

Case Nos. 10-2204, 10-2207 and 10-2214

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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COMMONWEALTH OF MASSACHUSETTS,

*Plaintiff-Appellee,*

v.

UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES, *et al.*,

*Defendants-Appellants.*

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DEAN HARA,

*Plaintiff-Appellee/Cross-Appellant,*

NANCY GILL, *et al.*,

*Plaintiffs-Appellees,*

KEITH TONEY; ALBERT TONEY, III,

*Plaintiffs,*

v.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,

*Defendants-Appellants/Cross-Appellees,*

HILARY RODHAM CLINTON,

in her official capacity as United States Secretary of State,

*Defendant.*

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Appeals from the United States District Court for the District of Massachusetts  
Civil Action Nos. 1:09-cv-11156-JLT, 1:09-cv-10309-JLT  
(Honorable Joseph L. Tauro)

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**BRIEF OF *AMICUS CURIAE*, AMERICAN COLLEGE OF  
PEDIATRICIANS, IN SUPPORT OF DEFENDANTS-APPELLANTS  
AND IN SUPPORT OF REVERSAL**

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**FRAP RULE 26.1 DISCLOSURE STATEMENT**

*Amicus curiae*, American College of Pediatricians, has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. As it has no stock, there is no publicly held corporation that owns 10% or more of its stock.

## TABLE OF CONTENTS

INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
I. The District Court’s Acceptance Of The False Assertion That Children Are Unaffected By Same-Sex Parenting Contradicts A Broad Base Of Research Indicating That Children Raised By Their Married Biological Parents Benefit In Significant Ways. ....	4
A. The alleged “consensus” that children are unaffected by same-sex parenting relies on flawed studies and disregards a large body of evidence, which casts substantial doubt on that claim.....	5
B. The optimal parenting model is not a question of whether two parents are better than one, but whether the optimal model links a child with his or her biological mother and father through marriage, which increases the probability of positive outcomes at many stages of life. ....	11
C. There is consensus that the presence of a non-biological parent—which is a necessity among same-sex couples—correlates with greatest risk for children.....	12
II. Children Benefit From Having Both A Father And A Mother.....	17
A. Mothers and Fathers each provide different benefits for their children that same-sex parenting is unlikely to provide. ....	17
B. Eliminating DOMA’s model of opposite-sex parenting will have negative effects on children. ....	25
III. Caution Is Appropriate When Using Social Science Data To Inform Judicial Decision-Making. ....	26
CONCLUSION.....	28

## TABLE OF AUTHORITIES

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<i>Goodridge v. Department of Health</i> , 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003) .....	7
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<i>Lofton v. Secretary of the Department of Children and Family Services</i> , 358 F.3d 804 (11th Cir. 2004) .....	7
<i>United States v. Carolene Products Company</i> , 304 U.S. 144 (1938).....	28

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### **INTEREST OF *AMICUS CURIAE***

The members of the American College of Pediatricians (“the College”) devote their professional lives to promoting the health and wellbeing of children. As a medical association, the College has an interest in the broad spectrum of factors that impact the physical, mental and social development of the young patients in their care. This interest extends to family structure and environment, which drives many of the outcomes for pediatric patients across a variety of key developmental categories.

The collective membership of the College has observed firsthand the effect of varied and changing family structures on the wellbeing of pediatric patients, and it is also familiar with the significant academic analysis and sociological data that augment understanding of these issues. The College submits this brief to present to the Court its professional perspective concerning the effect of various parenting models and family structures on the development and wellbeing of the children under the care of America’s pediatricians.

This brief is filed pursuant to the consent of Counsel of Record for all parties. No party or party’s counsel authored any part of the brief nor contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

## SUMMARY OF ARGUMENT

The District Court held that ““there exists no fairly conceivable set of facts that could ground a rational relationship’ between DOMA and a legitimate government objective.” *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (citation omitted). The district court based its holding, in part, on a severely flawed assertion that “a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.” *Id.* at 388. The American College of Pediatricians disagrees with the district court’s assertion. There is no such consensus. The sources cited in support of the district court’s belief, *id.* at 388 fn.106, reflect an incomplete and distorted understanding of the available data and professional consensus concerning parenting models and family structure.

In fact, no study has yet been undertaken to reliably establish the impact of same-sex parenting on children. We do, however, know that social science strongly suggests that certain family structures and parenting models are more likely than others to lead to successful outcomes for children. Correspondingly, other family structures—such as the replacement of a mother and father with a same-sex couple—are more likely in the aggregate to lead to negative outcomes

for children. Social science also indicates that biological family ties are important, and severing those ties is likely to produce unique risks for young children.

In addition to severing biological ties, it is also dangerous to dismiss the importance of the unique contributions mothers and fathers provide to their children. Broad legal, political, or cultural acceptance of the District Court's misinformed statement would significantly undermine the efficacy of efforts to promote fatherhood in communities where the absence of fathers has contributed to a variety of negative outcomes and social ills. We urge this Court to correct the district court's assertion that children are unaffected by significant parental changes. If, instead, the federal courts embrace this false statement, societal and governmental efforts to promote and encourage the parental choices that foster an optimal environment for child rearing may be significantly undermined.

