No. 14-124

IN THE

Supreme Court of the United States

GARY R. HERBERT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF UTAH, AND SEAN D. REYES, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF UTAH,
Petitioners,

v.

DEREK KITCHEN, MOUDI SBEITY, KAREN ARCHER, KATE CALL, LAURIE WOOD, AND KODY PARTRIDGE, INDIVIDUALLY,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF OF HISTORIANS AND AMERICAN LEADERSHIP FUND *AMICI CURIAE* IN SUPPORT OF PETITION

FRANK D. MYLAR
Counsel of Record
MYLAR LAW, P.C.
2494 Bengal Blvd.
Salt Lake City, Utah 84121
Phone: (801) 858-0700
Email: Mylar-Law@comcast.net
Counsel for Amici Curiae

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As required by Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *amici curiae's* intention to file this brief at least 10 days prior to the due date. All parties to this dispute consent to the filing of this brief.

Amici Curiae and Their Interests[1]

The *Amici* are one public policy organization and 19 distinguished professors and scholars of history and related disciplines. The work of the *Amici* professors encompasses decades of scholarly engagement in the humanities and social sciences including history, law, and matters of civil society. They believe the historical context provided by this brief will assist this Court in addressing the claim that the U.S. Constitution mandates a redefinition of marriage. These scholars do not speak for or represent educational institutions in this brief. See Appendix for a complete listing of each Scholar.

The American Leadership Fund is a private, non-profit 527 family policy organization that works on behalf of families and seeks to promote traditional values and constitutional principles in politics and American society. It helps fund, promote, and advocate for historical Constitutional perspectives.

I. Summary of Reasons to Grant the Petition

This Court should grant the Petition because the covenant of marriage is not merely words or historical nostalgia, but a means by which states hope to protect, raise, and educate its children by their mother and father, living together, and to encourage offspring from that male and female

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[1] *Amici* state that no counsel for any party authored this brief in whole or in part; and that no counsel or party, other than *amici*, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute consent to the filing of this brief.

relationship so as to maintain a sufficient number of citizens for future generations.

This Court has often recognized that states have primary jurisdiction and authority to regulate, define, and protect marriage. Last year this Court acknowledged, "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *United States v. Windsor,* 133 S. Ct. 2675, 2689-2690 (2013). Just thirty years ago this Court recognized and reiterated over a century of juris prudence reflecting the maxim that "domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact." *Sosna v. Iowa,* 419 U.S. 393, 404 (1975).

The lower court rulings in the Utah case and in several others, rejected over a century of precedents from this Court in interfering with a state's right to define marriage as a man and a woman. In doing so, these Courts departed from history and tradition dating back before recorded history. Such a paradigm shift could have substantial and detrimental consequences for future generations. It is of the utmost importance for this Court to review such decisions that so sharply diverge from societal norms and expectations.

The right of states to regulate marriage is particularly compelling when it involves children born of that union. In fact, protecting children from societal ills has long been regarded as one of the highest and most profound duties of a state since those children will be the next generation of leaders,

educators, business owners, employees, taxpayers, and nurturers of their own children.

The state not only has a right and duty to protect children, it has a vested interest in making sure it produces a critically significant number of children and that they are nurtured, raised, and educated in the best manner possible.

Biology teaches us that every child has one mother and one father. History, tradition, and even social science confirm that children most often grow to be law-abiding productive adults when they are raised in a home consisting of their mother and father. Utah, like many states, seeks to encourage children to be raised by their mothers and fathers in a relationship and covenant that is not easily broken. Such principles are not vague generalizations, but are grounded in express statutory language and historical experience. Such deeply rooted tradition, law, and experience should not be so quickly set aside without the review of this Court.

II. Argument

A. THE ABRUPT DEPARTURE OF LOWER COURTS FROM THE HISTORICAL AND TRADITIONAL UNDERSTANDING OF MARRIAGE NECESSITES THIS COURT'S REVIEW.

