Nos. 14-2386, 14-2387, 14-2388, 14-2526

In The United States Court of Appeals For The Seventh Circuit

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees,
v.

GREG ZOELLER, et al.,
Defendants-Appellants.

On Appeal From The United States District Court For The Southern District of Indiana

Case Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD
The Honorable Richard L. Young Presiding

and

VIRGINIA WOLF, et al.,
Plaintiffs-Appellees,
v.

SCOTT WALKER, et al.,
Defendants-Appellants.

On Appeal From The United States District Court For The Western District of Wisconsin

Case No. 3:14-cv-00064-BBC
The Honorable Barbara B. Crabb Presiding

BRIEF OF *AMICI CURIAE* JOAN HEIFETZ HOLLINGER, COURTNEY JOSLIN, AND SIXTY-FIVE OTHER FAMILY LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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Appellate Court Nos: 14-2386, 14-2387, 14-2388, 14-2526

Short Caption: Baskin v. Zoeller and Wolf v. Walker

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Morrison & Foerster LLP

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INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a),[1] *Amici Curiae*—all scholars of family law[2]—respectfully submit this brief in support of Plaintiffs-Appellees.[3] Specifically, *Amici* wish to provide the Court with an exposition of Indiana and Wisconsin law, as expressed both through statutes and case law, with respect to marriage, parentage, and the well-being of children—all of which are central to the issues now before the Court.[4]

SUMMARY OF ARGUMENT

Indiana Code Annotated section 31-11-1-1 and Wisconsin Statutes Annotated section 765.001 (the "marriage bans") preclude same-sex couples from entering civil marriage in Indiana and Wisconsin and deny recognition to marriages that same-sex couples have validly entered elsewhere.

Indiana and Wisconsin Appellants and their *amici* argue that the marriage bans further state interests with regard to the well-being of children. As family law professors, *Amici* are committed to promoting the welfare of children and encouraging parents to be responsible for their children's well-being. *Amici* agree that marriage can benefit children by providing support and stability to their families. The marriage bans, however, do not further child well-being or responsible parenting. As *Amici*

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[1]This brief is filed pursuant to the Joint Notice of Consent to the Filing of Amicus Curiae Briefs, Case No. 14-2386 (filed Jul. 14, 2014), ECF No. 28.

[2]*Amici* professors are listed in Appendix A.

[3]Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

[4]*Amici* agree with Appellees that heightened scrutiny should be applied in this case and that under any standard of review the Indiana and Wisconsin marriage bans are unconstitutional.

demonstrate, Appellants' arguments to the contrary lack any basis in history, law, or logic.

In Indiana, Wisconsin, and elsewhere, couples marry for many reasons, including a desire for public acknowledgment of their mutual commitment to share their lives with each other through a legally binding union. Appellants and their *amici* ignore the multiple purposes of marriage, and suggest that the ability to procreate without assistance is the raison d'être of marriage. But Indiana and Wisconsin have never limited marriage to couples who can or want to have children through "natural procreation." Indeed, it would be constitutionally impermissible to limit marriage only to such couples.

Second, Appellants and their *amici* argue that marriage can be limited to those couples who promote childrearing settings in which children are raised by their biological mothers and fathers. (*See* Brief and Required Short Appendix of Appellants (filed 7/15/2014), ECF No. 34 ("Appellants' Br.") 34[5]; Family-Pac Amicus Br. (Case No. 14-2037, filed 7/22/2014), ECF No. 32 ("Family-Pac Br.") 13.) Such optimal parenting arguments are wholly unsupported by social science, which overwhelmingly demonstrates that it is the quality and nature of the parental relationship, not a parent's gender or their biological relationship to a child, that is critical to positive child adjustment and outcomes. Appellants' and their *amici's* assertions also conflict with Indiana and Wisconsin laws that do not view biology as the sole criterion for parentage and that reject the notion that a parent's gender is legally relevant to determinations of

[5]Wisconsin Appellants' brief incorporates by reference Indiana Appellants' discussion of "responsible procreation." (Wisconsin State Defendants-Appellants' Br. and Short Appendix, 56 (filed 7/23/2014), ECF No. 53-1.) References to "Appellants' Br." herein refer to both the Indiana and Wisconsin Appellants' Briefs on these issues.

children's best interests. Moreover, a desire to encourage or require "gender-complementary" marriages, (Family-Pac Br. 13), violates constitutional boundaries by basing law on conformity to sex- or gender-based stereotypes. Even if promoting "natural procreation" were a permissible state interest, it would still fail as a matter of rational basis review because there is no rational relationship between the exclusion of same-sex couples from marriage and the decisions of different-sex couples regarding marriage, procreation, or childrearing.