Surely an interest in defining marriage consistent with the optimal parenting model constitutes a "conceivable set of facts that could ground a rational relationship' between DOMA and a legitimate government objective." *Gill*, 699 F. Supp. 2d at 387 (citation omitted). In light of the data available both when DOMA was enacted and available now, it is entirely rational for our Congressional policymakers to prefer that a child be raised by his or her own mother and father over any two other adults.

## ARGUMENT

### **I. The District Court's Acceptance Of The False Assertion That Children Are Unaffected By Same-Sex Parenting Contradicts A Broad Base Of Research Indicating That Children Raised By Their Married Biological Parents Benefit In Significant Ways.**

In order to justify a holding that Congress had no rational basis for its passage of DOMA, the District Court needed to dispose of Congress' clearly-stated rationales for the law. Those rationales included Congress' valid concern for preservation of "the irreplaceable role that [traditional] marriage plays in childrearing." Committee on the Judiciary Report on the Defense of Marriage Act, H.R. Rep. No. 104-664, at 14 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905-23, 1996 WL 391835 (citation omitted). Congress was rightfully interested in preserving what was then and continues to be the ideal model for childrearing—marriage of the child's biological father and mother.

Yet the District Court dismissed Congress' concerns with the erroneous claim that "[s]ince the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." *Gill*, 699 F. Supp. 2d at 388. While this is often asserted, it is simply not true.

***A. The alleged “consensus” that children are unaffected by same-sex parenting relies on flawed studies and disregards a large body of evidence, which casts substantial doubt on that claim.***

The District Court cited scant support for its conclusion that children are unaffected by same-sex parenting. The alleged “consensus” in the health care community consists primarily of unsupported policy statements from various organizations and GLBT advisory committees within those organizations. *Gill*, 699 F. Supp. 2d at 388 n.106. Those policy statements cite to a limited number of studies that purport to establish that same-sex parents are no different from a biological mother and father. Those studies, however, have significant flaws and do not support that finding.<sup>1</sup>

The cited studies suffer from a host of flaws, including insufficient sample sizes,<sup>2</sup> self-selecting participants,<sup>3</sup> premature conclusions based upon one-time

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<sup>1</sup> Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting*, Washington DC: Marriage Law Project 6 (2001) (“We conclude that the methods used in these studies are so flawed that these studies prove nothing.”).

<sup>2</sup> Norval D. Glenn, *The Struggle for Same Sex Marriage*, 41 Soc’y 25, 26-27 (2004); Ellen C. Perrin et al., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341,343 (2002)(conceding “[t]he small and nonrepresentative samples studied and the relatively young age of most of the children suggest some reserve.”); Walter R. Schumm, *What Was Really Learned from Tasker & Golombok’s (1995) Study of Lesbian and Single Parent Mothers?*, 94 Psychol. Rep. 422, 423 (2004) (urging policymakers to exercise “extreme caution” in “interpret[ing] research on gays and family life . . . or any [similarly] small subset” of a broader population).

self-reported snapshots rather than sustained temporal monitoring,<sup>4</sup> failure to control for pertinent variables,<sup>5</sup> a paucity of studies looking at gay fathers,<sup>6</sup> and politicized methodology that casts doubt on the validity of the conclusions presented by those who authored or managed the studies.<sup>7</sup> *See generally Nock Affidavit* (detailing flaws in same-sex parenting scholarship and studies).<sup>8</sup> Indeed, one of the most glaring deficiencies of the gay parenting data is that not a single study utilized a control group of married biological parents and their children.<sup>9</sup>

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<sup>3</sup> Affidavit of Steven Lowell Nock at paras. 39-40, *Halpern v. Attorney General of Canada* (2002), 60 O.R. 3d 321 (Can. Ont. C.A.) (No. 684/00 Ontario Sup. Ct. Justice) (hereinafter “Nock Affidavit”).

<sup>4</sup> Lerner & Nagai, at 6.

<sup>5</sup> *Id.* at 29-34.

<sup>6</sup> Fiona Tasker, *Lesbian Mothers, Gay Fathers and Their Children; A Review*, 26 *Dev. & Behav. Pediatrics* 224, 225 (2005) (admitting that “[s]ystematic research has so far not considered developmental outcomes for children brought up from birth by single gay male couples (planned gay father families), possibly because of the difficulty of locating an adequate sample.”).

<sup>7</sup> Lerner & Nagai at 61-62, 67 (detailing weaknesses in the studies supporting same-sex parenting because they fail to control the samples with measures of bias, reliability, or validity).