Throughout history, the word, institution, and act of "marriage" has always referred to the union of a man and woman. Every claim under the Fourteenth Amendment equal protection and

substantive due process clauses requires courts to account for history and tradition. While it is true that "our Nation's history, legal traditions, and practices"[2] are typically associated with substantive due process analysis, these considerations are also relevant to plaintiffs' equal protection arguments. This is because "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked"[3] by their common concern with protection from arbitrary laws. Although history and tradition may not be "the ending point" of constitutional analysis,[4] they are surely the place to begin, for even in equal protection cases "history will be heard."[5] This is especially true here because plaintiffs base their challenge on overlapping equal protection and substantive due process grounds.

It is highly relevant, therefore, "whether or not the objective character of [Utah's marriage amendment] is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning." That inquiry binds the court to "objective considerations, including history and precedent, [as] the controlling principle."[6] And as with all cases touching on socially important issues where the Constitution's terms provide no express direction, this court should be

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[2] *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

[3] *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

[4] *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

[5] *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

[6] *County of Sacramento*, 523 U.S. at 857-58 (Kennedy, J., concurring).

guided by "respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[7]

These historical considerations dictate against plaintiffs' asserted right to same-sex marriage and in favor of Utah's compelling interests to protect children. As demonstrated in greater depth below, this Nation lacks anything resembling a deeply rooted history, legal tradition, or practice of same-sex marriage. Indeed, before 2003, when the Massachusetts Supreme Judicial Court mandated same-sex marriage in that State,[8] same-sex marriage had never existed in this Nation. More broadly, throughout world history—regardless of politics, culture, or religion—marriage has always been defined as an opposite-sex union oriented toward the bearing and rearing of children.[9] By contrast, same-sex marriage is a historically rare anomaly that only existed in a minority of jurisdictions for a mere decade.

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[7] *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment).

[8] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

[9] The existence of polygamy in some past societies does not undercut this reality since even polygamous marriages are opposite-sex in nature. Polygamy still involves the union of a man and a woman even though it also allows for more than one of these unions to take place for a particular man at a given time.

B. THE PETITION SHOULD BE GRANTED TO REVIEW THE COMPELLING HISTORICAL AND CULTURAL BASES FOR MARRIAGE.

When the people of Utah amended their state constitution to retain the definition of marriage that had prevailed in the state since its admission into the Union, they reaffirmed an understanding of marriage consistently accepted across nearly all cultures throughout history. Such remarkable consensus is due to the need for societies to advance important child-centered interests by encouraging the potentially procreative relationships of men and women to take place in a setting where the children who may result have the opportunity to know and be raised by a mother and father firmly bound to one another.

Utah law expressly decrees that children are best raised in the home of their natural parents and that a "child's need for a normal family life in a permanent home, and for positive, nurturing, family relationships is usually best met by the child's natural parents." *See* Utah Code Ann. § 62A-4a-201(1)(c) (2014). Utah law further recognizes a compelling state interest in protecting children, secondary to the parent's role. *See* Utah Code Ann. § 62A-4a-201(1)(d) and (2) (2014). Even in divorce Utah law encourages, absent abuse or other harm, "frequent, meaningful, and continuing access to each parent" and to "have both parents actively involved in parenting the child." Utah Code Ann. § 30-3-32(2)(b)(i) and (iii) (2014). These laws are not only strong policy statements, but they evidence the

reality that it is best for children to be raised by their mother and father. Utah's marriage law directly serves these interests.

1. Reflecting Biological and Social Realities, Marriage Has Widely Been Understood To Be the Union of a Man and a Woman and to Serve, Among Other Purposes, Interests Related to Procreation.

