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

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARILYN RAE BASKIN, ET AL
PLAINTIFFS-APPELLEES

v.

PENNY BOGAN, ET AL
DEFENDANTS-APPELLANTS

On Appeal From the United States District Court
for the Southern District of Indiana
Nos. 1:14-cv-355-RLY-TAB,
1:14-cv-404-RLY-TAB, and 1:14-cv-406-RLY-MJD
The Honorable Richard L. Young, Chief Judge

BRIEF OF DAVID A. ROBINSON AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLANTS
IN SUPPORT OF REVERSAL OF DISTRICT COURT DECISION

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Appellate Court No: Seventh Circuit

Short Caption: Baskin v. Bogan, No. 14-2386

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My Identity, Counsel, Expenditures, Interest in This Case, and Consent to File This Brief

This brief is filed with the consent of all parties. *See* Doc. 28, filed July 14, 2014.

I am an individual, not a corporation or organization. I am a 61 year-old man, lifelong U.S. citizen, now residing in Connecticut. I am a lawyer. I practiced law for 31 years in Massachusetts and now practice in Connecticut.

I wrote this brief because I am in a relatively unique position to opine about court-ordered legalization of same-sex marriage. In 2003 I wrote a book that I believe possibly, inadvertently, played a role in the court-ordered legalization of same-sex marriage in Massachusetts, the first state to legalize it. My connection with Massachusetts and Connecticut, which in 2008 likewise experienced court-ordered legalization of same-sex marriage, enables me to offer insights that other parties in this case might not offer.

I am my own counsel. I wrote this brief myself. I have likewise written and filed amicus briefs in four other same-sex marriage cases pending in the U.S. Court of Appeals: *Bostic v. Schaefer*, No. 14-1167 (4th Cir. argued May 13, 2014), Doc. 76; *Bourke v. Beshear*, No. 14-5291 (6th Cir.), Doc. 24; and *DeBoer v. Snyder*, No. 14-1341 (6th Cir.), Doc. 48; and *Latta v. Otter*, Nos. 14-35420 & 35421 (9th Cir.), Doc. 24. I have paid any costs associated with these briefs myself. I have received no payment for any of them. No one has asked me to write these briefs. I write and

file these briefs solely because, as I said, I am in a relatively unique position to opine about court-ordered same-sex marriage. I possibly played a role in it in Massachusetts.

I have read Defendants-Appellants' principal brief, Doc. 34, filed July 15, 2014. My brief does not repeat their brief. My brief expands on some points in their brief and adds some points of my own.

I was born in Massachusetts in 1953, lived there until 2002, then moved to Connecticut. In 1977 I earned a J.D. from Washington University in St. Louis and was admitted to the Massachusetts bar. I practiced law in Springfield, Mass., from 1977 to 2008. I am now an active member of the Connecticut bar and retired member of the Massachusetts bar. I practice labor and employment law. I also teach part-time. I teach human resource management, including the laws pertaining to sexual orientation discrimination, at the University of New Haven. I have taught there since 2005.

In early 2003, while practicing law in Massachusetts, I wrote a book entitled *A Legal and Ethical Handbook for Ending Discrimination in the Workplace*. It was published by Paulist Press, a Christian book publisher, on or about July 1, 2003. In addition to legal tips and practical tips, the book included some Bible quotes I thought might motivate employers to provide equal opportunity to all. It received some publicity in Massachusetts in October 2003. *See, e.g.*, Kenneth L. Ross,

"Book targets workplace discrimination," *Sunday Republican* (the Springfield, Mass., daily newspaper is called *The Republican* because that was its original name in 1824; it is not a reference to the political party; the name predates the party), Oct. 19, 2003. I think it is possible that something I said in the book was misconstrued as an argument in favor of same-sex marriage. I said on page 71:

> Some of you might feel that laws protecting homosexuals from discrimination conflict with the Bible. The Bible forbids homosexuality (Lev 18:22; 20:13; 1 Cor. 6:9), but there is no conflict. These laws do not require you to *approve of* homosexuality. They require you *not to discriminate against* employees for being homosexual. In other words, these laws permit you to disapprove, in your heart and mind, of homosexuality, but do not permit you to play God. The law is the same as stated in the *Catechism of the Catholic Church*, which requires acceptance of homosexuals but does not require approval of homosexuality. "They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided" (*Catechism*, paragraph 2358).