The Indiana and Wisconsin marriage bans actually undermine these States' commitment to children's well-being. The bans do not assist children in any family, but they do inflict direct and palpable harms on same-sex couples and their children who are denied access to hundreds of important benefits under state and federal law. In addition, the categorical bans signal that the relationships of same-sex couples are deemed unequal to other couples.

Finally, even if there were any rational reason to believe that the bans would induce better behavior by different-sex couples, it is unconstitutional to punish children as a means to influence adult behavior.

In sum, the purported state interests that Appellants and their *amici* rely on to justify disparate treatment of different-sex and same-sex couples do not reflect the policies that Indiana or Wisconsin law pursues regarding marriage, parentage, and the best interests of children. As the U.S. Supreme Court recently reaffirmed, a desire to mark same-sex couples as less worthy of respect is an insufficient interest to sustain a law. *United States v. Windsor*, 133 S. Ct. 2675 (2013).[6] Accordingly, under the federal

[6]*See Romer v. Evans*, 517 U.S. 620, 632 (1996) (laws based solely on "animus" towards certain classes violate equal protection clause). "Animus" as used in *Romer* is a term of art and

Constitution, Appellants' claims provide no rational basis for denying same-sex couples the right to marry.

ARGUMENT

I. PROCREATION IS NOT A NECESSARY ELEMENT OF MARRIAGE.

Appellants' argument implies that the exclusion of same-sex couples from marriage is justified because, unlike many different-sex couples, they cannot procreate biologically through a conjugal union with each other. Appellants and their *amici* use this reductive difference to justify denying same-sex couples the right to marry. For example, Appellants argue that "[c]ivil marriage recognition exists for important reasons having nothing to do with same-sex couples. It arises from the need to protect the only procreative sexual relationship that exists . . . ." (Appellants' Br. 33). Implicit in this reasoning is that same-sex couples do not need or deserve marriage, because of this single, purportedly essential difference between different-sex and same-sex couples.

Appellants' view of marriage is not consistent with Indiana or Wisconsin civil law, the laws of other states, or the federal Constitution. An ability or desire to procreate has never been a requirement of marriage, and, if it were, it would be unconstitutional. Moreover, these States extend the right to marry to different-sex couples who are unable to procreate without assistance.

A. The Ability or Desire to Procreate Has Never Been the Defining Feature of or a Prerequisite for a Valid Marriage.

Appellants' suggestion that the right to marry is inextricably intertwined with procreation is—in a word—wrong. Indiana and Wisconsin, like all other states, have

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does not mean subjective dislike or hostility, but simply the absence of a rational reason for excluding a particular group from legal protections.

never required prospective spouses to agree to procreate, to remain open to procreation, or even to be able to procreate as a condition of marrying. *See* Ind. Code Ann. §§ 31-11-1-2–31-11-1-4 (other than the different-sex requirement, the only requirements for contracting and consenting to marriage are that a person be unmarried, at least eighteen years old, marrying someone who is not closely related, and capable of assenting to marriage); Wis. Stat. Ann. §§ 765.02–765.03 (same). Indeed, both States prohibit certain different-sex couples from marrying unless they can prove they cannot procreate. *See* Ind. Code Ann. § 31-11-1-2 (first cousins can marry only if both parties are sixty-five or older); Wis. Stat. Ann. § 765.03(1) (first cousins can marry if the female is at least fifty-five, or if either party submits an affidavit stating permanent sterility); *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."). Indeed, given that the choice whether or not to engage in procreative sexual activity is constitutionally protected from state intervention, *see, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965), it would also be constitutionally impermissible to condition marriage on such an ability or desire.

Indiana and Wisconsin statutory laws establish that an ability or desire to procreate is not a requirement for a valid marriage. For example, infertility (which is a very common condition)[7] is not a basis for voiding a marriage in these or any other state. *See* Ind. Code Ann. §§ 31-11-9-2–31-11-9-3 (marriage voidable if one party was

[7]Data from 2002 show that approximately seven million women and four million men suffer from infertility. Michael L. Eisenberg, M.D. et al., *Predictors of not Pursuing Infertility Treatment After an Infertility Diagnosis: Examination of a Prospective U.S. Cohort,* 94 Fertility & Sterility No. 6, 2369 (Nov. 2010). Approximately two to three million couples are infertile. *Encyc. of Contemp. Am. Soc. Issues* 1182 (Michael Shally-Jensen ed., 2011).

unable to contract due to age or mental incompetency, or if the marriage was entered based on fraud); Wis. Stat. Ann. §§ 765.02–765.03 (same); Amicus Curiae Brief of Historians of Marriage.