<sup>8</sup> Your amicus urges this Court to review the Nock Affidavit in its entirety, as it provides the most thorough and comprehensive assessment of the shortcomings of the handful of studies repeatedly relied upon by the policy statements cited in support for the District Court’s holding. No study has emerged to alter Professor Nock’s conclusion that “we simply do not yet know how the children of homosexual and heterosexual parents compare at this point in time [because] this research has not yet been done.” Nock Affidavit at para. 119.

<sup>9</sup> We are aware of one study, not cited in the policy statements, that did include such a control group. That study used non-representative sampling, recruiting both its lesbian families and its heterosexual control group through a lesbian-mother support group, ads in gay-themed publications, and the researchers’ friends and colleagues. David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative*

These critical shortcomings are one reason why other courts have quite properly refused to allow the questionable “social science” reflected in these studies to drive public policy and constitutional interpretation. *See, e.g., Lofton v. Secretary of the Dep’t of Children and Family Servs.*, 358 F.3d 804, 825 (11th Cir. 2004) (criticizing homosexual parenting studies due to “significant flaws in the studies’ methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents.”); *Goodridge v. Dept. of Health*, 440 Mass. 309, 387-388, 798 N.E.2d 941, 998-1000 (Mass. 2003) (Cordy, J., dissenting) (noting weaknesses in the available data such as “the sampling populations are not representative, that the observation periods are too limited in time, that the empirical data are unreliable, and that the hypotheses are too infused with political or agenda driven bias.”).

In fact, some of the studies that purportedly demonstrate that the children of same-sex parents fared no worse than opposite sex parents actually found that the children of same-sex parents *did* suffer worse outcomes. But rather than exploring

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*Study of Lesbian and Heterosexual Parents and Their Children*, 31 Dev. Psych. 105, 107 (1995). “[T]he resulting sample was predominantly White, highly educated, and economically privileged.” *Id.* at 113. The sample was also tiny, consisting of a mere 15 lesbian families and 15 heterosexual families, and the sample did not include any children raised by gay male parents. *Id.* at 107. The sample was also limited to young children between the ages of 3 and 9, and thus sheds no light whatsoever on the comparative effect of different family structures on adolescents and young adults.



those troubling findings, those studies either ignored the differences or dismissed them as statistically insignificant. *See, e.g.,* Jennifer L. Wainright & Charlotte J. Patterson, *Delinquency, Victimization, and Substance Use Among Adolescents with Female Same-Sex Parents*, 20 *J. Fam. Psychol.* 526, 528 (table 1) (2006) (showing that the children of same-sex parents involved in the study became intoxicated and participated in binge drinking more frequently than the children of opposite-sex parents, and were more likely to use marijuana; engage in the risky use of drugs and alcohol; have sexual relations under the influence of drugs and alcohol; and engage in delinquent behavior, than children of opposite-sex parents); Susan Golombok, et al., *Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 *J. Child Psychol. Psychiatry* 783, 788 (1997) (finding that, “children in father-absent families perceived themselves to be less cognitively competent ... and less physically competent ... than children in father-present families”); Fiona Tasker & Susan Golombok, *Growing Up In a Lesbian Family; Effects on Child Development* 133 (1997) (finding that the women with lesbian mothers were more likely to engage in premarital promiscuous sex). These differences in outcomes were dismissed as statistically insignificant because of the miniscule sample sizes of the studies. But rather than dismissing the differences that were discovered, the asserted justification of small samples merely

underscores the limitations of the overall studies—and same-sex parenting literature in general. In short, no study has considered a statistically-reliable sampling of same-sex parents. *See, e.g.*, Nock Affidavit, at para. 115, (“Not a single [study] was conducted according to generally accepted standards of scientific research.” Same-sex parenting studies contain “critical defects,” including failure to obtain sufficiently large samples of random, non-volunteer participants) (*Id.* at paras. 29-38, 116).

In contrast, there does exist an accumulated body of social science literature on childrearing that includes studies with sufficiently large sample sizes, random sample selections, and rigorous controls. These studies do not directly compare children raised by same-sex couples with children raised by their married biological parents, but do compare the outcome of children raised by their married biological parents with children raised in a variety of other family structures, including by single parents, biological and step-parent combinations, and adoptive parents. This broad group of quality studies strongly suggests, *contra* the District Court’s conclusion, that the ideal family structure for a child is a family headed by two opposite-sex biological parents in a low-conflict marriage. Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress through School*, 47 *Demography*, Aug. 2010, at 755 (noting that “[s]tudies of family structure and children’s outcomes nearly universally find at least a modest advantage for

children raised by their married biological parents”).<sup>10</sup> Unlike the statistically-deficient same-sex parenting studies, most studies of the life outcomes of children raised by their married biological parents involve broad national data sets and encompass a variety of behavioral, cognitive, psychological and financial results. The comparative reliability of this body of research further highlights the depth of the scientific support for an objective preference for married biological parenting in relation to other possible parenting models and family structures.