Marriage is widely understood to be the union of an opposite-sex couple. Just last year this Court ruled, "It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor,* 133 S. Ct. 2675, 2689 (2013). This widely held understanding of marriage is inextricably bound to the basic realities of sex difference and the related procreative capacity of male-female couplings. Indeed, as the distinguished sociologist Claude Levi-Strauss explained, marriage is "a social institution with a biological foundation."[10] A group of respected family scholars similarly

[10] Claude Levi-Strauss, *Introduction* in A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (vol. 1, Andre Burguiere, et al., eds. 1996).

acknowledged that "as a virtually universal human idea, marriage is about regulating the reproduction of children, families and society."[11]

This ubiquitous recognition of marriage as an opposite-sex coupling is not arbitrary, much less a multicultural, multi-millennial conspiracy to exclude identified groups. Rather, it is an acknowledgment that marriage serves purposes directly connected to the nature of the relationship. More specifically, marriage has been universally recognized as a way to encourage those who are responsible for creating a child—a mother and father—to take responsibility for the child that their union may produce. A prominent sociologist explains this dynamic: "[t]he genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents . . . the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring."[12] Another sociologist concurs: "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."[13]

This reality has been so widely remarked upon as to become a truism. Professor Levi-Strauss noted

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[11] W. BRADFORD WILCOX, ET AL., WHY MARRIAGE MATTERS 15 (2d ed. 2005).

[12] Kingsley Davis, *The Meaning & Significance of Marriage in Contemporary Society* in CONTEMPORARY MARRIAGE: PERSPECTIVES ON A CHANGING INSTITUTION 7-8 (Kingsley Davis, ed. 1985).

[13] JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2003).

that "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society."[14] Another historian noted that "[m]arriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies."[15] Philosopher Bertrand Russell observed that "[b]ut for children, there would be no need for any institution concerned with sex. . . . [I]t is through children alone that sexual relations become of importance to society."[16] Eminent anthropologist Bronislaw Malinowski similarly said that "the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents."[17] And the Anthropological Institute of Great Britain defined marriage "as a union between a man and a woman such that children borne by the woman are recognized as the legitimate offspring of both partners."[18]

This widely held understanding of marriage—as a male-female social institution—is not a mere social construct amenable to perpetual redefinition, but rather is an institution deeply rooted in biology itself. More recently, authors of an article in *Evolutionary Psychology* concluded that "[across

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[14] CLAUDE LEVI-STRAUSS, THE VIEW FROM AFAR 40-41 (1985).
[15] G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988).
[16] BERTRAND RUSSELL, MARRIAGE AND MORALS 77, 156 (1929).
[17] BRONISLAW MALINOWSKI, SEX, CULTURE AND MYTH 11 (1962).
[18] ANTHROPOLOGICAL INSTITUTE OF GREAT BRITAIN, NOTES AND QUERIES ON ANTHROPOLOGY 71 (6th ed. 1951).

cultures, men develop extended pair-bonds with women (they marry women) and provision these women. The men also nurture their own children. Within the context of these two universals, the argument is presented that the affiliation which mediates these behaviors is, in part, neuro-hormonal in character and thus part of the phylogenetic heritage of our species."[19]

Although some courts may shy away from references to "religious texts," it is important to note the historical and societal significance of the Biblical definition of marriage found in Genesis 2:24, which states in part, "For this reason a man will leave his father and mother and be united to his wife, and they will become one flesh." This reference and many more found in the Torah, or first five books of the Bible, formed the basis for the civil law code relating to marriage for a new nation dating back to about 1400 B.C. This Biblical definition of marriage has been the norm in Western Society, including the United States, for well over four millennia.

Regardless of the precise origins of the marriage covenant, this social institution is rooted in the reality that children often are a common biological and relational consequence when a man and woman live together. The marriage contract has become a prudent and rational means of protecting, providing for, and growing children into responsible adults and the state has a compelling interest in

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[19] Ronald S. Immerman & Wade C. Mackey, *Perspectives on Human Attachment (Pair Bonding): Eve's Unique Legacy of a Canine Analogue* 1 EVOLUTIONARY PSYCHOLOGY 138, 146 (2003).

fostering this particular relationship above all others for the benefit and survival of society.