A review of both States' statutory grounds for divorce reinforces the conclusion that procreation is not the core purpose of marriage, much less an essential requirement. Infertility is not and never has been a statutory fault-based ground for ending a valid marriage in either State. Today, like all other states, Wisconsin and Indiana permit "no-fault" divorce.[8] Indeed, in Wisconsin, the only grounds for divorce are now the no-fault ground of "irretrievable breakdown of the marriage," which is premised on a failure of the spousal relationship, not on concerns about procreation or infertility. *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. Rev. 1669, 1704 (2011)

Contrary to Appellants' narrow view of marriage, in Indiana and Wisconsin, as in every other state, marriage serves and has always served multiple purposes, the vast majority of which focus on enabling the spouses to protect and foster their personal, intimate, and mutually dependent relationship to one another. Married couples enjoy many protections and benefits and assume mutual responsibilities pertaining, for instance, to health care decisions, workers' compensation and pension benefits, property ownership, spousal support, inheritance, taxation, insurance coverage, and testimonial privileges.[9]

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[8]Indiana added the no-fault ground of "irretrievable breakdown of the marriage" to its divorce provisions in 1973. 1973 Ind. Acts 1585. Wisconsin changed its divorce statute in 1977 to provide only no-fault grounds for divorce. Wis. Stat. Ann. § 767.315; *see Dixon v. Dixon*, 319 N.W.2d 846, 850-51 (Wisc. 1982).

[9]*See, e.g.*, Ind. Code Ann. § 34-46-3-1 (spousal testimonial privilege); Wis. Stat. Ann. § 905.05 (same); *Troue v. Marker*, 252 N.E.2d 800 (Ind. 1969) (cause of action available to

In sum, Appellants' attempts to reduce the meaning and purpose of marriage to facilitating and protecting the fruits of procreative sexual activity are not supported by Indiana or Wisconsin law. As the U.S. Supreme Court has explained, this reductionist view of marriage demeans the institution and the relationship between the spouses. *See Lawrence v. Texas*, 539 U.S. at 567 ("[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

B. The Constitutional Rights to Marry and to Procreate Are Distinct and Independent.

As a matter of constitutional law, the U.S. Supreme Court declared in *Turner v. Safley*, 482 U.S. 78 (1987), that individuals cannot be excluded from the right to marry simply because they are unable to engage in procreation. The *Turner* Court recognized that incarcerated prisoners—even those with no opportunity to procreate—have a fundamental right to marry, because many "important attributes of marriage remain . . . after taking into account the limitations imposed by prison life." *Id.* at 95. The Court explained that marriage has multiple purposes unrelated to procreation, such as the "expressions of emotional support and public commitment," "exercise of religious faith," "expression of personal dedication," and "the receipt of government benefits." *Id.* at 95–96.

Moreover, Appellants' attempt to justify the marriage exclusion under the guise of promoting a particular method of procreation should be approached with caution, as procreative decisions are quintessential matters of individual liberty. *See, e.g.*,

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spouses for loss of consortium); *Fitzgerald v. Meissner & Hicks, Inc.*, 157 N.W.2d 595 (Wis. 1968) (same); Ind. Code Ann. § 29-1-3-1 (spousal right to take an elective share of the value of the estate); Wis. Stat. Ann. § 861.02 (same); Ind. Code Ann. § 29-1-2-1 (spousal right to intestate succession); Wis. Stat. Ann. § 852.01 (same); Ind. Code §§ 31-15-7-1, 31-15-7-4, 31-15-7-5 (spousal rights to property division and maintenance); Wis. Stat. Ann. §§ 767.61, 767.56 (same); Ind. Code § 6-3-4-2 (spousal right to file joint income taxes); Wis. Stat. Ann. § 71.03(2)(d) (same).

Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[I]t is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as to the decision whether to bear or beget a child."); *Griswold*, 381 U.S. at 479, 485-86 (married couples have a constitutionally protected right to engage in non-procreative sexual intimacy).

In sum, there is no historical or legal justification to support Appellants' claim that "the general capacity of opposite-sex couples to procreate through sexual intercourse justifies the voluntary marriage regulatory scheme offered by the State." (Appellants' Br. 36.)

II. A CLAIMED PREFERENCE FOR DUAL GENDER PARENTING BY BIOLOGICAL PARENTS IS BELIED BY INDIANA AND WISCONSIN LAWS AND IS INCONSISTENT WITH CONSTITUTIONAL PRINCIPLES.

Appellants and their *amici* also argue that it is permissible for the States to limit marriage to different-sex couples "to encourage child-rearing environments where parents care for their biological children in tandem." (Appellants' Br. 13.)[10] Appellants argue that even the marriages of non-procreative different-sex couples are allowed because they provide a "model [of] family life" for "potentially procreative men and women." (Appellants' Br. 37.) These arguments run counter to Indiana, Wisconsin, and federal law as well as to social science.