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<sup>10</sup> See also, Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social and Emotional Well-Being of the Next Generation*, 15 *Future Child.*, Fall 2005, at 75, 89 (suggesting family structure impacts “cognitive, emotional, and social problems” and fewer problems are experienced in childhood and adulthood by individuals raised by “two continuously married parents”); Femmie Juffer & Marinus H. van Ijzendoorn, *Adoptees Do Not Lack Self-Esteem: A Meta-Analysis of Studies on Self-Esteem of Transracial, International, and Domestic Adoptees*, 133 *Psychol. Bulletin* 1067, 1067 (2007) (“Many studies and several meta-analyses have shown that adopted children lag behind in physical growth, school performance, and language abilities; show more attachment and behavior problems; and are substantially overrepresented in mental health referrals and services for learning programs.”); Shelly Lundberg & Robert A. Pollack, *The American Family and Family Economics*, *J. Econ. Persp.*, Spring 2007 at 3, 19 (discussing substantial benefit for children raised in traditional nuclear families with regard to educational outcomes); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 *J. Marriage & Fam.* 876, 890 (2003) (finding that “[a]dolescents in married, two-biological-parent families generally fare better than children in any of the family types examined”); Sara McLanahan & Gary Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* 1, 3 (1994) (“argu[ing] that growing up with only one biological parent frequently deprives children of important economic, parental and community resources, and that these deprivations ultimately undermine their chances of success”); Pierre L. van den Berghe, *Human Family Systems: An Evolutionary View* 33-60 (1979) (establishing that human marriage and family is a flexible but beneficial system for reproduction).

***B. The optimal parenting model is not a question of whether two parents are better than one, but whether the optimal model links a child with his or her biological mother and father through marriage, which increases the probability of positive outcomes at many stages of life.***

Congressional interest in channeling responsible procreation through the institution of marriage is grounded in the reality that only opposite-sex relationships can produce children, and they often do so unintentionally. Children conceived in such situations do not have the option of being raised by two mothers or two fathers; the issue is only whether the child will be raised by his or her mother and father, or by a single parent (usually the child's mother). It is widely accepted that a child reared by two parents is generally better off than a child reared by one parent. But a belief that some gay couples may be successful parents does not merit abandonment of the notion that Congress has a rational interest in having children reared by their own married biological mother and father.

Married 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. *See, e.g.,* Lorraine Blackman et al., *The Consequences of Marriage for African-Americans: A Comprehensive Literature Review*, 24 Inst. for Amer. Values (2005) (delinquency, self-esteem and school performance); W. Bradford Wilcox et al., *Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences*, Inst. for American Values 32-33 (2d ed. 2005) [hereinafter "Wilcox, *Marriage Matters*"] (school performance,

delinquency, smoking, and risk of suicide); Paul R. Amato, *Parental Absence During Childhood and Depression In Later Life*, 32 Soc. Q. 543, 547 (1991) (risk of adult depression).

***C. There is consensus that the presence of a non-biological parent— which is a necessity among same-sex couples—correlates with greatest risk for children.***

Any debate relating to the value of married biological parenting should consider one of the clearest conclusions to be drawn from the pertinent social science literature: Across a wide range of studies spanning several decades, researchers have consistently found that the family structure presenting some of the greatest risks for children is that of a biological mother coupled with a stepfather. Researchers Martin Daly and Margo Wilson summarized that consensus, which is very real, by observing that “Living with a stepparent has turned out to be the most powerful predictor of severe child abuse yet.” Daly & Wilson, *Evolutionary Psychology and Marital Conflict: The Relevance of Stepchildren, in Sex, Power, Conflict: Evolutionary and Feminist Perspectives* 9-28 (1996). “Studies have found that young children in stepfamilies are more than 50 times more likely to be murdered by a stepparent (usually a stepfather) than by a biological parent. One study found that a preschooler living with a stepfather was 40 times more likely to be sexually abused than one living with both of his or her biological parents.” Wilcox, *Marriage Matters*, at 32. Similarly, a study that utilized a random sample

of 930 adult women in San Francisco “revealed that 17% or one out of every six women who had a stepfather as a principal figure in her childhood years, was sexually abused by him. The comparable figures for biological fathers were 2% or one out of approximately 40 women.” Diana E. H. Russell, *The Prevalence and Seriousness of Incestuous Abuse: Stepfathers vs. Biological Fathers*, 8 Child Abuse & Neglect 15, 15 (1984).

Similar phenomena exist with respect to the risk of other negative outcomes for children, including incarceration and teenage pregnancy. For instance, a recent longitudinal study addressing juvenile incarceration emphasized that “The adolescents who faced the highest incarceration risks, however, were those in stepparent families, including father-stepmother families . . . This study showed . . . that although children in father-absent households should be an important policy focus, marriage is not necessarily the answer to prevent incarceration unless it is between the two parents of the child; otherwise, children in single-parent households fare relatively better than those in stepparent households.” Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. Res. On Adolescence 369 at 369, 392 (2004). With respect to teenage pregnancy, “girls in stepfamilies are slightly *more* likely to have a teenage pregnancy compared to girls in single-parent families, and much more likely to have a teenage pregnancy than girls in intact, married families.” Wilcox, *Marriage Matters* at 14.