(emphasis in original). I was trying to make a magnanimous statement of goodwill and equality for gays in the workplace. I was trying to persuade Bible-reading employers not to discriminate against gays. I was talking about employment, not marriage.

But one month later, on November 18, 2003, the Massachusetts Supreme Judicial Court (SJC), in a 4-3 decision, stunned the world,[1] me included. For the

[1] *See, e.g.*, Kathleen Burge, "Gays have right to marry, SJC says in historic ruling," *Boston Globe* Nov. 19, 2003 ("This is such an incredible event," said a lawyer who

first time in U.S.—and possibly world—history, a high court held that same-sex couples have a constitutional right to a marriage certificate. *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The Hawaii Supreme Court in 1993 laid the groundwork for such a holding, *Baehr v. Lewin*, 852 P.2d 44, but *Goodridge* was the first to hold it. For reasons I will explain, I disagreed, and continue to disagree, with *Goodridge*. More importantly, I wondered if someone on the SJC read my book and construed, or misconstrued, my statement of goodwill and equality for gays in the workplace as an argument in favor of same-sex marriage.

Whether anyone on the Massachusetts SJC read or was influenced by my book, I do not know for certain. I think a number of judges and lawyers read it, but I do not know exactly who. Rather than speculate about it, I want to simply explain why my book's urging employers not to discriminate against gays was not, and is not, an argument in favor of same-sex marriage. I also want to explain how a little-noticed aspect of *Goodridge* should caution courts not to declare same-sex marriage a constitutional right. Same-sex marriage supporters were obviously

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wrote the amicus brief for the Boston Bar Association supporting gay marriage. "I think for the gay community, it is somewhat akin to the Berlin Wall coming down."); Michael Paulson, "Strong, divided opinions mark clergy response," *Boston Globe*, Nov. 19, 2003 (Boston archbishop O'Malley says "It is alarming that the Supreme Judicial Court in this ruling has cast aside what has been . . . the very definition of marriage held by peoples for thousands of years"; Massachusetts Catholic Conference calls *Goodridge* "radical").

ecstatic about *Goodridge* but there was one aspect of *Goodridge* they, or some of them, knew could hinder their quest to legalize same-sex marriage in other states. *Goodridge*, read together with Mass. Gen. Laws ch. 207, §§ 1 and 2, means that in Massachusetts a man can marry his brother. I devote much of this brief to discussing that aspect and how the district court decision in the present case (*Baskin v. Bogan*) has the same effect. I thereby expand on the argument defendants-appellants make on pp. 25 and 41 of their brief. They argue that the district court decision effectively allows marriage between brothers and other blood relatives. Then I cite some cases I think shed light on what the Framers of the Constitution and its Amendments might say about same-sex marriage. Then I explain how same-sex marriage diminishes heterosexual marriage and misleads young people about reproductive biology. I close by explaining why the statement (*see* page 3 *supra*) in my 2003 book ("Some of you might feel . . . .") is not an argument for same-sex marriage.

If anyone is curious, I did not get married until I was 50 years old, in 2003. I married a widow. We remain married today. She has two adult children. I have no children. She is now 66 years old.

ARGUMENT

The district court decision would allow a man to marry his elderly mother. There is no possibility that the Framers intended the Constitution and its Amendments to give a man the right to marry a blood relative or a man.

The district court held that a person can marry whomever he or she loves. "It is clear that the fundamental right to marry shall not be deprived to some individuals based solely on the person they choose to love." Short App. 33 ("Short App." refers to the Short Appendix in Defendants-Appellants' Brief, Doc. 34). The district court decision would therefore allow a man to marry his elderly (too old to get pregnant) mother. "The court agrees with Plaintiffs that they are similarly situated in all relevant aspects to opposite-sex couples for the purposes of marriage." Short App. 28. "They are in long-term, committed, loving relationships and some have children." *Id.* If two men are "similarly situated in all relevant respects to opposite-sex couples for the purposes of marriage," a 50-year-old man and his 75-year-old mother are even more "similarly situated in all relevant respects to opposite-sex couples for the purposes of marriage" than two men are. A man and his mother *are* an opposite-sex couple. And since she is too old to get pregnant, she and her son are similarly, and perhaps identically, situated with two men who want to marry: They love each other, want the benefits of marriage (just being mother and son does not give them all the benefits of marriage), and cannot conceive a child together.