2. Important state interests promoted by Marriage Laws will be lost if this Court does not grant the Petition.

"The western legal tradition followed the same pattern of recognizing marriage as solely the union of a husband and wife with a core purpose of advancing procreative interests. Legal historian John Witte explains that "the western tradition inherited from ancient Greece and Rome the idea that marriage is a union of a single man and a single woman who unite for the purposes of mutual love and friendship and mutual procreation and nurture of children."[20] Although Greek society could be very tolerant of homosexual conduct, its prominent thinkers nevertheless understood marriage as the union of husband and wife for the purpose of bearing and rearing children. Professor Witte explains that "[a]lready in the centuries before Christ, classical Greek philosophers treated marriage as a natural and necessary instruction designed to foster mutual love, support, and friendship of husband and wife, and to produce legitimate children who would carry on the family name and property."[21]

The Roman Stoic philosopher Musonius Rufus, writing in 30 A.D., extolled marital procreation as

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[20] JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 17 (2d ed. 2012).

[21] *Id.* at 3.

flowing out of and intrinsically part of the rich companionate relationship that should prevail between husband and wife:

> The husband and wife . . . should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them, and nothing peculiar or private to one or the other, not even their own bodies. The birth of a human being which results from such a union is to be sure something marvelous, but it is not yet enough for the relation of husband and wife, inasmuch as quite apart from marriage it could result from any other sexual union, just as in the case of animals. But in marriage there must be above all perfect companionship and mutual love of husband and wife, both in health and in sickness and under all conditions, since it was with this desire as well as for having children that both entered upon marriage.[22]

And in pre-Christian Roman law there "were steady efforts by lawmakers to provide institutional support for marriage and to recognize marriage as the means by which the next generation should come into being and be trained to accept its responsibilities."[23] Therefore, even in ancient times,

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[22] Musonius Rufus, *Fragment 13A, What is the Chief End of Marriage?* in MUSONIUS RUFUS: THE ROMAN SOCRATES 89 (Cora E. Lutz, ed. & trans. 1947).

[23] Charles J. Reid, *Marriage in Its Procreative Dimension: The Meaning of the Institution of Marriage Throughout the Ages* 6 U. ST. THOMAS L. J. 454, 455 (2009).

the government's support for marriage undeniably served compelling purposes connected with procreation and childrearing.

Following this same pattern, in "the early medieval west of the sixth through eleventh centuries, the High Middle Ages of the twelfth through fifteenth centuries, and the Anglican high church and theological culture of the early modern period . . . the procreative dimension of marriage was, in each of these societies, the central organizing principle of legal analysis and social life."[24] For instance, in his Thirteenth Century treatise, which formed the introduction to case law for jurists that would follow, Henri de Bracton included in the "law which men of all nations use . . . the union of man and woman, entered into by the mutual consent of both, which is called marriage," and from marriage, de Bracton observed, "there also comes the procreation and raising of children."[25]

De Bracton was not alone in connecting marriage with procreation and the rearing of children. In his influential treatise, William Blackstone listed marriage among the "great relations of private life," saying the relationship "of husband and wife . . . is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." The next great relationship was "[t]hat of parent and child, which is consequential to that of marriage, being its

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[24] *Id.*

[25] HENRI DE BRACTON, 2 ON THE LAWS AND CUSTOMS OF ENGLAND 27 (Samuel E. Thorne, transl. 1968).

principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated."[26] Later, Blackstone cites Montesquieu for the proposition that "the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children."[27]

The principal founding text of Scots Law, viz. Stair's Institutions of the Law of Scotland (1681)—which influenced Scottish Enlightenment thinkers (David Hume, Thomas Reid, Adam Smith, Dugald Stewart, etc.), who in turn influenced the framers of the U.S. Constitution—treats the relationship of marriage as between a man and a woman as a primary example of the Natural Law to which statutory law is indebted as source and as authority. Stair wrote: "Law is the dictate of reason determining every rational being to that which is congruous and convenient for the nature and condition thereof. . . . Obligations arising from voluntary engagement take their rule and substance from the will of man and may be framed and composed at his pleasure . . . [but] so cannot marriage, wherein it is not in the power of the parties . . . [because] marriage arises from the law of nature."[28] And David Hume, another important philosophical influence on the Founding generation, noted that "[t]he long and helpless infancy of man

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[26] WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 410 (1765).