In all households headed by two homosexual partners, the presence of children reflects either adoption by one or both partners, or a biological parent sharing custody with a stepparent. *See* Margaret Somerville, *Children's Human Rights and Unlinking Child-Parent Biological Bonds With Adoption, Same-Sex Marriage and New Reproductive Technologies*, 13 J. Fam. Stud. 179, 181 (2007) (observing that establishing same-sex families “unavoidably takes away [a child’s] right to know and be reared within his own biological family.”). As described above, and despite the District Court’s claim to the contrary, a substantial body of social science research strongly suggests that neither of these family structures is equivalent to married biological parenting in terms of producing positive outcomes and avoiding negative outcomes for children.

The disparity is not as stark when adoptive married heterosexual parents are compared with married biological parents. This is not surprising, because adoptive parents, particularly those involved in private adoptions, are usually subject to heavy screening, and often incur significant financial costs as part of the adoption process. Such parents are disproportionately likely to be drawn from a wealthy and well-educated demographic pool, and the evidence suggests that these educational and financial advantages may partially offset the negative pressure exerted on family structure by the absence of any biological tie between adoptive parents and their children. McLanahan & Sandefur, *supra*.

There is, however, no reason to believe that stepparent families, whether gay or heterosexual, will enjoy these same advantages. Instead, the comparative deficiencies and increased risks that appear to inhere in many stepparent families are well-documented. To the extent these negative outcomes derive, in part, from the relational asymmetry that exists when one parent has biological ties to a child, and the second parent lacks such ties, the risk of these negative outcomes can be expected to be equally present in gay stepparent families. Moreover, to the extent these negative outcomes are also a consequence, in whole or in part, of unique risks presented by men who lack a biological tie to their children, then gay male parenting may actually embody a family structure that presents a uniquely increased probability of the negative outcomes that social science has demonstrated are correlated with the presence of a stepfather in the home. In either event, the comparative problems associated with stepparent families, particularly families involving a stepfather, undermine the District Court's assertion that children are unaffected by the various alternative family structures in which they might potentially be raised.

It is, of course, always important to remember that the evaluation of social science data involves averages, probabilities, and aggregate outcomes. At the individual level, it is undoubtedly true there are some single parent, adoptive, and stepparent families, both gay and heterosexual, in which the parent or parents have



created a child-rearing environment that results in outcomes equal to or better than the average outcomes for children raised by married biological parents.

Nevertheless, the labels and classifications that the law applies to various social arrangements can communicate powerful implicit and explicit normative judgments concerning the ideal social arrangements that are to be actively pursued and embraced. The normative judgments communicated by political and legal institutions can have significant impact on mores and behavior outside of those institutions, because such judgments can create powerful cultural incentives for pursuing (or avoiding) participation in particular social arrangements. The District Court's misstatement that there is a consensus regarding the effect that same-sex parenting might have on children conveys an unmistakable normative judgment: that the federal courts believe there is no legitimate empirical or societal basis to prefer married biological parenting over any of the possible alternatives, including the demonstrably risky alternative of stepparent families comprised of a biological mother and a stepfather. It is difficult to predict the exact nature and magnitude of the harm if that message is broadly embraced by the federal courts.

In light of the comparatively increased risk of juvenile incarceration, teenage pregnancy, physical abuse, and sexual abuse presented by stepparent families in relation to married biological parenting, Congress has a compelling interest in maintaining a recognized distinction between married biological parenting and the

alternative of stepparent families. To the extent this Court believes that social science should inform its analysis of the issues presented in this case, we urge this Court to recognize that Congress also has a legitimate interest in promoting the family structure that has proven most likely to foster an optimal environment for the rearing of children as a basis for DOMA. The District Court's unsubstantiated statement that a consensus has emerged is not an adequate basis for ignoring or discounting those important interests.

## **II. Children Benefit From Having Both A Father And A Mother.**

If it is actually true that children are unaffected by same-sex parenting, then it would follow that children receive no benefit from having both a mother and a father, and children receive no particular benefit from having a connection to or relationship with their biological parents. Under the District Court's asserted "consensus," the only relevant parenting factor is the presence of two reliable caregivers. In the face of unrefuted research, that is a truly bold assertion.

### ***A. Mothers and Fathers each provide different benefits for their children that same-sex parenting is unlikely to provide.***

As discussed in Section I, social science data invalidates the District Court's dismissal of heterosexual parenting. Social science data strongly suggests that, on average, children derive a host of unique benefits from being raised by their married biological parents. Common sense reinforces this. There are, of course, a wide variety of differences between men and women in areas such as propensity

for aggression and violence, health challenges and health outcomes, life expectancy, and earning capacity. Data supports this widely-held understanding that fathers and mothers often 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. *See, e.g.,* M.E. Lamb et al., *Effects of Gender and Caretaking Role on Parent-Infant Interaction, in Development of Attachment and Affiliative Systems* 109, 117 (R. N. Emde & R. J. Harmon eds., 1982 ) (acknowledging prior authorship of statement that “[t]he data suggests that the differences between maternal and paternal behavior are more strongly related to either the parents’ biological gender or sex roles, than to either their degree of involvement in infant care or their attitudes regarding the desirability of paternal involvement in infant care”).