If anyone objects to a man's marrying his mother, on the grounds that incest is illegal in Indiana, the man and his mother will point out that it is illegal for a man to marry a man in Indiana. Ind. Code § 31-11-1-1. The district court held § 31-11-1-1 unconstitutional. If § 31-11-1-1 is unconstitutional, so is § 31-11-1-2 (marriage to close relative prohibited) as applied to close relatives who cannot conceive children together. Close relatives who cannot conceive children together are similarly situated with same-sex couples. The district court did not explicitly hold § 31-11-1-2 unconstitutional but I surmise (perhaps I'm mistaken) that none of the plaintiffs in this case are blood relatives of each other, and therefore the court did not need to decide the constitutionality of § 31-11-1-2. The district court left open the possibility of holding § 31-11-1-2 unconstitutional. Short App. 23 n.4.

Will same-sex marriage supporters object to a man's marrying his elderly mother? Same-sex marriage supporters say "Marriage is about love, not sex or procreation." "Marriage = Love." "We should be allowed to marry whoever we love." "Everyone should have the right to marry." If they are sincere about that, I don't see why they would object to a man's marrying his mother. The man and his mother love each other; want the tax benefits, insurance benefits, and social security benefits of marriage (just being mother and son does not entitle them to those benefits); and, like same-sex couples, cannot conceive children together. If they do object to the man's marrying his mother, they are hypocrites. If they argue

that is it is "ridiculous," "insulting," or "disgusting" to compare a 50-year-old man's having sex with his 75 year-old mother to two men's having sex with each other, they are hypocrites. They do exactly what they complain is done to them. They devalue and discriminate against the sex lives of many loving, consenting adult couples (couples who are blood relatives but cannot conceive a child together) who pose no more of a health hazard or other hazard than two male friends do.

If same-sex marriage supporters point out that there is a very ugly word used to describe a man who has sexual intercourse with his mother, the man and his mother will remind them that there is an equally ugly word used to describe a man who has oral sex with a man. Besides, it is quite possible that the man and his mother do not have sexual intercourse or other sexual contact.

Goodridge, the 2003 Massachusetts case, tried, or seemed to try, to prevent this slippery slope. *Goodridge* states, "Nothing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamy prohibitions of our marriage laws. . . . Rather, the statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender neutral manner." 798 N.E.2d at 969 n.34. But that statement in *Goodridge*, lofty though it may sound, makes no sense. The consanguinity prohibitions of our marriage laws make sense (are rational) only if they are gender-specific, not gender-neutral. The purpose of those

consanguinity laws is to discourage a couple of blood relatives from conceiving a child. Two brothers cannot conceive a child. Indeed, *Goodridge* states that as a result of *Goodridge*, a man can marry his brother in Massachusetts. "Sections 1 and 2 of G. L. c. 207 prohibit marriages between a man and certain female relatives and a woman and certain male relatives, but are silent as to the consanguinity of male-male or female-female marriage applicants." *Id.* at 953. Prior to *Goodridge*, a man could not marry his brother in Massachusetts. After *Goodridge*, he can.

The majority opinion in *Kitchen v. Herbert*, 2014 WL 2868044, at *31 (10th Cir. June 25, 2014), tries to distinguish same-sex marriage from incestuous marriage:

> Unlike polygamous or incestuous marriages, the Supreme Court has explicitly extended constitutional protection to intimate same-sex relationships, see *Lawrence*, 539 U.S. at 567, and to the public manifestations of those relationships, *Windsor*, 133 S. Ct. at 2695.

