholic Conference, Diocesan Bishops' Letter Supporting Proposal 2 (Oct. 15, 2004) ("The God of Nature and Revelation established marriage as a union only between a man and a woman."). The People of Michigan agree. MICH. CONST. of 1963, art. I, § 25 (2004). The Michigan Catholic Conference and the People of Michigan's belief coincides with the historical secular definition of marriage.

> This understanding of marriage as the union of man and woman is shared by the Jewish, Christian, and Muslim traditions; by ancient Greek and Roman thinkers untouched by these religions; and by various Enlightenment philosophers. It is affirmed by both common and civil law and by ancient Greek and Roman law. Far from having been intended to exclude same-sex relationships, marriage as the union of husband and wife arose in many places, over several centuries, in which same-sex marriage was nowhere on the radar. Indeed, it arises in cultures that had no concept of sexual orientation and in some that fully accepted homoeroticism and even took it for granted.

Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, Backgrounder No. 2775 THE HERITAGE FOUNDATION 3 (2013).

Aristotle wrote:

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[3] *See* Catechism of the Catholic Church ¶ 1601 ("The matrimonial covenant, by which a man and a woman establish themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament."). *See also* Code of Canon Law, c. 1055 § 1.

> He who thus considers things in their first growth and origin, whether a state or anything else, will obtain the clearest view of them. In the first place there must be a union of those who cannot exist without each other; namely, of male and female, that the race may continue (and this is a union which is formed, not of deliberate purpose, but because, in common with other animals and with plants, mankind have a natural desire to leave behind them an image of themselves) . . . .

Aristotle, Book I of *Politics*. William Blackstone wrote that the marital union is "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." 1 WILLIAM BLACKSTONE, COMMENTARIES *126-127.

The Bible, Aristotle, and Blackstone's description of marriage as a one male and one female union ordered towards the survival of the human race underlies modern law governing marriage. The union of one man and one woman as "one flesh" explains why marriage has, as its essential attributes, the union of mind and body.

Union of mind requires consent. *See e.g.*, MICH. COMP. LAWS 551.2 (requiring "the consent of parties capable in law of contracting" as essential to form a valid marital union). "If the consent be lacking in a marriage, all other celebrations, even should the union be consummated, are rendered void." Pope Nicholas I, 866 A.D.; *see also* Code of Canon Law, c. 1057 § 1 ("The consent of

the parties, legitimately manifested between persons quali-fied by law, makes marriage; no human power is able to supply this consent.").

Union of body requires physical consummation. Historically, a marriage was void if it was not consummated. *See Graham v. Graham*, 33 F. Supp. 936, 938 (E.D. Mich. 1940) (holding that, although there is no Michigan decision directly on point, the law is well settled that the failure to consummate the marriage through sexual intercourse renders the marriage void).[4] *Graham's* reference to the law being well-settled was based upon the RESTATEMENT OF LAW OF CONTRACTS § 587 (1932). That section stated: "A bargain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal." It gave the following illustration: "A and B who are about to marry agree to forego sexual intercourse. The bargain is illegal."

Great Britain's Matrimonial Causes Act provided among the grounds on which a marriage is voidable: "(a) [t]hat the marriage has not been consummated owing to the incapacity of either party to consummate it; and (b) [t]hat the marriage has not been consummated owing to the willful refusal of the respondent

[4] *See also*, *Millar v. Millar*, 167 P. 394, 396 (Cal. 1917) (holding the secret determination to refuse to engage in sexual intercourse constituted fraud sufficient to annul a marriage because "[t]he obligation of the relation in this behalf is such . . . as to be essential to the very existence of the marriage relation, a proposition as to which there appears to be no dissent in the authorities."). (Citation and internal quotation marks omitted).

to consummate it.").[5] Matrimonial Causes Act, 1973, c. 18, § 12. Indeed, discussing a prisoner's right to marry, the Supreme Court observed that "most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated." *Turner v. Safely*, 482 U.S. 78, 96 (1987).

To "consummate" means "to make (marital union) complete by sexual intercourse." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 248 (10th ed. 1993). It is this generative act – without which there is no marriage – that leads inescapably to the conclusion that marriage is, by its nature, ordered toward the creation of offspring and their upbringing.