A broad body of social science data highlights the unique contributions made by mothers and fathers, and the distinct ways in which separate maternal and paternal contributions promote positive child development outcomes. For example, the natural biological responsiveness of a mother to her infant fosters critical aspects of neural development and capabilities for interactivity in the infant brain.<sup>11</sup> Mothers are also able to extract the maximum return on the temporal

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<sup>11</sup> *See* C.A. Nelson & M. Bosquet, *Neurobiology of Fetal and Infant Development: Implications for Infant Mental Health, in Handbook of Infant Mental Health* 37-59 (C.H. Zeanah Jr., ed., New York: Guilford Press 2d ed. 2000); M. DeWolff & M.

investments of both parents in a two-parent home, because mothers provide critical direction for fathers in routine caretaking activities, particularly those involving infants and toddlers. See Sandra L. Hofferth et al., *The Demography of Fathers: What Fathers Do*, in *Handbook of Father Involvement: Multidisciplinary Perspectives* 81 (Catherine Tamis-Lamonda & Natasha Cabrera eds., 2002); Scott Coltrane, *Family Man* 54 (1996). Fathers need this direction, in part, because fathers do not share equally in the biological and hormonal interconnectedness that develops between and mother and a child during pregnancy, delivery, and lactation.

In comparison to fathers, mothers generally maintain more frequent and open communication and enjoy greater emotional closeness with their children, which fosters a sense of security in children with respect to the support offered by the family structure. Ross D. Parke, *Fatherhood*, *Developing Child Series* 7 (Jerome Bruner et al. ed., Harvard Univ. Press 1996) [hereinafter “Parke, *Fatherhood*”]. Mothers’ typical mode of parent-child play is predictable, interactive, and geared toward joint problem-solving, which helps children to feel comfortable in the world they inhabit. Eleanor Maccoby, *The Two Sexes: Growing*

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van Ijzendoorn, *Sensitivity and Attachment: A Meta-Analysis on Parental Antecedents of Infant Attachment*, 68 *Child Dev.* 571-91 (1997); M. Main & J. Solomon, *Discovery of an Insecure-Disorganized/Disoriented Attachment Pattern*, in *Affective Development in Infancy* 95-124 (T.B. Brazelton and M.W. Yogman eds., 1986).

*Up Apart, Coming Together* 266-67 (1998) [hereinafter “Maccoby, *The Two Sexes*”]; Parke, *Fatherhood*, at 5; Kyle D. Pruett & Marsha Kline Pruett, *Partnership Parenting: How Men and Women Parent Differently – Why It Helps Your Kids and Can Strengthen Your Marriage* 18-19 (2009). Mothers also impose more limits and discipline more frequently, albeit with greater flexibility when compared to fathers. Maccoby, *The Two Sexes*, at 273.

Mothers uniquely play a greater role in cultivating the language and communication skills of their children. Parke, *Fatherhood*, at 6. Mothers help children to understand their own feelings and respond to the feelings of others, in part by encouraging open discussion of feelings and emotions within the family unit. See Suzanne A. Denham et al., *Prediction of Externalizing Behavior Problems From Early to Middle Childhood: The Role of Parental Socialization and Emotion Expression*, 12 *Dev. & Psychopathology* 23-45 (2000); Maccoby, *The Two Sexes*, at 272. Active maternal influence and input is vital to the breadth and depth of children’s social ties, and mothers play a central role in connecting children to friends and extended family. Paul Amato, *More Than Money? Men’s Contributions to Their Children’s Lives?*, in *Men in Families, When Do They Get Involved? What Difference Does It Make?* 267 (Alan Booth & Ann C. Crouter, eds., 1998).

Fathers also make distinctive contributions to the upbringing of their children, and positive paternal contributions play a key role in avoiding a variety of negative outcomes that arise with greater frequency in homes where a father is not present. In two-parent households, despite the demographic changes in workforce participation in recent decades, fathers continue to provide the larger share of household income. See Bureau of Labor Statistics, *Women in the Labor Force: A Databook* (Dep't of Labor 2008), at Table 24. The comparatively higher contribution that fathers make to household income may be attributable to the earning power of men in the workplace, which is documented as being greater than women's earning power. Hilary M. Lips, *The Gender Wage Gap: Debunking the Rationalizations*, Womens Media, <http://www.womensmedia.com/new/Lips-Hilary-gender-wage-gap.shtml> (last visited Jan. 24, 2011). There is no dispute that an increase in household financial resources correlates with an increase in positive outcomes for children in areas such as education, physical health, and the avoidance of juvenile delinquency. McLanahan & Sandefur, *supra*.