But in reality the *Kitchen* majority holds that a man can marry his brother. *Kitchen* holds that constitutional protection extends to "intimate same-sex relationships." Two brothers who want to marry are an "intimate same-sex relationship." When *Kitchen* says the Supreme Court has not explicitly extended constitutional protection to "incestuous marriages," *Kitchen* means, or seems to mean, marriages between a male and female blood relative, not same-sex blood relatives. Thus,

according to the *Kitchen* majority, a man can marry his brother in Utah. *See also* the dissenting opinion in *Kitchen*, 2014 WL 2868044, at *36 (if marriage is so fundamental and freestanding a right that a man can marry a man, laws against bigamy are unconstitutional and possibly so are laws against under-age marriage).

In *Wolf v. Walker*, 2014 WL 2558444, at *41 (W.D. Wis. June 6, 2014), *appeal docketed*, No. 14-2526 (7th Cir. July 11, 2014) (consolidated with present case), the district court tried to distinguish same-sex marriage from incestuous or polygamous marriage. "For example, polygamy and incest raise concerns about abuse, exploitation, and threats to the social safety net." I do not know what *Wolf* means by "abuse, exploitation, and threats to the social safety net." *Wolf* does not say. Is there more abuse, exploitation, and threats to the social safety net if two adult brothers marry than if two male friends marry? I don't think so.

If same-sex marriage supporters argue that the man and his mother are already "related" and therefore should not be allowed to marry, the district court distinguished marriage from other relationships. "Having the status of 'married' comes with hundreds of rights and responsibilities under Indiana and federal law." Short App. 28. A mother and adult son do not have all these rights and responsibilities. The man and his mother want those rights and responsibilities.

Why would a man want to marry his mother? There could be several reasons but the most likely reason is to avoid estate tax and collect additional social

security benefits. Regarding estate tax, a man and his mother might argue they are "similarly situated" to the couple in *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013): They love each other, one of them is in poor health, and they want her money, when she dies, to pass to the survivor free of estate tax. They want the marital exemption. For all practical purposes, everything the Supreme Court said about the couple in *Windsor* can be said about the man and his mother. The Court said, "Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship." *Id.* The same can be said about a man born in New York City in 1963 and his now 75-year-old mother. The Court did not indicate whether Ms. Windsor and Ms. Spyer had a sexual relationship. If we are supposed to assume that Ms. Windsor and Ms. Spyer had a sexual relationship and therefore were not similarly situated with the man and his mother, what if the man and his mother have a sexual relationship? Are they then similarly situated? Is a same-sex couple's sexual relationship more deserving of a marriage certificate than an elderly (too old to get pregnant) mother and her adult son's? I don't think it is.

The district court opined that the plaintiffs in the case at bar "seek simply the same right that is currently enjoyed by heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." Short App. 20-21 (internal brackets and quotations marks omitted). The district

court thereby erred. A same-sex couple cannot "create" ("start") a family. A person needs, or a same-sex couple needs, someone of the opposite sex to "create" a family. Two people of the same sex can "be a couple" but cannot "create a family." Any person who is "created" is created not by a same-sex couple but by a man and woman. One member of a same-sex couple might be the man or woman who is one creator of the child but the child has a second creator: some woman or man who is not a member of the couple. Even if "creating" a family is broadly defined as conceiving a child with a sperm donor or surrogate or adopting a child that is not already the natural child of one member of the couple, relatively few same-sex couples "create" a family. Whether 2% of them do, or 5% of them do, or other percent of them do, I am unable to ascertain.

I have not counted how many of the plaintiffs in this lawsuit have "created" a family, because that is not a reliable way to ascertain the percent of same-sex couples (married or not) in the general population who "create" families. I don't know about the plaintiffs in this lawsuit but from what I have read from public sources, the plaintiffs in many of the pending same-sex marriage lawsuits around the nation are not a random or representative sample of same-sex couples who want to marry or have their marriages recognized. They are same-sex couples who were recruited to be plaintiffs. *See, e.g.*, "Lawyers take on fundraising in Utah same-sex marriage case," *Salt Lake Tribune*, July 5, 2014 (referring to an

organization "widely credited with recruiting the plaintiff couples")[2]; "Florida will watch same-sex marriage fight from the sidelines," *Orlando Sentinel*, July 26, 2013 (although some same-sex marriage supporters were urging Florida same-sex couples not to sue for marriage yet, groups working on behalf of same-sex marriage supporters "recruited more than 500 same-sex couples willing to serve as plaintiffs").[3] Thus, I assume that the plaintiffs in many of these same-sex marriage lawsuits are the couples most likely to generate sympathy. The same-sex couples most likely to generate sympathy are the ones who "created" families.