[10]This effort to justify the exclusion of same-sex couples from marriage by repeating the State's preference for married, different-sex parents merely circles back to the challenged classification without justifying it. *Romer*, 517 U.S. at 633 (discriminatory classifications must serve some "independent and legitimate legislative end.").

A. Indiana and Wisconsin Do Not Require a Biological Relationship to Establish a Legal Parent-Child Relationship.

Under Indiana and Wisconsin laws, there are many ways to establish a legal parent-child relationship. A biological or genetic connection to a child is one such means, but not always a necessary or sufficient one. For example, when a child is born during a marriage, the husband can be recognized as the legal father in some cases, even if he is not the biological father. *See, e.g.*, *Vanderbilt v. Vanderbilt*, 679 N.E.2d 909 (Ind. Ct. App. 1997) (mother was barred by laches from challenging paternity of her husband, where she knew from the child's birth that he was not the biological father of the child but still allowed her husband to name and raise the child); *Randy A.J. v. Norma I.J.*, 655 N.W.2d 195 (Wis. Ct. App. 2002) (concluding that the mother's husband, who had raised the child, was equitable father to child and biological father was not a legal father); Wis. Stat. Ann. § 767.863 (1m) (genetic tests to challenge the paternity of a child born during a marriage may not be ordered if it is not in the best interests of the child).

In addition, both States confer legal parentage on married couples who have children through assisted reproduction using donor gametes. *See, e.g.*, *Engelking v. Engelking*, 982 N.E.2d 326 (Ind. Ct. App. 2013) (husband required to pay child support for biologically unrelated children who were conceived and born during marriage as a result of donor insemination); *Levin v. Levin*, 645 N.E.2d 601 (Ind. 1994) (same); Wis. Stat. Ann. § 891.40(1) (husband who consents to wife's insemination using donor semen is the father of the child); Wis. Stat. Ann. § 891.40(2) (donor who provides semen to licensed physician for purposes of insemination has no parental rights).

In addition, like every other state, Indiana and Wisconsin permit the adoption of children by adults who are not a child's biological parents. *See* Ind. Code Ann. § 31-19-1-1 *et seq*; Wis. Stat. Ann. § 48.81 *et seq*. Adoptive parents are treated as equal to all other legal parents. *See, e.g.*, Ind. Code Ann. §§ 29-3-1-11, 31-9-2-88; Ind. Code Ann. § 29-1-2-8 (adopted children treated the same as natural children for purposes of inheritance); Wis. Stat. Ann. § 48.92 (" … all the rights, duties and other legal consequences of the natural relation of child and parent … exists between the adopted person and the adoptive parents."). Indiana also permits same-sex domestic partners to adopt each other's biological children without divesting the biological parent of their parental rights. *See, e.g.*, *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004); *In re Adoption of M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003).

In some contexts, both States deny protection to biological parents. For example, a biological father who has not established a "familial relationship" with his child or formally registered his parental interest, may not veto the child's proposed adoption, and may even be denied a right to notice of an adoption proceeding. *See, e.g.*, Ind. Code Ann. § 31-19-5-5 (a putative father must register with the putative father registry in order to entitle him to notice of the child's adoption); *In re Paternity of G.W.*, 983 N.E.2d 1193 (Ind. Ct. App. 2013) (unwed father who failed to register with the putative father registry was not entitled to notice of the child's adoption and was barred from filing a paternity action to establish his paternity); Wis. Stat. Ann. § 48.42(2), (2m) (biological father of a young child who has not lived with the child in a "familial relationship" has no standing to challenge termination of his parental rights unless he filed a declaration of parental interest within 14 days of birth or 21 days of receiving notice of an action to terminate parental rights).

In sum, the lack of a requirement of a biological tie as a condition for establishing legal parentage, and Indiana's and Wisconsin's preference for non-biological parents in certain instances, render implausible any contention that the marriage bans are premised on a preference for biological parenting.

B. Indiana and Wisconsin Have Eliminated Marriage and Child Custody Laws Based on Gender Stereotypes.

Indiana and Wisconsin laws and policy contradict any claims that "gender-complementar[it]y" in marriage and parenting are important state objectives. *Amici* for Appellants claim that the optimal setting for childrearing is a marital family that includes "mothers and fathers [because they] contribute in gender specific and in gender-complementary ways to the healthy development of children." (Family-Pac Br. 13 (citation omitted).) Contrary to these claims, marriage under Indiana and Wisconsin laws, as in every other state, is a union free of state-mandated, sex- or gender-based distinctions in spousal roles or the incidents of marriage. Child custody laws in both States also treat parents' sex or gender as legally irrelevant.