[27] *Id.* at 435.

[28] JAMES DALRYMPLE, VISCOUNT STAIR, *The Institutions of the Law of Scotland* (1681) Book I Common Principles of Law.

requires the combination of parents for the subsistence of their young."[29]

Given this intellectual and cultural heritage, American treatise writers naturally spoke of marriage as a legal status with a chief end of regulating procreation, focusing not merely on the begetting of children but also on their education and maintenance. Indeed, Noah Webster's 1828 dictionary includes an account of the divine origin of marriage, instituted "for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children."[30]

Justice Story concurred in this assessment, writing that "[m]arriage is not treated as a mere contract between the parties . . . . But it is treated as a civil institution, the most interesting and important in its nature of any in society. Upon it the sound morals, the domestic affections, and the delicate relations and duties of parents and children essentially depend."[31] New York Chancellor James Kent said that "[w]e may justly place to the credit of marriage, a great share of the blessings which flow from . . . the education of children."[32] In his 1851 legal encyclopedia, John Bouvier explained that

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[29] DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 66 (1751).

[30] NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE n.p. (1st ed. 1828); see also SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (defining marriage as the "act of uniting a man and woman for life").

[31] JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 168 (1834).

[32] JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 76 (3d ed. 1838).

"[t]he end of marriage is the procreation of children and the propagation of the species."[33] And perhaps the most prominent treatise writer in mid-nineteenth century America, Joel Prentiss Bishop, wrote that "[m]arriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby."[34]

This understanding was not merely academic. It was widely accepted by state and federal courts. Early in its history the Supreme Court stated that "no legislation can be supposed more wholesome and necessary . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony."[35] A few years later, the Court defined marriage as "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[36]

In 1859, the California Supreme Court stated that the "first purpose of matrimony, by the laws of nature and society, is procreation."[37] In 1952, the same court said that marriage advances important social interests by "channel[ing] biological drives that might otherwise become socially destructive"

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[33] JOHN BOUVIER, 1 INSTITUTES OF AMERICAN LAW 113-114 (1851).

[34] JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE §225 (1st ed. 1852).

[35] *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

[36] *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

[37] *Baker v. Baker*, 13 Cal. 87, 103 (1859).

and "ensur[ing] the care and education of children in a stable environment."[38] As late as 2008, the California Court of Appeals noted that "annulments based on fraud have only been granted in cases where the fraud relates in some way to the sexual, procreative or child-rearing aspects of marriage," since these went "to the very essence of the marriage regulation."[39] This procreative link has been commonly noted in cases throughout the country.[40]

Notably, in 1967, when this Court first applied the right to marry to invalidate a state regulation dealing with marriage, it cited two cases as precedent, both of which centered upon procreation and the family.[41] The first was *Skinner v. Oklahoma*, which had explicitly linked marriage and procreation: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the

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[38] *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952).

[39] *In re Marriage of Ramirez*, 81 Cal Rptr. 3d 180, 184-185 (Cal. Ct. App. 2008).

[40] *Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975) ("procreation of offspring could be considered one of the major purposes of marriage."); *Heup v. Heup*, 172 N.W.2d 334, 336 (Wis. 1969) ("Having children is a primary purpose of marriage."); *Zoglio v. Zoglio*, 157 A.2d 627, 628 (D.C. App. 1960). ("One of the primary purposes of matrimony is procreation."); *Stegienko v. Stegienko*, 295 N.W. 252, 254 (Mich. 1940) ("procreation of children is one of the important ends of matrimony"); *Gard v. Gard*, 169 N.W. 908, 912 (Mich. 1918) ("It has been said in many of the cases cited that one of the great purposes of marriage is procreation."); *Grover v. Zook*, 87 P. 638, 639 (Wash. 1906) ("One of the most important functions of wedlock is the procreation of children.").