But simple common sense compels the conclusion that the vast majority (not all, but the vast majority) of people who marry someone of the same sex do not want to "create" a family. The vast majority of them do not want to adopt a child that is not the natural child of one member of the couple, or create a child with a surrogate or by artificial insemination. My guess—I am unable to ascertain the exact statistic—is that the majority of married same-sex couples who are raising children are raising children that one member of the couple conceived by sexual intercourse with a previous sex partner of the opposite sex. It is possible I am

[2] www.sltrib.com/sltrib/news/58147753-78/utah-case-court-marriage.html.csp (last visited July 15, 2014).

[3] http://articles.orlandosentinel.com/2013-07-26/news/os-capview-column-deslatte072813-20130726_1_marriage-ban-florida-family-policy-council-marriage-act

mistaken about this. I am open to seeing or hearing reliable statistics to the contrary. Until I do, that is what common sense tells me. By contrast, 87% of male-female married couples conceive a child.[4]

Moreover, two brothers or a man and his elderly mother can "create" or "expand" a family the way a same-sex couple can. So if two men can marry, why not two brothers, or a man and his elderly mother?

The truth of the matter is that most (not all, but most) people who truly want to "create" a family suppress whatever homosexual urges (if any) they have, marry someone of the opposite sex, and create a family naturally (by sexual intercourse) with that person. Most same-sex marriage supporters convey, or try to convey, the impression that there are only two types of people: heterosexual and homosexual. The truth of the matter is that many people are in between. Many people—far more than the 2% or 3% of the population who identify as gay—have homosexual urges. Some of them do what they are tempted to do: engage in homosexual sex. Others resist the temptation. My guess—I don't know if there are reliable statistics on

[4] James B. Stewart, "A C.E.O.'s Support System, aka Husband," *N.Y. Times*, Nov. 4, 2011, www.nytimes.com/2011/11/05/business/a-ceos-support-system-a-k-a-husband.html?pagewanted=all&_r=0iting (last visited July 16, 2014). The *Times* derived the 87% figure from a Pew Research report that says, "Among 40-44-year-old women currently married or married at some point in the past, 13% had no children of their own in 2008." www.pewsocialtrends.org/2010/06/25/childlessness-up-among-all-women-down-among-women-with-advanced-degrees/ (last visited July 16, 2014).

this—is there are more people who suppress their homosexual urges than there are people who actually engage in homosexual sex. That is just my guess.

In any event, many of them—many of those who try homosexual sex and many of those who resist the temptation—eventually marry someone of the opposite sex. Why? Because they want to do what their bodies are designed to do. The male sex organ is designed to fit into the female sex organ. So they marry someone of the opposite sex. Here is another reason: Many people want to reproduce, and want to do so naturally, not artificially or by adopting someone else's child. Some people also have religious reasons.

A man who marries a woman and genuinely tries to make the marriage work must suppress *many* urges: the urge to have sex with other women, the urge to have sex with men, the urge to get drunk and stay out all night, the urge to buy exotic cars and other frivolities, the urge to be sloppy around the house, the urge to watch three consecutive entire football games on TV on Sunday, the urge to be lazy and not work, and so on. Men who marry women and create children with these women suppress, or try to suppress, or at least try for awhile to suppress, these urges. It is not easy. They do not always succeed. Many fail. But at least they try for awhile.

People who marry or try to marry someone of the same sex, on the other hand, do not suppress their homosexual urges. Of course, no one is requiring them

to suppress their homosexual urges. We who are opposed to same-sex marriage are simply saying that if people want the tax benefits, insurance benefits, social security benefits, and other benefits of marriage, they should unite with someone of the opposite sex. They should make the sacrifices and suppressions that male-female married couples make. If they are unwilling to, they should be treated like best friends—not better, not worse.