Since statehood, Indiana and Wisconsin have gradually eliminated the sex-specific roles that were once a core part of marriage. Indiana law now acknowledges that all spouses are able to be wage earners and caring parents. It has reversed the common law system of coverture by passing the Married Woman's Act in 1879. *See, e.g.*, Ind. Code Ann. § 31-11-7-2 ("A married woman has the same rights concerning real and personal property that an unmarried woman has."); *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 4 n.2 (Ind. 1993) (recognizing the end of coverture). Indiana long ago recognized that a married couple "is composed of two individuals who have or should have equal rights, duties and obligations." *Hary v. Arney*, 145 N.E2d 575, 576-77 (Ind.

Ct. App. 1957); *see* Wis. Stat. Ann. § 766.97(1) ("Women and men have the same rights and privileges under the law. . . ."); Wis. Stat. Ann. § 766.97(2) (providing that both spouses have the right to own and manage their separate property, to enter into contracts, and to sue and be sued in his or her own name).

Both Indiana and Wisconsin have departed from the common law doctrine that only a husband had a duty to provide for the necessary expenses of his wife. *See, e.g.*, *Hickory Creek at Connersville v. Estate of Combs*, 992 N.E.2d 209, 211-12 (Ind. Ct. App. 2013) ("The doctrine of necessaries was developed to protect women whose husbands, despite their common law duty, failed to provide necessary support."). The two States have now extended the doctrine to render both spouses liable for the family expenses incurred by the other. *See Bartrom*, 618 N.E.2d at 5 (explaining that Indiana "reformulate[d]" the doctrine of necessaries in a "gender-neutral manner"); *In re Estate of Stromsted*, 299 N.W. 2d 226, 230 (Wis. 1980) ("The woman shares with her husband the legal duty of support of the family."). In both States, the grounds for divorce are the same for each spouse. *See* Ind. Code Ann. §§ 31-15-2-2–31-15-2-3; Wis. Stat. Ann. § 767.315. At divorce, Indiana law treats marriage as an economic partnership between two individuals in which courts distribute the parties' assets as the equities of each case require, not solely according to who holds legal title. *See* Ind. Code Ann. §§ 31-15-7-4–31-15-7-5 (presuming that "an equal division of marital property. . . is just and reasonable"); *South Bend Clinic v. Estate of Ruffing*, 501 N.E.2d 1114, 1116 (Ind. Ct. App. 1986). Under Wisconsin's community property law, upon dissolution of marriage, "each former spouse owns an undivided one-half interest in the former marital property." Wis. Stat. Ann. § 766.75; *see Haack v. Haack*, 440 N.W.2d 794, 797 (Wis. Ct.

App. 1989) (explaining that Wisconsin's marital property act was designed to create remedies for "partners in a marriage – women and men both.")

Both States have rejected the common law gender-based rule that spousal support upon divorce was only paid by the husband to the wife. Spousal support upon divorce is now gender-neutral—either spouse may qualify or be held liable for support. Ind. Code. Ann. § 31-16-14-1; Wis. Stat. Ann. § 767.501. Regardless of gender, both parents are also equally obligated to provide care and support for their children. Ind. Code Ann. §§ 31-14-11-2, 31-16-6-1 (court may order either or both parents to pay child support); Wis. Stat. Ann. § 767.511 (same).

Likewise, custody determinations are based on the best interests of the child, without regard to the gender of the parents. *See* Ind. Code Ann. § 31-17-2-8; *Blue v. Blue*, 218 N.E.2d 370, 371-72 (Ind. Ct. App. 1966) (explaining that that Indiana applies a best interests of the child standard to custody determinations and not the "tender years" doctrine favoring granting custody of young children to the mother); Wis. Stat. Ann. § 767.41(5) (providing that Wisconsin follows the best interest of the child standard, and that in applying that standard, "[t]he court may not prefer one parent or potential custodian over the other on the basis of the sex. . . ."); Wis. Stat. Ann. § 767.41 (providing a presumption in favor of joint legal custody).

As these examples demonstrate, and contrary to Appellants' and their *amici's* claim, neither State imposes gender-differentiated roles in marriage or parenting. Rather, they affirmatively require a gender-neutral approach to constructing and implementing family law rules.

C. A Desire to Promote Gender-Differentiated Parenting Is a Constitutionally Impermissible Interest.

Beyond its inconsistency with Indiana and Wisconsin laws, any effort to enforce gender-differentiated roles in marriage or parenting would be unconstitutional. The Constitution prohibits "overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The U.S. Supreme Court has repeatedly held that it is impermissible to premise laws on outmoded sex-based stereotypes. *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 205 (1977) (holding unconstitutional Social Security Act provisions that were premised on the "archaic and overbroad" generalizations that "wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives"); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (social security benefits); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military benefits). These principles have been applied with full force to family law. *See, e.g.*, *Orr v. Orr*, 440 U.S. 268 (1979) (holding unconstitutional a state law that imposed support obligations on husbands but not on wives); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (striking down state law that gave husbands the unilateral right to dispose of jointly owned community property without his spouse's consent). Indeed, the Court recently approved of Congress's effort to combat "[s]tereotypes about women's domestic roles [and] parallel stereotypes presuming a lack of domestic responsibilities for men." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