[41] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

very existence and survival of the race."[42] The second was *Maynard v. Hill*, which, as noted above, called marriage "the foundation of the family."[43]

All of the cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species. Every child has a biological father and mother and the state has regulated marriage in a way that attempts to bring and keep these parties together. Furthermore, the state continues to regulate marriage between consenting adults by prohibiting polygamy[44] and intra-family marriages.[45] In short, our Nation's law, along with the law of our antecedents from ancient to modern times, has consistently recognized the biological and social realities of marriage, including its nature as a male-female unit advancing purposes related to procreation and childrearing.

3. The State has a compelling interest in promoting procreation in marriage.

The state of Utah, like other states and nations, has a compelling interest in promoting procreation through the covenant of marriage. Based upon publically available statistics, states and

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[42] *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
[43] *Maynard v. Hill*, 125 U.S. 190, 211 (1888).
[44] *Reynolds v. United States,* 98 U.S. 145, 166 (1878) *and Brown v. Buhman*, 947 F. Supp. 2d 1170, 1195 (D. Utah 2013) (upholding the ban on plural marriages, but striking as unconstitutional the ban on consensual sexual relations).
[45] *Lowe v. Swanson*, 663 F.3d 258, 264 (6th Cir. 2011).

nations that promote and define marriage as one man and one woman have higher fertility and birth rates than countries who have same-sex marriage laws or who do not promote marriage as one man and one woman. The European countries of Norway, Iceland, Netherlands, Belgium, and Spain all have dangerously low fertility rates of 1.86 to 1.48 births per thousand.[46] A common denominator of all of these countries is that they all define marriage to include same sex relationships. The United States, on the other hand, has until recently defined marriage as one man and one woman, and has a fertility rate of 2.01, far higher than the countries listed above, but still insufficient to sustain our way of life. Some experts say that a modern society must have a fertility rate of at least 2.1.[47]

Similarly in the United States, Massachusetts, the first state to adopt same-sex marriage, has a fertility rate of 1.67, far below the United States average.[48] Moreover, the six states with the lowest fertility rates are Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and

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[46] Cent. Intelligence Agency, *Country Comparison: Total Fertility Rate*, The World Factbook (last visited September 2, 2014), https://www.cia.gov/library/publications/the-world-factbook/rankorder/2127rank.html.

[47] Jean-Pierre Guengant, The Proximate Determinants During the Fertility Transition, http://www.un.org/en/development/desa/population/publications/pdf/fertility/completing-fertility/2RevisedGUENGANTpaper.PDF (last visited Sep. 2, 2014).

[48] *See* Ctrs. for Disease Control & Prevention, *National Vital Statistics Reports–Births: Final Data for 2010*, 42 (August 28, 2012), http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf.

Vermont; all have adopted laws and policy that promote same-sex marriage.[49]

Utah on the other hand, has a birthrate of 2.45, above the national average and above the sustainability rate. Similarly, the nine states with the highest rates (Alaska, Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, and Utah) have supported marriage as a man and a woman.[50]

Some countries are recognizing the critical importance of promoting marriages of one man and one woman on purely pragmatic survival grounds. Japan, for instance, whose birth rate is 1.41, promotes male-female marriages to increase the birthrate. "'Supporting marriage is an effective way to raise the birthrate,' said Ms. Kioke, who has served as defence and environmental minister."[51] Japan is giving financial aid to local matchmaking programs as part of steps to lift the birthrate. *Id.* Both Germany and France are also taking measures to boost their birthrates.[52] [53]

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[49] Joyce A. Martin, et al., Ctrs. for Disease Control & Prevention, *National Vital Statistics Reports–Births: Final Data for 2012*, Table 12 (December 30, 2013), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_09.pdf.

[50] *Id.*

[51] Keiko Ujikane, *Japan plays Cupid in bid to boost birthrate*, THE SYDNEY MORNING HERALD, March 28, 2014, http://www.smh.com.au/world/japan-plays-cupid-in-bid-to-boost-birthrate-20140321-hvkrf.html.