We often ask when analyzing constitutional issues what the Framers of the Constitution and its Amendments had in mind. *E.g.*, *Harris v. United States*, 536 U.S. 545, 563 (2002). This is difficult when the facts relate to cellphones, computers, automobiles, and other gadgetry that did not exist when the Constitution and pertinent Amendments were written. *United States v. Jones*, 132 S. Ct. 945, 958 (2012) (Alito, J., concurring). Had someone asked John Adams, Thomas Jefferson, or, eighty years later, the Framers of the Fourteenth Amendment (Equal Protection Clause, 1868), about cellphones, they would have asked, "What are cellphones?"

But homosexuality is as old as time. Had someone asked them if the Constitution and Amendments require the government to issue a marriage certificate to two men, they would have understood the question perfectly. They knew that some men have sex with men. I'm not sure they knew the word "homosexuality" but they knew the words "sodomy," "crime against nature," or

whatever they called it then. In 1858 in *Ausman v. Veal*, the Indiana Supreme Court stated, "Sodomy is a connection between two human beings of the same sex—the male—named from the prevalence of the sin in Sodom." 10 Ind. 355, 1858 WL 4030. The court stated that bestiality is a "connection between a human being and brute of the opposite sex." Then the court discussed both "sodomy" and "bestiality."

> Both may be embraced by the term, "crime against nature," as felony embraces murder, larceny, etc.; though we think that term is most generally used in reference to sodomy. Lev. ch. 18, v. 22, ch. 20, v. 13; Deut. ch. 23, v. 17; Rom. ch. 1, v. 27; 1 Cor. ch. 6, v. 9; 1 Tim. ch. 1, v. 10.

Note the authorities the court cited. Citing God and the Bible when writing appellate court opinions in 2014 would cause an uproar but was common in "sodomy" cases in the 1800s.

Prosecutors likewise invoked such language. In Maryland in 1810 an indictment alleged the defendant:

> in and upon . . . a youth of the age of 19 years . . . did beat, wound, and illtreat, with an intent that most horrid and detestable crime, (among christians not to be named,) called Sodomy . . . and against the order of nature, then and there feloniously, wickedly and devilishly . . . to the great displeasure of Almighty God, contrary to the act of assembly . . . .

Davis v. State, 3 H. & J. 154, 1810 WL 178 (Md. App.) (parenthetical material in original).

Passage of the Fourteenth Amendment (Equal Protection Clause) in 1868 did little, if anything, to increase public approval of homosexuality. *See, e.g., Ex parte De Ford*, 168 P. 58 (Okla. Crim. 1917). *De Ford* analyzes the history of "sodomy" and "detestable and abominable crime against nature" in Anglo-American law from the 1300s to early 1900s and concludes that male-on-male oral sex is "sodomy" and "detestable and abominable crime against nature."

There is no doubt how those nineteenth and twentieth century courts would have ruled on the question, Do the Constitution and its Amendments require the government to issue a marriage certificate to two men? They would have ruled no.

Legislatively enacted same-sex marriage is less likely to lead to incestuous marriage than court-ordered same-sex marriage is.

If, on the other hand, same-sex marriage becomes legal in a state because the state's citizens or legislators vote to make it legal, it is less likely to lead to incestuous marriage. Voters or legislators can, if they choose, write a law that allows same-sex marriage but not between blood relatives. Does that distinction or, to use another word, "discrimination," have a "rational basis?" Is it rational to discriminate against two brothers like that? Not in my mind, but others may disagree. I don't think two male friends should have more rights (right to marry) than two brothers. But I am not a legislator or judge. After same-sex marriage