Fathers engage proactively in spontaneous play with their children, and “children who roughhouse with their fathers . . . quickly learn that biting, kicking, and other forms of physical violence are not acceptable.” David Popenoe, *Life Without Father* 144 (1996); see also Linda Carroll, “Dads Empower Kids to Take Chances”, MSNBC, June 18, 2010, <http://www.msnbc.msn.com/id/37741738>. A

recent study conducted by developmental psychologist Daniel Paquette found that fathers are also more likely to supervise children at play while refraining from intervention in the child's activities, a pattern that stimulates "exploration, controlled risk-taking, and competition." Daniel Paquette & Mark Bigras, *The Risky Situation: A Procedure for Assessing the Father-Child Activation Relationship*, 180 *Early Childhood Dev. & Care* 33, 33-50 (2010).

Paternal modes of play activity are only one example of the ways in which fathers encourage their children to take risks. Compared to mothers, fathers are more likely to encourage children to try new things and to embrace novel situations and challenges. See Parke, *Fatherhood*, at 6. One study summarized this aspect of paternal input and observed that "Fathers, more than mothers, conveyed the feeling that they can rely on their adolescents, thus fathers might provide a 'facilitating environment' for adolescent attainment of differentiation from the family and consolidation of independence." See Shmuel Shulman & Moshe M. Klein, *Distinctive Role of the Father in Adolescent Separation – Individuation*, 1993 *New Directions for Child & Adolescent Dev.* 41, 53 (1993).

Fathers also utilize a different discipline style than mothers, in that they discipline with less frequency, but greater predictability and less flexibility in terms of deviating from pre-determined consequences for particular behavior. See Thomas G. Powers et al., *Compliance and Self-Assertion: Young Children's*

*Responses to Mothers Versus Fathers*, 30 *Developmental Psych.* 980-89 (1994). Children respond differently to paternal discipline, and are comparatively more likely to resist maternal commands and comply with paternal requests. Maccoby, *The Two Sexes*, at 274-75. This may be one reason why a number of studies have found that paternal influence and involvement plays an outsize role in preventing adolescent boys from breaking the law, and lowering the odds that a teenage girl will become pregnant. *See, e.g.*, Paul R. Amato & Fernando Rivera, *Paternal Involvement and Children's Behavior Problems*, 61 *J. Marriage & Fam.* 375-84 (1999) (finding that paternal involvement is linked to lower levels of delinquency and criminal activity, even after controlling for maternal involvement); Mark D. Regnerus & Laura B. Luchies, *The Parent-Child Relationship and Opportunities for Adolescents' First Sex*, 27 *J. Fam. Issues* 159-83 (2006) (study of 2000 adolescents finding that father-daughter relationship, rather than mother-daughter relationship, was key predictor of whether and when adolescent girls transitioned to sexual activity); *see also* Wilcox, *Marriage Matters*, at 14, 17-18 (discussing evidence suggesting that female sexual development is slowed by early childhood exposure to pheromones of biological father, and accelerated by regular early childhood exposure to pheromones adult male who is not child's biological father).<sup>12</sup>

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<sup>12</sup> It should be noted that any lack of consensus concerning the source of gender



The distinctive maternal and paternal contributions to the optimal childrearing environment highlight what should be obvious: there is no legitimate empirical basis for a claim that there is no difference between a family structure where a mother and father are present and a family structure that deprives children of either a maternal or paternal influence. Even in the absence of a detailed examination of social science data, common sense would suggest that children, like adults, benefit from balanced exposure to the diverse approaches reflected in the typical maternal and paternal parenting models.

In the educational context, the Supreme Court has recognized the indispensable benefits that are attained by an environment that incorporates significant levels of diversity, and has held that promotion of such diversity is a compelling state interest sufficient to justify differential treatment that might otherwise be thought to run afoul of the Equal Protection Clause. *See Grutter v. Bollinger*, 539 U.S. 306, 329-33 (2003). In many ways, the home is the primary educational environment for children, particularly in their most formative pre-adolescent years. Congress plainly has a legitimate and rational interest, even a

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differences is of little relevance. The source of the gender-based variances in parenting style observed in the literature and studies discussed above may be biological difference, cultural pressure, an outgrowth of evolutionary adaptation, or some combination thereof. The State may legitimately recognize the existence of gender differences, and account for their existence when fashioning policy, without endorsing every cultural, social or biological input that may have given rise to the differences in the first place.

compelling one, in making special provision for family structures and parenting models that facilitate the diverse and balanced childrearing environment that on average offers the greatest probability for successful developmental outcomes, and is most likely to avoid the negative outcomes associated with either maternal or paternal deprivation. We urge this Court to recognize that if the federal courts place a judicial stamp of approval on the notion that fatherhood and motherhood have no meaning, the effect of such approval cannot be confined to the judicial system.