Only one male and one female can participate in the generative act of marriage consummation. Our Creator designed in nature the complimentary male and female reproductive organs for the ultimate unity essential to our survival – the creation of life. When a marriage is consummated, husband and wife join together for the common purpose of procreation. The possibility of conceiving a child

[5] Great Britain's recent Marriage (Same Sex Couples) Act amended this section by adding a provision that paragraphs (a) and (b) do not apply to the marriage of a same sex couple. Marriage (Same Sex Couples) Act 2013.

through the marital requirement of consummation fundamentally links marriage to procreation, and procreation to marriage.[6]

The procreative purpose of marriage, as evidenced by its requirement of consummation, is essential to our survival and the only reason that marriage is considered a fundamental right. *See*, *e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (describing marriage as "fundamental to our very existence and survival"); *Maynard*, 125 U.S. at 211 (marriage is the "foundation of the family and of society, without which there would be neither civilization nor progress"); and *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("[I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.").

Marriage, through intercourse, thus fulfills its societal purpose:

> The principal thing is that marriage shall subserve a vast and wonderful social end; for while the trees last, and the hills and the mountains remain as they are, the greatest thing in the world, human life, persists only in so far as it is renewed, and renewal means a chance of improvement. And so, in the sacred rites of marriage the great soul of the world comes home to you and pleads with you to give it incarnation. That is the social end of marriage . . . .

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[6] *See also*, Sherif Girgis, et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245 (2010) (noting the conceptual connection between children and marriage is evident by the way that marriage is sealed through consummation).

FELIX ADLER, MARRIAGE AND DIVORCE 17 (1905).

Michigan's choice involves no discrimination and no violation of the equal protection clause. If the law elevates marriage because it offers the possibility of procreation, and the class of persons entitled to unite in marriage comprises only those persons who can naturally procreate, the classification withstands constitutional scrutiny.[7] *Johnson v. Robison*, 415 U.S. 361, 383 (1974) ("When, as in this case, the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985) (holding that under rational basis review, "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement," a State's decision to act on those differences does not run afoul of the equal protection clause). Nor is the classification overbroad because it includes some persons who may not be able to procreate, such as the elderly or

[7] The fundamental link between marriage and procreation is further evidenced by laws prohibiting marriage within a certain degree of consanguinity. *See e.g.*, MICH. COMP. LAWS 551.3 and MICH. COMP. LAWS 551.4. A man shall not marry his sister because their offspring are prone to genetic disorders. If marriage concerned only a state sanctioned emotional relationship between two adults as opposed to a naturally procreative relationship, consanguinity laws would be unnecessary and presumably unconstitutional, there being no rational reason to prevent two consenting adults from marrying each other.

infertile.[8] Elderly and infertile men and women possess the ability to consummate a marriage and are able to satisfy the marital requirement of bodily union.

> The union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality); reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can *actualize* and allow them to *experience* their *real common good—their marriage* with the two goods, parenthood and friendship, which . . . are the parts of its wholeness as an intelligible common good even if, independently of what the spouses will, their capacity for biological parenthood will not be fulfilled by that act of genital union.

John M. Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049, 1066 (1994) (emphasis in the original).

Defining marriage as the union of one male and one female reflects the reality that, as historically and presently defined – only one man and one woman can unite in marriage. Since two females or two males cannot consummate a marriage, it follows that they cannot unite in marriage. *Baker v. Nelson*, 191

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[8] The district court noted that the "prerequisites for obtaining a marriage license under Michigan law do not include the ability to have children . . . ." Findings of Fact & Conclusions of Law, RE 151, Page ID #3965. Aside from the fact that the law is powerless to employ fertility prescreening, *see Hernandez v. Robles*, 7 N.Y.3d 338, 365 (2006) ("limiting marriage to opposite-sex couples likely to have children would require gross intrusive inquiries . . ."), the district court misses the point entirely. Marriage, by its nature, is open to fertility and the gift of life. Because marriage is "intertwined with openness to the gift of life, only a man and a woman can enter this unique relationship . . . Two persons of the same sex are incapable of entering into a marital union and of welcoming life between them." UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, MARRIAGE: UNIQUE FOR A REASON 2 (2011).