supporters and their legislative allies realized that as a result of *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 953 (Mass. 2003), two brothers can marry in Massachusetts, they tried to make sure two brothers cannot marry in other states. In 11 of the 12 states have enacted statutes allowing same-sex marriage since *Goodridge*, two brothers cannot marry, and two sisters cannot marry. Conn. Gen. Stat. § 46b-21; Del. Laws tit. 13, § 101(a); Haw. Rev. Stat. § 572-1(1); Ill. Comp. Stat. 750, ch. 40, par. 212(a)(2); Maine Rev. Stat. § 701(2)(a); Md. Code Ann., Fam. Law § 2-202(b)(1); Minn. Stat. 2013, § 517.03(2); N.H. Rev. Stat. § 457:2; R.I. Gen. Laws § 15-1-2; Vt. Stat. tit. 15§ 1a; and Wash. Rev. Code § 26.04.020(2). The other state that enacted a statute allowing same-sex marriage, New York, allows two brothers to marry and two sisters to marry. N.Y. Dom. Rel. Law § 5. Connecticut's statute codifies *Kerrigan v. Commissioner of Pub. Health*, 957 A.2d 407 (Conn. 2008).

Is this legislation (allowing same-sex friends, but not same-sex siblings, to marry) constitutional? I don't know, but at least it is entitled to some deference. These states went through a democratic process to pass these laws. They thus have "virtually exclusive" authority to define marriage as they see fit, so long as federal constitutional rights are not violated. *Windsor*, 133 S. Ct. at 2689-2691. The district court's decision is contrary to *Windsor*. The district court held that Indiana does not have the right to define marriage as Indiana sees fit.

Same-sex marriage diminishes heterosexual marriage and misleads people, especially children and adolescents, about reproductive biology.

I write this section of the brief with great reluctance. I have many gay friends. I have friends and students (I teach at a university) in gay marriages. It might sound arrogant for me to say *their* marriages diminish *my* opposite-sex marriage. But the district court opined that same-sex marriage does not diminish opposite-sex marriage at all. Short App. 23. I disagree. I have resided in either Massachusetts or Connecticut—the two states that have continuously allowed same-sex marriage the longest—my entire life (I went away to college and law school but was still a legal resident of Massachusetts). I wouldn't say that same-sex marriage diminishes my opposite-sex marriage *much*, but it diminishes it *somewhat*.

First, a man who wears a wedding ring in Massachusetts or Connecticut might be asked, "Are you married to a man or woman?" When a man marries a woman, he is proud of her. He does not want to be asked if he married a man or a woman.

Second, as a result of same-sex marriage, Connecticut and Massachusetts are becoming increasingly "genderless" in many ways. They are apt to call a man a woman if he wants to be "regarded as," or he "identifies as," a woman. On the State of Connecticut's website as of July 16, 2014, there is a document entitled

"Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws."[5] It is from the Connecticut Safe Schools Coalition and is in a question and answer format. One question is, **"**What is the proper use of pronouns for transgender and gender non-conforming youth?" The answer: **"**School personnel should use the name and pronouns appropriate to the student's gender identity regardless of the student's assigned birth sex." In other words, Connecticut school personnel are being asked to refer to a boy as "she" and "her" if the boy "identifies" as a girl. Will this happen in Indiana?

A headline on the Springfield, Mass., daily newspaper's website (masslive.com) on March 1, 2014 (and still on that website on July 16, 2014), read, "Holyoke woman, 30, testified in Hampden Superior Court Friday she was raped when she was a boy." Will headlines like this appear in Indiana?

In Connecticut, an op-ed piece in the April 21, 2014, *Hartford Courant*, "Teen's Violent History Left State No Option," referred to a 16-year-old "transgender" juvenile in a women's correctional institution as "her" and "she." I had to read several news stories about this youth to learn what I was trying to learn: the youth's gender. An April 17, 2014, op-ed piece in the *Courant*, "State Must Answer for Imprisoning 16-Year-Old," clarified it somewhat, saying, "This young person was considered male at birth but she identifies as female." What

[5] http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf (last visited July 16, 2014).

does "considered male at birth" mean? I'm not sure I know what the words "he," "she," "male," and "female" mean in Connecticut and Massachusetts anymore. It is very confusing. I assume, unless I'm mistaken, this youth was born male.

The April 21 *Courant* op-ed piece was written by the Commissioner of the Connecticut Department of Children and Families. The commissioner ordered that the "transgender" juvenile be moved from a juvenile facility to an adult women's correctional facility. Why? According to the commissioner, this juvenile "has repeatedly, and over an extended period, assaulted girls and female staff members." The commissioner said that one of the assaulted staff members "suffered a concussion, an eye injury that temporarily impaired her sight, bites to her skull and arm, and bruises to her jaw, chest and arms." Is this what Indiana wants? Does Indiana want to place a person in a women's correctional facility who was born male and allegedly assaults girls and women?