[52] Suzanne Daley & Nicholas Kulis, *Germany Fights Population Drop*, N.Y. TIMES, August 13, 2013, http://www.nytimes.com/2013/08/14/world/europe/germany-fights-population-drop.html.

[53] Molly Moore, *As Europe Grows Grayer, France Devises a Baby Boom,* The Washington Post, October 18, 2006,

Utah need not prove a causal relationship between a positive increase in birth or fertility rates and its promotion of marriage as a man and a woman so long as the connection is not irrational. The positive correlation among states and nations, as cited above, is sufficient justification to pass Constitutional muster. The strong correlation between birthrates and how marriage is defined is yet another reason for this Court to grant the Petition.

C. ATTEMPTS TO DOWNPLAY THE SIGNIFICANCE OF THE STATE INTERESTS IN MARRIAGE RELATED TO PROCREATION ARE FLAWED

The historical record demonstrates that the male-female understanding of marriage is fundamental to its very definition and tied directly to its animating purpose of binding children to the mothers and fathers whose sexual relationships brought them into the world.

Gender has always been at the core of the marriage definition. Indeed, just five years after this Court invalidated Virginia's anti-miscegenation law, it summarily and unanimously rejected a claim that the Fourteenth Amendment required a state to redefine marriage to include same-sex couples.[54] This result is not surprising because throughout history the requirement "that the parties should be of

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http://washingtonpost.com/wp-dyn/content/article/2006/10/17/AR2006101701652.html.

[54] *Baker v. Nelson*, 409 U.S. 810 (1972).

different sex," unlike racial restrictions on marriage, "has always . . . been deemed requisite to the entire validity of every marriage."[55]

Common objections to the social interests in marriage related to procreation are similarly flawed. An oft-used tactic for avoiding the historical lesson of marriage's universal link to procreation and childrearing has been to suggest that it is irrelevant because of instances where married couples cannot or do not have children. But this is a red herring.

The existence of infertile married couples does not vitiate the child-centered purposes of marriage, universally recognized through time and across cultures, especially considering that fertile is the norm and infertile the exception. None of the major commentators on marriage has thought that allowing infertile couples to marry undermines the primary meaning of marriage as a procreative, child-centered union. They have of course understood that some couples cannot or will not have children.[56] But the fact that the traditional marriage model might include some male-female couples who do not fulfill marriage's primary social function does not mean that such unions either undermine that function or fail to fulfill other valuable and related functions.

Marriage is an essential social paradigm, a model, a norm that teaches, guides, and molds, albeit imperfectly and incompletely. As one of the dissenters in Massachusetts' same-sex marriage case

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[55] JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE at §228 (1st ed. 1852).

[56] *Wendel v. Wendel*, 30 A.D. 447, 449 (N.Y. App. 1898 ("it has never been suggested that a woman who has undergone [menopause] is incapable of entering the marriage state").

noted: "Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined (particularly in the modern age of widespread effective contraception and supportive social welfare programs), but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism."[57] Allowing infertile couples to marry does not change this central purpose of marriage in the least.

The interest in responsible procreation and childrearing is not solely in the birth of children, but in the rearing of children by a mother and father in a family unit once they are born. As the New York Court of Appeals explained, the state's interest in procreation includes more than just biological reproduction. The state can "rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father" because "[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."[58] And while "[i]t is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes— . . . the Legislature could find that the general rule will usually hold."[59]

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[57] *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting).
[58] *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).
[59] *Id.*

Furthermore, couples who rear children via adoption (or its predecessor statuses such as guardianship or other informal relationships) are serving part of marriage's procreation and childrearing functions. For children who would otherwise be deprived of a mother or father because of death, abuse, neglect, or abandonment still have that opportunity with another married man and woman.

The historical record demonstrates that marriage has universally advanced child-centered purposes by encouraging adults whose types of relationship may produce children to enter marriage. These purposes will be severely compromised if marriage definitions, like Utah's, are not allowed to stand.