N.W.2d 185, 185-186 (Minn., 1971), *summarily aff'd*, 409 U.S. 810 (1972) (holding that "in commonsense and in a constitutional sense, there is a clear distinction between a martial restriction based upon race and one based upon the fundamental difference in sex"). Stated otherwise, the Michigan Marriage Amendment does not invidiously discriminate against homosexuals because of their homosexuality. Rather, the Michigan Marriage Amendment simply recognizes that two persons of the same sex cannot unite in marriage as historically understood and presently defined.

It follows that plaintiffs' equal protection claim fails as plaintiffs do not seek to get married, but to fundamentally displace marriage from its natural and historical roots and substitute in its place a concept unknown anywhere in the world before 2000.[9]

[9] The district court acknowledged that plaintiffs seek to "redefine" marriage. Findings of Fact & Conclusions of Law, RE 151, Page ID #3968. The enormity of that statement should not be overlooked. The Constitution has limits. The constitutional power of the judiciary is limited to hearing and deciding cases, not to enact positive law. Thus, even assuming that the Michigan Marriage Amendment is declared unconstitutional, it does not follow that Michigan *must* recognize same-sex unions to the same extent the Michigan Marriage Amendment recognized heterosexual unions. Courts may not act as a superlegislature and dictate to the states what types of unions they must recognize. Indeed, a state would be well within its rights to decide not to recognize, benefit, or burden any union, whether heterosexual, homosexual, or polygamous, thus leaving it to private citizens and religious organizations to decide which unions should be distinguished and dignified.

II. Marriage Connects Children to their Mothers and Fathers in a Stable Environment.

Marriage, defined to include only those persons who can naturally procreate, promotes a legitimate government interest in ensuring that a child is raised in a stable environment most conducive to the child's development and upbringing. That stable environment includes both biological parents, each of whom makes unique contributions to the child's growth and development. The possibility that a child may be conceived outside of marriage only reinforces that the central purpose of marriage is procreation in a suitable environment for the upbringing of children.

William Blackstone wrote that parents "would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish." BLACKSTONE, *supra* at 447. This natural law principle of parenting is enshrined into the civil institution of marriage. Throughout history, the institution of marriage served as a mechanism to legitimate, provide for, and educate children. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 695 (1st ed. 1828) (marriage was instituted "for the purpose of preventing the promiscuous intercourse of the sexes, promoting domestic felicity, and for securing the maintenance and education of our children"); Bruce C. Hafen, *The Constitutional Status of Marriage*, 81 MICH. L. REV. 463, 470 (1983) ("regulation of marital status has always been a fundamental element in helping human society induce the behavior needed for social as well as

individual survival"). Even Bertrand Russell, far from orthodox in his approach to morality, recognized that "it is through children alone that sexual relations become of importance to society, and worthy to be taken cognizance of by a legal institution." BERTRAND RUSSELL, MARRIAGE AND MORALS 156 (Liveright ed., 1970).

Michigan has a legitimate, indeed compelling, interest in encouraging naturally procreative relationships to occur in a stable environment. *Hess v. Pettigrew*, 261 Mich. 618, 621; 247 N.W. 90 (1933) ("Marriage is a civil contract but it is not a pure private contract. It is affected with a public interest and by a public policy. The status of children, preservation of the home, private morality, public decency, and the like afford ample grounds for special treatment of marriage as a contract, by statute and decision."). As Roscoe Pound explained almost a century ago, "in modern social conditions there are the social interests in the family as a social institution, in the protection of dependent persons, and in the rearing and training of sound and well-bred citizens for the future." Roscoe Pound, *Interests in Domestic Relations* 14 MICH. L. REV. 177, 196 (1916).

Marriage is permanent and stable. Its essential properties are "unity and indissolubility." Code of Canon Law, c. 1056. Marriage unites not only husband and wife, but husband, wife, *and* child. Naturally, a child bonds with his mother through gestation and nurturing. The relationship to the father, however, is

tenuous. Marriage, the permanent union of mother and father, serves to establish a lasting connection between a child and both of her biological parents.[10] It is this connection that serves the interests of society as it encourages the raising of children in an environment most conducive to the child's development and upbringing. Robert Rector, *Married Fathers: America's Greatest Weapon Against Child Poverty*, Special Report No. 117 THE HERITAGE FOUNDATION 14 (2012) (concluding that, "on average, having and raising children inside of marriage is more beneficial than having and raising a child outside of marriage").