Maine allows same-sex marriage. On January 30, 2014, the Maine Supreme Judicial Court held that a student who was born male but eventually expressed and adhered to a "female gender identity" has the right to use the girl's bathroom in school. The court held that the school violated the student's rights by asking the student to use a unisex bathroom. *Doe v. Regional Sch. Dist. Unit 26*, 86 A.3d 600 (Maine 2014). Is this what Indiana wants? Does Indiana want people who were born male to be in girls' bathrooms?

New York allows same-sex marriage, as does the nation of Portugal. The front page of the Sunday *New York Times* on July 6, 2014, had an article, "Coming to U.S. for Baby, and Womb to Carry It."[6] The photo accompanying the article shows two men holding a newborn baby. In the photo's caption, the *Times* refers to the baby as "their son." The two men are married to each other and living in Portugal. Referring to a birthday celebration (I assume the birthday of one of the two men, but I am not sure) that occurred after the baby was conceived but before the baby was born, the first paragraph of the article reads,

> At home in Lisbon, a gay couple invited friends over to a birthday celebration, and at the end of the evening shared a surprise — an ultrasound image of their baby, moving around in the belly of a woman in Pennsylvania being paid to carry their child.

I am not criticizing the couple. I am describing how newspapers in states that allow same-sex marriage report on same-sex couples and reproduction. Not until the seventh paragraph of the article is there any mention of an egg. What would a 14-year-old boy conclude if he saw this headline, photo, caption, and read the first six paragraphs of the article? Might he conclude that two men can conceive a child without a woman and that a woman is necessary only to carry the baby until birth? I think many 14-year-old boys would.

[6] www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html?_r=0 (last visited July 16, 2014).

On May 31, 2014, singer Melissa Etheridge married a woman, Linda Wallem, in California. California allows same-sex marriage. According to *US Weekly* magazine, "Etheridge shares 7-year-old twins Johnnie and Miller with ex Tammy Lynn Michaels. She also is mom to daughter Bailey, 17, and son Beckett, 15, from her previous relationship with director Julie Cypher."[7] What would a 14-year-old boy think if he read this article? Might he conclude that two women can conceive a child together and a man is unnecessary? I think many 14-year-old boys would.

Does same-sex marriage harm anyone? Is the harm outweighed by the good? I think the people of Indiana should be allowed to decide for themselves.

From ancient times until 2001 (the Netherlands legalized same-sex marriage in 2001), everywhere in the world, the marriage laws included three requirements. The couple had to be: 1) at least a minimum age (15, 16, or whatever), 2) a male and female; and 3) not blood relatives of each other. The marriage laws were thus a three-legged stool. Breaking any of those legs, as the same-sex marriage movement seeks to do (end the male-female requirement), breaks the stool. How serious is the breakage? I just described some of the breakage. The Seventh Circuit can decide for itself how serious the breakage is.

[7] Stephanie Webber, "Melissa Etheridge Marries Fiancee Linda Wallem," www.usmagazine.com/celebrity-news/news/melissa-etheridge-marries-fiancee-linda-wallem-wedding-details-2014315 (last visited July 16, 2014).

I said in my 2003 book that employers should accept gay people, not "play God," and not discriminate "unjustly." I stand by what I said. I was speaking to employers, not the government, except to the extent the government is an employer. The employment laws serve a very different purpose than the marriage laws. The employment laws protect the right to earn a living. The marriage laws are the government's way of rewarding people for entering into the type of intimate relationship society desires. Laws that define marriage as the union of a man and woman who are not blood relatives of each other are "just," not "unjust." I adopt and incorporate by reference what the defendants-appellants said in this regard in their brief.

Conclusion

The district court decision should be reversed.

Date: July 17, 2014

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,087 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the requirements of Rules 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ David A. Robinson

Certificate of Service

I hereby certify that on July 17, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on (date). I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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