Implied but unstated is Appellants' and their *amici's* attempt to base their arguments on a desire to ensure that children will be socialized into appropriate gender-roles for their biological sex. (*See, e.g.*, Wisconsin Family Action Amicus Br. 25; Family-

Pac Br. 14 (expressing concerns about socialization of children and the "next generation").) This is exactly the kind of thinking that is suspect under constitutional principles. Almost forty years ago, the U.S. Supreme Court struck down a state law that provided different child support obligations for girls than for boys based on presumptions about their respective roles and destinies. *Stanton v. Stanton*, 421 U.S. 7 (1975). As the Court explained, "A child, male or female, is still a child . . . . No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Id.* at 14-15; *see Stanley v. Illinois*, 405 U.S. 645, 653, 661 (1972) (holding unconstitutional a state law that conclusively presumed that all unmarried fathers were "unqualified to raise their children"); *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (rejecting stereotypes about how female and male jurors differ); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (rejecting stereotype that only women should be nurses).

In addition, there are powerful common law traditions, bolstered by constitutional decisions, protecting parental autonomy, including the rights of parents to control the care and raising of their children, and socialize them as they see fit. *See, e.g., Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (parental liberty right to "direct the upbringing and education of [their] children"); *Meyer v. Nebraska*, 262 U.S.

390, 399 (1923) (the right to "marry, establish a home and bring up children" is a protected liberty); *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made.").

D. Social Science Refutes Claims About Child Outcomes Based on Parents' Gender or Sexual Orientation.

Appellants' and their *amici*'s arguments about optimal childrearing are also flatly contradicted by decades of social science research. In dozens of studies, sociologists and psychologists have found no significant differences between the long-term outcomes for children of same-sex parents and the children of different-sex parents. *See* Carlos A. Ball, *Social Science Studies and the Children of Lesbians and Gay Men: The Rational Basis Perspective*, 21 Wm. & Mary Bill Rts. J. 691, 715–16 (2013). These peer-reviewed studies have examined a stunning array of factors related to children's well-being, including their attachment to parents, emotional adjustment, school performance, peer relations, cognitive functioning, and self-esteem. No study has found any differences based on the sexual orientation of children's parents. *Id.* at 716–17. Instead, the key factors correlated with positive outcomes for children are the quality of the parent-child relationship and the relationship and resources of the parents. *Id.* at 733, n.286. In particular, having two involved parents rather than only one—an arrangement that would be supported by allowing parents to marry—is correlated with better outcomes for children, regardless of the sexual orientation or gender of the parents. *Id.*; *see* Amicus Curiae Br. of the American Sociological Association.

In light of this social science consensus, courts have increasingly rejected the optimal parenting argument. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010), reinstated in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) ("The gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology."). All of the seventeen or more federal district court rulings that have struck down state marriage bans since the Supreme Court's 2013 decisions in *Windsor*, 133 S. 2675, and *Hollingsworth*, 133 S. Ct. 2652, have echoed the *Perry* court's conclusions. *See, e.g.*, *DeBoer v. Snyder*, 973 F. 2d 757, 770 (E.D. Mich. 2014) (noting that over 150 sociological and psychological studies have repeatedly confirmed that there is no scientific basis to differentiate between children raised in same-sex versus heterosexual households). The Tenth and Fourth Circuits have recently affirmed four of these district court rulings and their conclusions concerning the social science findings. *See, e.g.*, *Kitchen v. Herbert*, No. 13-4178, at 56 (10th Cir. Jun. 25, 2014) ("We cannot embrace the contention that children raised by opposite-sex parents fare better than children raised by same-sex parents. . . ."); *Bostic v. Schaefer*, No 14-1167, at 60 (4th Cir. Jul. 28, 2014) ("'[T]he same factors'—including family stability, economic resources, and the quality of parent-child relationships—'are linked to children's positive development, whether they are raised by heterosexual, lesbian, or gay parents.'") (*quoting* the Amicus Br. of the American Psychological Association, *et al.*).

Indiana and Wisconsin courts have long recognized what this social science demonstrates—that a parent's sexual orientation has no bearing on the quality of their parenting, and should not be relevant to custody determinations. *See, e.g.*, *Teegarden v. Teegarden*, 642 N.E.2d 1007 (Ind. Ct. App. 1994); *Dinges v. Montgomery*, 514 N.W.2d 723 (Wis. Ct. App. 1993) [unpublished]. And, based on equitable principles that protect children's best interests even in the absence of specific statutory protections, the Wisconsin Supreme Court has held that the former same-sex partner of a biological parent has standing to seek visitation of a child raised by both partners. *In re Custody of H.S.H.-K.*, 533 N.W. 2d 419 (Wis. 1995).