The intuitive belief that marriage provides the best environment for raising children is substantiated by social science evidence, which "strongly suggests the prime way that marriage as a legal institution protects children is by increasing the likelihood that children will be raised by their mother and father in lasting, loving (or at least reasonably harmonious) family unions." INST. FOR AMERICAN VALUES & INST. FOR MARRIAGE AND PUB. POL'Y, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 7 (2006); A. Dean Byrd, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree*, 6 J.L. FAM. STUD. 213, 214 (2004)

[10] INST. FOR AMERICAN VALUES & INST. FOR MARRIAGE AND PUB. POL'Y, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 7 (2006) ("Because women are connected to their children naturally, through the process of gestation and birth, marriage is especially important for effectively connecting children to fathers, not only satisfying more children's longing for a loving father, but creating more equal distribution of parenting burdens between men and women.").

("There is no fact that has been established by social science literature more convincingly than the following: all variables considered, children are best served when reared in a home with married mother and father."). For example:

> Research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabitation relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents.

Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?* CHILD TRENDS RESEARCH BRIEF, at 6 (2002).

Similarly, "[m]arried biological parenting has been shown to increase the probability of positive outcomes and decrease the risk of negative outcomes across a wide range of developmental categories and life outcomes." Brief of *Amicus Curiae*, American College of Pediatricians at 11, *Donaldson, et. al., v. State of Montana*, No. DA 11-0451 (Mont. Jan. 23, 2012).[11] For example, "[c]hildren navigate developmental stages more easily, are more solid in their gender identity, perform better in academic tasks at school, have fewer emotional disorders and

[11] In support of its conclusion, the American College of Pediatricians cites research showing that there is a decreased risk for delinquency, low self-esteem, poor school performance, smoking, suicide, and risk of adult depression in children of married parents.

become better functioning adults when they are reared by dual-gender parents." Byrd, *supra* at 214. The American College of Pediatricians also consider the traditional family unit as advantageous to children because "[d]ata supports the widely-held understanding that fathers and mothers make unique contributions to the rearing of their children, and that these unique contributions can have a significant positive impact across a range of developmental categories." Brief of *Amicus Curiae*, American College of Pediatricians, *supra* at 12. It has been said that:

> The child needs father and mother; but it does not need them only, as some think, alternately, now the father's influence and then the mother's, or in some things the father's influence and in other things the mother's. The child needs the father's masculine influence, and the mother's feminine influence always together, the two streams uniting to pour their fructifying influence through the child's life into the life of humanity.

ADLER, *supra* at 26.

As an example of a unique contribution that fathers make, data show that teens who have involved fathers are significantly more likely to graduate from college. W. Bradford Wilcox, *A Key to College Success: Involved Dads*, THE ATLANTIC (Apr. 22, 2014). Marriage is crucial to a father's involvement in a child's life as data "indicate[] that adolescents are much more likely to report that they have a father who is involved or highly involved if their biological parents are

married." *Id*. The correlation between a father's involvement and marriage is consistent for families of all education levels. *Id*.

The district court found that social science evidence overwhelmingly supported the view that there is no substantial difference between children raised by heterosexual couples and children raised by homosexual couples. Findings of Fact & Conclusions of Law, RE 151, Page ID #3965. This finding, however, is not relevant to the actual issue raised in this case. The issue is not whether homosexual couples can raise a child to be well adjusted in the same manner as a heterosexual couple, but whether the People of Michigan could conceivably believe that marriage, limited to one man and one woman, would be in the best interests of a child's development.