When the People of Utah adopted the marriage amendment, they acted to retain in their law an understanding of marriage that, until very recently, was recognized universally and without exception throughout time and across cultures. That conception of the institution of marriage has consistently been understood to advance crucial social interests in the bearing and rearing of children. The remarkable consistency of this understanding makes clear that the decision of the People of Utah serves compelling state interests.

III. Conclusion

Regardless of one's position on the definition of marriage, it is not an overstatement that the recent decisions by lower courts, declaring unconstitutional state constitutional provisions that define marriage

as one man and one woman, is a radical departure from prior decisions of just a few years ago. Changing a societal norm, such as the definition of marriage, that has existed since before recorded history, by means of judicial decisions, is a matter of great concern to this country and a matter worthy of timely review by this Court.

As the ancient Greek philosopher Heraclitus said, "No man ever steps in the same river twice, for it's not the same river and he's not the same man," so it is also true that the Court cannot roll back the swift judicial current sweeping away all of the marriage laws in this country if it fails to promptly review this issue.

Respectfully submitted this 3rd day of September, 2014,

FRANK D. MYLAR
Counsel of Record
MYLAR LAW, P.C.
2494 Bengal Blvd.
Salt Lake City, Utah 84121
Phone: (801) 858-0700
Email: Mylar-Law@comcast.net
Counsel for Amici Curiae
Historians and American
Leadership Fund

APPENDIX

List of *Amici Curiae Professors*

Douglas Ambrose, Ph.D.
Professor of History
Hamilton College
dambrose@hamilton.edu

Herman Belz, Ph.D.
Professor Emeritus of History
University of Maryland
redbelz@verizon.net

Robert D. Benne, Ph.D.
Jordan-Trexler Professor Emeritus
Research Associate
Roanoke College
benne@roanoke.edu

Allan C. Carlson, Ph.D.
President, The Howard Center for Family, Religion & Society
Editor, *The Family in America: A Journal of Public Policy*
acarlson@profam.org

G.M. Curtis, Ph.D.
Professor of American History
Hanover College
gmcurtis@comcast.net

Michael O. Emerson, Ph.D.
Allyn & Glady Cline Professor of Sociology
Rice University
moe@rice.edu

Timothy George, Th.D.
Founding Dean
Professor of Divinity
Beeson Divinity School
tfgeorge@samford.edu

Harold James, Ph.D.
Professor of History and International Affairs
Claude and Lore Kelly Professor in European Studies
Director, Program in Contemporary European Politics and Society
Princeton University
hjames@princeton.edu

Steven Justice, Ph.D.
Professor of English
University of California at Berkeley
svjustice@gmail.com

Robert C. Koons, Ph.D.
Professor of Philosophy
University of Texas at Austin
robkoons@yahoo.com

Stanley Kurtz, Ph.D.
Senior Fellow
Ethics and Public Policy Center
skurtz@eppc.org

Gerald R. McDermott, Ph.D.
Jordan-Trexler Professor of Religion
Roanoke College
mcdermot@roanoke.edu

Russell Moore, Ph.D.
President of the Ethics and Religious Liberty Commission
Southern Baptist Convention
rmoore@erlc.com

Robert Paquette, Ph.D.
Professor of History
Co-Founder of the Alexander Hamilton Institute
rpaquett@hamilton.edu

Paul A. Rahe, Ph.D.
Professor of History
Hillsdale College
prahe@hillsdale.edu

Michael A. Reynolds, Ph.D.
Associate Professor in Near Eastern Studies
Princeton University
mar123@princeton.edu

Robert Louis Wilken, Ph.D.
Professor of the History of Christianity Emeritus
University of Virginia
rlw2w@virginia.edu

Christopher Wolfe, Ph.D.
Emeritus Professor of Political Science
Marquette University
Currently teaching at the University of Dallas
cwolfe@ticenter.net

Peter W. Wood, Ph.D.
President of the National Association of Scholar
Former Associate Professor of Anthropology
Boston University
pwood@nas.org