In contrast, Appellants' and their *amici*'s optimal parenting arguments are not grounded in science or in Indiana and Wisconsin laws, but in invalid stereotypes about how men and women parent their children.

E. Marriage Is Open to Virtually Any Different-Sex Couple, Irrespective of Their Ability to Be Optimal Parents.

Even if, *arguendo*, there were differences in how children fare between those raised by married heterosexual couples and those raised by cohabiting same-sex couples, it is not permissible to rely on such differences as justification for singling out same-sex couples and excluding only them from the right to marry. No other couples are denied the right to marry based on a belief that those couples will not provide an optimal setting for the raising of children. *See Kitchen*, at 28 ("The state does not restrict the right to marry or its recognition of marriage based on compliance with any set of parenting roles, or even parenting quality."). Parental resources are generally associated with better outcomes for children, but no one would suggest that lower- or middle-income people should be barred from marrying. (*See, e.g.*, Amicus Br. of the

American Psychological Association, *et al.*) The complete bar on marriage for all same-sex couples "[makes] no sense in light of how [Indiana and Wisconsin] treat[] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-450 (1985)).

The U.S. Supreme Court has also recognized that whether members of a couple would be good parents, or whether they could even provide support for children, are not permissible bases upon which to deny them the right to marry. The Court's decision in *Zablocki v. Redhail*, 434 U.S. 374 (1978), is instructive on this point. In *Zablocki*, Wisconsin sought to deny the right to marry to parents the State considered to be irresponsible because they had failed to pay child support, but the Court held that conditioning marriage on a person's parenting conduct was an unconstitutional infringement of the right to marry. *Id.* at 386, 388–89. In this vein, other courts that have rejected the optimal child-rearing theory have done so in part because marriage is not and cannot be restricted to individuals who would be "good" parents. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 900 (Iowa 2009) (noting that Iowa did "not exclude from marriage other groups of parents—such as child abusers, sexual predators, parents neglecting to provide child support, and violent felons—that are undeniably less than optimal parents").

Excluding same-sex couples from marriage and all of its attendant legal protections because they allegedly do not provide a certain kind of parenting, when different-sex couples are not required to have children at all, much less biological children, imposes a colossal burden on same-sex couples. A desire to mark the relationships and parenting abilities of same-sex couples as less worthy of respect is an

impermissible interest, under any standard of constitutional review. *Windsor*, 133 S. Ct. at 2695-96.

III. THE INDIANA AND WISCONSIN MARRIAGE BANS BEAR NO RATIONAL RELATIONSHIP TO THE WELL-BEING OF CHILDREN.

There is no rational connection between the marriage bans and any of the purported interests identified by Appellants or their *amici*. It is utterly implausible to believe that barring same-sex couples from marrying somehow improves the well-being of children raised by different sex couples. The ban does, however, cause clear and direct harm to the children of same-sex parents.

A. The Marriage Ban Does Nothing to Further the Well-being of Children Raised by Different-Sex Couples.

Appellants' *amici* claim that Indiana and Wisconsin have an interest in preserving "male-female marriage" for "the good of the resulting children." (Family-Pac Br. 14.) Insofar as marriage laws encourage different-sex couples to marry in order to channel unplanned pregnancies into a marital household, there is no basis in logic or social experience to suppose that such couples will lose respect for the institution if same-sex couples are permitted to marry in these States. Likewise, there is no logical reason to believe that permitting same-sex couples to marry would cause marital instability, much less cause these couples to care less about their children. (*Id.* at 19-21.) These suppositions, which are central to Appellants' *amici's* arguments, make sense only if same-sex relationships are so abhorrent as to contaminate the institution of marriage to the point that different-sex couples will shun it. Appellants ask this Court to bar committed couples from marriage, stigmatize them and their children, and deny them access to substantial state and federal benefits, on the imaginary basis that this will make marriage more attractive to different-sex couples.

Because there is no logical connection between the means and the purported end, numerous courts have rejected these arguments. *See, e.g.*, *Bostic*, at 62 ("because there is no link between banning same-sex marriage and promoting optimal childrearing, this aim cannot support the Virginia Marriage Laws."); *Kitchen*, at 51 ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples.").