The United Nations' Declaration of the Rights of the Child provides that "[t]he child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents . . . ." Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/RES/14/1386 (Nov. 20, 1959). The People of Michigan share this common sense belief that it is in the best interests of a child to be raised in a stable environment by both their biological father and mother, each of whom uniquely influence the child's life. *Marriage: Unique for a Reason*, *supra* note 7, at 17 ("Children learn not only what it means to be a man or a

woman from their father and mother, but also how men and women are meant to relate and interact in society. A husband and a wife thus form an incomparable model of interpersonal communion for their children."). "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 Dep't of Children & Family Servs.*, 358 F.3d 804, 820 (11th Cir. 2004). By definition, any other arrangement detracts from the goal of having a child raised by his parents. It follows that the decision by the People of Michigan to benefit, and burden, only the man-woman relationship as a marriage was a legitimate way to promote this rational belief, even if some other arrangements can produce well-adjusted children. *Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.") (Citations and internal quotation marks omitted).

Encouraging heterosexual marriage helps to ensure not only that a child will be born into a stable relationship, but that children will remain in that stable environment. This fact alone justifies Michigan's decision to elevate only this

naturally procreative relationship.[12] Research demonstrates that the traditional family unit is significantly more likely to remain together than unmarried persons having children together.[13] Marriage thus promotes a child's continued relationship with both biological parents, which is advantageous to her development and upbringing.

Moreover, the possibility that a child may be conceived outside of marriage only reinforces the central purpose of marriage is procreation in a suitable environment for the upbringing of children. As discussed, the family structure most conducive to a child's development includes both his biological parents. Elevating this family structure thus serves channeling and normative functions. That is, "[m]arriage exist[s] to encourage men and women to create the next generation in the right context and simultaneously to discourage the creation of children in other contexts . . . . ." Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 44 (2004).

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[12] *See* HAFEN, *supra* at 475-476 ("[C]ommitments inherent in formal families do increase the likelihood of stability and continuity for children. Those factors are so essential to child development that they alone may justify the legal incentives and preferences traditionally given to permanent kinship units based on marriage.").

[13] Marcia J. Carleson, *Trajectories of Couple Relationship Quality after Childbirth: Does Marriage Matter?* Center for Child Wellbeing Working Paper #2007-11-FF (2007).

"A democratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens, with all that implies." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Marriage, limited to one man and one woman, promotes the healthy, well rounded growth of children as they progress to adulthood. This relationship "is the natural and fundamental group unit of society and is entitled to protection by society and the State." Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/RES/3/217 A (Dec. 10, 1948). Thus, it cannot be said that the Michigan Marriage Amendment, enacted for the very purpose of securing and preserving this benefit "for our society and for future generations of children," MICH. CONST. of 1963, art. I, § 25 (2004), is unconstitutional.

III. Michigan's Constitutional Marriage Amendment Reaffirmed through the Democratic Process that Traditional Marriage is for the Public Good.

Since the founding of our Nation, States have exclusively governed and bestowed rights, privileges, and duties on family relationships. *Windsor*, 133 S.Ct. at 2689-2690 ("By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."). States have done so through the democratic process, a process that allows the People to debate and decide. Here, through the power of constitutional initiative reserved to the People of Michigan to directly influence the state's preeminent

governing document, MICH. CONST. of 1963, art. XII, § 2, Michigan voters reaffirmed the traditional view of marriage. MICH. CONST. of 1963, art. I, § 25. It is this traditional view that is ordered towards our survival as a species, a nation, and a state. And it is this traditional view that promotes stability and the upbringing of children. Even assuming the People's choice reflected only a policy choice that marriage should be reserved for a man and a woman, that policy choice cannot, in this action, be cast aside in favor of the ascendant views of a currently popular minority.

"[I]t cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted." H.L.A. HART, THE CONCEPT OF LAW 185 (Oxford Univ. Press 2nd ed. 1994). Any law is the result of a value judgment, defined as "a judgment assigned a value (as good or bad) to something." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* at 1301. Collectively, our laws represent an accumulation of value judgments. Criminal laws punish murderers because we, as a society, value life. Drugs are prohibited because we, as a society, place no value on their recreational use. Property is protected from being taken by the government for private use because we value individual property owner's rights

even if those rights impede the achievement of societal benefits. *See County of Wayne v. Hathcock*, 471 Mich. 445; 684 N.W.2d 765 (2004). At their core, all laws represent value judgments. That is, as between two or more alternatives, laws represent the People's collective judgment about how things ought to be.