***B. Eliminating DOMA's model of opposite-sex parenting will have negative effects on children.***

Fathers lack the gestational bond forged between a mother and her children. To encourage the involvement of fathers in the increasingly common occurrence of young unmarried heterosexual couples confronting an unplanned pregnancy, a variety of government programs have expended considerable public resources to persuade unmarried fathers to step forward and embrace the responsibilities of active fatherhood.<sup>13</sup> A number of these programs have met with considerable success.<sup>14</sup> But if there is no legitimate governmental interest in specifically

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<sup>13</sup> Christi Parsons, *Obama Pledges to Support Responsible Fatherhood*, Los Angeles Times, June 22, 2010, <http://articles.latimes.com/2010/jun/22/nation/la-na-obama-fathers-20100622>.

<sup>14</sup> *Boyz2Dads CD-ROM Pre-Post Pilot Evaluation Results Summer 2007*, National Fatherhood Initiative, <http://www.fatherhood.org/Document.Doc?id=39> (describing positive results from a pilot program designed to promote more

promoting “fatherhood” and “motherhood,” as opposed to the gender-neutral concept of “parenthood,” one can easily imagine the host of legal and political hurdles that will threaten the future survival of such programs.

By stating that children are unaffected by same-sex parenting, the District Court essentially consigned the distinct concepts of fatherhood and motherhood to legal and empirical irrelevance. But no one should be naïve enough to believe that these findings, if broadly endorsed by the federal courts, will not undermine the legal, political, cultural and societal support for fatherhood and motherhood in the world beyond the courtroom walls.

### **III. Caution Is Appropriate When Using Social Science Data To Inform Judicial Decision-Making.**

The foregoing discussion reflects an attempt to present to the Court pertinent social science data concerning parenting models and family structure. But great prudence should be used when interpreting and relying upon such data in the course of resolving a legal dispute. Social science involves assessments of averages, probabilities, and aggregate outcomes, usually in connection with complex aspects of human behavior where it is difficult to identify, let alone

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responsible attitudes about fatherhood in teen and pre-teen males); *Summary of Formative Evaluation Findings: Doctor Dad Pilot Test*, Center for Social Work Research, University of Texas at Austin, Spring 2004, National Fatherhood Initiative, <http://www.fatherhood.org/Document.Doc?id=52> (describing positive results from a pilot program designed to improve the awareness of young fathers as to health and safety issues with raising young children).

control for, all of the pertinent variables that might affect the outcomes under review. *See, e.g.*, Jim Manzi, *What Social Science Does – and Doesn't – Know: Our Scientific Ignorance of the Human Condition Remains Profound*, 20 City J., Summer 2010. Social science cannot predict with certainty the effect of changes to complex societal institutions such as the family unit, marriage and parenthood. Indeed, the questionable track record of social science influence on the development of family law in the United States is well-established.<sup>15</sup>

This unpredictability is especially pronounced when assessing gay parenting, civil unions, and same-sex marriage, all of which are practices of relatively recent vintage. *See* Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. Marriage & Fam. 3, 17 (2010) (“Because legal access to same-sex marriage is so new and rare, we do not yet have research that compares the children of married same-sex and different-sex couples.”). This Court should also not ignore the role of politics in this field. Two supporters of redefining marriage admit: “[T]he political stakes of this body of research are so high that the ideological ‘family values’ of scholars play a greater part than usual in how they

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<sup>15</sup> *See, e.g.*, Martha L. Fineman, *Custody Determination at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality*, 3 Can. J. Women & L. 88 (1989); Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era*, 59 U. Miami. L. Rev. 1, 81 (2004); Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. Cal. Interdisc. L.J. 631, 674-84 (1994).

design, conduct, and interpret their studies.” Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 *Amer. Soc. Rev.* 159, 161 (2001).

In light of the inherent limitations of the social science enterprise, this Court should be particularly reluctant to accept the District Court’s cavalier dismissal of the longstanding legal and cultural recognition of married biological parenting as the family structure that on average embodies the optimal childrearing environment for the next generation of our nation’s children.

### CONCLUSION

Although persons challenging the constitutionality of legislation may introduce evidence in support of their claim that the legislation is irrational . . . they will not prevail if “the question is at least debatable” in view of the evidence that may have been available to the Legislature. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-55 (1938). The question of how children might be affected by same-sex parenting is unanswered and highly debatable. As a result, we urge this Court to reject any rationale or statement that contradicts societal support for married biological parenthood, or that would undermine critical legal, political and cultural support for the unique contributions that fathers and mothers make to the successful upbringing of their children.

For the foregoing reasons the judgment of the district court should be reversed.

Respectfully submitted,  
this 25th day of January 2011

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,828 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

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## CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2011, I have electronically filed the foregoing Brief *Amicus Curiae* of American College of Pediatricians in the consolidated cases of *Commonwealth of Massachusetts v. United States Department of Health and Human Services* and *Hara, Gill, et al. v. Office of Personnel Management*, Nos. 10-2204, 10-2207, and 10-2214, with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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