B. The Marriage Ban Harms the Well-being of Children Raised by Same-Sex Couples.

Although there is not even a rational reason to think that the marriage ban will have any positive effect on the children of different-sex couples, it is absolutely clear that it harms the children of same-sex couples by denying their families access to hundreds of critical state and federal marital benefits that are conducive to providing stable and secure environments for raising children.[11]

The marriage ban also amounts to an official statement "that the family relationship of same-sex couples is not of comparable stature or equal dignity" to that of married couples. *In re Marriage Cases*, 183 P.3d 384, 445, 452 (Cal. 2008). This stigma leads children to understand that the State considers their gay and lesbian parents to be unworthy of participating in the institution of marriage and devalues their families

[11]As of 2011, about one in five same-sex couples are raising children under age 18. Gary J. Gates, *Same-Sex and Different-Sex Couples in the American Community Survey: 2005-2011* (Williams Institute, 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf. According to the 2010 Census, 19 percent of same-sex couples in Indiana and 16 percent of same-sex couples in Wisconsin were raising minor children. Gary J. Gates & Abigail M. Cooke, *Indiana Census Snapshot: 2010* (Williams Institute), *available at* http://williamsinstitute.law.ucla.edu/wpcontent/uploads/Census2010Snapshot_Indiana_v2.pdf; Gary J. Gates & Abigail M. Cooke, *Wisconsin Census Snapshot: 2010* (Williams Institute), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Wisconsin_v2.pdf.

compared to families that are headed by married heterosexuals. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003).

In this way, the marriage ban does significant tangible and intangible harm to the interests of children born to, adopted by, and raised in families headed by couples of the same sex.

C. Denying Rights and Protections to Children Is a Constitutionally Impermissible Means of Influencing Their Parents' Behavior.

Even if there were some reasonably conceivable connection between the marriage ban and increasing the marriage rates of heterosexual couples or the number of children born to married heterosexual couples, punishing innocent children is an impermissible means of trying to influence the behavior of adults.

The Indiana and Wisconsin marriage bans function in a way that is remarkably similar to the manner by which children born out-of-wedlock were denied legal and economic protections and stigmatized under now-repudiated laws regarding "illegitimate" children. Historically, state parentage laws in most states saddled the children of unwed parents with the demeaning status of "illegitimacy" and denied these children important rights in an effort to shame their parents into marrying one another. *See* Melissa Murray, *Marriage As Punishment*, 112 Colum. L. Rev. 1, 33 n.165 (2012) (marriage was offered as a way to lead unwed mothers away "from vice towards the path of virtue"). Rights that were denied to "illegitimate" children included the right to a relationship with and support from their fathers, intestate succession, and compensation for wrongful death or injury to their fathers.

Since the late 1960s, however, the U.S. Supreme Court has repudiated laws that discriminate against children based on outmoded concepts of "illegitimacy." In *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), for example, the Court found that

> imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Id. at 175. *See also Levy v. Louisiana*, 391 U.S. 68 (1968).

Consistent with the directive of the Supreme Court, Indiana and Wisconsin no longer deny protections to nonmarital children. *See In re Matter of M.D.H.*, 437 N.E.2d 119, 126 (Ind. Ct. App. 1982) ("Current statutory provision relating to support orders for legitimate and illegitimate children are virtually identical. . . . [A] parent's obligation to support his minor child, legitimate or illegitimate, is a basic tenet recognized in this state . . . ."); *In re Paternity of P.J.W.*, 441 N.W.2d 289, 292 (Wis. 1989) ("Any child, legitimate or illegitimate, can argue that he or she has not been supported with the necessities and amenities of life."). Nonmarital children also have the same inheritance rights as children of married parents. *See* Ind. Code Ann. § 29-1-2-7; Wis. Stat. Ann. § 852.05.

Indiana and Wisconsin laws do not support the proposition that it is permissible to deny critical benefits and security to some children in order to make the families of other children more stable or secure. Accordingly, the argument that the marriage bans can be justified as an effort to encourage biological, "child-centered," gender-differentiated parenting by making marriage exclusively available to heterosexuals is fundamentally at odds with these States' strong commitment to equal treatment for *all*

children. In exchange for a wholly speculative benefit for the children of heterosexual couples, other children—those raised by same-sex couples—pay the price. This is a legally unacceptable result. As the Idaho District Court so aptly concluded, "[f]ailing to shield Idaho's children in any rational way, Idaho's Marriage Laws fall on the sword they wield against same-sex couples and their families." *Latta v. Otter*, No. 1:13-cv-0482, 2014 WL 1909999, at *48 (May 13, 2014).

CONCLUSION

Amici ask that this Court affirm the district court's decision in the above-captioned action.

Dated: August 5, 2014

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 6,933 words in Georgia 12-point proportional type, with footnotes in Georgia 11-point proportional type. The word processing software used to prepare this brief was Microsoft Word 2010.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I certify that on August 5, 2014 the foregoing document was filed electronically with the Clerk of Court for the Seventh Circuit Court of Appeals and served on all parties or their counsel of record through the CM/ECF system.

Dated: August 5, 2014

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