The Michigan Marriage Amendment is no different. Limiting marriage to one man and one woman is based on the People's value judgment that heterosexual unions should be elevated over other unions. The law is simply a judgment based on the People's collective wisdom that one family arrangement – heterosexual marriage – is preferred over possible arrangements, for example homosexual or polygamous unions. The People's decision to value this relationship is not surprising. Less than 15 years ago, homosexual marriage was not recognized anywhere in the world. Polygamous marriages have been prohibited since the founding of this Country.[14] Heterosexual marriages, however, have always been encouraged and their value to society certain.

Even the legal positivist Justice Oliver Wendell Holmes wrote that "some form of permanent association between the sexes" was considered, among other things, a necessary element in any civilized society. Oliver Wendell Holmes,

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[14] *See Reynolds v. United States*, 98 U.S. 145, 165 (1878) (concluding that with respect to the laws prohibiting polygamy "it may safely be said there has never been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity" than death).

Natural Law, 32 HARV. L. REV. 40, 41 (1918). The traditional marital relationship has its roots in antiquity, in the founding of our nation, and, until recently, was considered unique in every Country in the world and every State in the Union. "That the law has long treated the classes as distinct . . . suggests that there is a commonsense distinction" between traditional marriage and all other relationships. *Heller*, 509 U.S. at 327. To disregard Michigan's value judgment under the auspice of the equal protection clause would be "to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every state." *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) ("The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . .").

Valuing traditional marriage as opposed to any other union is not based on animus or ill-will towards homosexuals any more than drug laws exhibit animus and ill-will towards drug users. The institution of marriage as the primary unit of society has endured. It thus cannot reasonably be questioned that the People would seek to protect this institution. To attribute the People's rational choice in protecting and promoting this institution, which by its nature is ordered towards

our survival, to the mere disapproval or animus towards homosexuality is to disregard the People's collective wisdom that marriage is for the public good. Indeed, "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette v. BAMN*, 572 U.S. ____; (2014) (slip op. at 17) (plurality opinion by Kennedy, J.). For, as H.L.A. Hart said:

> Men are not devils dominated by a wish to exterminate each other, and the demonstration that, given only the modest aim of survival, the basic rules of law and morals are necessities, must not be identified with the false view that men are predominantly selfish and have no disinterested interest in the survival and welfare of their fellows.

HART, *supra* at 196.

Moreover, to cast aside the collective wisdom of the People would be to cast aside democracy itself. "In the federal system States 'respond through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times.'" *Schuette*, 572 U.S. at ___ (slip op. at 15), quoting *Bond v. United States*, 564 U.S. ___; ___ (2011) (slip op., at 9).

> Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure.

Schuette, 572 U.S. at ___ (slip op. at 15-16).

The People of Michigan enacted the Marriage Amendment through the democratic process. That process was open to discussion, debate, principled argument, and, most importantly, a vote. As that process was designed, the discussion was full, the debate intense, and the argument vigorous. In the end, a politically popular minority representing just 4% of the population garnered 41% of the vote but lost its bid to fundamentally redefine marriage in Michigan.[15] To hold that the democratic process was for naught, that the time, money, and advocacy on these issues was an exercise in futility, "would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common." *Id.* at 16. That common right "is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.*

In the end, "[g]reat constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K.&T. Ry. Co. of Texas v. May*, 194 U.S. 267, 270 (1904). Perceived social inequities must be resolved through the democratic process:

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[15] *See Talking Points, How Many LGBT people live in Michigan*, available at www.equalitymi.org; and 2004 Official Michigan General Election Results, available at www.michigan.gov/sos.

> The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

Schuette, 572 U.S. at ___ (slip op. at 17).

CONCLUSION

The People of Michigan had a rational reason to perpetuate the institution of marriage as the union of one male and one female. Marriage so defined is the foundation of family and society and integral to our survival and development as a species. It connects children to their mothers and fathers, each positively contributing to the child's education and development. The preservation of this benefit through the Michigan Marriage Amendment is not only rational, but admirable. The district court should be reversed and the People of Michigan's right to shape their future through the democratic process affirmed.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and length requirements of Fed. R. App. P. 32(a)(5) and (a)(7). This brief has been prepared in a proportionally spaced typeface using Word Times New Roman font in 14 point pitch and contains 6,760 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

CERTIFICATE OF SERVICE

I certify that on May 14, 2014, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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